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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1935

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Erratum.—296 U. S. 609, line 4, "770" should read "270"

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.
STANLEY REED, Solicitor General.
CHARLES ELMORE CROPLEY, Clerk.
FRANK KEY GREEN, Marshall.

[1] For allotment of the Chief Justice and Associate Justices among the several circuits, see next page.

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

It is ordered, That the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, agreeably to the acts of Congress in such case made and provided, and that such allotment be entered of record, viz:

For the First Circuit, Louis Dembitz Brandeis, Associate Justice.

For the Second Circuit, Harlan Fiske Stone, Associate Justice.

For the Third Circuit, Owen J. Roberts, Associate Justice.

For the Fourth Circuit, Charles Evans Hughes, Chief Justice.

For the Fifth Circuit, Benjamin N. Cardozo, Associate Justice.

For the Sixth Circuit, James C. McReynolds, Associate Justice.

For the Seventh Circuit, Willis Van Devanter, Associate Justice.

For the Eighth Circuit, Pierce Butler, Associate Justice.

For the Ninth Circuit, George Sutherland, Associate Justice.

For the Tenth Circuit, Willis Van Devanter, Associate Justice.

March 28, 1932.

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IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1935.

UNITED STATES *v.* BUTLER ET AL., RECEIVERS OF HOOSAC MILLS CORP.

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

No. 401. Argued December 9, 10, 1935.—Decided January 6, 1936.

1. Processors of farm products have a standing to question the constitutionality of the "processing and floor-stock taxes" sought to be laid upon them by the Agricultural Adjustment Act of May 12, 1933, 48 Stat. 31. *Massachusetts* v. *Mellon,* 262 U. S. 447, distinguished. P. 57.
2. A tax, in the general understanding and in the strict constitutional sense, is an exaction for the support of Government; the term does not connote the expropriation of money from one group to be expended for another, as a necessary means in a plan of regulation, such as the plan for regulating agricultural production set up in the Agricultural Adjustment Act. P. 61.
3. In testing the validity of the "processing tax," it is impossible to wrest it from its setting and treat it apart as a mere excise for raising revenue. P. 58.
4. From the conclusion that the exaction is not a true tax it does not necessarily follow that the statute is void and the exaction uncollectible, if the regulation, of which the exaction is a part, is within any of the powers granted to Congress. P. 61.
5. The Constitution is the supreme law of the land, ordained and established by the people, and all legislation must conform to the principles it lays down. P. 62.
6. It is a misconception to say that, in declaring an Act of Congress unconstitutional, the Court assumes a power to overrule or control the action of the people's representatives. P. 62.

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7. When an Act of Congress is appropriately challenged in a court, it is the duty of the court to compare it with the article of the Constitution which is invoked and decide whether it conforms to that article. P. 62.
8. All that the court does or can do in such cases is to announce its considered judgment upon the question; it can neither approve nor condemn any legislative policy; it can merely ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution. P. 62.
9. The question in such cases is not what powers the Federal Government ought to have, but what powers have in fact been given it by the people. P. 63.
10. Ours is a dual form of government; in every State there are two Governments—the State and the United States; each State has all governmental powers, save such as the people, by the Constitution, have conferred upon the United States, denied to the States, or reserved to themselves. P. 63.
11. The Government of the United States is a Government of delegated powers; it has only such powers as are expressly conferred upon it by the Constitution and such as are reasonably to be implied from those expressly granted. P. 63.
12. The Agricultural Adjustment Act does not purport to regulate transactions in interstate or foreign commerce; and the Government in this case does not attempt to sustain it under the commerce clause of the Constitution. P. 63.
13. In Article I, § 8, cl. 1 of the Constitution, which provides that Congress shall have power "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States," the phrase "to provide for the general welfare" is not an independent provision empowering Congress generally to provide for the general welfare, but is a qualification defining and limiting the power "to lay and collect taxes," etc. P. 64.
14. The power to appropriate money from the Treasury (Constitution, Art. I, § 9, cl. 7) is as broad as the power to tax; and the power to lay taxes to provide for the general welfare of the United States implies the power to appropriate public funds for that purpose. P. 65.
15. The power to tax and spend is a separate and distinct power; its exercise is not confined to the fields committed to Congress by the other enumerated grants of power; but it is limited by the requirement that it shall be exercised to provide for the general welfare of the United States. P. 65.

16. The Court is not required in this case to ascertain the scope of the phrase "general welfare of the United States," or to determine whether an appropriation in aid of agriculture falls within it. P. 68.

17. The plan of the Agricultural Adjustment Act is to increase the prices of certain farm products for the farmer by decreasing the quantities produced; the decrease is to be attained by making payments of money to farmers who, under agreements with the Secretary of Agriculture, reduce their acreage and crops; and the money for this purpose is exacted, as a tax, from those who first process the commodities. *Held:*

(1) The Act invades the reserved powers of the States. P. 68.

(2) Regulation and control of agricultural production are beyond the powers delegated to the Federal Government. P. 68.

(3) The tax, the appropriation of the funds raised, and the direction for their disbursement, are but parts of the plan—the means to an unconstitutional end. P. 68.

(4) The power of taxation, which is expressly granted to Congress, may be adopted as a means to carry into operation another power also expressly granted; but not to effectuate an end which is not within the scope of the Constitution. P. 69.

(5) The regulation of the farmer's activities under the statute, though in form subject to his own will, is in fact coercion through economic pressure; his right of choice is illusory. P. 70.

(6) Even if the farmer's consent were purely voluntary, the Act would stand no better. At best it is a scheme for purchasing with federal funds submission to federal regulation of a subject reserved to the States. P. 72.

(7) The right to appropriate and spend money under contracts for proper governmental purposes cannot justify contracts that are not within federal power. P. 72.

(8) Congress cannot invade state jurisdiction by purchasing the action of individuals any more than by compelling it. P. 73.

(9) There is an obvious difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon the assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced. P. 73.

(10) Owing to the supremacy of the United States, if the contracts with farmers contemplated by the Agricultural Adjustment Act were within the federal power to make, the States could not declare them void or prevent compliance with their terms. P. 74.

(11) Existence of a situation of national concern resulting from similar and widespread local conditions cannot enable Con-

gress to ignore the constitutional limitations upon its own powers and usurp those reserved to the States. P. 74.

(12) If the novel view of the General Welfare Clause now advanced in support of the tax were accepted, that clause would not only enable Congress to supplant the States in the regulation of agriculture and of all other industries as well, but would furnish the means whereby all of the other provisions of the Constitution, sedulously framed to define and limit the powers of the United States and preserve the powers of the States, could be broken down, the independence of the individual States obliterated, and the United States converted into a central government exercising uncontrolled police power throughout the Union superseding all local control over local concerns. P. 75.

(13) Congress, being without power to impose the contested exaction, could not lawfully ratify the acts of an executive officer in assessing it. P. 78.

78 F. (2d) 1, affirmed.

Certiorari, 296 U. S. 561, to review a decree which reversed an order of the District Court (*Franklin Process Co.* v. *Hoosac Mills Corp.,* 8 F. Supp. 552), directing the receivers of Hoosac Mills, a cotton milling corporation, to pay claims of the United States for processing and floor taxes on cotton, levied under §§ 9 and 16 of the Agricultural Adjustment Act of May 12, 1933. The opinion of this Court begins on p. 53, *post;* the dissenting opinion on p. 78.

Solicitor General Reed, orally, after stating the case:

The conditions to which power is addressed are always to be considered when the exercise of power is challenged,—extraordinary conditions may call for extraordinary remedies; but, as the Court has said, "the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power." *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398; *Schechter Case,* 295 U. S. 495.

In the effort to meet the emergencies arising during this depression, we have proceeded under that view of the law; and we do not now contend that the extraordinary conditions give rise to anything more than an opportunity to use extraordinary remedies; but, of course, such remedies as flow from the language of the Constitution as it has been interpreted by this Court.

The Government, in legislating in regard to the depression, was quick to ratify actions that had been taken without clear, specific Congressional authority. The Court will recall that the first ratification by the Congress was as to the closing of the banks, which had been done under a statute conferring that authority, but in terms making ratification advisable. Further, there was an abrogation of the gold clause. There were Acts directed to the relief of distress. Others authorized lending to the home-owner, through the Home Owners Loan Corporation; to the farmer, through the Farm Credit Corporation; and to banks and industry, through the Reconstruction Finance Corporation.

As a part of this concerted effort to bring about recovery, the Agricultural Adjustment Act was passed. It should not, however, be approached as an emergency measure, nor as a measure that came into consideration because of the present emergency. Rather should we bear in mind that since the 68th Congress at least, the House and the Senate and the Executive have been giving careful attention to the problem of agricultural surpluses.

Eight times have acts been reported by the Agricultural Committee of the House, and ten times by the Committee on Agriculture and Forestry of the Senate. The House has rejected two and passed five. The Senate has rejected two and passed four. It is recalled, of course, that the McNary-Haugen Act was twice vetoed by President Coolidge, that the Federal Farm Board Act was approved by President Hoover, and the Agricultural Adjustment Act by President Roosevelt.

We have a long history of Legislative and Executive consideration of the problem of agricultural surplus. There were innumerable acts that dealt with other agricultural difficulties, rather than the surplus as such. But it was the mounting supply of the great staple, non-perishable, agricultural commodities that demanded the attention of the Legislature and of the Executive, and that has received the attention of the courts throughout those years.

I need refer only to the Coöperative Marketing Acts passed by States, complemented by acts of Congress, which had for an end not only an orderly marketing of commodities but an endeavor to bring about an adjustment of supply and demand and a hoped-for diminution of a burdensome surplus. They did not achieve that result.

The Federal Farm Board Act, 46 Stat. 11, 12 U. S. C. § 1141, while providing for loans to coöperatives that complied with the Capper-Volstead Act, 42 Stat. 388, 7 U. S. C. §§ 291, 292, also contemplated a control of production of cotton and wheat through stabilization corporations. I mean the handling of the surplus, as distinct from a control of the actual growth of the commodity. . . .

The present Act is comprehensive. The title probably gives as accurate a reflection of its purposes as any statement of mine could do.

I might say parenthetically that this act in separate titles dealt with the Farm Credit Administration and the establishment of the Farm Loan Bank Corporation, through which two billion dollars was loaned to agriculture.

The Act opens with a declaration of emergency, and passes on to a declaration of policy. A cursory reading will show that this declaration of policy, while it follows in form and in location in the Act declarations of policy that this Court considered in *Panama Rfg. Co.* v. *Ryan,* 293 U. S. 388, and in *Schechter* v. *United States*, is entirely distinct. It is a great deal more than a hope of what may happen, and will become important as an actual standard of what Congress sought from the passage of this legislation, and of what discretion it gave to its chosen instruments for carrying that out.

The essence of the declaration is that Congress hopes to re-establish prices to farmers at a level that will give agricultural commodities a purchasing power, with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period. For the purpose of this commodity and of all others, I believe, except tobacco, the base period was fixed as August, 1909, to July, 1914. . . .

After this declaration of policy, the Act points out what is to be done to effectuate it. Part 2 relates to the authority of the Secretary of Agriculture to achieve this standard which Congress has laid down. Section 8 gives to the Secretary of Agriculture the power to provide for reduction in the acreage or reduction in the production for market, or both, of any basic agricultural commodity through agreements with producers or by other voluntary methods, and to provide for rental or benefit payments in connection therewith. . . .

This case involves the floor-stock tax, together with the processing tax. The processing tax is covered by § 9 of the Act. Section 9(a) provides the action that puts the tax into effect, and § 9(b) declares what that tax shall be: "The processing tax shall be at such rate as equals the difference between the current average farm price for the commodity and the fair exchange value of the commodity," . . .

The current farm price for the commodity is a figure determined by the Department of Agriculture. The determination involves many different commodities, but includes all of those which are basic agricultural commodities under this Act. Prices of farm commodities have been determined and published by the Secretary of Agriculture for at least twenty years.

The exchange value of the commodity is defined in § 9 (c) of the Act, and is—
"the price therefor that will give the commodity the same purchasing power, with respect to articles farmers buy, as such comodity had during the base period specified in § 2."

That means that the value or farm price would need to be increased according to the rising scale of prices for articles that farmers bought. Both of those factors had been used by the Department of Agriculture for many years. . . .

The collection of the tax is left to the Collector of Internal Revenue in the usual form, and an appropriation is made to carry out the purposes of the Act. The appropriation, I am sure, will be found important because it clearly answers the contention that this tax was wholly for the purpose of rental and benefit payments.

By § 12 one hundred million dollars are appropriated "For administrative expenses under this title and for rental and benefit payments made with respect to reduction in acreage." It also appropriated "The proceeds derived from all taxes imposed under this title . . . to be available to the Secretary of Agriculture for expansion of markets and removal of surplus agricultural products and the following purposes under Part 2 of this title: Administrative expenses, rental and benefit payments, and refunds on taxes."

There has been no adjustment of the tax rates in respect to cotton. No question is here as to refunds of the tax, nor of amendments to the Agricultural Adjustment Act. We do not conceive that the amendments (passed in August, 1935, 49 Stat. 750) have any effect upon the present case, unless the Court should determine that the old Act, the first Act, does not properly delegate to the officers of the Government discretion to handle the duties imposed upon them, and in that case there has been a ratification of the action of the officers, so that the tax is now authorized not only by the discretion of the administrative officers, but by the amendatory legislation.

The license taxes are in and of themselves a revenue measure; they are levied as an excise on the processing of the commodity, and for that reason are to be collected without regard to the purposes for which they are to be spent, inasmuch as they go into the Treasury of the United States, together with other funds that were appropriated by the same section, and become there a part of the revenue of the Government.

It is true that by the very Act which imposed the tax and provided for its collection, the proceeds were appropriated to other purposes. But § 12 shows that if not a dollar had been collected in the way of processing taxes, the Government, nevertheless, made provision for the payment of rental and benefit contracts out of the hundred million dollars which Congress directly appropriated and out of the authority which they gave to the Secretary of the Treasury to furnish funds for carrying on this activity of the Government. As a matter of fact, something less than a billion dollars has already been collected in these taxes.

The question of the validity of the Agricultural Adjustment Act as a tax or revenue statute alone is dependent upon a consideration of the cases which this Court has decided, namely, the *Child Labor Tax* case, 259 U. S. 20, and the case of *Hill* v. *Wallace,* 259 U. S. 44, upon the one side, and *United States* v. *Doremus,* 249 U. S. 86, *Veazie Bank* v. *Fenno,* 8 Wall. 533, and *Magnano Company* v. *Hamilton,* 292 U. S. 40, upon the other.

We distinguish the *Child Labor Tax* case. That case involved a tax of ten per cent. upon the profits which might be earned by a manufacturer who employed child labor, to be imposed immediately upon a violation of the law. It was not a tax in the sense that it was levied upon an operation by the manufacturer, but was held by this Court to be a penalty which affected the income from the operation of a manufacturer who employed children, and that penalty applied at the very instant when he employed the first child contrary to that Act, and employed that child knowingly. The doctrine of scienter entered into that case. In *Hill* v. *Wallace* the tax was upon the selling of futures upon the Grain Exchange, and was levied at a rate of 20 cents a bushel, when the commission of the broker was only a fraction of a cent a bushel, so that it was prohibitive.

This Court said in the case of *Veazie Bank* v. *Fenno* that "the judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts but to the people, by whom its members are elected."

The case of *Hampton & Company* v. *United States*, 276 U. S. 394, involved an Act which declared in its very title that it was for the protection of industries and for the raising of revenue.

In the present case there is a plain statement in the Act that the tax is to be used for something other than the general support of the Government. The contract which the Secretary of Agriculture makes with the individual producer is to be for the purpose of inducing the producer to reduce his production.

In *United States* v. *Doremus*, which involved licenses and taxes to control the dealing in drugs, there was a tax, in the earlier acts, of only one dollar a year, and a license for the purpose of handling; and upon that tax Congress built an entire system for information in regard to dealing in morphine and other narcotics. That was upheld. . . .

In the case of *McCray* v. *United States,* 195 U. S. 27, there was a clear intention on the part of Congress, which was not, however, expressed in the Act itself, to use the power of taxation for purposes other than the raising of revenue.

I think it may be said that the *Doremus* case and the *McCray* case on one side, and the case of *Hill* v. *Wallace* and the *Child Labor* case on the other, lead to the conclusion that the motives of Congress in levying a tax are not to be considered by this Court. Even if the Act shows that the motive is ulterior to the tax in the mind of Congress, that is immaterial to the validity of the tax, so long as it is based upon an authority which occurs in the Constitution.

In both the *Child Labor Tax* case and in the case of *Hill* v. *Wallace,* you had clear evidence of prohibitions against constitutional rights which people had and exercised. In the *Child Labor Tax* case there had been, up to that time, and of course now is, the right to use child labor in manufacture if there was no State prohibition; and of course the brokers who deal upon the Exchange at Chicago, on the Grain Exchanges wherever they may be, have the right to deal upon those exchanges. So you had a tax which in effect prohibited the exercise of a right by the taxpayer. You had, in the *Child Labor* case, in addition to the excessive tax, an imposition of that tax for a violation of a rule laid down. That, we think, distinguishes those cases from this one. Here is a tax which is to be used, let us say, in rental and benefit payments, together with other things, but there is nothing in the use for a rental or benefit payment which deprives the person who contracts with the Government of any constitutional right which he had at that time. He may be induced to give up a right which he had, which of course every employee of the Government gives up when he gives up his liberty to do other things and agrees to do certain things for the Government.

In so far as the excise is concerned, our briefs, I think, cover that thoroughly. We have the question of uniformity, we have the question of floor-stocks, and I pass to the problem of delegation.

[Here followed an interesting discussion (interrupted by many questions from the Bench) of the method of fixing the tax and of the question whether the functions sought to be delegated to the Secretary of Agriculture in that regard were constitutionally delegated, with proper legislative standards. The speaker also contended that, in any event, the acts of the Secretary in fixing the taxes were ratified by § 21 (b) of the Amendatory Act of August 24, 1935.]

As to whether or not this is a violation of the Fifth Amendment, we contend that there is no power in the taxpayer to question the expenditures that are made. Citing *Massachusetts* v. *Mellon,* 262 U. S. 447. . . .

If the Court should think it proper to go beyond the tax itself, and consider the purpose for which this money is expended, then we contend that the general welfare clause gave Congress power to expend it for rental and benefit payments.

We distinguish, of course, between the use of Federal money to coerce some action by an individual, and the inducement to the individual. We say that the general welfare clause is a clause that is construed not as a general power, but as a special power in Congress to expend this money; and we rely particularly upon the case of *United States* v. *Realty Company,* 163 U. S. 427, where it was held that Congress had authority to appropriate for the payment of a claim for sugar bounty which was a moral claim upon the Government, even if the earlier act granting the bounty were unconstitutional. . . .

We also take up a discussion of the purpose of this money—as to whether this tax has been levied for a public purpose. We do not think that that can be approached except from the standpoint of the general rules in regard to the use of tax money. We know how hesitant the Court is to interfere with the appropriation by Congress of money for purposes deemed by Congress to be within the public welfare.

We accept the decision in the case of *Loan Association* v. *Topeka,* 20 Wall. 655, where this Court held that a State act was not for a public purpose, where it had authorized the payment to a local manufacturer of funds to operate his business. Upon the other side, the theory of public purpose upon which we rely is that enunciated in the case of *Noble State Bank* v. *Haskell,* 219 U. S. 104. In that case money was taken from the various banks that were operating in the State of Oklahoma and paid into a fund which was to be used to make whole the depositors in banks that failed. That is an illustration of the use of public money for a public purpose. It seems to us similar to the use that is made here of a tax levied on processors in the form of an excise passed on to the general consuming public, the purpose of which is to raise money to be used by the Government in contracts with farmers, for the reduction of surplus production that was pressing on the price and pressing on the supply in the hands of the American handlers of commodities. . . .

Extracts from the printed argument for the Government, signed by *Attorney General Cummings, Solicitor General Reed, Assistant Attorney General Wideman, Assistant Attorney General Morris,* and *Messrs. Sewall Key, Andrew D. Sharpe, Robert N. Anderson, Alger Hiss, Mastin G. White,* and *Prew Savoy.*

The sole purpose of the processing and floor-stock taxes is to raise revenue.

The processing and floor-stock taxes are excises; not direct taxes.

The floor-stocks adjustment may be separately justified as a necessary adjunct to the processing taxes.

Powers were not unlawfully delegated.

If in the original Act Congress exceeded its power to delegate, that is now immaterial because Congress has expressly ratified the assessment and collection of the taxes. Agricultural Adjustment Act, as amended Aug. 24, 1935, § 30, subsec. 21 (b); *Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226; *The Peggy*, 1 Cranch 103, 110; *Dinsmore* v. *Southern Express Co.*, 183 U. S. 115; *Dorchy* v. *Kansas*, 264 U. S. 286; *Steamship Co.* v. *Joliffe*, 2 Wall. 450.

This Court has recognized that Congress may ratify taxes, illegal when assessed but assessed under claim and color of authority, if it could have imposed such taxes in the first instance and if its power to do so remained unimpaired to the date of ratification. *United States* v. *Heinszen & Co.*, 206 U. S. 370; *Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226. See also *Mascot Oil Co.* v. *United States*, 282 U. S. 434; *Charlotte Harbor Ry.* v. *Welles*, 260 U. S. 8, 10, 11; *Seattle* v. *Kelleher*, 195 U. S. 351, 359–360; *Hamilton* v. *Dillin*, 21 Wall. 73; *Hodges* v. *Snyder*, 261 U. S. 600, 602–603; *Stockdale* v. *Insurance Companies*, 20 Wall. 323, 332; *Wagner* v. *Baltimore*, 239 U. S. 207, 216, 217; *Mattingly* v. *District of Columbia*, 97 U. S. 687; *Kansas City Ry. Co.* v. *Road District*, 266 U. S. 379; *Tiaco* v. *Forbes*, 228 U. S. 549. Cf. *Matter of People* (*Title & Mortgage Guaranty Co.*), 264 N. Y. 69; *Fisk* v. *Kenosha*, 26 Wis. 23; *Miller* v. *Dunn*, 72 Cal. 462.

A tax is not necessarily invalid because retroactively applied. Taxing acts having retroactive features have been upheld in view of the particular circumstances disclosed.

The processing and floor-stocks taxes do not contravene the Fifth Amendment. *Helvering* v. *City Bank Farmers Trust Co.*, 296 U. S. 85; *Nebbia* v. *New York*, 291 U. S. 502, 525; *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 347 (footnote 5); *Magnano Co.* v. *Hamilton*, 292 U. S. 40, 44; *McCray* v. *United States*, 195 U. S. 27;

Nicol v. *Ames,* 173 U. S. 509, 521; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107.

The contention that these taxes are not for a public purpose is simply another way of challenging their character as revenue measures. The money collected goes into the Treasury of the United States. One must presume that it will be used for a purpose within the powers of Congress. If so used, no objection could be made on the ground that the taxes are not levied for a public purpose. *Mountain Timber Co.* v. *Washington,* 243 U. S. 219; *Noble State Bank* v. *Haskell,* 219 U. S. 104; *Veazie Bank* v. *Fenno,* 8 Wall. 533.

Respondents should not be allowed to question the appropriation as a defense to the payment of their taxes. *Massachusetts* v. *Mellon,* 262 U. S. 447, 487. Cf. *Knights* v. *Jackson,* 260 U. S. 12, 15; *Patton* v. *Brady,* 184 U. S. 608, 620; *United States* v. *Realty Co.,* 163 U. S. 427.

Public policy requires that taxpayers shall not avoid payment of otherwise valid taxes by questioning the purpose of the levy or of an appropriation contained in the taxing statute. The appropriateness of such a rule is particularly apparent where, as here, it is not possible to ascertain the exact use to which the taxpayers' money will be put. It is true that the Act in its original form contained in itself an appropriation. § 12 (b). But this fact would not have made the money, if collected at that time, any the less a part of the public funds. See *Knights* v. *Jackson,* 260 U. S. 12. Furthermore, money collected under the Act could be used to defray any of the Government's expenses should Congress see fit to change the appropriation before the money was actually transferred from the general fund of the Treasury as a set-off against advances made out of that fund. Cf. *Head Money Cases,* 112 U. S. 580.

In the case of respondents' taxes, the use is made even more uncertain by the terms of the appropriation provisions found in the Act.

Under the Act of August 24, 1935, the appropriation is out of the general funds of the Treasury in an amount equivalent to the taxes collected under the original Act. Also, under the appropriation the Secretary of Agriculture may now use any part of the money for additional kinds of payments and for the acquisition of agricultural commodities pledged as security for certain loans made by federal agencies. Thus, additional objects of expenditure and additional elements of uncertainty have been introduced.

The general welfare clause should be construed broadly to include anything conducive to the national welfare; it is not limited by the subsequently enumerated powers. Congress may tax (and appropriate) in order to promote the national welfare by means which may not be within the scope of the other Congressional powers. That this, commonly known as the Hamiltonian theory, is correct, is shown by the plain language of the clause; by the circumstances surrounding its adoption; by the opinion of most of those who participated in the early execution of the Constitution; by the opinion of later authorities; and by long-continued practical construction.

The question was elaborately discussed in the briefs filed in *Field* v. *Clark,* 143 U. S. 649; *United States* v. *Realty Co.,* 163 U. S. 427; *Smith* v. *Kansas City Title Co.,* 255 U. S. 180; and *Massachusetts* v. *Mellon,* 262 U. S. 447.

The Madisonian theory, rejecting the natural meaning, and treating the clause as an introduction to the subsequent enumeration of Congressional powers (1 Richardson's Messages, etc., 585), violates the basic principle of constitutional construction. *Holmes* v. *Jennison,* 14 Pet. 540, 570–571. See Story, Const., §§ 912–913. This would transform a great independent power into a mere incident of other powers.

The circumstances surrounding the adoption of the clause and the opinions of most of those who participated in the adoption and early execution of the Constitution support the Hamiltonian view. Arts. of Confed. § 8; 9 Writings of James Madison (Hunt ed.), pp. 411–424, 370–375; 4 Madison, Letters and Writings, 126; Elliott's Debates.

The clause was adopted along with that relating to payment of the debts, after a prolonged discussion, not only of the Revolutionary debts, but also of the power of Congress, as against that of the States, in regard to matters of general interest. See Elliott's Debates, V, I; cf. 4 Madison, Letters and Writings, pp. 121 *et seq.*

Discussion in the ratifying conventions indicates clearly an almost unanimous view that the clause was not limited by the enumerated powers. Elliott's Debates; Hamilton's Rep. on Manufactures, 3 Hamilton's Works, pp. 192, 250; President Monroe, 2 Richardson's Messages, etc., pp. 165, 173.

There would seem no doubt that President Washington agreed with Hamilton and Monroe (Story, Const., § 978, note). And it is clear that John Quincy Adams was of the same opinion (Letter to Stevenson, July 11, 1832, reprinted in Cong. Rec., 49th Cong., 1st Sess., vol. 17, Part 8, Appendix, pp. 226 to 229), as was likewise Calhoun (30 Annals of Congress, 14th Cong., 2d Sess., p. 855). Henry St. George Tucker, of Virginia, representing a special committee of the House of Representatives in 1817, expressed the same opinion (II American State Papers (Misc.), 443, 446, 447), as did also Daniel Webster (Webster's Great Speeches, 243). Apparently, Jefferson likewise shared this view, although his opinion on the Bank of the United States has been quoted both as supporting the Hamiltonian and the Madisonian view. IV Elliott's Debates, 2d ed., 610. See Story, Const., § 926 (note); 1 Hare, American Const. Law, 244; and see President Jackson's statements in his veto of the Maysville Road Bill. [An Appendix to the Government's brief in this case contains a valuable collection of the opinions on this question delivered before the ratifying conventions, and other examples of contemporaneous exposition. See also 36 Harv. L. Rev. 548; 23 Georgetown L. J. 155; 22 *id.* 207; 8 Va. L. Rev. 167–180; 42 Yale L. J. 878.] Madison himself in later years recognized that his view had not been followed in practice. 4 Madison's Letters and Writings. 146.

Not only was the Hamiltonian theory adopted by the "weight of contemporaneous exposition" (See *Martin* v. *Hunter,* 1 Wheat. 304, 350); it has been accepted by most of the later great commentators on the Constitution. See Story, *ubi supra;* Pomeroy, the Const. (3d ed., 1883), pp. 174–175; Willoughby, Const., pp. 582–593; 1 Hare, Am. Const. L., pp. 241 *et seq.;* Mr. Justice Miller's "Lectures on the Constitution," pp. 229–231, 235; Burdick, Const., § 77. Of even more importance is the practical construction by the earlier Congresses. 30 Annals of Congress, 14th Cong., 2d Sess., p. 855; II American State Papers (Misc.), 443, 446, 447; Story, *op. cit.,* § 991.

The Hamiltonian view has been so continuously and so extensively followed by Congress that many of our most familiar and significant governmental policies and activities are dependent upon its validity. [Under this head the brief cites a large number of instances of appropriations for various objects, including: relief of distress due to catastrophes; health; education; science; social welfare; industry; agriculture.]

The relevant judicial authorities support the Hamiltonian theory. *United States* v. *Realty Co.,* 163 U. S. 427; *Missouri Utilities Co.* v. *California City,* 8 F. Supp. 454, 462; *United States* v. *Gettysburg Electric Ry.,* 160 U. S. 668, 681; *Head Money Cases,* 112 U. S. 580, 595; *Gibbons* v. *Ogden,* 9 Wheat. 1, 197; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 153.

The literal reading of the general welfare clause has been adopted by most of the lower federal courts. *Langer* v. *United States,* 76 F. (2d) 817; *Kansas Gas & Electric*

Co. v. *Independence,* 79 F. (2d) 32, supplemental opinion on rehearing, 79 F. (2d) 638; *Missouri Utilities Co.* v. *California City,* 8 F. Supp. 454; *Vogt & Sons* v. *Rothensies,* 11 F. Supp. 225. Cf. *Miles Planting Co.* v. *Carlisle,* 5 App. D. C. 138; *Washington Water Power Co.* v. *Coeur D'Alene,* 9 F. Supp. 263.

It is not suggested that the public money may be expended by Congress for any other than national purposes, or for any other uses than those of the Nation. But the question of what is a national purpose, of what is a national use, is, in the first instance, purely a question of governmental policy, of which Congress is to judge.

The procedure provided by the Constitution for the consideration by Congress of fiscal measures, and the accountability to the electorate, were the only checks on congressional appropriations. *McCulloch* v. *Maryland,* 4 Wheat. 316, 428; *Pacific Insurance Co.* v. *Soule,* 7 Wall. 433, 443.

The entire range of discussion in the Convention was directed to *locating* the power and little or no attention was given its *extent,* which everyone seemed to concede must, in the nature of things, be discretionary. The same is, in general, true of the ratifying conventions. In the early years following the adoption of the Constitution, the view was generally expressed that Congress' determination of what was for the general welfare was not subject to judicial review. Madison, Veto Message of March 4, 1817; Hamilton, Opinion on the National Bank, 3 Hamilton's Works (Lodge ed.), p. 485. See also Hamilton's Report on Manufactures, III Hamilton's Works (Hamilton ed.), p. 250; Monroe, Veto of the Road Bill, II Richardson, 142, 165, 166; Pomeroy, Const. L. (10th ed.), § 275; 1 Hare, American Const. L., 249; Cooley, Taxation (2d ed.), 109; Story, Const., §§ 924, 944, 991, 1348.

In *United States* v. *Realty Co.*, 163 U. S. 427, it was said that the determination of what debts or claimed debts should be paid "depends solely upon Congress" (p. 441); and that the decision of Congress recognizing a claim founded upon principles of right and justice "can rarely, if ever, be the subject of review by the judicial branch of the government" (p. 444). If this be true of the word "debt"—so familiar to our courts—Congressional application of the term "general welfare" cannot be more readily subject to judicial review.

The expenditures authorized by the Agricultural Adjustment Act were soundly designed to promote the general welfare. [Here followed an elaborate explanation of the agricultural situation and the application of the statute].

The tax was laid and the proceeds appropriated for a public purpose.

Rules applicable to municipal taxation are not relevant to the great power of Congress to raise revenues. 1 Cooley, Taxation, 4th ed., pp. 388–390.

While in local taxation the courts may, in extreme cases, review the legislative determination that a particular object is for a public purpose, in federal taxation Congress should be the final arbiter of what constitutes a federal public purpose. That which is for the "general welfare" as those words are used in the Constitution, must of necessity also be for a public purpose.

Yet even viewed by the more narrow and critical rules applicable to state taxation, the purpose here was clearly public. Citing and discussing many authorities, including *Loan Association* v. *Topeka,* 20 Wall. 655, 665; *Green* v. *Frazier,* 253 U. S. 233, 240–242; *Fallbrook Irrigation District* v. *Bradley,* 164 U. S. 112; *Parkersburg* v. *Brown,* 106 U. S. 487; *Cole* v. *LaGrange,* 113 U. S. 1.

It is no objection to the tariff acts that they benefit manufacturers as well as the country generally. *Field* v. *Clark,* 143 U. S. 649, 696; *Hampton & Co.* v. *United States,* 276 U. S. 394, 411.

The appropriations contemplated by the Act are a valid exercise of the fiscal powers of Congress. To stabilize and preserve the credit structure of the Nation, to protect the banks and other credit agencies which it had already established or sponsored, and to protect the credit of the Government itself.

It was inevitable that the sudden and tremendous decrease in farm incomes should have caused a serious strain on the farm-credit agencies which had already been weakened by the long price decline and general liquidation which had characterized agriculture since 1920. Only by increasing the purchasing power of the farmer could the stability of the financial system be restored and the large investments which the Federal Government had made in this field ever be liquidated.

Power of control over or regulation of agriculture has not been asserted, but, to the contrary, the steps authorized by this Act and taken under it do not go beyond the appropriation and spending of the money.

The contracts are a matter of negotiation and voluntary agreement and on the part of the United States amount to no more than a method by which the Secretary of Agriculture sees that the money appropriated goes to persons in the class specified by Congress. It is, indeed, probable that the Secretary would be held to have the right to enter into contracts of this sort even though he had not been specifically authorized by Congress to do so. See *United States* v. *Fidelity & Deposit Co.*, 80 F. (2d) 24. Similar contracts are entered into by administrative officials in almost every case where money is expended for such familiar matters as the construction of buildings and the delivery of supplies.

It would be most unusual to suppose that a contract of this nature, entered into freely by both parties, is an exercise of sovereign regulation and control over one of the parties or over the subject matter with which the contract deals. "The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf." *United States* v. *Bostwick,* 94 U. S. 53, 66; See also *Cooke* v. *United States,* 91 U. S. 389, 398; *Smoot's Case,* 15 Wall. 36. No method of enforcement of these contracts has been provided by Congress. Under them the rights of the United States are no greater than would be the rights of a private citizen under similar contracts, and enforcement must be by ordinary judicial process according to the law of the forum. The contracts are not derogatory of any sovereign rights of the States; they are carried out pursuant to and under the protection of the laws of the States.

In this Act the Government goes no further than offering benefits to those who comply with certain conditions. If power over the matters to which those conditions relate is vested in the States, they remain free to pass laws rendering it impossible for any of their inhabitants to comply with such conditions. In so doing the States would not be clashing with any enactment of Congress, even though the result were to terminate completely the administration of the agricultural provisions of the Act in those States. There is no attempt to require the States to take or refrain from action with respect to agricultural land within their borders, a power which this Court in *Kansas* v. *Colorado,* 206 U. S. 46, has declared does not reside in the Federal Government.

The distinction between an application of the law-making power to enforce compliance, and the use of the spending power to persuade, was pointed out in *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, 529, and illustrated by the case of *Federal Compress Co.* v. *McLean,* 291 U. S. 17.

The effect which the Act of Congress will have in a State is dependent entirely upon the voluntary action of that State and its inhabitants. The situation is much like that in *Massachusetts* v. *Mellon,* 262 U. S. 447.

Furthermore, if the expenditure results in regulation of matters normally within state control, that result cannot deprive Congress of the right of taxation for the general welfare given it by the Constitution. *McCray* v. *United States,* 195 U. S. 27.

Similarly, considering this Act as an exercise of the fiscal powers of Congress, it is not invalid even if it invades state fields. *First National Bank* v. *Fellows,* 244 U. S. 416; *Legal Tender Cases,* 12 Wall. 457, 539.

Oral argument of *Mr. George Wharton Pepper,* for respondents.

May it please your Honors, this record gives rise, as I see it, to two entirely distinct questions. One question is whether the portions of the Agricultural Adjustment Act which are under discussion would be constitutional in respect of the taxes levied under their authority, if Congress had itself levied them and settled every detail in connection with them. The second is the entirely distinct question (assuming that Congress might itself have done all that the Secretary of Agriculture has here done) whether the delegation to him of the authority in virtue of which he had undertaken to act was such a valid delegation that the acts done by him have the quality of taxation.

Mr. Hale, my colleague, who represents the receivers, respondents in this case, has invited me to address myself to the first of these questions, namely, whether or not this processing tax is a valid exaction, irrespective of the question of delegation; and he, with your Honors' permission, will address himself to the question of delegation, a great and important question in the case, but quite distinct, as it seems to me, from the one which I am going to discuss.

I have no disposition to raise an issue with the Solicitor General respecting the seriousness of the situation with which Congress undertook to deal; but when I come to consider whether or not the attempted remedy for the economic evils is or is not within the limits of the power of Congress, I cannot escape the conclusion that in his argument, able as it was, he has indulged somewhat in oversimplification. The case presents to him no difficulty. Congress, in the familiar course of legislation, has done two things, both of which, as he sees it, are well within its power. First it has laid a tax. Second it has made an appropriation. The tax feature is an ordinary exercise of the taxing power; and, as to the appropriation, even if it is for any reason questionable, nobody has a standing to question it. Apart from the question of delegation, he thus readily convicts the court below of error and asks confidently for a reversal.

I, on the other hand, find in this record some constitutional questions of great difficulty and of vast importance. It seems to me that a reversal of the judgment appealed from would justify the conclusion that Congress, originating as a federal legislature with limited powers, has somehow been transformed into a national parliament subject to no restraint except self-restraint.

I venture to hope that the judicial power of the United States does not extend to working any such transformation and that, to bring it about, we the people of the United States must deliberately resort to the process of constitutional amendment.

One of the difficulties necessarily involved in the argument of this case is to identify the relevant portions of the statute and to isolate the essential facts, and then make a statement of them that is full enough to be fair but compact enough to be manageable. Although the Solicitor General has done this to the extent required by his argument, I hope the Court will be patient with me if I attempt a brief restatement.

In what I am about to say I am referring to the unamended act, inasmuch as the taxes sought to be recovered by the Government in the instant case had accrued before the amendment. The significance of the amendment will be discussed at the proper point in the argument in connection with what we hold to be an ineffective attempt to ratify taxes theretofore invalid.

Any such statement must, as its first point, make a reference to the declared policy of the AAA, which is found in § 2 of Title I. That policy is by an elaborate mechanism to re-create for the farmer the favorable financial conditions which, under the operation of economic law, he for a short time enjoyed about a quarter of a century ago. More specifically, the policy is to raise the price which the farmer receives for a unit of what he produces until the sale of that unit shall enable him to buy as much and as many needed commodities as a unit sale would have enabled him to buy during the base period. The base period selected as the golden age of agriculture is, in the case of all commodities except tobacco and potatoes, the pre-war period from 1909 to 1914. In the case of tobacco and potatoes it is the post-war decade from 1919 to 1929. The golden age value to be secured for the unit is called its "fair exchange value." Obviously its determination requires first the ascertainment (at any given moment) of the actual current market price of the unit; second the actual current market price of commodities needed by the farmer; third the number of dollars that a unit fetched in the base period; and, fourth, the quantity of needed commodities for which a unit was then exchangeable. When the Secretary of Agriculture has ascertained these factors he has the material for a formula which will determine the gap or "spread" between the actual price and the ideal, or parity, price. This gap it is the laudable purpose of the act to close. Accordingly, the Secretary undertook, in the early part of 1933, to determine what had been, in the base period, the farm price per pound of cotton, and he found that it was 12.40 cents. He then ascertained that the price index of the commodities which farmers buy pointed to a figure higher than their price in the base period by 3 per cent, so that the figure was 103 per cent as of the time of his determination compared with the situation in the base period.

Applying his 103 per cent to his 12.40, he got 12.77. He then ascertained that the farm price current for a pound of cotton was 8.7 cents. Subtracting the 8.7 cents from 12.77, he got 4.07. Then he made an adjustment, which is explained by the fact that the farm prices have to do with the lint cotton, in bales, and the price to the farmer is based upon the unbaled weight, so he finally determined the gap to be 4.2 per pound.

It is perfectly true, as the Solicitor General has said, that we do not dispute that the Secretary of Agriculture did the best job he could do with the figures at his disposal. He gathered a lot of statistics from all over the country, and he weighted them and he did all the things which have been suggested from the bench as the common practice in the departments; and there did result this figure of 4.2, and there is no dispute between us respecting the fidelity with which the Secretary acted in an attempt to find the figures upon which to base the tax.

Adjustment of production to consumption by closing the gap in order to increase the purchasing power of agricultural commodities thus being the ultimate objective, the second important point is that the adjustment is to be accomplished by a reduction in acreage, or reduction in the production for market, or both, of any basic agricultural commodity. This reduction of production is relied upon to cause a corresponding diminution of marketable units and a consequent approximation of their actual market price to the golden age price.

I pause to note that the phrase "adjustment of production to consumption" is really not an accurate statement of the objective. The natural meaning of that phrase is that you are merely reducing production to the extent of equalizing it to a consumption which is to remain undisturbed. It is evident, however, that what is really proposed is such a reduced production as will secure for the farmer his parity price, irrespective of the effect produced upon the consumer.

The third point is that the closing of the gap through reduction of production is to be accomplished principally through agreements with producers containing provisions for rental or benefit payments in such amounts as the Secretary of Agriculture deems fair and reasonable; the producer in consideration of the payment agreeing to act in conformity with the federal policy.

The fourth point is that, in order to raise the money with which to purchase the promise of the farmer to limit his production and otherwise submit to regulation, a processing tax is levied upon processors in respect of the first conversion of raw material into a manufactured product; and the proceeds of this tax, while paid into the Treasury, are appropriated in advance to the Secretary of Agriculture for the specific purposes which I shall presently state. The rate of tax, per unit processed, is by the act declared to be the difference between the current average farm price for the commodity and the fair exchange value thereof. In other words, the rate of tax corresponds to the gap or spread between the actual and the ideal. Thus the rise and fall of the so-called tax is dependent upon factors wholly unrelated to the business of the processor. From his point of view the tax might as well have been levied at a figure per unit processed dependent upon the rise or fall of the mercury in the Fahrenheit thermometer.

The next point to be noted is that the proceeds of the tax when received by the Secretary of Agriculture are to be available for specific purposes, to wit, disbursements which include not merely rental and benefit payments to farmers but what is euphemistically described as "expansion of markets" and "removal of surplus agricultural products." "Expansion of markets" I understand to include those open market operations which, when conducted in financial centers, are described as "rigging the market." "The removal of surplus agricultural products" means in the case of hogs (for example) the purchase of quantities of animals at high prices and their incineration with a view to limitation of supply. My friend the Solicitor General is quite right when he says that there was appropriated a hundred million dollars initially out of the Treasury, before the scheme got to work, which was available for the time being for rental and benefit payments; but I am sure that the provision of the Act has not escaped him which is to the effect that as the proceeds of the tax come in, the amounts advanced by the Treasury are to be repaid; so that the whole financing of the scheme which I am outlining is accomplished by a tax paid by the processors in accordance with a measure or yardstick which has no relation under heaven to their activity or the business they are to do.

Finally, it may be observed that the original list of agricultural commodities as contained in § 11 of the act, has been increased by the subsequent inclusion of many others, the most recent being potatoes. Naturally it is impossible to make a definite statement respecting the scope of that provision of the act which authorizes the imposition of compensating taxes on articles found to be in competition with basic commodities. These competing commodities are to be identified only by the Secretary and might include a vast area of production in addition to the area specified in the act.

In making the foregoing statement I have carefully refrained from stating such features of the act as give rise to the question of delegated power. It seems to me to conduce to clearness to reserve a reference to those features until the argument on delegation is made. I merely remark in passing that the whole scheme of the act necessarily calls for so many determinations, adjustments and decisions on points of policy that it might fairly be described as a scheme for the government of agriculture with the Secretary of Agriculture as Governor General.

That is my basic statement of the significant parts of the Act and of the facts which it seems to me it is important to bear in mind in approaching the constitutional questions, which, as I have said, seem to me to be two. I affirm, first, that the processing exaction is not in its nature the exercise of the taxing power of the United States, but is wholly regulatory in character, and is part of a nation-wide scheme for the Federal regulation of local agricultural production; and, second, that if that scheme as a whole is unconstitutional as an invasion of the reserved powers of the States, then the whole scheme falls and the processing tax falls with it. . . .

When the Court rose yesterday I had completed an introductory statement upon the basis of which I desire to present two propositions for the consideration of this Court.

First: That the exactions called processing taxes are not exercises of the taxing power as such but are integral parts of a regulatory scheme and are themselves regulatory in character.

Second: That this regulatory scheme is an invasion of the field reserved by the Tenth Amendment to the States and to the people and that therefore the scheme must fall and carry the processing taxes with it.

If I can sustain these propositions, then without regard to the question of delegation, the judgment appealed from must be affirmed. I confidently assert, without arguing the point, that if my propositions are sound, nothing in the amendment of August 24, 1935, in any way affects them. I do not understand it to be seriously contended that the amendment has changed the nature of the regulatory scheme. If the original act was invalid for lack of power the amendment is in no better case.

The outline of the scheme which I have already made makes it clear that control of production is the objective of Congress. I now wish to show that the processing tax is merely a cog, though an essential cog, in the regulatory machine. That this is its true character appears from the following considerations:

There is no tax until the Secretary of Agriculture determines that rental or benefit payments are to be made. See § 9 (a). In other words, the making of rental or benefit payments is the sole occasion for the tax.

The declared objective being to close the gap between the farmer's financial condition today and his condition in a pre-war period, the rate of the tax is declared to be the extent of such gap. § 9 (b). In other words, (as already explained) there is no relation whatever between the rate of tax and the activity of the processor, except that the extent of the gap in the farmer's income is translated into such-and-such a sum per pound of raw material processed. Congress in so many words has said "We exact from the processor a sum equal to our estimate of what the farmer should be receiving in addition to his present income."

The sum so exacted is to be paid into the treasury but is by the act itself so appropriated as to be available to the Secretary of Agriculture for rental and benefit payments and other features of the reduction program. § 12 (b). In other words, the tax and its use are so related that, except for the specified use, there would be no tax, and except for the tax, the scheme could never go into effect.

The tax terminates at the end of the marketing year current at the time the Secretary determines to discontinue rental and benefit payments. § 9(a). In other words, just as the proposed exercise of control is the occasion of the tax so a determination to abandon control marks the end of the tax. The provision on that subject is the reciprocal of the first that I mentioned. The tax goes into effect when the Secretary declares that rental and benefit payments are to be made. The tax ceases to exist at the end of the market year when he declares that the rental and benefit payments are to terminate; and, as I have explained, in the interval the tax, in theory at least, is modified upward or downward by fluctuations in the fortunes of the farmer. I say "in theory at least," because (referring to the brief filed on behalf of the processors of hogs) you will find that while in the case of cotton it so happens, as so clearly explained by the Solicitor-General yesterday, that the tax has been maintained and still exists at the same figure at which it was originally placed—namely, 4.2 cents per pound, that being the precise mathematical outcome of the formula in the act, with some administrative adjustments—in the case of hogs the authority given to the Secretary to approach compliance with the formula gradually has been exercised so liberally that while the tax which the formula would have yielded at the time the tax was imposed was something over four dollars and a half per hundred-weight of hogs, the Secretary imposed a tax first of fifty cents, then of a dollar, then of a dollar and a half, and subsequently, as of March, 1934, a tax of $2.25 the hundred-weight, which has continued in effect and is in effect at the present time, although at the outset that was only about half the figure yielded by the formula; and the gap has in fact so far closed, owing to the successful operation of the scheme, that there was, I think, one time when the gap disappeared entirely; and there are judicial findings in a number of cases to the effect that the gap had shrunk to 81 cents at the time of the findings in question, although the tax was still maintained at $2.25.

I mention this to show that the tax is regulatory in character, and does not really follow even the fluctuations as required by the formula, but that resort must be had to that provision of the Act which authorizes the Secretary not merely to fix the rate at the outset in accordance with the formula or a gradual approach to it, but authorizes him to maintain the tax after it has been laid, so that if the tax equals the formula or is less than the formula at the time it is laid, and subsequently the gap closes, even approaching the vanishing point, the power to maintain is invoked for the purpose of keeping the tax at a figure in excess of the formula, provided in the opinion of the constituted authority it is necessary to do that thing in order to regulate local production.

Since the object of the scheme of federal control is to enable the farmers to get higher prices for their products, and so close the gap, it must follow that if (for example) the processors of hogs had voluntarily paid to their several vendors such prices as would close the gap there never would have been any tax whatever.

While the formula for the tax rate is specified in the act, the Secretary of Agriculture is given discretion to lower it, § 9(b); he is, by § 15(a), given authority to exempt the processing of any commodity from all tax whatever, and even to refund what has been paid; and he is empowered by § 15(d) to impose compensating taxes of unspecified amounts upon commodities competing with basic commodities.

In view of the foregoing I submit that what Congress has done is not to exercise its taxing power except as part of and solely in aid of a regulatory scheme, the administration of which it has confided to an executive official.

If I am right in my analysis, it is about as clear a case of an exaction masquerading as a tax, but really regulatory in its character, as I think has ever come before this Court. . . .

Now, may it please your Honors, if I am right in my contention that this so-called processing tax is merely a regulatory exaction, and not an exercise of the taxing power as such, it remains for me to satisfy your Honors that it is such an exaction as should fall if the scheme itself is beyond the power of Congress.

On this point I contend that this Court has decided that wherever it appears upon the face of the statute that levies are being imposed not to replenish the public treasury but to control the conduct of the private citizen, the validity of the levy depends upon whether the exercise of control is within the powers granted by the people to Congress.

At this point the Solicitor General advances the objection that there is a difference between this case and the decisions to which I refer. He is right: there *is* a difference but it is not a significant difference. It is true that in the *Child Labor Case* and others the tax was laid upon A in order to control A's conduct. In the instant case the money is exacted from A in order to be used for the control of the conduct of B. If, however, the fact be that *control of conduct* is the legislative objective and if such control cannot be accomplished without resort to a tax, then it must be immaterial whether the control, if achieved, results from A's desire to escape the tax or from B's readiness to exchange his freedom for a share of A's money. . . .

But the objection is then advanced in another form. It is said that in the instant case it is optional with the farmer whether he will accept the benefit payment and that, if he subjects himself to control, he does so voluntarily. This, it seems to me, is a factual distinction without a legal difference. The employer of child labor was not coerced except by economic pressure. The farmer is not coerced except by economic pressure. Whether the pressure takes the form of threatened exaction or of promised bounty, the Court is faced by the same fundamental proposition, namely that Congress is using the device of a tax as a means to the exertion of effective pressure upon the citizen in order to make him conform to congressional policy. If the control thus sought is within some granted power, well and good. If not, the whole scheme fails.

The Court will note that I am not contending that a federal loan or a federal bounty to farmers is, *per se*, invalid. I recognize that for a hundred years there have been all sorts of unchallenged congressional appropriations to promote agriculture. But these measures merely offered advice or instruction or extended financial aid to farmers. In no case, as far as I know, was there an attempt by Congress through the use of money to regulate local production. The type of regulation here attempted is the limitation of local agricultural production. Suppose it were the policy of a given State to stimulate such production through bounties or by more positive coercion. I find it hard to believe that the Constitution of the United States would sanction a public auction in which the farmer is placed on the auction block, the federal government bidding in order to purchase his promise to limit production and the State bidding in order to retain his loyalty to the local law. That is not at all an extravagant illustration, because, if, when your Honors come to look at Mr. Donald's able brief [referring to one of the briefs filed by *amici curiae*] you will glance at page 42, you will find the most interesting collection of constitutional and statutory declarations in the several States that seem to me to be at war with this Federal policy; and if it is going to be possible for the Federal Government to offer pecuniary reward to the farmer under conditions such that he cannot very well afford to decline, you get a situation in which he sells his freedom for this mess of pottage, and disavows his allegiance to that State which, under the Tenth Amendment, is entitled to control his production, and subjects himself to what is, in that sense, an alien scheme. I always distrust my capacity to put a perfect dilemma; but I suggest that in this case one of two things is true—either that control acquired by purchase is, if lawful, the supreme law of the land or that a scheme of local regulation which it is within the power of the State to nullify is a scheme which Congress lacks the power to set up.

If you look at the case realistically, it is not a voluntary matter with the farmer whether he does or does not accept the regime. It is no more voluntary than it was in the case of the manufacturer of goods made with child labor to continue to pay the tax and still remain in the business of which Congress disapproved. It is not possible for the farmer in any neighborhood who refuses to accept the regime to compete successfully with his next door neighbor who has accepted it. If you think realistically, it is not a voluntary scheme at all; and if you will glance at pages 32 to 36 in Mr. Donald's brief and note the intensive sales effort that was put out to capture the allegiance of the farmers, you will think that I am not extravagant in saying that that was a method of compulsion that is a good deal more effective than allotting quotas and threatening criminal penalties for their violation. It is a good deal more effective to purchase control with the use of liberal sums of money than it is to enforce obedience to a complicated scheme by means of criminal sanctions.

In connection with the emphasis laid by the Government upon the alleged voluntary character of the farmer's consent to be regulated, I think it significant to note that there is nothing voluntary in the consequences of his action as they affect the processor and the consumer. These people may well be neighbors of the farmer and citizens of the same State. The necessary result of the farmer's agreement with the federal government to limit production is threefold: first, it subjects the processor to a tax; second, it raises the price which the processor must pay to the farmer for his raw material; and, third, even if the processor absorbs the tax, he must reflect the rise in raw material costs in his price to the retailer—who, in turn, exacts an increased price from the ultimate consumer. There is, I repeat, nothing voluntary in this scheme as respects the effect upon processor and public. I mention this merely by the way; because I am contending that the criterion of validity or invalidity is the control sought by Congress and not the nature of the economic pressure exerted to secure it.

I have now attempted to establish that these processing exactions are an integral part of a scheme to regulate local production and to affect the price of agricultural commodities and so must be declared invalid if the scheme as a whole is invalid. Before passing to my second proposition—namely, that the scheme *is* invalid—I wish to notice a final objection made by the Government against treating the scheme of the act as a unity.

It is said that while A may resist payment of an exaction intended to control his own conduct, he has no standing to resist it if the proceeds are to go into the Treasury and there become subject to uncontrollable spending power. There is in this objection what seems to me an obvious fallacy. The precedent relied upon by the Government—*Massachusetts* v. *Mellon*—is merely authority for the proposition that neither a State nor an individual taxpayer has a sufficiently direct pecuniary interest to give him a standing to question the validity of an appropriation of money which is lawfully in the Treasury and subject to appropriation. The question presented by this record is wholly different. Here the citizen is resisting an attempt of the Federal Government to take money out of his own pocket and is basing his resistance upon the invalidity of the scheme of which both the threatened collection and proposed disbursement are necessary parts.

I do not overlook the announcement recently carried by the press that if this act is declared unconstitutional the next move of Congress will be to levy an excise in one Act and then appropriate money for benefit payments by another. If such a course is followed it will be time enough to discuss the constitutional questions to which it may give rise. I venture the suggestion, however, that if the spending power is ever thus deliberately invoked to enlarge the area of Congressional control, it might not be impertinent to ask this Court to consider whether, in a democracy, the individual citizen has not a standing to call the legislature to account, not because of his pecuniary stake but because of his responsible share in government.

I come now to my second proposition—which is that a scheme to regulate farm production and fix farm prices is an invasion of the field reserved by the Tenth Amendment.

I do not see how there can be much controversy over the purpose of this Act. The draftsman with commendable frankness has, as we have seen, explicitly stated it. Whether you call it realistically the philosophy of scarcity or euphemistically the adjustment of production to consumption, the plain fact is that the reduction of local production of crops must at all hazards be achieved or else the desired increase in farm prices is unattainable. It seems to me, therefore, that we have, as to agriculture, the same type of regulation unsuccessfully attempted by NRA in the case of industry. If the Court will compare the declarations of emergency in the two Acts it will be seen that obstruction of the normal currents of commerce figures largely in what Congress evidently hoped would be accepted by the Court as jurisdictional facts. In the case of both Acts the draftsman had a rosy vision of nationwide economic recovery achieved through increased commodity prices and he mistakenly assumed that this end could be lawfully accomplished through regimentation by a central authority—in one case the President, in the other the Secretary of Agriculture.

When NRA was submitted for judicial examination an effort was made to salvage it by seeking authority for the codes in the power to regulate interstate commerce. Now, however, when AAA is before the Court, there is a significant silence on the part of the Government as to the commerce clause. It seems to be conceded, as indeed it would have to be in the light of the *Schechter* decision, that the federal regulation of production is wholly beyond the scope of the commerce clause. The whole reliance of the Government is accordingly placed upon the proposition that we have nothing to consider but an unimpeachable tax and an uncontrollable appropriation.

To support the tax argument, the Government invokes the general welfare clause. This seems to me to afford the coldest kind of cold comfort.

As I understand it, when Congress merely imposes a tax (whether it be a uniform indirect tax or an apportioned direct tax) no question of *purpose* is involved. There are plenty of legitimate governmental needs for money, and Congress, presumably, is merely undertaking to meet them. Accordingly no problem arises unless and until, in the very act of imposing the tax, Congress (as here) specifies the purpose for which the money is sought to be raised. The purpose so specified might be one clearly within some recognized congressional power. In such case no difficulty would be presented. But suppose (as here) that the only specific power that might plausibly be invoked (to wit, the commerce power) falls far short of what is required. It is then, and then only, that recourse is had to the proposition that it is within the exclusive power of Congress to determine that a particular measure will promote the general welfare and that accordingly a tax to be applied for the purposes of that measure is a valid tax. This proposition, as far as I can see, means this: that Congress may determine that a certain nation-wide policy is necessary to the welfare of the nation; ergo that legislation to effectuate such policy must be within the power of Congress; and that, if you cannot find an applicable specific power which covers the case, you invoke the general welfare clause. The practical result of this argument is the same as that which would flow from the doctrine of "inherent national power" upon which this Court put a quietus in *Kansas* v. *Colorado*. Whether Congress invokes "inherent power" or wallows in the welfare clause—in either event the powers reserved by the Tenth Amendment disappear and that against which I solemnly protest ensues—namely the conversion of a federal legislature into a national parliament—with the consequent destruction of the right of local self-government.

As I understand it, there are three possible views of the general welfare clause. It seems to me to be patient of two interpretations and can be tortured into a third. It is patient of the Madisonian view; it is patient of the Hamiltonian view; and it can be tortured, possibly, although I hope not, to answer the needs of the Solicitor General in the present case.

I understand Madison's view to have been that the welfare for which Congress may appropriate is the welfare which may be achieved in the exercise of the granted powers. I understand the Hamiltonian view to have been that, irrespective of the existence of power in virtue of specific grants or implications, the power to tax may be used to raise revenue for the general welfare, and that appropriations may be made out of that fund for such purposes as Congress may think fit. But I did not know, until this statute proposed it, of any interpretation which begins where Hamilton stops, and asserts that because you may appropriate for anything which Congress thinks is consonant with the public welfare, you may, through that appropriation, control the local conduct of the producer in a particular reserved to the States under the Tenth Amendment. That, it seems to me, is the general welfare clause gone mad. It seems to me it is impossible to sustain any such view without throwing overboard once and for all the idea that Congress is a federal legislature with limited powers. It carries you all the way to the other extreme, which is that of the national parliament subject to no restraint but self-restraint. . . .

The commerce clause failing to serve his purpose— and the general welfare clause being unsafe ground on which to build, four subsidiary arguments are advanced by the Solicitor General to which I wish to refer briefly.

The first is based upon the historical fact that spending is an executive function. No student of English constitutional history will dispute the proposition and no contemporary observer can doubt that even in the United States the same function is effectively exercised by the Executive. But the conclusion sought to be drawn is a non-sequitur. Because the Executive may spend as he pleases, it is argued that when he pleases to make a certain expenditure his decision puts into operation a tax to raise the money for him to spend. Whether you call this a delegation to him of the taxing power or whether he is attempting to delegate to Congress his executive discretion is largely a matter of words. The practical result would be to give to the President and to Congress an unlimited power to tax for any purpose which could be attained by inflating the general welfare clause to the utmost. . . .

Next it is said that Congress may organize banks and other agencies with power to lend money to farmers on mortgage. This may be conceded. But the conclusion is remarkable—namely, that *therefore* Congress may take over the control of production in order to increase the farmer's ability to repay the loan. If this argument had been advanced a year ago it might have saved the NRA; because, since Congress has authorized the formation of National Banks with power to lend money to industrialists, it would seem to follow that Congress may take control of any and all industries to make it more likely that the notes will be paid. Here again the trouble with the argument is that it proves too much. It frees the legislature from all constitutional restraint.

The third subsidiary argument is based upon the proposition that power to pay the debts of the United States includes power to discharge a moral obligation. This may be conceded. Thus, if a farmer had performed his part of a contract with the Secretary and the latter were to refuse to pay the consideration on the ground that the contract was void, and if Congress were then to appropriate for the relief of the farmer, nobody could enjoin the appropriation. But to argue that Congress may therefore authorize an unconstitutional scheme in order to create an honorary duty, and may then tax the processor to raise the money to perform it, seems to me to be juggling with words. If the United States is unjustly enriched by accepting a farmer's performance, let Congress appropriate funds in the treasury not otherwise appropriated. If the honor of all the people is at stake, let all the people vindicate it. But for goodness sake do not permit the United States to purge itself of unjust enrichment by unjustly impoverishing the processor. The United States would not be entitled to a thrill of moral satisfaction merely because it had robbed Processor Peter in order to pay Producer Paul.

A fourth subsidiary argument is built around the contention that the farmer needs a tariff—and that therefore he should have it in the exercise of the same power that justifies the international tariff. The argument overlooks the fact that the international tariff is primarily an exercise of the express power to regulate commerce with foreign nations. It was so decided in *Board of Trustees of State University* v. *United States* in 289 U. S. Being free to forbid admission of goods from abroad, Congress may regulate their admission and use the taxing power in aid of regulation. There is no corresponding power to regulate agricultural production—and the argument loses its force. It has then no other basis than the exploded doctrine of "inherent national power"—to which reference has already been made.

There is one aspect of this case which requires a reference to the Fifth Amendment.

The Solicitor General indeed stoutly maintains that the Amendment has nothing to do with this case. I agree that if this processing exaction is merely part of a regulatory scheme that is beyond the power of Congress, then the reason for the invalidity of the tax is, not the Fifth Amendment, but the lack of power to control local production.

On the other hand, if I am wrong in my main contention and if Congress may lawfully regulate such production—on the general welfare theory or some other equally vague—it by no means follows that the entire cost of the regulatory process may be taken out of the pockets of the processors. As the Fifth Amendment applies to the exercise of all the powers of government it must apply to the regulatory power of Congress no matter whence derived. I concede that an excise tax on all processors to help raise money for the federal treasury could not be resisted merely because it was too heavy. If (contrary to my earnest contention) it were assumed that regulation of production by benefit payments and other uses of money is within some power of Congress, I should also have to concede that money in the treasury raised by general taxation is available for such use. I suggest, however, that there is something essentially unjust in compelling the first handler of an agricultural commodity to contribute whatever is necessary to make up deficiencies in the income of the man who produces that commodity. It is all very well to think of the promotion of the agricultural industry as a public purpose; but to integrate the industry for purposes of regulation by treating the handler and producer as having interlocking interests and then to compel the stronger group to extend financial aid to the weaker comes perilously close to taking A's property and giving it to B. Something like this was attempted by Congress in the Railroad Retirement Act, where strong roads were expected to make up the deficiencies of the weak. This exaction from the processor might be justified if there were any ascertainable relation between the rate of tax and the activity in respect of which the excise is levied. But when it appears that the tax rate is determined by the width of the gap between what the farmer's income is and what Congress thinks it ought to be, it begins to look as if the processor were brought upon the scene merely in order to have his pocket picked for the benefit of the farmer. It would be hard enough on the processor to have to submit to assessment merely to increase the producer's income; but when we reflect that the increase is accomplished by using the proceeds of the tax to raise the price which the processor has to pay for his raw material, the question arises whether this is the due process which the Fifth Amendment guarantees. It seems clear to me that it is not due process to measure an excise on processing by a deficiency in producer's income.

It is not possible for me to extract from the due process decisions of this Court a formula for determining what does and what does not come within the condemnation of the Fifth Amendment. Probably the Court has deliberately avoided the formulation of a rule for the same reason that chancellors refuse to specify the limits of fraud. Each case must be determined in the light of its own facts. I suggest, however, that the processing exaction is a far more marked departure from what is usually regarded as permissible in taxation than was the case in *Nichols* v. *Coolidge*, 274 U. S. 531 (1927), in *Hoeper* v. *Tax Commission of Wisconsin*, 284 U. S. 206 (1931) or in *Heiner* v. *Donnan*, 285 U. S. 312 (1932).

. . . . .

My time is fleeting and I must not pause to sum up the argument I have made. I have come to the point at which a consideration of delegation is the next logical step, and that is to be dealt with effectively by my colleague, Mr. Hale. But I do want to say just one final and somewhat personal word.

I have tried very hard to argue this case calmly and dispassionately, and without vehement attack upon things which I cannot approve, and I have done it thus because it seems to me that this is the best way in which an advocate can discharge his duty to this Court.

But I do not want your Honors to think that my feelings are not involved, and that my emotions are not deeply stirred. Indeed, may it please your Honors, I believe I am standing here today to plead the cause of the America I have loved; and I pray Almighty God that not in my time may "the land of the regimented" be accepted as a worthy substitute for "the land of the free."

Messrs. Edward R. Hale and *Bennett Sanderson* closed the argument for respondents.

Following are excerpts from the respondents' brief, on which were the two gentlemen last named, together with *Messrs. George Wharton Pepper, Humbert B. Powell,* *James A. Montgomery, Jr., J. Willison Smith, Jr.,* and *Edmund M. Toland:*

Notwithstanding the reservation of the Tenth Amendment, this Act, by purchased control, forces upon agricultural communities within state lines a reduction of production of agricultural commodities without regard to the needs, desires or policies of the State affected. It disregards even the policies against restraints on trade announced by many of the States in formal enactment.

Indeed, there is a substantial question of the power of the States themselves either to control agricultural activities and internal prices, or *a fortiori,* of their ability to grant any such power to the Federal Government. The ordinary legitimate pursuits and transactions of citizens are, except in extraordinary circumstances, traditionally free from control even of the States. *New State Ice Co.* v. *Liebmann,* 285 U. S. 262; *Tyson Bros.* v. *Banton,* 273 U. S. 418; *Fairmont Creamery* v. *Minnesota,* 274 U. S. 1; *Williams* v. *Standard Oil Co.,* 278 U. S. 235; *Van Winkle* v. *Fred Meyer, Inc.,* 151 Ore. 455; 49 P. (2d) 1140. If power to regulate the operation of farms and prices of farm products is reserved to the people, as distinguished from the States, it follows that such power may not be delegated to the Federal Government except by an act of the people, expressed in a constitutional amendment. *Kansas* v. *Colorado,* 206 U. S. 46, 90.

It is argued that there is something voluntary about the crop reduction program which removes it from the limitations upon the Federal Government. As a matter of law we are unable to see any valid distinction arising from the fact that in this Act the regulation of individual activities within the States is accomplished by purchase instead of penalty.

While economic compulsion is invoked in the original Act to secure compliance from the producer, Congress has not hesitated to employ legal compulsion where less drastic methods were too slow. Legal compulsion has thus been resorted to in the case of cotton (the commodity involved in the instant case), tobacco and potatoes. The Bankhead Cotton Act of 1934, 48 Stat. 598; The Kerr Tobacco Act, 48 Stat. 1275; The Potato Act of 1935 (being Title II of "An Act to Amend the Agricultural Adjustment Act, and for other Purposes," approved August 24, 1935, Public No. 320, 74th Congress). Similar power to exert legal compulsion upon the processor or handler is granted in § 8 (3) of the Agricultural Adjustment Act as originally enacted. Such power has been extended by the amendments of August 24, 1935. These related Acts and provisions leave no doubt that the original and continuing Congressional intention in the Agricultural Adjustment Act is to impose the federal will upon production of agricultural commodities. In the light of such intentions and acts, the argument that control is voluntary becomes mere casuistry.

The regulatory measures of which the tax is an integral part cannot be justified as a regulation of interstate commerce.

Neither the production of commodities by farmers nor the manufacture of articles is subject to the control of Congress. *Chassaniol* v. *Greenwood,* 291 U. S. 584; *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245; *Oliver Iron Mining Co.* v. *Lord,* 262 U. S. 172; *Crescent Cotton Oil Co.* v. *Mississippi,* 257 U. S. 129; *Kidd* v. *Pearson,* 128 U. S. 1.

Interstate commerce begins only when articles are delivered to a carrier to be transported. It comes to an end when articles are delivered. *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495; *Federal Compress Co.* v. *McLean,* 291 U. S. 17; *United Leather Workers* v. *Herkert & Co.,* 265 U. S. 457.

Neither agriculture nor manufacturing "affects" or "burdens" interstate commerce. In order to come within the interstate commerce power, the effect or burden of activities not commerce must be direct and immediate. *Schechter Poultry Corp.* v. *United States, supra; Railroad Retirement Board* v. *Alton R. Co.,* 295 U. S. 330; *Levering & Garrigues* v. *Morrin,* 289 U. S. 103; *United Leather Workers* v. *Herkert & Co.,* 265 U. S. 457; *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344; *Hammer* v. *Dagenhart,* 247 U. S. 251.

The processing and floor stocks taxes are levied in violation of the Fifth Amendment. The Act takes from one class without compensation, and gives to members of another. *Railroad Retirement Board* v. *Alton R. Co.,* 295 U. S. 330; *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555.

The taxing power is limited to taxes raised for public as distinguished from private purposes. *Loan Association* v. *Topeka,* 20 Wall. 655; *Cole* v. *LaGrange,* 113 U. S. 1; *Parkersburg* v. *Brown,* 106 U. S. 487; *Lowell* v. *Boston,* 111 Mass. 454.

The taxes are arbitrary and unreasonable. The Fifth Amendment requires that a law (including a tax law) shall not be unreasonable, arbitrary or capricious. Of tax laws it requires a reasonable classification of objects of taxation, a rate determined upon a reasonable basis, not arbitrary or confiscatory, and reasonableness in the time when the tax becomes effective. The Fifth Amendment also requires that the means selected to carry out one of the granted powers shall have a real and substantial relation to the object sought to be attained. *Railroad Retirement Board* v. *Alton R. Co.,* 295 U. S. 330, 347, note 5; *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555, 589, note 19. See also *Nebbia* v. *New York,* 291 U. S. 502, 525; *Heiner* v. *Donnan,* 285 U. S. 312; *Nichols* v. *Coolidge,* 274 U. S. 531; *Hoeper* v. *Tax Commission,* 284 U. S. 206.

Congress may not, under the guise of the taxing power, assert a power not delegated to it by the Constitution.

Ulterior purposes may be accomplished under this power only when they are truly incidental and necessary to a real revenue measure. Cf. *Railroad Retirement Board* v. *Alton R. Co., supra; Hill* v. *Wallace,* 259 U. S. 44; *Child Labor Tax Case,* 259 U. S. 20. *United States* v. *Doremus,* 249 U. S. 86 and *McCray* v. *United States,* 195 U. S. 27, distinguished.

The taxpayer may contest the tax and question the purpose thereof. *Massachusetts* v. *Mellon,* 262 U. S. 447, distinguished.

The floor stocks taxes are direct taxes and are void because not apportioned.

The Act is invalid in that it delegates legislative power to the Secretary of Agriculture. *Panama Refining Co.* v. *Ryan,* 293 U. S. 388; *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495; *Field* v. *Clark,* 143 U. S. 649; *United States* v. *Grimaud,* 220 U. S. 506; *Hampton & Co.* v. *United States,* 276 U. S. 394. *Williamsport Wire Rope Co.* v. *United States,* 277 U. S. 551; *Blair* v. *Oesterlein Machine Co.,* 275 U. S. 220; *Heiner* v. *Diamond Alkali Co.,* 288 U. S. 502, and *United States* v. *Grimaud,* 220 U. S. 506, distinguished.

Section 21 (b) of the amendments is ineffective to validate taxes assessed prior to its passage. *United States* v. *Heinszen,* 206 U. S. 370; *Rafferty* v. *Smith, Bell & Co.,* 257 U. S. 226; *Tiaco* v. *Forbes,* 228 U. S. 549; *Charlotte Harbor & N. Ry. Co.* v. *Welles,* 260 U. S. 8; *Graham & Foster* v. *Goodcell,* 282 U. S. 409; *Nichols* v. *Coolidge,* 274 U. S. 531; *Blodgett* v. *Holden,* 275 U. S. 142; *Untermyer* v. *Anderson,* 276 U. S. 440.

Solicitor General Reed closed the argument:

May it please the Court, in the brief time remaining to me to close the argument for the Government I should like particularly to call to your Honors' attention the problem of the welfare clause, the Tenth Amendment, and whether or not this tax is for a public purpose.

I do not know whether counsel for the respondents mean to take the position that the welfare clause does give a power of appropriation and a power to tax that can be utilized for the purposes of relief and that can be utilized for the purposes of making loans to agriculture through the Farm Loan Corporation, and making loans to home-owners through the Home Owners Loan Corporation, or can be used for making loans to agriculture, railroads, industry, and banks, through the Reconstruction Finance Corporation; or whether they take the position that the welfare clause as such does not give a right to the Government to make loans. If we can make a loan, can we also make a grant, or if we can make a grant, can we make a contract? The vital point of assault and defense upon the Agricultural Adjustment Act seems to me not to be in the Tenth Amendment, nor in whether this is for a public purpose, but as to whether the Government has the power to appropriate money which it raises by taxation for the benefit of individuals in the States, or to carry out contracts which the Government makes with those individuals.

The scope of the welfare clause has never been finally decided by this Court. The Government's position is not that it may take any action it pleases under the welfare clause. Our contention is that the welfare clause gives the right to tax and the right to appropriate, so long as the appropriations are limited to the general welfare.

This interpretation of the welfare clause has met the approval of those who participated in the ratifying conventions. It met the approval of George Washington when he sent his message to Congress that agriculture should be supported and benefited by Congressional appropriations. It met the approval of the early Congresses when they used the power of giving bounties to the cod fisheries of Massachusetts. . . .

That is the interpretation of the welfare clause which has met the approval of commentators from Story to

Justice Miller. With but one exception that I recall, they have been fully settled in the view that the appropriating power of Congress gave it the right to give money for relief, to aid those who were in distress, to lend where money was needed. And surely if it can take those steps, it can also contract to help, where it is also for the public welfare.

Is this present Act for the public welfare? I heard the manifestation of deep emotion with which counsel spoke of his interest in the preservation of the welfare of this Government, and I respect his motives and the earnestness with which he presents them to this Court. But there is another side to the argument, as to what is the duty of the Government of the United States. Over and over again counsel have used the words "control" and "regiment." There is no control or regimentation in this Act. An emergency existed, not of sudden creation, but grown up over the years; lack of balance between different sections of this country, not geographical sections, but different interests of the people of the United States.

This very corporation is an excellent example of benefits that have been secured from the taxing powers of this Government—a textile mill which, with its competitors, for more than a hundred years has received the bounties which come and the benefits which flow from the protective tariff system. Surely they should be the last to object to a readjustment of the balance between agriculture and industry.

The farmers of the United States comprise 30 per cent of the population, men, women and children, bringing out of the ground the natural resources which sustain the entire American commonwealth, and bringing from the ground the very resource which this corporation uses in its manufacture of textiles. There is no reason to begrudge it the bounties it has received from the Government, but on the other hand there is no reason why the Government of the United States, in the exercise of its power under the general welfare clause, should not seek to equalize the interests of agriculture and industry.

The Government sought to do that in the Act under consideration. The tax which is criticized has relation to the farmer and relation to the consumer. It was sought to equalize the benefits to the farmer, to give him better prices, and not impose a tax so high that the consumer would pay more than the normal amount the farmer was to receive. Therefore it is written that the tax shall not exceed the difference between the selling price of the commodity at the time the tax is placed upon it and the normal purchasing power of that commodity in what has been taken as a normal period.

Is there any reason why this country should be denied a right to help its citizens engaged in agriculture, which is open to every other country? Of course, it is said that we must act within the Constitution. Certainly we must. But the interpretation that is to be given to the Constitution must be viewed in the light of what is reasonable in the exercise of the power of Congress under the general welfare clause. Every nation, from the British Isles to Bechuanaland—we have cited the reports from them in the appendix to our brief—has taken steps to protect its agriculture.

We do not mean to say that that gives us a right so to legislate in this country if it is contrary to the Constitution, but we do say that it is evidence of the reasonable exercise of the power, if we have the power to provide for the general welfare, and the power of appropriation under that provision of the Constitution.

No one could be more firmly convinced of the necessity of keeping inviolate the separation of powers between the National Government and the States than counsel for the Government who appear here before this Court.

This Court, however, has laid down the rules by which we are to judge as to whether we are interfering with the rights of a State.

The case of *Massachusetts* v. *Mellon* has been repeatedly called to your Honors' attention. We have used it as an argument that the respondent cannot object in this case to the way in which the money is spent. But that is not the most important part of the case of *Massachusetts* v. *Mellon* at this moment. In that case the Court said not only that the citizen of a State could not object, but it said that "Probably, it would be sufficient to point out that the powers of the State are not invaded, since the statute imposes no obligation but simply extends an option which the State is free to accept or reject."

It was also said, in the case of *Ellis* v. *United States*, 206 U. S. 246, that the United States had the right even to control, by criminal provision, the actions of employers who employed people contrary to the laws of the United States when there was a contract between the employer and the United States.

We do not need to go so far in this case but we do say that the right to contract is free from limitation, that we have no more interfered with the rights of the States in this case than we would have interfered with the rights of the State in the case of *Massachusetts* v. *Mellon* if that State had accepted the money which was offered.

With those views, we submit that the Agricultural Adjustment Act, as it has been enacted and amended, is fully within the authority of the Constitution.

By leave of Court, briefs of *amici curiae* were filed as follows:

Mr. Vernon A. Vrooman, on behalf of the League for Economic Equality; *Messrs. Frederic P. Lee* and *Donald Kirkpatrick,* on behalf of the American Farm Bureau Federation; *Mr. Clay R. Apple,* on behalf of the National Beet Growers Assn., and the Mountain States Beet Growers Marketing Assn.; *Mr. O. O. Haga,* on behalf of the Farmers National Grain Corp.; and *Mr. Dan Moody,* on behalf of the Texas Agricultural Assn.;—supporting the validity of the Act.

Messrs. Nathan L. Miller, John W. Davis, and *William R. Perkins,* on behalf of Hygrade Food Products Corp., P. Lorillard Co., and National Biscuit Co.; *Messrs. Malcolm Donald* and *Edward E. Elder,* on behalf of the National Association of Cotton Manufacturers; *Messrs. Kingman Brewster, James S. Y. Ivins, Percy W. Phillips, O. R. Folsom-Jones, Richard B. Barker,* and *John W. Cutler; Mr. John E. Hughes,* on behalf of American Nut Co., Inc., et al.; *Messrs. Leo P. Harlow* and *Al. Philip Kane,* on behalf of Farmers' Independence Council of America; *Mr. Wm. B. Bodine,* on behalf of Berks Packing Co., Inc., et al.; and *Messrs. Charles B. Rugg, Frank J. Morley, Thomas Nelson Perkins,* and *Warren F. Farr,* on behalf of General Mills, Inc., et al.;—challenging the validity of the Act.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

In this case we must determine whether certain provisions of the Agricultural Adjustment Act, 1933,[1] conflict with the Federal Constitution.

Title I of the statute is captioned "Agricultural Adjustment." Section 1 recites that an economic emergency has arisen, due to disparity between the prices of agricultural and other commodities, with consequent destruction of farmers' purchasing power and breakdown in orderly exchange, which, in turn, have affected transactions in agricultural commodities with a national public interest and burdened and obstructed the normal currents of commerce, calling for the enactment of legislation.

[1] May 12, 1933, c. 25, 48 Stat. 31.

Section 2 declares it to be the policy of Congress:

"To establish and maintain such balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will reëstablish prices to farmers at a level that will give agricultural commodities [2] a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period."

The base period, in the case of cotton, and all other commodities except tobacco, is designated as that between August, 1909, and July, 1914.

The further policies announced are an approach to the desired equality by gradual correction of present inequalities "at as rapid a rate as is deemed feasible in view of the current consumptive demand in domestic and foreign markets," and the protection of consumers' interest by readjusting farm production at such level as will not increase the percentage of the consumers' retail expenditures for agricultural commodities or products derived therefrom, which is returned to the farmer, above the percentage returned to him in the base period.

Section 8 provides, amongst other things, that "In order to effectuate the declared policy," the Secretary of Agriculture shall have power

"(1) To provide for reduction in the acreage or reduction in the production for market, or both, of any basic agricultural commodity, through agreements with producers or by other voluntary methods, and to provide for rental or benefit payments in connection therewith or upon that part of the production of any basic agricultural commodity required for domestic consumption, in such amounts as the Secretary deems fair and reasonable, to

[2] Section 11 denominates wheat, cotton, field corn, hogs, rice, tobacco, and milk and its products, "basic agricultural commodities," to which the act is to apply. Others have been added by later legislation.

be paid out of any moneys available for such payments. . . ."

"(2) To enter into marketing agreements with processors, associations of producers, and others engaged in the handling, in the current of interstate or foreign commerce of any agricultural commodity or product thereof, after due notice and opportunity for hearing to interested parties. . . ."

"(3) To issue licenses permitting processors, associations of producers, and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof."

It will be observed that the Secretary is not required, but is permitted, if, in his uncontrolled judgment, the policy of the act will so be promoted, to make agreements with individual farmers for a reduction of acreage or production upon such terms as he may think fair and reasonable.

Section 9 (a) enacts:

"To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation. The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor. . . ."

The Secretary may from time to time, if he finds it necessary for the effectuation of the policy of the act, readjust the amount of the exaction to meet the requirements of subsection (b). The tax is to terminate at the end of any marketing year if the rental or benefit payments are discontinued by the Secretary with the expiration of that year.

Section 9 (b) fixes the tax "at such rate as equals the difference between the current average farm price for the commodity and the fair exchange value," with power in the Secretary, after investigation, notice, and hearing, to readjust the tax so as to prevent the accumulation of surplus stocks and depression of farm prices.

Section 9 (c) directs that the fair exchange value of a commodity shall be such a price as will give that commodity the same purchasing power with respect to articles farmers buy as it had during the base period and that the fair exchange value and the current average farm price of a commodity shall be ascertained by the Secretary from available statistics in his department.

Section 12 (a) appropriates $100,000,000 "to be available to the Secretary of Agriculture for administrative expenses under this title and for rental and benefit payments . . ."; and § 12 (b) appropriates the proceeds derived from all taxes imposed under the act " to be available to the Secretary of Agriculture for expansion of markets and removal of surplus agricultural products . . . administrative expenses, rental and benefit payments, and refunds on taxes."

Section 15 (d) permits the Secretary, upon certain conditions, to impose compensating taxes on commodities in competition with those subject to the processing tax.

By § 16 a floor tax is imposed upon the sale or other disposition of any article processed wholly or in chief value from any commodity with respect to which a processing tax is to be levied in amount equivalent to that of the processing tax which would be payable with respect to the commodity from which the article is processed if the processing had occurred on the date when the processing tax becomes effective.

On July 14, 1933, the Secretary of Agriculture, with the approval of the President, proclaimed that he had determined rental and benefit payments should be made with respect to cotton; that the marketing year for that commodity was to begin August 1, 1933; and calculated and fixed the rates of processing and floor taxes on cotton in accordance with the terms of the act.

The United States presented a claim to the respondents as receivers of the Hoosac Mills Corporation for processing and floor taxes on cotton levied under §§ 9 and 16 of the act. The receivers recommended that the claim be disallowed. The District Court found the taxes valid and ordered them paid.[3] Upon appeal the Circuit Court of Appeals reversed the order.[4] The judgment under review was entered prior to the adoption of the amending act of August 24, 1935,[5] and we are therefore concerned only with the original act.

First. At the outset the United States contends that the respondents have no standing to question the validity of the tax. The position is that the act is merely a revenue measure levying an excise upon the activity of processing cotton,—a proper subject for the imposition of such a tax,—the proceeds of which go into the federal treasury and thus become available for appropriation for any purpose. It is said that what the respondents are endeavoring to do is to challenge the intended use of the money pursuant to Congressional appropriation when, by confession, that money will have become the property of the Government and the taxpayer will no longer have any interest in it. *Massachusetts* v. *Mellon,* 262 U. S. 447, is claimed to foreclose litigation by the respondents or other taxpayers, as such, looking to restraint of the expenditure of government funds. That case might be an authority

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[3] *Franklin Process Co.* v. *Hoosac Mills Corp.,* 8 F. Supp. 552.

[4] *Butler* v. *United States,* 78 F. (2d) 1.

[5] 49 Stat. 750, c. 641.

in the petitioners' favor if we were here concerned merely with a suit by a taxpayer to restrain the expenditure of the public moneys. It was there held that a taxpayer of the United States may not question expenditures from its treasury on the ground that the alleged unlawful diversion will deplete the public funds and thus increase the burden of future taxation. Obviously the asserted interest of a taxpayer in the federal government's funds and the supposed increase of the future burden of taxation is minute and indeterminable. But here the respondents who are called upon to pay moneys as taxes, resist the exaction as a step in an unauthorized plan. This circumstance clearly distinguishes the case. The Government in substance and effect asks us to separate the Agricultural Adjustment Act into two statutes, the one levying an excise on processors of certain commodities, the other appropriating the public moneys independently of the first. Passing the novel suggestion that two statutes enacted as parts of a single scheme should be tested as if they were distinct and unrelated, we think the legislation now before us is not susceptible of such separation and treatment.

The tax can only be sustained by ignoring the avowed purpose and operation of the act, and holding it a measure merely laying an excise upon processors to raise revenue for the support of government. Beyond cavil the sole object of the legislation is to restore the purchasing power of agricultural products to a parity with that prevailing in an earlier day; to take money from the processor and bestow it upon farmers [6] who will reduce their acreage for

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[6] U. S. Department of Agriculture, Achieving A Balanced Agriculture, p. 38: "Farmers should not forget that all the processing tax money ends up in their own pockets. Even in those cases where they pay part of the tax, they get it all back. Every dollar collected in processing taxes goes to the farmer in benefit payments."

U. S. Dept. of Agriculture, The Processing Tax, p. 1: "Proceeds of processing taxes are passed to farmers as benefit payments."

the accomplishment of the proposed end, and, meanwhile to aid these farmers during the period required to bring the prices of their crops to the desired level.

The tax plays an indispensable part in the plan of regulation. As stated by the Agricultural Adjustment Administrator, it is " the heart of the law "; a means of " accomplishing one or both of two things intended to help farmers attain parity prices and purchasing power." [7] A tax automatically goes into effect for a commodity when the Secretary of Agriculture determines that rental or benefit payments are to be made for reduction of production of that commodity. The tax is to cease when rental or benefit payments cease. The rate is fixed with the purpose of bringing about crop-reduction and price-raising. It is to equal the difference between the " current average farm price " and " fair exchange value." It may be altered to such amount as will prevent accumulation of surplus stocks. If the Secretary finds the policy of the act will not be promoted by the levy of the tax for a given commodity, he may exempt it. (§ 11.) The whole revenue from the levy is appropriated in aid of crop control; none of it is made available for general governmental use. The entire agricultural adjustment program embodied in Title I of the act is to become inoperative when, in the judgment of the President, the national economic emergency ends; and as to any commodity he may terminate the provisions of the law, if he finds them no longer requisite to carrying out the declared policy with respect to such commodity. (§ 13.)

The statute not only avows an aim foreign to the procurement of revenue for the support of government, but by its operation shows the exaction laid upon processors to be the necessary means for the intended control of agricultural production.

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[7] U. S. Department of Agriculture, Agricultural Adjustment, p. 9.

In these aspects the tax, so-called, closely resembles that laid by the Act of August 3, 1882, entitled "An Act to Regulate Immigration," which came before this court in the *Head Money Cases,* 112 U. S. 580. The statute directed that there should be levied, collected and paid a duty of fifty cents for each alien passenger who should come by vessel from a foreign port to one in the United States. Payment was to be made to the collector of the port by the master, owner, consignee or agent of the ship; the money was to be paid into the Treasury, was to be called the immigrant fund, and to be used by the Secretary of the Treasury to defray the expense of regulating immigration, for the care of immigrants and relieving those in distress, and for the expenses of effectuating the act.

Various objections to the act were presented. In answering them the court said (p. 595):

"But the true answer to all these objections is that the power exercised in this instance is not the taxing power. The burden imposed on the ship owner by this statute is the mere incident of the regulation of commerce—of that branch of foreign commerce which is involved in immigration. . . ."

"It is true not much is said about protecting the ship owner. But he is the man who reaps the profit from the transaction, . . . The sum demanded of him is not, therefore, strictly speaking, a tax or duty within the meaning of the Constitution. The money thus raised, though paid into the Treasury, is appropriated in advance to the uses of the statute, and does not go to the general support of the government."

While there the exaction was sustained as an appropriate element in a plan within the power of Congress "to regulate commerce with foreign nations," no question was made of the standing of the shipowner to raise the question of the validity of the scheme and consequently of the exaction which was an incident of it.

It is inaccurate and misleading to speak of the exaction from processors prescribed by the challenged act as a tax, or to say that as a tax it is subject to no infirmity. A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the Government. The word has never been thought to connote the expropriation of money from one group for the benefit of another. We may concede that the latter sort of imposition is constitutional when imposed to effectuate regulation of a matter in which both groups are interested and in respect of which there is a power of legislative regulation. But manifestly no justification for it can be found unless as an integral part of such regulation. The exaction cannot be wrested out of its setting, denominated an excise for raising revenue and legalized by ignoring its purpose as a mere instrumentality for bringing about a desired end. To do this would be to shut our eyes to what all others than we can see and understand. *Child Labor Tax Case,* 259 U. S. 20, 37.

We conclude that the act is one regulating agricultural production; that the tax is a mere incident of such regulation and that the respondents have standing to challenge the legality of the exaction.

It does not follow that as the act is not an exertion of the taxing power and the exaction not a true tax, the statute is void or the exaction uncollectible. For, to paraphrase what was said in the *Head Money Cases* (*supra*), p. 596, if this is an expedient regulation by Congress, of a subject within one of its granted powers, "and the end to be attained is one falling within that power, the act is not void, because, within a loose and more extended sense than was used in the Constitution," the exaction is called a tax.

Second. The Government asserts that even if the respondents may question the propriety of the appropriation embodied in the statute their attack must fail because Article I, § 8 of the Constitution authorizes the contemplated expenditure of the funds raised by the tax. This contention presents the great and the controlling question in the case.[8] We approach its decision with a sense of our grave responsibility to render judgment in accordance with the principles established for the governance of all three branches of the Government.

There should be no misunderstanding as to the function of this court in such a case. It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty,—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the ques-

[8] Other questions were presented and argued by counsel, but we do not consider or decide them. The respondents insist that the act in numerous respects delegates legislative power to the executive contrary to the principles announced in *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, and *Schechter Corp.* v. *United States,* 295 U. S. 495; that this unlawful delegation is not cured by the amending act of August 24, 1935; that the exaction is in violation of the due process clause of the Fifth Amendment since the legislation takes their property for a private use; that the floor tax is a direct tax and therefore void for lack of apportionment amongst the states, as required by Article I, § 9; and that the processing tax is wanting in uniformity and so violates Article I, § 8, clause one, of the Constitution.

tion. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.[9]

The question is not what power the Federal Government ought to have but what powers in fact have been given by the people. It hardly seems necessary to reiterate that ours is a dual form of government; that in every state there are two governments,—the state and the United States. Each State has all governmental powers save such as the people, by their Constitution, have conferred upon the United States, denied to the States, or reserved to themselves. The federal union is a government of delegated powers. It has only such as are expressly conferred upon it and such as are reasonably to be implied from those granted. In this respect we differ radically from nations where all legislative power, without restriction or limitation, is vested in a parliament or other legislative body subject to no restrictions except the discretion of its members.

Article I, § 8, of the Constitution vests sundry powers in the Congress. But two of its clauses have any bearing upon the validity of the statute under review.

The third clause endows the Congress with power "to regulate Commerce . . . among the several States." Despite a reference in its first section to a burden upon, and an obstruction of the normal currents of commerce, the act under review does not purport to regulate transactions in interstate or foreign[10] commerce. Its stated pur-

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[9] Compare *Adkins* v. *Children's Hospital,* 261 U. S. 525, 544; *Massachusetts* v. *Mellon,* 262 U. S. 447, 488.

[10] The enactment of protective tariff laws has its basis in the power to regulate foreign commerce. See *Board of Trustees of the University of Illinois* v. *United States,* 289 U. S. 48, 58.

pose is the control of agricultural production, a purely local activity, in an effort to raise the prices paid the farmer. Indeed, the Government does not attempt to uphold the validity of the act on the basis of the commerce clause, which, for the purpose of the present case, may be put aside as irrelevant.

The clause thought to authorize the legislation,—the first,—confers upon the Congress power "to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States. . . ." It is not contended that this provision grants power to regulate agricultural production upon the theory that such legislation would promote the general welfare. The Government concedes that the phrase "to provide for the general welfare" qualifies the power "to lay and collect taxes." The view that the clause grants power to provide for the general welfare, independently of the taxing power, has never been authoritatively accepted. Mr. Justice Story points out that if it were adopted "it is obvious that under color of the generality of the words, to 'provide for the common defence and general welfare,' the government of the United States is, in reality, a government of general and unlimited powers, notwithstanding the subsequent enumeration of specific powers." [11] The true construction undoubtedly is that the only thing granted is the power to tax for the purpose of providing funds for payment of the nation's debts and making provision for the general welfare.

Nevertheless the Government asserts that warrant is found in this clause for the adoption of the Agricultural Adjustment Act. The argument is that Congress may appropriate and authorize the spending of moneys for the "general welfare"; that the phrase should be liberally

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[11] Story, Commentaries on the Constitution of the United States, 5th ed., Vol. I, § 907.

construed to cover anything conducive to national welfare; that decision as to what will promote such welfare rests with Congress alone, and the courts may not review its determination; and finally that the appropriation under attack was in fact for the general welfare of the United States.

The Congress is expressly empowered to lay taxes to provide for the general welfare. Funds in the Treasury as a result of taxation may be expended only through appropriation. (Art. I, § 9, cl. 7.) They can never accomplish the objects for which they were collected unless the power to appropriate is as broad as the power to tax. The necessary implication from the terms of the grant is that the public funds may be appropriated "to provide for the general welfare of the United States." These words cannot be meaningless, else they would not have been used. The conclusion must be that they were intended to limit and define the granted power to raise and to expend money. How shall they be construed to effectuate the intent of the instrument?

Since the foundation of the Nation sharp differences of opinion have persisted as to the true interpretation of the phrase. Madison asserted it amounted to no more than a reference to the other powers enumerated in the subsequent clauses of the same section; that, as the United States is a government of limited and enumerated powers, the grant of power to tax and spend for the general national welfare must be confined to the enumerated legislative fields committed to the Congress. In this view the phrase is mere tautology, for taxation and appropriation are or may be necessary incidents of the exercise of any of the enumerated legislative powers. Hamilton, on the other hand, maintained the clause confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant of them, and Congress consequently has a substantive power to tax and to ap-

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propriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States. Each contention has had the support of those whose views are entitled to weight. This court has noticed the question, but has never found it necessary to decide which is the true construction. Mr. Justice Story, in his Commentaries, espouses the Hamiltonian position.[12] We shall not review the writings of public men and commentators or discuss the legislative practice. Study of all these leads us to conclude that the reading advocated by Mr. Justice Story is the correct one. While, therefore, the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of § 8 which bestow and define the legislative powers of the Congress. It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.

But the adoption of the broader construction leaves the power to spend subject to limitations.

As Story says:

"The Constitution was, from its very origin, contemplated to be the frame of a national government, of special and enumerated powers, and not of general and unlimited powers." [13]

Again he says:

"A power to lay taxes for the common defence and general welfare of the United States is not in common sense a general power. It is limited to those objects. It cannot constitutionally transcend them." [14]

That the qualifying phrase must be given effect all advocates of broad construction admit. Hamilton, in his

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[12] *Loc. cit.* Chapter XIV, *passim.*

[13] *Loc. cit.* § 909.

[14] *Loc. cit.* § 922.

well known Report on Manufactures, states that the purpose must be "general, and not local." [15] Monroe, an advocate of Hamilton's doctrine, wrote: "Have Congress a right to raise and appropriate the money to any and to every purpose according to their will and pleasure? They certainly have not." [16] Story says that if the tax be not proposed for the common defence or general welfare, but for other objects wholly extraneous, it would be wholly indefensible upon constitutional principles.[17] And he makes it clear that the powers of taxation and appropriation extend only to matters of national, as distinguished from local welfare.

As elsewhere throughout the Constitution the section in question lays down principles which control the use of the power, and does not attempt meticulous or detailed directions. Every presumption is to be indulged in favor of faithful compliance by Congress with the mandates of the fundamental law. Courts are reluctant to adjudge any statute in contravention of them. But, under our frame of government, no other place is provided where the citizen may be heard to urge that the law fails to conform to the limits set upon the use of a granted power. When such a contention comes here we naturally require a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress. How great is the extent of that range, when the subject is the promotion of the general welfare of the United States, we hardly need remark. But, despite the breadth of the legislative discretion, our duty to hear and to render judgment remains. If the statute plainly violates the stated principle of the Constitution we must so declare.

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[15] Works, Vol. III, p. 250.

[16] Richardson, Messages and Papers of the Presidents, Vol. II, p. 167.

[17] *Loc. cit.* p. 673.

We are not now required to ascertain the scope of the phrase "general welfare of the United States" or to determine whether an appropriation in aid of agriculture falls within it. Wholly apart from that question, another principle embedded in our Constitution prohibits the enforcement of the Agricultural Adjustment Act. The act invades the reserved rights of the states. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government. The tax, the appropriation of the funds raised, and the direction for their disbursement, are but parts of the plan. They are but means to an unconstitutional end.

From the accepted doctrine that the United States is a government of delegated powers, it follows that those not expressly granted, or reasonably to be implied from such as are conferred, are reserved to the states or to the people. To forestall any suggestion to the contrary, the Tenth Amendment was adopted.[18] The same proposition, otherwise stated, is that powers not granted are prohibited. None to regulate agricultural production is given, and therefore legislation by Congress for that purpose is forbidden.

It is an established principle that the attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted.

"Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a de-

[18] The Tenth Amendment declares: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

cision come before it, to say that such an act was not the law of the land." *McCulloch* v. *Maryland,* 4 Wheat. 316, 423.

" Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within power reserved to the States, is invalid and cannot be enforced." *Linder* v. *United States,* 268 U. S. 5, 17.

These principles are as applicable to the power to lay taxes as to any other federal power. Said the court, in *McCulloch* v. *Maryland, supra,* 421:

" 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 consist with the letter and spirit of the constitution, are constitutional."

The power of taxation, which is expressly granted, may, of course, be adopted as a means to carry into operation another power also expressly granted. But resort to the taxing power to effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible.

" Congress is not empowered to tax for those purposes which are within the exclusive province of the States." *Gibbons* v. *Ogden,* 9 Wheat. 1, 199.

" There are, indeed, certain virtual limitations, arising from the principles of the Constitution itself. It would undoubtedly be an abuse of the [taxing] power if so exercised as to impair the separate existence and independent self-government of the States or if exercised for ends inconsistent with the limited grants of power in the Constitution." *Veazie Bank* v. *Fenno,* 8 Wall. 533, 541.

In the *Child Labor Tax Case,* 259 U. S. 20, and in *Hill* v. *Wallace,* 259 U. S. 44, this court had before it statutes which purported to be taxing measures. But their purpose was found to be to regulate the conduct of manufacturing and trading, not in interstate commerce, but in the states,—matters not within any power conferred upon Congress by the Constitution—and the levy of the tax a means to force compliance. The court held this was not a constitutional use, but an unconstitutional abuse of the power to tax. In *Linder* v. *United States, supra,* we held that the power to tax could not justify the regulation of the practice of a profession, under the pretext of raising revenue. In *United States* v. *Constantine,* 296 U. S. 287, we declared that Congress could not, in the guise of a tax, impose sanctions for violation of state law respecting the local sale of liquor. These decisions demonstrate that Congress could not, under the pretext of raising revenue, lay a tax on processors who refuse to pay a certain price for cotton, and exempt those who agree so to do, with the purpose of benefiting producers.

Third. If the taxing power may not be used as the instrument to enforce a regulation of matters of state concern with respect to which the Congress has no authority to interfere, may it, as in the present case, be employed to raise the money necessary to purchase a compliance which the Congress is powerless to command? The Government asserts that whatever might be said against the validity of the plan if compulsory, it is constitutionally sound because the end is accomplished by voluntary cooperation. There are two sufficient answers to the contention. The regulation is not in fact voluntary. The farmer, of course, may refuse to comply, but the price of such refusal is the loss of benefits. The amount offered is intended to be sufficient to exert pressure on him to agree to the proposed regulation.[19] The power to confer or withhold unlimited benefits is the power to coerce or destroy. If the cotton grower elects not to accept the benefits, he will receive less for his crops; those who receive payments will be able to undersell him. The result may well be financial ruin. The coercive purpose and intent of the statute is not obscured by the fact that it has not been perfectly successful. It is pointed out that, because there still remained a minority whom the rental and benefit payments were insufficient to induce to surrender their independence of action, the Congress has gone further and, in the Bankhead Cotton Act, used the taxing power in a more directly minatory fashion to compel submission. This progression only serves more fully to expose the coercive purpose of the so-called tax imposed by the present act. It is clear that the Department of Agriculture has properly described the plan as one to keep a non-coöperating minority in line. This is coercion by economic pressure. The asserted power of choice is illusory.

In *Frost Trucking Co.* v. *Railroad Comm'n*, 271 U. S. 583, a state act was considered which provided for supervision and regulation of transportation for hire by automobile on the public highways. Certificates of convenience and necessity were to be obtained by persons desiring to use the highways for this purpose. The regulatory

[19] U. S. Dept. of Agriculture, Agricultural Adjustment, p. 9. "Experience of cooperative associations and other groups has shown that without such Government support, the efforts of the farmers to band together to control the amount of their product sent to market are nearly always brought to nothing. Almost always, under such circumstances, there has been a noncooperating minority, which, refusing to go along with the rest, has stayed on the outside and tried to benefit from the sacrifices the majority has made. . . . It is to keep this noncooperating minority in line, or at least prevent it from doing harm to the majority, that the power of the Government has been marshaled behind the adjustment programs."

commission required that a private contract carrier should secure such a certificate as a condition of its operation. The effect of the commission's action was to transmute the private carrier into a public carrier. In other words, the privilege of using the highways as a private carrier for compensation was conditioned upon his dedicating his property to the quasi-public use of public transportation. While holding that the private carrier was not obliged to submit himself to the condition, the commission denied him the privilege of using the highways if he did not do so. The argument was, as here, that the carrier had a free choice. This court said, in holding the act as construed unconstitutional:

"If so, constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which, though, in form voluntary, in fact lacks none of the elements of compulsion. Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition, which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool,—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden." (p. 593.)

But if the plan were one for purely voluntary co-operation it would stand no better so far as federal power is concerned. At best it is a scheme for purchasing with federal funds submission to federal regulation of a subject reserved to the states.

It is said that Congress has the undoubted right to appropriate money to executive officers for expenditure under contracts between the government and individuals; that much of the total expenditures is so made. But appropriations and expenditures under contracts for proper governmental purposes cannot justify contracts which are not within federal power. And contracts for the reduction of acreage and the control of production are outside the range of that power. An appropriation to be expended by the United States under contracts calling for violation of a state law clearly would offend the Constitution. Is a statute less objectionable which authorizes expenditure of federal moneys to induce action in a field in which the United States has no power to intermeddle? The Congress cannot invade state jurisdiction to compel individual action; no more can it purchase such action.

We are referred to numerous types of federal appropriation which have been made in the past, and it is asserted no question has been raised as to their validity. We need not stop to examine or consider them. As was said in *Massachusetts* v. *Mellon, supra* (p. 487):

". . . as an examination of the acts of Congress will disclose, a large number of statutes appropriating or involving the expenditure of moneys for non-federal purposes have been enacted and carried into effect."

As the opinion points out, such expenditures have not been challenged because no remedy was open for testing their constitutionality in the courts.

We are not here concerned with a conditional appropriation of money, nor with a provision that if certain conditions are not complied with the appropriation shall no longer be available. By the Agricultural Adjustment Act the amount of the tax is appropriated to be expended only in payment under contracts whereby the parties bind themselves to regulation by the Federal Government. There is an obvious difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced. Many examples pointing the distinction might be cited. We are referred to appropriations in aid of education, and it is said that no one has doubted the power of Congress to stipulate the sort of education for which money shall be expended. But an appropriation to an educational institution which by its terms is to become available only if the beneficiary enters into a contract to teach doctrines subversive of the Constitution is clearly bad. An affirmance of the authority of Congress so to condition the expenditure of an appropriation would tend to nullify all constitutional limitations upon legislative power.

But it is said that there is a wide difference in another respect, between compulsory regulation of the local affairs of a state's citizens and the mere making of a contract relating to their conduct; that, if any state objects, it may declare the contract void and thus prevent those under the state's jurisdiction from complying with its terms. The argument is plainly fallacious. The United States can make the contract only if the federal power to tax and to appropriate reaches the subject matter of the contract. If this does reach the subject matter, its exertion cannot be displaced by state action. To say otherwise is to deny the supremacy of the laws of the United States; to make them subordinate to those of a State. This would reverse the cardinal principle embodied in the Constitution and substitute one which declares that Congress may only effectively legislate as to matters within federal competence when the States do not dissent.

Congress has no power to enforce its commands on the farmer to the ends sought by the Agricultural Adjustment Act. It must follow that it may not indirectly accomplish those ends by taxing and spending to purchase compliance. The Constitution and the entire plan of our government negative any such use of the power to tax and to spend as the act undertakes to authorize. It does not help to declare that local conditions throughout the nation have created a situation of national concern; for this is but to say that whenever there is a widespread similarity of local conditions, Congress may ignore constitutional limitations upon its own powers and usurp those reserved to the states. If, in lieu of compulsory regulation of subjects within the states' reserved jurisdiction, which is prohibited, the Congress could invoke the taxing and spending power as a means to accomplish the same end, clause 1 of § 8 of Article I would become the instrument for total subversion of the governmental powers reserved to the individual states.

If the act before us is a proper exercise of the federal taxing power, evidently the regulation of all industry throughout the United States may be accomplished by similar exercises of the same power. It would be possible to exact money from one branch of an industry and pay it to another branch in every field of activity which lies within the province of the states. The mere threat of such a procedure might well induce the surrender of rights and the compliance with federal regulation as the price of continuance in business. A few instances will illustrate the thought.

Let us suppose Congress should determine that the farmer, the miner or some other producer of raw materials is receiving too much for his products, with consequent depression of the processing industry and idleness of its employes. Though, by confession, there is no power vested in Congress to compel by statute a lowering of the prices of the raw material, the same result might be accomplished, if the questioned act be valid, by taxing the producer upon his output and appropriating the proceeds to the processors, either with or without conditions imposed as the consideration for payment of the subsidy.

We have held in *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, that Congress has no power to regulate wages and hours of labor in a local business. If the petitioner is right, this very end may be accomplished by appropriating money to be paid to employers from the federal treasury under contracts whereby they agree to comply with certain standards fixed by federal law or by contract.

Should Congress ascertain that sugar refiners are not receiving a fair profit, and that this is detrimental to the entire industry, and in turn has its repercussions in trade and commerce generally, it might, in analogy to the present law, impose an excise of two cents a pound on every sale of the commodity and pass the funds collected to such refiners, and such only, as will agree to maintain a certain price.

Assume that too many shoes are being manufactured throughout the nation; that the market is saturated, the price depressed, the factories running half-time, the employes suffering. Upon the principle of the statute in question Congress might authorize the Secretary of Commerce to enter into contracts with shoe manufacturers providing that each shall reduce his output and that the United States will pay him a fixed sum proportioned to such reduction, the money to make the payments to be raised by a tax on all retail shoe dealers or their customers.

Suppose that there are too many garment workers in the large cities; that this results in dislocation of the economic balance. Upon the principle contended for an excise might be laid on the manufacture of all garments manufactured and the proceeds paid to those manufacturers who agree to remove their plants to cities having not more than a hundred thousand population. Thus, through the asserted power of taxation, the federal government, against the will of individual states, might completely redistribute the industrial population.

A possible result of sustaining the claimed federal power would be that every business group which thought itself under-privileged might demand that a tax be laid on its vendors or vendees, the proceeds to be appropriated to the redress of its deficiency of income.

These illustrations are given, not to suggest that any of the purposes mentioned are unworthy, but to demonstrate the scope of the principle for which the Government contends; to test the principle by its applications; to point out that, by the exercise of the asserted power, Congress would, in effect, under the pretext of exercising the taxing power, in reality accomplish prohibited ends. It cannot be said that they envisage improbable legislation. The supposed cases are no more improbable than would the present act have been deemed a few years ago.

Until recently no suggestion of the existence of any such power in the Federal Government has been advanced. The expressions of the framers of the Constitution, the decisions of this court interpreting that instrument, and the writings of great commentators will be searched in vain for any suggestion that there exists in the clause under discussion or elsewhere in the Constitution, the authority whereby every provision and every fair implication from that instrument may be subverted, the independence of the individual states obliterated, and the United States converted into a central government exercising uncontrolled police power in every state of the Union, superseding all local control or regulation of the affairs or concerns of the states.

Hamilton himself, the leading advocate of broad interpretation of the power to tax and to appropriate for the general welfare, never suggested that any power granted by the Constitution could be used for the destruction of local self-government in the states. Story countenances no such doctrine. It seems never to have occurred to them, or to those who have agreed with them, that the general welfare of the United States, (which has aptly been termed "an indestructible Union, composed of indestructible States,") might be served by obliterating the constituent members of the Union. But to this fatal conclusion the doctrine contended for would inevitably lead. And its sole premise is that, though the makers of the Constitution, in erecting the federal government, intended sedulously to limit and define its powers, so as to reserve to the states and the people sovereign power, to be wielded by the states and their citizens and not to be invaded by the United States, they nevertheless by a single clause gave power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed. The argument when seen in its true character and in the light of its inevitable results must be rejected.

Since, as we have pointed out, there was no power in the Congress to impose the contested exaction, it could not lawfully ratify or confirm what an executive officer had done in that regard. Consequently the Act of 1935 does not affect the rights of the parties.

The judgment is

Affirmed.

Mr. Justice Stone, dissenting.

I think the judgment should be reversed.

The present stress of widely held and strongly expressed differences of opinion of the wisdom of the Agricultural Adjustment Act makes it important, in the interest of clear thinking and sound result, to emphasize at the outset certain propositions which should have controlling influence in determining the validity of the Act. They are:

1. The power of courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power

by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government.

2. The constitutional power of Congress to levy an excise tax upon the processing of agricultural products is not questioned. The present levy is held invalid, not for any want of power in Congress to lay such a tax to defray public expenditures, including those for the general welfare, but because the use to which its proceeds are put is disapproved.

3. As the present depressed state of agriculture is nation wide in its extent and effects, there is no basis for saying that the expenditure of public money in aid of farmers is not within the specifically granted power of Congress to levy taxes to "provide for the . . . general welfare." The opinion of the Court does not declare otherwise.

4. No question of a variable tax fixed from time to time by fiat of the Secretary of Agriculture, or of unauthorized delegation of legislative power, is now presented. The schedule of rates imposed by the Secretary in accordance with the original command of Congress has since been specifically adopted and confirmed by Act of Congress, which has declared that it shall be the lawful tax. Act of August 24, 1935, 49 Stat. 750. That is the tax which the government now seeks to collect. Any defects there may have been in the manner of laying the tax by the Secretary have now been removed by the exercise of the power of Congress to pass a curative statute validating an intended, though defective, tax. *United States* v. *Heinszen & Co.*, 206 U. S. 370; *Graham & Foster* v. *Goodcell*, 282 U. S. 409; cf. *Milliken* v. *United States*, 283 U. S. 15. The Agricultural Adjustment Act as thus amended de-

clares that none of its provisions shall fail because others are pronounced invalid.

It is with these preliminary and hardly controverted matters in mind that we should direct our attention to the pivot on which the decision of the Court is made to turn. It is that a levy unquestionably within the taxing power of Congress may be treated as invalid because it is a step in a plan to regulate agricultural production and is thus a forbidden infringement of state power. The levy is not any the less an exercise of taxing power because it is intended to defray an expenditure for the general welfare rather than for some other support of government. Nor is the levy and collection of the tax pointed to as effecting the regulation. While all federal taxes inevitably have some influence on the internal economy of the states, it is not contended that the levy of a processing tax upon manufacturers using agricultural products as raw material has any perceptible regulatory effect upon either their production or manufacture. The tax is unlike the penalties which were held invalid in the *Child Labor Tax Case,* 259 U. S. 20, in *Hill* v. *Wallace,* 259 U. S. 44, in *Linder* v. *United States,* 268 U. S. 5, 17, and in *United States* v. *Constantine,* 296 U. S. 287, because they were themselves the instruments of regulation by virtue of their coercive effect on matters left to the control of the states. Here regulation, if any there be, is accomplished not by the tax but by the method by which its proceeds are expended, and would equally be accomplished by any like use of public funds, regardless of their source.

The method may be simply stated. Out of the available fund payments are made to such farmers as are willing to curtail their productive acreage, who in fact do so and who in advance have filed their written undertaking to do so with the Secretary of Agriculture. In saying that this method of spending public moneys is an invasion of the reserved powers of the states, the Court does not assert that the expenditure of public funds to promote the general welfare is not a substantive power specifically delegated to the national government, as Hamilton and Story pronounced it to be. It does not deny that the expenditure of funds for the benefit of farmers and in aid of a program of curtailment of production of agricultural products, and thus of a supposedly better ordered national economy, is within the specifically granted power. But it is declared that state power is nevertheless infringed by the expenditure of the proceeds of the tax to compensate farmers for the curtailment of their cotton acreage. Although the farmer is placed under no legal compulsion to reduce acreage, it is said that the mere offer of compensation for so doing is a species of economic coercion which operates with the same legal force and effect as though the curtailment were made mandatory by Act of Congress. In any event it is insisted that even though not coercive the expenditure of public funds to induce the recipients to curtail production is itself an infringement of state power, since the federal government cannot invade the domain of the states by the "purchase" of performance of acts which it has no power to compel.

Of the assertion that the payments to farmers are coercive, it is enough to say that no such contention is pressed by the taxpayer, and no such consequences were to be anticipated or appear to have resulted from the administration of the Act. The suggestion of coercion finds no support in the record or in any data showing the actual operation of the Act. Threat of loss, not hope of gain, is the essence of economic coercion. Members of a long depressed industry have undoubtedly been tempted to curtail acreage by the hope of resulting better prices and by the proffered opportunity to obtain needed ready money. But there is nothing to indicate that those who accepted benefits were impelled by fear of lower prices if they did not accept, or that at any stage in the operation

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of the plan a farmer could say whether, apart from the certainty of cash payments at specified times, the advantage would lie with curtailment of production plus compensation, rather than with the same or increased acreage plus the expected rise in prices which actually occurred. Although the Agricultural Adjustment Act was put into operation in June, 1933, the official reports of the Department of Agriculture show that 6,343,000 acres of productive cotton land, 14% of the total, did not participate in the plan in 1934, and 2,790,000 acres, 6% of the total, did not participate in 1935. Of the total number of farms growing cotton, estimated at 1,500,000, 33% in 1934 and 13% in 1935 did not participate.

It is significant that in the congressional hearings on the bill that became the Bankhead Act, 48 Stat. 598, as amended by Act of June 20, 1934, 48 Stat. 1184, which imposes a tax of 50% on all cotton produced in excess of limits prescribed by the Secretary of Agriculture, there was abundant testimony that the restriction of cotton production attempted by the Agricultural Adjustment Act could not be secured without the coercive provisions of the Bankhead Act. See Hearing before Committee on Agriculture, U. S. Senate, on S. 1974, 73rd Cong., 2nd Sess.; Hearing before Committee on Agriculture, U. S. House of Representatives, on H. R. 8402, 73rd Cong., 2nd Sess. The Senate and House Committees so reported, Senate Report No. 283, 73rd Cong., 2nd Sess., p. 3; House Report No. 867, 73rd Cong., 2nd Sess., p. 3. The Report of the Department of Agriculture on the administration of the Agricultural Adjustment Act (February 15, 1934 to December 31, 1934), p. 50, points out that the Bankhead Act was passed in response to a strong sentiment in favor of mandatory production control " that would prevent noncooperating farmers from increasing their own plantings in order to capitalize upon the price advances that had resulted from the reductions made by contract signers."[1] The presumption of constitutionality of a statute is not to be overturned by an assertion of its coercive effect which rests on nothing more substantial than groundless speculation.

It is upon the contention that state power is infringed by purchased regulation of agricultural production that chief reliance is placed. It is insisted that, while the Constitution gives to Congress, in specific and unambiguous terms, the power to tax and spend, the power is subject to limitations which do not find their origin in any express provision of the Constitution and to which other expressly delegated powers are not subject.

The Constitution requires that public funds shall be spent for a defined purpose, the promotion of the general welfare. Their expenditure usually involves payment on terms which will insure use by the selected recipients within the limits of the constitutional purpose. Expenditures would fail of their purpose and thus lose their constitutional sanction if the terms of payment were not such that by their influence on the action of the recipients the permitted end would be attained. The power of Congress to spend is inseparable from persuasion to action over which Congress has no legislative control. Congress may not command that the science of agriculture be taught in state universities. But if it would aid the teaching of that science by grants to state institutions, it is appropriate, if not necessary, that the grant be on the condition, incorporated in the Morrill Act, 12 Stat. 503, 26 Stat. 417, that it be used for the intended purpose. Similarly it would seem to be compliance with the Constitution, not violation of it, for the government to take and the university to give a contract that the grant would be so used. It makes no dif-

[1] Whether coercion was the sole or the dominant purpose of the Bankhead Act, or whether the act was designed also for revenue or other legitimate ends, there is no occasion to consider now.

ference that there is a promise to do an act which the condition is calculated to induce. Condition and promise are alike valid since both are in furtherance of the national purpose for which the money is appropriated.

These effects upon individual action, which are but incidents of the authorized expenditure of government money, are pronounced to be themselves a limitation upon the granted power, and so the time-honored principle of constitutional interpretation that the granted power includes all those which are incident to it is reversed. "Let the end be legitimate," said the great Chief Justice, "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 consist with the letter and spirit of the Constitution, are constitutional." *McCulloch* v. *Maryland,* 4 Wheat. 316, 421. This cardinal guide to constitutional exposition must now be re-phrased so far as the spending power of the federal government is concerned. Let the expenditure be to promote the general welfare, still, if it is needful in order to insure its use for the intended purpose to influence any action which Congress cannot command because within the sphere of state government, the expenditure is unconstitutional. And taxes otherwise lawfully levied are likewise unconstitutional if they are appropriated to the expenditure whose incident is condemned.

Congress through the Interstate Commerce Commission has set aside intrastate railroad rates. It has made and destroyed intrastate industries by raising or lowering tariffs. These results are said to be permissible because they are incidents of the commerce power and the power to levy duties on imports. See *Minnesota Rate Cases,* 230 U. S. 352; *Shreveport Case,* 234 U. S. 342; *Board of Trustees of the University of Illinois* v. *United States,* 289 U. S. 48. The only conclusion to be drawn is that results become lawful when they are incidents of those powers but unlawful when incident to the similarly granted power to tax and spend.

Such a limitation is contradictory and destructive of the power to appropriate for the public welfare, and is incapable of practical application. The spending power of Congress is in addition to the legislative power and not subordinate to it. This independent grant of the power of the purse, and its very nature, involving in its exercise the duty to insure expenditure within the granted power, presuppose freedom of selection among divers ends and aims, and the capacity to impose such conditions as will render the choice effective. It is a contradiction in terms to say that there is power to spend for the national welfare, while rejecting any power to impose conditions reasonably adapted to the attainment of the end which alone would justify the expenditure.

The limitation now sanctioned must lead to absurd consequences. The government may give seeds to farmers, but may not condition the gift upon their being planted in places where they are most needed or even planted at all. The government may give money to the unemployed, but may not ask that those who get it shall give labor in return, or even use it to support their families. It may give money to sufferers from earthquake, fire, tornado, pestilence or flood, but may not impose conditions—health precautions designed to prevent the spread of disease, or induce the movement of population to safer or more sanitary areas. All that, because it is purchased regulation infringing state powers, must be left for the states, who are unable or unwilling to supply the necessary relief. The government may spend its money for vocational rehabilitation, 48 Stat. 389, but it may not, with the consent of all concerned, supervise the process which it undertakes to aid. It may spend its money for the suppression of the boll weevil, but may not compensate the farmers for suspending the growth of cotton in the infected areas. It may aid state reforestation and forest fire prevention agencies, 43 Stat. 653, but may not be permitted to supervise their conduct. It may support rural schools, 39 Stat. 929, 45 Stat. 1151, 48 Stat. 792, but may not condition its grant by the requirement that certain standards be maintained. It may appropriate moneys to be expended by the Reconstruction Finance Corporation "to aid in financing agriculture, commerce and industry," and to facilitate "the exportation of agricultural and other products." Do all its activities collapse because, in order to effect the permissible purpose, in myriad ways the money is paid out upon terms and conditions which influence action of the recipients within the states, which Congress cannot command? The answer would seem plain. If the expenditure is for a national public purpose, that purpose will not be thwarted because payment is on condition which will advance that purpose. The action which Congress induces by payments of money to promote the general welfare, but which it does not command or coerce, is but an incident to a specifically granted power, but a permissible means to a legitimate end. If appropriation in aid of a program of curtailment of agricultural production is constitutional, and it is not denied that it is, payment to farmers on condition that they reduce their crop acreage is constitutional. It is not any the less so because the farmer at his own option promises to fulfill the condition.

That the governmental power of the purse is a great one is not now for the first time announced. Every student of the history of government and economics is aware of its magnitude and of its existence in every civilized government. Both were well understood by the framers of the Constitution when they sanctioned the grant of the spending power to the federal government, and both were recognized by Hamilton and Story, whose views of the spending power as standing on a parity with the other powers specifically granted, have hitherto been generally accepted.

The suggestion that it must now be curtailed by judicial fiat because it may be abused by unwise use hardly rises to the dignity of argument. So may judicial power be abused. "The power to tax is the power to destroy," but we do not, for that reason, doubt its existence, or hold that its efficacy is to be restricted by its incidental or collateral effects upon the states. See *Veazie Bank* v. *Fenno,* 8 Wall. 533; *McCray* v. *United States,* 195 U. S. 27; compare *Magnano Co.* v. *Hamilton,* 292 U. S. 40. The power to tax and spend is not without constitutional restraints. One restriction is that the purpose must be truly national. Another is that it may not be used to coerce action left to state control. Another is the conscience and patriotism of Congress and the Executive. "It must be remembered that legislators are the ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." Justice Holmes, in *Missouri, Kansas & Texas Ry. Co.* v. *May,* 194 U. S. 267, 270.

A tortured construction of the Constitution is not to be justified by recourse to extreme examples of reckless congressional spending which might occur if courts could not prevent — expenditures which, even if they could be thought to effect any national purpose, would be possible only by action of a legislature lost to all sense of public responsibility. Such suppositions are addressed to the mind accustomed to believe that it is the business of courts to sit in judgment on the wisdom of legislative action. Courts are not the only agency of government that must be assumed to have capacity to govern. Congress and the courts both unhappily may falter or be mistaken in the performance of their constitutional duty. But interpretation of our great charter of government which proceeds on any assumption that the responsibility for the preservation of our institutions is the exclusive concern of any one of the three branches of government, or that it alone can save them from destruction is far more likely, in the long run, "to obliterate the constituent members" of "an indestructible union of indestructible states" than the frank recognition that language, even of a constitution, may mean what it says: that the power to tax and spend includes the power to relieve a nation-wide economic maladjustment by conditional gifts of money.

MR. JUSTICE BRANDEIS and MR. JUSTICE CARDOZO join in this opinion.

UNITED STATES *v.* SAFETY CAR HEATING & LIGHTING CO.*

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

No. 75. Argued December 20, 1935.—Decided January 6, 1936.

A patent-owner began suit in 1912 to restrain infringements and for damages and profits. The litigation was pending on February 25, 1913, the effective date of the Sixteenth Amendment, and March 1, 1913, the effective date of the first statute enacted under it, and was continued for many years thereafter during which the patent-owner obtained a decree finally sustaining the patent followed by a decree on accounting, of which a definite part was for profits received by the infringer before March 1, 1913, and the remainder for profits received thereafter, the claim for damages having been waived. Pending an appeal by the infringer involving the extent of his liability, a compromise occurred (1925) in which the patent-owner accepted a smaller amount in satisfaction of the judgment. *Held:*

1. The profits thus received accrued to the patent-owner and became taxable as his income, at the time of the settlement and liquidation. P. 93.

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* Together with No. 76, *Rogers, Collector of Internal Revenue,* v. *Safety Car Heating & Lighting Co.* Certiorari to the Circuit Court of Appeals for the Third Circuit.

2. There is no ground for treating the profits from the infringements committed prior to March 1, 1913, as having accrued to the patent-owner before that date and as being therefore excepted from taxation by the Act of October 3, 1913 and later Revenue Acts. P. 94.

3. The Treasury Regulation classifying claims that existed unconditionally on March 1, 1913, as nontaxable income, "although actually recovered or received subsequent to that date," was impliedly ratified by Congress by the passage of Revenue Acts without sign of disapproval. P. 94.

4. This regulation implies that conditional or contingent claims, though they may have had an inchoate existence before March 1, 1913, are to be taxed when they become unconditional. P. 95.

5. A claim of a patent-owner to profits received by an infringer, while its validity and amount remain uncertain, is not property transmuted into capital, but rather is contingent income. P. 96.

6. The claim of a patent-owner against an infringer for damages, like a claim for the infringer's profits, is too contingent and uncertain to have a determinable market value while the validity of the patent is unsettled and contested and while the factors of damage are conjectural. P. 97.

7. The claim in this case cannot be treated as one for damages, since the taxpayer abandoned his claim against the infringer for damages and recovered profits. P. 97.

8. This case must be distinguished from one where the basis of the claim is an injury to capital, with the result that the recovery is never income, no matter when collected. P. 98.

9. Congress has power to tax income which accrued after the adoption of the Sixteenth Amendment through the liquidation and settlement of a claim which was inchoate, but remained uncertain and contested, before the effective date of the Amendment. P. 98.

10. The acceptance in settlement of less than the claim involves no loss deductible by the taxpayer, where from its origin up to the time of settlement the claim was uncertain and contested. P. 99.

76 F. (2d) 133, reversed.

Certiorari, 296 U. S. 555, to review judgments affirming judgments of the District Court in two cases,—one an action against the United States to recover money paid as income taxes, 5 F. Supp. 276, and the other an action to recover a payment from the Collector.

Mr. J. P. Jackson, with whom *Solicitor General Reed*, *Assistant Attorney General Wideman* and *Mr. James W. Morris* were on the brief, for petitioners.

Mr. Thomas G. Haight, with whom *Messrs. Robert H. Montgomery*, *Henry T. Stetson*, and *James O. Wynn* were on the brief, for respondent.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The respondent claims a refund of income taxes under the Revenue Act of 1926. The petitioner in one of the cases (No. 75) is the United States, a defendant in the court below. The petitioner in the other (No. 76) is the Collector of Internal Revenue for the Fifth District of New Jersey.

Since 1907, the taxpayer, respondent, has been the owner of the Creveling patent for an improvement in the electric lighting equipment of railway passenger cars. It brought suit in 1912 against the United States Light & Heating Company to restrain an infringement of the patent, and for an accounting of damages and profits. The suit was pending on February 25, 1913, the effective date of the Sixteenth Amendment, and on March 1, 1913, the effective date of the first statute enacted thereunder. Act of October 3, 1913, c. 16, 38 Stat. 114, 166, 168, 172, 174.* The accused infringer contested its liability for in-

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* With reference to every corporation subject thereto, that act provides as follows: " The tax herein imposed shall be computed upon its entire net income accrued within each preceding calendar year ending December thirty-first: *Provided, however,* That for the year ending December thirty-first, nineteen hundred and thirteen, said tax shall be imposed upon its entire net income accrued within that portion of said year from March first to December thirty-first, both dates inclusive, to be ascertained by taking five-sixths of its entire net income for said calendar year: . . . " 38 Stat. 174.

fringement as well as its liability for damages and profits. Not till 1915 was the capital fact of an infringement determined. On February 15, 1915, there was entered in the District Court an interlocutory decree for an injunction, which was affirmed by the Circuit Court of Appeals in July of the same year. An accounting followed before a Master and continued for eight years. On that accounting the complainant waived any recovery for damages, and confined its claim to the profits received by the infringer. On May 26, 1923, the Master filed his report in which he found that there was due to the complainant for profits received by the infringer between January 1, 1909 and April 30, 1914, the sum of $501,180.32. Of this award, a large part ($436,137.41) was for profits applicable to the period before March 1, 1913. The report was confirmed by the District Court on October 10, 1923, at which time the infringing defendant was in the hands of receivers. A final decree followed in October, 1924, the award being adjudged to constitute a superior lien upon the assets of the infringer then held by a successor. Cross-appeals were carried to the Court of Appeals for the Second Circuit, the complainant contending that the award was too small, the infringer and its successor contending that the award was too large and that error had been committed also in the declaration of the lien. While the appeals were undetermined, the complainant accepted a settlement in May, 1925, after thirteen years of litigation, whereby it received from the infringer the sum of $200,000 in satisfaction of the judgment. After deducting the expenses incurred in connection with the suit ($23,468.05), the net amount collected was $176,531.95, of which part ($153,621.72) is attributable to acts of infringement before March 1, 1913, and part to such acts thereafter.

In May, 1926, the taxpayer filed its income tax return for 1925, showing a net income for that year of $1,473,-

187.13, and a tax due thereon of $172,610.19, which has been paid. It did not include in the return any part of the proceeds of the patent litigation ($176,531.95), nor did it claim any deduction for loss resulting from the settlement. Thereupon the Commissioner made a deficiency determination of $22,162.07, plus interest, the additional tax due after adding the net proceeds of the settlement to the income of the year. Two claims for refund followed. The first, filed in March, 1929, was for $69,729.18. The taxpayer took the ground that as a result of the settlement it had sustained a loss of $536,378.28, which through error it had failed to deduct in making its return and in paying the tax thereunder. Its books were kept on the accrual basis. The second of the two claims, filed in July, 1930, was for an additional refund in the amount of $19,970.82. In this the taxpayer took the ground that in determining the gross income for 1925 the Commissioner had erred by including that part of the proceeds of the settlement attributable to acts of infringement before March, 1913. Both claims were rejected by the Commissioner. The taxpayer then sued, making the United States the defendant with reference to the first claim and the Collector the defendant with reference to the second.

In the suit against the United States the District Court found that the taxpayer's claim for damages on account of so much of the infringement as had occurred before March 1, 1913, had a "market value" on that date of $436,137.41, the profits of the infringer up to that time as reported by the Master. From this the court concluded that in the year 1925 there had been a deductible loss of the difference between $436,137.41 and the sum of $174,040.62, a like proportion of the $200,000 actually recovered. The tax upon this difference ($262,096.79) was $34,072.58. The taxpayer received an award of judgment for that amount with interest. 5 F. Supp. 276. In the suit against the Collector, the District Court held that such portion of the net settlement as was allocable to acts of infringement before March 1, 1913 ($153,621.72), had accrued to the taxpayer in advance of that date, and was therefore to be treated as capital, not taxable as income for the year when the settlement was made. The taxpayer received an award of judgment for the tax on that amount (i. e., for $24,732.90) with interest.

The Circuit Court of Appeals for the Third Circuit affirmed the judgments in both suits. 76 F. (2d) 133. To fix more precisely the taxable quality of contested and contingent choses in action belonging to a taxpayer before March 1, 1913, writs of certiorari issued from this court.

First. Congress intended, with exceptions not now important, to lay a tax upon the proceeds of claims or choses in action for the recovery of profits, unless the right to such recovery existed unconditionally on March 1, 1913, the effective date of the first statute under the Sixteenth Amendment.

The tax imposed on the respondent was laid under the Revenue Act of 1926 (c. 27, 44 Stat. 9), which includes in gross income (§ 213 (a)) gains on profits "from any source whatever." We have said of that Act that it reveals in its provisions an intention on the part of Congress to reach "pretty much every sort of income subject to the federal power." *Helvering* v. *Stockholms Enskilda Bank,* 293 U. S. 84, 89. There is no denial that profits owing to a patentee by the infringer of a patent are income within the meaning of the statute, unless withdrawn from that category by the date of the infringement. Cf. T. R. 45, Art. 52; T. R. 62, Art. 51; T. R. 65, Art. 50; T. R. 69, Art. 50; *Commissioner* v. *S. A. Woods Machine Co.,* 57 F. (2d) 635.

Until July, 1915, the existence of any liability was contested and uncertain. The amount remained contested and uncertain until May, 1925, when there was a settlement of the liability reported by the Master. Then for the first time the profits flowing from the infringement became taxable as income. *North American Oil Consolidated* v. *Burnet,* 286 U. S. 417, 423; *Lucas* v. *American Code Co.,* 280 U. S. 445, 451, 452; *Lucas* v. *North Texas Lumber Co.,* 281 U. S. 11; *Burnet* v. *Huff,* 288 U. S. 156. The respondent admits this to be true to the extent that the acts of infringement were later than February, 1913. The argument seems to be, however, that accrual has a different meaning when applied to income generated by acts committed earlier. But plainly the respondent's exemption, if it exists, will have to rest upon some other basis. A claim for profits so contingent and indefinite as to lack the quality of accrued income in March, 1913, cannot have had the quality of such income before that time, its existence and extent being then equally uncertain. Only an arbitrary dichotomy could bring us to the conclusion that part of the recovery was income to the taxpayer as of the date of payment or collection and part as of the date of the underlying wrong. The respondent, to prevail, must be able to make out that though the profits were income in their entirety as of May, 1925, there was an intention of the Congress that part of this income, the part attributable to acts before March, 1913, should be excluded from the reckoning.

We find no disclosure of that intention in the provisions of the statute, and none in the history of other acts before it. The first statute following the Sixteenth Amendment laid a tax, as we have seen, on the entire net income "accrued" within each calendar year, the impost being coupled with a proviso that for the year 1913 what was to be taxed should be the entire net income "accrued" within that portion of the year from March 1 to the end. Definiteness of meaning was given to that and later acts by Treasury Regulations. Article 90 of Regulations 62, adopted in 1922, provides: "Any claim existing unconditionally on March 1, 1913, whether presently payable or not, and held by a taxpayer prior to March 1, 1913, whether evidenced by writing or not" does "not constitute taxable income, although actually recovered or received subsequent to such date." This provision appears without change of form in all Treasury Regulations adopted since that time. T. R. 65, Art. 90; T. R. 69, Art. 90; T. R. 74, Art. 91; T. R. 77, Art. 90. It appears with unimportant verbal differences in earlier regulations. T. R. 45, Art. 87, as amended by T. D. 3206, 5 Cum. Bul. 116. A claim existing "unconditionally" would include a claim for interest on a bond or for rent under a lease. A claim existing conditionally can have no better illustration than is found in a claim to recover an infringer's profits. Cf. O. D. 917, 4 Cum. Bul. 142; O. D. 1141, 5 Cum. Bul. 134; S. M. 2285, III–2 Cum. Bul. 87, 89, 90, disapproving I. T. 1294, I–1 Cum. Bul. 111. Nor does the case for the Government stand upon the regulations alone without confirmatory evidence. By clear implication the regulations have been ratified by Congress, which has passed Revenue Acts at frequent intervals thereafter without a sign of disapproval. "Congress must be taken to have been familiar with the existing administrative interpretation." *McFeely* v. *Commissioner,* 296 U. S. 102; *Zellerbach Paper Co.* v. *Helvering,* 293 U. S. 172, 179, 180. Claims existing unconditionally before March 1, 1913, being thus excluded from the tax, the plain meaning of the regulation is that conditional or contingent claims, though they may have had an inchoate existence before March 1, 1913, are to be taxed when they are shorn of their conditional or contingent quality and become unconditional or absolute. So far as the problem to be solved depends upon the intention of the Congress in the enactment of the statute, the result is hardly doubtful.

Whatever obscurity exists has its origin, one may believe, in a not uncommon confusion of the rule with the exception. There is a tendency now and again to look upon March 1, 1913 as fixing a point of time when claims of every kind, no matter how contingent, became transmuted into capital, at least for taxing purposes. This is far from the truth, as the acceptance by Congress of the foregoing regulations sufficiently attests. The intention has rather been that, with exceptions specially declared or dependent upon considerations of established methods of accounting, every form of income accruing fully or unconditionally after February, 1913, shall contribute to the Treasury, though it had a potential existence for years before its capacity to fructify. As already suggested, perception of this intention has been clouded by exceptions, actual or seeming, which have been so insulated and emphasized as to be taken for the rule itself. Thus, Congress has now provided (see, e. g., Revenue Act of 1916, c. 463, § 2 (a), 39 Stat. 756, 757; Revenue Act of 1921, c. 135, § 201, 42 Stat. 224, 228; Revenue Act of 1926, c. 27, § 201, 44 Stat. 9, 10) that dividends may be distributed exempt from the tax to the extent that they are made out of earnings or profits accumulated before March 1, 1913. The exemption is "a concession to the equity of stockholders" (*Lynch* v. *Hornby,* 247 U. S. 339, 346; *Helvering* v. *Canfield,* 291 U. S. 163, 167), and had no existence under the pioneer statute, the Act of 1913, a dividend, irrespective of its source, being then taxable altogether. *Lynch* v. *Hornby, supra.* So Congress has now provided (see e. g., Revenue Act of 1924, c. 232, 43 Stat. 253, 259, § 204 (11) (b); *supra,* § 204 (b); Revenue Act of 1926, *supra,* § 204 (b)) that in computing gain or loss from the sale or other disposition of property acquired before March 1, 1913, the base shall be the cost or the value on that day, whichever is the greater. See also, Revenue Act of 1916, *supra,* § 2 (c); Revenue Act of 1921, *supra,*

§ 202 (b) (1). Cf. *Merchants' L. & T. Co.* v. *Smietanka,* 255 U. S. 509; *Goodrich* v. *Edwards,* 255 U. S. 527. We are not unmindful of cases in which a like formula was applied without the aid of statute. *Lynch* v. *Turrish,* 247 U. S. 221; *Doyle* v. *Mitchell Bros. Co.,* 247 U. S. 179; *Hays* v. *Gauley Mountain Coal Co.,* 247 U. S. 189; and cf. *MacLaughlin* v. *Alliance Insurance Co.,* 286 U. S. 244, 251. They do not rule the case at hand. In those cases and others like them assets that were capital in February, 1913, had been converted into cash thereafter. Coal lands and timber lands and timber had been sold by an owner in the ordinary course of business. By the practice of merchants a stock in trade is capital according to its inventory value. *Hays* v. *Gauley Mt. Coal Co., supra,* at p. 193. Nothing of the kind is here. The case is not helped by speaking of the claim as "property." The question is whether it is property that has been transmuted into capital. In February, 1913, the chose in action now assessed was not a part of the respondent's capital as merchants or other business men would understand the term. Cf. *North American Oil Consolidated* v. *Burnet, supra.* At best it was contingent income, the income of the future. It had no inventory value, much less a value quoted in the market. Whether it would ever be worth anything was still unknown and unknowable. The answer was not given for many years thereafter.

The argument is pressed upon us that the claim collected by the respondent is to be viewed as one for damages rather than as one for profits, and that in the aspect of a claim for damages it had a "market value" ascertainable at the commencement of the suit and later. There are two reasons, if not more, why the argument must fail. In the first place, the respondent made an election to abandon any claim for damages and to confine itself to the profits received by the infringer. The amount of these profits was unknown at the commencement of the suit and must needs have remained unknown in advance of an accounting. To determine what the respondent got we are to consider what it did, and not what it could have had if it had made another choice. In the second place, a claim for damages like one for an infringer's profits is too contingent and uncertain to have a determinable market value when the validity of the patent is unsettled and contested and the factors making up the damage are arrived at by conjecture. *Sinclair Refining Co.* v. *Jenkins Petroleum Co.,* 289 U. S. 689, 697. Cf. *Heiner* v. *Crosby,* 24 F. (2d) 191; *Walter* v. *Duffy,* 287 Fed. 41. There is significance in the fact that the estimate of the damage in the claim filed with the Commissioner exceeded by nearly $300,000 the estimate of the damage accepted at the trial.

The case comes down to this: On February 28, 1913, the respondent had a contested claim for profits which if prosecuted effectively would ripen into income. That claim would not have been capital if it had been acquired for the first time on March 1, 1913. It was not turned into capital because it had been acquired earlier. *Edwards* v. *Keith,* 224 Fed. 585; 231 Fed. 110; *Workman* v. *Commissioner,* 41 F. (2d) 139. Before March 1, 1913, and afterwards, it was continuously the same thing until reduced to judgment and collected. The case is not to be confused with one where the basis of the suit is an injury to capital, with the result that the recovery is never income, no matter when collected. Examples of such a claim are *Saunders* v. *Commissioner,* 29 F. (2d) 834, and *Heiner* v. *Hewes,* 30 F. (2d) 787, cited by the taxpayer. *Buffalo Union Furnace Co.* v. *Helvering,* 72 F. (2d) 399, is perhaps upon the border line, the claim being not for profits, but for recovery of out of pocket expenses. Confining it to its peculiar facts, we do not read it as inconsistent with the views herein expressed.

Second. Congress was not restrained by express or implied restrictions of the Federal Constitution from giving effect to its intention and levying a tax upon the proceeds of the settlement.

In February, 1913, if our analysis of the facts is accurate, there was a contested and contingent claim for profits, not fairly to be characterized as income for that year or earlier. In 1925, this inchoate and disputed claim became consummate and established. It was now something more than a claim. It was income fully accrued, and taxable as such. Till then the patentee had its capital, the patent, and an expectancy of income, or income, more accurately, in the process of becoming. Thereafter it had something different. No doubt the income thus accrued derived sustenance and value from the soil of past events. We do not identify the seed with the fruit that it will yield.

Income within the meaning of the Sixteenth Amendment is the fruit that is born of capital, not the potency of fruition. With few exceptions, if any, it is income as the word is known in the common speech of men. *Lynch* v. *Hornby, supra,* p. 344. When it is that, it may be taxed, though it was in the making long before. *MacLaughlin* v. *Alliance Ins. Co., supra,* at pp. 249, 250; *Taft* v. *Bowers,* 278 U. S. 470; *Helvering* v. *Canfield, supra.* Cf. *Lucas* v. *Alexander,* 279 U. S. 573, 577, 578; *Towne* v. *Eisner,* 245 U. S. 418; *Eisner* v. *Macomber,* 252 U. S. 189, 206, 207. If exceptions are to be allowed in exceptional conditions, they are inapplicable here.

Third. The taxpayer is not entitled to a deduction on the basis of a difference between the value of the chose in action on March 1, 1913, or at any other time and the proceeds of collection.

(a) At the time of the settlement, the amount of the infringer's liability was contested as it had been before, the outcome of the contest being uncertain as long as the appeal was pending. The respondent chose to forego a large portion of the judgment in the belief that compromise was prudent. For all that appears, if compromise had been rejected, the judgment would have been so reduced as to make the recovery even less. True the respondent insists that the fear of a reduction was not the motive for the settlement. The motive is said to have been the fear that the judgment, even if not reduced, might not be susceptible of collection. On the other hand, the infringer may have viewed the prospects differently. We have no means of ascertaining whose forecast was the better. What we know is that there was a compromise through which patentee and infringer surrendered rights and opportunities.

(b) The value of the chose in action, uncertain at the time of settlement, was even more uncertain in February, 1913. Unpredictable vicissitudes might reduce it to a nullity. The patent might be adjudged invalid. The infringer might become insolvent. In the earlier years as in the later ones the supposed profits of the business might have evaporated as the result of neglect or incapacity. Not till the report by the Master and its confirmation by the court could the recovery be estimated with even approximate correctness. There is no contention by the respondent that the value of the judgment was greater at that time than it was a few months later at the date of the settlement in the face of an appeal.

The conclusion is inescapable that the acceptance of the settlement did not involve a loss of income, still less a loss of capital.

Fourth. The taxpayer is not entitled to a refund of the proportion of the settlement attributable to the profits of the infringer before the effective date of the Sixteenth Amendment.

This conclusion follows without need for elaboration from what has been said in this opinion as to the distinction between capital and income.

The judgments are

Reversed.

Mr. Justice Sutherland, Mr. Justice Butler, and Mr. Justice Roberts are of opinion that the judgments should be affirmed. The claim of respondent was a valid one, constituting property prior to March 1, 1913. It not only had an ascertainable value at that time, but a value which was actually ascertained and found as a fact by the trial judge and affirmed by the court below. Since there is evidence in the record to support these concurrent findings, we are not at liberty to set them aside. The case clearly falls within the principle of *Doyle* v. *Mitchell Brothers Co.,* 247 U. S. 179; *Lucas* v. *Alexander,* 279 U. S. 573, and other cases which might be cited. Certainly promissory notes, bonds, shares of stock and valid claims arising upon contract or in tort may be capital as distinguished from income, quite as much as a stock of goods or other tangible property. And quite as certainly, it is not necessary that these intangibles should have a *market* value or an *inventory* value. It is enough that they have an ascertainable value at the statutory time fixed.

MOOR *v.* TEXAS & NEW ORLEANS RAILROAD CO.

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

No. 49. Argued December 10, 1935.—Decided January 13, 1936.

1. A mandatory injunction is not granted as a matter of right, but is granted or refused in the exercise of a sound judicial discretion. P. 105.
2. Plaintiff sought a mandatory injunction to compel a railroad to accept shipments of cotton upon which the tax imposed by the Cotton Control Act of April 21, 1934, had not been paid and which, therefore, by the terms of that statute, the carrier was forbidden to transport. The plaintiff claimed the statute was unconstitutional, and resorted to equity upon the ground that, if he could not move his cotton to market, he would suffer a large financial loss,

the amount of which could not be determined accurately, and that he had no adequate remedy at law, and would be obliged to file many suits against railroads for refusal to accept shipments. The showing as to his financial condition was, however, general and meagre, and it did not appear that he could not have obtained the money necessary to move the cotton as he had done in respect of earlier consignments. Refusal to grant a mandatory injunction was sustained as within the District Court's discretion by the Circuit Court of Appeals. *Held* that there is no ground for certiorari. P. 105.

Writ of certiorari dismissed.

CERTIORARI was granted in this case, 295 U. S. 728, to review a decree of the court below which affirmed the decree of the District Court refusing an injunction and dismissing the bill in a suit to compel the railroad company to accept a shipment of baled cotton. The decision below is reported, 75 F. (2d) 386.

Messrs. Thornton Hardie and *Henry E. Hackney,* with whom *Messrs. Garner W. Green* and *Ben R. Howell* were on the brief, for petitioner.

Mr. Ben C. Dey, with whom *Messrs. J. H. Tallichet, Maury Kemp,* and *M. Nagle* were on the brief, for respondent.

By leave of Court, briefs of *amici curiae* were filed by *Messrs. Marcellus Green, Garner W. Green,* and *Forrest B. Jackson,* and *Messrs. Ralph W. Malone, George E. Seay,* and *Henry Moore, Jr.,* for reversal of the judgment.

Solicitor General Reed, by leave of Court, argued on behalf of the United States, as *amicus curiae,* for affirmance of the judgment. With him on the brief were *Assistant Attorney General Wideman* and *Messrs. Sewall Key, A. H. Feller, J. Paul Jackson, Francis A. LeSourd, Arnold Raum, Charles A. Horsky, Mastin G. White,* and *H. Stewart McDonald, Jr.*

PER CURIAM.

Lee Moor brought this suit on October 23, 1934, for a mandatory injunction to compel the Texas and New Orleans Railroad Company to transport ten bales of cotton from Clint, Texas, to New Orleans. The company had refused to transport the bales because of the lack of the bale tags required by the Cotton Control Act of April 21, 1934 (§§ 10, 14, 48 Stat. 598, 604). Moor contended that the statute was void, as an attempt to regulate the production of cotton contrary to the provisions of the Fifth and Tenth Amendments of the Constitution of the United States. On final hearing, the District Court did not rule upon the constitutional question but denied the injunction and dismissed the complaint upon the ground that it had not been shown that the plaintiff would suffer irreparable injury for which he had no adequate remedy at law. The Circuit Court of Appeals affirmed the decree, 75 F. (2d) 386, and certiorari was granted.

The complaint alleged that the plaintiff was the owner of more than 3500 acres of land in El Paso County, Texas; that the encumbrances and the taxes and charges assessed for water were such as to require that he raise and sell annually 2000 bales of cotton for at least ten cents a pound net, or lose his land through foreclosure proceedings; that his cotton would have no value unless it could be transported to cotton markets; that the Cotton Control Act imposed a tax of fifty per centum of the average central market price per pound of lint cotton and in no event less than five cents per pound; that having ginned about 1000 bales of cotton, and being under the financial necessity of selling them, which was impossible under the statute unless he procured bale tags showing that the cotton was exempt or the tax had been paid, he had sought, under duress, and had obtained tax exemption certificates for 855½ bales, the entire amount to which he was entitled; that he would raise and gin a total of about 2500 bales, each of the average weight of 500 pounds, during the year 1934, and had already ginned 1833 bales; that he had tendered, without the required tags, ten bales to the Southern Pacific Railroad Company for shipment to New York and ten bales to the defendant for shipment to New Orleans, but shipment had been refused solely by reason of the absence of the tags; that the average central market price of lint cotton was about twelve cents per pound, and, if transported, his cotton would be worth about $60 a bale, and the tax would be about $30 a bale; that if he was not permitted to move his cotton in interstate commerce he would suffer damage to the extent at least of $60,000, but that it would be impossible to determine the amount of damage accurately; that he had no adequate remedy at law and would be required to file a large number of suits based upon the refusal of the railroad companies to accept shipments. The complaint was not verified.

On October 25, 1934, the defendant moved to dismiss the complaint, invoking the provisions of the Act as a valid enactment, and on the same day the defendant answered to the same effect.

The case was tried on October 30 and November 5, 1934. Plaintiff made two "trial amendments" which somewhat amplified the allegations of his complaint. Defendant admitted the truth of substantially all the allegations except those relating to duress in connection with plaintiff's application for exemption certificates and as to the amount of his allotment, those as to future shipments, and those containing legal conclusions as to the invalidity of the Act and the tax which it imposed.

The trial court received evidence. Plaintiff did not appear as a witness. The manager of his farm testified generally as to its cotton production, the market for cotton, and plaintiff's inability to sell or move his cotton without the bale tags; that the average central market price of cotton was about twelve cents a pound, or $60 a bale of 500 pounds; that plaintiff had borrowed $50,000 to finish harvesting his cotton, mortgaging his 855 bales as security for that loan, which had been liquidated; and that plaintiff's financial condition was such that it was necessary for him to realize on his cotton. Another witness testified as to general market conditions. No testimony was offered for the defendant.

The allegations of the complaint with respect to plaintiff's financial necessities, as a ground for equitable intervention, were of the most general character and the evidence in that relation was general and meagre. There were general statements as to encumbrances and expenses, without any showing of details. Apparently, plaintiff had disposed of the 855 exempt bales and there was no showing that he could not have obtained the money necessary to move the remaining bales. The trial court concluded that plaintiff had failed to make a case for equitable relief and should be left to his legal remedy.

The Circuit Court of Appeals, in affirming the decree, rested its decision upon the established principle that a mandatory injunction is not granted as a matter of right, but is granted or refused in the exercise of a sound judicial discretion. *Morrison* v. *Work,* 266 U. S. 481, 490.

In this view of the record, and of the discretion which the trial court was entitled to exercise, the writ of certiorari was improvidently granted and it is dismissed.

Writ dismissed.

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

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

No. 173. Argued December 20, 1935.—Decided January 13, 1936.

1. Upon appeal from an order of the Board of Tax Appeals sustaining a tax assessment, the Circuit Court of Appeals should confine itself to grounds which were presented to or considered by the Board. P. 108.
2. Stock of a corporation worth more than par was acquired from it by the taxpayer upon payment of par value in cash and in further consideration of an option to the corporation to repurchase part of the shares at par and of the taxpayer's agreement not to compete with the corporation in business. *Held:*

   (1) That the taxpayer's failure to report the profit at the time in his income tax return, due to an innocent mistake, did not estop him, when measuring the gain from a disposition of the shares in a later year, from claiming that their market value at time of purchase was greater than the cash price he had paid for them. P. 109.

   (2) That the market value of the shares subject to the option of repurchase was necessarily limited to $100 per share. P. 109.

76 F. (2d) 112, affirmed.

CERTIORARI (cross-writs), 296 U. S. 557, to review a judgment reversing an order of the Board of Tax Appeals.

Assistant Solicitor General Bell, with whom *Solicitor General Reed, Assistant Attorney General Wideman* and *Mr. John R. Benney* were on the brief, for the Commissioner.

Mr. John G. Jackson, with whom *Messrs. William H. White, Jr.,* and *George B. Brooks* were on the brief, for Salvage.

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*Together with No. 280, *Salvage* v. *Helvering, Commissioner of Internal Revenue.* Certiorari to the Circuit Court of Appeals for the Second Circuit.

Mr. Justice McReynolds delivered the opinion of the Court.

These cross writs bring up a judgment of the Circuit Court of Appeals, 2nd Circuit, which disapproved a deficiency assessment for 1929 income; and authorized recovery for overpayment below the taxpayer's claim.

The petition for certiorari in No. 173 asserts: "The question is—Whether the taxpayer is estopped to claim that the difference between the market value of the 1,500 shares as of December 30, 1922 and their cost to him constituted taxable income to him for 1922; and hence that the fair market value of these shares, and not their cost, is the basis to be used in measuring the gain from the disposition of the shares in 1929, no income from the transaction having been reported in 1922."

The points to be urged in No. 280 are stated thus—"The Circuit Court of Appeals erred: (1) In holding that the cost base of the preferred stock of American Viscose Corporation redeemed in 1929 was to be arrived at by taking as the fair market value of The Viscose Company stock the sum of $100 per share, insofar as the five-sevenths of said stock which was subject to the option to repurchase was concerned. (2) In making a finding as to the value of said optioned stock."

Prior to 1922, Salvage, the taxpayer, bought twenty-five shares, Viscose Company stock. He paid $166.66 for each one—for all $4166.66. In December, 1922, he acquired from the corporation 1500 shares for which he paid $100 per share ($150,000) and entered into an obligation to refrain from competing business, etc. Also, he agreed that during 1923 the corporation might repurchase five-sevenths of 1500 shares at par; during 1924, four-sevenths, etc. Intrinsically (when unincumbered) a share of the company stock was then worth $1164.70.

Later during 1922, all these shares (1525) were exchanged for 6100 preferred shares, redeemable at $110, and 7625 common shares, American Viscose Corporation. The basis of exchange was four preferred and five common shares of new stock for one share of old. The taxpayer's return for 1922 (not in evidence) showed no gain from these transactions.

During 1929, American Viscose Corporation redeemed its preferred shares at $110; Salvage received $671,000. His return for that year disclosed as net capital gain the difference between that sum and $154,166.66, total outlay for the 1525 converted shares. Upon this, he paid the assessed tax. Apparently, he supposed apportionment between preferred and common stock of their total cost was impossible or unnecessary; also that no taxable gain arose before return of his entire outlay.

Upon an audit, the Commissioner ruled that proper apportionment of the total cost—$154,166.66—could be made. He assigned thirty-seven + per cent. to the preferred and sixty-two + per cent. to the common shares and made a deficiency assessment of $12,005.38. Thereupon, the taxpayer claimed, first that in 1922 each Viscose Company share was fairly worth $1164.70 and with that as the base, no taxable gain arose upon redemption of the preferred stock. Also that he had overpaid to the extent of $63,750. Second, that apportionment of the cost of both between preferred and common shares was impracticable and no taxable gain could arise prior to recovery of the full outlay.

Upon these conflicting claims, the Board of Tax Appeals took the matter. There the Commissioner asserted correctness of his action; he presented no affirmative defense; set up no claim of estoppel because of the taxpayer's failure properly to report 1922 gain.

The Board held the difference between the true value of Viscose Company shares and the price paid by the taxpayer was not compensation for services; also that the deficiency assessment was properly made. Estoppel was neither presented nor considered.

The court below held that the consideration for the Viscose Company stock acquired in 1922 was $100 per share, plus the covenants to resell five-sevenths at par, etc. and not to engage in competing business. Also that the base cost for estimating capital gain in 1929 was the fair market value in 1922 of the shares then held. And since the corporation had the right to repurchase at par, the market value of five-sevenths did not exceed $100 per share. Further, that the failure to disclose 1922 taxable gain apparently resulted from innocent mistake of law; there was no false representation of fact; nothing gave support to the claim of estoppel. The cause was remanded for ascertainment of the amount of the overpayment.

We find no reason to disagree with the judgment of the court.

The defense of estoppel was not before the Board. Under what we regard as the correct practice, *General Utilities & Operating Co.* v. *Helvering,* 296 U. S. 200, the court should have passed the point. Furthermore, the facts disclosed give it no support.

Considering the option to repurchase at par, outstanding in 1922, there could be no proper finding of fair market value at that time in excess of $100 per share. In the circumstances, the court did not err in so holding.

Pertinent Treasury Regulations, rulings and judicial opinions are adequately pointed out by the court's opinion.

The judgment is affirmed. The cause will be remanded for further proceedings.

Affirmed.

RICKERT RICE MILLS, INC. *v.* FONTENOT, COLLECTOR OF INTERNAL REVENUE.*

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

No. 577. Argued December 16, 17, 1935.—Decided January 13, 1936.

1. The infirmities of the Agricultural Adjustment Act, 1933, which were the basis of decision in *United States* v. *Butler, ante,* p. 1, holding it unconstitutional, were not cured by the Amendatory Act of August 24, 1935. The so-called tax exacted of processors still lacks the quality of a true tax, and remains a means for effectuating the regulation of agricultural production,—a matter not within the powers of Congress. P. 112.
2. The Court has no occasion to discuss or decide in this case the question whether § 21 (d) of the Amended Act affords an adequate remedy at law for the recovery of money unconstitutionally exacted of a processor. P. 112.
3. In suits by processors to restrain a collector from assessing and collecting "processing taxes" pursuant to the Agricultural Adjustment Act, 1933, as amended by the Act of August 24, 1935, this Court, in granting writs of certiorari, restrained the collection upon the condition that the petitioners pay the amcunts of the accruing taxes to a depositary, to be withdrawn only upon the further order of this Court. The exaction of the statute having been found unconstitutional, *held* that the impounded funds should be returned to petitioners without regard to the adequacy of the remedy under § 21 (d) of the Amended Act for recovery of taxes collected, since the petitioners have not paid those funds as taxes to the collector and cannot now be required to do so, nor can collection be enforced by distraint. P. 112.

Decrees of the District Court vacated.

CERTIORARI, 296 U. S. 569, to the Circuit Court of Appeals after denial by that court of applications for injunc-

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* Together with No. 578, *Dore* v. *Fontenot;* No. 579, *United Rice Milling Products Co.* v. *Fontenot;* No. 580, *Baton Rouge Rice Mill, Inc.* v. *Fontenot;* No. 581, *Simon* v. *Fontenot;* No. 585, *Levy Rice Milling Co.* v. *Fontenot;* No. 586, *Farmers Rice Milling Co.* v. *Fontenot;* and No. 587, *Noble-Trotter Rice Milling Co.* v. *Fontenot*—all on writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit.

tions, pending appeal, in suits brought by processors of rice against the respondent collector to enjoin assessment and collection of processing taxes under the Agricultural Adjustment Act as amended. The District Court had dismissed the bills. The decrees of this Court provide for return of moneys impounded under its orders; vacate the decrees of the District Court, and remand the cases to that court for entry of decrees of injunction.

Messrs. John P. Bullington and *Homer L. Bruce,* with whom *Messrs. Ralph J. Schwarz, Morris B. Redmann,* and *C. A. McCoy* were on the brief, for petitioners.

Assistant Attorney General Wideman, with whom *Attorney General Cummings, Solicitor General Reed, Messrs. Sewall Key, Norman D. Keller, J. Paul Jackson, Lucius A. Buck, Mastin G. White, Prew Savoy,* and *Miss Helen R. Carloss* were on the brief, for respondent.

By leave of Court, briefs of *amici curiae* were filed as follows: *Messrs. Nathan L. Miller, John W. Davis,* and *William R. Perkins,* on behalf of Hygrade Food Products Corp. et al.; *Messrs. Charles B. Rugg, Frank J. Morley, Thomas Nelson Perkins,* and *Warren F. Farr,* on behalf of General Mills, Inc., et al.; *Mr. John E. Hughes,* on behalf of American Nut Co., Inc., et al.; and *Messrs. James S. Y. Ivins, Kingman Brewster, Percy W. Phillips, O. R. Folsom-Jones, Richard B. Barker,* and *John Ward Cutler,*—all in support of the petitioners.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This is one of eight companion cases.[1] They were consolidated for hearing by the District Court. It will be sufficient briefly to state the facts in No. 577:

[1] The others are: 578, *Dore* v. *Fontenot;* 579, *United Rice Milling Products Co., Inc.* v. *Fontenot;* 580, *Baton Rouge Rice Mill, Inc.* v. *Fontenot;* 581, *Simon* v. *Fontenot;* 585, *Levy Rice Milling Co., Inc.* v. *Fontenot;* 586, *Farmers Rice Milling Co., Inc.* v. *Fontenot,* and 587, *Noble-Trotter Rice Milling Co., Inc.* v. *Fontenot.*

The petitioner, a processor of rice, filed its bill in the District Court for Eastern Louisiana, to restrain the respondent from assessing or collecting taxes levied for the month of September, 1935, and subsequent months, pursuant to the Agricultural Adjustment Act, 1933,[2] as amended by the Act of August 24, 1935.[3] The bill charges the exaction is unconstitutional and alleges the respondent threatens collection by distraint, which will cause irreparable injury, as the petitioner has no adequate remedy at law to recover what may be collected. A preliminary injunction was sought. The respondent filed a motion to dismiss, citing Revised Statutes 3224 and § 21 (a) of the amended Agricultural Adjustment Act as prohibiting restraint of collection, and also asserting that the petitioner had a plain, adequate, and complete remedy at law. The court refused an interlocutory injunction and entered a decree dismissing the bill. Appeal was perfected to the Circuit Court of Appeals. The District Judge refused to grant an injunction pending the appeal. Application to the Circuit Court of Appeals for such an injunction was denied upon the view that the petitioner had an adequate remedy at law and the statute deprived the court of jurisdiction to restrain collection.

In praying a writ of certiorari the petitioner asserted that by reason of the provisions of § 21 (d) it would be impossible to recover taxes collected, even though the act were unconstitutional, since the section forbids recovery except upon a showing of facts not susceptible of proof. This court granted the writ and restrained collection of the tax upon condition that the petitioner should pay the amount of the accruing taxes to a depository, to the joint credit of petitioner and respondent, such funds to be withdrawn only upon the further order of the court.

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[2] C. 25, 48 Stat. 31.

[3] C. 641, 49 Stat. 750.

The cause was advanced for hearing and has been fully argued on the questions of the constitutionality of the exaction and the inadequacy of the remedy for recovery of taxes paid.

The changes made by the amendatory act of August 24, 1935, do not cure the infirmities of the original act which were the basis of decision in *United States* v. *Butler, ante,* p. 1. The exaction still lacks the quality of a true tax. It remains a means for effectuating the regulation of agricultural production, a matter not within the powers of Congress.

We have no occasion to discuss or decide whether § 21 (d) affords an adequate remedy at law. As yet the petitioner has not paid the taxes to the respondent, and, in view of the decision in the *Butler* case, hereafter cannot be required so to do. If the respondent should now attempt to collect the tax by distraint he would be a trespasser. The decree of the District Court will be vacated, an appropriate order entered directing the repayment to the petitioner of the funds impounded *pendente lite,* and the cause remanded to the District Court for the entry of a decree enjoining collection of the assailed exaction. A similar disposition will be made of the companion cases.

Decree vacated.

43927°—36——8

VAN DER WEYDE *v.* OCEAN TRANSPORT CO., LTD. ET AL.

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

No. 4. Submitted January 15, 1936.—Decided February 3, 1936.

1. Jurisdiction if otherwise existing in the District Court over a libel of a Norwegian vessel by a seaman for personal injuries sustained on board in 1922, was not affected by Article XIII of the Treaty of 1827 with Sweden and Norway, providing a consular jurisdiction for adjudication of differences between captains and crews, in as much as that Article was terminated in 1919, by this Government, acting through the President and the Secretary of State. P. 116.
2. Under § 16 of the Seamen's Act of March 4, 1915, by which Congress expressed its judgment that treaty provisions in conflict with the Act should be terminated and requested and directed the President to give notice to that effect to Governments concerned, it was the duty of the President to reach his conclusions as to such conflicts; and his finding of inconsistency between Article XIII of the Treaty of 1827, *supra,* and provisions of the statute, was neither arbitrary nor inadmissible. P. 117.
3. Norway having agreed to the termination of Article XIII of the Treaty, her consul cannot be heard to question it. P. 118.
4. The Treaty of Friendship, Commerce and Consular Rights, of June 5, 1928, between Norway and the United States, which supplanted most of the Treaty of 1827, including Article XIII cannot be regarded as affecting retroactively the jurisdiction of the District Court. P. 118.

73 F. (2d) 922, reversed.

Certiorari, 296 U. S. 567, to review a decree affirming the dismissal of a libel in admiralty for want of jurisdiction. Reported below *sub nom.* The Taigen Maru.

Messrs. John P. Hannon, Wm. P. Lord, and *Andrew G. Haley* submitted for petitioner.

Messrs. Lane Summers, F. T. Merritt, and *W. H. Hayden* submitted for respondent.

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

Petitioner brought this libel in 1931, in the District Court for the Western District of Washington, against the vessel "Taigen Maru," for personal injuries which he sustained as a seaman in 1922. The vessel was then known as the "Luise Nielsen" and was of Norwegian registry. The respondent, Ocean Transport Company, Ltd., a Japanese corporation, made claim as owner, and filed exceptions alleging that a final decree had been entered in the District Court for the District of Oregon in 1924, dismissing a libel, for the same cause, on the intervention of the Norwegian consul.

In the present case, there was again an intervention by the Norwegian consul, who claimed that, while the vessel was now Japanese, he was nevertheless officially concerned, as the former Norwegian owner had agreed to deliver the vessel "free from all debts and encumbrances." The consul filed exceptive allegations to the effect that the libelant, a Dutch subject, had signed Norwegian articles and, so far as his rights as a seaman were concerned, was bound by the laws of Norway, which provided for appropriate remedies. The consul asked that, if the cause was not dismissed because of the former decree, the dispute should be left for his adjustment and disposition. The libelant made response and, on hearing, the District Court dismissed the cause "in the exercise of its discretion."

The Circuit Court of Appeals affirmed the decree, but upon the ground that the dismissal should have been for want of jurisdiction rather than as an exercise of discretion. 73 F. (2d) 922. The court based its decision upon the second paragraph of Article XIII of the Treaty of Commerce and Navigation, of 1827, between the United States and the Kingdom of Sweden and Norway, the text of which is given in the margin.[1] The court assumed that this provision was still in effect, apparently not being advised of the fact that Articles XIII and XIV of that treaty had been terminated in 1919. See Foreign Relations of the United States, 1919, pp. 47–54.

Section 16 of the Seamen's Act of March 4, 1915,[2] expressed "the judgment of Congress" that treaty provisions in conflict with the provisions of the Act "ought to be terminated," and the President was "requested and directed" to give notice to that effect to the several Governments concerned within ninety days after the passage of the Act. It appears that, in consequence, notice was given and that a large number of treaties were terminated in whole or in part.[3] The Treaty with Sweden and Norway of 1827 provided that it might be terminated, after an initial period of ten years, upon one year's notice.[4] On February 2, 1918, the Government gave notice to the Norwegian Government of the denunciation of the treaty in its entirety, to take effect on February 2, 1919, but later by an exchange of diplomatic

[1] 8 Stat. 346, 352. "Article XIII. . . . The consuls, vice consuls, or commercial agents, or the persons duly authorized to supply their places, shall have the right, as such, to sit as judges and arbitrators in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to their charge, without the interference of the local authorities, unless the conduct of the crews, or of the captain, should disturb the order of tranquillity of the country; or the said consuls, vice consuls, or commercial agents should require their assistance to cause their decisions to be carried into effect or supported. It is, however, understood, that this species of judgment, or arbitration shall not deprive the contending parties of the right they have to resort, on their return, to the judicial authority of their country."

[2] 38 Stat. 1164, 1184.

[3] Foreign Relations of the United States, 1915, pp. 3 *et seq.;* 1916, pp. 33 *et seq.*; 1917, pp. 9 *et seq.;* 1918, pp. 3 *et seq.;* 1919, pp. 47 *et seq.*

[4] Article XIX, 8 Stat. 356.

notes, this Government formally withdrew its denunciation, except as to Articles XIII and XIV. Foreign Relations of the United States, 1919, pp. 50–52. It was expressly stated that Articles XIII and XIV of the treaty, being in conflict with provisions of the Seamen's Act, were deemed to be terminated on July 1, 1916, so far as the laws of the United States were concerned. *Id.* pp. 53, 54.

On June 5, 1928, the two Governments signed a Treaty of Friendship, Commerce, and Consular Rights, and on February 25, 1929, an additional Article, which supplanted the Treaty of 1827 (so far as the latter had remained effective), save that Article I of the former treaty concerning the entry and residence of the nationals of the one country in the territories of the other for the purposes of trade, was continued in force.[5]

Respondent contends (1) that the Seamen's Act did not specifically direct the abrogation of Article XIII, (2) that the Act was not so unavoidably inconsistent with all the provisions of Article XIII as to require its entire abrogation, and (3) that the diplomatic negotiations attempting to effect abrogation of the whole of Article XIII "were in excess of congressional direction and in violation of constitutional authority."

The first and second points are unavailing, if Article XIII was actually abrogated in its entirety, and that this was the purport of the diplomatic exchanges between the two Governments is beyond dispute. As to the third point, we think that the question as to the authority of the Executive in the absence of congressional action, or of action by the treaty-making power, to denounce a treaty of the United States, is not here involved. In this instance, the Congress requested and directed the President to give notice of the termination of the treaty provi-

[5] 47 Stat. Pt. 2, pp. 2135, 2158, 2159.

sions in conflict with the Act. From every point of view, it was incumbent upon the President, charged with the conduct of negotiations with foreign governments and also with the duty to take care that the laws of the United States are faithfully executed, to reach a conclusion as to the inconsistency between the provisions of the treaty and the provisions of the new law. It is not possible to say that his conclusion as to Articles XIII and XIV was arbitrary or inadmissible. Having determined that their termination was necessary, the President through the Secretary of State took appropriate steps to effect it. Norway agreed to the termination of Articles XIII and XIV and her consul cannot be heard to question it.

The injuries, of which libelant complains, took place after that termination. The effect of the new treaty we need not, and do not, consider, as in any event it could not be regarded as retroactively affecting the jurisdiction of the District Court.

The Circuit Court of Appeals fell into error in sustaining the dismissal of the cause upon the ground of want of jurisdiction by reason of the treaty provision invoked. We express no opinion upon any other questions which the cause may present, as these have not been considered by the courts below. They should be considered and determined.

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

Reversed.

VIOLET TRAPPING CO., INC. *v.* GRACE, REGISTER STATE LAND OFFICE, ET AL.

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

No. 302. Argued January 10, 13, 1936.—Decided February 3, 1936.

Lands which a State had acquired by adjudication for nonpayment of taxes were leased by it for a term limited to end if the lands were redeemed by the former owner or sold by the State. *Held*, that a later statute, permitting redemption on terms less onerous than those in force when the lease was made, did not impair the lessee's rights under the contract clause of the Constitution or the due process and equal protection clauses of the Fourteenth Amendment. P. 120.

182 La. 405; 162 So. 26, affirmed.

APPEAL from a judgment affirming the dismissal of a suit in which a mandamus was sought to cancel certificates of redemption of land from tax sales, and an injunction against assertions of title thereunder.

Mr. Edward Rightor, with whom *Messrs. Eugie V. Parham* and *Edwin J. Prinz* were on the brief, for appellant.

Messrs. Emmet Alpha, George A. Dreyfous, and *Claude L. Johnson* were on the brief for appellees.

By leave of Court, *Messrs. Bentley G. Byrnes* and *M. C. Scharff* filed a brief on behalf of the Trappers & Fishermen's Union of St. Bernard and Plaquemines Parishes, as *amicus curiae*, supporting the position of appellees.

PER CURIAM.

Appellant is a sub-lessee of lands leased by the State of Louisiana in 1924 to the Terre aux Boeufs Drainage District. The lands had become the property of the State by an adjudication for unpaid taxes of 1911 to 1923. The lease by the State contained a clause that the lease would end in case the lands were redeemed by the former owner or sold by the State. At the time the lease and sub-lease were made, the lands could be redeemed only by payment of all taxes, penalties and interest due at the date of redemption. By a subsequent statute, Act No. 161 of 1934, the legislature of Louisiana permitted redemption on different and less onerous terms, that is, by the payment, on an installment basis, of the actual taxes for which the property had been adjudicated to the State. Under that statute, certificates for the redemption of the lands in question were issued by the Register of the State Land Office. Appellant then sought *mandamus* to compel the cancellation of the certificates, upon the ground that the Act of 1934 violated the Constitution of the United States in that the act impaired the obligation of appellant's contract of lease, deprived appellant of its property without due process of law, and denied to appellant the equal protection of the laws. Judgment against the appellant was affirmed by the Supreme Court of the State. That court decided that there was no impairment of the contract as the clause in the original lease, making it subject to redemption, was "free of ambiguity and without limitation as to the conditions under which the properties embraced in the lease might be redeemed or sold, or the price to be paid therefor." *State ex rel. Violet Trapping Co.* v. *Grace,* 182 La. 405; 162 So. 26.

While this Court, when the contract clause of the Federal Constitution is invoked, may determine for itself the meaning and effect of the contract (*Larson* v. *South Dakota,* 278 U. S. 429, 433; *United States Mortgage Co.* v. *Matthews,* 293 U. S. 232, 236), we find no reason for disagreeing with the conclusion reached by the state court. The questions sought to be raised under the due process and equal protection clauses of the Fourteenth Amendment are without merit. *Bachtel* v. *Wilson,* 204 U. S. 36, 41; *Rast* v. *Van Deman & Lewis Co.,* 240 U. S. 342, 357; *Sproles* v. *Binford,* 286 U. S. 374, 396. The judgment is

Affirmed.

TYSON v. UNITED STATES.

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

No. 192. Argued January 7, 1936.—Decided February 3, 1936.

1. Section 19 of the World War Veterans' Act of 1924, as amended, bars suits on yearly renewable term insurance unless brought within six years after the right accrued or within one year after the date of approval (July 3, 1930) of the amending Act, but suspends the limitation "for the period elapsing between the filing in the bureau of the claim sued upon and the denial of said claim by the director." *Held*, where a claim was filed July 3, 1931 and notice of denial was received by claimant through the mail on November 16, 1932, suspension of the limitation ended not later than the latter date and a suit brought on November 17, 1932, alleging disability existing from time of discharge in 1918, was barred. P. 122.
2. Whether denial of the claim occurred prior to the date when notice was received by the claimant, not decided. P. 123.

76 F. (2d) 533, affirmed.

Certiorari, 296 U. S. 554, to review a judgment affirming a judgment dismissing an action on a policy of War Risk Insurance.

Mr. J. Melville Broughton, with whom *Mr. Wm. H. Yarborough, Jr.*, was on the brief, for petitioner.

Mr. Will G. Beardslee, with whom *Solicitor General Reed* and *Messrs. Wilbur C. Pickett, Randolph C. Shaw*, and *W. Marvin Smith* were on the brief, for the United States.

By leave of Court, *Mr. Warren E. Miller* filed a brief, as *amicus curiae*, supporting the position of petitioner.

Mr. Justice McReynolds delivered the opinion of the Court.

Petitioner, Tyson, sued to recover total permanent disability benefits under a war risk term insurance contract, kept in force by premium payments while the insured remained in service. The petition, filed November 17, 1932, alleged that disability had existed ever since the claimant's discharge from the Army, December 18, 1918.

The trial court dismissed the cause for want of jurisdiction, being of opinion that it was not instituted within the prescribed time. The Circuit Court of Appeals affirmed the judgment.

July 3, 1931, Tyson filed his claim with the Veterans' Administration. November 16, 1932, he received from it a letter, dated November 12, 1932 and mailed at Washington November 14, 1932, which stated that this had been denied. Also—"You may consider such denial final for the purposes of instituting suit under Section 19 of the World War Veterans' Act, 1924, as amended. If you accept the denial of the claim by the Council as final, the suspension of the statute of limitations provided by Section 19 shall cease from and after the date of this letter plus the number of days usually required by the Post Office Department for the transmission of regular mail from Washington, D. C., to your last address of record."

The question for decision is whether the petitioner brought suit within the time permitted by § 19, Act of 1924, as amended. § 445, title 38, United States Code; c. 849, § 4, 46 Stat. 992, approved July 3, 1930.

"No suit on yearly renewable term insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made or within one year after the date of approval of this amendatory Act, whichever is the later date, . . . : *Provided,* That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded: *Provided further,* That this limitation is suspended for the period elapsing between the filing in the bureau of the claim sued upon and the denial of said claim by the director."

Manifestly, suit was not begun within six years after the right accrued, or within one year after July 3, 1930. Permission to sue had expired unless the limitation was suspended between the filing on July 3, 1931 and November 17, 1932, when proceedings began in the trial court.

Whether the denial occurred November 12th, the date given the letter of advice, or November 14th, when this was mailed, or November 16th, when the claimant actually received it, although much debated by counsel, we need not consider.

The statute provides: No suit . . . shall be allowed . . . unless . . . brought within six years after the right accrued . . . or within one year after July 3, 1930, whichever is the later date. But this limitation was suspended by the proviso for the period between the filing and denial of the claim.

In any view, the denial occurred not later than November 16th, 1932. And, with that day, the suspension of the statute ended—certainly the period between July 3, 1931 and November 16, 1932 did not extend beyond the latter day. The plain words employed by Congress require this conclusion. Suit was not begun until the 17th, and that was too late.

Affirmed.

GOOCH *v.* UNITED STATES.

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

No. 559. Argued January 13, 14, 1936.—Decided February 3, 1936.

1. An officer who is unlawfully seized and carried away to prevent the arrest of his captor is "held for . . . reward or otherwise" within the meaning of the Federal Kidnaping Act as amended; and transportation in interstate commerce of the officer while thus restrained constitutes a violation of the Act. Act of June 22, 1932, as amended by Act of May 18, 1934. P. 125.
2. The amending Act added to the words "held for ransom or reward" the words "or otherwise, except, in the case of a minor, by a parent thereof." The contention that the words "ransom" and "reward" mean only pecuniary benefits, and that *ejusdem generis* similarly restricts the words "or otherwise" notwithstanding the excepting clause, cannot be sustained. P. 126.
3. The rule of *ejusdem generis* is an aid in ascertaining the correct meaning of words when there is uncertainty. P. 128.
4. Penal statutes are construed in that sense which best harmonizes with their context and purpose. P. 128.

CERTIFICATE presenting two questions involving the construction of the Federal Kidnaping Act.

Mr. W. F. Rampendahl, with whom *Mr. E. M. Frye* was on the brief, for Gooch.

Mr. Gordon Dean, with whom *Solicitor General Reed, Assistant Attorney General Keenan,* and *Mr. William W. Barron* were on the brief, for the United States.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

By permission of § 346, 28 U. S. C., the Circuit Court of Appeals, 10th Circuit, has certified two questions and asked instruction.

"1. Is holding an officer to avoid arrest within the meaning of the phrase, 'held for ransom or reward or otherwise', in the act of June 22, 1932, as amended May 18, 1934 (48 Stat. 781), 18 U. S. C. A. 408a?

"2. Is it an offense under Section 408a, *supra*, to kidnap and transport a person in interstate commerce for the purpose of preventing the arrest of the kidnaper?"

The statement revealing the facts and circumstances out of which the questions arise follows—

"Gooch was convicted and sentenced to be hanged under an indictment charging that he, with one Nix, kidnaped two officers at Paris, Texas, 'for the purpose of preventing his (Gooch's) arrest by the said peace officers in the State of Texas,' and transported them in interstate commerce from Paris, Texas, to Pushmataha County, Oklahoma, and at the time of the kidnaping did bodily harm and injury to one of the officers from which bodily harm the officer was suffering at the time of his liberation by Gooch and Nix in Oklahoma.

"The proof supports the charge. It established these facts: Gooch and Nix, while heavily armed, were accosted by the officers at Paris, Texas. To avoid arrest, Gooch and Nix resisted and disarmed the officers, unlawfully seized and kidnaped them and transported them by automobile from Texas to Oklahoma, and liberated them in the latter State. During the time Gooch and Nix were kidnaping the officers they inflicted serious bodily injury upon one of the officers, from which injury he was suffering at the time of such liberation in the State of Oklahoma."

The Act of June 22, 1932, c. 271, 47 Stat. 326, provided—

"That whoever shall knowingly transport or cause to be transported, or aid or abet in transporting, in interstate or foreign commerce, any person who shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away by any means whatsoever and held for ransom or reward shall, upon conviction, be punished by imprisonment in the penitentiary for such term of years as the court, in its discretion, shall determine."

The amending Act of May 18, 1934, c. 301, 48 Stat. 781, 18 U. S. C. 408a, declares—

"Whoever shall knowingly transport or cause to be transported, or aid or abet in transporting, in interstate or foreign commerce, any person who shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away by any means whatsoever and held for ransom or reward *or otherwise, except, in the case of a minor, by a parent thereof,* shall, upon conviction, be punished (1) by death if the verdict of the jury shall so recommend, provided that the sentence of death shall not be imposed by the court if, prior to its imposition, the kidnaped person has been liberated unharmed, or (2) if the death penalty shall not apply nor be imposed the convicted person shall be punished by imprisonment in the penitentiary for such term of years as the court in its discretion shall determine: . . ."

Counsel for Gooch submit that the words "ransom or reward" import "some pecuniary consideration or payment of something of value"; that as the statute is criminal the familiar rule of *ejusdem generis* must be strictly applied; and finally, it cannot properly be said that a purpose to prevent arrest and one to obtain money or something of pecuniary value are similar in nature.

The original Act (1932) required that the transported person should be held "for ransom or reward." It did not undertake to define the words and nothing indicates an intent to limit their meaning to benefits of pecuniary value. Generally, reward implies something given in return for good or evil done or received.

Informed by experience during two years, and for reasons satisfactory to itself, Congress undertook by the 1934 Act to enlarge the earlier one and to clarify its purpose by inserting "or otherwise, except, in the case of a minor, by a parent thereof," immediately after "held for ransom or reward." The history of the enactment emphasized this view.

The Senate Judiciary Committee made a report, copied in the margin,[1] recommending passage of the amending bill and pointing out the broad purpose intended to be accomplished.

The House Judiciary Committee made a like recommendation and said—

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[1] "The Committee on the Judiciary, having had under consideration the bill (S. 2252) to amend the act forbidding the transportation of kidnaped persons in interstate commerce, reports the same favorably to the Senate and recommends that the bill do pass.

"The purpose and need of this legislation are set out in the following memorandum from the Department of Justice:

"S. 2252; H. R. 6918: This is a bill to amend the act forbidding the transportation of kidnaped persons in interstate commerce—act of June 22, 1932 (U. S. C., ch. 271, title 18, sec. 408a), commonly known as the 'Lindbergh Act.' This amendment adds thereto the word 'otherwise' so that the act as amended reads: 'Whoever shall knowingly transport . . . any person who shall have been unlawfully seized . . . and held for ransom or reward or otherwise shall, upon conviction, be punished . . .' The object of the addition of the word 'otherwise' is to extend the jurisdiction of this act to persons who have been kidnaped and held, not only for reward, but for any other reason.

"In addition, this bill adds a proviso to the Lindbergh Act to the effect that in the absence of the return of the person kidnaped and in the absence of the apprehension of the kidnaper during a period of 3 days, the presumption arises that such person has been transported in interstate or foreign commerce, but such presumption is not conclusive.

"I believe that this is a sound amendment which will clear up border-line cases, justifying Federal investigation in most of such cases and assuring the validity of Federal prosecution in numerous instances in which such prosecution would be questionable under the present form of this act." S. Rep. 534, 73d Cong., 2d Sess., March 22, 1934.

"This bill, as amended, proposes three changes in the act known as the 'Federal Kidnaping Act.' First, it is proposed to add the words 'or otherwise, except, in the case of a minor, by a parent thereof.' This will extend Federal jurisdiction under the act to persons who have been kidnaped and held, not only for reward, but for any other reason, except that a kidnaping by a parent of his child is specifically exempted. . . ." H. Rep. 1457, 73d Cong., 2d Sess., May 3, 1934.

Evidently, Congress intended to prevent transportation in interstate or foreign commerce of persons who were being unlawfully restrained in order that the captor might secure some benefit to himself. And this is adequately expressed by the words of the enactment.

The rule of *ejusdem generis,* while firmly established, is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty. Ordinarily, it limits general terms which follow specific ones to matters similar to those specified; but it may not be used to defeat the obvious purpose of legislation. And, while penal statutes are narrowly construed, this does not require rejection of that sense of the words which best harmonizes with the context and the end in view. *United States* v. *Hartwell,* 6 Wall. 385, 395; *Johnson* v. *Southern Pacific Co.,* 196 U. S. 1–17, 18; *United States* v. *Bitty,* 208 U. S. 393, 402; *United States* v. *Mescall,* 215 U. S. 26–31, 32.

Holding an officer to prevent the captor's arrest is something done with the expectation of benefit to the transgressor. So also is kidnaping with purpose to secure money. These benefits, while not the same, are similar in their general nature and the desire to secure either of them may lead to kidnaping. If the word reward, as commonly understood, is not itself broad enough to include benefits expected to follow the prevention of an arrest, they fall within the broad term, "otherwise."

The words "except, in case of a minor, by a parent thereof" emphasize the intended result of the enactment. They indicate legislative understanding that in their absence a parent, who carried his child away because of affection, might subject himself to condemnation of the statute. *Brown* v. *Maryland,* 12 Wheat. 419, 438.

Both questions must be answered in the affirmative.

MANHATTAN GENERAL EQUIPMENT CO. *v.* COMMISSIONER OF INTERNAL REVENUE.*

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

No. 226. Argued January 8, 1936.—Decided February 3, 1936.

1. A loss resulting from the sale in 1926 of securities in respect of which a distribution pursuant to a plan of reorganization had been made, *held* properly determined, for the purpose of computing income tax under the Revenue Act of 1926, by the method prescribed by Art. 1599 of Treasury Regulations 65, as amended April 3, 1928, rather than by the original regulation promulgated August 28, 1926, where the effect of applying the original regulation would be to credit the taxpayer with a loss greatly disproportionate as between the stock in respect of which the distribution was made and the stock distributed, contrary to the provision of the statute which requires that the basis shall be "apportioned" between the old and the new stock. P. 132.
2. To apportion is "to divide and assign in just proportion," "to distribute among two or more a just part or share to each." P. 134.
3. The validity of an administrative regulation depends on whether it is consistent with the statute and reasonable. P. 134.
4. Since the original regulation could not lawfully be applied in the circumstances of this case, because inconsistent with the statute and unreasonable, the amended regulation in effect became the

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* Together with No. 227, *Collier Service Corp.* v. *Commissioner of Internal Revenue.* Certiorari to the Circuit Court of Appeals for the Second Circuit.

primary and controlling rule in respect of the situation presented, and was not void as retroactive. P. 135.

76 F. (2d) 892, affirmed.

Certiorari, 296 U. S. 559, to review a judgment affirming a decision of the Board of Tax Appeals, 29 B. T. A. 395, sustaining determinations of deficiencies in income taxes in two cases. The cases were consolidated before the Board of Tax Appeals and disposed of by a single decision both by the Board and by the Circuit Court of Appeals.

Mr. Laurence Graves, with whom *Messrs. Emil Weitzner, Samuel H. Kaufman, Brode B. Davis,* and *Isadore Polier* were on the brief, for petitioners.

Assistant Solicitor General Bell, with whom *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. Sewall Key, Joseph M. Jones,* and *John R. Benney* were on the brief, for respondent.

Mr. Justice Sutherland delivered the opinion of the Court.

These cases involve identical facts and questions of law, and were disposed of by the court below in one opinion. 76 F. (2d) 892. The facts, so far as they concern the question here, are taken from the statement of that court.

"The petitioners are affiliates of United Brokerage Company. That corporation filed income tax returns for itself and its affiliates for 1925 and 1926 and the petitioners seek to review tax deficiencies attributed to them by the Commissioner, which the Board of Tax Appeals has affirmed. . . .

"On June 30, 1925, the United Brokerage Company purchased for $3,414,345.63 in cash all the capital stock of Artemas Ward, Inc., [a New York corporation] that was issued and outstanding, consisting of 4,964 shares of no par value. . . .

"On December 31, 1925, pursuant to a plan of reorganization, Artemas Ward, Inc. (N. Y.) transferred to Artemas Ward, Inc. (a Delaware corporation), in exchange for 100 shares of stock of the latter company of no par value, all its assets, then of a net book value of $1,246,-920.07, with the exception of cash and accounts receivable aggregating $284,967.21; that is to say, the New York corporation transferred to the Delaware corporation assets of the value of $961,952.86. Immediately after the transfer, and on December 31, 1925, Artemas Ward, Inc. (N. Y.) distributed to United Brokerage Company the 100 shares of stock of Artemas Ward, Inc. (Del.) and accounts receivable amounting to $234,967.21. In December, 1926, United Brokerage sold the entire 4,964 shares of Artemas Ward, Inc. (N. Y.) for $49,640. That stock had cost the United Brokerage $3,414,345.63 and the total must be apportioned between the 100 shares of the Delaware corporation (which it still owns) and the 4,964 shares of Artemas Ward, Inc. (N. Y.) in order to determine the loss suffered by the United Brokerage Company through its sale of the 4,964 shares at $49,640.

. . . . .

"Upon the reorganization, the New York corporation had left among its assets, valued at $1,246,920.07, accounts receivable and cash aggregating $284,967.21, or approximately 22.85% thereof, after $961,952.86 had been transferred to the Delaware Company. Under Art. 1599 (2) [as amended, *infra,*] the portion of $3,414,345.63 paid by the United Brokerage Company for the stock of Artemas Ward, Inc. (N. Y.) represented by that stock after the reorganization was $780,303.97. If from this be deducted $234,967.21 accounts receivable and the $49,640 realized from the sale in December, 1926, there would be a loss of $495,696.76. This loss the Commissioner allowed in assessing the income tax for 1925. The second point raised on this appeal is whether the loss, for the year 1926, to which the United Brokerage Company and its affiliates were entitled, was only the sum of $495,696.76 or was the sum of $2,167,785.56 which would arise through deducting from $3,414,345.63, (the cost of the stock of the New York company) the value at the time of the reorganization of the Delaware stock, which was $961,952.86 and $234,967.21 realized from accounts receivable and $49,640 realized from sale of the 4,964 shares."

It thus appears, the New York company having parted with all its assets except $50,000 in cash, that the assets behind the 4,964 shares when the 100 share distribution was made consisted of only that sum, while the 100 shares of the Delaware company stock was represented by the transferred assets of the New York company of the value of $961,952.86. The sale of the 4,964 shares brought $49,640; and the simple question to be determined is what method for the purposes of taxation should be employed to determine the loss in respect of the 4,964 shares under the Revenue Act of 1926, § 204 (a) (9), c. 27, 44 Stat. 9, 14, 15. That section provides that the basis for determining the gain or loss from such sale shall be the cost of the property, except that—

"(9) If the property consists of stock or securities distributed after December 31, 1923, to a taxpayer in connection with a transaction described in subdivision (c) of section 203,* the basis in the case of the stock in

*Sec. 203 (c) provides: "If there is distributed, in pursuance of a plan of reorganization, to a shareholder in a corporation a party to the reorganization, stock or securities in such corporation or in another corporation a party to the reorganization, without the surrender by such shareholder of stock or securities in such a corporation, no gain to the distributee from the receipt of such stock or securities shall be recognized."

respect of which the distribution was made shall be apportioned, under rules and regulations prescribed by the Commissioner with the approval of the Secretary, between such stock and the stock or securities distributed; . . ."

At the time of the reorganization, Article 1599 of Treasury Regulations 69, which had been promulgated on August 28, 1926, was in force. Petitioners invoke subdivision 2 of that regulation which provided:

"Where the stock distributed in reorganization is in whole or in part of a character or preference materially different from the stock in respect of which the distribution is made, the cost or other basis of the old shares of stock shall be divided between such old stock and the new stock in proportion, as nearly as may be, to the respective values of each class of stock, old and new, at the time the new shares of stock are distributed, and the basis of each share of stock will be the quotient of the cost or other basis of the class with which such share belongs, divided by the number of shares in the class. *The portion of the cost or other basis of the old shares of stock to be attributed to the shares of new stock shall in no case exceed the fair market value of such shares as of the time of their distribution."* (Italics added.)

April 3, 1928, this regulation was amended by striking from it the italicized portion. The taxpayer contended that its loss should be computed in accordance with the original regulation. This would have resulted in an allocation to the 4,964 shares of the New York corporation of $2,452,392.77; and, after making certain deductions, the allowable loss, as already appears, would have been something over $2,000,000. The commissioner, however, proceeding in strict accordance with the amended regulation, determined the amount of loss to be $495,696.76. Without pursuing the matter in further detail, it is enough to say that the case turns entirely upon the question whether the loss was to be determined in accordance with the original or the amended regulation. If in accordance with the former, the taxpayer is right; if in accordance with the latter, the commissioner is right. The court below held that the amended and not the original regulation furnished the applicable rule, and affirmed the determination of the Board of Tax Appeals, which in turn had sustained the commissioner. We agree with that view.

In determining a loss, the statute requires that the basis shall be "apportioned" between the old and the new stock. To apportion is to "divide and assign in just proportion," "to distribute among two or more a just part or share to each," *Fisher* v. *Charter Oak Life Ins. Co.*, 14 Abb. N. C. 32, 36, albeit, a division may be just without necessarily being also an exactly equal division. The result of applying the original regulation here is to bring about an inequitable apportionment, contrary to the intent of the statute, and to credit the taxpayer with a loss essentially and greatly disproportionate. On the other hand, application of the amended regulation effectuates the legislative intent that the basis of apportionment between the old and the new stock shall result in a fair and just division.

The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. *Lynch* v. *Tilden Produce Co.*, 265 U. S. 315, 320–322; *Miller* v. *United States*, 294 U. S. 435, 439–440, and cases cited. And not only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable.

International Ry. Co. v. *Davidson,* 257 U. S. 506, 514. The original regulation as applied to a situation like that under review is both inconsistent with the statute and unreasonable.

The contention that the new regulation is retroactive is without merit. Since the original regulation could not be applied, the amended regulation in effect became the primary and controlling rule in respect of the situation presented. It pointed the way, for the first time, for correctly applying the antecedent statute to a situation which arose under the statute. See *Titsworth* v. *Commissioner,* 73 F. (2d) 385, 386. The statute defines the rights of the taxpayer and fixes a standard by which such rights are to be measured. The regulation constitutes only a step in the administrative process. It does not, and could not, alter the statute. It is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand.

Judgment affirmed.

GREAT NORTHERN RAILWAY CO. v. WEEKS, STATE TAX COMMISSIONER, ET AL.

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

No. 178. Argued January 6, 7, 1936.—Decided February 3, 1936.

1. The full and fair value of property for the purpose of a tax assessment is the equivalent of the property in money paid at the time of assessment. P. 139.
2. In assessing railway property for taxation, the assessor is not bound by any rule or formula, but is free to consider all pertinent facts, estimates and forecasts and to give them their reasonable weight. P. 139.
3. Courts will not disturb tax assessments unless clearly unreasonable. To warrant an injunction, overvaluation due to mere error of judgment is not enough; there must have been that which in

legal effect is the equivalent of intention or fraudulent purpose to overvalue, and so to set at naught fundamental principles that safeguard the taxpayer's rights and property. P. 139.

4. An assessment of property for taxation is presumed to have been rightly made on the basis of actual value. P. 139.

5. In apportioning value of an interstate railway system to a State for taxation, there were used as factors the percentages in the State (a) of total track mileage; (b) of physical property, measured by cost of reproduction less depreciation; (c) of car and locomotive miles, average of five years; and (d) of gross earnings, average for five years, the amount of such earnings assigned to the State being found by adding to the intrastate revenue earned in the State the mileage proportion of revenue from traffic moving partly within and partly outside of her boundaries. Though percentages thus used were not higher than those submitted to the taxing board by the Railway Company, the Company contended in this suit that the apportionment operated to tax property outside of the State. *Held* that, having regard to the size of the entire railway system and the variety of things that affect values to be attributed to its railroad in different States, and the numerous matters as to which there may be wide difference of opinion, the use of the percentages was not shown to be confiscatory or arbitrary. P. 143.

6. In determining whether a tax assessment was arbitrarily made and grossly excessive, the assessors may not be compelled to submit to examination as to the operation of their minds in making it. P. 145.

7. Judicial notice must be taken of the fact that late in 1929 there occurred a great collapse of values of all classes of property—railroads, other utilities, commodities and securities,—and that the depression then commenced progressively became greater. P. 149.

8. In assessing railroad property during the depression, a taxing board was bound to take into account and give due weight to the sudden, progressive and enormous declines of value. P. 149.

9. In a suit by an interstate railway company to enjoin in part the collection of taxes levied on its property in North Dakota for the year 1933, the allegations and evidence on behalf of the state authorities showed that for a series of years, including the depression years 1929–1932, the basis adopted by them and approved by them as the best available for computing the value of the entire railway system, was the five-year average value of the stocks and bonds and capitalized income; that if this basis had been used in 1933, the system valuation for that year and the part of it assignable to and assessed in North Dakota would have been vastly less

than in 1932, owing to the effects of the economic depression upon property values, prices and earnings; but that, in assessing for 1933, they had arbitrarily repeated the assessment for 1932, without making a fresh computation of value or paying heed to economic changes. Resolving all doubts in favor of validity, the evidence conclusively showed that the challenged (1933) assessment exceeded the true full value of the railway's property in North Dakota in 1933 by $10,000,000. *Held:*

(1) That the taxing board's failure to consider the enormous diminution in value of the railway's property caused by the 1929 collapse and the progress of the depression, was equivalent in law to intention to make the grossly excessive assessment, and deprived the railway of rights under the due process clause of the Fourteenth Amendment. Pp. 145, 151.

(2) The railway's right to relief was not prejudiced by overassessment and submission to overtaxation in any prior year. P. 152.

77 F. (2d) 405, reversed.

CERTIORARI, 296 U. S. 558, to review the affirmance of a decree dismissing the bill in a suit to enjoin collection of taxes.

Mr. F. G. Dorety, with whom *Mr. C. J. Murphy* was on the brief, for petitioner.

Mr. Harold D. Shaft, with whom *Mr. P. O. Sathre,* Attorney General of North Dakota, was on the brief, for respondents.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This suit was brought in the federal district court for North Dakota by petitioner against the state tax commissioner and the auditors and treasurers of 30 counties, to enjoin collection of about 40% of 1933 taxes laid upon its railroad properties in each county. The assessed value of all petitioner's railroad property in the State is $78,832,888. The total of the tax is $1,508,352.34, of which petitioner has paid about 60%. The suit is grounded upon the claim that the taxes are based on a valuation that includes properties located outside the State and in other respects are so excessive and arbitrary as to be repugnant to the due process and equal protection clauses of the Fourteenth Amendment to, and the commerce clause of, the Federal Constitution. Issues were joined, the case was tried, the court made findings of fact, concluded that petitioner was not entitled to relief and dismissed the bill. The Circuit Court of Appeals affirmed. 77 F. (2d) 405.

The state law requires that all property subject to taxation be assessed at its true and full value in money. Comp. Laws 1913, § 2122. The state board of equalization is required in August of each year to assess at its actual value every railroad within the State and it is governed by the rules that apply to township assessors in valuing other property. § 2242. 1925 Supp., § 2141a3. The average values per mile of main and branch lines, respectively, constitute the bases for assignment of value to counties. § 2243. And on like mileage bases the value given to each county is distributed to its cities, towns, townships and districts, through which the railroad extends. § 2244. The railroad property is taxed, as is personal property, by applying the local rate to 50% of the assessed value.[1] Petitioner did not allege that other property was not assessed at its full and true value as required by state law, and does not seek relief on the ground of discrimination.

Petitioner claims that the board made the assessment by attributing to North Dakota too great a proportion of a grossly excessive system valuation. More specifically its contentions are: (1) That, by reason of the methods employed for the ascertainment of the percentage of system value to be assigned to North Dakota, the assessment

[1] Comp. Laws, 1913, § 2244. Initiated measure, approved June 29, 1932, Laws 1933, p. 493, amending 1925 Supp., § 2122a, reduced the percentage of assessed value to be used in calculating the tax from 75% to 50%.

includes the value of property located in other States to the extent of approximately $20,000,000, and (2) that, even if the factors used to make the allocation be not condemned, the assessment must nevertheless be held arbitrary and excessive to the extent of $15,000,000.

The full and true value of the property is the amount that the owner would be entitled to receive as just compensation upon a taking of that property by the State or the United States in the exertion of the power of eminent domain. That value is the equivalent of the property, in money paid at the time of the taking. *Olson* v. *United States,* 292 U. S. 246, 254. The principles governing the ascertainment of value for the purposes of taxation, are the same as those that control in condemnation cases, confiscation cases and generally in controversies involving the ascertainment of just compensation. *West* v. *C. & P. Telephone Co.,* 295 U. S. 662, 671.

In determining the amount of the assessment the board was not bound by any formula, rule or method, but for guidance to right judgment it was free to consider all pertinent facts, estimates and forecasts and to give to them such weight as reasonably they might be deemed to have. Courts decline to disturb assessments for taxation unless shown clearly to transgress reasonable limits. Overvaluation is not of itself sufficient to warrant injunction against any part of the taxes based on the challenged assessment; mere error of judgment is not enough; there must be something that in legal effect is the equivalent of intention or fraudulent purpose to overvalue the property and so to set at naught fundamental principles that safeguard the taxpayer's rights and property. *Rowley* v. *Chicago & N. W. Ry.,* 293 U. S. 102, 109–111. The assessment is presumed to have been rightly made on the basis of actual value. Its validity must be tested upon consideration of the facts established by the evidence and of those of which judicial notice may be taken.

There is controversy between the parties as to whether the evidence discloses how the assessment was made. Petitioner maintains that the record shows that the board found system value and apportioned it to North Dakota and also shows the methods by which these determinations were made. The district court refused to find, and the Circuit Court of Appeals held that petitioner failed to prove, that the board made the valuation by methods which petitioner claims that it employed.

1. As to methods employed by the board. Respondents called as a witness Mr. Lyman A. Baker, who had been with the North Dakota tax commissioner for 19 years and during the last 13 years, ending January 1, 1933, had been deputy commissioner in charge of the valuation of railroads and other utilities. He was engaged in this litigation in behalf of respondents and spent much time in making computations and in the preparation of exhibits that were put in evidence by respondents. In substance he testified:

The first step in the valuation of railroad property within a State is to determine the value of the entire system. There are two classes of evidence ordinarily considered: The average market price of stock and bonds, and the past earnings over a period of years. As the stock and bond prices reflect value of the entire railroad, it is necessary to eliminate the value of non-operating property. The method requires a definite period over which to average price quotations and that must of necessity be somewhat arbitrarily fixed. It assumes that the average price reflects value, but rarely is controlling interest bought or sold on the exchange. Where control is sought prices advance sharply. The method also assumes that purchasers act on accurate knowledge of conditions; it ignores the influence of pure speculation. In applying the method, taxing boards, economists and railroad men have always adopted five-year periods immediately preceding the assessment in order to give stability to the tax value. The depression resulted in a collapse in the stock and bond market. Forced selling brought prices down to a figure that did not fairly represent the value of the property. "Despite all these objections to the stock and bond method of valuation, I still consider it as one of the best indices of value obtainable."

He further testified: Capitalization of net railroad operating income is generally recognized as an important element in estimating the value of railroad operating property. The average net income, usually for five years, is capitalized at a reasonable rate of return. The method assumes the amount so ascertained to be the value of the property. The income of a single year is seldom, if ever, used. As 1931 and 1932 were the worst years in railroad history since the panic of 1893, the use of the three-year period ending in 1932 has but little justification. The five-year period has been given the same weight by the state board for a good many years. It is generally considered that the rate of return that a company is allowed to earn under state and federal law is a fair rate to use. A rate of six percent. is justifiable under present conditions. Economic return from farm property, being about 65% of all that is taxable in North Dakota, decreased about 75% from the 1924–1928 average. Assessments on values indicated by capitalization of average net income for the five years ending in 1932 would result in giving preferential treatment to railroads as compared with other properties. Where properties have been operated at a loss over a period of years, there are no earnings to capitalize. Yet they have present and prospective value which would be reflected by use of the stock and bond valuation method. The criticisms made of these methods are not sufficient to render them valueless. "On the contrary the two methods are universally approved as the two best evidences of the value of a railroad which are available."

The answer alleges: In 1932 the tax commissioner made and presented to the board computations based upon a determination of system value by the use of a composite of the average stock and bond values of the petitioner for a period of five years preceding the assessment and the average value ascertained by capitalizing net earnings for the same period; by apportioning the system value to North Dakota upon the basis of the average of five factors: (1) miles of all track, (2) physical property, (3) car and locomotive miles, (4) ton and passenger miles, (5) gross earnings, there was produced a value of $76,-115,715; another apportionment on the basis of the three use factors, viz. car and locomotive miles, ton and passenger miles, and gross earnings, produced $79,417,825, and a third apportionment by the average of track miles and the three use factors produced $80,671,790. The answer further alleged that "upon this evidence and upon all other evidence and matters of common knowledge before it the Board did in the year 1932 fix the valuation of plaintiff's property in North Dakota at $78,850,024"; that in 1933 the commissioner and the railway company presented to the board the financial and operating statistics of the plaintiff's railroad and reports and computations based upon the formulas used in 1932 and other evidence of value, and that the board after full consideration of them and all other evidence of value and matters of common knowledge fixed the assessment for 1933 at $78,832,888 "which said amount represented the honest judgment" of the board "and the full and true value of the plaintiff's North Dakota property in money."

The average of the valuations computed for 1932 as alleged in the answer is $78,735,110; the assessment was $78,850,024. The difference is less than one-sixth of one per cent. The trial court found that for 1933 the board assessed the property at "the sum of $78,832,888, which sum was the same as the 1932 assessment except for a deduction of $17,136 for certain trackage of the plaintiff which had been removed."

It is clear that the computations prepared by the tax commissioner for the use of the board served as guides to, if indeed they were not used as the measure of, value for the assessments made by the board for 1932 and 1933. Respondents' answer and evidence require a finding that these computations were in fact the controlling bases and constituted the very foundation of the 1932 and 1933 assessments. In view of the relatively small differences between the 1933 assessment and the figures produced by the methods approved by respondents and universally as the best available evidence of value of a railroad, the latter rightly may be used in testing the validity of the former.

2. Petitioner's claim that the board's apportionment of system value to North Dakota operated to assess and tax property in other States cannot be upheld.

Petitioner maintains that the amount attributed to that State was found by the use of the factors above referred to. More fully described, they are: 1. Miles of all track (as of December 31, 1931)—20.19%. 2. Physical property as measured by cost of reproduction less depreciation (as of December 31, 1931)—13.84%. 3. Car and locomotive miles (average for five years ending with 1931)—19.90%. 4. Ton and passenger miles (average for five years ending with 1931)—18.65%. 5. Gross earnings (average for five years ending with 1931)—18.45%; the amount assigned to North Dakota was found by adding to the intrastate revenue earned in that State its mileage proportion of revenue derived from traffic moving partly within and partly outside her boundaries. The average of these percentages is 18.206%.

The principal grounds on which petitioner assails the board's apportionment are: Petitioner's railroad in North Dakota consists largely of relatively cheaper branch lines.

The most valuable terminals and costly construction are in other States and, while these include little mileage, they contribute as much to system value in proportion to cost as do the cheaper stretches of the road where the same investment is spread over much greater mileage.

The problem of apportionment is a difficult one. It is impossible to formulate a rule generally applicable. Controlling conditions vary greatly from time to time. Allocations to be sufficiently accurate for practical purposes must be arrived at by the exercise of sound judgment based on facts that fairly reflect the relation between value of the system as a whole and value of the part within a State. *Rowley* v. *Chicago & N. W. Ry., supra,* 109, 110.

The methods proposed by petitioner discredit its objections to the apportionment made by the board. While the board had the 1933 assessment under consideration, petitioner submitted to it a brief in which it proposed two methods of apportionment. One was by use of the above described factors 1, 3, 4 and 5, and the other by use of 3, 4 and 5, producing, respectively, as calculated by petitioner, 19.35% and 19.14%. These percentages are higher than the average of those that petitioner says the board used. There is no evidence that the assessment was arrived at by use of apportioning percentages higher than those then used by petitioner.

Petitioner's bill suggests a method of apportionment that would assign to North Dakota less than 12½% of system value. Briefly, the method is this: To the revenue derived from North Dakota intrastate traffic add a part of the revenue received from the interstate moving in North Dakota that is equal to its proportion of the property used in, and the cost of, carrying that traffic; deduct the operating expenses incurred in moving it from the total revenue. The relation of the state net earnings so found to the net for the system will be the same as that existing between North Dakota value and system value. As petitioner gives this method scant, if any, support here and as it was rejected by the lower courts, we need not consider it. *United States* v. *State Investment Co.,* 264 U. S. 206, 211. *Texas & N. O. R. Co.* v. *Railway Clerks,* 281 U. S. 548, 558. *United States* v. *Commercial Credit Co.,* 286 U. S. 63, 67.

And here petitioner argues that the apportionment should be made on the basis of physical property, i. e. factor 2 above described. That would assign to North Dakota less than 15% of the system value. Petitioner did not submit it to the board as the measure or even include it in the group of factors upon which it based the calculations included in its brief. It is not sustained by evidence.

When regard is had to the size of the Great Northern system and the variety of things that affect values to be attributed to its railroad in different States, and the numerous matters as to which there may be wide difference of opinion, it must be held that percentages lower than, or substantially the same as, those petitioner itself used and submitted to the board are not confiscatory or arbitrary. *Helvering* v. *Taylor,* 293 U. S. 507, has no bearing.

3. There remains to consider whether the assessment may be sustained against petitioner's claim that, assuming validity of apportionment, the valuation was arbitrarily made and is grossly excessive.

No testimony was given by the tax commissioner or any other member of the board. They could not be compelled to submit to examination as to the operation of their minds in making the challenged assessment. *Chicago, B. & Q. Ry. Co.* v. *Babcock,* 204 U. S. 585, 593. *Bohler* v. *Callaway,* 267 U. S. 479, 491. It results that resort must be had to determinations of the board, findings of the lower courts, the evidence and the facts judicially known.

From the answer and evidence it unquestionably appears that the board valued petitioner's system and made apportionment to North Dakota. The assessments for the years 1929–1933 are: $83,294,677, $83,294,688, $82,999,997, $78,850,024 and $78,832,888. The trial judge found no overassessment for 1932 but refused to find the value of the property in 1933 or whether the assessment for that year was excessive; and he found that there is no evidence, other than that offered to show overvaluation, that the assessment was fraudulent or made with intent to defraud petitioner. The Circuit Court of Appeals held that petitioner failed to prove the method employed by the board to make the assessment or that it was grossly excessive and arbitrary.

Respondents' witness prepared tabulations which were put in evidence as Exhibit P. It shows: 1. The value for each year, based on averages for preceding five years, from 1929 to 1933, inclusive, of the system operating property as indicated by: (a) stock and bond value less value of non-operating property; (b) net operating income capitalized at six per cent; (c) the average of (a) and (b). 2. Apportionment of system value to North Dakota by percentages reflected by average of: (a) three use factors, i. e. transportation service, traffic units and gross operating revenue; (b) mileage of tracks operated and the three use factors; (c) mileage of tracks owned and operated and leased and operated and the three use factors; (d) mileage of track operated, physical property and the three use factors; (e) mileage of track operated, physical property, the three use factors and net revenue. 3. Apportionment to North Dakota of: (a) stock and bond value; (b) capitalized value; (c) average of (a) and (b). 4. The North Dakota assessments. Ratio of assessments to apportionments made on (a) stock and bond value; (b) capitalized value; (c) average of (a) and (b).[2]

The composite of the five year average of stock and bond value and of net operating income capitalized for 1932 was $415,278,961; admittedly that was produced by the use of the two methods shown by respondents' witness to be universally approved as the best methods for finding system value. The 1932 assessment is 99.93% of that figure apportioned on the basis of the three use fac-

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[2] Exhibit P need not be given in full. The following statement shows by years, 1929–1933, inclusive:

Column 1, system value according to average of stock and bond value and capitalized value.

Column 2, percentage of system value in North Dakota as reflected by the apportionment factors used in the exhibit.

Column 3, values apportioned to North Dakota according to average of stock and bond values and capitalized values.

Column 4, the North Dakota assessments.

Column 5, ratio of assessments to assigned values on the basis of stock and bond values.

Column 6, ratio of assessments to assigned values on the basis of capitalized values.

Column 7, ratio of assessments to assigned values on the basis of composite of both.

	1	2	3	4	5	6	7
Apportionment to North Dakota on basis of three use factors, i. e., transportation service, traffic units and gross operating revenue.							
1929	$437, 789, 980	18. 826%	$82, 418, 342	$83, 294, 677	112. 09%	92. 01%	101. 06%
1930	460, 989, 128	18. 80	86, 665, 956	83, 294, 688	107. 12	87. 15	96. 11
1931	455, 777, 674	18. 853	85, 927, 765	82, 999, 997	103. 73	90. 37	96. 59
1932	415, 278, 961	19. 00	78, 903, 003	78, 850, 024	102. 36	97. 62	99. 93
1933	345, 188, 820	19. 14	66, 069, 140	78, 832, 888	114. 95	124. 03	119. 32
Apportionment to North Dakota on basis of trackage operated and the three use factors.							
1929	437, 789, 980	19. 113	83, 674, 799	83, 294, 677	110. 40	90. 63	99. 55
1930	460, 989, 128	19. 148	88, 270, 198	83, 294, 688	105. 17	85. 57	94. 36
1931	455, 777, 674	19. 185	87, 440, 947	82, 999, 997	101. 94	88. 81	94. 92
1932	415, 278, 961	19. 298	80, 140, 534	78, 850, 024	100. 78	96. 11	98. 39
1933	345, 188, 820	19. 345	66, 776, 777	78, 832, 888	113. 73	122. 71	118. 05
Apportionment to North Dakota on basis of mileage of tracks owned and operated and leased and operated and the three use factors.							
1929	437, 789, 980	19. 59	85, 763, 057	83, 294, 677	107. 72	88. 42	97. 12
1930	460, 989, 128	19. 632	90, 501, 386	83, 294, 688	102. 58	83. 46	92. 04

(Continued on next page.)

tors, 98.39% apportioned on the basis of track mileage operated and three use factors; 96.02% apportioned on tracks owned and operated and leased and operated and the three use factors, 104.29% apportioned on track mileage, physical property and the three use factors; 101.40% apportioned on track operated, physical property, three use factors and net revenue.

If the system value for 1933 had been computed on the basis of the stock and bond and capitalized income methods used for 1932, it would have been $345,188,820, about 83% of the corresponding figure for 1932, less than 76% of like figures for 1931 and 1930 and about 79% of that for 1929. See footnote 2. The 1933 assessment exceeds what would have been made on system valuation based on the five-year average of stock and bond values, apportioned by use of the five factors above described (advocated by the State as "the fairest basis of allocation") by 19.97%, exceeds that based on net operating income capitalized by 29.44%, on the composite of both by 24.52%. The testimony and computations made by respondents' witness show that the 1933 assessment could not have

	1	2	3	4	5	6	7
Apportionment to North Dakota on basis of mileage of tracks owned and operated and leased and operated and the three use factors—Continued.							
1931	455,777,674	19.673	89,665,142	82,999,997	99.41	86.60	92.57
1932	415,278,961	19.775	82,121,415	78,850,024	98.35	93.79	96.02
1933	345,188,820	19.812	68,388,809	78,832,888	111.05	119.82	115.27
Apportionment to North Dakota on basis of trackage operated, physical property and the three use factors.							
1929	437,789,980	18.05	79,021,091	83,294,677	116.91	95.97	105.41
1930	460,989,128	18.102	83,448,252	83,294,688	111.25	90.51	99.82
1931	455,777,674	18.136	82,659,839	82,999,997	107.84	93.94	100.41
1932	415,278,961	18.206	75,605,688	78,850,024	106.82	101.88	104.29
1933	345,188,820	18.34	63,307,629	78,832,888	119.97	129.44	124.52
Apportionment to North Dakota on basis of trackage operated, physical property, the three use factors and net revenue.							
1929	437,789,980	18.783	82,230,092	83,294,677	112.34	92.22	101.29
1930	460,989,128	18.773	86,541,489	83,294,688	107.27	87.28	96.25
1931	455,777,674	18.710	85,276,003	82,999,997	104.53	91.06	97.33
1932	415,278,961	18.725	77,760,985	78,850,024	103.86	99.05	101.40
1933	345,188,820	18.763	64,767,778	78,832,888	117.26	126.52	121.72

been arrived at by any calculation based on the principles and methods governing the tax commissioner in his computations submitted to the board through a period of years and constituting the controlling bases of the assessments made by it. The five-year average of the composite of the stock and bond and capitalized income values, held by all to be the best method, produced for 1932 a valuation within one-sixth of one per cent. of the assessment for that year. The board arbitrarily adopted that assessment, less value of a short stretch of track removed, as the assessment for 1933. If the assessment for that year had been based on the principles governing in 1932 and preceding years, it would have been less by about $13,000,000 than the amount fixed by the board and here in controversy.

The long period through which, even in 1933, the depression had extended compelled the conclusion that it was not temporary. Judicial notice must be taken of the fact that late in 1929 there occurred a great collapse of values of all classes of property—railroads, other utilities, commodities and securities, and that the depression then commenced progressively became greater. In making assessments in that period, the board was bound to take into account and give due weight to the sudden, progressive and enormous declines of value.

Respondents' witness testified: The purchasing power of money greatly increased and correspondingly values decreased from 1929 to 1933. The Dow-Jones & Company average of 30 industrial stocks fell from 383.17 in September, 1929, to 41.22 in July, 1932. The average of 20 railroad stocks fell between the same dates from 189.11 to 13.23; total market value of all common and preferred stocks listed on the New York Stock Exchange fell from eighty-nine and one-half billion to fifteen and one-half billion dollars. Assessing officials and equalizing boards were confronted with a very difficult situation.

"Values which had been more or less stable for a generation have melted rapidly away. If all assessments had been reduced to conform to actual market value, the State and its subdivisions would have ceased to function, as the revenue would not even approximate necessary expenses."

Changed business conditions affecting petitioner's traffic, coupled with competition from new methods of transportation, precluded belief that prospective improvement in petitioner's business and earnings would within a reasonable time, if ever, be sufficient to justify the assessment in question. Cf. *Nashville, C. & St. L. Ry.* v. *Walters,* 294 U. S. 405, 423. But from 1929 to and including 1933 the board reduced assessments of petitioner's North Dakota railroad properties by less than six per cent. It is everywhere known that the general decline in values in that period was very much greater than that. The evidence conclusively shows that the value of petitioner's system and of its North Dakota railroad properties declined several times six per cent. Its traffic, gross earnings and net income from operation fell off enormously.[3] The 1929 collapse and the decline progressively following it resulted in much lower levels of prices and values which at least as early as 1933 were to be regarded

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[3] The tabulation follows:

Year	*Railway Operating Revenue*	*Net Railway Operating Income*
1922	$103,452,937	$17,276,598
1923	120,077,771	24,731,992
1924	110,243,104	24,201,287
1925	114,924,960	28,276,183
1926	117,383,909	31,280,429
1927	117,904,005	29,202,540
1928	126,737,091	31,294,069
1929	125,932,808	32,457,523
1930	104,996,076	21,912,508
1931	77,087,454	12,669,420
1932	55,549,247	1,290,551

not as temporary but as at least relatively permanent. *Atchison, T. & S. F. Ry. Co.* v. *United States,* 284 U. S. 248, 260–261. *Los Angeles Gas Co.* v. *Railroad Comm'n,* 289 U. S. 287, 311–312.

In cases such as this, courts are not permitted to weigh evidence of value. They may not substitute their opinions for the findings of assessing officers or boards. But, when the jurisdiction of the district court is appropriately invoked, it is its duty to decide upon the merits of the taxpayer's claim that the assessment of his property was arbitrarily made and is grossly excessive. It clearly appears that the board failed to give reasonable weight to the falling off of petitioner's traffic, gross earnings, operating income, the extraordinary shrinkage in values of railroad properties, the prices of commodities and securities generally. The value of petitioner's property varied with the profitableness of its use, present and prospective. *Cleveland, C., C. & St. L. Ry. Co.* v. *Backus,* 154 U. S. 439, 445. *Southern Ry. Co.* v. *Kentucky,* 274 U. S. 76, 81–82. Petitioner's system net operating income was for 1929 in round figures $32,457,000; in the following years $21,912,000, $12,669,000, $1,290,000. The board persistently disregarded known conditions essential to the just ascertainment of value. While the vanishing of values described by respondents' witness, the reduction of the tax base from 75% to 50%, and the established limitations upon rates of taxation, justify diligence on the part of the assessing authorities that taxable property be assessed at full value, neither these nor any other conditions warrant or excuse arbitrary or excessive valuations.

The facts alleged in respondents' answer, and those shown by the testimony of their witness and his computations above described, compel the conclusion that, by reason of changed conditions affecting value, the methods or system by which the board arrived at the 1933 value of petitioner's railway as a whole were plainly calculated to produce a grossly excessive assessment of its North Dakota property for that year. That assessment being shown to have been arbitrarily made and grossly excessive, petitioner's right to relief was not conditioned upon overassessment or upon its submission to overtaxation in 1932 or any prior year. It follows that the lower courts erred in holding that petitioner was not entitled to any relief. The evidence persuasively supports petitioner's claim that by reason of system overvaluation the North Dakota assessment was too high by $15,000,000. And, resolving all doubts in favor of validity, the evidence must be held conclusively to show that the challenged assessment exceeds the true and full value of petitioner's North Dakota railroad properties in 1933 by $10,000,000. See footnote 2. The board's failure to consider the enormous diminution in value of petitioner's property caused by the 1929 collapse and the progress of the depression is, within the principles of our decisions, the equivalent in law of intention to make a grossly excessive assessment for 1933 in disregard of petitioner's rights under the due process clause of the Fourteenth Amendment. We need not consider whether the assessment is repugnant to the equal protection or commerce clause. Unquestionably, the assessment was made in plain violation of established principles that govern property valuation. *Fargo* v. *Hart,* 193 U. S. 490, 502. *Rowley* v. *Chicago & N. W. Ry., supra,* 109–110. *Southwestern Bell Tel. Co.* v. *Public Service Comm'n,* 262 U. S. 276, 287–288. *Bluefield Waterworks Co.* v. *Public Service Comm'n,* 262 U. S. 679, 692. *McCardle* v. *Indianapolis Water Co.,* 272 U. S. 400, 408–412. *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312.

The judgment of the Circuit Court of Appeals will be reversed. The case will be remanded to the district court with directions to enter a decree for petitioner, the plaintiff below, that respondents, the defendants below, be enjoined from collecting on account of the taxes levied against petitioner on the basis or because of the challenged assessment any amount in excess of such proportion of the taxes levied as the value above indicated, $68,832,888, is to the assessment, $78,832,888, being 87.3149+%; the injunction will be conditioned upon payment by petitioner of that proportion of the taxes. And the decree shall declare that it is without prejudice to the authority of the state board of equalization, if any it has, again to assess petitioner's properties for 1933.

Reversed.

MR. JUSTICE STONE, dissenting.

I think the judgment should be affirmed.

The decision of the Court turns on the constitutionality of the valuation, for 1933 taxation, of so much of petitioner's railroad as is located in North Dakota.

The Court finds that the valuation of the railroad within the state is not so disproportionate to the value of petitioner's entire railroad system as to transcend due process. See *Fargo* v. *Hart,* 193 U. S. 490, 500; compare *Rowley* v. *Chicago & Northwestern Ry.,* 293 U. S. 102, 109–111. It does not find, and there is no contention, that there has been any discrimination in the valuation of petitioner's property as compared with that of other property in the state. Its decision that the tax is invalid rests on the single ground that the valuation is excessive.

This conclusion is based on an elaborate examination of the evidence produced before the trial court, evidence which it is assumed affords the only basis for the valuation of the Board of Equalization. Emphasizing as the important, if not controlling factors, in determining taxable value, the depressed market value of the securities of the entire railroad, representing its property in many states, its diminished earnings, its capitalized value based on what it considers, for this purpose, a fair rate of return, the Court concludes that, as prices of securities and earnings were much lower in 1933 than in 1932 and earlier years, the valuation of the railroad property in North Dakota for that year should have been correspondingly reduced. And because the decline in value found by this formula is substantial, something like 20%, and as the Board placed the same valuation on the property in 1933 as in 1932, it is declared that the valuation is so arbitrary as to make any tax based upon it a violation of due process.

We may lay aside any consideration of the numerous uncertain and imponderable elements involved in valuation of a railroad which may well make the use of such a formula untrustworthy in times like the present, see *Rowley* v. *Chicago & Northwestern Ry., supra,* 109; which would seem to make it impossible for a court to say that the rejection of the results of such a formula by the taxing officials involved anything more than the exercise of an authorized judgment, which courts cannot pronounce arbitrary merely because it does not conform to their own.

The feature of the decision which is especially a matter of concern is that for the first time this Court is setting aside a tax as a violation of the Fourteenth Amendment on the ground that the assessment on which it is computed is too high, without any showing that the assessment is discriminatory or that petitioner is in any way bearing an undue share of the tax burden imposed on all property owners in the state.

Assessment for taxation is a quasi-judicial act and the tax assessment has the quality of a judgment. *Hagar* v. *Reclamation District,* 111 U. S. 701, 709; *Gallup* v. *Schmidt,* 183 U. S. 300; *Londoner* v. *Denver,* 210 U. S. 373, 386; *Turner* v. *Wade,* 254 U. S. 64. Even if the valuation of the Board be erroneous, the errors of a state judicial officer, however gross, whether of law or of fact, are not violations of the Constitution and are not open to review in the federal courts merely because they are errors. If overvaluation, even though gross or intentional, were, without more, held to infringe the Fourteenth Amendment, every taxpayer would be at liberty to ask the federal courts to review a state tax assessment upon the bare allegation that it is grossly excessive, and without showing that it does more than subject him to taxation on the same basis as every other taxpayer.

It has long been recognized that discrimination between taxpayers, if intentional or so persistent as to be systematic, is a denial of equal protection, whether the discrimination is in the application of different rates to property in the same class or in inequality in its valuation. *Iowa-Des Moines Bank* v. *Bennett,* 284 U. S. 239, 245; *Cumberland Coal Co.* v. *Board of Review,* 284 U. S. 23, 25ff; *Chicago G. W. Ry. Co.* v. *Kendall,* 266 U. S. 94, 98, 99; *Sioux City Bridge Co.* v. *Dakota County,* 260 U. S. 441, 445; *Raymond* v. *Chicago Traction Co.,* 207 U. S. 20, 37. But to hold that a tax is unconstitutional because based upon an assessment which is too high, as compared with the value of the same property for purposes of condemnation, overlooks the principle upon which property taxes are laid and collected. Taxation is but a method of raising revenue to defray the expenses of government, and of distributing the burden among those who must bear it. The taxpayer cannot complain of the tax burden which he has to bear, who shows no inequality in the application of it. And plainly he does not show inequality merely by proving that the valuation of his property for taxation is much higher than its market or its condemnation value.

The burden of a property tax like the present is distributed by applying a rate of tax to the assessed valuation of all taxable property. Variation of either, without discrimination, affects the amount of the tax but not the equality of its distribution. The activities and expenses of government, over which the state has plenary control, do not cease in time of depression. They may increase. The state may meet those expenses by raising the valuation of taxable property, or by raising tax rates, or both, without infringing any constitutional immunity. Here the state, so far as appears, is raising the needed revenue and distributing the burden as in previous years, by continuing old valuations. However high those valuations may be, if not discriminatory, they impose no unequal share of the tax burden on petitioner and cannot be said to be arbitrary or oppressive in the constitutional sense.

Recently we held that a claim that the rate of a nondiscriminatory tax is excessively high presents no constitutional question. *Magnano Co.* v. *Hamilton,* 292 U. S. 40, 44. No reason has been advanced at the bar, or given in the opinion of the Court, why a tax valuation, excessive when compared with condemnation or market value, should have any different legal consequences. In neither case is inequality of the tax burden established. It is for that reason that this Court has held, without exception, that valuation of property for tax purposes, however excessive, not shown to be discriminatory, infringes no constitutional immunity. *Rowley* v. *Chicago & N. W. Ry., supra,* 111; *Southern Ry. Co.* v. *Watts,* 260 U. S. 519, 526; and see *Cumberland Coal Co.* v. *Board of Review,* 284 U. S. 23, 25ff; *Sunday Lake Iron Co.* v. *Wakefield,* 247 U. S. 350.

Cases setting aside an excessive allocation of railroad system value to the taxing state, *Fargo* v. *Hart, supra; Rowley* v. *Chicago & Northwestern Ry., supra,* or setting aside improper valuation made for purposes of condemning property, *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, or for determining whether public utility rates are confiscatory, *Southwestern Bell Telephone*

Co. v. *Public Service Comm'n*, 262 U. S. 276, 287, 288; *Bluefield Waterworks Co.* v. *Public Service Comm'n*, 262 U. S. 679, 692; *McCardle* v. *Indianapolis Water Co.*, 272 U. S. 400, 408, 412, do not support the decision now made. In such cases the complainant, because the valuation is too high or too low, suffers a harm from which the Constitution guarantees immunity. But the Constitution guarantees no immunity from taxation even though the tax, because of its amount, may be burdensome, see *Magnano Co.* v. *Hamilton, supra,* or because it is as high in a year of depression and falling property values as in years of prosperity. Beyond this, petitioner does not show that it is harmed, or present any case for invoking the protection of the Constitution.

Mr. Justice Brandeis and Mr. Justice Cardozo join in this opinion.

UNITED STATES *v.* ATKINSON.

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

No. 265. Argued January 8, 1936.—Decided February 3, 1936.

In the absence of exceptional circumstances, error in a jury trial, which was not brought to the attention of the court by proper exception or request to charge, will not be considered on appeal. P. 159.

76 F. (2d) 564, affirmed.

Certiorari, 296 U. S. 559, to review a judgment affirming a judgment against the United States in an action on a policy of converted war risk insurance.

Mr. Will G. Beardslee, with whom *Solicitor General Reed* and *Messrs. Wilbur C. Pickett, Fendall Marbury,* and *W. Marvin Smith* were on the brief, for the United States.

Mr. Warren E. Miller, with whom *Mr. A. H. Culwell* was on the brief, for respondent.

Mr. Justice Stone delivered the opinion of the Court.

This case was brought here on certiorari to review a determination of the Court of Appeals for the Fifth Circuit, said to be inconsistent with our decision in *Miller* v. *United States,* 294 U. S. 435. The challenged holding is that there is statutory authority for including in contracts of United States government insurance (converted war risk insurance) covering death or total permanent disability a provision that "the permanent loss of hearing of both ears . . . shall be deemed to be total disability." The case was tried in the district court to a jury which rendered a verdict for the plaintiff, respondent here. Judgment in his favor was affirmed by the Circuit Court of Appeals for the Fifth Circuit, 76 F. (2d) 564, which held that the insertion in the policy of the quoted definition of total disability, pursuant to Veterans' Administration Regulation, § 3122, was authorized by 43 Stat. 624, 1309, 38 U. S. C., § 512.[1]

The government, by its assignment of errors here, assails, as it did in the court below, the correctness of

[1] "§ 512. Not later than July 2, 1926, all term insurance held by persons who were in the military service after April 6, 1917, shall be converted, without medical examination, into such form or forms of insurance as may be prescribed by regulations and as the insured may request. Regulations shall provide for the right to convert into ordinary life, twenty-payment life, endowment maturing at age sixty-two, and into other usual forms of insurance, . . . Provisions for maturity at certain ages, for continuous installments during the life of the insured or beneficiaries, or both, for cash, loan, paid up and extended values, dividends from gains and savings, and such other provisions for the protection and advantage of and for alternative benefits to the insured and the beneficiaries as may be found to be reasonable and practicable, may be provided for in the contract of insurance, or from time to time by regulations. . . ."

this ruling, but examination of the record discloses that no such objection was presented to the trial court. In consequence the government is precluded from raising the question on appeal.

The trial judge instructed the jury that respondent might recover either on the theory that his loss of hearing constituted in fact a permanent disability preventing his pursuit of any substantially gainful occupation, or that his loss of hearing of both ears, if permanent, was a permanent disability as defined by the policy. The jury was thus left free to return a verdict for respondent if it found that he had suffered permanent loss of hearing of both ears, regardless of its effect upon his ability to earn his livelihood. The government failed to question the correctness of these instructions either by exception or request to charge, and its motion for a directed verdict was upon other grounds not now material.

The verdict of a jury will not ordinarily be set aside for error not brought to the attention of the trial court. This practice is founded upon considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact. *Beaver* v. *Taylor,* 93 U. S. 46; *Allis* v. *United States,* 155 U. S. 117, 122, 123; *United States* v. *United States Fidelity & Guaranty Co.,* 236 U. S. 512, 529; *Guerini Stone Co.* v. *Carlin Construction Co.,* 248 U. S. 334, 348; *Pennsylvania R. Co.* v. *Minds,* 250 U. S. 368, 375; *Burns* v. *United States,* 274 U. S. 328, 336; see *Shannon* v. *Shaffer Oil & Refining Co.,* 51 F. (2d) 878, 880. It is substantially that adopted by Rule 10, Subdivision 1, of the rules of the Court of Appeals for the Fifth Circuit, which requires the party excepting to the charge "to state distinctly the several matters of law" to which he excepts, and directs that "those matters of law, and those only, shall be inserted in the bill of exceptions."

In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings. See *New York Central R. Co.* v. *Johnson,* 279 U. S. 310, 318; *Brasfield* v. *United States,* 272 U. S. 448, 450. But no such case is presented here. The judgment must be affirmed for the reason that the error assigned was not made the subject of appropriate exception or request to charge upon the trial.

Affirmed.

MEYER ET AL. *v.* KENMORE GRANVILLE HOTEL CO. ET AL.

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

Nos. 375 and 376. Argued January 16, 1936.—Decided February 3, 1936.

1. An order of the District Court denying a petition which prays dismissal of a proceeding to reorganize a corporation under § 77B of the Bankruptcy Act, and incidentally for the recall of an injunction restraining creditors in that proceeding, is not appealable to the Circuit Court of Appeals as of right but only by leave of that court. Bankruptcy Act, §§ 77B (k), 24, and 25. P. 162.
2. An order of the District Court confirming a plan of reorganization under § 77B of the Bankruptcy Act, is not appealable to the Circuit Court of Appeals as of right but only by leave of that court. P. 165.

77 F. (2d) 1004; 78 F. (2d) 1018, affirmed.

CERTIORARI, 296 U. S. 565, to review orders of the Circuit Court of Appeals dismissing two appeals, and an order denying a petition to appeal, from orders of the District Court in reorganization proceedings under § 77B of the Bankruptcy Act.

Mr. Meyer Abrams, with whom *Mr. Max Shulman* was on the brief, for petitioners.

Mr. Isaac E. Ferguson, with whom *Mr. Arthur M. Cox* was on the brief, for respondents.

MR. JUSTICE STONE delivered the opinion of the Court.

Certiorari was granted in these cases as companion cases to *St. Louis Can Co.* v. *General American Life Insurance Co.,* 77 F. (2d) 598 (C. C. A. 8th), in which certiorari was granted on the same day, to resolve questions as to the mode of appeal from certain orders entered by a district court in the course of a reorganization proceeding under § 77 B of the Bankruptcy Act, 48 Stat. 912, 11 U. S. C. 207. The writ in *St. Louis Can Co.* v. *General American Life Insurance Co.* was later dismissed by this Court on stipulation of the parties, 296 U. S. 660.

On February 4, 1935, an involuntary petition was filed in the district court for northern Illinois for reorganization of a corporate debtor. The debtor filed an answer admitting the essential allegations of the petition, and the district court found that the petition was filed in good faith, and ordered that it stand approved, and that creditors be restrained from asserting claims against the property of the debtor. After this order was entered the petitioner here filed a petition in the reorganization proceeding setting up that she owned some of the mortgage bonds to which the property of the debtor was subject; that subsequent to the petition for reorganization, but before it was approved, she had brought suit in the state courts against the debtor and others for an accounting, charging fraud in the issue and sale of the bonds and a fraudulent scheme to bring about a reorganization of the debtor to the detriment of the bondholders and to the advantage of the defendants in the suit. She prayed that the petition for reorganization be dismissed for want of good faith and of jurisdiction in the district court, and that the injunction be dissolved. The district court entered an order March 20, 1935, denying the petition. From this order it allowed an appeal to the Court of Appeals for the Seventh Circuit, which dismissed the appeal without opinion. The correctness of this ruling is presented in No. 375.

Meanwhile, the district court proceeded with hearings, in which petitioner took no part, on a proposed plan of reorganization. The plan, after certain modifications, was ultimately approved by 94% of the bondholders of one class and 95% of another, and, with further changes directed by the court, was confirmed by order entered May 20, 1935. The Court of Appeals dismissed without opinion petitioner's appeal from this order, allowed by the district court. And it denied petitioner's application for leave to appeal from the same order, on the ground that petitioner, who alone sought leave to appeal, had not objected to the plan in the bankruptcy court, and so was not in a position to challenge the plan on her own behalf or on that of bondholders who had objected. The correctness of these rulings of the Court of Appeals is presented in No. 376.

1. The question in No. 375 is whether the order of the district court denying the application to dismiss the proceeding brought under § 77 B and to dissolve the injunction generally restraining creditors, is, for purposes of appeal, the equivalent of "a judgment adjudging or refusing to adjudge the defendant a bankrupt," which by § 25 (a) of the Bankruptcy Act, 44 Stat. 665, 11 U. S. C. 48 (a), is appealable as of right to the court of appeals.

When § 77 B introduced into the Bankruptcy Act the proceeding for reorganization of a corporation, it was provided that the procedure to be followed in case reorganization were ordered should, so far as practicable, follow that already established by the Bankruptcy Act for liquidation proceedings. Section 77 B (k)[1] directs that the other sections of the Bankruptcy Act shall apply to proceedings under § 77 B, unless inconsistent with it, and that ". . . the date of the order approving the petition or answer under this section shall be taken to be the date of adjudication, and such order shall have the same consequence and effect as an order of adjudication."

The appeal provisions of §§ 24 and 25[2] of the Bankruptcy Act are thus made applicable to orders entered in the course of a reorganization proceeding, and an order approving or disapproving a petition for reorganization is made the equivalent, at least for purposes of an appeal under § 25 (a), of a judgment adjudging or refusing to

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[1] Section 77 B, sub-section (k):

". . . All other provisions of this title, except such as are inconsistent with the provisions of this section, shall apply to proceedings instituted under this section, whether or not an order to liquidate the estate has been entered. For the purposes of such application, provisions relating to 'bankrupts' shall be deemed to relate also to 'debtors'; 'bankruptcy proceedings' or 'proceedings in bankruptcy' shall be deemed to include proceedings under this section; the date of the order approving the petition or answer under this section shall be taken to be the date of adjudication, and such order shall have the same consequence and effect as an order of adjudication."

[2] Section 24:

"(a) The Supreme Court of the United States, the circuit courts of appeal of the United States, the Court of Appeals of the District of Columbia, and the supreme courts of the Territories, in vacation, in chambers and during their respective terms, . . . are invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases.

"(b) The several courts of appeal and the Court of Appeals of the District of Columbia shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law (and in matter of law and fact the matters specified in section 25 of this title) the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised by appeal and in adjudge the defendant a bankrupt. By § 24 (a) and (b) appeals in "proceedings" in bankruptcy, as distinguished from appeals in "controversies arising in bankruptcy," may be taken only on leave granted in the discretion of the appellate court, except that in the cases enumerated in § 25 (a), including, in clause (1), "a judgment adjudging or refusing to adjudge the defendant a bankrupt," an appeal may be taken as of right.

The petitioner appealed not from the order approving the reorganization, but from that denying her application to dismiss the reorganization proceedings. It is not contended that this order is one in a controversy arising in bankruptcy, appealable as of right under § 24 (a). See *Taylor* v. *Voss,* 271 U. S. 176, 181; *Harrison* v. *Chamberlin,* 271 U. S. 191; *Hewit* v. *Berlin Machine Works,* 194 U. S. 296, 299, 300. It is urged that it is the equivalent of an order approving a petition in a reorganization proceeding, which § 77 B (k) assimilates to an order of adjudication, appealable as of right. But an order refusing to set aside an adjudication of bankruptcy is not within § 25 (a) clause (1). This Court has held that an appeal can be taken from such an order only on leave of the appellate court, under § 24 (b). *Vallely* v. *Northern F. & M. Insurance Co.,* 254 U. S. 348. The present appeal from the order refusing to dismiss the reorganization

the form and manner of an appeal, except in the cases mentioned in said section 25 of this title to be allowed in the discretion of the appellate court."

Section 25 (a):

"Appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit courts of appeal of the United States and the Court of Appeals of the District of Columbia and to the supreme courts of the Territories in the following cases, to wit: (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of $500 or over. . . ."

proceedings does not stand on any different footing, and was rightly dismissed because taken without leave of the appellate court. *Humphrey* v. *Bankers Mortgage Co.*, 79 F. (2d) 345; *Vitagraph, Inc.* v. *St. Louis Properties Corp.*, 77 F. (2d) 590; *St. Louis Can Co.* v. *General American Life Insurance Co., supra; Credit Alliance Corp.* v. *Atlantic, Pacific & Gulf Refining Co.*, 77 F. (2d) 595; and see *Wilkerson* v. *Cooch*, 78 F. (2d) 311.

That part of petitioner's application to the district court which asked that the injunction restraining creditors be set aside does not present a "controversy arising in bankruptcy" as distinguished from a "proceeding" in bankruptcy. The relief from the restraining order which petitioner sought was but incidental to her assault on the order approving the petition, and raised no issue capable of litigation independently of the proceeding in the bankruptcy court. It related only to the due administration of the pending proceeding and so was a "proceeding" in bankruptcy, in which the allowance of an appeal is discretionary. See *Taylor* v. *Voss, supra; Harrison* v. *Chamberlin, supra*.

2. In No. 376 petitioner contends that the order of the district court approving the plan of reorganization corresponds to an order confirming or rejecting a composition with creditors, and that the latter, as was held in *United States ex rel. Adler* v. *Hammond*, 104 Fed. 862, is appealable as of right under § 25 as equivalent to an order "granting or denying a discharge." But we think it plain that an order confirming a plan of reorganization under § 77 B is not the equivalent of a judgment granting or denying a discharge, for, unlike confirmation of a composition, see § 14, 30 Stat. 550, 11 U. S. C., § 32 (c), it does not operate as a discharge. The release of the debtor in a reorganization proceeding is contingent upon the performance of its part of the reorganization plan. Section 77 B (h) commands the debtor and others to execute

the plan of reorganization, when confirmed, under the direction of the court, authorizes the court to make appropriate orders to that end, and provides that "upon the termination of the proceedings a final decree shall be entered," which "shall discharge the debtor from its debts and liabilities." Discharge is effected not by confirmation of the plan but by the final decree.

Confirmation of a plan of reorganization is but a step in the administration of the debtor's estate, and, for reasons already stated, is an order in a proceeding in bankruptcy rather than a controversy arising in bankruptcy proceedings, and appeal lies only in the discretion of the appellate court. See *Campbell* v. *Alleghany Corporation*, 75 F. (2d) 947, 955.

3. In the exercise of the discretion conferred upon it by § 24 (b) the court below denied the application for leave to appeal from the order of the district court confirming the plan of reorganization. Petitioner, who alone asked leave to appeal, made no objection to the plan. Her criticisms of the plan are not of a character to invite the exercise of the discretion of the court to examine them for the first time on appeal.

Affirmed.

MR. JUSTICE VAN DEVANTER took no part in the consideration or decision of these cases.

DISMUKE *v*. UNITED STATES.

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

No. 199. Argued January 7, 1936.—Decided February 3, 1936.

1. The District Court has jurisdiction under the Tucker Act of a claim to an annuity founded on § 8 (a) of the Civil Service Retirement Act of June 30, 1933. P. 169.
2. The declaration of that section that annuities shall be payable from the retirement fund, which by an earlier Act is "appropriated for the payment of annuities," amounts to no more than a direction that they shall be charged on the books of the Treasury to the appropriation made for their payment. It does not impair or restrict the obligation to pay. *Id.*
3. Claims for annuities payable under the Retirement Act are not claims for pensions or for salary or for compensation for services, within the meaning of the prohibition of the Tucker Act excluding claims of those descriptions from the jurisdiction it confers upon the District Courts. P. 170.
4. An administrative decision rejecting, on a pure question of law, a claim for an annuity under § 8 (a) of the Retirement Act, *supra*, *held* open to review by the District Court in a suit by the claimant under the Tucker Act. P. 171.
5. In creating claims against itself, the United States may limit claimants to an administrative remedy; but in the absence of compelling language, resort to the courts to assert the right created will be deemed to be curtailed only so far as authority to decide is given to the administrative officer; and, in the absence of plain command the power of the officer will not be deemed to extend to the denial of that which the statute allows as a right and to which, upon the facts found or admitted by such officer, the claimant is entitled. P. 172.
6. A field deputy United States marshal, during the period 1895–1902, was not an employee of the United States within the meaning of the Retirement Act, *supra*. P. 173.

76 F. (2d) 715, affirmed.

Certiorari, 296 U. S. 554, to review the reversal of a judgment recovered by Dismuke in the District Court in a suit under the Tucker Act.

Mr. W. A. Bootle, with whom *Mr. John J. McCreary* was on the brief, for petitioner.

Mr. Alexander Holtzoff, with whom *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Paul A. Sweeney* and *M. Leo Looney, Jr.,* were on the brief, for the United States.

Mr. Justice Stone delivered the opinion of the Court.

About June 30, 1933, petitioner filed a claim with the Administration of Veterans' Affairs for allowance of an annuity under the provisions of § 8 (a) of the Civil Service Retirement Act of June 16, 1933, 48 Stat. 283, 305, 5 U. S. C., § 692d, which authorizes payment of annuities, at a specified rate, under circumstances not now material, to retired government employees in the classified civil service who have rendered at least thirty years' service. His claim was rejected by the Director of Insurance, on the ground that his employment as a field deputy United States marshal from December 16, 1895 to April 30, 1902, which he had counted as a part of his thirty years' service, could not be so included, because field deputy marshals during that time were employees of the marshal appointing them, and not of the United States. Deducting this period, his total service was twenty-four years, which, if established in accordance with the provisions of the Act, would entitle him to an annuity at a lower rate, under § 7 of the Act of May 29, 1930, 46 Stat. 468, 474, 5 U. S. C., § 697a. On appeal the Board of Veterans' Appeals denied petitioner's application for the same reason.

In the present suit, brought in the district court under the Tucker Act, to recover accrued installments of the annuity based on the thirty-year period of service, and for a declaratory judgment establishing petitioner's right to such annuity, the court gave judgment for petitioner. The Court of Appeals for the Fifth Circuit reversed, 76 F. (2d) 715, holding that the district court was without jurisdiction because the Retirement Act must be construed as committing the adjudication of claims under it solely to administrative officers, to the exclusion of the courts. This Court granted certiorari in view of the public importance of the questions involved.

(1) The government urges that the district court was without jurisdiction to entertain the suit. The Tucker Act of March 3, 1887, 24 Stat. 505, as amended by § 24 of the Judicial Code, c. 231, 36 Stat. 1087, 1093, 28 U. S. C., § 41, permitting suits against the United States, confers on the district courts jurisdiction "concurrent with the Court of Claims of all claims not exceeding ten thousand dollars founded upon . . . any law of Congress or upon any regulation of an executive department or upon any contract, express or implied, with the Government of the United States. . . ."

Section 8 (a) of the Retirement Act declares that, under conditions specified, the employee "shall be entitled to an annuity payable from the civil-service retirement and disability fund." The provision is mandatory, expressed in terms of the right of the employee, which is inseparable from the correlative obligation of the employer, the United States. The present suit to recover the annuity is thus upon a claim "founded upon a law of Congress" and is within the jurisdiction conferred upon district courts, as are suits to recover sums of money which administrative officers are directed by Act of Congress to "pay" or "repay." *Medbury* v. *United States*, 173 U. S. 492; *McLean* v. *United States,* 226 U. S. 374; *United States* v. *Hvoslef,* 237 U. S. 1, and see *United States* v. *American Tobacco Co.,* 166 U. S. 468. The declaration that the annuities are payable from the retirement fund, which, by § 8 of the Act of May 22, 1920, 41 Stat. 618, is "appropriated for the payment of annuities," amounts to no more than a direction that they shall be charged on the books of the Treasury to the appropriation made for their payment. It does not impair or restrict the obligation to pay.

The Tucker Act declares that it shall not be construed as giving jurisdiction of "claims for pensions" or "of cases brought to recover fees, salary or compensation for services of officers of the United States." The government argues that the present suit must be either the one or the other. It does not press the contention that the annuities are "salary or compensation," which we think without merit, see *Retirement Board* v. *McGovern,* 316 Pa. 161; 174 Atl. 400, but it insists that the suit is brought to recover a pension. The proviso withholding jurisdiction of suits on claims for pensions was a part of the original Tucker Act, which became law March 3, 1887, long before the enactment of the Retirement Act of May 22, 1920, and at a time when the term "pensions" commonly referred to the gratuities paid by the government in recognition of past services in the Army or Navy. The annuities payable under the Retirement Act are not gratuities in that sense. The annuitant contributes to them by deductions from his salary or by actual payments into the fund, as in the present case, and the scheme of the Act is to provide for payment of annuities, in part at least from contributions by employees, in recognition both of their past services and of services to be performed.

The Act itself, in contradistinction to the numerous pension acts, see 38 U. S. C., does not refer to the annuities as pensions, and expressly excludes from the service to be counted, in determining the class to which the annuitant is to be assigned, the period for which the employee "elects to receive a pension under any law . . ." § 3, Act of May 22, 1920, 41 Stat. 615, 5 U. S. C.,

§ 707. We conclude that annuities payable under the Retirement Act are not pensions within the meaning of the Tucker Act and that suits against the government to recover them are within the jurisdiction of district courts, if not precluded, as the court below held they are, by the administrative provisions of the Retirement Act.

(2) Although the Retirement Act does not, in terms, forbid employees to assert in the courts rights acquired under it, the government insists that such restriction is to be implied from the administrative provisions of the Act. It points to the authority given the Commissioner of Pensions,[1] under direction of the Secretary of the Interior, to make rules and regulations for carrying the act into effect, § 17 of the Act of 1930, 46 Stat. 478, 5 U. S. C., § 707a, and to § 13 of the same Act, 5 U. S. C., § 703a, which prescribes the form of application for the annuity, the character of evidence to be presented in its support, and declares that upon receipt of satisfactory evidence the Commissioner of Pensions[1] shall forthwith adjudicate the claim of the applicant," and finally to the administrative appeals authorized by § 17. From this it is argued that the prescribed application to the Commissioner, his adjudication, and the appeal from his decision to departmental officials, afford an exclusive remedy which precludes any resort to the courts for the recovery of the annuity.

The United States is not, by the creation of claims against itself, bound to provide a remedy in the courts.

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[1] By Executive Order dated July 21, 1930, under § 1 of Act of July 3, 1930, 46 Stat. 1016, the functions of the Bureau of Pensions were transferred to the Veterans' Administration. By Executive Orders Nos. 6670 and 6731, dated respectively April 7, 1934, and June 5, 1934, under § 16 of Act of March 3, 1933, 47 Stat. 1517, and Order of the Civil Service Commission dated August 24, 1934, the administration of the Civil Service Retirement Act was transferred from the Veterans' Administration to the Civil Service Commission, effective as of September 1, 1934.

It may withhold all remedy or it may provide an administrative remedy and make it exclusive, however mistaken its exercise. See *United States* v. *Babcock,* 250 U. S. 328. But, in the absence of compelling language, resort to the courts to assert a right which the statute creates will be deemed to be curtailed only so far as authority to decide is given to the administrative officer. If the statutory benefit is to be allowed only in his discretion, the courts will not substitute their discretion for his. *Williamsport Wire Rope Co.* v. *United States,* 277 U. S. 551; *United States* v. *Atchison, T. & S. F. Ry. Co.,* 249 U. S. 451, 454; *Ness* v. *Fisher,* 223 U. S. 683. If he is authorized to determine questions of fact his decision must be accepted unless he exceeds his authority by making a determination which is arbitrary or capricious or unsupported by evidence, see *Silberschein* v. *United States,* 266 U. S. 221, 225; *United States* v. *Williams,* 278 U. S. 255, 257, 258; *Meadows* v. *United States,* 281 U. S. 271, 274; *Degge* v. *Hitchcock,* 229 U. S. 162, 171; or by failing to follow a procedure which satisfies elementary standards of fairness and reasonableness essential to the due conduct of the proceeding which Congress has authorized, *Lloyd Sabaudo Societa* v. *Elting,* 287 U. S. 329, 330, 331. But the power of the administrative officer will not, in the absence of a plain command, be deemed to extend to the denial of a right which the statute creates, and to which the claimant, upon facts found or admitted by the administrative officer, is entitled. *United States* v. *Laughlin,* 249 U. S. 440, 443; *United States* v. *Hvoslef, supra; McLean* v. *United States, supra,* 378; *Parish* v. *MacVeagh,* 214 U. S. 124; *Medbury* v. *United States, supra,* 497, 498; see *Bates & Guild Co.* v. *Payne,* 194 U. S. 106, 109, 110.

The Commissioner is required by § 13, "upon receipt of satisfactory evidence" of the character specified, "to adjudicate the claim." This does not authorize denial of a claim if the undisputed facts establish its validity as a matter of law, or preclude the courts from ascertaining whether the conceded facts do so establish it. The decisions of the Director of Insurance and the Board of Veterans' Appeals, and the stipulation of facts upon which the case was tried, show that the petitioner's claim for an annuity based on thirty years' service was rejected on the sole ground that his employment as a field deputy United States marshal could not be counted as service as an employee of the United States. The administrative decision thus turned upon a question of law, whether a field deputy marshal during the period from December 16, 1895 to December 30, 1902, was an employee of the United States. The administrative determination of that question is open to review in the present suit, and should have been considered and decided by the court below.

(3) We are of the opinion that a field deputy United States marshal from 1895 to 1902 was not an employee of the United States within the meaning of the Retirement Act. Before the Act of May 28, 1896, c. 252, 29 Stat. 140, 181, United States marshals were authorized to appoint deputy marshals, removable from office by the district judge or by the circuit court, R. S. § 780, who were to be paid a "proper" allowance, not to exceed three-fourths of the fees earned by them. R. S. § 841. Sections 9 and 10 of the Act of 1896 placed the marshal and office deputy marshals upon a salary basis, but § 11 authorized the marshal to appoint field deputy marshals to hold office during his pleasure unless sooner removed by the district courts, who should receive as compensation three-fourths of the fees, including mileage, earned by them. The status of a field deputy marshal under this legislation was therefore the same as that of all deputy marshals under the earlier Act. We regard the question whether such a field deputy marshal was an

employee of the government or of the marshal as settled by the decision and reasoning of this Court in *Douglas* v. *Wallace,* 161 U. S. 346, which held that, in view of the manner of a deputy marshal's appointment and payment, his claim for compensation had the status of that of a claim of an employee of the marshal, not of the government, and so was not affected by R. S., § 3477, declaring void any assignment of any interest in a claim against the United States. To the same effect are *United States* v. *McDonald,* 72 Fed. 898, 900; *Powell* v. *United States,* 60 Fed. 687; *Wintermute* v. *Smith,* 30 Fed. Cas. No. 17,897. This has been the administrative ruling since 1920, see Claim of George Taylor Larkin, recorded in 21 P. & R. D. 42. A construction of such long standing is not lightly to be overturned. See *United States* v. *Moore,* 95 U. S. 760, 763; *Logan* v. *Davis,* 233 U. S. 613, 627; *Maynard* v. *Elliott,* 283 U. S. 273; *Brewster* v. *Gage,* 280 U. S. 327, 336; *Fawcus Machine Co.* v. *United States,* 282 U. S. 375; *Interstate Commerce Comm'n* v. *New York, N. H. & H. R. Co.,* 287 U. S. 178; *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294, 315. Later legislation providing for payment of annuities to employees of the United States must be taken to have been adopted in the light of it.

Since the record does not disclose any administrative determination of petitioner's right to an annuity computed on the basis of twenty-four years service, the sole issue now presented is whether the decision that he was not entitled to the annuity calculated on the basis of thirty years' service was erroneous. The judgment of the court below must therefore be affirmed, but for reasons stated in this opinion and not those stated in the opinion of the court below.

Affirmed.

UNITED STATES *v.* CALIFORNIA.

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

No. 33. Argued January 16, 17, 1936.—Decided February 3, 1936.

1. Whether a transportation agency is a common carrier depends not upon its corporate character or declared purposes, but upon what it does. P. 181.
2. The State Belt Railroad, owned by the State of California and operated by it along the waterfront of San Francisco harbor, which receives all freight cars, loaded and empty, offered to it by railroads, industrial plants and steamships, with which it connects, and hauls them at a flat rate per car, the larger part of such traffic having its origin or destination in States other than California, is a common carrier engaged in interstate commerce. P. 182.
3. In operating a common-carrier railroad in interstate transportation, though the purpose be to facilitate the commerce of a port and the net proceeds be used in harbor improvement, a State acts in subordination to the power of Congress under the commerce clause. P. 183.
4. Even though the State, in the conduct of its railroad, be said to act in its "sovereign," distinguished from a "private," capacity, its sovereignty in that regard is necessarily diminished to the extent of the power granted by the Constitution to the Federal Government. P. 183.
5. The principle by which state instrumentalities are protected from federal taxation, and *vice versa,* is inapplicable by analogy as a limitation upon the federal power to regulate interstate commerce. P. 184.
6. The provisions of the Safety Appliance Act forbidding any common carrier engaged in interstate commerce by railroad to haul cars not equipped with couplers as prescribed, and penalizing infractions, include state-owned interstate rail carriers. P. 185.
7. The canon of construction that a sovereign is presumptively not intended to be bound by its own statute unless named in it, should not be extended so as to exempt from an Act of Congress a business plainly within its terms and purpose, merely because the business is carried on by a State. P. 186.
8. Congress may confer on inferior courts original jurisdiction of suits in which a State is a party. P. 187.

9. The inclusion of an earlier provision in the Judicial Code was not a reënactment. P. 187.

10. Section 6 of the Safety Appliance Act, as amended in 1896, provides that any common carrier, for each car hauled by it in violation of the Act, shall be liable to a penalty of $100, "to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed." Section 233, Jud. Code, originally enacted as part of the Judiciary Act of 1789, gave this Court "exclusive jurisdiction of all controversies of a civil nature where a State is a party," (with certain exceptions). Assuming that a suit to recover the penalty is a controversy of a civil nature, *held* that, with respect to such suits when brought against States, § 6 supplants § 233, and lodges jurisdiction in the district court of the locality. P. 187.

75 F. (2d) 41, reversed.

CERTIORARI, 296 U. S. 554, to review a judgment reversing a judgment for a penalty recovered by the United States against the State of California by suit in the District Court.

Assistant Solicitor General Bell, with whom *Solicitor General Reed, Assistant Attorney General Keenan,* and *Messrs. David V. Cahill, M. S. Huberman, Charles E. Wyzanski, Jr.,* and *Daniel W. Knowlton* were on the brief, for the United States.

The State of California in the operation of the state-owned State Belt Railroad is a common carrier engaged in interstate commerce by railroad. *United States* v. *Brooklyn Terminal Co.,* 249 U. S. 296, 304; *United States* v. *Union Stock Yard Co.,* 226 U. S. 286; *United States* v. *Sioux City Stock Yards Co.,* 162 Fed. 556; *Union Stockyards Co.* v. *United States,* 169 Fed. 404; *Belt Ry. Co.* v. *United States,* 168 Fed. 542; *United States* v. *Atlanta Terminal Co.,* 260 Fed. 779, cert. den., 251 U. S. 559; *McCallum* v. *United States,* 298 Fed. 373, cert. den., 266 U. S. 606; *Tilden* v. *United States,* 21 F. (2d) 967. Distinguishing: *Sherman* v. *United States,* 282 U. S. 25, The State is subject to the provisions of the Federal Safety Appliance Act. *United States* v. *Erie R. Co.,* 237 U. S. 402, 409; *St. Louis & I. M. Ry. Co.* v. *Taylor,* 210 U. S. 281, 294-296; *Chicago, B. & Q. R. Co.* v. *United States,* 220 U. S. 559; *Delk* v. *St. Louis & S. F. R. Co.,* 220 U. S. 580; California Canneries Co. *v.* Southern Pacific Co., 51 I. C. C. 500, 502–503; United States *v.* Belt Line R. Co., 56 I. C. C. 121; Texas State Railroad, 34 I. C. C. Val. Rep. 276; *United States* v. *New York Central R. Co.,* 272 U. S. 457, 461–462.

The power of the Federal Government to regulate state-owned railroads engaged in interstate commerce would seem beyond doubt. Cf. *Helvering* v. *Powers,* 293 U. S. 214 (operation of a street railway); *South Carolina* v. *United States,* 199 U. S. 437 (sale of liquor under a dispensary system); *Ohio* v. *Helvering,* 292 U. S. 360 (sale of liquor through state-owned stores); *Georgia* v. *Chattanooga,* 264 U. S. 472, 481; *United States* v. *Planters' Bank,* 9 Wheat. 904; *Bank of Kentucky* v. *Wister,* 2 Pet. 318, 323; *Curran* v. *Arkansas,* 15 How. 304, 308.

It is plain that a state-owned railroad would not be immune from the federal taxing power. So far as the commerce power is concerned it is not clear that any immunity is properly to be implied in favor of the States; but assuming that such immunity exists, it is manifestly no more extensive than the immunity from federal taxation. *Board of Trustees* v. *United States,* 289 U. S. 48, 59; *Southern Ry. Co.* v. *Railroad Commission,* 236 U. S. 439; *Gilvary* v. *Cuyahoga Valley Ry.,* 292 U. S. 57, 60–61.

Since the Federal Government clearly has the power to regulate state-owned railroads engaged in interstate commerce, no sound reason appears for excepting them from the operation of existing federal statutes. The Safety Appliance Act embraces *any* common carrier, The historical basis for the rule that a sovereign is not bound by a statute unless specifically named, clearly indicates that it has application only to the enacting sovereign. There is no reason to assume that Congress meant to distinguish between state and privately owned railroads. See *Southern Ry. Co.* v. *United States,* 222 U. S. 20, 27; *Mathewes* v. *Port Utilities Comm'n,* 32 F. (2d) 913.

"The judicial power," Constitution, Art. III, extends to suits by the United States against a State. *United States* v. *North Carolina,* 136 U. S. 211; *United States* v. *Texas,* 143 U. S. 621, 644, 645; 162 U. S. 1, 90; *United States* v. *Michigan,* 190 U. S. 379, 396; *Oklahoma* v. *Texas,* 258 U. S. 574, 581; *United States* v. *Minnesota,* 270 U. S. 181, 195; cf. *Monaco* v. *Mississippi,* 292 U. S. 313, 329; and Congress can vest jurisdiction of such cases in the inferior federal courts. *Ames* v. *Kansas,* 111 U. S. 449; *United States* v. *Louisiana,* 123 U. S. 32.

The Constitutional principle is the same whether the suit be brought with or without the consent of the State. This is shown by *Ames* v. *Kansas, supra,* where the State objected to having its suit removed. See also *Börs* v. *Preston,* 111 U. S. 252.

Mr. Ralph O. Marron, Deputy Attorney General of California, with whom *Mr. U. S. Webb,* Attorney General, was on the brief, for the State of California.

California is not a common carrier engaged in interstate commerce. *Kentucky & Indiana Bridge Co.* v. *Louisville & N. R. Co.,* 37 Fed. 567; *Sherman* v. *United States,* 282 U. S. 25.

The operation of the State Belt Railroad is the exercise of a governmental function. *Denning* v. *State,* 123 Cal. 316, 321, 322; *Sherman* v. *United States, supra.* Distinguishing *Helvering* v. *Powers,* 293 U. S. 214; *South Carolina* v. *United States,* 199 U. S. 437; *Ohio* v. *Helver-*

ing, 292 U. S. 360, as cases in which the States were acting in a proprietary capacity and to that extent were amenable to the federal taxing power. In order to subject a State to the federal taxing power it is necessary that the State be engaged in a private undertaking. *Georgia* v. *Chattanooga,* 264 U. S. 472, 481–482; *United States* v. *Planters' Bank,* 9 Wheat. 904; *Bank of Kentucky* v. *Wister,* 2 Pet. 318, 323; *Curran* v. *Arkansas,* 15 How. 304, 308.

The operation and control of port facilities is a sovereign function. *Commissioner* v. *Ten Eyck,* 76 F. (2d) 515.

Congress has no power to impose a penalty on a State when engaged in the discharge of a sovereign function. *McCulloch* v. *Maryland,* 4 Wheat. 316; *Robinson* v. *Sichel,* 127 U. S. 507, 515.

The Federal Act is not applicable since States are not specifically referred to therein. *Savings Bank* v. *United States,* 19 Wall. 227, 239; *New York* v. *Irving Trust Co.,* 288 U. S. 329, 331; *United States* v. *Herron,* 20 Wall. 251; *Guarantee Co.* v. *Title Guaranty Co.,* 224 U. S. 142; *In re Fowble,* 213 Fed. 676; *Villere* v. *United States,* 18 F. (2d) 409, cert. den., 275 U. S. 532; *United States* v. *Clausen,* 291 Fed. 231.

The venue of any action against the State by the United States must be in the Supreme Court of the United States. Const., Art. III, § 2; *Rhode Island* v. *Massachusetts,* 12 Pet. 657; *United States* v. *Texas,* 143 U. S. 621. The provision of Jud. Code, § 233, giving this Court exclusive jurisdiction over all controversies of a civil nature where a State is a party, was not impliedly repealed by the Safety Appliance Act. *Great Northern Ry. Co.* v. *United States,* 155 Fed. 945, aff'd 208 U. S. 452; *Gay* v. *Ruff,* 292 U. S. 25, 37; *Knapp* v. *Byram,* 21 F. (2d) 226, 227; *United States* v. *McIntosh,* 57 F. (2d) 573.

Mr. Justice Stone delivered the opinion of the Court.

This is a suit brought by the United States against the State of California in the District Court for northern California to recover the statutory penalty of $100 for violation of the federal Safety Appliance Act, § 2, Act of March 2, 1893, c. 196, 27 Stat. 531, 45 U. S. C. § 2, and § 6 of the Act as amended April 1, 1896, 29 Stat. 85, 45 U. S. C., § 6.[1]

The complaint alleges that California, in the operation of the state-owned State Belt Railroad, is a common carrier engaged in interstate transportation by railroad, and that it has violated the Safety Appliance Act by hauling over the road a car equipped with defective coupling apparatus. Upon the trial, without a jury, upon stipulated facts, the district court gave judgment for the United States. The Court of Appeals for the Ninth Circuit reversed, 75 F. (2d) 41, on the ground that as exclusive jurisdiction of suits to which a state is a party is conferred upon this Court by § 233 of the Judicial Code, 36 Stat. 1156, 28 U. S. C. 341, the district court was without

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[1] "Section 2. It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

"Section 6. Any common carrier engaged in interstate commerce by railroad using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the preceding provisions of this chapter, shall be liable to a penalty of $100 for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred: . . ."

jurisdiction of the cause. We granted certiorari to review the case as one involving questions of public importance, upon a petition of the government which urged that the state is a common carrier by railroad, subject to the Safety Appliance Act, and, under its provisions, to suit in the district court to recover penalties for violation of the Act.

In an earlier suit, *Sherman* v. *United States,* 282 U. S. 25, brought against the Board of State Harbor Commissioners, which supervises operation of the State Belt Railroad, to recover penalties for violation of the Act, this Court set aside the judgment of the district court for the government because the state had not been made a party.

1. Whether a transportation agency is a common carrier depends not upon its corporate character or declared purposes, but upon what it does. *United States* v. *Brooklyn Terminal,* 249 U. S. 296, 304. The State Belt Railroad is owned and operated by the state, see *Sherman* v. *United States, supra.* It parallels the water front of San Francisco harbor and extends onto some forty-five state-owned wharves. It serves directly about one hundred and seventy-five industrial plants, has track connection with one interstate railroad, and, by wharf connections with freight car ferries, links that and three other interstate rail carriers with freight yards in San Francisco leased to them by the state. It receives and transports from the one to the other, by its own engines, all freight cars, loaded and empty, and the freight they contain, offered to it by railroads, steamship companies and industrial plants. The larger part of this traffic has its origin or destination in states other than California. For the transportation service it makes a flat charge per car. It issues no bills of lading and is not a party to through rates. It moves the cars on instructions contained in "switch lists" made out by the delivering or receiving carrier, which pays the charge and absorbs it in its rate. The

charge on cars not delivered to or received from another carrier is paid by the industry concerned.

The Belt Railroad is thus a terminal railroad for the industries and carriers with which it connects, and it serves as a link in the through transportation of interstate freight shipped to or from points in San Francisco over the connecting carriers. Its service is of a public character, for hire, and does not differ in any salient feature from that which this Court, in *United States* v. *Brooklyn Terminal, supra,* 304, 305, held to be common carriage by rail in interstate commerce within the meaning of the federal Hours of Service Act, 34 Stat. 1415, 45 U. S. C., § 61.

The state insists that the facts that it maintains no freight station, issues no bills of lading, and is engaged only in moving cars for a flat rate instead of at a charge per hundred pounds of freight moved, distinguish the operation of its railroad from that of the Brooklyn Terminal. As the service involves transportation of the cars and their contents, the method of fixing the charge is unimportant. *Belt Railway of Chicago* v. *United States,* 168 Fed. 542, 544; see *United States* v. *Union Stock Yard & Transit Co.,* 226 U. S. 286, 299, 300. And while maintenance of a freight station and the issue of bills of lading may be embraced in the service of a common carrier, and a part of interstate commerce, see *United States* v. *Ferger,* 250 U. S. 199; *Atchison, T. & S. F. Ry. Co.* v. *United States,* 295 U. S. 193, they are not indispensable adjuncts to either where the subject of transportation, here cars loaded and empty, may be effected without.

All the essential elements of interstate rail transportation are present in the service rendered by the State Belt Railroad. They are the receipt and transportation, for the public, for hire, of cars moving in interstate commerce. See *United States* v. *Union Stock Yard & Transit Co., supra,* 299; *Union Stockyards Co.* v. *United*

States, 169 Fed. 404; *Belt Railway of Chicago* v. *United States, supra.* Its service, involving as it does the transportation of all carload freight moving in interstate commerce between the industries concerned and all railroad and steamship lines reaching the port, is of the same character, though wider in scope, as that held to be common carriage by rail in interstate commerce in the *Brooklyn Terminal* and the *Union Stockyard* cases. They abundantly support the conclusion that such is the service rendered by the state in the present case, a conclusion twice reached by the Court of Appeals for the Ninth Circuit, see *McCallum* v. *United States,* 298 Fed. 373; *Tilden* v. *United States,* 21 F. (2d) 967.

2. The state urges that it is not subject to the federal Safety Appliance Act. It is not denied that the omission charged would be a violation if by a privately-owned rail carrier in interstate commerce. But it is said that as the state is operating the railroad without profit, for the purpose of facilitating the commerce of the port, and is using the net proceeds of operation for harbor improvement, see *Sherman* v. *United States, supra, Denning* v. *State,* 123 Cal. 316, it is engaged in performing a public function in its sovereign capacity and for that reason cannot constitutionally be subjected to the provisions of the federal Act. In any case it is argued that the statute is not to be construed as applying to the state acting in that capacity.

Despite reliance upon the point both by the government and the state, we think it unimportant to say whether the state conducts its railroad in its "sovereign" or in its "private" capacity. That in operating its railroad it is acting within a power reserved to the states cannot be doubted. See *Puget Sound Power & Light Co.* v. *Seattle,* 291 U. S. 619, 624; *Green* v. *Frazier,* 253 U. S. 233; *Jones* v. *Portland,* 245 U. S. 217. The only question we need consider is whether the exercise of that power, in whatever capacity, must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution. The power of a state to fix intrastate railroad rates must yield to the power of the national government when their regulation is appropriate to the regulation of interstate commerce. *United States* v. *Louisiana,* 290 U. S. 70, 74, 75; *Wisconsin Railroad Comm'n* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563; *Shreveport Rate Cases,* 234 U. S. 342. A contract between a state and a rail carrier fixing intrastate rates is subject to regulation and control by Congress, acting within the commerce clause, *New York* v. *United States,* 257 U. S. 591, as are state agencies created to effect a public purpose, see *Sanitary District of Chicago* v. *United States,* 266 U. S. 405; *Board of Trustees* v. *United States,* 289 U. S. 48; see *Georgia* v. *Chattanooga,* 264 U. S. 472. In each case the power of the state is subordinate to the constitutional exercise of the granted federal power.

The analogy of the constitutional immunity of state instrumentalities from federal taxation, on which respondent relies, is not illuminating. That immunity is implied from the nature of our federal system and the relationship within it of state and national governments, and is equally a restriction on taxation by either of the instrumentalities of the other. Its nature requires that it be so construed as to allow to each government reasonable scope for its taxing power, see *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 522–524, which would be unduly curtailed if either by extending its activities could withdraw from the taxing power of the other subjects of taxation traditionally within it. *Helvering* v. *Powers,* 293 U. S. 214, 225; *Ohio* v. *Helvering,* 292 U. S. 360; *South Carolina* v. *United States,* 199 U. S. 437; see *Murray* v. *Wilson*

Distilling Co., 213 U. S. 151, 173, explaining *South Carolina* v. *United States, supra.* Hence we look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual.

California, by engaging in interstate commerce by rail, has subjected itself to the commerce power, and is liable for a violation of the Safety Appliance Act, as are other carriers, unless the statute is to be deemed inapplicable to state-owned railroads because it does not specifically mention them. The federal Safety Appliance Act is remedial, to protect employees and the public from injury because of defective railway appliances, *Swinson* v. *Chicago, St. Paul, M. & O. Ry. Co.,* 294 U. S. 529; *Fairport, P. & E. R. Co.,* v. *Meredith,* 292 U. S. 589, 594; *Johnson* v. *Southern Pacific Co.,* 196 U. S. 1, 17, and to safeguard interstate commerce itself from obstruction and injury due to defective appliances upon locomotives and cars used on the highways of interstate commerce, even though their individual use is wholly intrastate. *Southern Ry. Co.* v. *United States,* 222 U. S. 20; *Moore* v. *Chesapeake & Ohio Ry. Co.,* 291 U. S. 205, 214. The danger to be apprehended is as great and commerce may be equally impeded whether the defective appliance is used on a railroad which is state-owned or privately-owned. No convincing reason is advanced why interstate commerce and persons and property concerned in it should not receive the protection of the act whenever a state, as well as a privately-owned carrier, brings itself within the sweep of the statute, or why its all-embracing language should not be deemed to afford that protection.

In *Ohio* v. *Helvering, supra,* it was held that a state, upon engaging in the business, became subject to a federal statute imposing a tax on those dealing in intoxicating liquors, although states were not specifically mentioned in the statute. The same conclusion was reached in *South Carolina* v. *United States, supra;* and see *Helvering* v. *Powers, supra.* Similarly the Interstate Commerce Commission has regarded this and other state-owned interstate rail carriers as subject to its jurisdiction, although the Interstate Commerce Act does not in terms apply to state-owned rail carriers. See California Canneries Co. *v.* Southern Pacific Co., 51 I. C. C. 500, 502, 503; United States *v.* Belt Line R. Co., 56 I. C. C. 121; Texas State Railroad, 34 I. C. C. Val. R. 276.

Respondent invokes the canon of construction that a sovereign is presumptively not intended to be bound by its own statute unless named in it, see *Guarantee Title & Trust Co.* v. *Title Guaranty Co.,* 224 U. S. 152; *United States* v. *Herron,* 20 Wall. 251; *In re Fowble,* 213 Fed. 676. This rule has its historical basis in the English doctrine that the Crown is unaffected by acts of Parliament not specifically directed against it. *United States* v. *Herron, supra,* 255; *Dollar Savings Bank* v. *United States,* 19 Wall. 227, 239. The presumption is an aid to consistent construction of statutes of the enacting sovereign when their purpose is in doubt, but it does not require that the aim of a statute fairly to be inferred be disregarded because not explicitly stated. See *Baltimore National Bank* v. *State Tax Commission of Maryland,* decided this day, *post,* p. 209. We can perceive no reason for extending it so as to exempt a business carried on by a state from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action. Language and objectives so plain are not to be thwarted by resort to a rule of construction whose purpose is but to resolve doubts, and whose application in the circumstances would be highly artificial. It was disregarded in *Ohio* v. *Helvering, supra,* and *South Carolina* v. *United States, supra.* See *Heiner* v. *Colonial Trust Co.,* 275 U. S. 232, 234, 235.

3. The jurisdiction of the district court to entertain suits by the United States against a state under the Safety Appliance Act turns on the construction to be given to § 6 of the Act in the light of § 233 of the Judicial Code. Article III, § 2 of the Constitution extends the judicial power of the United States and the original jurisdiction of the Supreme Court to cases "in which a state shall be a party." See *United States* v. *West Virginia,* 295 U. S. 463, 470, and cases cited. But Congress may confer on inferior courts concurrent original jurisdiction of such suits. *Ames* v. *Kansas,* 111 U. S. 449, *United States* v. *Louisiana,* 123 U. S. 32; compare *Börs* v. *Preston,* 111 U. S. 252. Section 233 of the Judicial Code, 28 U. S. C., 341, originally enacted as § 13 of the Judiciary Act of 1789, 1 Stat. 80, became § 687 of the Revised Statutes, and was carried into the Judicial Code in 1911, 36 Stat. 1156. It gives to this Court "exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens or between a state and citizens of other states or aliens." The later enacted § 6 of the Safety Appliance Act, see *Smiley* v. *Holm,* 285 U. S. 355, provides that the penalty which it imposes is "to be recovered in a suit or suits to be brought . . . in the district court of the United States having jurisdiction in the locality where such violation shall have been committed. . . ."

If it be assumed that the present suit to recover the payment denominated a "penalty" by § 6 is a controversy of a civil nature, but see *Wisconsin* v. *Pelican Insurance Co.,* 127 U. S. 265; cf. *Milwaukee County* v. *M. E. White Co.,* 296 U. S. 268, it is by § 233 of the Judicial Code within the exclusive jurisdiction of this Court, unless that provision is supplanted with respect to suits such as the present by the provisions of § 6. Upon that assumption § 6 is in conflict with § 233 of the Judicial Code and supersedes it, *United States* v. *Yuginovich,* 256 U. S. 450, 463; *United States ex rel. Chandler* v. *Dodge County Comm'rs,* 110 U. S. 156; *United States* v. *Tynen,* 11 Wall. 88, 92, unless, again, the general language of § 6 is to be taken as not applying to suits brought against a state. Since the section which, as we have held, imposes the liability upon state- and privately-owned carriers alike, also provides the remedy and designates the manner and the court in which the remedy is to be pursued, we think the jurisdictional provisions are as applicable to suits brought to enforce the liability of states as to those against privately-owned carriers, and that the district court had jurisdiction.

If we lay aside possible doubts, whether the suit is of a "civil nature," in which case only does § 233 of the Judicial Code purport to make the jurisdiction of this Court exclusive, still, in construing the jurisdictional provisions of § 6 of the Safety Appliance Act practical convenience and "the tacit assumptions" upon which it is reasonable to suppose its language was used, see *Ohio ex rel. Popovici* v. *Agler,* 280 U. S. 379, 383, are not to be disregarded. The controversy in a suit authorized by § 6 is essentially local in character and involves issues for which a jury trial may be appropriate, compare *Georgia* v. *Brailsford,* 3 Dall. 1. Their adjudication often requires the presence, as witnesses, of railroad workers, shippers and others of the locality. These are considerations which undoubtedly led to the command that the suit should be brought in the district court of the "locality" where violations occur. They are considerations as applicable to suits against a state as to suits against a privately-owned railroad. The suggestion that it should be assumed that Congress did not intend to subject a sovereign state to the inconvenience and loss of dignity involved in a trial in a district court is not persuasive when weighed against the complete appropriateness of the court and venue selected for the trial of issues growing out of the particular activity in which the state has chosen to engage.

Reversed.

TREIGLE *v.* ACME HOMESTEAD ASSOCIATION.*

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

No. 287. Argued January 9, 1936.—Decided February 3, 1936.

Prior to the adoption of Act No. 140 of 1932 by the legislature of Louisiana, building and loan associations in that State were required, whenever the income ordinarily applicable to the demands of withdrawing members was insufficient to pay all such demands within sixty days from date of notice, to set apart fifty per cent. of the receipts of the association to pay such withdrawing members, and payments were to be made in the order of presentation of notices of withdrawal. Act No. 140 abolished this requirement, and the amount to be allocated to payment of withdrawing members was by that Act left to the sole discretion of the directors, who were authorized to apply the association's receipts to the making of loans, to payment of old or new debts, to dividends to continuing members, or to the creation of a cash reserve for future dividends. A stockholder who, prior to the adoption of the Act, gave notice of withdrawal, but whose demand had not been paid, although similar applications had been paid, challenged the validity of the Act under the Federal Constitution. *Held:*

1. The Act impairs the obligation of the stockholder's contract and destroys his vested rights in violation of § 10 of Article I, and § 1 of the Fourteenth Amendment, of the Federal Constitution. P. 194.

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* Together with No. 288, *Treigle* v. *Thrift Homestead Assn.;* No. 289, *Treigle Sash Factory, Inc.* v. *Conservative Homestead Assn.;* No. 290, *Treigle Sash Factory, Inc.* v. *Union Homestead Assn.;* and No. 316, *Mitchell* v. *Conservative Homestead Assn.* Appeals from the Supreme Court of Louisiana.

2. The Act is not justifiable control or regulation in the public interest of the operations of building and loan associations and is not a valid exercise of the police power. P. 196.

3. As the Act does not purport to deal with any existing emergency and the provisions respecting the rights of withdrawing members are neither temporary nor conditional, it cannot be treated as an emergency measure. P. 195.

4. The challenged sections of the Act are neither intended nor adapted to conserve the assets of building and loan associations, but affect merely the rights of members *inter sese,* and in this respect are unreasonable and arbitrary interferences with vested contract rights. P. 195.

5. The Act cannot be sustained as within the power of the State to amend the corporation's charter. P. 196.

6. While building and loan associations, like banks and public service companies, are peculiarly subject to the regulatory power of the State, yet legislation affecting them must be confined to purposes reasonably connected with the public interest as distinguished from purely private rights. P. 197.

7. Though the obligations of contracts must yield to a proper exercise of the police power, and vested rights cannot inhibit the proper exertion of the power, it must be exercised for an end which is in fact public and the means adopted must be reasonably adapted to that end and must not be arbitrary or oppressive. P. 197.

181 La. 941, 971, 972, 973, 974; 160 So. 637, 646, 647, 648, reversed.

Appeals from judgments of the state supreme court reversing in five cases judgments of the civil district court holding certain provisions of Act 140 of 1932 unconstitutional and enjoining building and loan associations from compliance therewith.

Mr. Alex W. Swords, with whom *Mr. A. Giffen Levy* was on the brief, for appellants.

Mr. Delvaille H. Theard, with whom *Messrs. Louis H. Yarrut, Harry Emmet McEnerny, Azzo J. Plough, Percival H. Stern, Elias Goldstein, Joseph W. Carroll,* and *William John Waguespack, Jr.,* were on the brief, for appellees.

By leave of Court, *Mr. C. Clinton James* filed a brief on behalf of the United States Building & Loan League, as *amicus curiae,* supporting the position of appellees.

Mr. Justice Roberts delivered the opinion of the Court.

This is one of five appeals [1] from a decision of the Supreme Court of Louisiana,[2] presenting the question whether certain provisions of Act No. 140, adopted by the legislature of that State on July 12, 1932,[3] are consistent with Article I, § 10, and § 1 of the Fourteenth Amendment, of the Constitution of the United States.

Prior to the adoption of Act No. 140 the laws of Louisiana provided that every stockholder of a domestic building and loan association should have the right to withdraw as a member upon filing a written notice of intention so to do; and thereupon to receive the amount of his investment and a share of the profits. Every association was required to keep a register, in which notices of withdrawal were to be entered in the order of presentation; and to pay withdrawals in that order. If the proportion of the association's income ordinarily made applicable to the demands of withdrawing members was insufficient to pay all such demands within sixty days from date of notice, one-half of the association's receipts was to be set apart to liquidate such members' claims, until all deferred claims were paid.[4]

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[1] The companion cases are: No. 288, *Treigle* v. *Thrift Homestead Association;* No. 289, *Treigle Sash Factory, Inc.* v. *Conservative Homestead Association;* No. 290, *Treigle Sash Factory, Inc.* v. *Union Homestead Association;* No. 316, *Joseph Mitchell* v. *Conservative Homestead Association.*

[2] 181 La. 941; 160 So. 637. The other cases are reported in 181 La. pp. 971 to 973, inclusive; 160 So. 646, 647, 648.

[3] Louisiana Laws, 1932, p. 454.

[4] Act 120 of 1902, Louisiana Laws, 1902, p. 195, as amended by Act 280 of 1916, Louisiana Laws, 1916, p. 568.

On May 19, 1932, appellant, as owner of fifty shares of full paid stock of appellee, a building and loan association incorporated and domiciled in Louisiana, gave a written withdrawal notice. Thereafter the Legislature adopted Act No. 140 of 1932. By § 53 the directors of any association are authorized, before making any appropriation of receipts which may be applied to the liquidation of claims of withdrawing members, to use its receipts and funds for operating expenses, maintenance and improvement of repossessed property, payment of obligations and creation of cash reserves for future dividends. Section 54 provides that whenever, subsequent to the passage of the act, the proportion of receipts ordinarily made applicable to the demands of withdrawing members is insufficient to pay all such demands within sixty days from date of application for withdrawal, the applicant first on the list shall receive twenty-five per cent of the amount due him, not less, however, than $500. As to any balance his claim is to be transferred to the end of the list and, except as hereafter noted, he is to receive no further payments until his name shall have reached the head of the list. Each pending application is to be similarly treated. New applications are to be placed at the foot of the list. The association may, however, in its discretion, pay in full any demand which amounts to less than $100 and may also pay not more than $100 per month to any applicant if the directors find his necessities call for such payment.

Section 55 gives the directors discretionary power to authorize an allowance on the amount of unpaid withdrawals under such terms and conditions as to the amount of individual withdrawals in view of the time the application has been on the list, or otherwise, as the board may decide; but the amount of such allowance is not to exceed sixty per cent of the rate of dividend currently paid in cash on continuing members' shares. The allowance may be withdrawn at any time without affecting the association's right to continue to pay dividends on the shares of continuing members.

Section 56 empowers the directors to allocate, from receipts or other assets, sums to be paid withdrawing members; and supersedes the earlier provision for setting aside fifty per cent of all receipts for this purpose. The section further provides that twenty-five per cent of the gross receipts may be used for making loans notwithstanding the existence of a withdrawal list and that all, or any part, of the funds and current receipts may be expended for payment of debts, operating expenses, or dividends to continuing members.

The appellant brought suit in the civil district court for the Parish of Orleans to restrain the appellee from complying with the foregoing provisions of Act 140. In his petition he recited his ownership of full-paid shares; his rights under the association's charter and by-laws and the statutes in force prior to the adoption of that act; his application on May 19, 1932, for withdrawal of his shares. He alleged that, subsequent to the date of his notice, other similar applications had been paid in full but that his had not been reached for payment; that, in violation of the contract clause and the Fourteenth Amendment of the Federal Constitution, Act 140 purports to destroy and materially change his vested rights as a withdrawing shareholder. A rule *nisi* issued, the appellee answered, and also excepted to the petition and demand for failure to state a right of action or a cause of action. Judgment awarding an injunction was reversed by the Supreme Court of Louisiana and the suit was dismissed.

The statute, in § 76, provides:

"Any person holding shares in an association . . . who attacks the constitutionality . . . of any . . . provision of this statute, must file suit to that effect against the association within ninety days from the time when the present Statute goes into effect; and said period of ninety days is now fixed as the term of prescription within which any remedy in that behalf must be instituted in the courts by any member or other person; and the failure to file such suit within that delay shall be deemed and held by all courts at all times thereafter as an acquiescence in . . . any . . . provision of the present statute, and after such ninety-day period no further attack on the constitutionality of . . . any . . . provision of the present statute can be presented; . . ."

The appellant instituted his suit within the ninety-day period. In his petition he alleged that he had no adequate remedy at law, and that he would suffer irreparable injury if the appellee's officers acted as permitted or required by the statute. The Supreme Court said:

"There is no doubt, however, that the Act of 1932 did prevent some of the many withdrawing shareholders in building and loan associations throughout the state from collecting the amount of their shares in full at the time when payment would have been made if this statute had not been adopted. We shall rest this decision, therefore, upon the proposition that the Act of 1932 did deprive the plaintiff of an advantage, and of a valuable right, which he enjoyed by virtue of having his name on the withdrawal list more than sixty days before the statute was adopted. The question, therefore, is whether the Legislature could deprive the plaintiff of the advantage and right which he enjoyed, without violating the constitutional limitation forbidding the passing of a law impairing the obligation of contracts, or divesting vested rights." [954, 955.]

The statute impairs the obligation of the appellant's contract and destroys his vested rights in contravention of Article I, § 10, and Amendment XIV, § 1, of the Constitution.

The court below held the challenged sections of the act proper exertions of the state's police power, upon the view that state legislation to promote health, safety, morals or welfare cannot be defeated by private contracts between citizens, or nullified because it interferes with vested rights; and, since building and loan associations are creatures of the state, the power to alter and amend their charters inheres in the sovereign. The appellant, conceding the correctness of these propositions, insists that the statute is not in fact a valid exercise of the police power and cannot be sustained as an amendment of the association's charter.

The appellee asserts the act was adopted to meet the existing economic emergency; members of, and borrowers from, building and loan associations found themselves unable to keep up their dues and interest payments; those whose savings were invested in the shares of such associations were compelled by their necessities to seek withdrawal of the investment; these conditions imperiled the usefulness, if not the existence, of many building and loan associations; the state had a vital interest in their preservation and the equitable administration of their assets in the interest of all concerned. The appellant replies that the sections under attack are neither intended nor adapted to conserve the assets of building associations, but, on the contrary, affect merely the rights of members *inter sese,* and are unreasonable and arbitrary interferences with vested contract rights.

The act is a revision and codification of the statutory law governing building and loan associations, including their incorporation, management, supervision by state administrative authority, winding up and dissolution. It does not purport to deal with any existing emergency and the provisions respecting the rights of withdrawing members are neither temporary nor conditional. Compare *W. B. Worthen Co.* v. *Thomas,* 292 U. S. 426, 433–434. The sections in question do not contemplate the liquidation of associations, the conservation of their assets or the distribution thereof amongst creditors and members. Other sections deal with these matters.[5] Section 54 merely changes the order of payment of those entitled to withdraw their investments. The section effects no reduction in the amount of the debt, no postponement of payment of the total, but a redistribution of the proportions to be paid to individuals. The provision is comparable to a statute declaring that whereas preferred stockholders heretofore have enjoyed a priority in the distribution of assets, in that respect they shall hereafter stand *pari passu* with common stockholders. Such an interference with the right of contract cannot be justified by saying that in the public interest the operations of building associations may be controlled and regulated, or that in the same interest their charters may be amended. The statute merely attempts, for no discernible public purpose, the abrogation of contracts between members and the association lawful when made. This cannot be done under the guise of amending the charter powers of the corporation. Compare *Bedford* v. *Eastern Building & Loan Assn.,* 181 U. S. 227.

Under existing law, and the appellant's contract, fifty per cent of the receipts of the association had to be set apart to pay withdrawing members. By the new legislation this requirement is abolished and the amount to be set aside is left to the sole discretion of the directors. They are authorized to apply the association's receipts to the making of loans, to payment of old or new debts, to dividends to continuing members, or to the creation of a cash reserve for future dividends. The sections permitting such use of the amounts collected do not tend to conserve the assets of the association, to render it more solvent, or to insure that its affairs will be administered so as to protect the investments of the continuing and

[5] See §§ 66 and 67. See also Act No. 44, Second Extraordinary Session of 1934, Louisiana Laws, 1934, p. 156.

withdrawing members. They do alter the rights of the withdrawing members as between themselves and as against continuing members.

The appellee bases its entire argument in support of the challenged enactment upon the proposition that, as building and loan associations are incorporated for a quasi-public purpose, the state has a peculiar interest and a concomitant power of supervision and regulation to prevent injury and loss to their members; and it is said that this court affirmed the principle in *Hopkins Federal Savings & Loan Assn.* v. *Cleary,* 296 U. S. 315. We have no disposition to qualify what was there said. We recognize that these associations, like banks and public service companies, are subject to a degree of regulation which would be unnecessary and unreasonable in the case of a purely private corporation. But laws touching building and loan associations, like those affecting banks or utility companies, must be confined to purposes reasonably connected with the public interest as distinguished from purely private rights. The legislature has no greater power to interfere with the private contracts of such corporations, or the vested rights of their stockholders as such, under the pretext of public necessity, than it would have to attempt the same ends in the case of a private corporation. Though the obligations of contracts must yield to a proper exercise of the police power,[6] and vested rights cannot inhibit the proper exertion of the power,[7] it must be exercised for an end which is in fact public and the means adopted must be reasonably adapted to the accomplishment of that end and must not be arbitrary or oppressive.

As we have pointed out, the questioned sections deal only with private rights, and are not adapted to the legitimate end of conserving or equitably administering the

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[6] *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398.

[7] *Nebbia* v. *New York,* 291 U. S. 502.

assets in the interest of all members. They deprive withdrawing members of a solvent association of existing contract rights, for the benefit of those who remain. We hold the challenged provisions impair the obligation of the appellant's contract and arbitrarily deprive him of vested property rights without due process of law.

The judgment of the Supreme Court of Louisiana must be reversed. As numbers 288, 289, 290 and 316 involve the same question as the instant case, a like judgment will be entered in each.

Reversed.

THE PRUDENCE CO., INC. *v.* FIDELITY & DEPOSIT COMPANY OF MARYLAND ET AL.

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

No. 270. Argued January 8, 9, 1936.—Decided February 3, 1936.

1. In an action by the maker of a building loan, secured by a mortgage on the building, to recover on a bond indemnifying him from loss due to the failure of the borrower to complete the building in time and manner as specified in the loan contract, the measure of damages should be such as will place the lender in the same position as if the building had been completed as stipulated. P. 205.
2. Where the lender, in such a case, was obliged by the borrower's defaults in construction of an apartment building, to foreclose his mortgage, buy in the unfinished structure for less than the loan and take a deficiency judgment, it was error to limit recovery on the indemnity bond to the cost of completing the building in accordance with the contract; in the estimation of damages there should be considered also the rents that might have been impounded in the foreclosure proceedings had the building been ready for use, and the reduced value of the building at the foreclosure sale because of its unfinished state. P. 206.
3. The difference between the value of the unfinished building, at the foreclosure sale, and the value it would have had if completed as per contract, may be considered as made up of two elements, the cost of completion and the carrying charges meanwhile. These may

be proved by expert testimony; or where, as in this case, the building was completed by the lender, the actual cost of that may be shown; and the other element may be established by expert proof of the rental value of such a building (finished) at the date of default and later. P. 206.

4. In this case, in proof of damages due to delay in completing the building, evidence was received, without objection, of payments for taxes and insurance and of loss of interest on investment during the time required for its completion. *Held* that an objection that such carrying charges may have exceeded the rents that might have been received if the building had been finished as agreed, came too late, it not having been made at the trial. P. 207.

5. In an action for damages caused by impairment of a mortgage security, through the borrower's failure to complete the mortgaged building as agreed, loss of rents is to be classed not as special but as general damage and may be proved without having been specifically alleged. P. 207.

77 F. (2d) 834, modified and affirmed.

Certiorari, 296 U. S. 566, to review a judgment reversing one recovered in the District Court, 7 F. Supp. 392, in an action on an indemnity bond.

Mr. Alfred T. Davison, with whom *Messrs. Martin A. Schenck* and *Orrin G. Judd* were on the brief, for petitioner.

Interest, taxes and insurance should be allowed as part of the damages caused by the failure to complete the building at the time guaranteed. *Trainor Co.* v. *Aetna Casualty Co.*, 290 U. S. 47; *Kidd* v. *McCormick*, 83 N. Y. 391.

The facts and circumstances of this transaction, specifically show that interest, taxes and insurance premiums were within the contemplation of the parties as items of damage in case of breach.

Interest bears the same relation to money as rent does to land, and is clearly recoverable as an item of damage. *Woerz* v. *Schumacher*, 161 N. Y. 530, 536; *White* v. *McLaren*, 151 Mass. 553; *U. S. Fidelity & Guaranty Co.* v. *Parsons*, 147 Miss. 335; *Noonan* v. *Independence In-*

demnity Co., 328 Mo. 706; *Hexter* v. *Knox*, 63 N. Y. 561; *Lord* v. *Comstock*, 20 J. & S. (N. Y.) 548; *Donlan* v. *Trust Co.*, 139 N. C. 212; *Somerby* v. *Tappan*, Wright (Ohio) 229, 231, 570.

The holder of a mortgage, representing a money interest in land, is entitled to the interest, corresponding to the rent of an owner, which he loses, during the delay in completion of a building guaranteed to be finished at a specified time.

Interest is recognized as part of the measure of damages for breach of contract, where loss of such interest was within the contemplation of the parties. *United States* v. *New York*, 160 U. S. 598, 621; *Wilbur* v. *United States*, 284 U. S. 231; *Meyer* v. *Haven*, 70 App. Div. 529; *Gordon* v. *Curtis Bros.*, 119 Ore. 55, 66; *Wood* v. *Joliet Gaslight Co.*, 111 Fed. 463; *DeFord* v. *Maryland Steel Co.*, 113 Fed. 72; *American Bridge Co.* v. *Camden Interstate Ry. Co.*, 135 Fed. 323, 330–31; *New York Mining Co.* v. *Fraser*, 130 U. S. 611, 622; *South African Territories, Ltd.* v. *Wallington*, [1897] 1 Q. B. 692; *Lloyd Investment Co.* v. *Illinois Surety Co.*, 164 Wis. 282, 286, 288; *Macleod* v. *National Surety Co.*, 133 Minn. 351.

In addition to being within the contemplation of the parties, interest, taxes and insurance premiums are recoverable because necessarily included in the general rules of damages applicable to bonds guaranteeing completion.

If the building had been completed and ready for occupancy with all equipment installed, on December 16, 1930, Prudence Company could have immediately rented it instead of having to wait until October 1, 1931; and out of such rent it would have had a source of payment of its interest, taxes and insurance premiums.

The fact that a breach of the obligation to pay the mortgage is also involved does not alter the causal relation between the delay in completion of the building and the loss of interest, taxes and insurance premiums. *Sauter* v. *New York Central & H. R. R. Co.,* 66 N. Y. 50; *Lane* v. *Atlantic Works,* 111 Mass. 136; Torts Restatement (Am. L. Inst.) § 447. See *Purchase* v. *Seelye,* 231 Mass. 434. Cf. *O'Brien* v. *Illinois Surety Co.,* 203 Fed. 436, 439. See also *Rock* v. *Monarch Building Co.,* 87 Ohio St. 244; *Kanter* v. *New Amsterdam Casualty Co.,* 195 App. Div. 756, 760, aff'd 233 N. Y. 602.

Whether the rule of damages be considered from the standpoint of difference in value, cost of completion, or impairment of security, the broad primary rule of putting Prudence Company in as good position as it would have been had the building been properly completed and within the time specified, requires allowance of its actual loss in interest, taxes and insurance premiums.

Interest, taxes and insurance premiums during the period of completion must necessarily enter into the determination of difference in value.

Taxes, insurance premiums, and interest on the investment during the construction period are uniformly treated for accounting, rate-making and general legal purposes, as part of the cost of construction, and must be included in the entire cost of the erection, construction and completion of the building which the sureties agreed to pay.

The provisions of the surety bond in this case obliged the surety in express terms to pay interest on the loan, and taxes and insurance on the mortgaged property until the date of actual completion of the building in accordance with the plans and specifications.

Mr. John W. Davis, with whom *Messrs. Thomas E. White* and *Joseph F. Murray* were on the brief, for respondents.

The measure of damages is the difference between the value of the uncompleted building on the date of the default and its value if it had been completed. *Trainor Co.*

v. *Aetna Casualty Co.,* 290 U. S. 47; *Kidd* v. *McCormick,* 83 N. Y. 391; *United Real Estate Co.* v. *McDonald,* 140 Mo. 605, 612; *Longfellow* v. *McGregor,* 61 Minn. 494; *Province Securities Corp.* v. *Maryland Casualty Co.,* 269 Mass. 75, 94; *Phillipe* v. *Curran,* 218 Ill. App. 517; *Comey* v. *United Surety,* 217 N. Y. 268; *Kanter* v. *New Amsterdam Casualty Co.,* 195 App. Div. 756, aff'd 233 N. Y. 602.

Under the decisions in *Kidd* v. *McCormick* and *Trainor* v. *Aetna Casualty Co.,* petitioner is not entitled to recover loss of interest on the mortgage loan, taxes or insurance premiums.

The petitioner included in its claimed cost of completion, taxes and insurance premiums covering the period alleged to have been used for completion, but which were due and were paid after petitioner had purchased the property on the foreclosure sale.

It also claimed specifically for interest on the mortgage loan claimed to have been lost during the alleged period used for completion.

In neither *Kidd* v. *McCormick* nor *Trainor* v. *Aetna Casualty Co.* did the court allow interest on mortgages, taxes or insurance premiums. In each case it was held that the proper measure of damages was difference in value.

Respondents' bond did not guarantee payment of interest, taxes and insurance premiums, but only guaranteed the completion of a building. Cf. *United Real Estate Co.* v. *McDonald,* 140 Mo. 605; *Province Securities Corp.* v. *Maryland Casualty Co.,* 269 Mass. 75, 94; *McCauslan* v. *Zoar Holding Co.,* 131 Misc. 148, 150.

The obligation of the surety is not to be extended. *Smith* v. *Molleson,* 148 N. Y. 241, 246.

The bond was a guaranty only of the completion of the building. *Maloney* v. *Nelson,* 144 N. Y. 182, 186.

Interest on the mortgage loan as damages is not recoverable from respondents because they assumed no obligation as to the principal of the loan; and interest as damages cannot be recovered apart from the principal. *Matter of Trustees,* 137 N. Y. 94, 98; *Cutter* v. *Mayor,* 92 N. Y. 166, 170; *Southern Central R. Co.* v. *Moravia,* 61 Barb. 180, 188. See *United Real Estate Co.* v. *McDonald,* 140 Mo. 605; *Province Securities Corp.* v. *Maryland Casualty Co.,* 269 Mass. 75, 94.

All cases and authorities recognize the distinction between interest payable by virtue of contract and that payable as damages for breach of contract. *Brewster* v. *Wakefield,* 22 How. 118; *Holden* v. *Trust Co.,* 100 U. S. 72; *O'Brien* v. *Young,* 95 N. Y. 428; *Brady* v. *Mayor,* 14 App. Div. 152; *Hamilton* v. *Van Rensselaer,* 43 N. Y. 244; *Melick* v. *Knox,* 44 N. Y. 676.

No evidence was offered by petitioner to show that it suffered any loss of interest on mortgage loan, or taxes or insurance premiums, by reason of failure to complete the building.

Since petitioner concedes that it is entitled to recover damages suffered by it only as mortgagee and not as owner, it may not recover interest on mortgage, taxes or insurance premiums, because the foreclosure of the mortgage and the sale of the property terminated its status as mortgagee.

The difference in value between a building with and without omissions and substitutions is the proper measure of damages for such omissions and substitutions and the petitioner offered no evidence that the value of the building was lessened by reason thereof.

Mr. Justice Cardozo delivered the opinion of the Court.

We are to determine the measure of damages upon a bond conditioned against loss through the failure to complete a building at the time and in the manner called for by the building contract.

In September, 1929, petitioner, the Prudence Company, Inc., undertook to make a mortgage loan of $6,-650,000 in aid of the construction of Essex House, an apartment hotel in the City of New York. The borrower covenanted that the building would conform to plans and specifications, and would be completed not later than December 16, 1930. As part of the same transaction, two surety companies, the respondents in this court, signed a bond in the sum of $3,000,000, indemnifying the lender against loss through the failure of the borrower to construct and pay for a building conforming to the contract, and complete it by the stated time. The bond also provided that in the event of the borrower's default, the lender, if it so elected, should be at liberty to go forward with the work, and charge the cost against the sureties. Other conditions are believed to be immaterial to any question now before us.

On December 16, 1930, the borrower made default under the mortgage, abandoning the work with the building then unfinished. At that time the petitioner's advances under the building loan agreement were $6,575,-000, the full amount promised, less $75,000 retained by agreement. On December 18, 1930, petitioner through its nominee brought suit in the state court for the foreclosure of the mortgage. On January 6, 1931, it went into possession with the mortgagor's consent. On January 19, 1931, there was a judgment of foreclosure, followed by a sale on March 17, 1931, at which the mortgagee was the buyer, the bid of $6,000,000 being applied upon the mortgage. A deficiency judgment of $716,215.02 was entered the next month.

Petitioner in possession of the building went on with the unfinished work, bringing it to completion in October, 1931. An action on the bond was then begun against the sureties. The trial court gave judgment for damages in the sum of $798,416.81, made up of three classes of items:

the cost of completion; the loss from omissions and inferior substitutions; and the interest on investment, together with taxes and insurance charges, while the building was idle because unready for its occupants. 7 F. Supp. 392. The Circuit Court of Appeals for the Second Circuit found this award to be excessive. In the view of that court no award should have been made for interest, taxes or insurance during the period of idleness. Payments necessary to complete the building were properly allowed, for they were evidence of the difference in value between an incomplete and a completed structure. Reparation was also to be made for omissions and substitutions to the extent that they diminished value, unless strict compliance had been waived by the lender or its agents. However, the extent of the recovery was not susceptible of ascertainment without the aid of a new trial. This was so because evidence of waiver had been offered by the surety and erroneously excluded. A remand was thus necessary to elicit all the facts. 77 F. (2d) 834. Before a second trial was had, a writ of certiorari issued at the instance of petitioner to resolve a claim of conflict between the decision to be reviewed and a decision of this court. *Trainor Co.* v. *Aetna Casualty & Surety Co.*, 290 U. S. 47. The writ states that it is "limited to the question of the measure of damages," thus excluding from our consideration the ruling of the court below as to the effect of waiver of performance.

Limiting our review accordingly, we think the extent of the recovery upon the new trial that will be necessary has been too narrowly confined.

The petitioner should be placed in the same position it would have occupied if the building had been completed on December 16, 1930. *Trainor Co.* v. *Aetna Casualty & Surety Co., supra,* at pp. 54, 55; *Kidd* v. *McCormick,* 83 N. Y. 391, 398; *Province Securities Corp.* v. *Maryland Casualty Co.,* 269 Mass. 75, 94; 168 N. E. 252. To give it nothing but the cost of doing the unfinished work, plus the loss resulting from omissions and substitutions, would be a scant measure of reparation, allowing nothing for delay. *Ruff* v. *Rinaldo,* 55 N. Y. 664; *C. W. Hunt Co.* v. *Boston Elevated Ry. Co.,* 199 Mass. 220, 233, 235; 85 N. E. 446; Sedgwick, Damages, 9th ed., § 645. If performance had been prompt, the mortgagee would have had the security of a finished structure, which a buyer at a foreclosure sale could have utilized at once. During the pendency of the suit, the rents might have been impounded at the hands of a receiver and applied upon the deficiency resulting from the sale. *Freedman's Saving & Trust Co.* v. *Shepherd,* 127 U. S. 494, 503; *Worthen Co.* v. *Kavanaugh,* 295 U. S. 56, 62. With the building still unfinished there were no rents to be collected and hence none to be applied in reduction of the debt. More important still, the amount of any bid was certain to be reduced by notice to the bidders that the building would be unproductive until ready to be occupied. From the point of view of bidders the reduction in value as the consequence of delay would be made up of two factors: the estimated cost of finishing the work, and the estimated carrying charges, not to exceed the rental value, during the period of idleness. Cf. *Trainor Co.* v. *Aetna Casualty & Surety Co., supra,* at p. 55; *Kidd* v. *McCormick, supra,* at p. 398. So at least an assessor of the damages might find as a fair inference of fact, even if the finding does not follow as an inference of law. The effect of the decision is to hold down the recovery to the first of these factors and to eliminate the second.

The petitioner might have relied upon the testimony of experts as to the total depreciation and as to the weight of the component factors. It chose a different method. To show the loss sustained from finishing the work, it proved the actual cost, as by the express provisions of the bond it was at liberty to do. Cf. *Comey* v.

United Surety Co., 217 N. Y. 268, 276; 111 N. E. 832; *Appleton* v. *Marx,* 191 N. Y. 81, 85, 86; 86 N. E. 563. One of the factors of diminished value it has thus established with precision. To fix the weight of the other factor, it would have done better to give evidence by experts of the rental value of such a building at the date of the default and later. *Griffin* v. *Colver,* 16 N. Y. 489, 496; *Cassidy* v. *Le Fevre,* 45 N. Y. 562, 567; *Witherbee* v. *Meyer,* 155 N. Y. 446, 453, 454; 50 N. E. 58. Instead of doing this it chose to give evidence of the taxes, insurance premiums and interest on investment. We are told by the respondents now that for anything appearing in the record the carrying charges may have been greater than any rents that could have been earned if the building had been finished. No such objection was made upon the trial. We think it comes too late when first made upon appeal. In the absence of more specific challenge the trier of the facts might not improperly assume that interest on the investment along with taxes and insurance were losses flowing from the failure to receive a finished building. *New York & Colorado Mining Syndicate* v. *Fraser,* 130 U. S. 611, 622, 623. The point will not be labored, for the assumption is a safe one that evidence and objection will not be subject to this criticism when the case is tried again.

A question is raised as to the form of the complaint. The respondents insist that its allegations are insufficient to permit proof of loss of rents in addition to the cost. We read the pleading otherwise. In the circumstances of this case, loss of rents is to be reckoned as general, not special, damage. Sedgwick, Damages, 9th ed., § 1261; *Griffin* v. *Colver, supra; Cassidy* v. *Le Fevre, supra; Ruff* v. *Rinaldo, supra; Jutte* v. *Hughes,* 67 N. Y. 267, 271. It is one of the factors contributing to and measuring the diminished worth of the security. Damages when general are recoverable under a pleading that does not enumerate the items. *Armstrong* v. *Percy,* 5 Wend. 535, 538, 539; *Laraway* v. *Perkins,* 10 N. Y. 371, 373. Here the complaint alleges that except for the default and in particular the delay, the plaintiff would have obtained upon foreclosure the full amount of principal and interest due upon the mortgage; it alleges that through the same causes the value of the mortgage was impaired to the extent of the deficiency judgment; it alleges that the plaintiff has thereby been deprived of any and all return on the amount of the investment. We find these allegations broad enough to let in evidence of damages along the lines that have been marked.

Another trial will permit the petitioner to show more accurately than it has done upon the record now before us that the building was continuously untenantable until the completion of the work and that the time taken for completion did not outrun the bounds of reason.

What was ruled by the Court of Appeals in respect of the scope of the recovery for omissions and substitutions was not specified as error in the petition for the writ, and will be assumed to be correct. *Zellerbach Paper Co.* v. *Helvering,* 293 U. S. 172, 182; *Helvering* v. *Taylor,* 293 U. S. 507, 511; *Clark* v. *Williard,* 294 U. S. 211, 216.

The judgment is modified by a direction that the measure of damages upon a new trial shall be that defined in this opinion, and as thus modified affirmed.

Modified and affirmed.

BALTIMORE NATIONAL BANK *v.* STATE TAX COMMISSION OF MARYLAND.

CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

No. 283. Argued January 10, 1936.—Decided February 3, 1936.

1. The consent given by R. S., § 5219, to state taxation of "all" shares of national banks has been heretofore construed to embrace shares of national banks when owned by another national bank, and by parity of reasoning embraces preferred shares of a national bank when owned by the Reconstruction Finance Corporation. P. 212.
2. In the legislation authorizing the Reconstruction Finance Corporation to subscribe for preferred shares of national and state banks, 12 U. S. C., § 51 (d), the proviso limiting the authority to shares of which the holders are exempt from double liability, is significant of the understanding of the Congress that upon the acceptance of the shares the corporation would be exposed to the same measure of liability and would stand in the same position as shareholders in general. P. 213.
3. This view is corroborated by the fact that the authority of national banks to issue preferred shares, and the authority of the Reconstruction Finance Corporation to subscribe for them, were provided by the same Act as parts of the banking system, without suggestion of any distinction in the liabilities of shareholders. P. 213.
4. The general provision in the Act creating the Reconstruction Finance Corporation, 15 U. S. C., § 610, which exempts "the corporation, including its franchise, its capital, reserves, and surplus, and its income" "from all taxation," (excepting real estate) is to be construed with the earlier, specific provision of § 5219 R. S. permitting state taxation of "all" shares of national banks, and does not preclude a state tax laid on national bank shares belonging to the Reconstruction Finance Corporation and collected from the bank. P. 214.

169 Md. 65; 180 Atl. 260, affirmed.

Certiorari, 296 U. S. 538, to review a judgment reversing a judgment of the Circuit Court of Baltimore City, which canceled an order of the State Tax Commission of Maryland upholding a tax on shares of the Bank.

Messrs. Edwin F. A. Morgan and *Gaylord Lee Clark* for petitioner.

Mr. Herbert R. O'Conor, Attorney General of Maryland, and *Mr. William L. Henderson,* Assistant Attorney General, for respondent.

By leave of Court, *Messrs. James B. Alley, Max O'Rell Truitt, Hans A. Klagsbrunn,* and *William Radner,* and *Florence A. de Haas* filed a brief on behalf of the Reconstruction Finance Corporation, as *amicus curiae,* in support of the proposition that shares of national bank stock held by the Reconstruction Finance Corporation are not subject to state taxation.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

This case presents the single question whether shares in a national bank, subscribed for and owned by the Reconstruction Finance Corporation, may be taxed by a state.

The Baltimore Trust Company closed its doors in February, 1933, and was unable to reopen. It was reorganized in August of the same year as a national banking association under the name of the Baltimore National Bank with a place of business in Baltimore, Maryland. To set the business going, the Reconstruction Finance Corporation subscribed for the entire issue of preferred stock, 10,000 shares of the par value of $1,000,000. Following a provision of the Maryland Code (1935 Supp., Article 81, § 15 e*), the State Tax Commission upheld a tax upon the shares, overruling thereby the protest of the

* "Shares of stock assessable under this section shall be taxed to the several owners thereof, and the taxes thereon shall be debts of such owners, but may be collected in each case from the bank or other corporation, which shall be bound to pay the same for account of its

bank, which made a claim of immunity under the Federal Constitution for the benefit of the shareholder as well as for itself. The order made by the Commission was reviewed upon appeal by the Circuit Court of Baltimore City, which canceled the assessment. In accord is a ruling of a District Court of the United States for the Western District of Kentucky. *United States* v. *Lewis,* 10 F. Supp. 471. Upon an appeal by the Commission to the Court of Appeals of Maryland, the order of the Circuit Court was reversed and the assessment reinstated. 169 Md. 65; 180 Atl. 260. To settle an important question as to the taxing power of a state, a writ of certiorari issued from this court.

The Reconstruction Finance Corporation was organized in 1932 to give relief to financial institutions in a national emergency and for other and kindred ends. Act of January 22, 1932, 47 Stat. 5; Act of July 21, 1932, 47 Stat. 709; 15 U. S. C., c. 14. At the time of its creation and continuously thereafter the United States has been and is the sole owner of its shares. The purpose that it has aimed to serve is not profit to the government, though profit may at times result from one or more of its activities. The purpose to be served is the rehabilitation of finance and industry and commerce, threatened with prostration as the result of the great depression. We assume, though without deciding even by indirection, that within *McCulloch* v. *Maryland,* 4 Wheat. 316, a corporation so conceived and operated is an instrumentality of government without distinction in that regard between one activity and another. Even on that assumption taxation by state or municipality may overpass the usual limits

stockholders whether or not dividends are declared thereon, as if such corporations were the ultimate taxpayer, but may obtain reimbursement therefor from the respective stockholders, and may charge the same in reduction of any amounts due to the several shareholders as dividends or otherwise."

if the consent of the United States has removed the barriers or lowered them.

We think consent has been so given where shares in a national bank are the property to be taxed, though an agency of government is the owner of the assets subjected to the burden. By § 5219 of the Revised Statutes (12 U. S. C., § 548; cf. Act of June 3, 1864, 13 Stat. 99, 112; Act of February 10, 1868, 15 Stat. 34) "all" the shares of a national banking association whose principal place of business is within the limits of a state are made subject to taxation at the pleasure of the legislature with conditions as to form and method not important at this time. This court has held that Congress in saying "all" meant exactly what it said, and that shares in a national bank belonging to another national bank were taxable to the same extent as if they belonged to any one else. *Bank of Redemption* v. *Boston,* 125 U. S. 60, 69, 70; *Bank of California* v. *Richardson,* 248 U. S. 476, 483; *Bank of California* v. *Roberts,* 248 U. S. 497; *Des Moines National Bank* v. *Fairweather,* 263 U. S. 103. "The manifest intention of the law is to permit the State in which a national bank is located to tax, subject to the limitations prescribed, all the shares of its capital stock without regard to their ownership." *Bank of Redemption* v. *Boston, supra,* at p. 70. True, as we have assumed, the Reconstruction Finance Corporation is a governmental agency, but so also is a national bank. *McCulloch* v. *Maryland, supra.* The question thus reduces itself to this, whether there is sufficient reason to believe that immunity from taxes of this kind has been given to the one agency, though by long accepted decisions it has been denied to the other.

In such a situation the burden is heavily on the suitor who would subject the word "all" with its uncompromising generality to an unexpressed exception. The petitioner reminds us that the ends to be served by the

Reconstruction Finance Corporation are even more predominantly public than those of a national bank, since the bank, while promoting the fiscal needs of the government, is acting at the same time for the profit of its stockholders. The suggestion has its force, but force inadequate, we think, to carry to the goal. Its inadequacy is the more apparent when the capacity of the corporation to become a subscriber to the stock is followed to the sources. Until March, 1933, there was no power on the part of national banks to issue preferred shares. Act of March 9, 1933, Title III, 48 Stat. 5; amended June 15, 1933, 48 Stat. 147; 12 U. S. C., § 51 (a). Until then there was no power on the part of the Reconstruction Finance Corporation to subscribe for such shares or indeed for any others. Act of March 9, 1933, Title III, 48 Stat. 5, 6; amended March 24, 1933, 48 Stat. 20, 21; 12 U. S. C., § 51 (d). By statutes then enacted a national bank was authorized to issue preferred shares of one or more classes upon the approval first obtained of the Comptroller of the Currency. The Reconstruction Finance Corporation was authorized at the same time, with the approval of the Secretary of the Treasury, to subscribe for preferred shares in national banks and also in state banks and trust companies that were in need of funds for capital purposes, subject to the proviso that no such subscription was to be permitted unless the holders of the preferred shares were exempt from double liability. This proviso in and of itself is highly significant of the understanding of the Congress that upon the acceptance of the shares the corporation would be exposed to the same measure of liability and would stand in the same position as shareholders in general.

Other signposts of intention seem to point us the same way, though perhaps with less directness. The newly created power to issue preferred shares was given by an act for the governance of banks (48 Stat. 5), now incorporated in the United States Code as part of title 12, regulating banks and banking. 12 U. S. C., § 51 (a). The newly created power to subscribe for preferred shares was given by the same act. 48 Stat. 5, 6; amended March 24, 1933, 48 Stat. 20, 21; 12 U. S. C., § 51 (d). The two are incidents and aspects of a unitary scheme. No one will deny that shares put out under this act would have been taxable to the holders in the event that some one other than this particular corporation had acquired the new issue through purchase or subscription. If they were to be exempt in the hands of a particular corporation, empowered to acquire them by an associated section, then was the appropriate time for announcing the exception. Instead there is a clear assumption, brought out into full relief by the exclusion of shares chargeable with double liability, that subscriptions when permitted are to stand on an equality, irrespective of their source. A shareholder in the banking system is a shareholder for every purpose, accepting the attendant liabilities along with the attendant powers.

We have reserved to the last an argument strongly pressed in behalf of the petitioner, but one more easily appraised in the light of what has gone before. The act for the formation of the Reconstruction Finance Corporation has its own provisions for exemption, which have now to be considered. "The corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation . . . except that any real property of the corporation shall be subject to . . . taxation to the same extent according to its value as other real property is taxed." 47 Stat. 5, 9, 10; 15 U. S. C., § 610.[1] The petitioner insists that the tax now in controversy is forbidden by that section. The contention is plausible, yet it will not prevail against analysis. For

[1] The real property of national banks is subject to a like exception. R. S. § 5219; 12 U. S. C.. § 548, subdivision 3.

the tax now in controversy, whatever its indirect effect, is not laid directly upon the capital, reserves, or surplus of the corporation claiming the immunity or accorded the exemption. It is laid upon the shares in another corporation, a member of the banking system, which must pay it in the first place (Maryland Code, 1935 Supp., Article 81, § 15 e; *Home Savings Bank* v. *Des Moines,* 205 U. S. 503, 518), though with a right to be made whole thereafter. "Capital, reserves and surplus" are not taxable by a state if they belong to the Reconstruction Finance Corporation. Neither are they taxable if they belong to a national bank. *First National Bank of Gulfport* v. *Adams,* 258 U. S. 362; *Des Moines Bank* v. *Fairweather, supra,* at pp. 106, 107; *Domenech* v. *National City Bank,* 294 U. S. 199, 204. This has not been thought to exclude the taxation of such a bank upon its shares in other banks, members of the federal system. *Bank of Redemption* v. *Boston, supra; Bank of California* v. *Richardson, supra; Bank of California* v. *Roberts, supra; Des Moines National Bank* v. *Fairweather, supra.* With hardly more reason may words of like extension have a broader meaning here. An earlier act, specific in its coverage, will be read as an exception to a later one directed to investments generally. "It is a well-settled principle of construction that specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling." *Kepner* v. *United States,* 195 U. S. 100, 125; cf. *Ginsberg & Sons* v. *Popkin,* 285 U. S. 204, 208; *In re East River Co.,* 266 U. S. 355, 367; *Washington* v. *Miller,* 235 U. S. 422, 428; *Rosencrans* v. *United States,* 165 U. S. 257, 262; *Red Rock* v. *Henry,* 106 U. S. 596, 603. All shares in national banks—no matter by whom owned—shall be subject to taxation. R. S. § 5219. Across the petitioner's path there still lies the stumbling block of that uncompromising "all."

The judgment is

Affirmed.

DUPARQUET HUOT & MONEUSE CO. ET AL. *v.* EVANS ET AL.

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

No. 533. Argued January 17, 1936.—Decided February 3, 1936.

1. A receivership in a foreclosure suit, for the purpose of conserving the mortgaged property and collecting the rents *pendente lite* for the benefit of the lienholder, is not an "equity receivership," within the meaning of § 77B (a) (i) of the Bankruptcy Act. P. 218.
2. An equity receivership, within the meaning of § 77B, is a receivership for the purpose of conserving and reorganizing or winding up the business of the corporation. P. 218.
3. Under § 3 of the Bankruptcy Act, appointment of a receiver for the debtor's property is not an act of bankruptcy if not done while the debtor is insolvent. P. 224.

78 F. (2d) 678, affirmed.

CERTIORARI, 296 U. S. 569, to review a decree affirming a decree of the District Court, which dismissed a petition of three creditors for a reorganization of a debtor corporation under § 77B of the Bankruptcy Act.

Mr. Harold Harper, with whom *Mr. Mark M. Horblit* was on the brief, for petitioners.

Mr. Daniel A. Shirk, with whom *Mr. Edwin R. Wolff* was on the brief, for respondents.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The question is whether a receivership for the collection of rents and profits in a suit for the foreclosure of a mortgage is an "equity receivership" within the meaning of § 77B of the Bankruptcy Act providing for the reorganization of debtor corporations in involuntary proceedings.

In 1934 and afterwards, "2168 Broadway Corporation" was the owner of a large hotel in the City of New York, and of the fixtures and furniture contained therein. It had no other property. The holder of a mortgage on the hotel began an action of foreclosure and procured the appointment of receivers to collect the rents and profits. Soon after that appointment, three creditors of the corporation, holding claims a little in excess of $1,000, filed a petition in a District Court of the United States for the reorganization of the corporate debtor in accordance with § 77B of the Bankruptcy Act, alleging that the value of the assets was largely in excess of the liabilities, but that the debtor was unable to pay its debts as they matured. The District Court dismissed the petition on the ground that submission to the receivership in the suit for foreclosure was not an act of bankruptcy and did not relieve the creditors from showing in their petition that such an act had been committed. 11 F. Supp. 404. The Circuit Court of Appeals for the Second Circuit affirmed, 78 F. (2d) 678, declining to follow a decision in the Seventh Circuit which upheld a different conclusion. *In re Granada Hotel Corp.*, 78 F. (2d) 409; affirming 9 F. Supp. 909. Because of this conflict and because of the importance of removing doubt as to the meaning of the statute a writ of certiorari was granted by this court.

Section 77B of the Bankruptcy Act, which took effect as law on June 7, 1934 (Act of June 7, 1934, 48 Stat. 911, 912; 11 U. S. C., § 207) provides for two classes of proceedings, voluntary and involuntary. Any corporation, with exceptions not now important, may file a petition stating that it is insolvent or presently unable to meet maturing obligations, and that it desires to effect a plan of reorganization. If the petition is approved, the court assuming jurisdiction shall have and may exercise all the powers, unless specially withdrawn, "which a Federal court would have had it appointed a receiver in equity of the property of the debtor by reason of its inability to pay its debts as they mature." § 77B (a). But jurisdiction is not confined to proceedings initiated by the debtor. The statute makes provision by the same section for the reorganization of a corporate debtor at the instance of the creditors. Three or more creditors who have provable claims against a corporation aggregating $1,000 or more in excess of the value of securities may file "a petition stating that such corporation is insolvent or unable to meet its debts as they mature and, if a prior proceeding in bankruptcy or equity receivership is not pending, that it has committed an act of bankruptcy within four months," and that such creditors propose that it shall effect a reorganization. § 77B (a). A later subdivision, § 77B (i); 11 U. S. C., § 207 (i), rounds out the statutory scheme. "If a receiver or trustee of all or any part of the property of a corporation has been appointed by a Federal, State, or Territorial court, . . . a petition . . . may be filed under this section at any time thereafter by the corporation, or its creditors as provided in subdivision (a) of this section," and upon the approval of the petition by a court of appropriate jurisdiction, "the trustee or trustees appointed under this section, or the debtor if no trustee is appointed, shall be entitled forthwith to take possession" of the property, displacing in so doing the possession of the trustee or receiver theretofore appointed.

To fix the meaning of these provisions there is need to keep in view the background of their history. There is need to keep in view also the structure of the statute, and the relation, physical and logical, between its several parts. History and structure will be found to teach together that a receivership in a foreclosure suit is not an equity receivership within the meaning of the law.

The evils and embarrassments that brought § 77B into existence are matters of common knowledge. Corporations not insolvent in the statutory sense (*United States* v. *Oklahoma*, 261 U. S. 253, 260, 261), but presently unable to discharge maturing obligations, were without a statutory method for winding up their business without a sacrifice of assets. If they had recourse to voluntary bankruptcy, the forms and methods of administration were rigid and often wasteful, leaving little opportunity for coöperative endeavor on the part of all concerned. See Report of Solicitor General Thacher to the President of the United States submitted to the Congress February, 1932; Senate Document 65, 72nd Congress, 1st Session, p. 90. If they held aloof from courts and put their trust in time and effort, there was the danger of disruptive judgments, which would give a preference to a few, with involuntary bankruptcy little, if at all, deferred. The "equity receivership" flourished in this soil. At the suit of friendly creditors, embarrassed corporations joined in the prayer for the appointment of receivers to stave off other creditors more selfish or impatient, and foster whatever value was latent in the assets. There is little doubt that many of these receiverships were legitimate and helpful. None the less there resided in the practice a capacity for abuses, which will be found reflected in the decisions of this and other courts. At times the receivership was used as an instrument of fraud or covin. *Harkin* v. *Brundage,* 276 U. S. 36; *Shapiro* v. *Wilgus,* 287 U. S. 348; cf. *First National Bank* v. *Flershem,* 290 U. S. 504, 517, 518. At times, however fair in its beginnings, it was inordinately prolonged. *Michigan* v. *Michigan Trust Co.,* 286 U. S. 334. At times it had a tendency to intrench delinquency in power, and to stifle inquiry into acts of waste or spoliation. Whatever the importance of these abuses or the defects of the existing remedies, the demand became insistent for a practice more open, more responsible, more efficiently and closely regulated, and withal more surely valid, under the supervision of a court of bankruptcy.

Section 77B, enacted in 1934, was born of that demand. The remedy to be supplanted or more efficiently controlled had no relation to receiverships for the collection of rents and profits in actions of foreclosure. The remedy in view was the one generally known as an "equity receivership," whereby the assets of a corporation were committed to the custody of a court until the time should arrive when they could be returned to the rehabilitated debtor, or if that should be impossible, divided among creditors. The receivership might come into being at the instance of a stockholder (cf. *Bryan* v. *Welch,* 74 F. (2d) 964) or oftener a creditor, but always the end to be served was essentially the same. The end was reorganization or liquidation or something akin thereto. Cf. *Continental Illinois Nat. Bank* v. *Chicago, R. I. & P. Ry. Co.,* 294 U. S. 648, 672; *Gordon* v. *Washington,* 295 U. S. 30, 38. Neither the members of the legal profession nor the legislators were in danger of confusing decrees directed to such an end with the sequestration of rents in an action of foreclosure. Bar associations had their special committees on "equity receiverships," with elaborate reports which were submitted to Congressional Committees.[1] Witnesses, appearing in support of one statute or another, discoursed to Congressional Committees on the failings of "equity receiverships," and on the measures needed for correction.[2] However colloquial and uncertain the words had been in the beginning, they had won for themselves finally an acceptance and a definiteness that made them fit to play a part in the legislative process. They came into the statute through an amendment proposed when the bill which was adopted as § 77 B was passing through

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[1] Annual Report of the Special Committee on Equity Receiverships, Association of the Bar of the City of New York, Year Book (1927) 299, 301; *id.* (1930) 407; Hearings before the Judiciary Committee of the House of Representatives, 71st Congress, 2nd Session, April 11, 1930, H. R. 9997, 9998, 9999, 10,000, p. 29.

[2] Hearings, *supra,* at pp. 1–28. Cf. Senate Report 482, Corporate Reorganizations, March 15, 1934, 73rd Congress, 2nd Session.

the Senate. Congressional Record, vol. 78, part 7, 73rd Congress, 2nd Session, p. 7889. They came there freighted with the meaning imparted to them by the mischief to be remedied and by contemporaneous discussion. *Humphrey's Executor* v. *United States,* 295 U. S. 602, 625. In such conditions history is a teacher that is not to be ignored.

Passing from the setting of the statute to a view of its internal structure, we are brought to the same conclusion, but with added firmness of conviction. A receivership in a foreclosure suit is limited and special. The rents and profits are impounded for the benefit of a particular mortgagee, to be applied upon the debt in the event of a deficiency. *Freedman's Saving & Trust Co.* v. *Shepherd,* 127 U. S. 494; *Worthen Co.* v. *Kavanaugh,* 295 U. S. 56, 62; *Sullivan* v. *Rosson,* 223 N. Y. 217; 119 N. E. 405. The corporation retains its other property, if it has any, unaffected in its power of disposition by the decree of sequestration. The creditors retain their remedies except against the income subjected to the lien. There is neither winding up of the business nor attempt to reorganize it and set it going anew. This is not the equity receivership of which the lawmakers were thinking if context and analogy have capacity to deliver up a lesson.

In our scrutiny of the context, we turn to the beginning of the section with its statement of the powers to be exercised after the approval by the court of a voluntary petition. The powers are to be those "which a federal court would have had it appointed a receiver in equity of the property of the debtor by reason of its inability to pay its debts as they mature." § 77 B (a). But plainly there is no description here of the powers incidental to the appointment of a receiver in foreclosure. On the contrary, the words describe with aptness an equity receivership to wind up or reorganize. We cannot doubt that the same concept persisted through the section. A few sentences thereafter, in the self-same subdivision, Congress used the words in controversy, speaking compendiously of an "equity receivership" as of something ascertained and known. Surely it was not thinking of a different kind of equity receivership from that explained already, about a score of lines before. The words had been defined. In reason there could be no need to expand or redefine them.

Still scrutinizing the context, we pass to a later subdivision, § 77 B (i), and mark its implications. We learn from this that a petition may be approved if a receiver or trustee of all or any part of the property of a corporation has been appointed by any court in the United States and that thereupon the possession of the receiver shall be displaced and superseded. But plainly this direction, though fairly applicable to an equity receiver in the sense already indicated, was never meant to apply to a receiver in foreclosure. It is common learning that an equity receiver in suits to conserve the assets or divide them among creditors must yield to a trustee in bankruptcy. *Gross* v. *Irving Trust Co.,* 289 U. S. 342. On the other hand, it is also common learning that not even a trustee in bankruptcy may override a valid mortgage lien or supersede a receiver who has been put into possession in fulfilment of the mortgage contract. *Straton* v. *New,* 283 U. S. 318, 322, 327; *Metcalf* v. *Barker,* 187 U. S. 165; *Lincoln Savings Bank* v. *Realty Associates Security Corp.,* 67 F. (2d) 895; *In re Berdick,* 56 F. (2d) 288; *Russell* v. *Edmondson,* 50 F. (2d) 175; *In re Brose,* 254 Fed. 664; *Carling* v. *Seymour Lumber Co.,* 113 Fed. 483, 491. Section 77 B does not make these precedents inapposite. True, the suit for the foreclosure of the mortgage may be stayed or enjoined upon a showing of necessity, § 77 B (c) (10); the lien may be transferred to the proceeds of a sale, § 77 B (b); at times the holder of the lien may have his security modified or reduced by the plan of reorganization when finally approved, § 77 B (b), (e), (f), (h). Cf. *Continental Illinois Nat. Bank* v. *Chicago, R. I. & P. Ry. Co., supra,* pp. 675, 676, 677; *Louisville Bank* v. *Radford,* 295 U. S. 555, 585. Nowhere does the statute say, however, that those results or any of them shall follow automatically upon the approval of the petitition as properly filed. § 77 B (a). Only by excluding a receiver in foreclosure from the scope of subdivision (i) can we avoid anomalous encroachments upon vested rights and interests.

Such a reading of the act will help at the same time in the avoidance of other consequences too harsh or incongruous to have been intended by the Congress. The statute speaks, § 77 B (i), of a receiver "of all or any part of the property of a corporation." These words will have a proper office if the receivership is understood to be a general one for liquidation or for cognate purposes. They will take care of a situation where only part of the property is within the jurisdiction, so that not even an "equity receivership" will be competent always, without ancillary orders, to give possession of the whole. But the situation is very different if the receivership in view is one for the foreclosure of a mortgage. In its normal operation such a receivership does not connote possession of all the property of the debtor or even all the property within the appointing jurisdiction. The mortgage may be a lien upon one parcel or a few, leaving other property of abundant value for payment of the debts. Indeed, the cases must be many where the owner of a mortgaged building, not personally liable for the payment of the mortgage debt, will hold it the part of prudence, whether he is solvent or insolvent, to let the building go. True indeed it is that in this case it so happens that the property subject to the mortgage is everything the debtor has. All that is but an accident, which has little, if any, bearing upon the meaning of the act. True it is also that a court receiving a petition for reorganization *in invitum* may approve or disapprove it, and that any hardship growing out of extreme or unusual situations may thereby be averted. Even so, the search at the moment is for a definition of an equity receivership that will tend to minimize anomalies, and give consistency and coherence to the statutory rule. There is little persuasion in an argument that in despite of all anomalies the system, if it is well administered, may manage to survive.

The suggestion is faintly made that under § 3 of the Bankruptcy Act (11 U. S. C., § 21) the respondent corporation has committed an act of bankruptcy, and hence may be declared a debtor irrespective of the meaning of an "equity receivership" in § 77 B. An act of bankruptcy results *inter alia* if a "person," natural or corporate, has made a general assignment for the benefit of creditors, or if "while insolvent, a receiver or a trustee has been appointed, or put in charge of his property." Bankruptcy Act, § 3 (a) (5), 44 Stat. 662, 663; 11 U. S. C., § 21 (a) (5). There is support for the view that to satisfy this provision the receivership must be general, as contrasted with a receivership incidental to the enforcement of a lien. *Standard Accident Insurance Co.* v. *E. T. Sheftall Co.,* 53 F. (2d) 40, 41. We need not go into that question now. Enough for present purposes that the receiver was not appointed or put in charge "while" the debtor was "insolvent." By the petitioners' admission the value of the assets far exceeds the liabilities. *In re Edward Ellsworth Co.,* 173 Fed. 699; *In re William S. Butler & Co.,* 207 Fed. 705; *Meek* v. *Beezer,* 28 F. (2d) 343; *Standard Accident Insurance Co.* v. *E. T. Sheftall & Co., supra.*

The decree is

Affirmed.

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

TUTTLE ET AL. v. HARRIS ET AL.

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

No. 428. Argued January 17, 1936.—Decided February 3, 1936.

A mortgagee let into possession in foreclosure proceedings, under the law of Illinois, is not an equity receiver within the meaning of § 77B (a) of the Bankruptcy Act. *Duparquet Huot & Moneuse Co.* v. *Evans, ante,* p. 216. P. 226.

78 F. (2d) 409, reversed.

CERTIORARI, 296 U. S. 567, to review a decree affirming one of the District Court, 9 F. Supp. 909, which denied a motion of the present petitioners to dismiss an application under § 77B (a) of the Bankruptcy Act.

Mr. George T. Buckingham, with whom *Messrs. Don Kenneth Jones* and *Vincent O'Brien* were on the brief, for petitioners.

Mr. Maurice Walk, with whom *Messrs. Frank E. McAllister* and *William J. Grace* were on the brief, for respondents.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The controversy here, as in *Duparquet Huot & Moneuse Co.* v. *Evans,* decided at the same time, *ante,* p. 216, is one as to the meaning of the words "equity receiverships" in the statute for the reorganization of debtor corporations. Bankruptcy Act, § 77 B (a); 11 U. S. C., § 207 (a).

A mortgagee brought suit against Granada Hotel Corporation in the Superior Court of Cook County, Illinois, to foreclose a second mortgage upon real property of the corporation located in that state. A receiver was appointed to collect the rents and profits. Thereafter a prior mortgagee, the trustee under a deed of trust to secure an issue of bonds, brought suit to foreclose the prior mortgage, and in accordance with the law of Illinois laid claim to the possession of the property as owner after condition broken. In response to that claim the state court made an order discharging the receiver, and directing that the prior mortgagee be let into possession.

While possession was so held, respondents brought a proceeding under Bankruptcy Act, § 77 B, contending that the possession of the mortgagee was that of an equity receiver or at least equivalent thereto. The District Court upheld that contention, denying a motion by petitioners, who had intervened in the proceeding, to dismiss the application, 9 F. Supp. 909; and the Court of Appeals for the Seventh Circuit affirmed. 78 F. (2d) 409. A writ of certiorari issued from this court.

An equity receivership within the meaning of the statute does not result from the appointment of a receiver for the collection of the rents in a suit to foreclose a mortgage. *Duparquet Huot & Moneuse Co.* v. *Evans, supra.* But here there was no receiver either for the collection of rents or for any other purpose. A mortgagee after condition broken under the law of Illinois is the owner of a legal estate, and as such entitled as of right to the possession of the mortgaged premises. *Wolkenstein* v. *Slonim,* 355 Ill. 306; 189 N. E. 312. The grantee under the deed of trust was in possession not as receiver, but as owner.

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

Reversed.

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

PALMER CLAY PRODUCTS CO. v. BROWN, TRUSTEE.

CERTIORARI TO THE MUNICIPAL COURT OF BOSTON, MASSACHUSETTS.

No. 125. Argued December 13, 1935.—Decided February 10, 1936.

Whether a payment to a creditor by an insolvent debtor on an overdue debt, within four months of the debtor's bankruptcy, operates as a preference, voidable by the trustee, under § 60 (a), (b), of the Bankruptcy Act, depends not upon what would have been its effect on creditors if the debtor's assets had been liquidated and distributed at the time of the payment but upon its actual effect determined in the ensuing bankruptcy. P. 228.

290 Mass. 108; 195 N. E. 122, affirmed.

Certiorari, 296 U. S. 556, to review a judgment recovered by Brown as trustee in bankruptcy. The judgment was entered in the court below pursuant to a rescript from the Supreme Judicial Court of Massachusetts.

Mr. Edward F. Smith, with whom *Messrs. Frank H. Pardee* and *F. Paul Welsch* were on the brief, for petitioner.

Mr. Matthew Brown, with whom *Mr. Harrison J. Barrett* was on the brief, for respondent.

Mr. Justice Brandeis delivered the opinion of the Court.

In the Municipal Court of Boston, Matthew Brown, trustee in bankruptcy of Metropolitan Builders' Supply Company, brought this action against Palmer Clay Products Company, to recover as preferences amounts received on account of an overdue debt. The court found as facts that the defendant had received several such payments within the four months preceding the filing of the petition in bankruptcy; and that at the time of each payment it had reasonable cause to believe that the debtor was insolvent, and also that such payment would effect a preference over other creditors of the same class. It refused to rule that the burden rested on the plaintiff to prove further that each payment had the effect of enabling the defendant to receive a greater percentage of its debt than other creditors of the same class could have received at the time of such payment if the assets had then been liquidated. Judgment for $1,843 was entered pursuant to the rescript of the Supreme Judicial Court of Massachusetts, 290 Mass. 108; 195 N. E. 122, which, in approving the action of the trial court, followed *Rubenstein* v. *Lottow,* 223 Mass. 227; 111 N. E. 973. We granted certiorari because the decision, while in accord with *Bronx Brass Foundry, Inc.* v. *Irving Trust Co.,* 76 F. (2d) 935, in the Second Circuit, and *Commerce-Guardian Trust & Savings Bank* v. *Devlin,* 6 F. (2d) 518, in the Sixth Circuit, conflicts with *W. S. Peck & Co.* v. *Whitmer,* 231 Fed. 893, and other cases in the Eighth Circuit.[1]

The question for our determination is the construction to be given to §§ 60 (a) and (b) of the Bankruptcy Act.[2]

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[1] See *Mansfield Lumber Co.* v. *Sternberg,* 38 F. (2d) 614; *Haas* v. *Sachs,* 68 F. (2d) 623. Also, *Eyges* v. *Boylston Nat. Bank,* 294 Fed. 286 (D. Mass.); *Jentzer* v. *Viscose Co.* (S. D. N. Y.), 13 F. Supp. 540.

[2] The applicable provisions are:

"Sec. 60 (a) A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition . . . made a transfer of any of his property, and the effect of the enforcement of such . . . transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.

"Sec. 60 (b) If a bankrupt shall have . . . made a transfer of any of his property, and if, at the time of the transfer . . . the

The petitioner contends that a creditor who receives a part payment of his claim does not receive a preference, although he has reason to believe that the debtor is insolvent, provided the debtor's assets at the time of the payment would, if then liquidated and distributed, be sufficient to pay all the creditors of the same class an equal proportion of their claims.

Whether a creditor has received a preference is to be determined, not by what the situation would have been if the debtor's assets had been liquidated and distributed among his creditors at the time the alleged preferential payment was made, but by the actual effect of the payment as determined when bankruptcy results. The payment on account of say 10% within the four months will necessarily result in such creditor receiving a greater percentage than other creditors, if the distribution in bankruptcy is less than 100%. For where the creditor's claim is $10,000, the payment on account $1000, and the distribution in bankruptcy 50%, the creditor to whom the payment on account is made receives $5500, while another creditor to whom the same amount was owing and no payment on account was made will receive only $5000. A payment which enables the creditor "to obtain a greater percentage of his debt than any other of such creditors of the same class" is a preference.

We may not assume that Congress intended to disregard the actual result, and to introduce the impractical rule of requiring the determination, as of the date of each payment, of the hypothetical question: What would have been the financial result if the assets had then been liquidated and the proceeds distributed among the then creditors?

Affirmed.

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bankrupt be insolvent and the . . . transfer then operate as a preference, . . . it shall be voidable by the trustee and he may recover the property or its value from such person."

BRONX BRASS FOUNDRY, INC. *v.* IRVING TRUST CO., TRUSTEE.

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

No. 232. Argued December 13, 1935.—Decided February 10, 1936.

1. The right of a plaintiff in equity to dismiss his bill when the defendant cannot have affirmative relief on the pleadings and can suffer no prejudice save for the vexation and expense of a second suit, is subject to modification by rule of court. P. 231.
2. Under a rule in the Southern District of New York, the bankruptcy court may refuse to permit the withdrawal of a creditor's claim after issue joined upon it. P. 232.
3. *Palmer Clay Products Co.* v. *Brown, Trustee, ante,* p. 227, followed on a construction of § 60 (a), (b), Bankruptcy Act, concerning preferences. P. 232.

76 F. (2d) 935, affirmed.

CERTIORARI, 296 U. S. 565, to review the affirmance of an order denying a claim in bankruptcy.

Mr. Maxwell H. Goldstein for petitioner.

Mr. Charles A. Houston for respondent.

By leave of Court, *Mr. John A. McManus* filed a brief on behalf of the Viscose Co., as *amicus curiae,* contending there had been no voidable preference.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

J. R. Palmenberg Sons, Inc., was adjudged bankrupt in the federal court for southern New York in August, 1933. In September, Bronx Brass Foundry, Inc., filed its proof of claim. In January, 1934, the Irving Trust Company, trustee in bankruptcy, moved to expunge the claim on the ground that the creditor had received within the four months preceding the bankruptcy, payments on account aggregating $1,000 which were unlawful preferences. The creditor denied the allegations of preference.

On the issue thus raised, several hearings were had before the referee and the evidence introduced clearly indicated that the payments would, upon bankruptcy, effect a preference over other creditors of the same class, and that the claimant had received them having reasonable cause to believe the debtor insolvent. But it left uncertain whether the amount received was more than its pro rata share would have been, if the then existing assets had been ratably distributed among all the then creditors. Before the hearing closed, and in view of an adverse ruling on the admission of evidence, the creditor filed a withdrawal of its claim and left the hearing.

The trustee objected to allowance of the withdrawal, and introduced further evidence, insisting that it was entitled to an adjudication of the question whether the payments made were unlawful preferences. The referee, at the close of the hearing, ordered that the claim be expunged, unless the creditor within 20 days repay the preference to the trustee, with interest from the date of service of the motion to expunge. He said:

"When a creditor files a claim against the bankrupt estate he elects a forum which may hear and determine whether a preference to him was made. Although judgment of recovery may not be granted, the finding thereon, subject to review, is conclusive as between the parties. It is not intended that a party shall have two trials of the same issue or be permitted to present the same issue to different tribunals for determination. When issue is joined upon the question whether a voidable preference has been received, the creditor may not withdraw of his own motion and thereby avoid such determination as the proof warrants."

The District Court approved the order of the referee. Its judgment was affirmed by the Circuit Court of Appeals, which held that the creditor had received a preference although the proof did not show that at the times of the payments the assets of the debtor were insufficient to pay proportional amounts to all the other creditors, 76 F. (2d) 935. We granted certiorari, because the ruling on the right of the creditor to withdraw its claim appeared to conflict with *Scholl Mfg. Co.* v. *Rodgers,* 51 F. (2d) 971, decided by the Court of Appeals for the Eighth Circuit; and because the ruling on the question of preference conflicted with *W. S. Peck & Co.* v. *Whitmer,* 231 Fed. 893, also decided by that court.

First. The referee was justified in refusing to permit the creditor to withdraw its claim. The Circuit Court of Appeals recognized that ordinarily a plaintiff in equity has, as stated in *Ex parte Skinner & Eddy Corp.,* 265 U. S. 86, 93, the absolute right to dismiss his bill. Its approval of the referee's refusal to permit the creditor to withdraw rested on the ground that the District Court had adopted a rule which authorized the court to refuse, after issue joined, "to permit the plaintiff to discontinue even though the defendant cannot have affirmative relief under the pleadings and though his only prejudice be the vexation and expense of a possible second suit upon the same cause of action"; that this modification of the right of voluntary discontinuance was within the judicial power, since it dealt with procedure; that the rule had been approved by the Court of Appeals; that it was applicable also to bankruptcy proceedings; and that it had been properly applied below. We agree with the reasoning and the conclusion reached.

Second. The ruling of the referee on the question of preference was correct for the reasons stated in *Palmer Clay Products Co.* v. *Brown,* decided this day, *ante,* p. 227.

Affirmed.

GROSJEAN, SUPERVISOR OF PUBLIC ACCOUNTS OF LOUISIANA, v. AMERICAN PRESS CO., INC., ET AL.

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

No. 303. Argued January 14, 1936.—Decided February 10, 1936.

1. As respects the amount in controversy, the District Court has jurisdiction of a suit where the requisite value is involved as to each of several plaintiffs though not involved as to others. P. 241.
2. A motion to dismiss the whole case because the amount in controversy as to some of the plaintiffs is too small, should be overruled. *Id.*
3. There is equitable jurisdiction to enjoin collection of an allegedly unconstitutional state tax, where the taxpayer, if he pays, is afforded no clear remedy of restitution. P. 242.
4. Liberty of the press is a fundamental right protected against state aggression by the due process clause of the Fourteenth Amendment. P. 242.
5. The fact that, as regards the Federal Government, the protection of this right is not left to the due process clause of the Fifth Amendment but is guaranteed *in specie* by the First Amendment, is not a sufficient reason for excluding it from the due process clause of the Fourteenth Amendment. P. 243.
6. A corporation is a "person" within the meaning of the due process and equal protection clauses of the Fourteenth Amendment. P. 244.
7. A State license tax (La. Act No. 23, July 12, 1934) imposed on the owners of newspapers for the privilege of selling or charging for the advertising therein, and measured by a percent. of the gross receipts from such advertisements, but applicable only to newspapers enjoying a circulation of more than 20,000 copies per week, *held* unconstitutional. P. 244.
8. From the history of the subject it is plain that the English rule restricting freedom of the press to immunity from censorship before publication was not accepted by the American Colonists, and that the First Amendment was aimed at any form of previous restraint upon printed publications or their circulation, including restraint by taxation of newspapers and their advertising, which were well-known and odious methods still used in England when the First Amendment was adopted. P. 245.

9. The predominant purpose of the grant of immunity was to preserve an untrammeled press as a vital source of public information. P. 250.
10. Construction of a constitutional provision phrased in terms of the common law, is not determined by rules of the common law which had been rejected in this country as unsuited to local civil or political conditions. P. 248.

It is not intended in this case to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of Government. The tax in question is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press. The manner of its use in this case is in itself suspicious; it is not measured or limited by the volume of advertisements, but by the extent of the circulation of the publication in which the advertisements are carried, with the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers.

10 F. Supp. 161, affirmed.

Appeal from a decree permanently enjoining the enforcement of a state tax on newspapers.

Mr. Charles J. Rivet, with whom *Mr. Gaston L. Porterie,* Attorney General of Louisiana, was on the brief, for appellant.

There is lack of jurisdiction.

The value of the disputed tax alone is the amount in controversy. *Healy* v. *Ratta,* 292 U. S. 263.

The tax in controversy must equal the jurisdictional sum as to each complainant. *Scott* v. *Frazier,* 253 U. S. 243; *Pinel* v. *Pinel,* 240 U. S. 594; *Cole* v. *Norborne Land Drainage District,* 270 U. S. 45; *Di Giovanni* v. *Camden Fire Insurance Assn.,* 296 U. S. 64.

The averments of the bill present no real and substantial federal question.

The statute assailed as unconstitutional furnished no means of action to the Supervisor of Public Accounts, charged with its enforcement, other than the institution of a suit in a court of competent jurisdiction, where every objection of law and fact would be open to the defendant in such suit.

The statute does not provide for a lien against property, nor for summary seizure thereof, nor for interference with the business by injunction, or otherwise; and no execution is permitted except such as would result from any other final judgment of the state court.

No great or irreparable injury can be asserted when the only possible complaint is that a law suit in the state court may result unfavorably to the complainants.

Sections 5 and 11 of the Act may be fairly construed to mean that where a tax is paid under protest no remittance is to be made to the State Treasurer until judicial determination of liability.

The First Amendment of the Federal Constitution imposes no restriction upon the States with reference to abridging the freedom of speech or of the press.

The theory that by effect of the Fourteenth Amendment legislatures of the States are prohibited from passing laws infringing the freedom of the press, finds no support in the jurisprudence of this Court. 1 Cooley's Const. Lim., 8th ed., p. 67, note.

The effect of the second clause of the Fourteenth Amendment was to protect from the hostile legislation of the States, the privileges and immunities of citizens of the United States as distinguished from the privileges and immunities of citizens of the States. To establish a clear and comprehensive definition of this citizenship, the first clause of the Fourteenth Amendment declares that "all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizen of the United States." See *Slaughter House Cases,* 16 Wall. 36.

The liberty guaranteed by the Fourteenth Amendment against deprivation without due process of law is the liberty of natural, not of artificial persons. *Western Turf Assn.* v. *Greenberg,* 204 U. S. 359. The appellees are corporations. They do not possess the privileges and immunities of citizens of the United States within the meaning of the Constitution. *Liberty Warehouse Co.* v. *Tobacco Growers Assn.*, 276 U. S. 71.

A corporation cannot claim the protection of the clause of the Fourteenth Amendment which secures the privileges and immunities of citizens of the United States against abridgment or impairment by the law of a State. *Selover, Bates & Co.* v. *Walsh,* 226 U. S. 112.

There is nothing contrary to this in *Near* v. *Minnesota,* 283 U. S. 697; *Gitlow* v. *New York,* 268 U. S. 652; *Whitney* v. *California,* 274 U. S. 357; *Fiske* v. *Kansas,* 274 U. S. 380; *Powell* v. *Alabama,* 287 U. S. 45.

Nor will it do to say that because the stockholders of these corporations are citizens of the United States the corporations must be considered as such. Cf. *Bank of Augusta* v. *Earle,* 13 Pet. 519.

Furthermore, as pointed out in *Near* v. *Minnesota, supra,* the chief purpose of the constitutional protection of liberty of the press is to prevent previous restraints upon publications.

Nowhere has it ever been held that a person or corporation engaged in the publishing business is exempt from taxation. The following authorities are to the contrary: *In re Jaeger,* 29 S. C. 438 (license taxes); *Norfolk* v. *Norfolk Landmark Publishing Co.,* 95 Va. 564 (license taxes); The Federalist, p. 632.

If freedom of the press implied freedom from taxation, the income tax law of the United States, which takes a part of every penny collected as income from the business of publishing a newspaper, would be clearly unconstitutional.

The tax is not an occupational license tax on the business of publishing newspapers. The legislature could have levied such a tax, but it did not do so. It imposed the tax on the business "of selling, or making any charge for, advertising or for advertisements."

It is not essential to liberty of speech and freedom of the press, as constitutionally understood, that profit be derived from the exercise of these rights. Nor was it ever contemplated that the constitutional guarantee should extend to charging for and selling advertising.

In fact, the constitutional guarantee is limited to the right of the citizen to speak and publish his views, subject to punishment for the abuse of that privilege. Liberty of speech and of the press is not an absolute right. *Near* v. *Minnesota,* 283 U. S. 697.

Appellees rely also upon § 3 of Art. 1 of the Constitution of Louisiana. The highest court of Louisiana has already construed that provision as not affording an exemption from taxation. *New Orleans* v. *Crescent Newspaper,* 14 La. Ann. 804.

The state statute does not censure or restrict the free expression of opinions. It merely requires of those who engage in the profitable business of making others pay for the expression of their views, or for advertising their business, a small contribution for the support of government.

There was no denial of equal protection.

Messrs. Esmond Phelps and *Elisha Hanson,* with whom *Messrs. Bennett C. Clark, J. J. Davidson, Jr., Eberhard P. Deutsch, Ben B. Taylor,* and *John H. Tucker, Jr.,* were on the brief, for appellees.

The District Court had jurisdiction to determine the questions presented.

The case presented called for the exercise of jurisdiction by a court of equity.

The statute violates the provisions of § 8 of Art. X of the Constitution of Louisiana of 1921, which requires that license taxes must be levied on all persons engaged in the trade, business, occupation, vocation or profession upon which a license tax is imposed.

The Act denies appellees the equal protection of the laws.

The Act violates the provisions of the Constitution of Louisiana and of the Constitution of the United States guaranteeing freedom of the press.

The constitutional guaranties against abridgment of the freedom of the press were intended to prohibit every form of abridgment conceivable in the minds of hostile legislatures.

The Act provides for a licensing of the press and a payment of a gross receipts tax on that portion of the revenues of the press derived from the sale and publication of advertising. Further, the Act is limited in its applicability to but thirteen newspapers out of a total of 163 in the State, of which thirteen newspapers twelve were active in their opposition to the dominant political group in the State, which group controlled the Legislature and at whose dictates the Legislature passed this law.

Among the efforts to restrain the press with which the framers of the Constitution were familiar were licensing, censorship, taxation, writs of attachment, seditious libel and injunction proceedings. Taxation as a form of restraint was well known and particularly obnoxious to our forefathers. The historical background of the First Amendment was fully discussed by this Court in its decision in *Near* v. *Minnesota,* 283 U. S. 697.

Not only the First Amendment, but the Fourth and Fifth grew out of the knowledge of our constitution-makers of efforts to control the press, which, if successful, would make it easy for dictators to control their subjects. See *Boyd* v. *United States,* 116 U. S. 616.

See American Debates by Marion Mills Miller, Vol. 1, p. 20; John Lennox and the Taxes on Knowledge, William Stewart, p. 8, as to application of the Stamp Tax, 1765, to newspapers in the Colonies.

At the outbreak of the War for Independence and at the time of the adoption of the Constitution, there were stamp taxes on the circulation and taxes on the advertising matter of English newspapers. The circulation tax became effective in 1712 and it was not repealed until 1855. The advertising tax became effective in 1712 and was abolished in 1853. James Paterson, The Liberty of the Press, London, 1880, pp. 56–58.

During the debates on the ratification of the Constitution, one of the burning issues before the public was the failure of the constitutional convention to include in the body of the document a so-called bill of rights including a guaranty of a free press. Richard Henry Lee, Eleazer Oswald, Melancthon Smith, and other patriots in the debates over ratification specifically assailed the Convention for failing to include a free press provision which would prohibit suppression of the press by taxation.

Since the ratification of the Fourteenth Amendment, the guaranty of free press expressed in the First Amendment, is binding upon state legislatures as well. *Near* v. *Minnesota, supra; Gitlow* v. *New York,* 268 U. S. 652; *Whitney* v. *California,* 274 U. S. 357.

The power to tax the press is the power to destroy it.

One of the purposes of this tax was to divert business from newspapers having a circulation of more than 20,000 per week to newspapers with less circulation.

The levy is a direct tax upon the newspaper publishing business. Its effect is immediate, direct and punitive. Cf. *Brown* v. *Maryland,* 12 Wheat. 419; *Cook* v. *Pennsylvania,* 97 U. S. 566; *Ex parte Harrison,* 212 Mo. 88.

A tax on the principal source of revenue of a newspaper is a tax upon its subsistence. *Evans* v. *Gore,* 253 U. S. 245.

An attempt to tax the press over a certain size is a direct violation of this provision. The record shows that circulation is but one of many factors affecting advertising. The volume of a newspaper's circulation certainly has but a remote bearing on its revenues from advertising, if any at all.

Even were the law so phrased as to levy the tax by reference to the volume of advertising instead of the volume of circulation, it would be invalid.

The fact that these appellees are corporations does not deprive them of the right to resist an attempt to abridge the freedom of the press. *Home Insurance Co.* v. *New York,* 134 U. S. 594.

This Court has the power to ascertain the nature and effect of this Act, irrespective of its designation or declared purpose.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This suit was brought by appellees, nine publishers of newspapers in the State of Louisiana, to enjoin the enforcement against them of the provisions of § 1 of the act of the legislature of Louisiana known as Act No. 23, passed and approved July 12, 1934, as follows:

"That every person, firm, association, or corporation, domestic or foreign, engaged in the business of selling, or making any charge for, advertising or for advertisements, whether printed or published, or to be printed or published, in any newspaper, magazine, periodical or publication whatever having a circulation of more than 20,000 copies per week, or displayed and exhibited, or to be displayed and exhibited by means of moving pictures, in the State of Louisiana, shall, in addition to all other taxes and licenses levied and assessed in this State, pay a license tax for the privilege of engaging in such business in this State of two per cent. (2%) of the gross receipts of such business."

The nine publishers who brought the suit publish thirteen newspapers; and these thirteen publications are the only ones within the State of Louisiana having each a circulation of more than 20,000 copies per week, although the lower court finds there are four other daily newspapers each having a circulation of "slightly less than 20,000 copies per week" which are in competition with those published by appellees both as to circulation and as to advertising. In addition, there are 120 weekly newspapers published in the state, also in competition, to a greater or less degree, with the newspapers of appellees. The revenue derived from appellees' newspapers comes almost entirely from regular subscribers or purchasers thereof and from payments received for the insertion of advertisements therein.

The act requires everyone subject to the tax to file a sworn report every three months showing the amount and the gross receipts from the business described in § 1. The resulting tax must be paid when the report is filed. Failure to file the report or pay the tax as thus provided constitutes a misdemeanor and subjects the offender to a fine not exceeding $500, or imprisonment not exceeding six months, or both, for each violation. Any corporation violating the act subjects itself to the payment of $500 to be recovered by suit. All of the appellees are corporations. The lower court entered a decree for appellees and granted a permanent injunction. 10 F. Supp. 161.

First. Appellant assails the federal jurisdiction of the court below on the ground that the matter in controversy does not exceed the sum or value of $3,000, as required by par. 1 of § 24 of the Judicial Code. The case arises under the Federal Constitution; and the bill alleges, and the record shows, that the requisite amount is involved in respect of each of six of the nine appellees. This is enough to sustain the jurisdiction of the district court. The motion was to dismiss the bill—that is to say, the bill in its entirety—and in that form it was properly denied. No motion to dismiss was made or considered by the lower court as to the three appellees in respect of whom the jurisdictional amount was insufficient, and that question, therefore, is not before us. *The Rio Grande,* 19 Wall. 178, 189; *Gibson* v. *Shufeldt,* 122 U. S. 27, 32.

Second. The objection also is made that the bill does not make a case for equitable relief. But the objection is clearly without merit. As pointed out in *Ohio Oil Co.* v. *Conway,* 279 U. S. 813, 815, the laws of Louisiana afford no remedy whereby restitution of taxes and property exacted may be enforced, even where payment has been made under both protest and compulsion. It is true that the present act contains a provision (§ 5) to the effect that where it is established to the satisfaction of the Supervisor of Public Accounts of the state that any payment has been made under the act which was "not due and collectible," the Supervisor is authorized to refund the amount out of any funds on hand collected by virtue of the act and not remitted to the state treasurer according to law. It seems clear that this refers only to a payment not due and collectible within the terms of the act, and does not authorize a refund on the ground that the act is invalid. Moreover, the act allows the Supervisor to make remittances immediately to the state treasurer of taxes paid under the act, and requires him to do so not later than the 30th day after the last day of the preceding quarter; in which event the right to a refund, if not sooner exercised, would be lost. Whether an aggrieved taxpayer may obtain relief under § 5 is, at best, a matter of speculation. In no view can it properly be said that there exists a plain, adequate and complete remedy at law. *Davis* v. *Wakelee,* 156 U. S. 680, 688; *Union Pacific R. Co.* v. *Weld County,* 247 U. S. 282, 285.

Third. The validity of the act is assailed as violating the Federal Constitution in two particulars—(1) that it abridges the freedom of the press in contravention of the due process clause contained in § 1 of the Fourteenth

Amendment; (2) that it denies appellees the equal protection of the laws in contravention of the same Amendment.

1. The first point presents a question of the utmost gravity and importance; for, if well made, it goes to the heart of the natural right of the members of an organized society, united for their common good, to impart and acquire information about their common interests. The First Amendment to the Federal Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." While this provision is not a restraint upon the powers of the states, the states are precluded from abridging the freedom of speech or of the press by force of the due process clause of the Fourteenth Amendment.

In the case of *Hurtado* v. *California,* 110 U. S. 516, this Court held that the term "due process of law" does not require presentment or indictment by a grand jury as a prerequisite to prosecution by a state for a criminal offense. And the important point of that conclusion here is that it was deduced from the fact that the Fifth Amendment, which contains the due process of law clause in its national aspect, also required an indictment as a prerequisite to a prosecution for crime under federal law; and it was thought that since no part of the amendment could be regarded as superfluous, the term "due process of law" did not, *ex vi termini,* include presentment or indictment by a grand jury in any case; and that the due process of law clause of the Fourteenth Amendment should be interpreted as having been used in the same sense, and as having no greater extent. But in *Powell* v. *Alabama,* 287 U. S. 45, 65, 68, we held that in the light of subsequent decisions the sweeping language of the *Hurtado* case could not be accepted without qualification. We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution.

That freedom of speech and of the press are rights of the same fundamental character, safeguarded by the due process of law clause of the Fourteenth Amendment against abridgement by state legislation, has likewise been settled by a series of decisions of this Court beginning with *Gitlow* v. *New York,* 268 U. S. 652, 666, and ending with *Near* v. *Minnesota,* 283 U. S. 697, 707. The word "liberty" contained in that amendment embraces not only the right of a person to be free from physical restraint, but the right to be free in the enjoyment of all his faculties as well. *Allgeyer* v. *Louisiana,* 165 U. S. 578, 589.

Appellant contends that the Fourteenth Amendment does not apply to corporations; but this is only partly true. A corporation, we have held, is not a "citizen" within the meaning of the privileges and immunities clause. *Paul* v. *Virginia,* 8 Wall. 168. But a corporation is a "person" within the meaning of the equal protection and due process of law clauses, which are the clauses involved here. *Covington & Lexington Turnpike Co.* v. *Sandford,* 164 U. S. 578, 592; *Smyth* v. *Ames,* 169 U. S. 466, 522.

The tax imposed is designated a "license tax for the privilege of engaging in such business"—that is to say, the business of selling, or making any charge for, advertising. As applied to appellees, it is a tax of two per cent. on the gross receipts derived from advertisements carried in their newspapers when, and only when, the newspapers of each enjoy a circulation of more than 20,000 copies per week. It thus operates as a restraint in a double sense. First, its effect is to curtail the amount of revenue realized from advertising, and, second, its direct tendency is to restrict circulation. This is plain enough when we consider that, if it were increased to a high degree, as it could be if valid (*Magnano Co.* v. *Hamilton,* 292 U. S. 40, 45, and cases cited), it well might result in destroying both advertising and circulation.

A determination of the question whether the tax is valid in respect of the point now under review, requires an examination of the history and circumstances which antedated and attended the adoption of the abridgement clause of the First Amendment, since that clause expresses one of those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" (*Hebert* v. *Louisiana,* 272 U. S. 312, 316), and, as such, is embodied in the concept "due process of law" (*Twining* v. *New Jersey,* 211 U. S. 78, 99), and, therefore, protected against hostile state invasion by the due process clause of the Fourteenth Amendment. Cf. *Powell* v. *Alabama, supra,* pp. 67–68. The history is a long one; but for present purposes it may be greatly abbreviated.

For more than a century prior to the adoption of the amendment—and, indeed, for many years thereafter—history discloses a persistent effort on the part of the British government to prevent or abridge the free expression of any opinion which seemed to criticize or exhibit in an unfavorable light, however truly, the agencies and operations of the government. The struggle between the proponents of measures to that end and those who asserted the right of free expression was continuous and unceasing. As early as 1644, John Milton, in an "Appeal for the Liberty of Unlicensed Printing," assailed an act of Parliament which had just been passed providing for censorship of the press previous to publication. He vigorously defended the right of every man to make public his honest views "without previous censure"; and declared the impossibility of finding any man base enough to accept the office of censor and at the same time good enough to be allowed to perform its duties. Collett, History of the Taxes on Knowledge, vol. I, pp. 4–6. The act expired by its own terms in 1695. It was never renewed; and the liberty of the press thus became, as pointed out by Wickwar (The Struggle for the Freedom of the Press, p. 15), merely "a right or liberty to publish *without* a license what formerly could be published only *with* one." But mere exemption from previous censorship was soon recognized as too narrow a view of the liberty of the press.

In 1712, in response to a message from Queen Anne (Hansard's Parliamentary History of England, vol. 6, p. 1063), Parliament imposed a tax upon all newspapers and upon advertisements. Collett, vol. I, pp. 8–10. That the main purpose of these taxes was to suppress the publication of comments and criticisms objectionable to the Crown does not admit of doubt. Stewart, Lennox and the Taxes on Knowledge, 15 Scottish Historical Review, 322–327. There followed more than a century of resistance to, and evasion of, the taxes, and of agitation for their repeal. In the article last referred to (p. 326), which was written in 1918, it was pointed out that these taxes constituted one of the factors that aroused the American colonists to protest against taxation for the purposes of the home government; and that the revolution really began when, in 1765, that government sent stamps for newspaper duties to the American colonies.

These duties were quite commonly characterized as "taxes on knowledge," a phrase used for the purpose of describing the effect of the exactions and at the same time condemning them. That the taxes had, and were intended to have, the effect of curtailing the circulation of newspapers, and particularly the cheaper ones whose readers were generally found among the masses of the people, went almost without question, even on the part of those who defended the act. May (Constitutional History of England, 7th ed., vol. 2, p. 245), after discussing the control by "previous censure," says: ". . . a new, restraint was devised in the form of a stamp duty on newspapers and advertisements,—avowedly for the purpose of repressing libels. This policy, being found effectual in limiting the circulation of cheap papers, was improved upon in the two following reigns, and continued in high esteem until our own time." Collett (vol. I, p. 14), says, "Any man who carried on printing or publishing for a livelihood was actually at the mercy of the Commissioners of Stamps, when they chose to exert their powers."

Citations of similar import might be multiplied many times; but the foregoing is enough to demonstrate beyond peradventure that in the adoption of the English newspaper stamp tax and the tax on advertisements, revenue was of subordinate concern; and that the dominant and controlling aim was to prevent, or curtail the opportunity for, the acquisition of knowledge by the people in respect of their governmental affairs. It is idle to suppose that so many of the best men of England would for a century of time have waged, as they did, stubborn and often precarious warfare against these taxes if a mere matter of taxation had been involved. The aim of the struggle was not to relieve taxpayers from a burden, but to establish and preserve the right of the English people to full information in respect of the doings or misdoings of their government. Upon the correctness of this conclusion the very characterization of the exactions as "taxes on knowledge" sheds a flood of corroborative light. In the ultimate, an informed and enlightened public opinion was the thing at stake; for, as Erskine, in his great speech in defense of Paine, has said, "The liberty of opinion keeps governments themselves in due subjection to their duties." Erskine's Speeches, High's ed., vol. I, p. 525. See May's Constitutional History of England, 7th ed., vol. 2, pp. 238–245.

In 1785, only four years before Congress had proposed the First Amendment, the Massachusetts legislature, following the English example, imposed a stamp tax on all newspapers and magazines. The following year an advertisement tax was imposed. Both taxes met with such violent opposition that the former was repealed in 1786, and the latter in 1788. Duniway, Freedom of the Press in Massachusetts, pp. 136–137.

The framers of the First Amendment were familiar with the English struggle, which then had continued for nearly eighty years and was destined to go on for another sixty-five years, at the end of which time it culminated in a lasting abandonment of the obnoxious taxes. The framers were likewise familiar with the then recent Massachusetts episode; and while that occurrence did much to bring about the adoption of the amendment (see Pennsylvania and the Federal Constitution, 1888, p. 181), the predominant influence must have come from the English experience. It is impossible to concede that by the words "freedom of the press" the framers of the amendment intended to adopt merely the narrow view then reflected by the law of England that such freedom consisted only in immunity from previous censorship; for this abuse had then permanently disappeared from English practice. It is equally impossible to believe that it was not intended to bring within the reach of these words such modes of restraint as were embodied in the two forms of taxation already described. Such belief must be rejected in the face of the then well known purpose of the exactions and the general adverse sentiment of the colonies in respect of them. Undoubtedly, the range of a constitutional provision phrased in terms of the common law sometimes may be fixed by recourse to the applicable rules of that law. But the doctrine which justifies such recourse, like other canons of construction, must yield to more compelling reasons whenever they exist. Cf. *Continental Illinois Nat. Bank* v. *Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648, 668–669. And, obviously, it is subject to the qualification that the common law rule invoked shall be one not rejected by our ancestors as unsuited to their civil or political conditions. *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 276–277; *Waring* v. *Clarke,* 5 How. 441, 454–457; *Powell* v. *Alabama, supra,* pp. 60–65.

In the light of all that has now been said, it is evident that the restricted rules of the English law in respect of the freedom of the press in force when the Constitution was adopted were never accepted by the American colonists, and that by the First Amendment it was meant to preclude the national government, and by the Fourteenth Amendment to preclude the states, from adopting any form of previous restraint upon printed publications, or their circulation, including that which had theretofore been effected by these two well-known and odious methods.

This court had occasion in *Near* v. *Minnesota, supra,* at pp. 713 *et seq.*, to discuss at some length the subject in its general aspect. The conclusion there stated is that the object of the constitutional provisions was to prevent previous restraints on publication; and the court was careful not to limit the protection of the right to any particular way of abridging it. Liberty of the press within the meaning of the constitutional provision, it was broadly said (p. 716), meant "principally although not exclusively, immunity from previous restraints or [from] censorship."

Judge Cooley has laid down the test to be applied—"The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." 2 Cooley's Constitutional Limitations, 8th ed., p. 886.

It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government. But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press.

The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties. A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.

In view of the persistent search for new subjects of taxation, it is not without significance that, with the single exception of the Louisiana statute, so far as we can discover, no state during the one hundred fifty years of our national existence has undertaken to impose a tax like that now in question.

The form in which the tax is imposed is in itself suspicious. It is not measured or limited by the volume of advertisements. It is measured alone by the extent of the circulation of the publication in which the advertisements are carried, with the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers.

2. Having reached the conclusion that the act imposing the tax in question is unconstitutional under the due process of law clause because it abridges the freedom of the press, we deem it unnecessary to consider the further ground assigned that it also constitutes a denial of the equal protection of the laws.

Decree affirmed.

BORDEN'S FARM PRODUCTS CO., INC. *v.* TEN EYCK, COMMISSIONER OF AGRICULTURE & MARKETS OF NEW YORK, ET AL.

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

No. 597. Argued January 6, 1936.—Decided February 10, 1936.

1. As an incident to a temporary and experimental scheme for assisting the milk industry by fixing prices to producer and consumer (*Nebbia* v. *New York,* 291 U. S. 502), the New York Milk Control Act, as amended, discriminated between dealers who had, and dealers who had not, well-advertised trade names, by permitting the latter to sell bottled milk in the City of New York at a price one cent less per quart than the price prescribed for the former. *Held* that there was a reasonable basis for the discrimination; and that a dealer of the former class, who failed to show that, in practice, the differential had resulted in any gain of trade at its expense by the latter class of dealers, or had caused it substantial loss, did not

prove a violation of the equal protection clause of the Fourteenth Amendment. Pp. 261, 263.

2. The findings in this case establish that, before the fixing of prices under the Act, dealers without well-advertised brands were able to compete for the trade in question, but only by slightly underselling their advertised competitors. The differential is sustained as an attempt, competent to the legislature during the limited term of the experiment, to preserve this trade practice, already existing, which balanced the advantage of a lower price, for the one group, against the advantage of advertisement enjoyed by the other. P. 261.

11 F. Supp. 599, affirmed.

Appeal from a decree which dismissed, upon the final hearing, a suit to enjoin the enforcement of a provision of the New York Agriculture & Markets Law. For an earlier phase see s.c., 293 U. S. 194. Cf. p. 266, *post.*

Mr. Walter E. Hope, with whom *Mr. Timothy N. Pfeiffer* was on the brief, for appellant.

The differential constitutes an arbitrary and unreasonable discrimination against appellant and others similarly situated. It has not been advocated by any impartial investigating or administrative agency. It has no relation to cost, quality, or service. It is directly at variance with the avowed objectives of the Milk Control Law.

There could have been no reasonable doubt when the statute was passed that the differential would prove injurious to appellant; and it cannot be justified as an effort to protect existing dealers from losses which might result from the State's emergency price-fixing.

There was no ground for a reasonable belief by the legislature that without the statutory differential the independent dealers would be eliminated; and the differential cannot be justified as an effort to preserve the independent dealers in the public interest.

The essence of price-fixing is to fix a single compulsory price for products and services of equal grade; its meaning is that price competition is at an end, and that henceforth all competition shall be on the basis of quality, and selling and productive efficiency. In such a conception, there is no room for unequal prices for things of the same grade, whatever their brands or trade names. It follows that if the differential is to be justified at all, it must be on some other principle than those which lend support to ordinary price-fixing.

Besides the attempted justifications thus far considered, it has been suggested that the differential is an anti-advertising measure; that it is an anti-monopoly measure; and that it is a measure akin to the chain store tax statutes upheld by this Court in *Tax Commissioners* v. *Jackson,* 283 U. S. 527; *Liggett Co.* v. *Lee,* 288 U. S. 517; *Fox* v. *Standard Oil Co.,* 294 U. S. 87. None of these hypotheses fits the case.

In the absence of special considerations such as those present in the trading stamp cases (*Rast* v. *Van Deman & Lewis Co.,* 240 U. S. 342) the validity of a statute penalizing advertising in an ordinary commercial business is at least open to serious doubt. *Semler* v. *State Board of Dental Examiners,* 294 U. S. 608.

Apart from whether price regulation may be employed to curb monopoly (*Fairmont Creamery Co.* v. *Minnesota,* 274 U. S. 1; *Williams* v. *Standard Oil Co.,* 278 U. S. 235), it is certain that the differential is not an anti-monopoly measure.

As for the justification founded on the chain store tax cases, it seems clear that the differential was not intended to foster or preserve free and equal economic opportunity for the public as a whole. If such had been the intent of the statute, its privileges would have been made available to new-comer dealers, to dealers who had been forced out and obliged to start over, and, in general, to all dealers who were still small. Its privileges are not available to such persons but are the monopoly of the favored group of dealers who were already in the field when the differential was first enacted and who were instrumental in procuring its passage.

The differential was in reality a thinly veiled attempt by the independent dealers to preëmpt the New York City store market.

The novel character of the differential and the drastic penalty it imposes require that a clear justification for it be shown.

It requires no argument to demonstrate the serious consequences of permitting a legislature, under the pressure of interested groups, to determine that one competitor's product is to enjoy a preference as against another's irrespective of cost, quality or other distinguishing factors. The building up of a good reputation through the sale of an honest product over a long period of years becomes not an asset but a handicap if the legislature may step in and fix a higher price for such product while it permits a competitor to sell a similar product at a lower price. The competitor with an established reputation is thus denied the right to meet the price of a lesser known rival. The public is required to pay more for the product which it wants or to abandon it in favor of a less desired product because the legislature believes, or professes to believe, that one or more competitors are enjoying what the legislature regards as too large a percentage of the market.

The State can and should take proper measures to see that competitive conditions in general are free from improper restrictions and are fair and equal. But if the legislature is to be free to intervene in each competitive group in each community and to discriminate between competitors by arbitrarily establishing different prices for the same article, there can be but one result. Political intrigue and the pressure for advantage by one group against another will inevitably lead to oppression. The dangers are not illusory but real and practical ones.

The differential is not an integral part of the Milk Control Law and may be declared invalid without invalidating the remainder of the statute.

Messrs. Samuel Kramer and *Henry S. Manley,* with whom *Mr. John J. Bennett, Jr.,* Attorney General of New York, and *Mr. David L. Weissman* were on the brief, for appellees.

The differential provision, having as its aims (1) the preservation of competitive opportunities among the dealers, (2) the stabilization of conditions among the producers, and (3) the prevention of monopoly, is neither discriminatory, arbitrary, nor unreasonable.

The device of classification, with the application of different regulations for different classes, is a common device of the law. "Classification is the most inveterate of our reasoning processes." *Truax* v. *Corrigan,* 257 U. S. 312, 337-338. The "State has a broad discretion in classification, in the exercise of its power of regulation." *Borden's Farm Products Co.* v. *Baldwin,* 293 U. S. 194, 210. Exactness in classification cannot always be obtained, and a tendency to fairness is enough, as is illustrated by *Singer Sewing Machine Co.* v. *Brickell,* 233 U. S. 304. The classification is valid unless it is "without any reasonable basis" and one who assails the classification "must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 78-79. The statute is good so long as it does not "preclude the possibility of a rational basis for the legislative declaration." *Ohio ex rel. Clarke* v. *Deckebach,* 274 U. S. 392, 397. "The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction." *Board of Tax Comm'rs* v. *Jackson,* 283 U. S. 527, 537. The thought that runs through all the cases is that all that a classification needs to sustain it is a showing that it rests upon some rational basis. Cf. *Nebbia* v. *New York,* 291 U. S. 502.

What the legislature did here has been merely to continue a condition which previously existed. Though it is unnecessary to a decison of this case, it will prove fruitful to consider whether the legislature did not have the power to incorporate in the law a differential even if one had not previously existed. Cf. *Fox* v. *Standard Oil Co.,* 294 U. S. 87.

The plaintiff has not shown such damage traceable to the differential as entitles it to relief in equity.

The plaintiff is estopped from attacking the constitutionality of the differential provision. By obtaining a license under the Act, it acquired a valuable property right, a right which prevented all unlicensed persons from competing with it in its business. *Frost Trucking Co.* v. *Corporation Commission,* 278 U. S. 515. For an entire year it availed itself of the benefits of the Act. The plaintiff is now estopped from attacking that part which it regards as a burden. *United Fuel Gas Co.* v. *Railroad Commission,* 278 U. S. 300; *Booth Fisheries Co.* v. *Industrial Commission,* 271 U. S. 208; *St. Louis Co.* v. *Prendergast,* 260 U. S. 469.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This cause is here a second time. The prior appeal was from a decree denying a preliminary injunction and dismissing the bill.[1] We reversed, holding that evidence should be taken, findings and conclusions made, and a decree thereupon entered. After remand the appellant amended its bill, the court sent the case to a master who made findings of fact, stated his conclusions of law, and

[1] 293 U. S. 194; 7 F. Supp. 352.

recommended that an injunction be entered. The District Court accepted the master's findings, and found certain additional facts, but dismissed the bill upon the merits.[2] From this judgment the present appeal was taken.

As will appear by reference to our former opinion the appellant's complaint is that the fixing of a differential of not to exceed one cent per quart on sales to stores, in favor of milk dealers not having a "well advertised trade name," by the Milk Control Law of April 10, 1933 (reënacted by the laws of 1934, chapter 126), was an invasion of rights guaranteed by the Fourteenth Amendment. The bill, as framed when the case was here before, recited that the administrative authority which fixed the minimum price on sales to stores found the appellant and three other milk dealers in the metropolitan market had well advertised trade names and the statute permitted dealers not having such trade names to sell bottled milk to stores at one cent per quart less than the minimum which dealers with well advertised trade names were required to charge, and also permitted stores to resell to their customers the unadvertised brands of milk at a price one cent per quart less than that at which the appellant's milk could be sold under the minimum fixed by the order. Resulting loss of business and irreparable damage were alleged.

In this court the appellees sought to justify the differential by the assertion that the statute was temporary in character, intended to relieve a temporary economic situation, and meanwhile to prevent monopoly of the business by dealers having well advertised names. In support of this position it was said that prior to the adoption of the Milk Control Act of 1933 independent dealers, so-called, had purchased from producers at prices lower than

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[2] 11 F. Supp. 599.

those paid by appellant and other purveyors of well advertised brands, and in turn charged less to stores than the appellant and others in its class. By the Milk Control Act the independent dealers were compelled to purchase from the farmers on the same basis as the well known dealers; and to deprive them of this advantage and in turn to compel them to charge the same price for their milk as the well advertised brands commanded would be to transfer all their customers to the owners of well known brands, and put them out of business. The appellant replied that, prior to the adoption of the Milk Control Law, there had been a threat to forbid the sale of milk in bulk to stores; this compelled the independents who had formerly sold mostly bulk milk to change to the bottled trade, and keen competition ensued between them and the owners of well advertised brands with destructive price cutting throughout the greater part of New York City, so that there was no fixed price for bottled milk sold to stores either by the independents or the well advertised dealers. In support of these contentions we were referred to statements found in the legislative report leading to the adoption of the Milk Control Law, and the injunction affidavits.

We held we could not take judicial notice of local trade conditions prevailing in the City of New York; as the case had been disposed of below on the allegations of the bill, we were not called upon to examine the affidavits submitted in support of the motion for injunction and to find the facts; and the constitutionality of the challenged provision should be determined in the light of evidence upon the matters as to which the parties were in disagreement.

By amendment the appellant added to its bill paragraphs to the following effect: Prior to 1932 less than one-third of the fluid milk sold in New York was bottled, the balance being sold in bulk and under no trade name.

Toward the end of 1931 a commission recommended that the sale of loose milk to stores be prohibited. The Board of Health made an order, effective January 1, 1933, the effective date of which was subsequently postponed to June 1, 1933, prohibiting the practice. By reason of the impending ban upon the sale of loose milk, dealers engaged in the sale of that commodity were forced to make a drastic change in their methods. The transition from the sale of loose milk to bottled, which began about April 1, 1933, and continued until June 1, 1933, engendered widespread price cutting and a steadily declining price level, and brought about unsettled market conditions and great variations in price. At no time prior to the effective date of the Milk Control Act was there any trade custom, practice, or usage whereby the bottled milk of dealers thereafter classified as not having well advertised trade names was sold to stores at a price different from that of the bottled milk of the appellant and others classified as having well advertised trade names. Before April 10, 1933, and thereafter, the appellant was in active competition with more than one hundred and fifty dealers in the sale of bottled milk to stores in the city. The appellant and others classified as having well advertised trade names sell approximately twenty-one per cent of the bottled milk sold to stores. The prices paid by dealers to producers under the Milk Control Law have been the same for all dealers no matter how classified. All bottled milk must have printed on the cap the name of the dealer distributing it. The services rendered by the appellant and by so-called independent dealers differ in no respect.

The assertions of shrinkage of appellant's sales to stores consequent upon the establishment of the differential were repeated and amplified in the amended bill. An answer was filed denying the allegations of the bill. Much evidence was received.

The findings of the master establish that the dealers having a well advertised trade name, of which appellant is one, are in keen competition with each other and with the independent dealers, and have no monopoly, nor anything approaching a monopoly, of the sale of bottled milk to stores. The findings further demonstrate that the good will incident to appellant's well known trade-name "Borden's" has been built up largely by advertising, and there is no finding that the appellant's methods in that respect, or its trade practices, have been illegal. Grade B milk, with which we are alone concerned, must conform to standards of quality, purity and cleanliness prescribed by law, whether sold by appellant or by an independent dealer. The service rendered and the conditions of sale are the same for both. It is plain from these facts that the allowance of the differential cannot be justified as a preventive of monopoly or as a deterrent of illegal combination or illegal trade practices, or as a recognition of differences in the service rendered.

We are brought to the remaining issue of fact to resolve which the case was remanded. Was there a differential during a substantial period prior to adoption of the act between the price charged to stores by dealers having well-advertised trade names and that charged by those lacking this advantage?

The master's findings upon the point, though the appellant excepted to them, were adopted by the court below. They are to the effect that from November, 1931, to April, 1933, and for several years prior thereto, the independent dealers sold their bottled milk to stores in New York City for resale to consumers at one or more cents per quart below the price at which the advertised dealers were selling their bottled milk to stores in that city; and during the same years the stores were selling the independents' bottled milk to consumers from one cent to two cents per quart below the price at which they were vending the bottled milk of the advertised dealers. The District Court made additional findings, supplementing those of the master, that independent dealers on occasions before November 1, 1931, and until April 1, 1933, tried to sell bottled milk to stores at the same price as that charged by the appellant and another advertised dealer, and in each case were compelled by loss of business to resume their earlier and lower price; and during the same period customers when offered the several brands at the same price would usually take a bottle of the well-advertised dealer's milk in preference to that of an independent dealer. These findings of the master and the court disclose the circumstances in the light of which the appellant's claim that it was denied the equal protection of the laws must be considered. The appellant assigns them as error; but they are supported by substantial evidence and we will not disturb them.

We hold that the fixing of the differential in favor of the sellers of milk not having a well-advertised trade name, in the situation exhibited by the findings, does not deny the appellant equal protection.

The argument is that the classification is arbitrary since the statute puts the appellant and other dealers who have well advertised trade names in a single class solely by reason of the fact that their legitimate advertising has brought them good will. So, it is said, they are penalized for their business skill and acumen. The answer seems sufficiently obvious. In enforcing its policy of price fixing,—a temporary expedient to redress an injurious economic condition,—the legislature believed that a fixed minimum price by dealers to stores would not preserve the existing economic method of attaining equality of opportunity. That method was for the well-advertised dealers to rely on their advertising to obtain a given price, and for the independents to retain their share of the market, not by counter-advertising but by a slight reduction of price. The one expedient the law did not purport to touch; the other by fixing the same minimum for all dealers it would effectually destroy. In these circumstances, it was competent to the law makers to attempt, during the limited term of the legislative experiment, to preserve the existing relationship of advantage established by the past trade practices of the two groups. So to do, we must assume, was within the legislative power under the state constitution. No prohibition of the expedient is found in the Federal Constitution, unless in the Fourteenth Amendment. We have held that article does not prevent the fixing of maximum and minimum prices for milk, in the circumstances existing in the State of New York in 1933.[3] We now hold that to provide that a differential of one cent maintained by the independent dealers shall continue does not deny their advertised competitors equal protection. There was a plain reason for the classification. It was not merely that appellant had established a good will; it was that there had resulted a balance between that advantage and the resulting disadvantage to the unadvertised dealer,—a balance maintained by a price differential. To attempt the maintenance of that balance was to strive for equality of treatment, equality of burden, not to create inequality. To adapt the law to the existing trade practice was neither unreasonable nor arbitrary. The present case affords an excellent example of the difficulties and complexities which confront the legislator who essays to interfere in sweeping terms with the natural laws of trade or industry. The danger in such efforts always is that unintended dislocations will bring hardship to groups whose situation the broad rules fail to fit. Where, as here, there is recognition of an existing status and an attempt to equate the incidence of the statute in accordance with it, we find a

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[3] *Nebbia* v. *New York,* 291 U. S. 502.

compliance with, rather than a disregard of the constitutional guarantee of equal protection. The appellant cannot complain if, in fact, the discrimination embodied in the law is but a perpetuation of a classification created and existing by the action of the dealers. In the light of the facts found the legislature might reasonably have thought trade conditions existed justifying the fixing of a differential. Judicial inquiry does not concern itself with the accuracy of the legislative finding, but only with the question whether it so lacks any reasonable basis as to be arbitrary. *Standard Oil Co.* v. *Marysville,* 279 U. S. 582, 586–587.

A second argument is that, instead of maintaining equality between the two groups, the act has destroyed it by unduly favoring the independents. The differential is said to inflict grievous injury and irreparable and continuing damage upon the appellant. We must look to the record to determine whether it supports the appellant's claim. The master made numerous findings touching the relative sales of bulk and bottled milk to stores by the two groups of dealers at various times before and after the adoption of the act, and in respect of appellant's share of that trade in comparison with total sales and those of its independent competitors. He also found: "Since the enactment of the 1933 Law, the advertised dealers have had a smaller proportion relative to the independent dealers of the total sales of bottled milk to stores in New York City than before the enactment of the law." But neither in his findings nor in his general discussion does he say that the smaller volume of appellant is due to the differential provision. He does state: "the voluminous proofs fail to furnish facts on which to base a finding as to the effect of minimum prices without a differential." There is no fact finding of loss and damage to plaintiff from the differential. A conclusion of law is: "By reason of the differential provision, the plaintiff is now suffering, and will continue to suffer irreparable damage." After a full discussion of the master's findings the District Court said: "From all this it seems to us very doubtful whether the differential has really damaged the plaintiff at all." We have examined the findings and the evidence, and concur in the conclusion. Though appellant, at the time of the trial, had acquired a large experience of the operation of the differential, its proofs and the findings based upon them, leave serious doubt as to the effect on the appellant's store trade of other factors, such as seasonal variation, the decrease in the consumption of milk in 1934, the change from loose to bottled milk in store distribution, and the sale of great quantities of so-called relief milk under arrangement with the public authorities. It has failed to show that as a result of the statute the independent dealers have gained trade at its expense, or that it has suffered substantial loss.

We have no occasion to determine whether the differential would become unlawful, and the appellant would be entitled to relief, if there were proof that in practice it produces such gross inequality, and so unnecessarily damages the appellant, as to shock the conscience.

Decree affirmed.

Mr. Justice McReynolds, dissenting.

Mr. Justice Van Devanter, Mr. Justice Sutherland, Mr. Justice Butler and I think the challenged judgment should be reversed.

In *Nebbia* v. *New York,* 291 U. S. 502, 539, we stated reasons in support of the conclusion that the New York Milk Control Act of 1933 infringed the due process clause. We adhere to what we there said.

The present cause raises a distinct, although subordinate, question. Assuming that the general price fixing provisions of the Control Act are valid, do the provisions which permit other dealers to sell below the minimum price prescribed for appellant deprive it of the equal protection of the laws? The answer should be in the affirmative.

Rational classification, based on substantial differences, is within legislative power. An act which permits dealer A to sell at less than the price fixed for dealer B obviously denies equality; and in the absence of some adequate reason for different treatment, the enactment is invalid.

Here appellant differs from favored dealers only in that it possesses a well advertised brand, while they do not. And solely because of that fact, the Legislature undertook to handicap it and thus enable others profitably to share the trade. There is no question of unfair trade practices or monopoly.

By fair advertisement and commendable service, appellant acquired the public's good will. The purpose is to deprive it of the right to benefit by this and thereby aid competitors to secure the business. This is grossly arbitrary and oppressive.

To support the legislation, it is said the Legislature believed that a fixed minimum price to stores would not preserve the existing economic method of attaining equality of opportunity. Apparently, this means that a dealer, who through merit has acquired a good reputation, can be deprived of the consequent benefit in order that another may trade successfully. Thus the statute destroys equality of opportunity—puts appellant at a disadvantage because of merit.

Merely because on a given date there were differences in prices under open competition, offers no rational reason for legislation abolishing competition and perpetuating such differences. The status existing under competitive conditions certainly is not preserved by destroying competition. Formerly, appellant had the right to adjust prices to meet trade exigencies and thus protect itself from loss of business. Now it must stand helpless while adversaries take possession of the field. It may suffer utter ruin solely because of good reputation, honestly acquired.

MAYFLOWER FARMS, INC. *v.* TEN EYCK, COMMISSIONER OF THE DEPARTMENT OF AGRICULTURE & MARKETS OF NEW YORK, ET AL.

APPEAL FROM THE SUPREME COURT OF NEW YORK.

No. 349. Argued January 15, 1936.—Decided February 10, 1936.

1. The New York Milk Control Act, as amended effective April 1, 1934, discriminates between milk dealers without well-advertised trade names who were in the business before April 10, 1933, and those in that class who entered it later, by granting to the former and denying to the latter the privilege of selling milk in New York City at a price one cent below the minimum binding on competitors with well-advertised trade names. *Held* that the discrimination is arbitrary and unreasonable and violates the equal protection clause of the Fourteenth Amendment. P. 271.
2. This provision, on its face, is not a regulation of a business in the interest of, or for the protection of, the public, but an attempt to give an economic advantage to those engaged in a given business at an arbitrary date as against all those who entered the business after that date. No reasons for the discrimination are disclosed by the record; and in the absence of such showing the Court has no right to conjure up possible situations which might justify the discrimination. Pp. 272, 274.
3. The question whether the time limitation found unconstitutional is severable from the provision for the price differential, is left for adjudication by the state courts upon remand of the case. P. 274.

Reversed.

APPEAL from a judgment upholding an order denying the appellant a license to sell milk. For reports of the case in the New York courts, see 267 N. Y. 9, 195 N. E. 532; 242 App. Div. 881, 275 N. Y. S. 669. Compare the case next preceding in this volume.

Mr. Seymour Ellenbogen, with whom *Mr. Max Cohen* was on the brief, for appellant.

The purpose of the time limitation is to create a monopoly, by preventing new dealers from entering the field. It was not intended to prevent new and injurious competition; such competition was and is directly and effectively prevented by § 258–c of the Act, which the court below overlooked. It was not enacted to preserve the *status quo* of the milk dealers in business on April 10, 1933, or upon the ground that the well-advertised dealers would form unadvertised subsidiaries; or on emergency grounds.

It cannot be supported as a legitimate exercise of police power. *Lawton* v. *Steele,* 152 U. S. 133, 137; *Colon* v. *Lisk,* 153 N. Y. 188, 196; *Wright* v. *Hart,* 182 N. Y. 330.

To prescribe different qualifications for entrance into the business, or to prescribe regulations covering the different classes, is entirely different from proscribing, in effect, the right to engage in such business altogether.

This case is like *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540; *Truax* v. *Corrigan,* 257 U. S. 312. The limitation is not based on any factual situation. It is an unusual legislative expedient and its approval will establish a most dangerous precedent.

To concede the validity of the time limitation would be to concede the power of the legislature, in the guise of regulation, to destroy a lawful business—a power which this Court has declared in many cases does not exist. *Burns Baking Co.* v. *Bryan,* 264 U. S. 504, 513. See also *Meyer* v. *Nebraska,* 262 U. S. 390, 399–400; *Norfolk Ry. Co.* v. *Public Service Comm'n,* 265 U. S. 70, 74; *Pierce* v. *Society of Sisters,* 268 U. S. 510, 534–535; *Weaver* v. *Palmer Bros.,* 270 U. S. 402, 412–415; *Fairmont Co.* v. *Minnesota,* 274 U. S. 1, 9–11; *Liggett Co.* v. *Baldridge,* 278 U. S. 105, 113.

On the other hand, a decision conceding this appellant a license which it deserves and has qualified for, will not disrupt, but will promote, the working of the milk control system of the State.

Appellant falls naturally into the class of unadvertised dealers in New York City for whose benefit the price differential provision was enacted and, as a member of such class, is entitled to that benefit. *Standard Oil Co.* v. *Charlottesville,* 42 F. (2d) 88; *State* v. *Whitcom,* 122 Wis. 110; *Chicago, M. & St. P. Ry. Co.* v. *Westby,* 178 Fed. 619; *Fountain Park Co.* v. *Hensler,* 199 Ind. 95; *U. S. Automobile Service Club* v. *Winkle,* 128 Ore. 274; *Ex parte Wacholder,* 1 Cal. App. (2d) 260; *Cook Coffee Co.* v. *Flushing,* 267 Mich. 131; *State* v. *Hinman,* 65 N. H. 103; *Johnson* v. *Milwaukee,* 88 Wis. 383, 390–392; *State ex rel. Resch* v. *Trustees,* 121 Wis. 44, 54; *Servonitz* v. *State,* 133 Wis. 231, 238; *Borgnis* v. *Falk Co.,* 147 Wis. 327, 353, 354; *Nichols* v. *Walter,* 37 Minn. 264, 271; *Davis Construction Co.* v. *Board,* 192 Ind. 144; *Louisville & N. R. Co.* v. *Railroad Commissioner,* 19 F. (2d) 679, 695; *Tugman* v. *Chicago,* 78 Ill. 405; *Alexander* v. *Elizabeth,* 56 N. J. L. 71. For other cases in New Jersey condemning arbitrary time limitations, see *State* v. *Post,* 55 N. J. L. 264; *State ex rel. Pierson* v. *O'Connor,* 54 N. J. L. 36; *Pavonia Horse R. Co.* v. *Jersey City,* 45 N. J. L. 297; *Stahl* v. *Trenton,* 54 N. J. L. 444. *Sutton* v. *State,* 96 Tenn. 696; *Pabst Corporation* v. *Milwaukee,* 190 Wis. 349; *Northwestern National Ins. Co.* v. *Fishback,* 130 Wash. 490; *Hauser* v. *N. B. & M. Insurance Co.,* 206 N. Y. 455; *People* v. *Ringe,* 197 N. Y. 143; *Southeastern Electric Co.* v. *Atlanta,* 179 Ga. 514.

The time limitation is separable.

Mr. Henry S. Manley, with whom *Mr. John J. Bennett, Jr.,* Attorney General of New York, and *Mr. Henry Epstein,* Solicitor General, were on the brief, for appellees.

There was good reason for limiting the privilege of selling at the "unadvertised" price to dealers who were in business on April 10, 1933, when the original Milk Control Law was enacted. The classification is not unconstitutional.

For the purpose of testing the narrow question of constitutionality involved in this case, it is necessary to examine the facts underlying the statute. The legislature did not wish to increase and intensify the lower-price competition against the "advertised" dealers by permitting new dealers to join it; and if persons and corporations wanted to make investments in the milk business after April 10, 1933, they were required to attach themselves to the higher-price group.

New legislation frequently makes important distinctions with relation to its effective date, and such classification, far from being arbitrary and unfair, often is necessary to protect from an unfair burden those who began business before the statute was contemplated. *Sperry & Hutchinson Co.* v. *Rhodes,* 220 U. S. 502, 505; *Buck* v. *Bell,* 274 U. S. 200, 208; *Watson* v. *Maryland,* 218 U. S. 173; *People* v. *Griswold,* 213 N. Y. 92, 97; *Cooper* v. *Rollins,* 152 Ga. 588; *People* v. *Logan,* 284 Ill. 83; *Criswell* v. *State,* 126 Md. 103; *Commonwealth* v. *Ward,* 136 Ky. 146; *Sammarco* v. *Boysa,* 193 Wis. 642; *Manheim* v. *Harrison,* 164 La. 564; *Aurora* v. *Burns,* 319 Ill. 84; *Spector* v. *Building Inspector,* 250 Mass. 63; *Standard Oil Co.* v. *Charlottesville,* 42 F. (2d) 88; *Norton* v. *Hutson,* 142 Kan. 305; *New York City* v. *Kelsey,* 158 App. Div. 183. See, to the same effect, *Baylis* v. *Van Nostrand,* 176 App. Div. 396; *Moritz* v. *United Brethren Church,* 269 N. Y. 125; *Commonwealth* v. *Charity Hospital,* 198 Pa. 270; *Commonwealth ex rel. Elkin* v. *Charity Hospital,* 199 Pa. 119.

Even if the time limitation is unconstitutional, appellant is not entitled to any relief in this proceeding. This Court will not exercise "judicial surgery" for the purpose of extending to the appellant and other new dealers the benefit of the "unadvertised differential" provision. The legislature was moved by the anticipated hardship of an even price, upon dealers whose existing businesses depended upon continuing sales at a lower price, to make them a concession which this Court has said is "novel, if not unique." *Borden's Farm Products Co.* v. *Baldwin,* 293 U. S. 194, 203. The legislature made the concession only to the extent that it was needed. It intended merely to save existing business done on the lower price level; it had no intention of encouraging new dealers to come in on that basis.

The statute now under consideration contains a separability clause; but we do not understand that such a clause is conclusive upon all questions of separability. Such a clause is "but an aid to interpretation and not an inexorable command." *Dorchy* v. *Kansas,* 264 U. S. 286, 290; *Williams* v. *Standard Oil Co.,* 278 U. S. 235, 242; *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165, 184; *Champlin Refining Co.* v. *Commission,* 286 U. S. 210, 235.

The general rule as to separability has been stated and applied many times. See, for examples, *Sprague* v. *Thompson,* 118 U. S. 90, 94–95; *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540, 565; *Lynch* v. *United States,* 292 U. S. 571, 586. The rule applied by the highest court of New York State is the same. *People ex rel. Cement Co.* v. *Knapp,* 230 N. Y. 48, 60; *City Bank F. T. Co.* v. *New York Central R. Co.,* 253 N. Y. 49, 55–57; *People* v. *Mancuso,* 255 N. Y. 463, 472–474.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The appellant is a corporation formed under the laws of New York, pursuing the business of a milk dealer in Brooklyn. It did not enter the business until the autumn of 1933, when it applied for, and was granted, a license under the Milk Control Act of March 31, 1933. The statute having been reënacted for the year commencing April 1, 1934, the company, on April 16, 1934, sought a license under the new act. After a hearing the application was denied. The Supreme Court granted a certiorari order, and upon that order and the return the Appellate Division confirmed the order of the Department of Agriculture and Markets refusing a license, and this action was affirmed by the Court of Appeals.

The Milk Control Act of 1933,[1] authorized a board to fix minimum prices for sales of fluid milk in bottles by dealers to stores in cities of more than one million inhabitants, with a differential of one cent per quart in favor of dealers "not having a well advertised trade name." [2] The term of the act was one year. An amended act, effective April 1, 1934,[3] which placed milk control under the jurisdiction of a division of the Department of Agriculture and Markets, contained a similar provision with respect to the differential. The pertinent section, as it stood at the time of the appellant's application for a license, follows; the words in brackets having been in the original act, but eliminated when the statute was revised in 1934, those in italics having been added by the later act:

"It shall not be unlawful for any milk dealer who [at the time this act shall take effect is] *since April tenth, nineteen hundred thirty-three has been* engaged *continuously* in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under

[1] Laws of 1933 (N. Y.) c. 158. See *Nebbia* v. *New York*, 291 U. S. 502.

[2] *Ibid.*, § 317 (c).

[3] Laws of 1934 (N. Y.) c. 126.

a well advertised trade name, *and such lower price shall also apply on sales from stores to consumers;* provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed [by the board] for such sales to stores in such a city." [4]

The appellant had not a well-advertised trade name. The reason for refusing it a license was that though it had not been continuously in the business of dealing in milk since April 10, 1933 it had sold and was selling to stores milk at a price a cent below the established minimum price. The question is whether the provision denying the benefit of the differential to all who embark in the business after April 10, 1933, works a discrimination which has no foundation in the circumstances of those engaging in the milk business in New York City, and is therefore so unreasonable as to deny appellant the equal protection of the laws in violation of the Fourteenth Amendment.

The record discloses no reason for the discrimination. The report of the committee, pursuant to which the Milk Control Act was adopted, is silent on the subject. While the legislative history indicates that the differential provision was intended to preserve competitive conditions affecting the store trade in milk, it affords no clue to the genesis of the clause denying the benefit of the differential to those entering the business after April 10, 1933.

The Court of Appeals thought a possible reason for the time limitation might be that, without it, the companies having well advertised names could, through subsidiaries, sell milk not bearing their names in competition with unadvertised dealers and thus drive some of the latter

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[4] Laws of 1933 N. Y., c. 158, § 317 (c); Article 21-A, § 258 (q) of the Agriculture and Markets Law of the State of New York; Laws of 1934 (N. Y.) 580.

out of the field with consequent injury to the farmers who sell them milk. This view ignores the fact that the purchase price to the farmer is fixed and that the introduction of new unadvertised brands of bottled milk would not reduce the total demand for fluid milk in the metropolitan area. The appellees do not attempt now to support the provision on this ground.

Another suggested reason for the discrimination is that the legislature believed an equal price basis for all dealers would cause most of the business of selling milk through stores to pass into the hands of the large and well known dealers; the differential provision was designed to prevent this result, and save existing businesses of the independent dealers, but was limited in its scope by the reason for it; the legislature did not wish to increase the lower price competition against well advertised dealers by permitting new independent dealers to go into the business, and so required persons or corporations desiring to make investments in the milk business after April 10, 1933 to attach themselves to the higher price group. This is but another way of saying the legislature determined that during the life of the law no person or corporation might enter the business of a milk dealer in New York City. The very reason for the differential was the belief that no one could successfully market an unadvertised brand on an even price basis with the seller of a well advertised brand. One coming fresh into the field would not possess such a brand and clearly could not meet the competition of those having an established trade name and good will, unless he were allowed the same differential as others in his class. By denying him this advantage the law effectually barred him from the business.

We are referred to a host of decisions to the effect that a regulatory law may be prospective in operation and may except from its sweep those presently engaged in the calling or activity to which it is directed. Examples are statutes licensing physicians and dentists, which apply only to those entering the profession subsequent to the passage of the act and exempt those then in practice, or zoning laws which exempt existing buildings, or laws forbidding slaughter houses within certain areas, but excepting existing establishments. The challenged provision is unlike such laws, since, on its face, it is not a regulation of a business or an activity in the interest of, or for the protection of, the public, but an attempt to give an economic advantage to those engaged in a given business at an arbitrary date as against all those who enter the industry after that date. The appellees do not intimate that the classification bears any relation to the public health or welfare generally; that the provision will discourage monopoly; or that it was aimed at any abuse, cognizable by law, in the milk business. In the absence of any such showing, we have no right to conjure up possible situations which might justify the discrimination. The classification is arbitrary and unreasonable and denies the appellant the equal protection of the law.

At the argument we were asked to hold that if the time limitation be bad, it is severable, and the provision for the differential, shorn of it, remains in force; and we were referred to a section of the act claimed to show the legislature so intended. While we have jurisdiction to decide the question, it is one which may appropriately be left for adjudication by the courts of New York, *Dorchy* v. *Kansas,* 264 U. S. 286, 290, 291; *Fox Film Corp.* v. *Muller,* 296 U. S. 207, 209, 210.

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

Reversed.

MR. JUSTICE CARDOZO, dissenting.

The judgment just announced is irreconcilable in principle with the judgment in Borden's case, *ante*, p. 251, announced a minute or so earlier.

A minimum price for fluid milk was fixed by law in April, 1933. At that time, "independents" were underselling their competitors, the dealers in well-advertised brands, by approximately a cent a quart. There was reason to believe that unless that differential was preserved, they would be driven out of business. To give them an opportunity to survive, the lawmakers maintained the differential in the City of New York, the field of keenest competition. We have learned from the opinion in Borden's case that this might lawfully be done.

The problem was then forced upon the lawmakers, what were to be the privileges of independents who came upon the scene thereafter? Were they to have the benefit of a differential though they had not invested a dollar in the milk business at the passage of the act, or were they to take the chances of defeat by rivals stronger than themselves, as they would have to do in other callings? "The Fourteenth Amendment does not protect a business against the hazards of competition." *Hegeman Farms Corp.* v. *Baldwin,* 293 U. S. 163, 170; *Public Service Comm'n* v. *Great Northern Utilities Co.,* 289 U. S. 130, 135. To concede the differential to newcomers might mean an indefinite extension of an artificial preference, thereby aggravating the handicap, the factitious barrier to expansion, for owners of established brands. There was danger that the preference would become so general as to occupy an unfair proportion of the field, the statutory norm being thus disrupted altogether. On the other hand, to refuse the differential might mean that newcomers would be deterred from putting capital and labor at the risk of such a business, and, even if they chose to do so, would wage a losing fight.

Hardships, great or little, were inevitable, whether the field of the differential was narrowed or enlarged. The legislature, and not the court, has been charged with the duty of determining their comparative extent. To some minds an expansion of the field might seem the course of wisdom and even that of duty; to others wisdom and duty might seem to point the other way. The judicial function is discharged when it appears from a survey of the scene that the lawmakers did not play the part of arbitrary despots in choosing as they did. *Standard Oil Co.* v. *Marysville,* 279 U. S. 582, 586, 587. When a line or point has to be fixed, and "there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark." Holmes, J., in *Louisville Gas & Electric Co.* v. *Coleman,* 277 U. S. 32, 41. Cf. *Dominion Hotel* v. *Arizona,* 249 U. S. 265, 268, 269. The judgment of the court commits us to a larger rôle. In declaring the equities of newcomers to be not inferior to those of others, the judgment makes a choice between competing considerations of policy and fairness, however emphatic its professions that it applies a rule of law.

For the situation was one to tax the wisdom of the wisest. At the very least it was a situation where thoughtful and honest men might see their duty differently. The statute upheld by this court in *Nebbia* v. *New York,* 291 U. S. 502, was an experiment, and a novel one, in that form of business enterprise. Relations between groups had grown up and crystallized under cover of the regime of unrestricted competition. They were threatened with disruption by a system of regulated prices which might crowd the little dealers out and leave the strong and the rich in possession of the field. If there was to be dislocation of the price structure by the action of the state, there was a duty, or so the lawmakers might believe, to spread the consequences among the groups with a minimum of change and hence a minimum of hardship. But the position of men in business at the beginning of the change was very different from those who might go into the business afterwards. Those already there would lose something more than an opportunity for a choice between one business and another. They would lose capital already ventured; they would lose experience already bought; they would suffer the pains incidental to the sudden and enforced abandonment of an accustomed way of life. A newcomer could not pretend that he was exposed to those afflictions. Then, too, the ephemeral character of the project counted heavily in favor of the older dealers, and little in favor of a newcomer, or rather, indeed, against him. The system of regulation had been set up as a temporary one, to tide producers over the rigors of the great depression. If independents already in the field could have their business saved from ruin, it might come back to them intact when the statute was no longer needed. Those who went into the system later would have to count the cost.

Considerations akin to these have seemed sufficient to other legislatures for drawing a distinction between an old business and a new one. They have seemed sufficient to this court in determining the validity of other acts of legislation not different in principle. *Stanley* v. *Public Utilities Comm'n,* 295 U. S. 76, 78; *Continental Baking Co.* v. *Woodring,* 286 U. S. 352, 370, 371; *Sperry & Hutchinson Co.* v. *Rhodes,* 220 U. S. 502, 505; *Watson* v. *Maryland,* 218 U. S. 173, 177, 178; cf. *Spector* v. *Building Inspector,* 250 Mass. 63, 70, 71; 145 N. E. 265. Independents who were in business when the statute was adopted would not have suffered a denial of a constitutional right or privilege if they had been refused a differential, though the refusal might have condemned them to a foreordained and hopeless struggle with advertised competitors stronger than themselves. For the same reason, independents starting afterwards must submit to the same chances unless their equities are as commanding as those of dealers on the scene before. It is juggling with words to say that all the independents make up a single "class," and by reason of that fact must be subjected to a single rule. Whether the class is divisible into subclasses is the very question to be answered. There may be division and subdivision unless separation can be found to be so void of rationality as to be the expression of a whim rather than an exercise of judgment. "We have no right," it is now said, "to conjure up possible situations which might justify the discrimination." The court has taught a different doctrine in its earlier decisions. "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." *Metropolitan Casualty Insurance Co.* v. *Brownell,* 294 U. S. 580, 584; *Rast* v. *Van Deman & Lewis Co.,* 240 U. S. 342, 357; *O'Gorman & Young* v. *Hartford Fire Insurance Co.,* 282 U. S. 251, 257; *Williams* v. *Mayor,* 289 U. S. 36, 42. On this occasion, happily, the facts are not obscure. Big dealers and little ones, newcomers in the trade and veterans, were clamorously asserting to the legislature their title to its favor. I have not seen the judicial scales so delicately poised and so accurately graduated as to balance and record the subtleties of all these rival equities, and make them ponderable and legible beyond a reasonable doubt.

To say that the statute is not void beyond a reasonable doubt is to say that it is valid.

Mr. Justice Brandeis and Mr. Justice Stone join in this opinion.

BROWN et al. v. MISSISSIPPI.

CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI.

No. 301. Argued January 10, 1936.—Decided February 17, 1936.

Convictions of murder, which rest solely upon confessions shown to have been extorted by officers of the State by torture of the accused, are void under the due process clause of the Fourteenth Amendment. Pp. 279, 285.

173 Miss. 542; 158 So. 339; 161 So. 465, reversed.

CERTIORARI, 296 U. S. 559, to review a judgment affirming convictions of murder.

Mr. Earl Brewer, with whom *Mr. J. Morgan Stevens* was on the brief, for petitioners.

Messrs. William D. Conn, Jr., and *William H. Maynard,* Assistant Attorneys General of Mississippi, with whom *Mr. Greek L. Rice,* Attorney General, was on the brief, for respondent.

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

The question in this case is whether convictions, which rest solely upon confessions shown to have been extorted by officers of the State by brutality and violence, are consistent with the due process of law required by the Fourteenth Amendment of the Constitution of the United States.

Petitioners were indicted for the murder of one Raymond Stewart, whose death occurred on March 30, 1934. They were indicted on April 4, 1934, and were then arraigned and pleaded not guilty. Counsel were appointed by the court to defend them. Trial was begun the next morning and was concluded on the following day, when they were found guilty and sentenced to death.

Aside from the confessions, there was no evidence sufficient to warrant the submission of the case to the jury. After a preliminary inquiry, testimony as to the confessions was received over the objection of defendants' counsel. Defendants then testified that the confessions were false and had been procured by physical torture. The case went to the jury with instructions, upon the request of defendants' counsel, that if the jury had reasonable doubt as to the confessions having resulted from coercion, and that they were not true, they were not to be considered as evidence. On their appeal to the Supreme Court of the State, defendants assigned as error the inadmissibility of the confessions. The judgment was affirmed. 158 So. 339.

Defendants then moved in the Supreme Court of the State to arrest the judgment and for a new trial on the ground that all the evidence against them was obtained by coercion and brutality known to the court and to the district attorney, and that defendants had been denied the benefit of counsel or opportunity to confer with counsel in a reasonable manner. The motion was supported by affidavits. At about the same time, defendants filed in the Supreme Court a "suggestion of error" explicitly challenging the proceedings of the trial, in the use of the confessions and with respect to the alleged denial of representation by counsel, as violating the due process clause of the Fourteenth Amendment of the Constitution of the United States. The state court entertained the suggestion of error, considered the federal question, and decided it against defendants' contentions. 161 So. 465. Two judges dissented. *Id.*, p. 470. We granted a writ of certiorari.

The grounds of the decision were (1) that immunity from self-incrimination is not essential to due process of law, and (2) that the failure of the trial court to exclude the confessions after the introduction of evidence showing their incompetency, in the absence of a request for such exclusion, did not deprive the defendants of life or liberty without due process of law; and that even if the trial court had erroneously overruled a motion to exclude the confessions, the ruling would have been mere error reversible on appeal, but not a violation of constitutional right. *Id.*, p. 468.

The opinion of the state court did not set forth the evidence as to the circumstances in which the confessions were procured. That the evidence established that they were procured by coercion was not questioned. The state court said: "After the state closed its case on the merits, the appellants, for the first time, introduced evidence from which it appears that the confessions were not made voluntarily but were coerced." *Id.*, p. 466. There is no dispute as to the facts upon this point and as they are clearly and adequately stated in the dissenting opinion of Judge Griffith (with whom Judge Anderson concurred)—showing both the extreme brutality of the measures to extort the confessions and the participation of the state authorities—we quote this part of his opinion in full, as follows (*Id.*, pp. 470, 471):

"The crime with which these defendants, all ignorant negroes, are charged, was discovered about one o'clock p. m. on Friday, March 30, 1934. On that night one Dial, a deputy sheriff, accompanied by others, came to the home of Ellington, one of the defendants, and requested him to accompany them to the house of the deceased, and there a number of white men were gathered, who began to accuse the defendant of the crime. Upon his denial they seized him, and with the participation of the deputy they hanged him by a rope to the limb of a tree, and having let him down, they hung him again, and when he was let down the second time, and he still protested his innocence, he was tied to a tree and whipped, and still declining to accede to the demands that he confess, he was finally released and he returned with some difficulty to his home, suffering intense pain and agony. The record of the testimony shows that the signs of the rope on his neck were plainly visible during the so-called trial. A day or two thereafter the said deputy, accompanied by another, returned to the home of the said defendant and arrested him, and departed with the prisoner towards the jail in an adjoining county, but went by a route which led into the State of Alabama; and while on the way, in that State, the deputy stopped and again severely whipped the defendant, declaring that he would continue the whipping until he confessed, and the defendant then agreed to confess to such a statement as the deputy would dictate, and he did so, after which he was delivered to jail.

"The other two defendants, Ed Brown and Henry Shields, were also arrested and taken to the same jail. On Sunday night, April 1, 1934, the same deputy, accompanied by a number of white men, one of whom was also an officer, and by the jailer, came to the jail, and the two last named defendants were made to strip and they were laid over chairs and their backs were cut to pieces with a leather strap with buckles on it, and they were likewise made by the said deputy definitely to understand that the whipping would be continued unless and until they confessed, and not only confessed, but confessed in every matter of detail as demanded by those present; and in this manner the defendants confessed the crime, and as the whippings progressed and were repeated, they changed or adjusted their confession in all particulars of detail so as to conform to the demands of their torturers. When the confessions had been obtained in the exact form and contents as desired by the mob, they left with the parting admonition and warning that, if the defendants changed their story at any time in any respect from that last stated, the perpetrators of the outrage would administer the same or equally effective treatment.

"Further details of the brutal treatment to which these helpless prisoners were subjected need not be pursued. It is sufficient to say that in pertinent respects the transcript reads more like pages torn from some medieval account, than a record made within the confines of a modern civilization which aspires to an enlightened constitutional government.

"All this having been accomplished, on the next day, that is, on Monday, April 2, when the defendants had been given time to recuperate somewhat from the tortures to which they had been subjected, the two sheriffs, one of the county where the crime was committed, and the other of the county of the jail in which the prisoners were confined, came to the jail, accompanied by eight other persons, some of them deputies, there to hear the free and voluntary confession of these miserable and abject defendants. The sheriff of the county of the crime admitted that he had heard of the whipping, but averred that he had no personal knowledge of it. He admitted that one of the defendants, when brought before him to confess, was limping and did not sit down, and that this particular defendant then and there stated that he had been strapped so severely that he could not sit down, and as already stated, the signs of the rope on the neck of another of the defendants were plainly visible to all. Nevertheless the solemn farce of hearing the free and voluntary confessions was gone through with, and these two sheriffs and one other person then present were the three witnesses used in court to establish the so-called confessions, which were received by the court and admitted in evidence over the objections of the defendants duly entered of record as each of the said three witnesses delivered their alleged testimony. There was thus enough before the court when these confessions were first offered to make known to the court that they were not, beyond all reasonable doubt, free and voluntary; and the failure of the court then to exclude the confessions is sufficient to reverse the judgment, under every rule of procedure that has heretofore been prescribed, and hence it was not necessary subsequently to renew the objections by motion or otherwise.

"The spurious confessions having been obtained—and the farce last mentioned having been gone through with on Monday, April 2d—the court, then in session, on the following day, Tuesday, April 3, 1934, ordered the grand jury to reassemble on the succeeding day, April 4, 1934, at nine o'clock, and on the morning of the day last mentioned the grand jury returned an indictment against the defendants for murder. Late that afternoon the defendants were brought from the jail in the adjoining county and arraigned, when one or more of them offered to plead guilty, which the court declined to accept, and, upon inquiry whether they had or desired counsel, they stated that they had none, and did not suppose that counsel could be of any assistance to them. The court thereupon appointed counsel, and set the case for trial for the following morning at nine o'clock, and the defendants were returned to the jail in the adjoining county about thirty miles away.

"The defendants were brought to the courthouse of the county on the following morning, April 5th, and the so-called trial was opened, and was concluded on the next day, April 6, 1934, and resulted in a pretended conviction with death sentences. The evidence upon which the conviction was obtained was the so-called confessions. Without this evidence a peremptory instruction to find for the defendants would have been inescapable. The defendants were put on the stand, and by their testimony the facts and the details thereof as to the manner by which the confessions were extorted from them were fully developed, and it is further disclosed by the record that the same deputy, Dial, under whose guiding hand and active participation the tortures to coerce the confessions were administered, was actively in the performance of the supposed duties of a court deputy in the courthouse and in the presence of the prisoners during what is denominated, in complimentary terms, the trial of these defendants. This deputy was put on the stand by the state in rebuttal, and admitted the whippings. It is interesting to note that in his testimony with reference to the whipping of the defendant Ellington, and in response to the inquiry as to how severely he was whipped, the deputy stated, 'Not too much for a negro; not as much as I would have done if it were left to me.' Two others who had participated in these whippings were introduced and admitted it—not a single witness was introduced who denied it. The facts are not only undisputed, they are admitted, and admitted to have been done by officers of the state, in conjunction with other participants, and all this was definitely well known to everybody connected with the trial, and during the trial, including the state's prosecuting attorney and the trial judge presiding."

1. The State stresses the statement in *Twining* v. *New Jersey,* 211 U. S. 78, 114, that "exemption from compulsory self-incrimination in the courts of the States is not secured by any part of the Federal Constitution," and the statement in *Snyder* v. *Massachusetts,* 291 U. S. 97, 105, that "the privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the State." But the question of the right of the State to withdraw the privilege against self-incrimination is not here involved. The compulsion to which the quoted statements refer is that of the processes of justice by which the accused may be called as a witness and required to testify. Compulsion by torture to extort a confession is a different matter.

The State is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts, supra; Rogers* v. *Peck,* 199 U. S. 425, 434. The State may abolish trial by jury. It may dispense with indictment by a grand jury and substitute complaint or information. *Walker* v. *Sauvinet,* 92 U. S. 90; *Hurtado* v. *California,* 110 U. S. 516; *Snyder* v. *Massachusetts, supra.* But the freedom of the State in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law. Because a State may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand. The State may not permit an accused to be hurried to conviction under mob domination—where the whole proceeding is but a mask—without supplying corrective process. *Moore* v. *Dempsey,* 261 U. S. 86, 91. The State may not deny to the accused the aid of counsel. *Powell* v. *Alabama,* 287 U. S. 45. Nor may a State, through the action of its officers, contrive 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." *Mooney* v. *Holohan,* 294 U. S. 103, 112. And the trial equally is a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence. The due process clause requires "that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Hebert* v. *Louisiana,* 272 U. S. 312, 316. It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.

2. It is in this view that the further contention of the State must be considered. That contention rests upon the failure of counsel for the accused, who had objected to the admissibility of the confessions, to move for their exclusion after they had been introduced and the fact of coercion had been proved. It is a contention which proceeds upon a misconception of the nature of petitioners' complaint. That complaint is not of the commission of mere error, but of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void. *Moore* v. *Dempsey, supra.* We are not concerned with a mere

question of state practice, or whether counsel assigned to petitioners were competent or mistakenly assumed that their first objections were sufficient. In an earlier case the Supreme Court of the State had recognized the duty of the court to supply corrective process where due process of law had been denied. In *Fisher* v. *State,* 145 Miss. 116, 134; 110 So. 361, 365, the court said: "Coercing the supposed state's criminals into confessions and using such confessions so coerced from them against them in trials has been the curse of all countries. It was the chief inequity, the crowning infamy of the Star Chamber, and the Inquisition, and other similar institutions. The constitution recognized the evils that lay behind these practices and prohibited them in this country. . . . The duty of maintaining constitutional rights of a person on trial for his life rises above mere rules of procedure and wherever the court is clearly satisfied that such violations exist, it will refuse to sanction such violations and will apply the corrective."

In the instant case, the trial court was fully advised by the undisputed evidence of the way in which the confessions had been procured. The trial court knew that there was no other evidence upon which conviction and sentence could be based. Yet it proceeded to permit conviction and to pronounce sentence. The conviction and sentence were void for want of the essential elements of due process, and the proceeding thus vitiated could be challenged in any appropriate manner. *Mooney* v. *Holohan, supra.* It was challenged before the Supreme Court of the State by the express invocation of the Fourteenth Amendment. That court entertained the challenge, considered the federal question thus presented, but declined to enforce petitioners' constitutional right. The court thus denied a federal right fully established and specially set up and claimed and the judgment must be

Reversed.

ASHWANDER ET AL. v. TENNESSEE VALLEY AUTHORITY ET AL.

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

Nos. 403 and 404. Argued December 19, 20, 1935.—Decided February 17, 1936.

1. Owners of a minority of the preferred shares, with voting power, in a corporation have standing to sue in its right to prevent the carrying out of a contract executed in its name by the directors with an agency of the United States, upon the grounds that the contract is unconstitutional and that its performance will cause irreparable injury to the interests of the corporation. P. 318.

   In order to establish the stockholders' right of suit, it is not necessary to show that, in executing the contract, the directors acted with fraudulent intent or under legal duress or *ultra vires* of the corporation. In the absence of an adequate legal remedy, it is enough to show the breach of duty involved in the injurious, illegal action. This may consist in yielding to illegal government demands. The fact that the directors, in the exercise of their judgment, resolved to comply with such demands, is not an adequate ground for denying to the stockholders an opportunity to contest their validity.
2. The opportunity to resort to equity, in the absence of an adequate legal remedy, in order to prevent illegal transactions by those in control of corporate properties, should not be curtailed because of reluctance to decide constitutional questions. P. 321.
3. Estoppel in equity must rest on substantial grounds of prejudice or change of position—not on technicalities. P. 322.
4. Where a contract between an electric power corporation and the Tennessee Valley Authority, a federal agency, for the sale by the former to the latter of transmission lines leading from a government dam where electricity was generated, was attacked in behalf of the corporation upon the ground that legislation by Congress purporting to empower the federal agency was unconstitutional,—*held* that the corporation was not estopped by having bought electricity of the Government at the dam before and after the passage of the legislation; or by having applied to a state public service commission for approval of the contract; or by a delay of some months in the bringing of a stockholders' suit to set the contract aside. P. 323.

The principle that one who accepts the benefit of a statute may not question its constitutionality, *held* inapplicable.

5. The judicial power does not extend to the determination of abstract questions. P. 324.

6. The Act providing for declaratory judgments does not attempt to change the essential requisites for the exercise of judicial power. By its terms, it applies to "cases of actual controversy," meaning a controversy of a justiciable nature, thus excluding advisory decrees upon hypothetical states of fact. P. 325.

7. The dam across the Tennessee River at Muscle Shoals, known as the Wilson Dam, was constructed pursuant to the National Defense Act of June 3, 1916, in the exercise of constitutional functions of the Federal Government, (a) as a means of assuring abundant electric energy for the manufacture of munitions in the event of war; (b) to improve the navigability of the river. P. 326.

8. Judicial notice is taken of the international situation existing when the Act of 1916 was passed. Indisputably, the Wilson Dam and its auxiliary plants, including a hydro-electric power plant, are, and were intended to be, adapted to the purposes of national defense. P. 327.

9. The power to regulate interstate commerce includes the power to remove obstructions to navigation from the navigable rivers of the United States. P. 328.

10. In the execution of the Wilson Dam project for the constitutional purposes above stated, the United States acquired full title to the dam site, with all riparian rights. Water power, an inevitable incident of the construction of the dam, came into the exclusive control of the Federal Government, and was convertible into electric energy. *Held:*

(1) That the water power, the right to convert it into electric energy, and the electric energy thus produced, constitute property belonging to the United States. P. 330.

(2) That this electric energy, so produced at the Wilson Dam, is property of which Congress may dispose pursuant to the authority expressly granted by § 3, Art. IV, of the Constitution. P. 330.

(3) The Ninth and Tenth Amendments do not apply to rights which are expressly granted by the Constitution to the Federal Government. P. 330.

(4) The authority of Congress to dispose of electric energy generated at the Wilson Dam, is not limited to a surplus necessarily created in the course of making munitions of war or operat-

ing the works for navigation purposes, but extends to the remainder of the available energy, which would otherwise be lost or wasted. P. 335.

(5) The method of disposing of government property under the constitutional provision (§ 3, Art. IV) must be appropriate to the nature of the property, and be adopted in the public interest as distinguished from private or personal ends; and, the Court assumes, it must be consistent with the foundation principles of our dual system of Government and must not be contrived to govern the concerns reserved to the States. P. 338.

11. The Government, acting through its agency, the Tennessee Valley Authority, undertook to dispose of electric energy generated at the Wilson Dam by sale to a power company, by interchange of energy with the company, and by purchase from the company of certain transmission lines leading from the dam and providing the means of distributing such energy to a large population within fifty miles. The power company had theretofore been buying energy from the Government at the dam and was apparently the only customer to whom it could be sold there. The purchase of the lines was to enable the Government to seek a wider market. *Held:*

(1) That there was no basis for concluding that the contract exceeded the federal power to dispose of property, and invaded rights reserved to the State or to the people. P. 338.

(2) The power company had no constitutional right to insist that the energy should be sold to it at the dam or go to waste. P. 339.

The decision on the constitutional question is strictly limited to the right of the Government to dispose of the energy itself,—which is simply the mechanical energy, incidental to falling water at this dam, converted into electric energy, susceptible of transmission,—and the right to acquire these transmission lines as a facility for disposing of that energy. The Government rightly conceded at the bar that it was without constitutional authority to acquire or dispose of electric energy except as it comes into being in the operation of works constructed in the exercise of some power delegated to the United States. The question whether it might constitutionally use the energy generated at Wilson Dam in carrying on manufacturing or commercial enterprises not related to the purposes for which the Government was established, is not involved in this case; nor is the question whether, for disposing of the energy, the Government could acquire or operate local or urban distribution systems. The Court expresses no opinion as to such questions, nor as to the status of any other dam or power development in the Tennessee Valley, whether connected with or apart from the Wilson Dam, nor as to the validity of the Tennessee Valley Authority Act or of the claims made in the pronouncements and program of that Authority, apart from the questions discussed in relation to the particular provisions of the contract above mentioned affecting the Power Company. P. 339.

78 F. (2d) 578, affirmed.

Certiorari, 296 U. S. 562, to review a decree reversing a decree of the District Court, by which that court, at the suit of preferred stockholders of the Alabama Power Company, set aside a contract that had been entered into by the Company and the Tennessee Valley Authority involving the sale and exchange of electric power generated at a government dam, and the acquisition by the Authority of certain transmission lines from the Power Company.

Messrs. Forney Johnston and *James M. Beck,* with whom *Mr. Joseph F. Johnston* was on the brief, for petitioners.

This proceeding presents for review the constitutional validity of an effort through a corporate agency of the Federal Government to bring about a *coup d'etat* that would commit the Government permanently to the manufacture and distribution of electricity throughout an initial region comprising approximately one-fifth of the population of the United States.

The effort of the agency is to commit the Government to this commercial program by actionable contracts, to endure, without reserved right of cancellation, for a generation.

The agency has admitted on this record that its proposed additions to the power supply present an economic problem of the first magnitude.

The program, if established as a precedent by this *coup,* or by custom of the Constitution, or by decision on this record, would open every essential industry and service to direct and permanent governmental competition, by means of preparedness plants, operated commercially while awaiting governmental use.

It would also, in a proceeding to which the States are not parties, establish the pretended right of the Government to extract by a commercial manufacturing business, from every navigable stream and headwater tributary, the entire energy of the flowing waters, an asset in the stream, heretofore regarded as vested inalienably in the States and their citizens, subject only to regulation in the interest of navigation.

The Government has sought no compact among the Valley States; it has silenced the state administrations with a revocable stipend. The basis of the case asserted by the Government is that by improving navigation the Government acquires a commodity or proprietary right in the use of the surplus waters not even in a discretionary sense necessary for navigation, and may compel their passage through commercial generating units owned by the Government, which has no physical or functional relation to navigation.

The record shows that the program is being pressed in the region by this corporate agency by arbitrary and oppressive methods of competition and by action and commitment wholly inconsistent with federal function; for the admitted purpose of accomplishing primary objectives which have no relation to any governmental use or function.

The service proposed will result in a monopoly of electric service by the Federal Government in any area to be taken on by this Board. The establishment of the program means the displacement of any practical regulation of utility functions in the service area thus to be taken over or controlled by the Government. It would displace the existing processes of regulation by substituting a corporate anomaly of the Federal Government, subjected to no standard or restraint, with unlimited discretion highly legislative in character.

Petitioners challenge its validity in every aspect, in its entirety, and in detail, asserting that the program and all of its essentials, the means employed to promote it, its dominant objectives, and its arbitrary methods, do not consist with the letter and spirit of the Constitution.

Powers not expressly granted to the Federal Government cannot be implied or regarded as incidental where their exercise would be inconsistent with affirmative powers granted by the Constitution or with its letter and spirit. *McCulloch* v. *Maryland,* 4 Wheat. 316, 421; *Linder* v. *United States,* 268 U. S. 5, 17; *Bailey* v. *Drexel Furniture Co.,* 259 U. S. 20; *Hammer* v. *Dagenhart,* 247 U. S. 251; *Kansas* v. *Colorado,* 206 U. S. 46; *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495.

Under the test formulated by Chief Justice Marshall, the means employed by Congress must consist with the letter and the spirit of the Constitution. It is, after all, not solely a question whether the legislative intent was to regulate affairs reserved to the State. There is the further question whether, regardless of intent, the statute is in fact consistent with the theory of the dual system, or plainly and palpably crosses the line. *Wisconsin* v. *Illinois,* 278 U. S. 367, 415; *Veazie Bank* v. *Fenno,* 8 Wall. 533, 541.

The express powers delegated to Congress must be exercised subject to the restrictions implicit in the other provisions of the Constitution. Thus, legislation under the commerce clause must be consistent with the Fifth and Tenth Amendments. *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 336; *United States* v. *Joint Traffic Assn.,* 171 U. S. 505, 571–572; *Adair* v. *United States,* 208 U. S. 161, 180; *United States* v. *Chicago, M. & St. P. Ry.,* 282 U. S. 311, 327; *Keller* v. *United States,* 213 U. S. 138, 148.

The war power must give heed to the Fifth Amendment. *United States* v. *Cohen Grocery Co.,* 255 U. S. 81, 88. Even the power of federal taxation must respect these Amendments. *Collector* v. *Day,* 11 Wall. 113, 124; *Indian Motocycle Co.* v. *United States,* 283 U. S. 570.

The means and instrumentalities challenged on this record do not rest upon the Constitution. They rest in part upon an Act of Congress, the prototype of which was vetoed by two Presidents, was rejected by successive previous Congresses, was adopted over the most earnest protest during a period of national disaster and tension, and which constitutes a departure from a tradition unbroken for a century and a half. They rest in part upon the discretion of a board of three men with practically unlimited power.

Between them, this board and a majority in Congress are undertaking to commit the Federal Government to a course from which, in fact, there can be no retreat; to a commercial venture within state domain in a field which, over the 150 years of our history, has been recognized as the constitutional domain of the States.

The negation of the delegation of legislative power is a necessary implication attaching to the legislative power. *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149, 164; *Panama Refining Co.* v. *Ryan,* 293 U. S. 388; *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495; *Jackson* v. *Jackson,* 90 Fla. 563; *People v. Brown,* 203 N. Y. 136, 142.

A commercial program undertaken by an agency of Congress based upon a series of long term contracts devised by a federal board, which irrevocably commit the Government to a course of action intended by the Constitution to remain subject to continuing legislative duty and discretion, does not "consist with the Constitution" and is illegal. *Louisville & Nashville Ry.* v. *Mottley,* 219 U. S. 467; *Norman* v. *Baltimore & Ohio R. Co.,* 294 U. S. 240.

Commitment of the Government by fixed contracts to the permanent business of commercial manufacture of electricity and rendition of regional utility service within state domain is intrinsically alien to federal function. *South Carolina* v. *United States,* 199 U. S. 437, 457; *Ashwander* v. *Tennessee Valley Authority,* 8 F. Supp. 893; 9 F. Supp. 965; *Tennessee Public Service Co.* v. *Knoxville,* Chancery Court, Knox County, Tenn., July 17, 1935; *Kansas* v. *Colorado,* 206 U. S. 46; *License Tax Cases,* 5 Wall. 462; *Kidd* v. *Pearson,* 128 U. S. 1, 24.

Congress may not invade the field of action reserved to the States and the people under the guise of exercising substantive federal powers. *Employers Liability Cases,* 207 U. S. 463; *Hammer* v. *Dagenhart,* 247 U. S. 251; *Child Labor Tax Case,* 259 U. S. 20; *Hill* v. *Wallace,* 259 U. S. 44; *Trusler* v. *Crooks,* 269 U. S. 475; *Linder* v. *United States,* 268 U. S. 5.

This invasion under claim of implied power is comparable to the futile effort to take property desired for public convenience under the guise of regulation (*Pennsylvania Mining Co.* v. *Mahon,* 260 U. S. 393) or under the commerce clause or performance of international obligations (*International Paper Co.* v. *United States,* 282 U. S. 399).

The National Defense Act of 1916, 39 Stat. 166, 215 (the debates at the inception of this matter may be found in Cong. Rec., vol. 53, pt. 5, pp. 5146–9, 5687, 5706, 5956, 5957, 5962, 6031, 6032, 6120, etc.; they are also reported in compact form in Powell, Cong. Debates, pp. 752 *et seq.*) was the initial step in American history toward establishing the principle of federal commercial operation of "surplus capacity" resulting from intentional construction of plants for commercial operation, or from construction for an actual, or supposed, or miscalculated, government requirement which has become spent or suspended. All such capacity so used is in fact commercial capacity, however acquired.

The Convention declined to permit the inclusion in the Constitution of a clause authorizing Congress to grant corporate charters, lest it be assumed that the power to incorporate carried general jurisdiction to authorize charters not confined to the powers expressly granted. Madison's Journal, Aug. 18; Farrand, Record, vol. II, p. 325. It deliberately declined to include an express power to the Federal Government to grant any charter whatever for a proprietary purpose. The contention now is that the Federal Government may discharge all proprietary purposes through the device of creating a corporation to "dispose of" government property.

It is not possible to reconcile this extraordinary conception with the known attitude of the Convention and of the ratifying States. It cannot be reconciled with the established reason for the adoption of the Tenth Amendment. *Kansas* v. *Colorado,* 206 U. S. 46, 90.

The indispensable essence of the Constitution is that the meaning and intent of its provisions, as they are interpreted by this Court as of the time of its adoption, shall not be changed except by amendment. *South Carolina* v. *United States, supra,* dissent, p. 472; *Dred Scott* v. *Sandford,* 19 How. 393, 426; *Downes* v. *Bidwell,* 182 U. S. 244, 290–291.

The Tenth Amendment was ratified in 1790–91, and was to all intents and purposes a part of the original document. It expressed then, and expresses now, the conception that the States must not be subordinated in their internal affairs to federal control as to matters not expressly delegated. *Smith* v. *Turner,* 7 How. 283, 428.

The disciplining and regulation of local utilities, by competition or monopoly, the promotion of public ownership of utilities to function under control of the Government, the desire to supplement regulation by state authorities and state processes, the general desire to promote the industrial, social and economic welfare of the public in state domain in matters reserved to the States, are not functions of the Federal Government, however exigent they may be deemed by Congress. *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495; *Railroad Retirement Board* v. *Alton R. Co.,* 295 U. S. 330; *Missouri* v. *Holland,* 252 U. S. 416; *License Tax Cases,* 5 Wall. 462, 470.

It is difficult to conceive of any function which is by nature and tradition more completely local and internal to the States than the function of regulating and operating local utility service. *Public Utility Comm'n* v. *Attleboro Steam & Electric Co.,* 273 U. S. 83; *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165; *Public Utilities Comm'n* v. *Landon,* 249 U. S. 236; *East Ohio Gas Co.* v. *Tax Commission,* 283 U. S. 465; *South Carolina Power Co.* v. *Tax Commission,* 52 F. (2d) 515, 524, aff'd 286 U. S. 525.

The desire for revenue does not authorize the Federal Government to commit itself to engage in a permanent commercial business to earn it.

The property clause of the Constitution (Art. IV, § 3, cl. 2), does not authorize permanent operation of a commercial business by the Federal Government.

The property clause is found in the Constitution, not among the legislative powers, but among the clauses dealing with the relations between the state and federal governments.

"Clearly it does not grant to Congress any legislative control over the States; and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits." *Kansas* v. *Colorado,* 206 U. S., at p. 89.

The only power of exclusive legislation conferred upon Congress by the Constitution is Art. I, § 8, cl. 17, relating to the District of Columbia and places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards and other needful buildings.

Not even in the public domain can Congress regulate the public lands as a territorial legislature in such wise as to impair the rights of the citizens and the States in their traditional functions, as contemplated at the time of the adoption of the Constitution. *Kansas* v. *Colorado, supra; Dred Scott* v. *Sandford, supra.*

The genesis of the property clause and, notably, the rejection of a general welfare amendment by the Convention, make clear that wide commercial operations in state domain were not contemplated. Charles Warren, The Making of the Constitution, pp. 599–600; *Dred Scott* v. *Sandford,* 19 How. 393, 436, 514.

It is absurd to say that this clause was intended to open up the States to the destructive possibility of federal commercial operations, carrying by necessary implication the power of monopoly.

To assume that the Constitution meant any such result, would be to condemn the personnel of the Convention to universal derision. This is not a case where the principles of the Constitution are to be applied to new conditions. The Federal Government could, by direct operation of the public lands, have taken every domestic and foreign market in every commodity from the people of the States, if ownership of land in trust for national purposes carried authority to operate commercially. That action would have dried up the tax resources of the States. Its possibility could not have been contemplated or authorized.

The proposal is to convert the power in the stream into transportable form, thereby exhausting it from the stream, transport the converted product 250 miles and sell it commercially. When that is done throughout the river, every ounce of water power has been wrung from it by the Federal Government and taken away from the State and the people who own it, in as real and final a sense as was proposed on behalf of the Government, and denied by this Court, in *Kansas* v. *Colorado, supra.*

Engaging in the business of operating the steam plant for manufacture of electricity for commercial sale to the public, at any place or for any term, is not a function of "disposal" of the steam plant within the meaning of the property clause.

Engaging in the business of manufacturing electricity at the commercial units installed in the dams is not a function of disposal either of the plants or of the "water power," even if the Government had any proprietary right to exhaust the power in the water as a commodity, by concentrating the surplus waters of the stream.

The steam plants and the hydro-electric plants are all that the Government owns or can dispose of. It cannot sell or otherwise dispose of the duty of regulating navigation. It can lease emplacements in the dam. Subject to limitations, it can lease hydro-generators and charge a rental for the use, permitting the lessee, if also licensed by the State, to get the benefit of the water flow, as dispatched by the Government in the regulation of navigation and unfettered by any illegal commitment to antagonistic utility service.

The Government has no more authority to sell the water or the right to the flow of the water than it has to sell the right to coin money, or to guarantee that the Bankruptcy Act will not be amended.

Not having the right to sell the transit of the water, it cannot dispose of any such right as property. The Government, presumably, can free navigation flumes in the Columbia River of salmon by trapping them out, but the conception that it could go into the permanent business of taking and packing and merchandizing throughout state domain the salmon thus impounded, as a yardstick to regulate the price of salmon in state domain, would be regarded as preposterous. *McCready* v. *United States,* 94 U. S. 391, 394.

Even if running water could be regarded as property of the Government, as tangible as coal or oil, it could not be disposed of under the property clause of the Constitution by regarding it as a base raw material to be transformed by commercial manufacture into a different product for commercial sale to the public, any more than the Government can manufacture coal taken from the public domain into coke and by-products, or into power, for commercial competitive sale in state domain,—if either the State or its citizens who are injured object. It results from even a superficial analysis that the Government owns no "water power." It owns merely a plant, which it may lease, and a sovereign duty which it may not.

A commitment of the Government, by long term contracts, to operate a permanent utility business would involve the Government in non-federal functions not fairly related to property. The commitment would involve credit, executive and administrative personnel, and the funds of the Government, in a permanent service non-governmental in character. These permanent and extraordinary business services are not functions of the ownership of property.

There is no right (except use for governmental purpose, sale or disposal outright) in property in the Federal Government; nor any right to engage in proprietary business under any power except where the business itself is in direct furtherance of a substantive power.

"The United States cannot hold property as a monarch may for private or personal purposes." *Van Brocklin* v. *Anderson,* 117 U. S. 157, 158. Cf. *United States* v. *Trinidad Coal Co.,* 137 U. S. 160, 170.

Power conferred upon a trustee to sell or to convey or dispose of a trust estate carries no authority to engage in business by means of the property. *In re Corbin's*

Will, 91 N. Y. S. 797; *Pearce* v. *Pearce,* 199 Ala. 491; *Rifling* v. *Burnet,* 47 F. (2d) 859.

This Court asserted in *United States* v. *Gratiot,* 14 Pet. 526, that the power to dispose of government property includes the right to lease mineral properties for a rental, payable in smelted ore (lead) desired by the War Department. It said: "There can be no apprehension of any encroachments upon state rights by the creation of a numerous tenantry within their borders, as has been so strenuously urged in the argument." (p. 538) It is significant also that the Court noted that the statutory authority under which the lease was made was "limited to a short period, so as not to interfere with the power of Congress to make other disposition of the mines should they think proper so to do."

Here Congress has not made a lease for a long or short period. Actually the commitment of the properties by TVA to a permanent and continuing service under actionable, non-assignable contracts is an interference with disposal. It is therefore not a use or disposition of property under any definition of the term which "consists with the letter and spirit of the Constitution."

The conduct of a permanent utility business is not a function of conservation of government property.

So far as the property clause is concerned, there is no basis whatever for stating that a steam-electric plant or a hydro-electric plant are being "disposed of" or regulated by committing them permanently to the business of manufacture in order to create a commodity, in order, in turn, to "dispose of" that commodity, in order, in turn, to regulate local utility service, finance and promote public ownership, or like non-federal functions.

Possible war uses for a product do not justify its commercial manufacture and sale by the Federal Government.

The so-called critical and strategic war materials reasonably necessary for military purposes in time of war or for the sustenance or war psychology of the civilian population, are innumerable. Every essential industrial plant is a potential war requirement, within the discretion of Congress. Plants for the processing of these materials are plainly within reach of military preparedness, so far as review by the courts is concerned, in the absence of a palpable abuse of the war power. *Highland* v. *Russell Car Co.,* 279 U. S. 253.

Orderly and bona fide liquidation of war investments is clearly distinguishable. *Clallam County* v. *U. S. Spruce Corp.,* 263 U. S. 341.

There are fundamental distinctions between acts of ownership, or the disposal or lease of property, and the function of engaging in business by means of the property. The corporate income tax cases sufficiently illustrate the point to require no further documentation. The constitutional cleavage is clear.

The commerce clause does not authorize the Federal Government to engage in a commercial business. *Detroit International Bridge Co.* v. *Tax Appeal Board,* 294 U. S. 83; *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165; *South Carolina Power Co.* v. *Tax Commission,* 52 F. (2d) 515, 524, affirmed, 286 U. S. 525.

Protection of commerce of the States from interferences within the Nation was a basic motive underlying the draft of the Constitution. Charles Warren, The Making of the Constitution, pp. 461, 462, 567–589; *id.,* p. 580; III Farrand, Records of the Federal Convention, p. 463; *id.,* p. 478; *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312; *United States* v. *Joint Traffic Assn.,* 171 U. S., at p. 571.

Production is exclusively within the domain of the States and the people. *Hammer* v. *Dagenhart,* 247 U. S. 251, 276; *Linder* v. *United States,* 268 U. S. 5; *Panama Refining Co.* v. *Ryan,* 293 U. S. 388; *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495; *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165.

The question whether the Government, in impounding more water in a navigable stream than is necessary to be manipulated for navigation, can thereupon appropriate such water and make it the basis of a general manufacturing and marketing business, is not a question of navigation or of the commerce power. It does not warrant serious discussion under the commerce clause. *Wisconsin* v. *Illinois,* 278 U. S. 367, 396. Distinguishing *Missouri* v. *Holland,* 252 U. S. 416; *United States* v. *McCullagh,* 221 Fed. 288; and *United States* v. *Shauver,* 214 Fed. 154.

The power to regulate commerce is not the power to engage in and monopolize the business or function regulated. Cf. *South Carolina* v. *United States,* 199 U. S. 437; *Ohio* v. *Helvering,* 292 U. S. 360; *Helvering* v. *Powers,* 293 U. S. 214; and *Osborne* v. *Bank,* 9 Wheat. 738.

Any pretense that commercial production, transmission or sale of electricity is necessary to the functioning of the locks or the regulation of navigation is not only totally insubstantial, but it is repudiated by the terms of the Act and the organization of the Tennessee Valley Authority itself.

The contentions of the Valley Authority, and the basis of the decision below, cannot be reconciled with the decisions of this Court as to the rights of the State and its grantees in the waters of navigable streams. *Pollard's Lessee* v. *Hagan,* 3 How. 212; *Shively* v. *Bowlby,* 152 U. S. 1, 43; *Port of Seattle* v. *Oregon-Washington Ry.,* 255 U. S. 56; *Kansas* v. *Colorado,* 206 U. S. 46; *United States* v. *Arizona,* 295 U. S. 174; *United States* v. *West Virginia,* 295 U. S. 463. Distinguishing *Arizona* v. *California,* 283 U. S. 423.

It was settled in *Pollard's Lessee* v. *Hagan,* that the States, in their capacity as proprietors in trust for their citizens, cannot by grant, treaty, or waiver, divest themselves of this sovereign duty and responsibility, even to the Federal Government. *Mobile Transportation Co.* v. *Mobile,* 153 Ala. 409. That which cannot be accomplished directly cannot be accomplished by transitory acceptance by a State of the anomalous and terminable stipend prescribed by § 13 of the Tennessee Valley Authority Act. *United States* v. *Chandler-Dunbar Water Power Co.,* 229 U. S. 53, distinguished. See *Wisconsin* v. *Illinois,* 278 U. S. 367.

The decisions of this Court have settled beyond argument that the Government has no proprietary or commodity right in the waters; that it has only a right of regulation that must be related to navigation and not arbitrary, *Wisconsin* v. *Illinois, supra;* within bounds that respect the Fifth Amendment, *Monongahela Navigation Co.* v. *United States, supra;* and the Tenth, *Kansas* v. *Colorado, supra.* Distinguishing *Kaukauna Water Co.* v. *Green Bay Canal Co.,* 142 U. S. 254 and *Green Bay Canal Co.* v. *Patten Paper Co.,* 172 U. S. 58; 173 U. S. 179.

Active participation by the Government in the control of the proposed defendant municipal systems, and its proven objective in financing these systems, renders the proposed investments dynamic and illegal, without reference to their intrinsic invalidity as appropriations for non-federal purposes.

The Federal Government cannot make appropriations and investments for purposes which are beyond its power of affirmative action. *Gibbons* v. *Ogden,* 9 Wheat., at p. 199.

Even as *res integra* and without the inexorable history of the clause in the Convention to force the same conclusion, the phrase "common defense and general welfare" appearing in the tax power at the head of a section enumerating the limited functions of the Federal Government, could not be regarded as other than comprehensive terms to extend the taxing power to the range of expressly delegated functions, which alone the Convention had undertaken to entrust to the general Government. The familiar history of the phraseology, lifted out of the old Articles and plainly referable to the debts "contracted in the common defense," leaves Madison's account of the evolution of the clause documented beyond reasonable dispute. No one could have supposed in that day that taxation and spending were substantive ends of government. The theory of redistribution through taxation has only recently been evolved. *Loan Association* v. *Topeka,* 20 Wall. 655; *Parkersburg* v. *Brown,* 106 U. S. 487; *Cole* v. *La Grange,* 113 U. S. 1, 9; *Green* v. *Frazier,* 253 U. S. 233; *Dodge* v. *Mission Township,* 107 Fed. 821; *Lowell* v. *Boston,* 111 Mass. 454.

The delegates to the Convention were men of the most finished discrimination in the use of words. It is not credible that they would have included, in a clause relating solely to the raising of revenue for all functions of government, a power provision so broad as to make the subsequent enumeration of powers useless and to undermine the organic theory of federal limitation.

Whatever be the conclusion as to the scope of the general welfare provision in the tax clause, there is no opinion deserving consideration which supports the contention that the spending power authorizes Congress to follow the appropriation and engage or participate in nondelegated functions by means of the instrumentality created by the appropriation. 2 Story, Commentaries on the Constitution, 153–154; *Kansas Gas & Electric Co.* v. *Independence,* 79 F. (2d) 638; 1 Willoughby, Const. L., 2d ed., § 61, pp. 97–98; Burdick, Amer. Const. L., 181.

Where the dominant objective of an Act of Congress, or of an administrative program undertaken by the Federal Government, is to regulate or control matters reserved by the Ninth and Tenth Amendments, the Act or transaction is illegal. "Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not intrusted to the Federal Government." *Veazie Bank* v. *Fenno,* 8 Wall. 533, 541; *McCulloch* v. *Maryland,* 4 Wheat. 316, 423; *Linder* v. *United States,* 268 U. S. 5; *Bailey* v. *Drexel Furniture Co.,* 259 U. S. 20; *Hammer* v. *Dagenhart,* 247 U. S. 251; *Hill* v. *Wallace,* 259 U. S. 366; *Trusler* v. *Crooks,* 269 U. S. 475; *Chastleton Corp.* v. *Sinclair,* 264 U. S. 543; *Magnano Co.* v. *Hamilton,* 292 U. S. 40; *United States* v. *One Ford Coupe,* 272 U. S. 32; *Pollock* v. *Farmers Loan & Trust Co.,* 157 U. S. 429.

The contract is not only for the primary purpose of acquiring going utility properties, with attached customers, for continued operation and enlargement by TVA, as part of its commercial utility net work. Its express and necessary purpose and effect are to set up a monopoly of electric service within its territorial area, by an agency not subject to regulation by and within the State of Alabama; an agency to control rates and dominate service.

There is a vital distinction between the commercial powers, including competitive functions, which may be granted to a private business corporation created or adopted as a federal agency, and exercise of such powers by the Government. Even in the case of federal agency corporations, privately owned and operating for profit, Chief Justice Marshall asserted that the corporate powers granted must have relation to the federal objective. *Osborne* v. *Bank,* 9 Wheat., at p. 860.

So-called precedents where no remedy existed are not judicial precedents. *Massachusetts* v. *Mellon,* 262 U. S. 447; *Myers* v. *United States,* 272 U. S. 52, 170–171; *United States* v. *Boyer,* 85 Fed. 425; *Field* v. *Clark,* 143 U. S. 649, 691; *Maynard* v. *Hill,* 125 U. S. 190, 204; *Fairbank* v. *United States,* 181 U. S. 283, 306–311; *Miles Planting Co.* v. *Carlisle,* 5 App. D. C. 138, 161.

The action of the Valley Authority in furtherance of its program is characterized by arbitrary administration of the power and resources of the Government and constitutes illegal action and competition.

The Tennessee Valley Authority Act of 1933, as amended, is unconstitutional because of the delegation of legislative power.

This stockholders' suit was properly entertained.

Mr. John Lord O'Brian and *Solicitor General Reed,* with whom *Attorney General Cummings, Mr. James Lawrence Fly,* General Solicitor, Tennessee Valley Authority, and *Messrs. Paul A. Freund* and *Allan D. Jones,* and *Miss Bessie Margolin* were on the brief, for the Tennessee Valley Authority, respondent.

The petitioners as minority stockholders have no standing to maintain this suit. In the first place, they are estopped to assert a cause of action on behalf of their corporation, the Alabama Power Company. That Company has purchased Wilson Dam electric energy from the United States since 1926, continuing its purchases after the enactment of the Tennessee Valley Authority Act in May 1933, and later pursuant to the contract of January 4, 1934. These purchases were wholly voluntary. One who thus accepts the benefits of a statute is estopped to assert that it is invalid. *Great Falls Manufacturing Co.* v. *Attorney General,* 124 U. S. 581; *Wall* v. *Parrot Silver & Copper Co.,* 244 U. S. 407; *St. Louis Co.* v. *Prendergast Co.,* 260 U. S. 469; *Buck* v. *Kuykendall,* 267 U. S. 307, 316–317. The Act makes available to others the benefits long enjoyed by the Alabama Power Company. No stockholder made protest until seven months after the execution of the contract in suit. Meanwhile, the Authority had undertaken substantial operations and obligations in reliance on the contract.

Secondly, the petitioners have established no basis for the maintenance of this suit upon the refusal of the management to sue. The District Court ruled that the contract was not assailable for fraud, negligence, or duress; and that ruling was plainly correct. Nor were the corporate directors guilty of abandonment of discretion; they acted for the best interests of the corporation and disclaimed any opinion that the Act was unconstitutional. The contract was not *ultra vires* of the corporation. The theory of the District Court that equity may enjoin a contract for the sole reason that it is in furtherance of an illegal purpose, irrespective of damage, can have no application where a statute is attacked on constitutional grounds. Nor can the suit be maintained to enjoin competition, since the contract limited the activities of the Authority during the life of the agreement to that area served by the lines purchased, and the activities within that area are consensual and not competitive. The claim for declaratory relief from possible future competition upon the expiration of the contract does not give petitioners standing to maintain this suit.

None of the cases of stockholders' suits relied on by the petitioners lends support to their position. Cf. *Hawes* v. *Oakland,* 104 U. S. 450; *Corbus* v. *Gold Mining Co.,* 187 U. S. 455; *Dodge* v. *Woolsey,* 18 How. 331; *Hill* v. *Wallace,* 259 U. S. 44; *Pollock* v. *Farmers Loan & Trust Co.,* 157 U. S. 429; *Smith* v. *Kansas City Title & Trust Co.,* 255 U. S. 180. In each of those cases, there was a showing of *ultra vires* conduct, or duress, or abandonment of discretion, or irreparable injury to the corporation resulting from the application of a taxing or regulatory statute.

If it may be assumed that petitioners are properly before the Court, we maintain that the narrow issue involved in this case is the validity of the contract of January 4, 1934, which depends upon the right of the Authority to dispose of the Wilson Dam power alone. Wilson Dam is a dam *sui generis.* It was constructed to serve two constitutional purposes, navigation and national defense. The generating equipment was installed particularly for national defense purposes. Since the construction of the dam and the power plant those facilities have been maintained and are still being maintained in aid of both constitutional functions.

The legislative background of the Act indicates that it was designed to serve recognized federal functions. The Act provides for operation of the Muscle Shoals properties, a vexatious legislative problem for many years, and authorizes development of the entire Tennessee River in the interest of navigation and flood control, a matter of national concern for a century.

The navigation and flood control project embodied in the Act includes dams now being constructed by the Authority, with which, we submit, this case is not concerned. It may be noted, however, that these dams are essential parts of a project embodied in the Act, based upon long considered and exhaustive studies for development of the river to secure the maximum improvement to navigation on the Tennessee River and the control of flood waters on the lower Tennessee River and the Mississippi River.

The most difficult phase of the historic effort to improve the Tennessee has been the improvement of the thirty-seven mile stretch known as Muscle Shoals, which presented the most serious obstruction to navigation on the river. The War interrupted consideration of various private proposals and precipitated the construction of Wilson Dam at Muscle Shoals, together with Nitrate Plant No. 2, pursuant to the National Defense Act of 1916. The dam was intended to provide hydroelectric energy for the manufacture of synthetic nitrate to meet a recognized need for a permanent domestic supply of this indispensable ingredient of explosives. Completed in 1925, after careful consideration of its importance for navigation, the dam provides a slack-water pool extending fifteen miles upstream, thus eliminating the most serious obstruction to navigation on the river.

The disposal of the facilities at the dam, their continued maintenance in aid of national defense and navigation, and, in particular, the disposal of the power created at the dam in such manner as to earn a revenue, to avoid the monopolistic position of the Alabama Power Company, and to diffuse the benefits to numerous small purchasers, were basic factors in the ever-recurring problem. Transmission lines were essential.

Under the Commerce Clause, the Federal Government may dispose of the water power created by navigation dams constructed, owned, and maintained by it. This proposition has been settled by an unbroken line of decisions of this Court, culminating in *Arizona* v. *California*, 283 U. S. 423. (See *Kaukauna Water Power Co.* v. *Green Bay Canal Co.*, 142 U. S. 254; *Green Bay Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58, rehearing denied, 173 U. S. 179; *United States* v. *Chandler-Dunbar Water Co.*, 229 U. S. 53). No misapprehension as to the meaning of these decisions has existed in the lower federal courts, and the principle which they establish has been a recognized basis of congressional action for half a century.

Generation of electric energy and acquisition of transmission lines are reasonable means of facilitating the disposal of the water power inevitably created by Wilson Dam. The various means chosen by Congress to dispose of surplus power at federal navigation dams have paralleled scientific development. The National Defense Act of 1916, the Boulder Canyon Project Act of 1928, and the Tennessee Valley Authority Act of 1933 are an outgrowth of the old leasing statutes and reflect the fact that generation and sale of electric energy constitute usually related incidents of the maintenance of a large navigation dam.

The constitutional issue of the choice of means is a narrow one. It cannot seriously be contended that while it is wholly reasonable for Congress to employ independent contractors to generate and deliver energy to purchasers from the Government, it is wholly capricious for Congress to employ its own officers for the same purpose. At Wilson Dam the means chosen by Congress are peculiarly appropriate in view of the maintenance of the generating plant for national defense purposes, the construction of the plant for unitary operation, and the long experience of the United States in attempting to dispose of the power in the public interest.

The Muscle Shoals properties, including the dam and generating plant, constitute a valuable national defense asset, as found by the trial court after extensive testimony by responsible officers of the War Department. The Act requires that the properties be maintained for war purposes, and authorizes the manufacture of explosives and the making of experiments in aid of the national defense.

Unlike ordinary surplus army supplies, the energy available at the dam must be utilized or it is irretrievably lost. In these circumstances, generation and sale of the surplus power by the United States are appropriate means of disposing of the surplus energy under the war powers.

The water power created by Wilson Dam belongs to the United States as owner of the dam. Like other property of the United States, it is held in trust for the people and may be disposed of in the public interest pursuant to the Property Clause of the Constitution. Cf. *United States* v. *Gratiot,* 14 Pet. 526; *United States* v. *Beebe,* 127 U. S. 338; *Camfield* v. *United States,* 167 U. S. 518; *Light* v. *United States,* 220 U. S. 523; *Ruddy* v. *Rossi,* 248 U. S. 104.

In disposing of the surplus power at Wilson Dam, Congress has adopted the long established policy of assuring wide-spread distribution of the benefits of government-owned property. That policy has governed the disposal of public lands from the beginning of our Government, and also is responsible for the undertaking by the Government of extensive reclamation projects in preference to reliance upon private enterprise, which would require large grants to a few individuals. Cf. *United States* v. *Hanson,* 167 Fed. 181; *Burley* v. *United States,* 179 Fed. 1.

In the circumstances existing at Wilson Dam, the transmission and sale of the surplus electric energy by the United States was particularly appropriate. Sales solely to the Alabama Power Company and its affiliates, the only available purchasers of power at the dam, would not avoid waste or monopoly of the power or effect a widespread distribution of its benefits.

These principles are reflected in the established practice of the Government. For almost fifty years provision has been made by Congress for the disposition of power incidentally created by the construction and maintenance of federal water developments. For almost thirty years provision has been made for the conversion of the incidental water power into electric energy and the sale of that energy. The Bureau of Reclamation has constructed twenty-two power plants at federal reclamation projects, nine of which were operated by the Government in 1932. The Bureau sells power to towns, villages, rural customers, and power companies, and has built and operated transmission lines for commercial purposes. A similar practice has been followed with respect to the power produced as a by-product of navigation developments. The general dam act of 1912 authorized the Secretary of War to make provision for future generation of electricity in the construction of all navigation dams. The Boulder Canyon Project Act of 1928 provided for the sale of electric energy by the Secretary of the Interior to various classes of purchasers, preference being given to states and municipalities.

The ablest legal advisers of the Roosevelt, Taft, and Wilson administrations were agreed that where the Government has constructed a dam for the lawful purpose of improving navigation, it may dispose of the power produced as a by-product.

There is no merit in the contention of petitioners that the activities of the Authority are "intrinsically alien to Federal function" and constitute an invasion of state sovereignty. The fact that the activities of the Authority may be described as commercial or proprietary is of no constitutional significance. Cf. *Puget Sound Power & Light Co.* v. *Seattle,* 291 U. S. 619, 625; *Emergency Fleet Corp.* v. *Western Union,* 275 U. S. 415, 424; *Juilliard* v. *Greenman,* 110 U. S. 421, 448.

There is no purpose in the Act to regulate matters reserved to the States by the Ninth and Tenth Amendments. The contracts with the municipalities are subservient to the law of Alabama no less than if the municipalities had made contracts with a private wholesaler. The State of Alabama has exercised its regulatory powers in the instant case by authorizing the municipalities to enter into contracts with the Authority under certain stated conditions. The Supreme Court of Alabama has sustained that legislation. *Oppenheim* v. *City of Florence,* 229 Ala. 50, 155 So. 859.

The "yardstick" is not a law and imposes no regulation or duty. Its function is educational, and, at most, advisory. Cf. *Standard Scale Co.* v. *Farrell,* 249 U. S. 571.

Both courts below properly exercised their discretion in refusing to grant a declaratory decree on the validity of "proposed extensions of the competition" by the Authority. In No. 404, no justiciable controversy is presented, since the complaint is based upon potential or contingent acts and upon assumed potential invasions. (See *New Jersey* v. *Sargent,* 269 U. S. 328, 339; *Arizona* v. *California,* 283 U. S. 423, 462.)

Aside from the prematurity and hypothetical character of the complaints, the restrictive nature of a stockholder's suit is inconsistent with a right to secure declaratory relief in advance of immediately threatened injury.

In any event, the granting of a declaratory decree is a discretionary matter. In view of the hypothetical and speculative nature of the complaint, and the complicated and uncertain facts, the refusal to grant a declaratory judgment was a proper exercise of discretion.

If the Court should nevertheless deem it appropriate to inquire into activities of the Authority involving new dams, the Record shows that operations thus far undertaken by the Authority are in furtherance of the project "to improve navigation in the Tennessee River and to control the destructive flood waters in the Tennessee River and Mississippi River Basins," authorized by the Tennessee Valley Authority Act following the exhaustive survey of the Army Engineers in House Document No. 328, adopted by the Rivers and Harbors Act of 1930, 46 Stat. 918. The District Court found that all of the dams now under construction by the Authority are of the type which are *indispensable* in carrying out these purposes.

Mr. W. H. Mitchell submitted for the City of Florence, respondent.

Messrs. Thomas W. Martin, Perry W. Turner, and *Wm. Logan Martin* submitted for the Alabama Power Co., respondent.

Messrs. Courtland Palmer and *Jehu T. Stokely* submitted for The Chemical Bank & Trust Co., respondent.

By leave of Court, briefs of *amici curiae* were filed by *Mr. Sam W. Oliver,* County Attorney, on behalf of Tallapoosa County, Alabama; *Mr. J. M. Holley,* County Attorney, on behalf of Elmore County, Alabama; and *Mr. Lawrence C. Jones,* Attorney General, on behalf of the State of Vermont, all attacking the validity of the Tennessee Valley Authority Act.

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

On January 4, 1934, the Tennessee Valley Authority, an agency of the Federal Government,[1] entered into a contract with the Alabama Power Company, providing (1) for the purchase by the Authority from the Power Company of certain transmission lines, sub-stations, and auxiliary properties for $1,000,000, (2) for the purchase by the Authority from the Power Company of certain real property for $150,000, (3) for an interchange of hydro-electric energy, and in addition for the sale by the Authority to the Power Company of its "surplus power," on stated terms, and (4) for mutual restrictions as to the areas to be served in the sale of power. The contract was amended and supplemented in minor particulars on February 13 and May 24, 1934.[2]

The Alabama Power Company is a corporation organized under the laws of Alabama and is engaged in the generation of electric energy and its distribution generally throughout that State, its lines reaching 66 counties. The transmission lines to be purchased by the Authority extend from Wilson Dam, at the Muscle Shoals plant owned by the United States on the Tennessee River in

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[1] The Tennessee Valley Authority is a body corporate created by the Act of Congress of May 18, 1933, amended by the Act of Congress of August 31, 1935. 48 Stat. 58; 49 Stat. 1075.

[2] The Commonwealth & Southern Corporation, organized under the laws of Delaware, and the owner of the common stock of the Alabama Power Company, was a party to the contract, which also contained agreements with other subsidiaries of the Commonwealth & Southern Corporation, viz: Tennessee Electric Power Company, Georgia Power Company, and Mississippi Power Company. The agreements with these companies are not involved in this suit.

northern Alabama, into seven counties in that State, within a radius of about 50 miles. These lines serve a population of approximately 190,000, including about 10,000 individual customers, or about one-tenth of the total number served directly by the Power Company. The real property to be acquired by the Authority (apart from the transmission lines above mentioned and related properties) is adjacent to the area known as the "Joe Wheeler dam site," upon which the Authority is constructing the Wheeler Dam.

The contract of January 4, 1934, also provided for cooperation between the Alabama Power Company and the Electric Home and Farm Authority, Inc., a subsidiary of the Tennessee Valley Authority, to promote the sale of electrical appliances, and to that end the Power Company, on May 21, 1934, entered into an agency contract with the Electric Home and Farm Authority, Inc. It is not necessary to detail or discuss the proceedings in relation to that transaction, as it is understood that the latter corporation has been dissolved.

There was a further agreement on August 9, 1934, by which the Alabama Power Company gave an option to the Tennessee Valley Authority to acquire urban distribution systems which had been retained by the Power Company in municipalities within the area served by the transmission lines above mentioned. It appears that this option has not been exercised and that the agreement has been terminated.

Plaintiffs are holders of preferred stock of the Alabama Power Company. Conceiving the contract with the Tennessee Valley Authority to be injurious to the corporate interests and also invalid, because beyond the constitutional power of the Federal Government, they submitted their protest to the board of directors of the Power Company and demanded that steps should be taken to have the contract annulled. The board refused, and the

Commonwealth & Southern Corporation, the holder of all the common stock of the Power Company, declined to call a meeting of the stockholders to take action. As the protest was unavailing, plaintiffs brought this suit to have the invalidity of the contract determined and its performance enjoined. Going beyond that particular challenge, and setting forth the pronouncements, policies and programs of the Authority, plaintiffs sought a decree restraining these activities as repugnant to the Constitution, and also asked a general declaratory decree with respect to the rights of the Authority in various relations.

The defendants, including the Authority and its directors, the Power Company and its mortgage trustee, and the municipalities within the described area, filed answers and the case was heard upon evidence. The District Court made elaborate findings and entered a final decree annulling the contract of January 4, 1934, and enjoining the transfer of the transmission lines and auxiliary properties. The court also enjoined the defendant municipalities from making or performing any contracts with the Authority for the purchase of power, and from accepting or expending any funds received from the Authority or the Public Works Administration for the purpose of constructing a public distribution system to distribute power which the Authority supplied. The court gave no consideration to plaintiffs' request for a general declaratory decree.

The Authority, its directors, and the city of Florence appealed from the decree and the case was severed as to the other defendants. Plaintiffs took a cross appeal.

The Circuit Court of Appeals limited its discussion to the precise issue with respect to the effect and validity of the contract of January 4, 1934. The District Court had found that the electric energy required for the territory served by the transmission lines to be purchased under that contract is available at Wilson Dam without the necessity for any interconnection with any other dam or power plant. The Circuit Court of Appeals accordingly considered the constitutional authority for the construction of Wilson Dam and for the disposition of the electric energy there created. In the view that the Wilson Dam had been constructed in the exercise of the war and commerce powers of the Congress and that the electric energy there available was the property of the United States and subject to its disposition, the Circuit Court of Appeals decided that the decree of the District Court was erroneous and should be reversed. The court also held that plaintiffs should take nothing by their cross appeal. 78 F. (2d) 578. On plaintiffs' application we granted writs of certiorari.

First. The right of plaintiffs to bring this suit. Plaintiffs sue in the right of the Alabama Power Company. They sought unsuccessfully to have that right asserted by the Power Company itself, and upon showing their demand and its refusal they complied with the applicable rule.[3] While their stock holdings are small, they have a real interest and there is no question that the suit was brought in good faith.[4] If otherwise entitled, they should not be denied the relief which would be accorded to one who owned more shares.

Plaintiffs did not simply challenge the contract of January 4, 1934, as improvidently made,—as an unwise exercise of the discretion vested in the board of directors. They challenged the contract both as injurious to the

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[3] Equity Rule 27.

[4] The District Court found that "Approximately 1900 preferred stockholders of the Alabama Company, holding over 40,000 shares of the preferred stock thereof, have associated themselves with a preferred stockholders' protective committee and authorized their names to be joined with the plaintiffs of record in this case as parties plaintiff."

interests of the corporation and as an illegal transaction,—violating the fundamental law. In seeking to prevent the carrying out of the contract, the suit was directed not only against the Power Company but against the Authority and its directors upon the ground that the latter, under color of the statute, were acting beyond the powers which the Congress could validly confer. In such a case it is not necessary for stockholders—when their corporation refuses to take suitable measures for its protection—to show that the managing board or trustees have acted with fraudulent intent or under legal duress. To entitle the complainants to equitable relief, in the absence of an adequate legal remedy, it is enough for them to show the breach of trust or duty involved in the injurious and illegal action. Nor is it necessary to show that the transaction was *ultra vires* of the corporation. The illegality may be found in the lack of lawful authority on the part of those with whom the corporation is attempting to deal. Thus, the breach of duty may consist in yielding, without appropriate resistance, to governmental demands which are without warrant of law or are in violation of constitutional restrictions. The right of stockholders to seek equitable relief has been recognized when the managing board or trustees of the corporation have refused to take legal measures to resist the collection of taxes or other exactions alleged to be unconstitutional (*Dodge* v. *Woolsey,* 18 How. 331, 339, 340, 345; *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429, 433, 553, 554; *Brushaber* v. *Union Pacific R. Co.,* 240 U. S. 1, 10); or because of the failure to assert the rights and franchises of the corporation against an unwarranted interference through legislative or administrative action (*Greenwood* v. *Freight Co.,* 105 U. S. 13, 15, 16; *Cotting* v. *Kansas City Stockyards Co.,* 183 U. S. 79, 114). The remedy has been accorded to stockholders of public service corporations with respect to rates alleged to be confiscatory (*Smyth* v. *Ames,* 169 U. S. 466, 469, 517; *Ex parte Young,* 209 U. S. 123, 129, 130, 143). The fact that the directors in the exercise of their judgment, either because they were disinclined to undertake a burdensome litigation or for other reasons which they regarded as substantial, resolved to comply with the legislative or administrative demands, has not been deemed an adequate ground for denying to the stockholders an opportunity to contest the validity of the governmental requirements to which the directors were submitting. See *Dodge* v. *Woolsey, supra,* at pp. 340, 345; *Greenwood* v. *Freight Co., supra,* at p. 15; *Pollock* v. *Farmers' Loan & Trust Co., supra,* at pp. 433, 553, 554; *Brushaber* v. *Union Pacific R. Co., supra,* at p. 10.

In *Smith* v. *Kansas City Title Co.,* 255 U. S. 180, a shareholder of the Title Company sought to enjoin the directors from investing its funds in the bonds of Federal Land Banks and Joint Stock Land Banks upon the ground that the Act of Congress authorizing the creation of these banks and the issue of bonds was unconstitutional, and hence that the bonds were not legal securities in which the corporate funds could lawfully be invested. The proposed investment was not large,—only $10,000 in each of the classes of bonds described. *Id.,* pp. 195, 196. And it appeared that the directors of the Title Company maintained that the Federal Farm Loan Act was constitutional and that the bonds were "valid and desirable investments." *Id.,* p. 201. But neither the conceded fact as to the judgment of the directors nor the small amount to be invested,—shown by the averments of the complaint—availed to defeat the jurisdiction of the court to decide the question as to the validity of the Act and of the bonds which it authorized. The Court held that the validity of the Act was directly drawn in question and that the shareholder was entitled to maintain the suit. The Court said: "The general allegations as to the interest of the shareholder, and his right to have an injunction to prevent the purchase of the alleged unconstitutional securities by misapplication of the funds of the corporation, give jurisdiction under the principles settled in *Pollock* v. *Farmers' Loan & Trust Co.* and *Brushaber* v. *Union Pacific R. Co., supra.*" *Id.*, pp. 201, 202. The Court then proceeded to examine the constitutional question and sustained the legislation under attack. A similar result was reached in *Brushaber* v. *Union Pacific R. Co., supra.* A close examination of these decisions leads inevitably to the conclusion that they should either be followed or be frankly overruled. We think that they should be followed, and that the opportunity to resort to equity, in the absence of an adequate legal remedy, in order to prevent illegal transactions by those in control of corporate properties, should not be curtailed because of reluctance to decide constitutional questions.

We find no distinctions which would justify us in refusing to entertain the present controversy. It is urged that plaintiffs hold preferred shares and that, for the present purpose, they are virtually in the position of bondholders. The rights of bondholders, in case of injury to their interests through unconstitutional demands upon, or transactions with, their corporate debtor, are not before us. Compare *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 367, 368. Plaintiffs are not creditors but shareholders (with equal voting power share for share with the common stockholders, according to the findings) and thus they have a proprietary interest in the corporate enterprise which is subject to injury through breaches of trust or duty on the part of the directors who are not less the representatives of the plaintiffs because their shares have certain preferences. See *Ball* v. *Rutland R. Co.*, 93 Fed. 513, 514, 515. It may be, as in this case, that the owner of all the common stock has participated in the transaction in question, and the owners of preferred stock may be the only persons having a proprietary interest in the corporation who are in a position to protect its interests against what is asserted to be an illegal disposition of its property.[5] A court of equity should not shut its door against them.

It is said that here, instead of parting with money, as in the case of illegal or unconstitutional taxes or exactions, the Power Company is to receive a substantial consideration under the contract in suit. But the Power Company is to part with transmission lines which supply a large area, and plaintiffs allege that the consideration is inadequate and that the transaction entails a disruption of services and a loss of business and franchises. If, as plaintiffs contend, those purporting to act as a governmental agency had no constitutional authority to make the agreement, its execution would leave the Power Company with doubtful remedy, either against the governmental agency which might not be able, or against the Government which might not be willing, to respond to a demand for the restoration of conditions as they now exist. In what circumstances and with what result such an effort at restoration might be made is unpredictable. If, as was decided in *Smith* v. *Kansas City Title Co.*, *supra,* stockholders had the right to sue to test the validity of a proposed investment in the bonds of land banks, we can see no reason for denying to these plaintiffs a similar resort to equity in order to challenge, on the ground of unconstitutionality, a contract involving such a dislocation and misapplication of corporate property as are charged in the instant case.

The Government urges that the Power Company is estopped to question the validity of the Act creating the Tennessee Valley Authority and hence that the stockholders, suing in the right of the corporation, cannot

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[5] See note 2.

maintain this suit. It is said that the Power Company, in 1925, installed its own transformers and connections at Wilson Dam and has ever since purchased large quantities of electric energy there generated, and that the Power Company continued its purchases after the passage of the Act of 1933 constituting the Authority. The principle is invoked that one who accepts the benefit of a statute cannot be heard to question its constitutionality. *Great Falls Manufacturing Co.* v. *Attorney General,* 124 U. S. 581; *Wall* v. *Parrot Silver & Copper Co.,* 244 U. S. 407; *St. Louis Casting Co.* v. *Prendergast Construction Co.,* 260 U. S. 469. We think that the principle is not applicable here. The prior purchase of power in the circumstances disclosed may have a bearing upon the question before us, but it is by no means controlling. The contract in suit manifestly has a broader range and we find nothing in the earlier transactions which preclude the contention that this contract goes beyond the constitutional power of the Authority. Reference is also made to a proceeding instituted by the Power Company to obtain the approval of the contract by the Alabama Public Service Commission and to the delay in the bringing of this suit. It was brought on October 8, 1934, following plaintiffs' demand upon the board of directors in the preceding August. Estoppel in equity must rest on substantial grounds of prejudice or change of position, not on technicalities. We see no reason for concluding that the delay or the proceeding before the Commission caused any prejudice to either the Power Company or the Authority, so far as the subject matter of the contract between them is concerned, or that there is any basis for the claim of estoppel.

We think that plaintiffs have made a sufficient showing to entitle them to bring suit and that a constitutional question is properly presented and should be decided.

Second. The scope of the issue. We agree with the Circuit Court of Appeals that the question to be determined is limited to the validity of the contract of January 4, 1934. The pronouncements, policies and program of the Tennessee Valley Authority and its directors, their motives and desires, did not give rise to a justiciable controversy save as they had fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of the persons complaining. The judicial power does not extend to the determination of abstract questions. *Muskrat* v. *United States*, 219 U. S. 346, 361; *Liberty Warehouse Co.* v. *Grannis*, 273 U. S. 70, 74; *Willing* v. *Chicago Auditorium Assn.*, 277 U. S. 274, 289; *Nashville, C. & St. L. Ry. Co.* v. *Wallace*, 288 U. S. 249, 262, 264. It was for this reason that the Court dismissed the bill of the State of New Jersey which sought to obtain a judicial declaration that in certain features the Federal Water Power Act[6] exceeded the authority of the Congress and encroached upon that of the State. *New Jersey* v. *Sargent*, 269 U. S. 328. For the same reason, the State of New York, in her suit against the State of Illinois, failed in her effort to obtain a decision of abstract questions as to the possible effect of the diversion of water from Lake Michigan upon hypothetical water power developments in the indefinite future. *New York* v. *Illinois*, 274 U. S. 488. At the last term the Court held, in dismissing the bill of the United States against the State of West Virginia, that general allegations that the State challenged the claim of the United States that the rivers in question were navigable, and asserted a right superior to that of the United States to license their use for power production, raised an issue "too vague and ill-defined to admit of judicial determination." *United States* v. *West Virginia*, 295 U. S. 463, 474. Claims based merely upon "assumed potential invasions"

[6] 41 Stat. 1063.

of rights are not enough to warrant judicial intervention. *Arizona* v. *California,* 283 U. S. 423, 462.

The Act of June 14, 1934,[7] providing for declaratory judgments, does not attempt to change the essential requisites for the exercise of judicial power. By its terms, it applies to "cases of actual controversy," a phrase which must be taken to connote a controvery of a justiciable nature, thus excluding an advisory decree upon a hypothetical state of facts. See *Nashville, C. & St. L. Ry. Co.* v. *Wallace, supra.* While plaintiffs, as stockholders, might insist that the board of directors should take appropriate legal measures to extricate the corporation from particular transactions and agreements alleged to be invalid, plaintiffs had no right to demand that the directors should start a litigation to obtain a general declaration of the unconstitutionality of the Tennessee Valley Authority Act in all its bearings or a decision of abstract questions as to the right of the Authority and of the Alabama Power Company in possible contingencies.

Examining the present record, we find no ground for a demand by plaintiffs except as it related to the contracts between the Authority and the Alabama Power Company. And as the contract of May 21, 1934, with the Electric Home and Farm Authority, Inc., and that of August 9, 1934, for an option to the Authority to acquire urban distribution systems, are understood to be inoperative (*ante,* p. 316), the only remaining questions that plaintiffs are entitled to raise concern the contract of January 4, 1934, providing for the purchase of transmission lines and the disposition of power.

There is a further limitation upon our inquiry. As it appears that the transmission lines in question run from the Wilson Dam and that the electric energy generated at that dam is more than sufficient to supply all the re-

[7] 48 Stat. 955.

quirements of the contract, the questions that are properly before us relate to the constitutional authority for the construction of the Wilson Dam and for the disposition, as provided in the contract, of the electric energy there generated.

Third. The constitutional authority for the construction of the Wilson Dam. The Congress may not, "under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government." Chief Justice Marshall, in *McCulloch* v. *Maryland,* 4 Wheat. 316, 423; *Linder* v. *United States,* 268 U. S. 5, 17. The Government's argument recognizes this essential limitation. The Government's contention is that the Wilson Dam was constructed, and the power plant connected with it was installed, in the exercise by the Congress of its war and commerce powers, that is, for the purposes of national defense and the improvement of navigation.

Wilson Dam is described as a concrete monolith one hundred feet high and almost a mile long, containing two locks for navigation and eight installed generators. Construction was begun in 1917 and completed in 1926. Authority for its construction is found in § 124 of the National Defense Act of June 3, 1916.[8] It authorized the President to cause an investigation to be made in order to determine "the best, cheapest, and most available means for the production of nitrates and other products for munitions of war"; to designate for the exclusive use of the United States "such site or sites upon any navigable or nonnavigable river or rivers or upon the public lands, as in his opinion will be necessary for carrying out the purposes of this Act"; and "to construct, maintain and operate" on any such site "dams, locks, improvements to navigation, power houses, and other plants and equipment or other

[8] 39 Stat. 166, 215.

means than water power as in his judgment is the best and cheapest, necessary or convenient for the generation of electrical or other power and for the production of nitrates or other products needed for munitions of war and useful in the manufacture of fertilizers and other useful products." The President was authorized to lease, or acquire by condemnation or otherwise such lands as might be necessary and there was further provision that "The products of such plants shall be used by the President for military and naval purposes to the extent that he may deem necessary, and any surplus which he shall determine is not required shall be sold and disposed of by him under such regulations as he may prescribe." *Id.*

We may take judicial notice of the international situation at the time the Act of 1916 was passed, and it cannot be successfully disputed that the Wilson Dam and its auxiliary plants, including the hydro-electric power plant, are, and were intended to be, adapted to the purposes of national defense.[9] While the District Court found that there is no intention to use the nitrate plants or the hydro-electric units installed at Wilson Dam for the production

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[9] Among the findings of the District Court on this point are the following:

"38. The Muscle Shoals plants, including the Sheffield steam plant and the 8 hydro-electric units installed at Wilson Dam, were authorized for war purposes by Section 124 of the National Defense Act of 1916 in anticipation of participation in the great war. The original conception was for the use of Nitrate Plant No. 1 employing the Haber process and Plant No. 2 employing the cyanamide process for the fixation or manufacture of nitrogen and its subsequent conversion into ammonium nitrate for explosives. Plant No. 1 was completed but was never practicable, due to the lack of knowledge of the Haber process. Plant No. 2 successfully developed calcium cyanamide from a manufacturing standpoint but due to the availability of ammonium nitrate as a result of commercial development of by-product or synthetic processes, the commercial or peacetime manufacture of calcium cyanamide at Nitrate Plant No. 2 is of war materials in time of peace, "the maintenance of said properties in operating condition and the assurance of an abundant supply of electric energy in the event of war, constitute national defense assets." This finding has ample support.

The Act of 1916 also had in view "improvements to navigation." Commerce includes navigation. "All America understands, and has uniformly understood," said Chief Justice Marshall in *Gibbons* v. *Ogden,* 9 Wheat. 1, 190, "the word 'commerce,' to comprehend navigation." The power to regulate interstate commerce embraces the power to keep the navigable rivers of the United States free from obstructions to navigation and to remove such obstructions when they exist. "For these purposes," said the Court in *Gilman* v. *Philadelphia,* 3 Wall. 713, 725, "Congress possesses all the powers which existed in the States before the adoption of the national Constitution, and which have always existed in the Parliament in England." See, also, *Philadelphia Company* v. *Stimson,* 223 U. S. 605, 634.

The Tennessee River is a navigable stream, although there are obstructions at various points because of shoals, reefs and rapids. The improvement of navigation on this river has been a matter of national concern for over a century. Recommendation that provision be made for

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considered uneconomical and undesirable and is not proposed or suggested by either the War Department or the TVA. The Court further finds, however, that the plant with the aid of electric power furnished by Wilson Dam and the Sheffield steam plant can be operated to produce annually 110,000 tons of ammonium nitrate by the cyanamide process and that the present plans of the War Department count upon that plant to supply that amount annually in the event of a major war. . . .

"40. The existence of these facilities which make available large quantities of nitrogenous war materials by use of either the nitrogen fixing process or the oxidation of synthetic ammonia is a valuable national defense asset."

navigation around Muscle Shoals was made by the Secretary of War, John C. Calhoun, in his report transmitted to the Congress by President Monroe in 1824,[10] and, from 1852, the Congress has repeatedly authorized projects to develop navigation on that and other portions of the river, both by open channel improvements and by canalization.[11] The Wilson Dam project, adopted in 1918, gave a nine foot slack water development, for fifteen miles above Florence, over the Muscle Shoals rapids and, as the District Court found, "flooded out the then existing canal and locks which were inadequate." The District Court also found that a "high dam of this type was the only feasible means of eliminating this most serious obstruction to navigation." By the Act of 1930, after a protracted study by the Corps of Engineers of the United States Army, the Congress adopted a project for a permanent improvement of the main stream "for a navigable depth of nine feet." [12]

While, in its present condition, the Tennessee River is not adequately improved for commercial navigation, and traffic is small, we are not at liberty to conclude either that the river is not susceptible of development as an important waterway, or that Congress has not undertaken

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[10] Sen. Doc. No. 1, 18th Cong., 2d sess.; H. R. Doc. No. 119, 69th Cong., 1st sess., 11, 12.

[11] See Rivers and Harbors Acts of August 30, 1852, c. 104, 10 Stat. 56, 60; July 25, 1868, c. 233, 15 Stat. 171, 174; March 3, 1871, c. 118, 16 Stat. 538, 542; June 10, 1872, c. 416, 17 Stat. 370, 372; September 19, 1890, c. 907, 26 Stat. 426, 445, 446; August 18, 1894, c. 299, 28 Stat. 338, 354; April 26, 1904, c. 1605, 33 Stat. 309; March 2, 1907, c. 2509, 34 Stat. 1073, 1093; June 25, 1910, c. 382, 36 Stat. 630, 652; July 25, 1912, c. 253, 37 Stat. 201, 215; July 27, 1916, c. 260, 39 Stat. 391, 399; March 3, 1925, c. 467, 43 Stat. 1186, 1188; July 3, 1930, c. 847, 46 Stat. 918, 927, 928. See, also, H. R. Docs. No. 319, 67th Cong., 2d sess.; No. 463, 69th Cong., 1st sess.; No. 185, 70th Cong., 1st sess.; No. 328, 71st Cong., 2d sess.

[12] Act of July 3, 1930, c. 847, 46 Stat. 918, 927, 928.

that development, or that the construction of the Wilson Dam was not an appropriate means to accomplish a legitimate end.

The Wilson Dam and its power plant must be taken to have been constructed in the exercise of the constitutional functions of the Federal Government.

Fourth. The constitutional authority to dispose of electric energy generated at the Wilson Dam. The Government acquired full title to the dam site, with all riparian rights. The power of falling water was an inevitable incident of the construction of the dam. That water power came into the exclusive control of the Federal Government. The mechanical energy was convertible into electric energy, and the water power, the right to convert it into electric energy, and the electric energy thus produced, constitute property belonging to the United States. See *Green Bay Canal Co.* v. *Patten Paper Co.,* 172 U. S. 58, 80; *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 72, 73; *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165, 170.

Authority to dispose of property constitutionally acquired by the United States is expressly granted to the Congress by § 3 of Article IV of the Constitution. This section provides:

"The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."

To the extent that the power of disposition is thus expressly conferred, it is manifest that the Tenth Amendment is not applicable. And the Ninth Amendment (which petitioners also invoke) in insuring the maintenance of the rights retained by the people does not withdraw the rights which are expressly granted to the

Federal Government. The question is as to the scope of the grant and whether there are inherent limitations which render invalid the disposition of property with which we are now concerned.

The occasion for the grant was the obvious necessity of making provision for the government of the vast territory acquired by the United States. The power to govern and to dispose of that territory was deemed to be indispensable to the purposes of the cessions made by the States. And yet it was a matter of grave concern because of the fear that "the sale and disposal" might become "a source of such immense revenue to the national government, as to make it independent of and formidable to the people." Story on the Constitution, §§ 1325, 1326. The grant was made in broad terms, and the power of regulation and disposition was not confined to territory, but extended to "other property belonging to the United States," so that the power may be applied, as Story says, "to the due regulation of all other personal and real property rightfully belonging to the United States." And so, he adds, "it has been constantly understood and acted upon." *Id.*

This power of disposal was early construed to embrace leases, thus enabling the Government to derive profit through royalties. The question arose with respect to a government lease of lead mines on public lands, under the Act of March 3, 1807. The contention was advanced that "disposal is not letting or leasing"; that Congress had no power "to give or authorize leases" and "to obtain profits from the working of the mines." The Court overruled the contention, saying: "The disposal must be left to the discretion of Congress. And there can be no apprehensions of any encroachments upon state rights, by the creation of a numerous tenantry within their borders, as has been so strenuously urged in the argument." *United States* v. *Gratiot,* 14 Pet. 526, 533, 538. The policy, early adopted and steadily pursued, of segregating mineral lands from other public lands and providing for leases, pointed to the recognition both of the full power of disposal and of the necessity of suitably adapting the methods of disposal to different sorts of property. The policy received particular emphasis following the discovery of gold in California in 1848.[13] For example, an Act of 1866, dealing with grants to Nevada, declared that "in all cases lands valuable for mines of gold, silver, quicksilver, or copper shall be reserved from sale." [14] And Congress from the outset adopted a similar practice in reserving salt springs. *Morton* v. *Nebraska,* 21 Wall. 660, 667; *Montello Salt Co.* v. *Utah,* 221 U. S. 452. It was in the light of this historic policy that the Court held that the school grant to Utah by the Enabling Act of 1894 [15] was not intended to embrace land known to be valuable for coal. *United States* v. *Sweet,* 245 U. S. 563, 572. See, also, as to the reservation and leases of oil lands, *Pan American Petroleum Co.* v. *United States,* 273 U. S. 456, 487.

But when Congress thus reserved mineral lands for special disposal, can it be doubted that Congress could have provided for mining directly by its own agents, instead of giving that right to lessees on the payment of royalties? [16] Upon what ground could it be said that the Government could not mine its own gold, silver, coal, lead, or phosphates in the public domain, and dispose of them as property belonging to the United States? That it could dis-

[13] See citations of numerous statutes in *United States* v. *Sweet,* 245 U. S. 563, 568, 569.

[14] Act of July 4, 1866, c. 166, § 5, 14 Stat. 85, 86.

[15] Act of July 16, 1894, c. 138, 28 Stat. 107.

[16] See, as to royalties under leases "to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," the Act of February 25, 1920, c. 85, 41 Stat. 437. Also, as to leases of public lands containing potassium deposits, the Act of October 2, 1917, c. 62, 40 Stat. 297.

pose of its land but not of what the land contained? It would seem to be clear that under the same power of disposition which enabled the Government to lease and obtain profit from sales by its lessees, it could mine and obtain profit from its own sales.

The question is whether a more limited power of disposal should be applied to the water power, convertible into electric energy, and to the electric energy thus produced at the Wilson Dam constructed by the Government in the exercise of its constitutional functions. If so, it must be by reason either of (1) the nature of the particular property, or (2) the character of the "surplus" disposed of, or (3) the manner of disposition.

(1) That the water power and the electric energy generated at the dam are susceptible of disposition as property belonging to the United States is well established. In the case of *Green Bay Canal Co.* v. *Patten Paper Co., supra,* the question was "whether the water power, incidentally created by the erection and maintenance of the dam and canal for the purpose of navigation in Fox River" was "subject to control and appropriation by the United States, owning and operating those public works, or by the State of Wisconsin, within whose limits Fox River lies." *Id.,* pp. 68, 69. It appeared that, under the authority of the Congress, the United States had acquired, by purchase from a Canal Company, title to its improvement works, lands and water powers, on the Fox River, and that the United States had consented to the retention by the Canal Company of the water powers with appurtenances. We held that the "substantial meaning of the transaction was, that the United States granted to the Canal Company the right to continue in the possession and enjoyment of the water powers and the lots appurtenant thereto, subject to the rights and control of the United States as owning and operating the public works"; and that the method by which the arrangement was

effected was "as efficacious as if the entire property had been conveyed to the United States by one deed, and the reserved properties had been reconveyed to the Canal Company by another." *Id.*, p. 80. We thought it clear that the Canal Company was "possessed of whatever rights to the use of this incidental water power that could be validly granted by the United States." *Id.*, p. 69. And in this view it was decided that so far as the "water powers and appurtenant lots are regarded as property," the title of the Canal Company could not be controverted, and that it was "equally plain that the mode and extent of the use and enjoyment of such property by the Canal Company" fell within the sole control of the United States. See *Kaukauna Water Power Co.* v. *Green Bay Canal Co.*, 142 U. S. 254; *Green Bay Canal Co.* v. *Patten Paper Co.*, 173 U. S. 179.

In *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, the United States had condemned land in Michigan, lying between the St. Marys River and the ship canal strip of the Government, in order to improve navigation. The riparian owner, under revocable permits from the Secretary of War, had placed in the rapids "the necessary dams, dykes and forebays for the purpose of controlling the current and using its power for commerical purposes." *Id.*, p. 68. The Act of March 3, 1909,[17] authorizing the improvement, had revoked the permit. We said that the Government "had dominion over the water power of the rapids and falls" and could not be required to pay "any hypothetical additional value to a riparian owner who had no right to appropriate the current to his own commercial use." *Id.*, p. 76. The Act of 1909 also authorized the Secretary of War to lease "any excess of water power which results from the conservation of the flow of the river, and the works which the Government may con-

[17] 35 Stat. c. 264, 815, 820, 821.

struct." "If the primary purpose is legitimate," said the Court, "we can see no sound objection to leasing any excess of power over the needs of the Government. The practice is not unusual in respect to similar public works constructed by state governments." *Id.*, p. 73. Reference was made to the case of *Kaukauna Water Power Co.* v. *Green Bay Canal Co., supra,* where the Court had observed in relation to a Wisconsin statute of 1848, which had reserved to the State the water power created by the dam over the Fox River:—"As there is no need of the surplus running to waste, there was nothing objectionable in permitting the State to let out the use of it to private parties, and thus reimburse itself for the expenses of the improvement." In *International Paper Co.* v. *United States,* 282 U. S. 399, the Government made a war-time requisition of electrical power and was held bound to make compensation to a lessee who thereby had lost the use of the water to which he was entitled. The Court brushed aside attempted "distinctions between the taking of power and the taking of water rights," saying that the Government intended "to take and did take the use of all the water power" and had exercised its power of eminent domain to that end. *Id.,* pp. 407, 408.

(2) The argument is stressed that, assuming that electric energy generated at the dam belongs to the United States, the Congress has authority to dispose of this energy only to the extent that it is a surplus necessarily created in the course of making munitions of war or operating the works for navigation purposes; that is, that the remainder of the available energy must be lost or go to waste. We find nothing in the Constitution which imposes such a limitation. It is not to be deduced from the mere fact that the electric energy is only potentially available until the generators are operated. The Government has no less right to the energy thus available by letting the water course over its turbines than it has

to use the appropriate processes to reduce to possession other property within its control, as, for example, oil which it may recover from a pool beneath its lands, and which is reduced to possession by boring oil wells and otherwise might escape its grasp. See *Ohio Oil Co.* v. *Indiana,* 177 U. S. 190, 208. And it would hardly be contended that, when the Government reserves coal on its lands, it can mine the coal and dispose of it only for the purpose of heating public buildings or for other governmental operations. Or, if the Government owns a silver mine, that it can obtain the silver only for the purpose of storage or coinage. Or that when the Government extracts the oil it has reserved, it has no constitutional power to sell it. Our decisions recognize no such restriction. *United States* v. *Gratiot,* 14 Pet. 526; *Kansas* v. *Colorado,* 206 U. S. 46, 88, 89; *Light* v. *United States,* 220 U. S. 523, 536, 537; *Ruddy* v. *Rossi,* 248 U. S. 104, 106. The United States owns the coal, or the silver, or the lead, or the oil, it obtains from its lands, and it lies in the discretion of the Congress, acting in the public interest, to determine of how much of the property it shall dispose.

We think that the same principle is applicable to electric energy. The argument pressed upon us leads to absurd consequences in the denial, despite the broad terms of the constitutional provision, of a power of disposal which the public interest may imperatively require. Suppose, for example, that in the erection of a dam for the improvement of navigation, it became necessary to destroy a dam and power plant which had previously been erected by a private corporation engaged in the generation and distribution of energy which supplied the needs of neighboring communities and business enterprises. Would anyone say that, because the United States had built its own dam and plant in the exercise of its constitutional functions, and had complete ownership and dominion over both, no power could be supplied to the communities and enterprises dependent on it, not because of any unwillingness of the Congress to supply it, or of any overriding governmental need, but because there was no constitutional authority to furnish the supply? Or that, with abundant power available, which must otherwise be wasted, the supply to the communities and enterprises whose very life may be at stake must be limited to the slender amount of surplus unavoidably involved in the operation of the navigation works, because the Constitution does not permit any more energy to be generated and distributed? In the case of the *Green Bay Canal Co.*, above cited, where the government works supplanted those of the Canal Company, the Court found no difficulty in sustaining the Government's authority to grant to the Canal Company the water powers which it had previously enjoyed, subject, of course, to the dominant control of the Government. And in the case of *United States* v. *Chandler-Dunbar Co., supra,* the statutory provision, to which the Court referred, was "that any excess of water in the St. Marys River at Sault Sainte Marie over and above the amount now or hereafter required for the uses of navigation shall be leased for power purposes by the Secretary of War upon such terms and conditions as shall be best calculated in his judgment to insure the development thereof." It was to the leasing, under this provision, "of any excess of power over the needs of the Government" that the Court saw no valid objection. *Id.*, p. 73.

The decisions which petitioners cite give no support to their contention. *Pollard* v. *Hagan,* 3 How. 212, *Shively* v. *Bowlby,* 152 U. S. 1, and *Port of Seattle* v. *Oregon-Washington R. Co.,* 255 U. S. 56, dealt with the title of the States to tidelands and the soil under navigable waters within their borders. See *Borax Consolidated* v. *Los Angeles,* 296 U. S. 10, 15. Those cases did not concern the dominant authority of the Federal Government in the interest of navigation to erect dams and avail itself of the incidental water power. We emphasized the dominant character of that authority in the case of the *Green Bay Canal Co., supra,* by this statement, at p. 80: "At what points in the dam and canal the water for power may be withdrawn, and the quantity which can be treated as surplus with due regard to navigation, must be determined by the authority which owns and controls that navigation. In such matters there can be no divided empire." The case of *Wisconsin* v. *Illinois,* 278 U. S. 367, related to the diversion by the State of Illinois of water from Lake Michigan through the drainage canal at Chicago, and the questions now before us with respect to the disposition of surplus energy created at a dam erected by the Federal Government in the performance of its constitutional functions were in no way involved.

(3) We come then to the question as to the validity of the method which has been adopted in disposing of the surplus energy generated at the Wilson Dam. The constitutional provision is silent as to the method of disposing of property belonging to the United States. That method, of course, must be an appropriate means of disposition according to the nature of the property, it must be one adopted in the public interest as distinguished from private or personal ends, and we may assume that it must be consistent with the foundation principles of our dual system of government and must not be contrived to govern the concerns reserved to the States. See *Kansas* v. *Colorado, supra.* In this instance, the method of disposal embraces the sale of surplus energy by the Tennessee Valley Authority to the Alabama Power Company, the interchange of energy between the Authority and the Power Company, and the purchase by the Authority from the Power Company of certain transmission lines.

As to the mere sale of surplus energy, nothing need be added to what we have said as to the constitutional authority to dispose. The Government could lease or sell and fix the terms. Sales of surplus energy to the Power Company by the Authority continued a practice begun by the Government several years before. The contemplated interchange of energy is a form of disposition and presents no questions which are essentially different from those that are pertinent to sales.

The transmission lines which the Authority undertakes to purchase from the Power Company lead from the Wilson Dam to a large area within about fifty miles of the dam. These lines provide the means of distributing the electric energy, generated at the dam, to a large population. They furnish a method of reaching a market. The alternative method is to sell the surplus energy at the dam, and the market there appears to be limited to one purchaser, the Alabama Power Company, and its affiliated interests. We know of no constitutional ground upon which the Federal Government can be denied the right to seek a wider market. We suppose that in the early days of mining in the West, if the Government had undertaken to operate a silver mine on its domain, it could have acquired the mules or horses and equipment to carry its silver to market. And the transmission lines for electric energy are but a facility for conveying to market that particular sort of property, and the acquisition of these lines raises no different constitutional question, unless in some way there is an invasion of the rights reserved to the State or to the people. We find no basis for concluding that the limited undertaking with the Alabama Power Company amounts to such an invasion. Certainly, the Alabama Power Company has no constitutional right to insist that it shall be the sole purchaser of the energy generated at the Wilson Dam; that the energy shall be sold to it or go to waste.

We limit our decision to the case before us, as we have defined it. The argument is earnestly presented that the Government by virtue of its ownership of the dam and power plant could not establish a steel mill and make and sell steel products, or a factory to manufacture clothing or shoes for the public, and thus attempt to make its ownership of energy, generated at its dam, a means of carrying on competitive commercial enterprises and thus drawing to the Federal Government the conduct and management of business having no relation to the purposes for which the Federal Government was established. The picture is eloquently drawn but we deem it to be irrelevant to the issue here. The Government is not using the water power at the Wilson Dam to establish any industry or business. It is not using the energy generated at the dam to manufacture commodities of any sort for the public. The Government is disposing of the energy itself which simply is the mechanical energy, incidental to falling water at the dam, converted into the electric energy which is susceptible of transmission. The question here is simply as to the acquisition of the transmission lines as a facility for the disposal of that energy. And the Government rightly conceded at the bar, in substance, that it was without constitutional authority to acquire or dispose of such energy except as it comes into being in the operation of works constructed in the exercise of some power delegated to the United States. As we have said, these transmission lines lead directly from the dam, which has been lawfully constructed, and the question of the constitutional right of the Government to acquire or operate local or urban distribution systems is not involved. We express no opinion as to the validity of such an effort, as to the status of any other dam or power development in the Tennessee Valley, whether connected with or apart from the Wilson Dam, or as to the validity of the Tennessee Valley Authority Act or of the claims made in the pronouncements and program of the Authority apart from the questions we have discussed in relation to the particular provisions of the contract of January 4, 1934, affecting the Alabama Power Company.

The decree of the Circuit Court of Appeals is

Affirmed.

MR. JUSTICE BRANDEIS, concurring.

"Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it." *Blair* v. *United States,* 250 U. S. 273, 279.

I do not disagree with the conclusion on the constitutional question announced by the Chief Justice; but, in my opinion, the judgment of the Circuit Court of Appeals should be affirmed without passing upon it. The Government has insisted throughout the litigation that the plaintiffs have no standing to challenge the validity of the legislation. This objection to the maintenance of the suit is not overcome by presenting the claim in the form of a bill in equity and complying with formal prerequisites required by Equity Rule 27. The obstacle is not procedural. It inheres in the substantive law, in well settled rules of equity, and in the practice in cases involving the constitutionality of legislation. Upon the findings made by the District Court, it should have dismissed the bill.

From these it appears: The Alabama Power Company, a corporation of that State with transmission lines located there, has outstanding large issues of bonds, preferred stock, and common stock. Its officers agreed, with the approval of the board of directors, to sell to the Tennessee Valley Authority a part of these lines and incidental property. The management thought that the transaction was in the interest of the company. It acted in the exercise of its business judgment with the utmost good faith.[1]

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[1] The management explained that it was in the best interest of the Company to accept the offer of the Authority for the purchase of the transmission lines in a limited area coupled with an agreement

There was no showing of fraud, oppression, or gross negligence. There was no showing of legal duress. There was no showing that the management believed that to sell to the Tennessee Valley Authority was in excess of the Company's corporate powers, or that it was illegal because entered into for a forbidden purpose.

Nor is there any basis in law for the assertion that the contract was *ultra vires* of the Company. Under the law of Alabama, a public utility corporation may ordinarily sell a part of its transmission lines and incidental property to another such corporation if the approval of the Public Service Commission is obtained. The contract provided for securing such approval. Moreover, before the motion to dissolve the restraining order was denied, and before the hearing on the merits was concluded, the Legislature, by Act No. 1, approved January 24, 1935, and effective immediately, provided that a utility of the State may sell all or any of its property to the Tennessee Valley Authority without the approval of the Public Service Commission or of any other state agency.

First. The substantive law. The plaintiffs who object own about one-three hundred and fortieth of the preferred stock. They claimed at the hearing to represent about one-ninth of the preferred stock; that is, less than one-forty-fifth in amount of all the securities outstanding. Their rights are not enlarged because the Tennessee Valley Authority entered into the transaction pursuant to

on the part of the Authority not to sell outside of that area during the life of the contract. It protected the Company against possible entrance of the Authority into the territory in which were located nine-tenths of the Company's customers, including the largest; and it assured the Company that so long as the latter retained its urban distribution systems within the territory served by the transmission lines, those systems would be serviced by power from Wilson Dam. Upon delivery of the transmission lines, the Authority agreed to pay the Company $1,150,000.

an act of Congress. The fact that the bill calls for an enquiry into the legality of the transaction does not overcome the obstacle that ordinarily stockholders have no standing to interfere with the management. Mere belief that corporate action, taken or contemplated, is illegal gives the stockholder no greater right to interfere than is possessed by any other citizen. Stockholders are not guardians of the public. The function of guarding the public against acts deemed illegal rests with the public officials.

Within recognized limits, stockholders may invoke the judicial remedy to enjoin acts of the management which threaten their property interest. But they cannot secure the aid of a court to correct what appear to them to be mistakes of judgment on the part of the officers. Courts may not interfere with the management of the corporation, unless there is bad faith, disregard of the relative rights of its members, or other action seriously threatening their property rights. This rule applies whether the mistake is due to error of fact or of law, or merely to bad business judgment. It applies, among other things, where the mistake alleged is the refusal to assert a seemingly clear cause of action, or the compromise of it. *United Copper Securities Co.* v. *Amalgamated Copper Co.*, 244 U. S. 261, 263–264. If a stockholder could compel the officers to enforce every legal right, courts, instead of chosen officers, would be the arbiters of the corporation's fate.

In *Hawes* v. *Oakland,* 104 U. S. 450, 462, a common stockholder sought to enjoin the Contra Costa Waterworks Company from permitting the City of Oakland to take without compensation water in excess of that to which it was legally entitled. This Court, in affirming dismissal of the bill, said: "It may be the exercise of the highest wisdom to let the city use the water in the manner complained of. The directors are better able to act understandingly on this subject than a stockholder residing in New York. The great body of the stockholders residing in Oakland or other places in California may take this view of it, and be content to abide by the action of their directors. If this be so, is a bitter litigation with the city to be conducted by one stockholder for the corporation and all other stockholders, because the amount of his dividends is diminished?"

In *Corbus* v. *Alaska Treadwell Gold Mining Co.*, 187 U. S. 455, 463, a suit by a common stockholder to enjoin payment of an Alaska license tax alleged to be illegal, the Court said: "The directors represent all the stockholders and are presumed to act honestly and according to their best judgment for the interests of all. Their judgment as to any matter lawfully confided to their discretion may not lightly be challenged by any stockholder or at his instance submitted for review to a court of equity. The directors may sometimes properly waive a legal right vested in the corporation in the belief that its best interests will be promoted by not insisting on such right. They may regard the expense of enforcing the right or the furtherance of the general business of the corporation in determining whether to waive or insist upon the right. And a court of equity may not be called upon at the appeal of any single stockholder to compel the directors or the corporation to enforce every right which it may possess, irrespective of other considerations. It is not a trifling thing for a stockholder to attempt to coerce the directors of a corporation to an act which their judgment does not approve, or to substitute his judgment for theirs."[2]

Second. The equity practice. Even where property rights of stockholders are alleged to be violated by the management, stockholders seeking an injunction must

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[2] See also *Samuel* v. *Holladay*, 21 Fed. Cas. No. 12,288, pp. 306, 311–312.

bear the burden of showing danger of irreparable injury, as do others who seek that equitable relief. In the case at bar the burden of making such proof was a peculiarly heavy one. The plaintiffs, being preferred stockholders, have but a limited interest in the enterprise, resembling, in this respect, that of a bondholder in contradistinction to that of a common stockholder. Acts may be innocuous to the preferred which conceivably might injure common stockholders. There was no finding that the property interests of the plaintiffs were imperiled by the transaction in question; and the record is barren of evidence on which any such finding could have been made.

Third. The practice in constitutional cases. The fact that it would be convenient for the parties and the public to have promptly decided whether the legislation assailed is valid, cannot justify a departure from these settled rules of corporate law and established principles of equity practice. On the contrary, the fact that such is the nature of the enquiry proposed should deepen the reluctance of courts to entertain the stockholder's suit. "It must be evident to any one that the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility."—1 Cooley, Constitutional Limitations (8th ed.), p. 332.

The Court has frequently called attention to the "great gravity and delicacy" of its function in passing upon the validity of an act of Congress;[3] and has restricted exercise of this function by rigid insistence that the jurisdiction of federal courts is limited to actual cases and controversies; and that they have no power to give advisory

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[3] E. g., Miller, J., in *Ex parte Garland,* 4 Wall. 333, 382; *Hepburn* v. *Griswold,* 8 Wall. 603, 610; *Adkins* v. *Children's Hospital,* 261 U. S. 525, 544; Holmes, J., in *Blodgett* v. *Holden,* 275 U. S. 142, 147–148.

opinions.[4] On this ground it has in recent years ordered the dismissal of several suits challenging the constitutionality of important acts of Congress. In *Texas* v. *Interstate Commerce Comm'n,* 258 U. S. 158, 162, the validity of Titles III and IV of the Transportation Act of 1920. In *New Jersey* v. *Sargent,* 269 U. S. 328, the validity of parts of the Federal Water Power Act. In *Arizona* v. *California,* 283 U. S. 423, the validity of the Boulder Canyon Project Act. Compare *United States* v. *West Virginia,* 295 U. S. 463, involving the Federal Water Power Act, and *Liberty Warehouse Co.* v. *Grannis,* 273 U. S. 70, where this Court affirmed the dismissal of a suit to test the validity of a Kentucky statute concerning the sale of tobacco; also *Massachusetts State Grange* v. *Benton,* 272 U. S. 525.

The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. They are:

1. The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding, declining because to decide such questions "is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act." *Chicago & Grand Trunk Ry.* v. *Wellman,* 143 U. S. 339, 345. Compare *Lord* v. *Veazie,* 8 How. 251; *Atherton Mills* v. *Johnston,* 259 U. S. 13, 15.

2. The Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it."

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[4] E. g., *Hayburn's Case,* 2 Dall. 409; *United States* v. *Ferreira,* 13 How. 40; *Gordon* v. *United States,* 2 Wall. 561, 117 U. S. 697; *Muskrat* v. *United States,* 219 U. S. 346; *Willing* v. *Chicago Auditorium Assn.,* 277 U. S. 274.

Liverpool, N. Y. & P. S. S. Co. v. *Emigration Commissioners,* 113 U. S. 33, 39;[5] *Abrams* v. *Van Schaick,* 293 U. S. 188; *Wilshire Oil Co.* v. *United States,* 295 U. S. 100. "It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Burton* v. *United States,* 196 U. S. 283, 295.

3. The Court will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Liverpool, N. Y. & P. S. S. Co.* v. *Emigration Commissioners, supra.* Compare *Hammond* v. *Schappi Bus Line,* 275 U. S. 164, 169–172.

4. The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter. *Siler* v. *Louisville & Nashville R. Co.,* 213 U. S. 175, 191; *Light* v. *United States,* 220 U. S. 523, 538. Appeals from the highest court of a state challenging its decision of a question under the Federal Constitution are frequently dismissed because the judgment can be sustained on an independent state ground. *Berea College* v. *Kentucky,* 211 U. S. 45, 53.

5. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation.[6] *Tyler* v. *The Judges,* 179 U.

[5] E. g., *Ex parte Randolph,* 20 Fed. Cas. No. 11,558, pp. 242, 254; *Charles River Bridge* v. *Warren Bridge,* 11 Pet. 420, 553; *Trade-Mark Cases,* 100 U. S. 82, 96; *Arizona* v. *California,* 283 U. S. 423, 462–464.

[6] E. g., *Hatch* v. *Reardon,* 204 U. S. 152, 160–161; *Corporation Commission* v. *Lowe,* 281 U. S. 431, 438; *Heald* v. *District of Columbia,* 259 U. S. 114, 123; *Sprout* v. *South Bend,* 277 U. S. 163, 167; *Concordia Fire Insurance Co.* v. *Illinois,* 292 U. S. 535, 547.

S. 405; *Hendrick* v. *Maryland,* 235 U. S. 610, 621. Among the many applications of this rule, none is more striking than the denial of the right of challenge to one who lacks a personal or property right. Thus, the challenge by a public official interested only in the performance of his official duty will not be entertained. *Columbus & Greenville Ry.* v. *Miller,* 283 U. S. 96, 99–100. In *Fairchild* v. *Hughes,* 258 U. S. 126, the Court affirmed the dismissal of a suit brought by a citizen who sought to have the Nineteenth Amendment declared unconstitutional. In *Massachusetts* v. *Mellon,* 262 U. S. 447, the challenge of the federal Maternity Act was not entertained although made by the Commonwealth on behalf of all its citizens.

6. The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.[7] *Great Falls Mfg. Co.* v. *Attorney General,* 124 U. S. 581; *Wall* v. *Parrot Silver & Copper Co.,* 244 U. S. 407, 411–412; *St. Louis Malleable Casting Co.* v. *Prendergast Construction Co.,* 260 U. S. 469.

7. "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell* v. *Benson,* 285 U. S. 22, 62.[8]

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[7] Compare *Electric Co.* v. *Dow,* 166 U. S. 489; *Pierce* v. *Somerset Ry.,* 171 U. S. 641, 648; *Leonard* v. *Vicksburg, S. & P. R. Co.,* 198 U. S. 416, 422.

[8] E. g., *United States* v. *Delaware & Hudson Co.,* 213 U. S. 366, 407–408; *United States* v. *Jin Fuey Moy,* 241 U. S. 394, 401; *Baender* v. *Barnett,* 255 U. S. 224; *Texas* v. *Eastern Texas R. Co.,* 258 U. S. 204, 217; *Panama R. Co.* v. *Johnson,* 264 U. S. 375, 390; *Linder* v. *United States,* 268 U. S. 5, 17–18; *Missouri Pacific R. Co.* v. *Boone,* 270 U. S. 466, 471–472; *Richmond Screw Anchor Co.* v. *United States,* 275 U. S. 331, 346; *Blodgett* v. *Holden,* 275 U. S. 142, 148; *Lucas* v. *Alexander,* 279 U. S. 573, 577; *Interstate Commerce Comm'n* v. *Oregon-Washington R. & N. Co.,* 288 U. S. 14, 40.

Fourth. I am aware that, on several occasions, this Court passed upon important constitutional questions which were presented in stockholders' suits bearing a superficial resemblance to that now before us. But in none of those cases was the question presented under circumstances similar to those at bar. In none, were the plaintiffs preferred stockholders. In some, the Court dealt largely with questions of federal jurisdiction and collusion. In most, the propriety of considering the constitutional question was not challenged by any party. In most, the statute challenged imposed a burden upon the corporation and penalties for failure to discharge it; whereas the Tennessee Valley Authority Act imposed no obligation upon the Alabama Power Company, and under the contract it received a valuable consideration. Among other things, the Authority agreed not to sell outside the area covered by the contract, and thus preserved the corporation against possible serious competition. The effect of this agreement was equivalent to a compromise of a doubtful cause of action. Certainly, the alleged invalidity of the Tennessee Valley Authority Act was not a matter so clear as to make compromise illegitimate. These circumstances present features differentiating the case at bar from all the cases in which stockholders have been held entitled to have this Court pass upon the constitutionality of a statute which the directors had refused to challenge. The cases commonly cited are these: [9]

Dodge v. *Woolsey,* 18 How. 331, 341–346, was a suit brought by a common stockholder to enjoin a breach of trust by the directors which, if submitted to, would seriously injure the plaintiff. The Court drew clearly the distinction between "an error of judgment" and a breach

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[9] Others are *Memphis* v. *Dean,* 8 Wall. 64, 73; *Smyth* v. *Ames,* 169 U. S. 466, 515–518; *Corbus* v. *Alaska Treadwell Gold Mining Co.,* 187 U. S. 455; *Ex parte Young,* 209 U. S. 123, 143; *Delaware & Hudson Co.* v. *Albany & Susquehanna R. Co.,* 213 U. S. 435; *Wathen* v. *Jackson Oil & Refining Co.,* 235 U. S. 635.

of duty; declared that it could not interfere if there was only an error of judgment; held that on the facts the threatened action of the directors would be a breach of trust; and pointed to the serious injury necessarily resulting therefrom to the plaintiff.[10]

Greenwood v. *Freight Co.*, 105 U. S. 13, 15–16, was a suit brought by a common stockholder to enjoin the enforcement of a statute alleged to be unconstitutional as repealing the corporation's charter. The Court said: "It is sufficient to say that this bill presents so strong a case of the total destruction of the corporate existence . . . that we think the complainant as a stockholder comes within the rule . . . which authorizes a shareholder to maintain a suit to prevent such a disaster, where the corporation peremptorily refuses to move in the matter."

Pollock v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 553–554, was a suit brought by a common stockholder to enjoin a breach of trust by paying voluntarily a tax which was said to be illegal. The stockholder's substantive right to object was not challenged. The question raised was that of equity jurisdiction. The allegation of threatened irreparable damage to the corporation and

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[10] The resolution of the directors (p. 340) was this: "Resolved, that we fully concur in the views expressed in said letter as to the illegality of the tax therein named, and believe it to be in no way binding upon the bank; but, in consideration of the many obstacles in the way of testing the law in the courts of the State, we cannot consent to take the action which we are called upon to take, but must leave the said Kleman to pursue such measures as he may deem best in the premises." Referring to *Dodge* v. *Woolsey*, the Court pointed out in *Hawes* v. *Oakland*, 104 U. S. 450, 459: "As the law then stood there was no means by which the bank, being a citizen of the same State with Dodge, the tax-collector, could bring into a court of the United States the right which it asserted under the Constitution, to be relieved of the tax in question, except by writ of error to a State court from the Supreme Court of the United States."

to the plaintiff was admitted. The Court said: "The objection of adequate remedy at law was not raised below, nor is it now raised by appellees, if it could be entertained at all at this stage of the proceedings; and, so far as it was within the power of the government to do so, the question of jurisdiction, for the purposes of the case, was explicitly waived on the argument. . . . Under these circumstances, we should not be justified in declining to proceed to judgment upon the merits." The jurisdictional issue discussed in the dissent (157 U. S. at 608–612) was the effect of R. S. § 3224.

Cotting v. *Kansas City Stock Yards Co.,* 183 U. S. 79, 113, was a suit brought by a common stockholder to enjoin enforcement of a rate statute alleged to be unconstitutional against which the directors refused to protect the corporation. It was alleged and found that its enforcement would subject the company to great and irreparable loss. The serious contention concerning jurisdiction was, as stated by Mr. Justice Brewer, whether a suit lay against the Attorney General of the State. Of the jurisdiction of the suit "as one involving a controversy between the stockholders and the corporation and its officers, no serious question is made."

Chicago v. *Mills,* 204 U. S. 321, was a suit brought by a common stockholder of the People's Gas, Light and Coke Company to enjoin enforcement of an ordinance alleged to be illegal. The sole question before this Court was whether the federal court had jurisdiction. That question raised an issue of fact. This Court in affirming the judgment below said (p. 331): "Upon the whole record we agree with the Circuit Court that the testimony does not disclose that the jurisdiction of the Federal court was collusively and fraudulently invoked. . . ."

Brushaber v. *Union Pacific R. Co.,* 240 U. S. 1, 9–10, was a suit brought by a common stockholder to restrain the corporation from voluntarily paying a tax alleged to be invalid. As stated by plaintiff's counsel: "The contention is—and this is the only objection that is made to the suit—that it seeks to do indirectly what the Revised Statutes [§ 3224] have said shall not be done; namely, enjoin the collection of a tax." The Court, assuming that the averments were identical with those in the *Pollock* case, declared that the right of the stockholder to sue was clear.

Smith v. *Kansas City Title & Trust Co.,* 255 U. S. 180, 199–202, was a suit brought by a common stockholder to enjoin investment by the company in bonds issued under the Federal Farm Loan Act. Neither the parties, nor the government which filed briefs as *amicus,* made any objection to the jurisdiction. But as both parties were citizens of Missouri, the Court raised, and considered fully, the question whether there was federal jurisdiction under § 24 of the Judicial Code. It was on this question that Mr. Justice Holmes and Mr. Justice McReynolds dissented. The Court held that there was federal jurisdiction; and upon averments of the bill, assumed to be adequate, sustained the right of the stockholder to invoke the equitable remedy on the authority of the *Brushaber* and *Pollock* cases.

Hill v. *Wallace,* 259 U. S. 44, 60–63, was a suit by members of the Board of Trade of Chicago to restrain enforcement of the Future Trading Act, alleged to be unconstitutional. The Court held that the averments of the bill, which included allegations of irreparable injury, stated "sufficient equitable grounds to justify granting the relief" on the cases above cited.

If, or in so far as, any of the cases discussed may be deemed authority for sustaining this bill, they should now be disapproved. This Court, while recognizing the soundness of the rule of *stare decisis* where appropriate, has not hesitated to overrule earlier decisions shown, upon fuller consideration, to be erroneous.[11] Our present keener appreciation of the wisdom of limiting our decisions rigidly to questions essential to the disposition of the case before the court is evidenced by *United States* v. *Hastings,* 296 U. S. 188, decided at this term. There, we overruled *United States* v. *Stevenson,* 215 U. S. 190, 195, long a controlling authority on the Criminal Appeals Act.

Fifth. If the Company ever had a right to challenge the transaction with the Tennessee Valley Authority, its right had been lost by estoppel before this suit was begun; and as it is the Company's right which plaintiffs seek to enforce, they also are necessarily estopped. The Tennessee Valley Authority Act became a law on May 18, 1933. Between that date and January, 1934, the Company and its associates purchased approximately 230,000,000 kwh electric energy at Wilson Dam. Under the contract of January 4, 1934, which is here assailed, continued purchase of Wilson Dam power was provided for and made; and the Authority has acted in other matters in reliance on the contract. In May, 1934, the Company applied to the Alabama Public Service Commission for approval of the transfers provided for in the contract; and on June 1, 1934, the Commission made in general terms its finding that the proposed sale of the properties was consistent with the public interest. Moreover, the plaintiffs in their own right are estopped by their long inaction. Although widespread publicity was given to the negotiations for the contract and to these later pro-

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[11] A notable recent example is *Humphrey's Executor* v. *United States,* 295 U. S. 602, which limited (p. 626 *et seq.*) *Myers* v. *United States,* 272 U. S. 52, disapproving important statements in the opinion. For lists of decisions of this Court later overruled, see *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, 406–409; Malcolm Sharp, Movement in Supreme Court Adjudication—A Study of Modified and Overruled Decisions, 46 Harv. L. Rev. 361, 593, 795.

ceedings, the plaintiffs made no protest until August 7, 1934; and did not begin this suit until more than eight months after the execution of the contract. Others—certain ice and coal companies who thought they would suffer as competitors—appeared before the Commission in opposition to the action of the Authority; and apparently they are now contributing to the expenses of this litigation.

Sixth. Even where by the substantive law stockholders have a standing to challenge the validity of legislation under which the management of a corporation is acting, courts should, in the exercise of their discretion, refuse an injunction unless the alleged invalidity is clear. This would seem to follow as a corollary of the long established presumption in favor of the constitutionality of a statute.

Mr. Justice Iredell said, as early as 1798, in *Calder* v. *Bull,* 3 Dall. 386, 399: "If any act of Congress, or of the Legislature of a state, violates those constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case."

Mr. Chief Justice Marshall said, in *Dartmouth College* v. *Woodward,* 4 Wheat. 518, 625: "On more than one occasion, this Court has expressed the cautious circumspection with which it approaches the consideration of such questions; and has declared, that, in no doubtful case, would it pronounce a legislative act to be contrary to the constitution." [12]

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[12] In 1811, Chief Justice Tilghman of the Supreme Court of Pennsylvania, while asserting the power of the court to hold laws unconstitutional, but declining to exercise it in a particular case, stated the practice as follows: "For weighty reasons, it has been assumed as a principle in constitutional construction by the Supreme Court of the United States, by this court, and every other court of reputation in the United States, that an Act of the legislature is not to be

Mr. Justice Washington said, in *Ogden* v. *Saunders,* 12 Wheat. 213, 270: "But if I could rest my opinion in favor of the constitutionality of the law on which the question arises, on no other ground than this doubt so felt and acknowledged, that alone would, in my estimation, be a satisfactory vindication of it. It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt. This has always been the language of this Court, when that subject has called for its decision; and I know that it expresses the honest sentiments of each and every member of this bench."

Mr. Chief Justice Waite said in the *Sinking-Fund Cases,* 99 U. S. 700, 718: "This declaration [that an act of Congress is unconstitutional] should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

The challenge of the power of the Tennessee Valley Authority rests wholly upon the claim that the act of

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declared void, unless the violation of the constitution is so manifest as to leave no room for reasonable doubt." James B. Thayer, after quoting the passage in The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. Law Review 129, 140, called attention (p. 144) to "a remark of Judge Cooley, to the effect that one who is a member of a legislature may vote against a measure as being, in his judgment, unconstitutional; and, being subsequently placed on the bench, when this measure having been passed by the legislature in spite of his opposition, comes before him judicially, may there find it his duty, although he has in no degree changed his opinion, to declare it constitutional."

Congress which authorized the contract is unconstitutional. As the opinions of this Court and of the Circuit Court of Appeals show, that claim was not a matter "beyond peradventure clear." The challenge of the validity of the Act is made on an application for an injunction—a proceeding in which the court is required to exercise its judicial discretion. In proceedings for a mandamus, where, also, the remedy is granted not as a matter of right but in the exercise of a sound judicial discretion, *Duncan Townsite Co.* v. *Lane,* 245 U. S. 308, 311–312, courts decline to enter upon the enquiry when there is a serious doubt as to the existence of the right or duty sought to be enforced. As was said in *United States* v. *Interstate Commerce Comm'n,* 294 U. S. 50, 63: "Where the matter is not beyond peradventure clear we have invariably refused the writ [of mandamus], even though the question were one of law as to the extent of the statutory power of an administrative officer or body." *A fortiori* this rule should have been applied here where the power challenged is that of Congress under the Constitution.

Mr. Justice Stone, Mr. Justice Roberts, and Mr. Justice Cardozo join in this opinion.

Separate opinion of Mr. Justice McReynolds.

Considering the consistent rulings of this court through many years, it is not difficult for me to conclude that petitioners have presented a justiciable controversy which we must decide. In *Smith* v. *Kansas City Title Co.,* 255 U. S. 180, the grounds for jurisdiction were far less substantial than those here disclosed. We may not with propriety avoid disagreeable duties by lightly forsaking long respected precedents and established practice.

Nor do I find serious difficulty with the notion that the United States, by proper means and for legitimate ends, may dispose of water power or electricity honestly developed in connection with permissible improvement of navigable waters. But the means employed to that end must be reasonably appropriate in the circumstances. Under pretense of exercising granted power, they may not in fact undertake something not intrusted to them. Their mere ownership, e. g., of an iron mine would hardly permit the construction of smelting works followed by entry into the business of manufacturing and selling hardware, albeit the ore could thus be disposed of, private dealers discomfited and artificial prices publicized. Here, therefore, we should consider the truth of petitioners' charge that, while pretending to act within their powers to improve navigation, the United States, through corporate agencies, are really seeking to accomplish what they have no right to undertake—the business of developing, distributing and selling electric power. If the record sustains this charge, we ought so to declare and decree accordingly.

The Circuit Court of Appeals took too narrow a view of the purpose and effect of the contract of January 4, 1934. That went far beyond the mere acquisition of transmission lines for proper use in disposing of power legitimately developed. Like all contracts, it must be considered as a whole, illumined by surrounding circumstances. Especial attention should be given to the deliberately announced purpose of Directors, clothed with extraordinary discretion and supplied with enormous sums of money. With $50,000,000 at their command they started out to gain control of the electrical business in large areas and to dictate sale prices. The power at Wilson Dam was the instrumentality seized upon for carrying the plan into effect.

While our primary concern is with this contract, it cannot be regarded as a mere isolated effort to dispose of property. And certainly to consider only those provisions which directly relate to Alabama Power Company is not permissible. We must give attention to the whole transaction—its antecedents, purpose and effect—as well as the terms employed.

No abstract question is before us; on the contrary, the matter is of enormous practical importance to petitioners—their whole investment is at stake. Properly understood, the pronouncements, policies and program of the Authority illuminate the action taken. They help to reveal the serious interference with the petitioners' rights. Their property was in danger of complete destruction under a considered program commenced by an agency of the National Government with vast resources subject to its discretion and backed by other agencies likewise intrusted with discretionary use of huge sums. The threat of competition by such an opponent was appalling. The will to prevail was evident. No private concern could reasonably hope to withstand such force.

The Tennessee River, with headwaters in West Virginia and North Carolina, crosses Tennessee on a southwesterly course, enters Alabama near Chattanooga, and flows westerly across the northern part of that State to the northeast corner of Mississippi. There it turns northward, passes through Tennessee and Kentucky, and empties into the Ohio forty miles above Cairo. The total length is nine hundred miles; the drainage basin approximates forty thousand square miles. The volume of water is extremely variable; commercial navigation is of moderate importance.

At Muscle Shoals, near Florence, Alabama (twenty miles east of the Mississippi line and fifteen south of Tennessee), a succession of falls constitutes serious interference with navigation; also presents possibilities for development of power on a large scale. During and immediately after the World War, a great dam was constructed there by the United States, intended primarily for generation of power. Production of electricity soon commenced. Some of this was devoted to governmental purposes; much was sold, delivery being made at or near the dam.

During the last thirty years, several corporations have been engaged in the growing business of developing electric energy and distributing this to customers over a network of interconnected lines extending throughout Tennessee, Georgia, Alabama and Mississippi. At great expense they gradually built up extensive businesses and acquired properties of very large value. All operated under state supervision. Through stock ownership or otherwise, they came under general control of the Commonwealth & Southern Corporation. Among the associates were the Alabama Power Company which serviced Alabama; the Mississippi Company which serviced Mississippi; and the Tennessee Company which operated in eastern Tennessee. Huge sums were invested in these enterprises by thousands of persons in many states. Apparently, the companies were diligently developing their several systems and responding to the demands of the territories which they covered.

In 1933, operations began under an imposing program for somewhat improving Tennessee River navigation and especially for developing the water power along its whole course at public expense. This plan involved conversion of water power into electricity for wide distribution throughout the valley and adjacent territory. Its development was intrusted to the Tennessee Valley Authority, a federal corporation wholly controlled by the United States. This promptly took over the Wilson Dam and began work upon the Wheeler Dam, twenty miles up the River, and the Pickwick Dam, some forty miles lower down. Also it commenced construction of Norris Dam across Clinch River, a branch of the Tennessee, two hundred miles above the Wilson Dam. All these, with probable additions, were to be connected by transmission wires, and electric energy distributed from them to millions of people in many states. Public service corporations were to be brought to terms or put out of business. At least $75,000,000 of public funds was early appropriated for expenditure by the Directors; and other governmental agencies in control of vast sums were ready to lend aid. Readily to understand the issues now before us, one must be mindful of these circumstances.

The trial court made findings of fact which fill more than sixty printed pages. They are not controverted and for present purposes are accepted; upon them the cause stands for decision. They are much quoted below. Plainly they indicate, and that court, in effect, declared, the contract of January 4th was a deliberate step into a forbidden field, taken with definite purpose to continue the trespass.

Nothing suggests either necessity or desirability of entering into this agreement solely to obtain solvent customers willing to pay full value for all surplus power generated at Wilson Dam. Apparently, there was ample opportunity for such sales, deliveries to be made at or near the dam. No attempt was made to show otherwise. The definite end in view was something other than orderly disposition.

The Authority's Answer to the Complaint is little more than a series of denials. It does not even allege that the contract of January 4th was necessary for ready disposal of power; or that thereby better prices could be obtained; or that no buyer was ready, able and willing to take at the dam for full value; or that the Board expected to derive adequate return from the business to be acquired. No sort of explanation of the contract is presented—why it was entered into or whether profitable use probably could be made of the property. And I find in the Authority's brief no serious attempt to justify the purchases because necessary or in fact an advantageous method for disposing of property. Nothing in the findings lends support to any such view.

The record leaves no room for reasonable doubt that the primary purpose was to put the Federal Government into the business of distributing and selling electric power throughout certain large districts, to expel the power companies which had long serviced them, and to control the market therein. A government instrumentality had entered upon a pretentious scheme to provide a "yardstick" of the fairness of rates charged by private owners, and to attain "no less a goal than the electrification of America." "When we carry this program into every town and city and village, and every farm throughout the country, we will have written the greatest chapter in the economic, industrial and social development of America." Any reasonable doubt concerning the purpose and result of the Contract of January 4th or of the design of the Authority should be dispelled by examination of its Reports for 1934 and 1935.*

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* From the Annual Report, T. V. A. Board for 1934, pp. 23, 24, 25, 26, 27, and 28.

To provide a workable and economic basis of operations, the Authority plans initially to serve certain definite regions and to develop its program in those areas before going outside.

The initial areas selected by the Authority may be roughly described as (a) the region immediately proximate to the route of the transmission line soon to be constructed by the Authority between Muscle Shoals and the site of Norris Dam; (b) the region in proximity to Muscle Shoals, including northern Alabama and northeastern Mississippi; and (c) the region in the proximity of Norris Dam (the new source of power to be constructed by the Authority on the Clinch River in northeast Tennessee).

At a later stage in the development it is contemplated to include, roughly, the drainage area of the Tennessee River in Kentucky, Alabama, Georgia, and North Carolina, and that part of Tennessee which lies east of the west margin of the Tennessee drainage area.

To make the area a workable one and a fair measure of public ownership, it should include several cities of substantial size (such as Chattanooga and Knoxville) and, ultimately, at least one city of more

"The conception was to establish an independent network comparable in all respects with the electric utility system serving the area, with which TVA sought to establish interchange arrangements, both as outlets for its

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than a quarter million, within transmission distance, such as Birmingham, Memphis, Atlanta, or Louisville.

While it is the Authority's present intention to develop its power program in the above-described territory before considering going outside, the Authority may go outside the area if there are substantial changes in general conditions, facts, or governmental policy, which would necessarily require a change in this policy of regional development, or if the privately owned utilities in the area do not coöperate in the working out of the program.

The Authority entered into a 5-year contract on January 4, 1934, with the Commonwealth & Southern Corporation and its Alabama, Tennessee, Georgia, and Mississippi subsidiaries. The contract covered options to purchase electric properties in certain counties of Alabama, Mississippi, and Tennessee, the sale of distribution systems to municipalities in these counties, restrictions on territorial expansion by the contracting parties, the interchange of power, and other matters.

Alabama properties.—All of the low-tension (44,000 volts or lower) transmission lines, substations, rural lines, and rural distribution systems of the Alabama Power Co., in the counties of Lauderdale, Colbert, Lawrence, Limestone, and Morgan (except the Hulaco area), were included in the contract; also those in the north half of Franklin County, including the town of Red Bay, and the territory in the northern part of Cullman County served by a line of the Alabama Power Co. extending south from Decatur. The price of these properties was set at $1,101,256. The purchase had not been completed at the end of the fiscal year.

The power company agreed to attempt to sell the local distribution systems in the above counties to the respective municipalities, the Authority reserving the right to serve them if sales were not consummated within 3 months of bona fide negotiation and effort. Because of the failure of any [many] of the municipalities in northern Alabama to consummate negotiations for the purchase of the distribution systems serving them, the Authority entered into negotiations for the direct purchase of these distribution systems, but a purchase contract had not been completed on June 30.

Mississippi properties.—The contract covered all of the properties of the Mississippi Power Co. in the counties of Pontotoc, Lee, Itaown power and to use existing systems as a stand-by or back-up service."

"The TVA plan as conceived and in process of execution contemplates complete and exclusive control and jurisdiction over all power sites on the Tennessee River

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wamba, Union, Benton, Tippah, Prentiss, Tishomingo, and Alcorn, except a dam site on the Tennessee River in Tishomingo County. The purchase price was $850,000. The purchase was completed and delivery was accepted on June 1, 1934.

The transmission and generation facilities acquired in Mississippi and to be retained as part of the Authority's system include the following:

44,000-volt transmission lines	miles	63
44,000-volt substations		6
22,000-volt transmission lines	miles	45
22,000-volt substations		4
Tupelo steam stand-by generating plant	Kilovolt-amperes	4,374
Corinth steam stand-by generating plant	do	2,225
Blue Mountain Diesel generating plant	do	150
Myrtle Diesel generating plant	do	75

Part of the local distribution facilities acquired in Mississippi were sold prior to the end of the fiscal year and it is expected that all will be sold eventually, as noted hereafter.

Tennessee properties.—The contract covered all of the properties of the Tennessee Electric Power Co. in the counties of Anderson, Campbell, Morgan (except the lines extending into Morgan County from Harriman), and Scott; also those in the west portion of Claiborne County, and the 66,000-volt transmission line from Anderson County to Knoxville. The price of these properties was set at $900,000. The purchase had not been completed at the end of the fiscal year.

Negotiations were carried on diligently for several months with the National Power & Light Co., an affiliate of the Electric Bond & Share Co., in an endeavor to acquire the eastern Tennessee electric properties of the Tennessee Public Service Co., a subsidiary of the National Power & Light Co. The electric distribution system in the city of Knoxville is included in these properties. The negotiations resulted in a contract after the end of the fiscal year.

Construction of rural electric lines in northern Alabama and northeastern Mississippi was commenced in the latter part of 1933 with relief labor, the Authority furnishing supervision and materials.

and tributaries." "The TVA policy contemplates full corporate discretion by TVA in developing, executing and extending its electric system and service within transmission limits." "This policy contemplated service utility in type and covered not only generation but transmission and distribution (preferably through public or non-profit agencies, if available) both wholesale and retail. That is,

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Relief labor was withdrawn on February 15, 1934, after which date the work was continued by the Authority with its own forces. Approximately 93.5 miles of rural electric lines were under construction in Lauderdale and Colbert Counties, Ala., on June 30, and approximately 127 miles in Lee, Pontotoc, Alcorn, Itawamba, Prentiss, Monroe, and Tishomingo Counties, Miss.

A standard form of 20-year contract was devised to govern the sale of power at wholesale to municipal distribution systems, and was first used in a contract with the city of Tupelo, Miss. The Tupelo contract has been published by the Authority and is available for distribution.

Annual Report, T. V. A. 1935, pp. 29, 30—

The Authority has devoted special attention during the year to the problems of rural electrification, as required by section 10 of the act. By the close of the fiscal year 200 miles of rural electric line had been built, and 181 additional miles were in process of construction. These lines are divided among the various counties as follows:

	Miles completed	Miles in progress
Alabama:		
Colbert	19	15
Lauderdale	72	..
Mississippi:		
Alcorn	41	29
Lee and Itawamba	41	26
Pontotoc	27	..
Prentiss	..	7
Tennessee:		
Lincoln	..	104
Total	200	181

In addition to the above, a number of the rural lines purchased from the Mississippi Power Co. were rehabilitated in order to improve operating and safety conditions, and to provide for increases in load. Also, additional customers were connected to all existing rural lines.

moreover, implicit in both the January 4 contract and the now terminated August 9th contract."

The challenged contract is defended upon the theory that the "Federal Government may dispose of the surplus water power necessarily created by Wilson Dam and may authorize generation of electric energy and acquisition of transmission lines as means of facilitating this disposal." But to facilitate disposal was not the real purpose; obviously the thing to be facilitated was carrying on business by use of the purchased property. Under the guise of disposition something wholly different was to be accomplished—devotion of electric power to purposes beyond the sphere of proper federal action, an unlawful goal. There is no plausible claim that such a contract was either necessary or desirable merely to bring about the sale of property. This Court has often affirmed that facts, not artifice, control its conclusions. The Agency has stated quite clearly the end in view: "This public operation is to serve as a yardstick by which to measure the fairness of electric rates." "The TVA power policy was not designed or limited with a view to the marketing of the power produced and available at Muscle Shoals." "In formulating and going forward with the power policy the Board was considering that policy as a permanent and independent commercial function."

For present purposes a complete survey of relevant circumstances preceding the contract of January 4th and all its consequences is not essential. The pleadings and findings fairly outline the situation. What follows is mainly quoted or derived from them.

The Act of May 18, 1933, created the Tennessee Valley Authority as a body corporate "for the purpose of maintaining and operating the properties now owned by the United States in the vicinity of Muscle Shoals, Alabama, in the interest of the national defense and for agricultural and industrial development, and to improve navigation in the Tennessee River and to control the destructive flood waters in the Tennessee River and Mississippi River Basins." It provided, a board of three directors "shall direct the exercise of all the powers of the Corporation," and "is authorized to make alterations, modifications or improvements in existing plants and facilities, and to construct new plants"; and to "produce, distribute, and sell electric power as herein particularly specified." The Corporation "shall have such powers as may be necessary or appropriate for the exercise of the powers herein specifically conferred upon the Corporation"; "to acquire real estate for the construction of dams, reservoirs, transmission lines, power houses, and other structures, and navigation projects at any point along the Tennessee River, or any of its tributaries.

Also, the Board is "hereby empowered and authorized to sell the surplus power not used in its operations, and for operation of locks and other works generated by it, to States, counties, municipalities, corporations, partnerships, or individuals, according to the policies hereinafter set forth; and to carry out said authority, the board is authorized to enter into contracts for such sale for a term not exceeding twenty years." "In order to promote and encourage the fullest possible use of electric light and power on farms within reasonable distance of any of its transmission lines the board in its discretion shall have power to construct transmission lines to farms and small villages that are not otherwise supplied with electricity at reasonable rates, and to make such rules and regulations governing such sale and distribution of such electric power as in its judgment may be just and equitable."

"One of the first corporate acts of TVA after its organization was to formulate and announce a power policy to govern the commercial distribution of electric power by TVA. The evidence establishes the fact that the Board from the outset has considered that it has general corporate discretion as to the establishment and extension of its electric power policy. In establishing a power policy the Board was not primarily considering merely the question of disposal of power produced at Muscle Shoals no longer required for governmental purposes as a result of overbuilding, obsolescence of plants, or termination of war purpose. Nor was it considering disposal of prospective increases in electric power to be unavoidably created in excess of some governmental requirement. It was considering the matter from the standpoint of the successful establishment and permanent operation of an independent and well rounded government-owned electric distribution system and the general civic, social, and industrial planning and development of the Tennessee Valley region as a whole."

"Under date of August 25, 1933, TVA announced its power policy, indicating both the initial stage of its development and certain later steps originally determined upon. . . . This power policy had not been rescinded or abandoned or modified at the time of submission of this cause."

"In September, 1933, the Authority announced its wholesale and retail rate schedules, which are shown by the evidence to be materially lower than corresponding schedules of the existing utilities in the area. Following this action numerous municipalities in the area began to make efforts to construct municipal systems with which to distribute TVA current, and Public Works Administration (called PWA) gave assurances of favorable consideration of applications for loans to that end."

Under such circumstances, Commonwealth & Southern Corporation negotiated the January 4th contract for its operating subsidiaries—Alabama Power Company, Georgia Power Company, Mississippi Power Company, and Tennessee Electric Power Company.

This recited that the Alabama Company, the Mississippi Company and the Tennessee Company desired to sell, and the Authority desired to purchase, certain land, buildings and physical properties devoted to the generation, transmission and distribution of electricity, together with certain franchises, contracts and going business.

The Alabama Company agreed to sell for $1,000,000 all of its low tension (44 KV or lower) transmission lines, substations (including the high tension station at Decatur and the Sheffield Steam Plant Station) and all rural lines and rural distribution systems in five Alabama counties and parts of two others. [These counties are northwestern Alabama and lie on both sides of the Tennessee River for eighty miles or more.]

The Mississippi Company, in consideration of $850,000, agreed to transfer all of its transmission and distribution lines, substations, generating plants and other property in Pontotoc, Lee, Itawamba, Union, Benton, Tippah, Prentiss, Tishomingo and Alcorn counties (except one dam site in Tishomingo County) State of Mississippi, used in connection with the generation, transmission, distribution or sale of electrical energy. [These counties are the northeastern section of the state, a territory sixty miles square.]

For $900,000, the Tennessee Company agreed to convey its transmission and distribution lines, substations, distribution systems and other properties used in connection with the transmission, distribution and sale of electrical energy in Anderson, Campbell, Morgan and Scott counties, East Tennessee, and "all of the 66 KV transmission line from Cove Creek to Knoxville." [These counties are in the mountains northward from Knoxville within a radius of about sixty miles. They lie northeast of Muscle Shoals and some points therein are much more than a hundred miles from Wilson Dam. They have a population of 86,000.]

The power companies agreed, that "any conveyance of property shall include not only the physical property, easements and rights-of-way, but shall also include all machinery, equipment, tools and working supplies set forth in the respective exhibits, and all franchises, contracts and going business relating to the use of any of said properties." Also, "to transfer or secure the transfer of said franchises, contracts and going business, and to transfer said properties with all present customers attached, so far as they are able." Also, "that during the period of this contract none of said companies will sell electric energy to any municipality, corporation, partnership, association or individual in any portion of the above-described counties or parts thereof in Alabama, Tennessee and Mississippi," etc. The Authority agreed not to sell electric energy outside of the specified counties to the customers of non-utilities supplied by the power companies.

Other covenants provided for interchange of electric energy between the contracting parties and for coöperation in the sale of electric appliances throughout the entire territory served by the power companies.

"Power Companies covenant and agree that after the expiration of this agreement the interchange arrangement then in effect will be maintained by Power Companies for an additional period (not exceeding eighteen months) sufficient to permit Authority to construct its own transmission facilities for serving all of the territory which it is then serving in whole or in part with power obtained at such interchange points."

"Power Companies agree to have available at all times for exchange, at each point of exchange, energy and capacity to supply the entire demands of the customers served by Authority from such points of exchange, subject to the limitations as to transmission capacity set forth in Section 10 (h) hereof; Provided, that the maximum amount which Authority shall be entitled to demand at all points of exchange shall be 70,000 k.v."

Prior to the agreement for sale The Alabama Company had derived $750,000 gross annual revenue from its properties located within the "ceded area." This district had a population of 190,000; and the Company had therein 10,000 individual customers—approximately 1/10 of all those directly served by it. The lines transferred by the Mississippi Power Company served directly 4,000 customers in 9 counties, having total population of 184,000. When this cause began, the Mississippi properties were being operated by TVA and rural lines were in process of extension by it in both Mississippi and Alabama.

"All of the electric properties and facilities covered by the contract of January 4, 1934, . . . were contracted for by TVA for the purpose of continuing and enlarging the utility service for which they were used by the respective power companies."

"The operation of a commercial utility service by TVA and the wholesaling and retailing by TVA of electricity in the area served by the Alabama Power Company is not and will not be in aid of the regulation of navigation or national defense or other governmental function in so far as any plan, purpose or activity of the TVA or of the United States disclosed on this record would indicate."

Answering the Petitioners' Complaint, Alabama Company admitted "that the public statements of TVA indicated the program therein alleged; and the directors of respondent company considered that to vest such an agency as therein alleged with unlimited power and access to public funds, in a program of business competition and public ownership promotion in the area served by respondent company would in effect destroy this respondent's property; and such conclusion on its part was the principal inducement for it to enter into the contracts of January 4 and August 9, 1934; and respondent company thereby was and will be enabled to salvage a larger amount of its property than it could have done by competition." Also, "that under the circumstances of threatened competition, directed or controlled by TVA as averred therein, this respondent agreed to the sale of certain of its transmission lines and property, and entered into the contract dated January 4, 1934. . . . Respondent company admits that at and before the execution of the contract, the threat was made to use federal funds to duplicate the facilities of respondent which would result in competition with rates not attainable by or permissible to this respondent, and such rates would be stipulated, controlled and regulated by TVA."

As matter of law the trial court found—

"The function intended by TVA under the evidence in relation to service, utility in type, in the area ceded by the contract of January 4, 1934, transcends the function of conservation or disposition of government property, involves continuing service and commercial functions by the government to fill contracts not governmental in origin or character."

"Performance of the contract of January 4th, 1934, would involve substantial loss and injury to the Alabama Power Company, including, inter alia, the loss or abandonment of franchises, licenses, going business and service area supporting its general system and power facilities and unless resisted would tend to invite a progressive encroachment on its service area by the Tennessee Valley Authority."

"Congress has no constitutional authority to authorize Tennessee Valley Authority or any other federal agency to undertake the operation, essentially permanent in character, of a utility system, for profit, involving the generation, transmission and commercial distribution of electricity within State domain, having no reasonable relation to a lawful governmental use."

"The contract of January 4, 1934, expressly provided for the transfer of all or substantially all of the lines and properties of the Alabama Power Company for the service of the ceded area, included transmission lines, rural distribution systems and certain urban distribution systems, and contemplated the eventual transfer of fourteen urban distribution systems. This contract, expressly contemplating service of the ceded area by the Tennessee Valley Authority with electricity to be generated or purchased by the Tennessee Valley Authority for that purpose, was in furtherance of illegal proprietary operations by the Tennessee Valley Authority in violation of the Federal Constitution and void. The contract was accordingly ultra vires and void as to the Alabama Power Company."

Having made exhaustive findings of fact and law, the trial court entered a decree annulling the January 4th contract and enjoining the Alabama Power Company from performing it. The Circuit Court of Appeals reversed, upon the theory that the Authority was making proper arrangements for sale of surplus power from the Wilson dam. The injunction was continued.

I think the trial court reached the correct conclusion and that its decree should be approved. If under the thin mask of disposing of property the United States can enter the business of generating, transmitting and selling power as, when and wherever some board may specify, with the definite design to accomplish ends wholly beyond the sphere marked out for them by the Constitution, an easy way has been found for breaking down the limitations heretofore supposed to guarantee protection against aggression.

CITY OF LINCOLN ET AL. *v.* RICKETTS, TRUSTEE IN BANKRUPTCY.

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

No. 348. Argued February 5, 1936.—Decided March 2, 1936.

Section 64 (b) (7) of the Bankruptcy Act gives priority to "debts owing to any person who by the laws of the States or the United States is entitled to priority: Provided, That the term 'person' as used in this section shall include corporations, the United States and the several States and Territories of the United States." *Held* that a municipality is a "corporation" and hence a "person" within the meaning of this provision if entitled to priority by the law of its State. Pp. 374, 377.

77 F. (2d) 425, reversed.

CERTIORARI, 296 U. S. 566, to review a judgment denying the City's claim of preference in a bankruptcy case.

Mr. Don W. Stewart, with whom *Mr. Karl W. Kindleberger* was on the brief, for petitioners.

Mr. R. A. Boehmer, with whom *Mr. A. W. Field* was on the brief, for respondent.

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

The City of Lincoln, Nebraska, a municipal corporation, sought priority in the payment of its claim against the Lincoln Trust Company, bankrupt. The claim was for $45,000, with interest. The City based its contention on § 64b of the Bankruptcy Act, and also claimed that the amounts in question had been placed in the custody of the Trust Company as a trust fund. The District Court held that the City was not within § 64b, and that the trust had not been established except as to the sum of $628.63.

The court directed that the remainder should be allowed as a general claim. The Circuit Court of Appeals modified the judgment by disallowing altogether the claim of priority, and, as modified, the judgment was affirmed. 77 F. (2d) 425. We granted certiorari, limited to the question of the application of § 64b.

Section 64b is as follows:

"The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be . . . (7) debts owing to any person who by the laws of the States or the United States is entitled to priority: *Provided,* That the term 'person' as used in this section shall include corporations, the United States and the several States and Territories of the United States."

The question is presented whether a municipal corporation is a "person" within the meaning of this section. The word "person" is expressly stated to include corporations. A municipal corporation is a corporation in the usual sense of the term. Does the Bankruptcy Act use the term in a more limited sense?

Section 1a (6) provides that

"'corporations' shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association, joint stock companies, unincorporated companies and associations, and any business conducted by a trustee, or trustees, wherein beneficial interest or ownership is evidenced by certificate or other written instrument."

We find nothing in this definition which can be taken to exclude municipal corporations. The words "having any of the powers and privileges of private corporations not possessed by individuals or partnerships" do not mean, as the context plainly shows, that those described must be "private corporations," but that the term embraces those which have powers and privileges analogous to those of private corporations and not possessed by individuals or partnerships. Municipal corporations have such powers and privileges and thus fall within the definition of the term "corporations" as used in the Bankruptcy Act. The range of the definition shows the intention of the Congress to widen rather than to restrict the term.

Other provisions of the Bankruptcy Act, by expressly excluding municipal corporations in certain relations, indicate that they were intended to be included when, in the absence of exception, the reference is to "corporations" generally, or to "persons,"—a term which, in the section containing the general definition, is stated to "include corporations, except where otherwise specified." § 1a (19). Thus § 4 provides:

"(a) Any person, except a municipal, railroad, insurance, banking corporation or a building and loan association, shall be entitled to the benefits of this Act as a voluntary bankrupt.

"(b) Any natural person, except a wage earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any moneyed, business, or commercial corporation, (except a municipal, railroad, insurance or banking corporation, or a building and loan association) owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act."

It is urged that in the provision of § 64a specifying the priority of taxes owing by the bankrupt, a "municipality" is specifically named. The United States and the States are also specifically named in that provision and again in § 64b (7). But we think that the failure to repeat the word "municipality" in § 64b (7) cannot be regarded as controlling in view of the express inclusion of "corporations" in that subdivision.

In construing the words of an act of Congress, we seek the legislative intent. We give to the words their natural significance unless that leads to an unreasonable result plainly at variance with the evident purpose of the legislation. *Ozawa* v. *United States,* 260 U. S. 178, 194; *Ohio* v. *Helvering,* 292 U. S. 360, 370. Counsel at the bar could suggest no reason for allowing to corporations generally, or to the associations comprehended within the term "corporations" as used in the Bankruptcy Act, the priority given by § 64b (7), when the state law provides for it, and denying that priority in accordance with state law to a municipal corporation. We can conceive of no reasonable basis for such a discrimination. And while we may assume that it would be within the power of the Congress to make it, we find no support in the provisions of the Act for the view that such a discrimination was intended.

Respondent strongly relies upon our decision in *Davis* v. *Pringle,* 268 U. S. 315. That decision was rendered in 1925, before the amendment of § 64b (7) which defined the term "person" as there used. From an examination of the context, the Court reached the conclusion that the word "person" in the original provision was not intended to include the United States. The Court noted that "Elsewhere in cases of possible doubt when the Act means the United States it says the United States." *Id.,* p. 318. The Congress then amended § 64b (7) by expressly providing that the term "person" should include the United States. Act of May 27, 1926, 44 Stat. 662, 667. But that amendment also provided that the term "person" should include "corporations." At the same time, by the amendment of § 1a (6) the scope of the term "corporations" was extended so as to include "joint stock companies, unincorporated companies and associations." *Id.* In view of the explicit inclusion of "corporations" in the amendment of § 64b (7), and the evident intention shown by the context not to restrict the meaning of the term "corporations," the reasoning of the opinion in *Davis* v. *Pringle* cannot be regarded as apposite to the present case.

We conclude that a municipal corporation is a "corporation" and hence a "person" entitled to the priority accorded by § 64b (7).

There is a further question, which is one of state law. The preference under § 64b (7) is only in the case of "debts owing to any person who by the laws of the States or the United States is entitled to priority." The further question then is whether the City of Lincoln is entitled to priority under the law of Nebraska. The Circuit Court of Appeals did not determine that question. The court cited its decision as to the status of the City and County of Denver under the laws of Colorado (*Denver* v. *Stenger,* 295 Fed. 809; compare *U. S. Fidelity & Guaranty Co.* v. *McFerson,* 78 Colo. 338; 241 Pac. 728), and apparently assuming, without deciding, that the law of Nebraska accorded priority to the City of Lincoln, the court proceeded to base its decision in the instant case upon the inapplicability of § 64b (7) to a municipal corporation. The law of Nebraska was not discussed.

As we hold that the construction placed upon the Bankruptcy Act was erroneous, the cause will be returned to the Circuit Court of Appeals for the determination of the remaining issue as to local law.

The decree of the Circuit Court of Appeals is reversed and the cause is remanded to that court for further proceedings in conformity with this opinion.

Reversed.

INGRAHAM ET AL. *v.* HANSON.

APPEAL FROM THE SUPREME COURT OF UTAH.

No. 427. Argued February 14, 1936.—Decided March 2, 1936.

Amendments of § 2058 of the Compiled Laws of Utah, so as to provide that sales of lands in drainage districts for delinquency in payment of drainage taxes shall be separate from sales of the same lands for general taxes, *held* not to impair the obligation of drainage district bonds, sold before the amendments, or to deprive the bondholders of property without due process of law.

86 Utah 424; 46 P. (2d) 400, affirmed.

APPEAL from the affirmance of a judgment quieting the title of the plaintiff, the present appellee, to land in a drainage district which had been taken by the county for general taxes and conveyed by the county to him.

Mr. Orson P. Soule, with whom *Messrs. Horace L. Lohnes* and *H. L. McCormick* were on the brief, for appellants.

Messrs. Charles D. Moore and *O. A. Tangren* for appellee.

Mr. Grover A. Giles, Assistant Attorney General of Utah, with whom *Mr. Joseph Chez,* Attorney General, and *Mr. Irwin Arnovitz,* representing the State Tax Commission, and *Messrs. Charles D. Moore* and *O. A. Tangren,* representing Millard County and Millard County School District, were on the brief, as *amici curiae,* by special leave of Court.

PER CURIAM.

Appellee brought this suit in the state district court to quiet his title to certain land in Millard County, Utah. He alleged that the general taxes against the land for the year 1926 had not been paid, and that as a result a tax deed of the property was taken by the county which had conveyed the land to him. The land lay within the boundaries of the Midland County Drainage District Number Three. Appellants are owners of the bonds of the drainage district. They set up that the bonds were payable by annual assessments and levy of drainage taxes under the statutes of Utah in force when the bonds were sold. Compiled Laws of Utah, 1917, §§ 2055, 2057, 2058, 2071, 2072, 2073. They contend that the provisions of the statute became part of the obligations of their bonds and required that when general taxes and drainage taxes became delinquent there should be but one notice of sale, and but one certificate of sale and tax deed, in which all general and special taxes should be included.

In 1921, and again in 1925, § 2058 of the Compiled Laws of Utah was amended so as to provide that lands sold for delinquent district taxes should be sold separately for such taxes and that a separate certificate of sale should be issued. Appellants contend that the amendment impaired the obligation of their contracts in violation of the contract clause of the Constitution of the United States, and hence that the separate sale in question, exclusively for the non-payment of general taxes, and appellee's tax deed were void. The amended statute was also assailed as depriving appellants of their property without due process of law in violation of the Fourteenth Amendment. The state district court overruled these contentions and entered judgment quieting appellee's title "against the lien and cloud" of the bonds of the drainage district. The judgment was affirmed by the Supreme Court of the State, 86 Utah 424; 46 P. (2d) 400, and the case comes here on appeal.

It is not disputed that under the laws of Utah taxes for general governmental purposes are paramount to all other demands against the property to which the tax lien attaches. *Robinson* v. *Hanson,* 75 Utah 30; 282 Pac. 782. The state court held that the challenged amendment did not make any substantial change in the rights of the holders of the drainage district bonds. Two opinions were delivered. By separate paths they reached the same result. In the principal opinion by Justice Moffat it was said: "The manner by which the drainage tax lien is made effective for the purpose of reaching the security to which the bond lien attaches is substantially the same since the amendment as before, even considering the statutory references in the drainage tax law as making the procedure for the collection of general taxes applicable. By the procedure prescribed, no added burden is placed upon the drainage district nor the bondholder whereby the lien provided by the statute is impaired, nor is it made more difficult of enforcement. . . . That the lien for general taxes was superior to the lien for drainage district taxes was as much the law then as it is now. No right to pursue and make effective the drainage tax lien has been taken away or impaired. . . . Between the time of sale and expiration of the redemption period, and during which there is outstanding a certificate of sale for both delinquencies for non-payment of general and drainage taxes, the drainage district may pay general taxes and take tax sale certificate. After the period of redemption has expired, the drainage district, upon payment of the general taxes, is entitled to a deed vesting it with title to the property sold for drainage taxes, if general taxes have been paid and drainage taxes have not. This is the ultimate limit to which the drainage district and the bondholders were entitled to go at any time, whether before or after the amended statutes." 46 P. (2d) pp. 409, 410. In the concurring opinion of Justice Wolfe, it was said that the words of the statute "meant the same before the amendment of 1921 as the amendment itself specifies, and that said amendment was for the purpose of clarifying and not changing the law." Further, that "the tax officials in 1920, before and after the amendment, followed a procedure which was justified by the statutes throughout, and followed the method of assessing, notifying, levying, and collecting taxes as the same was in force at the time of the issuance of the bonds." *Id.*, p. 418.

While this Court, in enforcing the contract clause, may determine for itself the meaning and effect of the contract (*Appleby* v. *New York City,* 271 U. S. 364, 380; *Larson* v. *South Dakota,* 278 U. S. 429, 433), we see no reason for not accepting the ruling of the state court as to the construction of the statute in question and the state practice. We find no basis for a conclusion that, under the amendment, the procedure for enforcing the liens of drainage district taxes was substantially different from that which obtained before the amendment, or that the contract rights of the bondholders have been impaired. Compare *Violet Trapping Co.* v. *Grace, ante,* p. 119. No question, materially different, is presented under the Fourteenth Amendment.

The judgment is

Affirmed.

GULF REFINING CO. v. FOX, TAX COMMISSIONER.*

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

No. 442. Argued February 12, 13, 1936.—Decided March 2, 1936.

Gasoline filling stations *held* to be "stores," "controlled" by appellant refining companies, within the meaning of the West Virginia "Chain Store Tax Act." See *Fox* v. *Gulf Refining Co.*, 295 U. S. 75.

11 F. Supp. 425, 431, affirmed.

Mr. Arthur S. Dayton, with whom *Mr. Fred O. Blue* was on the brief, for Gulf Refining Co., appellant in No. 442.

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* Together with No. 538, *Ashland Refining Co.* v. *Fox, Tax Commissioner*. Appeal from the District Court of the United States for the Southern District of West Virginia.

Mr. E. L. McDonald for Ashland Refining Co., appellant in No. 538.

Mr. Homer A. Holt, Attorney General of West Virginia, with whom *Mr. Wm. Holt Wooddell,* Assistant Attorney General, was on the brief, for appellee.

Per Curiam.

These suits were brought to restrain the enforcement of a statute of West Virginia known as the "Chain Store Tax Act," imposing a graduated license tax upon "stores," which are defined as including any mercantile establishments "which are owned, operated, maintained and/or controlled by the same person, firm, corporation, copartnership or association." Acts of 1933, c. 36. In a companion case, this Court sustained the constitutional validity of the statute and also decided that gasoline filling stations were stores or mercantile establishments within its purview. *Fox* v. *Standard Oil Co.,* 294 U. S. 87. There remained, in the instant cases, the question whether certain filling stations, particularly described, were stores belonging to, operated or controlled by the complainants, respectively.

On the appeal to this Court in the case of the Gulf Refining Company, it appeared that this question had not been determined by the District Court and, on the reversal of its decree, the cause was remanded to the District Court that it might consider and decide that issue. *Fox* v. *Gulf Refining Co.,* 295 U. S. 75.

The question, in the case of the Gulf Refining Company, related to 568 filling stations operated under particular arrangements with "Authorized Licensed Dealers." These arrangements were evidenced by a lease of the premises from the dealer to the company, a license by the company to the dealer for retail sale of the company's products on the premises, a contract for sales by the company to the dealer, and various receipts for equipment and forms of riders. On considering the terms and effect of these agreements, the District Court, of three judges, decided that the stations were controlled by the Gulf Refining Company within the meaning of the statute. 11 F. Supp. 425.

In the case of the Ashland Refining Company, the question related to 82 filling stations. The company conceded that by the original leases and agency agreements covering these stations the dealer was made the agent of the company and sold its products on a consignment basis. But the company contended that, before the taxing statute was enacted, the parties had abandoned that arrangement and that the company was selling its products outright to the dealers and was not exercising control over the stations. The modification of the earlier agreements was not in writing, but was shown by a stipulation of facts. The District Court considered the nature and effect of the stated modification and decided that the stations were still operated or controlled by the company within the meaning of the act. 11 F. Supp. 431.

Appeals have been taken directly to this Court. 28 U. S. C. 380. The questions involved are purely state questions with respect to the application of the statute to particular instances in the light of the facts disclosed. On examining the record in each case, we find no sufficient ground for disturbing the rulings of the District Court. The decrees are severally

Affirmed.

UNITED STATES SHIPPING BOARD MERCHANT FLEET CORP. ET AL. v. RHODES.*

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

No. 546. Argued February 14, 1936.—Decided March 2, 1936.

The right of a creditor of an insolvent national bank to bring suit for recovery of funds of the bank alleged to have been unlawfully dis-

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* Together with No. 547, *O'Connor, Comptroller of the Currency, et al.* v. *Rhodes.* Certiorari to the United States Court of Appeals for the District of Columbia.

bursed by the receiver under the direction of the Comptroller of the Currency, is sustained, in the circumstances of this case, although there was no prior demand upon or refusal by the officials named to bring suit themselves.

65 App. D. C. 21; 79 F. (2d) 146, affirmed.

Certiorari, 296 U. S. 568, to review a decree which, on a special appeal below, affirmed in part orders of the trial court overruling motions to dismiss a bill for an accounting, etc.

Solicitor General Reed submitted for petitioners in No. 546.

Mr. George P. Barse, with whom *Messrs. Swagar Sherley, Frederick DeC. Faust,* and *Charles F. Wilson* were on the brief, for petitioners in No. 547.

Mr. Hugh H. Obear, with whom *Messrs. Charles A. Douglas, R. L. Merrick,* and *R. H. McNeill* were on the brief, for respondent.

Per Curiam.

Respondent, Thomas E. Rhodes, suing in his own right and on behalf of other creditors of the Commercial National Bank of Washington, sought the restoration of amounts alleged to have been illegally paid to petitioners by the bank's receiver. The payments were of amounts deposited with the bank by the United States Shipping Board Merchant Fleet Corporation and the Alien Property Custodian, respectively. The bank had pledged assets to secure the deposits and, recognizing the pledges as valid, the receiver under the direction of the Comptroller of the Currency had paid the amount of the deposits in full. Similar relief was sought against the Comptroller of the Currency with respect to payments to the Comptroller, in like circumstances, of deposits made by him of moneys belonging to insolvent banks. Unsecured creditors and depositors had received a dividend of but 50 per cent. of their claims. Respondent alleged that the above-mentioned pledges and the preferential payments were unlawful.

The defendants the Comptroller of the Currency and the receiver of the bank moved to dismiss the bill of complaint for want of equity, and, in particular, because the bill failed to show any demand by plaintiff upon the Comptroller or receiver that such suits be brought or their refusal to sue. The defendants the Fleet Corporation and the Attorney General as successor to the Alien Property Custodian, made a similar motion. These motions were denied and a special appeal was allowed.

The Court of Appeals held that, while as a rule a stockholders' or creditors' suit could not be maintained "until demand had been made upon the receiver, the Comptroller, or the bank," the rule did not apply "where the receiver or Comptroller refuses to bring the suit or where it would be a vain thing to make demand upon them, and it is shown there is necessity for a suit for the protection of the interests of creditors." The court was of the opinion that the facts alleged in the complaint were sufficient to show that the Comptroller and the receiver "were both actively and personally involved in the transactions claimed to be unlawful," and that this was enough to take the case out of the ordinary rule. The court also held that the pledge made by the bank to secure the deposits by the Comptroller of the Currency of moneys belonging to insolvent banks was a valid pledge in view of the provisions of the Act of May 15, 1916, 39 Stat. 121, but that there was no authority for the exaction of pledges to secure the deposits which had been made by the Fleet Corporation and the Alien Property Custodian, and hence that those pledges were invalid. Accordingly, the order of the Supreme Court of the District was reversed and the dismissal of the bill was directed as to the Comptroller of the Currency, and with respect to the Fleet Corporation and the Acting Alien Property Custodian the order was affirmed. *O'Connor* v. *Rhodes,* 65 App. D. C. 21; 79 F. (2d) 146.

On motion for reargument, the Court of Appeals adhered to its decision. 65 App. D. C. 27; 79 F. (2d) 152. The court, however, took notice of the statement that the receiver, since the decision, had instituted a suit against the Acting Alien Property Custodian and the Fleet Corporation to recover the assets alleged to have been illegally pledged or the preferential payments made in consequence of such pledges—"covering the same items, in the same circumstances, as are covered in the bill in the instant proceeding." The court, while again recognizing the general rule, reiterated its view that the particular circumstances showed that the preferential payments in question "were made at the instance and with the approval of the Comptroller and receiver" and that "the claims for payment were instigated and invited by the Comptroller and the receiver." The case was thus deemed to fall within the exception to the rule requiring demand and refusal before the bringing of suit. But the court noted the statement of counsel for the Comptroller that he no longer adhered to his former position that the payments to the Fleet Corporation and the Alien Property Custodian were validly made. As there had been no motion by either party to stay further proceedings in the instant suit, pending the prosecution by the receiver of the suit filed by him, the court did not press the point which it had raised as to its power to direct such a stay. That reservation was expressly stated to be "without prejudice to the right of the trial court, on motion and in the exercise of its judicial discretion, and on such reasonable terms as it may impose, to arrange the order of trial in the two suits as may result in the most economical and speedy determination of the issues involved." 65 App. D. C. 28, 79 F. (2d) 153.

We granted certiorari limited to the question of the right of respondent to bring this suit without prior demand upon, or refusal by, the Comptroller of the Currency or the receiver, or both.

As the case turns on its exceptional facts and suit has been brought by the receiver, and the course of procedure in the interest of economical and efficient administration is left to be determined by the trial court in the exercise of a sound discretion, the decree of the Court of Appeals is

Affirmed.

WINE RAILWAY APPLIANCE CO. *v.* ENTERPRISE RAILWAY EQUIPMENT CO.

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

No. 356. Argued January 16, 1936.—Decided March 2, 1936.

Section 4900 R. S., does not mean that a patentee who has not made the patented article may not recover for infringements committed before he gave actual notice of his patent to the infringer. Pp. 392, 397.

77 F. (2d) 159, reversed.

Certiorari, 296 U. S. 560, to review a decree reducing the recovery on an accounting for infringement of a patent. See also 25 F. (2d) 236.

Mr. Gilbert P. Ritter for petitioner.

It is especially to be observed that § 4900 R. S., provides for the giving of two notices, one to the public and the other to an infringer. The notice to the public, since it is required to be given by marking a tangible patented article, can only be given by a manufacturing patentee. The notice to an infringer is required to be given only in the event of a failure to mark the patented article. The two notices are related; the necessity of giving the actual notice to an infringer is dependent upon the failure to mark an article which has been made, that is to say, the necessity of giving it arises only upon a failure to notify the public that a patented article which has been made or vended is patented. This failure, therefore, is not a failure to manufacture but a failure, in case of manufacture, to give notice to the public by marking the article "patented," that is, a failure "to mark."

The statute does not require a non-manufacturing patentee to give any notice whatsoever to the public as to the existence of his patent, and as the giving of notice to an infringer is only required of him who fails to comply with the provisions of the statute respecting notice to the public, the statute does not require a non-manufacturing patentee to give notice to an infringer.

The purpose is to prevent an unwitting infringement by a member of the public who, seeing an article bearing no mark indicating that it is patented, proceeds to make other specimens of it. Robinson on Patents, Vol. III, § 902.

Letters patent recorded under R. S., § 4883, in the Patent Office, are "a record which is notice to all the world"; *Sessions* v. *Romadka,* 145 U. S. 29, 50; "all persons are bound to take notice of their contents." *Boyden* v. *Burke,* 14 How. 575, 582.

The policy of Congress in dealing with patents has been not to require the manufacture of patented articles. Section 4900 R. S., should be interpreted in harmony with that policy. *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.,* 210 U. S. 405, 429.

The right to recover damages for infringement is given by §§ 4919 and 4921, R. S. Being in derogation of that right, § 4900 R. S., should be strictly construed; and the phrase "failing to mark," appearing in the penalty clause, should not be interpreted as if it read "failing so to manufacture and mark."

Many patentees cannot lawfully manufacture articles patented to them without first obtaining a license under some patent owned by another.

Section 4900 R. S. and § 13 of the Patent Act of 1861, are identical in purpose and meaning.

The legislative history of § 4900 R. S., shows that Congress intended the existing law to remain unchanged in substance.

The decision of the court below is in apparent conflict with the interpretation placed on § 4900 R. S. by this Court; there is a diversity of opinion respecting the interpretation. *Dunlap* v. *Schofield,* 152 U. S. 244, 247–248; *Campbell* v. *Mayor,* 81 Fed. 182; *Ewart* v. *Baldwin Co.,* 91 Fed. 262; *Wagner* v. *Corn Products Refining Co.,* 28 F. (2d) 617; *Van Meter* v. *United States,* 37 F. (2d) 111, 113; *Olsson* v. *United States,* 72 Ct. Cls. 72, 103.

It has been decided in the following cases that § 4900 R. S. does not apply to a process patent, since the process is not susceptible of marking: *Carnegie Steel Co.* v. *U. S. Mitis Co.,* 90 Fed. 829, affirming 89 Fed. 206; *U. S. Mitis Co.* v. *Midvale Steel Co.,* 135 Fed. 103; *Wagner* v. *Corn Products Refining Co.,* 28 F. (2d) 617. Cf. *Parker Rust Proof Co.* v. *Ford Motor Co.,* 23 F. (2d) 502, and *Churchward International Steel Co.* v. *Bethlehem Steel Co.,* 262 Fed. 438, which did not involve process claims.

The following cases have been found holding that the Section applies to all patentees regardless of whether the patented articles have ever been made or sold under the patent: *Churchward International Steel Co.* v. *Bethlehem Steel Co.,* 262 Fed. 438; *Son* v. *Pressed Steel Car Co.,* 21 F. (2d) 528; *Van Meter* v. *United States,* 47 F. (2d) 192; *Flat Slab Patents Co.* v. *Northwestern Glass Co.,* 281 Fed. 51.

Mr. M. K. Hobbs, with whom *Mr. George I. Haight* was on the brief, for respondent.

The interpretation of the petitioner would mean that one who makes, sells, and gives to the public the benefit of his invention before the expiration of the seventeen years, is placed at a disadvantage in protecting his patent over one who maintains merely a paper patent. Congress did not intend any such fantastic result. See *Flat Slab Patents Co.* v. *Northwestern Glass Co.*, 281 Fed. 51.

Every patent owner or licensee can give individual notice of infringement, one of the alternative methods provided, without trouble or expense.

If an article is marked, the accused infringer has notice as a member of the public. If an article is not or cannot be marked because not in existence, then special notice is required to the defendant.

Copying an article marked patented is of itself such notice. But mere knowledge of the existence of a patent is not notice of infringement.

The alternative method of notice provided in the statute and recognized by this Court in *Dunlap* v. *Schofield*, 152 U. S. 244, makes an entirely consonant and harmonious policy of the law.

The purpose of the statute is not that notice may be given of the issuance and existence of a patent, but to prevent innocent infringement; and this is accomplished in two ways,—by marking the article if made, for all to see; or by the sending of an accusing notice.

The legislative history of the section shows that Congress changed prior statutes respecting marking and notice, and intended to make the change it wrought. See *Churchward International Steel Co.* v. *Bethlehem Steel Co.*, 262 Fed. 438; *Flat Slab Patents Co.* v. *Northwestern Glass Co.*, 281 Fed. 51.

If the present edition of the statute meant that giving notice is imposed only on those who make or sell, there would have been no necessity for changing the earlier enactments of the statute.

The Act of August 29, 1842, required all patentees who made and vended to mark the patented articles and carried a penalty for not so doing. That provision made no reference to notice of infringement. This Act was followed by the Act of March 2, 1861, which contained the same requirement in respect to the marking of articles made or vended by any person. The 1861 Act made the first important change by denying the right to damages unless notice was given; but the Act was still limited to the patentees who made and vended. Then came the Act of July 8, 1870, now § 4900 R. S., which extended the provision requiring marking and notice to all patentees, as well as to persons who made and vended, thus making the second important change over the original enactment of 1842.

The decision below is in harmony with *Dunlap* v. *Schofield,* 152 U. S. 244, and with the decision of each Circuit Court of Appeals which has passed upon the question. *Flat Slab Patents Co.* v. *Northwestern Glass Co.,* 281 Fed. 51; *Flat Slab Patents Co.* v. *Turner,* 285 Fed. 257; *American Caramel Co.* v. *Mills,* 162 Fed. 147; *Van Meter* v. *United States,* 47 F. (2d) 192; *Enterprise Railway Equipment Co.* v. *Wine Railway Appliance Co.,* 77 F. (2d) 159; *Son* v. *Pressed Steel Car Co.,* 21 F. (2d) 528; *Churchward International Steel Co.* v. *Bethlehem Steel Co.,* 262 Fed. 438.

Mr. Justice McReynolds delivered the opinion of the Court.

In 1922, respondent, Equipment Company, sued the petitioner for infringing certain patents. April 25, 1923, petitioner, Appliance Company, by counterclaim, charged that respondent had infringed its patents and asked for damages. The District Court dismissed both bill and counterclaim. The Circuit Court of Appeals held one of petitioner's patents valid and infringed and remanded the cause for an accounting.

The master reported (June 17, 1932) that profits amounting to $18,002.83 had been realized on the infringing device and recommended judgment for that sum. Of this total he attributed $5,490.77 to the period preceding the filing of the counterclaim and $12,512.06 to the subsequent one. The District Court approved; but the Circuit Court of Appeals, after citing many conflicting opinions by other Federal Courts, held no recovery could be had for anything done prior to the counterclaim. This ruling is challenged. To determine the issue, we must construe § 4900 R. S.; U. S. C., Title 35, § 49, which provides—

"It shall be the duty of all patentees, and their assigns and legal representatives, and of all persons making or vending any patented article for or under them, to give sufficient notice to the public that the same is patented; either by fixing thereon the word 'patented,' together with the day and year the patent was granted; or when, from the character of the article, this can not be done, by fixing to it, or to the package wherein one or more of them is inclosed, a label containing the like notice; and in any suit for infringement, by the party failing so to mark, no damages shall be recovered by the plaintiff, except on proof that the defendant was duly notified of the infringement, and continued, after such notice, to make, use, or vend the article so patented."

This section derives verbatim from § 38 of "An Act to revise, consolidate, and amend the Statutes relating to Patents and Copyrights," approved July 8, 1870, c. 230, 16 Stat. 198, 203, and has remained in force without change, presently important.[1]

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[1] The Act of February 7, 1927, c. 67, 44 Stat. 1058, amended 4900 R. S. by inserting "*Provided, however,* That with respect to any patent issued prior to April 1, 1927, it shall be sufficient to give such notice in the form following, viz: 'Patented,' together with the day and year the patent was granted" immediately after the words "like notice" and before "and in any suit."

Section 4901, R. S.; U. S. C., Title 35, § 50,[2] penalizes the use of unauthorized marks upon manufactured articles "for the purpose of deceiving the public." Sections 4919 and 4921, R. S.; U. S. C., Title 35, §§ 67 and 70, permit recovery of damages for infringement of any patent.

The parties agree that issuance of a patent and recordation in the Patent Office constitute notice to the world of its existence. *Boyden* v. *Burke,* 14 How. 575, 582; *Sessions* v. *Romadka,* 145 U. S. 29, 50.

Neither petitioner nor another with its consent has ever manufactured or vended an article under the infringed patent. No actual notice of infringement was given respondent prior to the counterclaim.

Counsel for petitioner affirm that under § 4900, whenever a patented article is made or vended by one of those therein specified it becomes his duty to give sufficient notice to the public "that the same is patented" either by placing thereon or upon the label the word "Patented." Also, that, as penalty for failure therein, the defaulter is

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[2] Section 4901, R. S.; U. S. C., Title 35, § 50. "Every person who, in any manner, marks upon anything made, used, or sold by him for which he has not obtained a patent, the name or any imitation of the name of any person who has obtained a patent therefor without the consent of such patentee, or his assigns or legal representative; or

"Who, in any manner, marks upon or affixes to any such patented article the word 'patent' or 'patentee,' or the words 'letters-patent,' or any word of like import, with intent to imitate or counterfeit the mark or device of the patentee, without having the license or consent of such patentee or his assigns or legal representatives; or

"Who, in any manner, marks upon or affixes to any unpatented article the word 'patent,' or any word importing that the same is patented, for the purpose of deceiving the public, shall be liable, for every such offense, to a penalty of not less than one hundred dollars with costs; one-half of said penalty to the person who shall sue for the same, and the other to the use of the United States, to be recovered by suit in any district court of the United States within whose jurisdiction such offense may have been committed."

deprived of the right to recover damages for infringement, except upon proof that after notice, the defendant continued to make, use or vend. This construction, it is said, correctly we think, gives effect to every word in the section and carries out the legislative purpose.

Counsel for respondent submit—

Section 4900 requires a patentee or patent owner, whether or not he makes or vends, to give notice in one of the two alternative methods, (marking the article, or giving actual notice to the defendant) as therein specified. By plain language, the duty to give notice of infringement is imposed without limitation upon "all patentees and their assigns and legal representatives." Then the statute proceeds and imposes this upon "all persons making or vending any patented article for or under them." The duty to give notice is required not only of patentees and their assigns and legal representatives, but also the duty is imposed upon all persons making or vending under them. The purpose is not that notice may be given of the issuance and existence of a patent, but to prevent innocent infringement; and this is accomplished in two ways—by marking the article, if made, for all to see; or by sending an accusing notice. The section clearly does say that the three classes of persons named therein, (1) patentees, (2) assigns and legal representatives, and (3) all persons making or vending patented articles for or under them, must either mark the article of the patent in accordance with the statute or give notice to the accused infringer. Alternative methods of giving notice are provided by the statute; so no hardship is worked upon him who does not make and sell and no lack of harmony with other provisions of the patent laws exists. If the present edition of the statute means that giving notice is imposed only on those who make or sell, there would have been no necessity for changing the earlier enactments of the statute. The whole matter could have been disposed of by saying "all persons who make or vend patented articles."

Obviously, but for § 4900, a patentee might recover for all damages suffered through infringement without giving prior actual notice to the infringer. That section subtracts something and creates an exception.

If respondent's position is correct, process patents and patents under which nothing has been manufactured may be secretly infringed with impunity, notwithstanding injury to owners guilty of no neglect. Only plain language could convince us of such an intent.

The idea of a tangible article proclaiming its own character runs through this and related provisions. Two kinds of notice are specified—one to the public by a visible mark, another by actual advice to the infringer. The second becomes necessary only when the first has not been given; and the first can only be given in connection with some fabricated article. Penalty for failure implies opportunity to perform.

If the word "patentees" is not qualified by "making or vending any patented article," the section would seem to impose on such persons a duty to the public impossible of performance when no article is made or vended by them. Also, if these words do not qualify patentees, then the words "same" and "thereon," are not easily understood.

Section 5, Act of August 29th, 1842, c. 263, 5 Stat. 544, declared, that it shall be an offense to place the word "patent" or "letters-patent" on any unpatented article with intent to deceive the public and prescribes a penalty recoverable by action.

"Sec. 6. . . . That *all patentees and assignees of patents* hereafter granted, are hereby required to stamp, engrave, or cause to be stamped or engraved, on each article vended, or offered for sale, the date of the patent; and if any person or persons, patentees or assignees, shall neglect to do so, he, she, or they, shall be liable to the same penalty, to be recovered and disposed of in the manner specified in the foregoing fifth section of this act."

The Act of March 2, 1861, c. 88, 12 Stat. 249, provided—

"Sec. 13. . . . That in all cases where an article is *made or vended by any person under the protection of letters-patent,* it shall be the duty of such person to give sufficient notice to the public that said article is so patented, either by fixing thereon the word patented, together with the day and year the patent was granted; or when, from the character of the article patented, that may be impracticable, by enveloping one or more of the said articles, and affixing a label to the package or otherwise attaching thereto a label on which the notice, with the date, is printed; on failure of which, in any suit for the infringement of letters-patent by the party failing so to mark the article the right to which is infringed upon, no damage shall be recovered by the plaintiff, except on proof that the defendant was duly notified of the infringement, and continued after such notice to make or vend the article patented."

Section 38 of the Act of July 8, 1870, *supra,* became § 4900, R. S. Section 39—now § 4901, R. S.—is in the margin, *ante,* p. 393.

By the Act of 1842 (the earliest here important) "*all patentees and assignees of patents*" were required to mark "each article vended or offered for sale" and defaulters were subjected to a money penalty. The Act of 1861 directed that "in all cases where an article is made or vended by *any person under the protection of letters-patent,* it shall be the duty of such person to give sufficient notice to the public that said article is so patented, etc." It penalized default by taking away the right to recover damages, except, etc. The Act of 1870, prepared by the

Commissioners to Revise the Statutes (Act June 27, 1866, 14 Stat. 74)[3] made it the duty of *"all patentees, and their assigns and legal representatives, and of all persons making or vending any patented article for or under them, to give sufficient notice to the public that the same is patented,"* etc. and penalized default as did the Act of 1861.

All these acts reveal the purpose to require that marks be put on patented articles for the information of the public. They undertook to specify those charged with the duty to attach such marks. In this regard, the meaning of the Act of 1861 is not open to question. The different language found in the Act of 1870 was intended, we think, to delimit the term "a person under the protection of letters patent," to describe the members of the class more definitely, and not to impose a new and different burden upon non-producing patentees. We find nothing adequate to support the notion that such patentees were deprived of the right theretofore existing to claim damages from an infringer unless and until he could be run down and served with actual notice.

The Circuit Court of Appeals erroneously sustained the respondent's position, because of the different language found in the Act of 1870. It said:

"The earlier statute provided 'that in all cases where an article is made or vended by any person under the protection of letters-patent, it shall be the duty of such person to give sufficient notice to the public that said article is patented, . . .' (12 Stat. 249.) That statute required any person making or vending an article under the protection of letters-patent to give the notice, whereas the present one requires that notice be given by all patentees and their assigns and legal representatives, and also, by all persons making or vending the patented

[3] Congressional Globe, Vol. 43, Part 5, pp. 2679–2684.
Congressional Globe, Vol. 43, Part 5, pp. 2679–2680.
Congressional Globe, Vol. 43, Part 5, p. 2680.

article. Thus under the earlier statute a patentee who did not make or vend the article was not required to give the notice, but under the present statute the patentee, his assigns and legal representatives must give it, whether they do or do not make or vend the article. This is the only difference between the two statutes, and in our opinion the amendment to the old statute as embodied in the new requires the patentee or his assignee who does not make or vend the article to give notice of the patent and limits the recovery for infringement thereof to damages sustained thereafter."

Under the interpretation which we accept, § 4900, R. S., provides protection against deception by unmarked patented articles, and requires nothing unreasonable of patentees. By admission, the Act of 1861 did not require a patentee who did not produce to give actual notice to an infringer before damages could be recovered; and there is nothing in the language or history of the Act of 1870 sufficient to indicate an intent to alter his position in this regard. This conclusion is in harmony with the language of *Dunlap* v. *Schofield,* 152 U. S. 244, 247.

The challenged judgment must be reversed. The judgment of the District Court is affirmed.

Reversed.

SOUTHERN RAILWAY CO. *v.* LUNSFORD, ADMINISTRATRIX.

CERTIORARI TO THE COURT OF APPEALS OF GEORGIA.

No. 399. Submitted February 10, 1936.—Decided March 2, 1936.

The absolute duty laid on carriers by the Boiler Inspection Act to keep "all parts and appurtenances" of their locomotives in proper condition does not extend to safety devices which do not increase the peril and which are placed on locomotives by the carrier for experimental purposes. P. 401.

50 Ga. App. 829; 179 S. E. 571, reversed.

Certiorari, 296 U. S. 561, to review the affirmance of a judgment against the Railway in an action under the Employers' Liability Act.

Messrs. G. E. Maddox, H. O'B. Cooper, Sidney S. Alderman, and *S. R. Prince* submitted for petitioner.

Messrs. Reuben R. Arnold and *B. P. Gambrell* submitted for respondent.

Mr. Justice McReynolds delivered the opinion of the court.

Respondent's intestate, J. M. Cox, driver of the engine on petitioner's fast train from Birmingham to Atlanta, lost his life when it overturned. As the train moved forty miles per hour over a six degree curve to the left, something, apparently a stone, turned the wheels of the front truck to the right and off the rails. After bumping over the cross ties for seven-tenths of a mile they struck a switch and the upset followed.

The front or boiler end of the locomotive found support through a rigidly attached center casting rounded to fit, some three or four inches, into another casting made fast to the forward truck. This adjustment permitted passage around curves. The parts were held together by the weight of the locomotive. If the wheels of the truck left the rails the connection would be broken; the locomotive would rest on the driving wheels and short chains attached to it would pull the truck along. Compressed air carried in a hose pipe from the pump, controlled all brakes. Pressure released them; when withdrawn, they automatically applied.

A mechanism, known as Wright's Little Watchman, fastened beneath the locomotive frame, carried a valve closing an entrance into the air line actuated by a lever or trigger. A pull on this would open the valve, let out air and thus set the brakes. The lever was connected with the forward truck; if its wheels left the track and fell five inches or more a downward pull was expected.

Newly constructed locomotives carry no Watchman; they are not in common use. Petitioner buys and applies them; has experimented with them for seven years; nearly all of its passenger locomotives carry them. The device is not regarded as an essential or integral part. The carrier's General Superintendent testified without contradiction—"The use of this device cannot possibly endanger the operation of the train. It is used in the hope that it may apply the brakes and stop the train in event of derailment of front trucks. My experience with this device is that it sometimes works and sometimes will not work, and that it cannot be relied upon with any degree of certainty." Both witnesses who spoke to the point asserted that it was in an experimental stage; was being tried out with the hope of securing good results; sometimes it had proved effective, sometimes it disappointed. Notwithstanding use during seven years, it remained experimental.

Respondent brought an action for damages in a State Court and relied upon two grounds—(1) failure properly to maintain the track, (2) failure to keep the Watchman in proper condition wherefore it failed to function and arrest the train. The court presented the cause to the jury upon both theories. Judgment for respondent after a favorable verdict was affirmed by the appellate court. Discussion of the first ground is unnecessary; the judgment must be reversed because of error in the charge relative to the second.

The Boiler Inspection Act of June 7, 1924, c. 355, § 2, 43 Stat. 659, U. S. C., Title 45, § 23, provides—

"It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30, and 32 and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

This enactment has been much considered. *Baltimore & Ohio R. Co.* v. *Groeger,* 266 U. S. 521; *Napier* v. *Atlantic Coast Line R. Co.,* 272 U. S. 605; *United States* v. *Baltimore & Ohio R. Co.,* 293 U. S. 454. But we have not heretofore undertaken to give definite interpretation to the words "parts and appurtenances."

The accepted doctrine is that the Act imposes upon the carrier an absolute and continuing duty to maintain the locomotive, and all parts and appurtenances thereof, in proper condition, and safe to operate in active service without unnecessary peril to life or limb. Also, that, after proper inquiry, the Interstate Commerce Commission may "prescribe the rules and regulations by which the fitness for service shall be determined."

The Commission has promulgated no rule mentioning Little Watchmen; they are not subjected to inspection; without them locomotives "may be employed in the active service . . . without unnecessary peril to life or limb." While most carriers do not use them, their locomotives commonly are in "proper condition."

Respondent does not suggest that the Watchman, whether operative or not, detracted from safety or in any way contributed to the derailment. But it is said that in the circumstances shown the mechanism failed promptly to stop the train, and the jury was at liberty to find faulty condition which caused the engineer's death. The soundness of this reasoning we need not consider; certiorari was granted because of another point.

Upon the evidence, beyond reasonable doubt, the Watchman was in the experimental stage. Use during seven years gave it no other status, as the witnesses pointed out. Nevertheless, the claim is that when attached it became a part or appurtenance which the carrier was absolutely bound properly to maintain.

With frankness, counsel assert: "There is no doubt that the judge charged that as to this device there was an absolute requirement that it should be in proper condition." In support of this, they urge: The carrier "creates its own standard of safety by the appliances which it places on its own locomotive; and that the Boiler Inspection Act, in requiring all parts and appurtenances on the entire locomotive to be in proper condition, applies to each particular locomotive of every type."

We are unable to accept this view. With reason, it cannot be said that Congress intended that every gadget placed upon a locomotive by a carrier, for experimental purposes, should become part thereof within the rule of absolute liability. So to hold would hinder commendable efforts to better conditions and tend to defeat the evident purpose—avoidance of unnecessary peril to life or limb. Whatever in fact is an integral or essential part of a completed locomotive, and all parts or attachments definitely prescribed by lawful order of the Interstate Commerce Commission, are within the statute. But mere experimental devices which do not increase the peril, but may prove helpful in an emergency, are not. These have not been excluded from the usual rules relative to liability.

The charge in the particulars indicated was erroneous and prejudicial.

Reversed.

Syllabus.

PACIFIC TELEPHONE & TELEGRAPH CO. *v.* TAX COMMISSION OF WASHINGTON.*

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 544. Argued January 13, 1936.—Decided March 2, 1936.

1. Where intrastate and interstate commerce are served by the same instrumentalities of a foreign common-carrier corporation, a state tax on the privilege of doing the local business measured on the gross income from that business will not be held invalid as imposing indirectly an undue burden on the interstate business, in the absence of proof that it actually had such effect. P. 412.
2. No reason appears for holding such a tax upon the local business void where, despite its burden, the local business is conducted at a profit; or where, though conducted at an apparent loss, the corporation wishes to continue the local business because of benefits present or prospective. P. 414.
3. The occupation tax involved in this case is held to be inherently unobjectionable. It is not upon an instrumentality of interstate commerce, nor is it a disguised attempt to discriminate against that commerce; payment is not made a condition to continuance of business; the amount is moderate and not increased because of the interstate business; the tax is not inseparable, although the two branches of the business are so. P. 414.
4. No decision of this Court supports the proposition that an occupation tax upon local business, otherwise valid, must in such cases be held void merely because the local and interstate branches are for some reason inseparable. P. 415.
5. The mere fact that an occupation tax on the intrastate business of a railroad increases an operating deficit in that branch of the business while, according to the carrier's allocations, the interstate business is profitable, does not show that the tax is an undue burden on the interstate business. P. 418.
6. The occupation tax, like other taxes and expenses, lessens the benefit derived by interstate commerce from the joint operation with it of the intrastate business of the carrier; but it is not an undue burden on interstate commerce where, as in this case, the

* Together with No. 529, *Northern Pacific Ry. Co.* v. *Washington,* and No. 573, *Great Northern Ry. Co.* v. *Washington,* both on appeal from the Supreme Court of Washington.

advantage to the carrier, and to interstate commerce, of continuing the intrastate business is greatly in excess of the tax. P. 419.

183 Wash. 697, 33, 698; 48 P. (2d) 931, 938, affirmed.

Appeals in three cases from judgments sustaining the validity of state taxes assessed against three foreign corporations, each engaged in both intrastate and interstate business, on the privilege of doing the intrastate business. In No. 544, the Telephone Company sued to enjoin collection. The other two cases were actions by the State to collect the taxes from the two Railway Companies.

Mr. Otto B. Rupp, with whom *Messrs. Maurice McMicken, Alfred J. Schweppe,* and *Alfred Sutro* were on the brief, for Pacific Telephone & Telegraph Co., appellant in No. 544.

It is difficult to make a correct segregation of the property, revenues and expenses of a large telephone and telegraph company. It can only be done on a time use basis—a method approved by this Court. *Lindheimer* v. *Illinois Bell Tel. Co.,* 292 U. S. 151, 155. Using that method, a segregation of the property was made in this case, which resulted in finding that over ninety per cent. of the property would have to be retained if interstate service only was furnished. That property would be subject to a tax burden one and one-half times as great as the total gross amount received by the appellant in the rendition of its interstate telephone and telegraph service. Not only so, but the property would have to be maintained, and, even if maintained, would depreciate. In addition, appellant would have to employ and pay operators, superintendents, accountants, agents and officers, and purchase power to operate the plant.

Moreover, as a matter of law, appellant cannot withdraw from its intrastate business without also abandoning its interstate business.

It follows that the tax sought to be imposed by the Act, while ostensibly levied for the privilege of doing an intrastate business only, is in effect a tax for the privilege of doing both kinds of business.

Discussing: *Interstate Busses* v. *Holyoke Street Ry. Co.*, 273 U. S. 45; *Sprout* v. *South Bend,* 277 U. S. 163; *East Ohio Tax Co.* v. *Tax Commission,* 283 U. S. 465, 470; *Cooney* v. *Mountain States Telephone Co.*, 294 U. S. 384.

To condition appellant's right to do an intrastate business is also to condition its right to do an interstate business; and that last right is just as much conditioned if the condition be a tax measured by gross intrastate revenues as if the condition were a tax measured by the number of wagons or cars or telephone instruments. See *Crutcher* v. *Kentucky,* 141 U. S. 47; *International Textbook Co.* v. *Pigg,* 217 U. S. 91; *Western Union* v. *Pendleton,* 122 U. S. 347; *Western Union* v. *Kansas,* 216 U. S. 1, 26.

Mr. Lorenzo B. da Ponte, with whom *Mr. Dennis F. Lyons* was on the brief, for Northern Pacific Ry. Co., appellant in No. 529.

Appellant cannot abandon its local business while continuing its interstate business.

While a State may require payment of an occupation tax by one engaged in both intrastate and interstate commerce, the exaction, in order to be valid under the commerce clause, must be solely on account of the intrastate business done and the party taxed must be free in law and fact to withdraw from the intrastate business without withdrawing also from the interstate. *Pullman Co.* v. *Adams,* 189 U. S. 420; *Crutcher* v. *Kentucky,* 141 U. S. 47; *Cooney* v. *Mountain States Telephone Co.*, 294 U. S. 384; *Northern Express Co.* v. *State,* 76 Wash. 636; *Great

Northern v. *State,* 147 Wash. 630; *Allen* v. *Pullman Co.,* 191 U. S. 171; *Western Union* v. *Kansas,* 216 U. S. 1; *Barrett* v. *New York,* 232 U. S. 14; *Bowman* v. *Continental Oil Co.,* 256 U. S. 642; *Interstate Busses* v. *Holyoke Street Ry. Co.,* 273 U. S. 45; *Railroad Commission* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563; *Colorado* v. *United States,* 271 U. S. 153; *Sprout* v. *South Bend,* 277 U. S. 163; *East Ohio Gas Co.* v. *Tax Commission,* 283 U. S. 465; *California* v. *C. P. R. Co.,* 127 U. S. 1; *Great Northern* v. *Minnesota,* 278 U. S. 503. Distinguishing: *Ohio Tax Cases,* 232 U. S. 576; *Kansas City, Ft. S. & M. Ry. Co.* v. *Botkin,* 240 U. S. 227; *St. Louis S. W. Ry. Co.* v. *Arkansas,* 235 U. S. 350; *Cudahy Packing Co.* v. *Minnesota,* 246 U. S. 450.

The intrastate business was conducted at a loss which must be made up from net income from interstate business and business done in other States. Appellant cannot increase many intrastate rates because of competition of other kinds of transportation, and for economic reasons, nor can it do so under the laws of the State without the consent of the Department of Public Service. Appellant has applied for an increase of intrastate rates, but the application was denied. Appellant, as a practical matter, has been unable to increase its revenue from intrastate business, and the Superior Court finds that it has done all it can but without success.

The obligation of intrastate business under the Transportation Act, 1920, to contribute a just proportion of operating expense, including return on value of property, is declared in *Railroad Commission* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563. Whether the burden on interstate commerce be due to inadequate intrastate rates, excessive taxation, excessive expenditures in the local interest, or otherwise, is without legal significance. Cf. *Colorado* v. *United States,* 271 U. S. 153; *Smyth* v. *Ames,* 169 U. S.

466. Even *ad valorem* taxation, measured by a percentage of gross revenue, is subject to restraint of the commerce clause. *Southern Ry. Co.* v. *Kentucky,* 274 U. S. 76. Certainly, no value inheres in the so-called privilege of being compelled to do intrastate business at a loss. And even so, the property is otherwise taxed as a going concern. *Postal Telegraph Co.* v. *Richmond,* 249 U. S. 252.

As the tax falls on income earned outside the State, there is a violation of the due process clause. *Western Union* v. *Kansas,* 216 U. S. 1; *Ludwig* v. *Western Union,* 216 U. S. 146; *Fargo* v. *Hart,* 193 U. S. 490; *Wallace* v. *Hines,* 253 U. S. 56; *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203; *Shaffer* v. *Carter,* 252 U. S. 37. Not only is there no fixed right of compensation payable at the time of taking, but compensation will never be received because increased rates, if obtained, will not apply retroactively.

Mr. Thomas Balmer, with whom *Messrs. F. G. Dorety* and *Edwin C. Matthias* were on the brief, for Great Northern Ry. Co., appellant in No. 573.

Appellant cannot withdraw from its intrastate business in Washington and at the same time continue its interstate business, either as a matter of law, or as a matter of fact. Therefore, under the decisions of this Court, the tax is a burden upon, and a regulation of, interstate commerce, in violation of Art. I, § 8 of the Constitution.

Income from intrastate business is essential to appellant's existence as a carrier of interstate commerce. Abandonment of its intrastate business would have resulted in a loss in the year 1933 of $2,179,760 and a saving of not more than 14% of that amount. This is due to the fact that even though local service were discontinued it would be impossible to make much reduction in train service. In order to continue interstate service, appellant would have to make a greater increase in its rates and fares than interstate commerce could bear.

As the amount of the tax, if valid, is a matter of state discretion, an essential instrumentality of interstate commerce may be destroyed by the State. This is made more apparent when we consider that, if the State of Washington can impose such a tax, all of the States through which appellant's line of railroad is constructed may do likewise.

Congress has so taken possession of the local business, in so far as such business has a direct relation to interstate business, that there is not room for state power to license local business as a privilege which may be granted or denied at the will of the State, nor to take any action whatever which will disable or hamper the carrier in the performance of its duty to maintain an interstate system of transportation and economically and efficiently serve interstate commerce at reasonable rates.

It is therefore obvious that the exaction of a tax by the State for the privilege of carrying on local commerce is a direct burden on, and a regulation of, interstate commerce, where, as here, both classes of commerce are carried over the same lines by the same employees, in the same trains, and by the use of the same instrumentalities, and the interstate business is absolutely dependent for its efficient and economical transaction upon the local business. Even if there could have been a doubt upon this point prior to the enactment of the Transportation Act, there can be none now, in view of the provisions of that Act, and there is therefore controlling reason for the strict application of the rule invoked at the beginning of this argument, in view of the amendments and additions to the Interstate Commerce Act by the Transportation Act of 1920. *Railroad Commission* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563; *Colorado* v. *United States,* 271 U. S. 153; *New York* v. *United States,* 257 U. S. 591; *Dayton-Goose*

Creek R. Co. v. *United States,* 263 U. S. 456; *Atlantic Coast Line R. Co.* v. *Daughton,* 262 U. S. 413.

While this Court has always held that *ad valorem* taxes may be imposed upon property used in interstate commerce, it has likewise always held that an excise or license tax which must be paid out of the receipts from interstate commerce is a burden on such commerce.

Appellant's answer alleges, and both courts below have found, that appellant's intrastate business was conducted at a loss during the year 1933, and that the tax in question would have to be paid out of appellant's earnings from interstate and foreign commerce and from the income from its property located outside the State of Washington.

The tax is not rendered constitutional by the fact that appellant did not secure permission to raise intrastate rates which, due to competitive and economic conditions, cannot be raised.

The following authorities point to the invalidity of the statute under the Fourteenth Amendment: *Western Union* v. *Kansas,* 216 U. S. 1; *Ludwig* v. *Western Union,* 216 U. S. 146; *Fargo* v. *Hart,* 193 U. S. 490; *Wallace* v. *Hines,* 253 U. S. 66; *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203; *Shaffer* v. *Carter,* 252 U. S. 37.

The tax is not rendered constitutional by reduction of *ad valorem* taxes.

Mr. R. G. Sharpe, Assistant Attorney General of Washington, and *Mr. Walter L. Baumgartner,* with whom *Mr. G. W. Hamilton,* Attorney General, was on the brief, for appellees.

By leave of Court, *Messrs. A. C. Van Soelen* and *Walter L. Baumgartner* filed a brief on behalf of the City of Seattle, as *amicus curiae,* urging affirmance of the judgment below.

Mr. Justice Brandeis delivered the opinion of the Court.

The State of Washington laid upon practically all persons engaged in intrastate business an occupation tax effective August 1, 1933, to continue for twenty-four months. The tax is measured by a percentage of the gross income solely of that business; and, as construed, purports not to tax the privilege of doing interstate business. The rate for telephone companies is 3 per cent; for railroads, 1½ per cent. Laws of Washington, 1933, c. 191. No. 544 is a suit by Pacific Telephone & Telegraph Company against the Tax Commission to enjoin proceedings to enforce the tax. No. 573 is an action by the State against Great Northern Railway to collect the tax for the period ending December 31, 1933. No. 529 is a like action against Northern Pacific Railway. Each company is a foreign corporation. The cases are here on appeals from the Supreme Court of the State and were argued together. Each presents the question whether the statute, as applied, is obnoxious to the commerce clause of the Federal Constitution. The railroads claim also that the statute violates the due process clause by taxing income earned outside the State. In each case the trial court held the statute void. The Supreme Court sustained its validity in all the cases. 183 Wash. 697, 698, 33; 48 P. (2d) 931, 938.

None of the companies rests its challenge of the statute primarily upon proof that the tax, in fact, burdens interstate commerce. The Telephone Company relies wholly, and the railroads mainly, upon an alleged rule of law— the proposition that when a foreign corporation engages within a State in both local and interstate commerce, an occupation tax laid upon the local business is necessarily void, unless the corporation is free in law and in fact to withdraw therefrom without discontinuing its interstate business. They urge that the alleged rule applies to them, claiming that inability to abandon the local business without also discontinuing the interstate is imposed by state and federal law, and arises also from practical considerations. They insist that the rule applies although the tax is not such in character or amount as to induce withdrawal from the local business. The railroads contend further that the tax, in fact, burdens interstate commerce.

The trial court found, and the Supreme Court assumed, that practical considerations would prevent either of the railroads from abandoning its intrastate business without also withdrawing from the interstate. And this was assumed to be true of the Telephone Company. The operations of the two classes of business are inextricably intertwined. In the main, they are carried on at the same time, by the same employees, with the same plant, equipment, and facilities. The interstate business is found profitable when carried on in connection with the local, because the expenses of the joint operation are, under applicable accounting rules, apportioned between the two branches of the business. Withdrawal from local business would reduce by but a small percentage each company's cost of operation. The remaining unavoidable expense would be heavier than the interstate business could bear under the existing rates or under any conceivable increase. Moreover, the trial court ruled, and the Supreme Court assumed, that the governing law would not permit these corporations to withdraw from local business without discontinuing also the interstate.

The State denies the existence of the alleged rule of law that an occupation tax upon intrastate business is necessarily void, if the corporation is not free to withdraw from the local business without discontinuing also the interstate. There is no denial that a tax upon the privilege of engaging in the local business is void if, by reason of its character or amount, it, in fact, imposes a direct burden upon interstate commerce. The State insists that this tax does not do so.

First. Where interstate and intrastate commerce are served by the same instrumentalities of a common carrier, it is possible that a regulation of the State applied directly to the intrastate business only may in fact burden the interstate. Where this occurs Congress may remove the burden, since state regulation must yield to its paramount power to assure adequate interstate service. That power is comprehensive; and has, under appropriate legislation, been extensively exercised. Through the Interstate Commerce Commission, Congress has commanded the raising of local rates where they were so low that the intrastate traffic did not bear its fair share of the cost of the service. It has prevented state authorities from compelling the erection of a union station so expensive as unduly to deplete the financial resources of the carrier. It has prevented the construction of an intrastate branch line which would have depleted the financial resources of the builder or of another interstate carrier. It has curtailed existing local service and authorized abandonment of a controlled line, despite the carrier's contract with the State to maintain the line. Such control over intrastate commerce exists because it is a necessary incident of freeing interstate commerce from burdens, obstructions or discrimination. It has been exerted wherever Congress deemed that the State's power to regulate and promote intrastate commerce is exercised in such a way as to prejudice the interstate. *Colorado* v. *United States,* 271 U. S. 153, 164–166.

Similarly, where interstate and intrastate commerce are served by the same instrumentalities of the carrier, it is possible that a tax applied directly to the privilege of doing the local business may in fact burden the related interstate business. While a State may tax the privilege of engaging in local business, as it may regulate local rates, it may not tax the privilege of engaging in interstate commerce. Taxation being one of the forms of regulation, *Lehigh Valley R. Co.* v. *Pennsylvania,* 145 U. S. 192, 200, any tax laid directly upon the privilege is void even in the absence of legislation by Congress or a finding of prejudice. As local rates may be so low, and the circumstances such, that these rates must be raised in order to protect interstate commerce, so a tax on the privilege of engaging in local business may conceivably be so high, and the circumstances such, as to require lowering of the tax in order to protect interstate commerce. But the high tax on the local privilege, like the low rate for the local traffic, if it burdens interstate commerce at all, does so by reason of its consequences. This being so, a tax upon the local privilege only must be held valid in the absence of proof that it imposes an undue burden upon interstate commerce. "The question of constitutional validity is not to be determined by artificial standards." See *Gregg Dyeing Co.* v. *Query,* 286 U. S. 472, 480. The alleged indirect tax must be judged by its practical operation.

In its effect upon interstate commerce an occupation tax solely upon local business does not differ from an *ad valorem* property tax upon tangible property used exclusively in such business. Each increases the necessary cost of doing the local business. Either might conceivably be so large as to render the local business immediately unprofitable. A common carrier cannot be compelled to carry on business indefinitely at a loss. *Brooks-Scanlon Co.* v. *Railroad Commission,* 251 U. S. 396; *Bullock* v. *Florida,* 254 U. S. 513, 520–521; *Railroad Commission* v. *Eastern Texas R. Co.,* 264 U. S. 79, 85. If, because of such loss, a corporation, seeing no prospect of betterment, wished to discontinue its local business and were prevented by law from doing so unless it discontinued also its interstate business, the law might be held void as imposing an unconstitutional condition upon the privilege of engaging in interstate commerce. Compare *Pullman Co.* v. *Adams,* 189 U. S. 420. If it was the tax which caused the unprofitableness of the local business and, consequently, the desire to discontinue it, the tax would then appear as a direct burden on interstate commerce. Compare *Postal Telegraph-Cable Co.* v. *Richmond,* 249 U. S. 252, 258; *Postal Telegraph-Cable Co.* v. *Fremont,* 255 U. S. 124, 127. But no reason has been suggested why a tax upon the local business should be held void, if despite its burden, the local business is conducted at a profit; or if, although conducted at an apparent loss, the corporation desires to continue it because of benefits present or prospective. Compare *Ohio Tax Cases,* 232 U. S. 576, 590.

Second. Inherently the tax challenged is unobjectionable. It is not upon an instrumentality of interstate commerce; it is moderate in amount; and is not a disguised attempt to discriminate against interstate commerce. As the collection is being made by an action at law, the tax is not open to the objection raised in *Western Union Telegraph Co.* v. *Massachusetts,* 125 U. S. 530, 554, that payment may be made a condition of continuing to do business. Compare *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113, 119. The tax is "imposed solely on account of the intrastate business"; and it appears "that the amount exacted is not increased because of the interstate business done." Compare *East Ohio Gas Co.* v. *Tax Commission,* 283 U. S. 465, 470. Although the two branches of the business of the companies are inseparable, the tax is not laid inseparably upon both. Thus, it is not open to the objection held fatal in *Leloup* v. *Mobile,* 127 U. S. 640, and *Cooney* v. *Mountain States Telephone & Telegraph Co.,* 294 U. S. 384. "Certainly, one cannot avoid a tax upon a taxable business by also engaging in a non-taxable business." *Raley & Bros.* v. *Richardson,* 264 U. S. 157, 159.

The distinction drawn by those cases between an occupation tax valid because laid only on local business and one void because laid inseparably upon the whole business, is clearly shown in the discussion of the two classes of taxes involved in *Bowman* v. *Continental Oil Co.*, 256 U. S. 642, 646–647. Taxes for the privilege of doing local business measured by the gross income of such business have frequently been laid upon concerns engaged in both intrastate and interstate business; and have, for half a century, been sustained without enquiry whether withdrawal from the local business would compel discontinuance of the interstate. That an occupation tax upon a foreign telegraph company measured by earnings from its local business is valid, was indicated as early as *Telegraph Co.* v. *Texas,* 105 U. S. 460, 464–465; and was definitely held in *Ratterman* v. *Western Union Telegraph Co.*, 127 U. S. 411, which has been repeatedly cited with approval in cases involving interstate railroads and telegraph companies.[1] Similarly, in *Southern Ry. Co.* v. *Watts,* 260 U. S. 519, 529–530, a so-called franchise tax for the privilege of doing intrastate business, measured by a percentage of the value of property subject also to an *ad valorem* tax, was sustained as against both foreign and domestic railroads.

No decision of this Court lends support to the proposition that an occupation tax upon local business, otherwise valid, must be held void merely because the local and interstate branches are for some reason inseparable. In

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[1] *Western Union Telegraph Co.* v. *Pennsylvania,* 128 U. S. 39, 40; *Western Union Telegraph Co.* v. *Alabama,* 132 U. S. 472, 476–477; *Lehigh Valley R. Co.* v. *Pennsylvania,* 145 U. S. 192, 201; *Postal Telegraph Cable Co.* v. *Charleston,* 153 U. S. 692, 697; *Postal Telegraph Cable Co.* v. *Adams,* 155 U. S. 688, 698. See also *Pacific Express Co.* v. *Seibert,* 142 U. S. 339, 349–350; *Cornell Steamboat Co.* v. *Sohmer,* 235 U. S. 549; *Ohio Tax Cases,* 232 U. S. 576, 591–593. Compare *Osborne* v. *Florida,* 164 U. S. 650; *Kehrer* v. *Stewart,* 197 U. S. 60.

cases relied upon by appellants there are expressions which may seem to support that contention. But in none of those cases was the challenged tax measured by the gross income of the intrastate business only. In some it was laid inseparably upon the privilege of doing both interstate and intrastate business.[2] In some the case was suggested of a compulsory local service which, coupled with a tax, might burden interstate commerce.[3] In *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1, and *Pullman Co.* v. *Kansas,* 216 U. S. 56, the question presented, and on which the Court divided, was whether payment of a confessedly unconstitutional tax could be made a condition of permitting a foreign corporation to exercise the privilege of continuing to do intrastate business within the State.[4] It is true that in *Sprout* v. *South Bend,* 277 U. S. 163, 171, the Court, when reciting the essentials of a valid license fee for doing local business, said that it must appear "that the person taxed could discontinue the intrastate business without withdrawing also from the interstate." [5] But that statement was made in discussing the validity of a flat bus license fee, prescribed by an ordinance which made no distinction between busses en-

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[2] *Allen* v. *Pullman Car Co.,* 191 U. S. 171, 179; *Galveston, H. & S. A. Ry. Co.* v. *Texas,* 210 U. S. 217; *Adams Express Co.* v. *New York City,* 232 U. S. 14.

[3] *Pullman Co.* v. *Adams,* 189 U. S. 420; *Allen* v. *Pullman Car Co.,* 191 U. S. 171, 182–183; *Postal Telegraph-Cable Co.* v. *Richmond,* 249 U. S. 252, 258; *Postal Telegraph-Cable Co.* v. *Fremont,* 255 U. S. 124, 127.

[4] The statute was held, or assumed, to be inherently unconstitutional, because it was measured by a percentage of the authorized capital of the companies and was, therefore, a tax upon all their property without and within the State.

[5] See *East Ohio Gas Co.* v. *Tax Commission,* 283 U. S. 465, 470; *Cooney* v. *Mountain States Telephone & Telegraph Co.,* 294 U. S. 384, 393, where the passage was repeated. Compare *Interstate Busses Corp.* v. *Holyoke Street Ry. Co.,* 273 U. S. 45, 51.

gaged exclusively in interstate commerce, those engaged exclusively in intrastate commerce, and those engaged in both classes of commerce; and it must be read in that context. The license fee was held void, because Sprout, who was engaged in both classes of commerce, could not escape payment of the tax by confining himself to interstate business. The cases cited by the Court in that connection were of the same character.[6]

Third. The Telephone Company relies wholly upon the alleged rule of law. It makes no claim that the tax laid upon it in fact burdens interstate commerce. Nor could it do so. The company's business, both the intrastate and the interstate, was conducted at a profit during the tax period. The net operating income from the local business for the year 1933 was $781,338.44, after deducting taxes assignable thereto; the net operating income from the interstate business was $118,225.74.[7] The tax for the five months ending December 31, 1933, is apparently $112,251.31. Not only is the intrastate business (even with the addition of this tax) no burden; it is that branch of the business which makes it financially possible to carry on the interstate. The gross operating revenues from interstate business were in 1933 only $932,424.74, while the total operating expenses of the company within the State were $7,649,933.89. The greater part of these expenses involved plant, equipment facilities, and employees' services indispensable to the conduct of the in-

[6] *Leloup* v. *Mobile,* 127 U. S. 640; *Crutcher* v. *Kentucky,* 141 U. S. 47, 58; *Adams Express Co.* v. *New York City,* 232 U. S. 14, 30; *Bowman* v. *Continental Oil Co.,* 256 U. S. 642, 647. Compare *Williams* v. *Talladega,* 226 U. S. 404, 417; *Postal Telegraph-Cable Co.* v. *Richmond,* 249 U. S. 252.

[7] The gross operating revenues from the intrastate business were $9,317,598.94; the net, $2,221,631.73. The net operating revenues from the interstate business were $282,728.59. Here, as elsewhere, no account is taken of a return on the cost or value of the property.

terstate business: of the total expenses, $7,009,241.85 was charged to the intrastate business and only $640,-692.04 to the interstate. As the statute is valid in the absence of a showing that the tax in fact directly burdened interstate commerce, the judgment against the Telephone Company is affirmed.

Fourth. The Great Northern, besides invoking the alleged rule of law, claims that in fact the tax upon it directly burdens interstate commerce. The amount for the five months ending December 31, 1933, is $12,988.35. To prove that this tax burdens interstate commerce, it presented accounts which, as the trial court found, show that in the year 1933 the intrastate business resulted in a net operating deficit of $99,269. But, even if the items in the account are correct, it does not follow necessarily that the local business (with the tax upon it) directly burdens interstate commerce. The contrary appears. The gross operating revenues from the intrastate business were $2,179,760. To it were charged $1,730,361 of the company's operating expenses, leaving net operating revenues amounting to $449,399. The deficit of $99,269 is arrived at by deducting from these net revenues both railway tax accruals to the amount of $335,247,[8] and equipment and joint facility rentals to the amount of $213,421. It is true that, according to this allocation of the joint expenses and charges, it appears that the intrastate business was carried on at a small loss. But it is conceded that withdrawal from intrastate business and carrying on the interstate alone would have subjected the company to a very heavy loss. As the trial court found: "The net result of abandonment by defendant of its intrastate passenger and freight business in order to escape the tax imposed by said Chapter 191, Laws of 1933, would be the loss of $2,179,760 [the whole intrastate gross operating

[8] *Ad valorem* taxes paid in Washington in 1933 totalled $1,238,385.

revenues], and the saving of not more than 14% of that amount."

It is said that the deficit from the intrastate branch of the business was paid from profits of the interstate branch; and it is asserted that, as the tax would increase the amount of the deficit, it directly burdens interstate commerce. But this does not follow. Every tax, and every other charge or item of expense, reduces to that extent the profit which otherwise would be made from doing business. This tax lessens the benefit derived by interstate commerce from the joint operation with it of the intrastate business; but because of the advantage to the company (and to interstate commerce) in continuing to do the intrastate business, neither the tax of $12,988.35 here in question, nor the other taxes allocated to the local business, would induce the company to withdraw from the local business, even if it were permitted by law to do so. There is no more reason for saying that the $12,988.35, because an occupation tax, directly burdens interstate commerce, since it contributes to the operating deficit, than that the $335,247 taxes paid by local business under other statutes confessedly valid, do so. Since this tax is laid upon intrastate commerce only and is not shown to be a direct burden upon interstate commerce, or to be otherwise objectionable, the judgment against the Great Northern is affirmed. Compare *Postal Telegraph-Cable Co.* v. *Richmond,* 249 U. S. 252, 257, 261; *Postal Telegraph-Cable Co.* v. *Fremont,* 255 U. S. 124; *Williams* v. *Talladega,* 226 U. S. 404, 417.

Fifth. The Northern Pacific, besides invoking the alleged rule of law, claims also that the tax upon it directly burdens interstate commerce. The relevant facts are similar to those concerning the Great Northern; and the same rules of law govern both. The amount of the tax for the five months ending December 31, 1933, is $36,116.22. To prove that this tax in fact burdens interstate commerce, the company presented accounts which, as the trial court found, show that in the year 1933, the intrastate business resulted in a net operating deficit of $192,507. On the other hand to have abandoned the intrastate business while operating the interstate would have cost the company gross operating revenues of $5,271,893. Since the occupation tax challenged is not shown to be a direct burden upon the company's interstate business, the judgment against it is affirmed.

What has been said above disposes of the contention of the railroads that the statute violated the due process clause. It also renders unnecessary consideration of the additional reasons urged by the State in support of the judgments of its Supreme Court. On these we express no opinion.

Affirmed.

LEAHY *v.* STATE TREASURER OF OKLAHOMA ET AL.

CERTIORARI TO THE SUPREME COURT OF OKLAHOMA.

No. 599. Submitted February 11, 1936.—Decided March 2, 1936.

Decided, upon the authority of *Choteau* v. *Burnet,* 283 U. S. 691, that an income tax, by the State of Oklahoma, on moneys received by a competent member of the Osage Tribe of Indians as his share of income from mineral resources held by the United States for the Tribe, is not void as a tax upon a federal instrumentality. 173 Okla. 614; 49 P. (2d) 570, affirmed.

CERTIORARI, 296 U. S. 572, to review a judgment against the present petitioner in his action to recover money exacted of him as income taxes.

Mr. Charles Stuart Macdonald, with whom *Mr. G. B. Fulton* was on the brief, submitted for petitioner.

Messrs. C. D. Cund and *C. W. King* submitted for respondents.

Mr. Justice Brandeis delivered the opinion of the Court.

Leahy brought this action in a court of Oklahoma against the State Treasurer and others to recover $11.99 paid under protest as state income tax. He is a duly enrolled member of the Osage Tribe of Indians, and has long held a certificate of competency. As such member he is entitled to receive, from time to time, his pro rata share of the income of the restricted mineral resources of the Tribe held by the United States for the Tribe under the Act of June 28, 1906, c. 3572, 34 Stat. 539, and later legislation. The tax challenged is upon such income paid to him. Leahy claims that it is void because laid by the State upon a federal instrumentality. The trial court overruled the contention and entered judgment for the defendants. On the authority of *Choteau* v. *Burnet,* 283 U. S. 691, its action was affirmed by the Supreme Court of the State, three judges dissenting. 173 Okla. 614; 49 P. (2d) 570. We granted certiorari because of the constitutional question presented.

The facts are substantially the same as those presented in *Choteau* v. *Burnet, supra,* which upheld a federal income tax on a like payment. The applicable statutes and decisions are discussed there. As Leahy was entitled to have the income paid to him and was free to use it as he saw fit, no reason appears why it should not be taxable also by the State.

Affirmed.

BAYSIDE FISH FLOUR CO. *v.* GENTRY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 2. Argued February 12, 1936.—Decided March 2, 1936.

1. The Fish and Game Code of California, for the purpose of conserving for food the fish found within the waters of the State, regulates the local processing of sardines, whether taken within those waters or imported. As applied to a manufacturing company treating only sardines brought in from the high seas and disposing of its products only in interstate and foreign commerce, *held:*

   (1) That the regulation is not invalid under the commerce clause of the Constitution, since in purpose and in direct operation it is confined to a merely local activity, and if it affects interstate or foreign commerce the result is purely incidental. *Foster Packing Co.* v. *Haydel,* 278 U. S. 1, distinguished. P. 425.

   (2) To the extent that the Act deals with the use or treatment of sardines brought into the State, they being indistinguishable from those taken within the three mile limit, it is justifiable upon the ground that it operates as a shield against the covert depletion of the local supply, and thus tends to effectuate the policy of the law by rendering evasion of it less easy. P. 426.

   (3) The regulation is within the state police power. *Id.*

   (4) It is not void under the due process clause of the Fourteenth Amendment because indirectly it is a deterrent to the exercise of the right to contract for the purchase of sardines taken from the high seas and brought into the State. P. 427.

2. A statute does not become unconstitutional merely because it has created a condition of affairs which renders the making of a related contract, lawful in itself, ineffective. *Id.*

3. State regulations bearing a reasonable relation to an object within the state police power—e. g., the conservation of the State's fish supply—cannot be declared invalid because a court may regard them as ineffectual, or harsh in particular instances or as aids to an objectionable policy. *Id.*

4. The differences between a process of canning the edible portions of fish in their original form for food, and a more rapid process of reducing them to a flour or meal which may be readily diverted to other purposes than human consumption, are enough to justify,

consistently with equal protection, restrictions of the latter process not imposed upon the former, in regulations adopted by a State to conserve her fish supply for food. P. 428.

8 F. Supp. 67, affirmed.

Appeal from a decree which dismissed a bill to enjoin the above named appellees, officers of California, from enforcing certain portions of the State Fish and Game Code.

Mr. Walter Slack argued the cause and *Mr. Roy Daily* filed a brief for appellant.

Mr. Darwin Bryan for appellees.

Mr. Justice Sutherland delivered the opinion of the Court.

This is a suit brought to enjoin appellees, officers of the State of California, from enforcing certain provisions of the State Fish and Game Code (Statutes of 1933, pp. 394, 484 *et seq.*) alleged to contravene the commerce clause, and the due process and equal protection clauses of the Fourteenth Amendment, of the Federal Constitution. The court below sustained a motion to dismiss the bill, on the ground that it did not state facts sufficient to constitute a cause of action or to entitle appellant to any relief by injunction or otherwise. 8 F. Supp. 67. We are of opinion that this decree must be affirmed.

Appellant is a California corporation engaged in the business of manufacturing, from the meat of sardines, fish flour for human consumption. The sardines are caught by fishermen upon the high seas beyond the three-mile limit to which the jurisdiction of the state extends, sold to appellant, and brought into the state and there reduced to fish flour at appellant's reduction plants. The fish flour is made with the expectation of selling and shipping it in interstate and foreign commerce; and it is so sold and shipped and is used as food in the United States and foreign countries. Sardines are a migratory fish found in great numbers in the Pacific Ocean beyond the three-mile limit as well as within that limit. So far as known, they spawn upon the open seas. In the process of reducing the fish, appellant uses a portion for producing flour for human consumption, the remainder being converted into a meal used for chicken feed, and into fertilizer, fish oil and other nonedible substances.

Sardines caught in the same way are also purchased by packers, who clean, cook, and can or preserve them for human food, using in that process only a part of the fish and utilizing the remainder for reduction into nonedible products.

The provisions of the Fish and Game Code which appellees threaten to enforce against appellant and those necessary to be considered in that connection are copied in the margin.[1] The bill alleges that appellees will pre-

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[1] Sec. 1010. Every person must procure a license for each plant or place of business to engage in the business of:

(a) Canning, curing, preserving or packing fish, taken from the waters of this State or brought into this State in a fresh condition.

(b) Manufacturing fish scrap, fish meal, fish oil, chicken feed or fertilizer from fish or fish offal.

. . . . .

Sec. 1060. As used in this article:

(a) "Reduction plant" means any plant used in the reduction of fish into fish flour, fish meal, fish scrap, fertilizer, fish oil or other fishery products or by-products.

(b) "Packer" means any person canning fish or preserving fish by the common methods of drying, salting, pickling or smoking.

(c) "Fish offal" means the heads, viscera, and other parts of fish taken off in preparing for canning or preserving.

. . . . .

Sec. 1064. It is unlawful to cause or permit any deterioration or waste of any fish taken in the waters of this State, or brought into this State, or to take, receive or agree to receive more fish than can vent appellant from manufacturing fish flour in its reduction plants while at the same time permitting packers to use sardines, taken from the waters of the state or those outside, in their packing plants.

First. There is nothing in the state act to suggest a purpose to interfere with interstate commerce. It in no way limits or regulates or attempts to limit or regulate the

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be used without deterioration, waste or spoilage. Except as allowed by this code, it is unlawful to use any fish or part thereof, except fish offal, in a reduction plant or by a reduction process.

Sec. 1065. Sardines may be taken for use in a reduction plant, or by a packer, only in accordance with the provisions of this article, as follows: In districts 4, 4¾, 18, 19, 20, 20A, and 21 between November 1 and March 31; elsewhere in the State between August 1 and February 15. This section does not prohibit the taking of sardines for the purpose of salting, curing, smoking or drying or for the purpose of packing in cans commonly known as quarter-pound or square cans less than 10 ounces in net weight; provided, that in a ten-ounce can, fish of a size of not less than eight fish to the can may be used, and there shall be added to the commonly known quarter-pound can not less than one ounce of olive oil or a commercial salad oil, and a proportionately larger amount of such oil to the larger sizes of cans.

Sec. 1066. Any person engaged in canning sardines may take and use in a reduction plant thirty-two and one-half per cent of the amount of sardines actually received at such canning plant during each calendar month.

. . . . .

Sec. 1068. The commission may grant a revocable permit, subject to such restrictions, rules or regulations as the commission may prescribe, to take and use fish by a reduction or extraction process. No reduction of fish shall be permitted which may tend to deplete the species, or result in waste or deterioration of fish.

. . . . .

Sec. 1070. Persons engaged in preserving sardines by the common methods of drying, salting, smoking or pickling may use in a reduction plant or by reduction process such sardines, or fish delivered mixed with sardines, as are unfit for drying, salting, smoking or pickling, which are not intentionally taken into the plant in a condition unfit for processing for human consumption.

movement of the sardines from outside into the state, or the movement of the manufactured product from the state to the outside. The act regulates only the manufacture within the state. Its direct operation, intended and actual, is wholly local. Whether the product is consumed within the borders of the state or shipped outside in interstate or foreign commerce are matters with which the act is not concerned. The plain purpose of the measure simply is to conserve for food the fish found within the waters of the state. Over these fish, and over state wild game generally, the state has supreme control. Sardines taken from waters within the jurisdiction of the state and those taken from without are, of course, indistinguishable; and to the extent that the act deals with the use or treatment of fish brought into the state from the outside, its legal justification rests upon the ground that it operates as a shield against the covert depletion of the local supply, and thus tends to effectuate the policy of the law by rendering evasion of it less easy. *Silz* v. *Hesterberg,* 211 U. S. 31, 39–40.

If the enforcement of the act affects interstate or foreign commerce, that result is purely incidental, indirect, and beyond the purposes of the legislation. The provisions of the act assailed are well within the police power of the state, as frequently decided by this and other courts. It is unnecessary to do more than refer to *Silz* v. *Hesterberg, supra,* pp. 39 *et seq.,* and *Van Camp Sea Food Co.* v. *Department of Natural Resources,* 30 F. (2d) 111, where the decisions are collected.

Appellant places great reliance upon *Foster-Fountain Packing Co.* v. *Haydel,* 278 U. S. 1. There an act of the State of Louisiana forbade exportation of shrimp from which the heads and hulls or shells had not been removed. The ostensible purpose of the act was to conserve the raw shells for local use. The bill and affidavits in support of it, however, demonstrated, we held, that this purpose was feigned, and that the real purpose was to prevent the shrimp from being moved as theretofore from Louisiana to a point in Mississippi, where they were packed or canned and sold in interstate commerce, and thus through commercial necessity to bring about the removal of the packing and canning industries from Mississippi to Louisiana. The Louisiana act authorized every part of the shrimp to be shipped and sold in interstate commerce. We held that the state might have retained the shrimp for use and consumption therein; but, having fully permitted shipment and sale outside the state, those taking the shrimp under the authority of the act became entitled to the rights of private ownership and the protection of the commerce clause. It is plain that the decision has no application to the case under review.

Second. The point that the provisions of the Fish and Game Code deprive appellant of its property without due process of law seems to be based upon the contention that appellant is denied the right to contract for the purchase of sardines taken from the high seas and brought into the state. Assuming the point to have been properly raised below, which is by no means clear, it is without merit. Undoubtedly the right to contract, with some exceptions, is a liberty which falls within the protection of the due process clause of the Fourteenth Amendment. *Adkins* v. *Children's Hospital,* 261 U. S. 525, 545–546, and cases cited. Plainly enough, however, that right is not directly interfered with by the legislative provisions in question. Nor, because they may operate indirectly as a deterrent, do they, in the sense of the Constitution, deprive appellant of the liberty of contract. A statute does not become unconstitutional merely because it has created a condition of affairs which renders the making of a related contract, lawful in itself, ineffective.

These provisions have a reasonable relation to the object of their enactment—namely, the conservation of the fish supply of the state—and we cannot invalidate them because we might think, as appellant in effect urges, that they will fail or have failed of their purpose. *McLean* v. *Arkansas,* 211 U. S. 539, 547–548. Nor can we declare the provisions void because it might seem to us that they enforce an objectionable policy or inflict hardship in particular instances. *Chicago, B. & Q. R. Co.* v. *Nebraska,* 170 U. S. 57, 77. And see, generally, *Chicago, B. & Q. R. Co.* v. *McGuire,* 219 U. S. 549. "Whether the enactment is wise or unwise," this court said in that case (p. 569), "whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance."

Third. Finally, it is said that the provisions of the state code so discriminate between the business of appellant and that of persons engaged in canning or preserving fish, as to deny appellant the equal protection of the laws. Section 1010, *supra,* requires a license for each plant or place of business to engage in (a) canning, curing, preserving or packing fish, etc., and (b) manufacturing fish scrap, fish meal, fish oil, chicken feed or fertilizer from fish or fish offal. Section 1060 defines "reduction plant" as a plant used in the reduction of fish into fish flour, fish meal, fish scrap, fertilizer, fish oil, or other fishery products or by-products; and defines "packer" as any person canning fish or preserving fish by the common methods of drying, salting, pickling or smoking. Section 1064 is a provision intended to prevent deterioration or waste of fish, and specifically provides that, except as allowed by the Code, it shall be unlawful to use any part of the fish except the offal in a reduction plant or by a reduction process. By § 1065, sardines are allowed to be taken for use in a reduction plant or by a packer only in accordance with certain provisions set forth. By § 1068, the State Fish and Game Commission is authorized to grant a revocable permit "subject to such restrictions, rules or regulations as the commission may prescribe, to take and use fish by a reduction or extraction process. No reduction of fish shall be permitted which may tend to deplete the species, or result in waste or deterioration of fish." No similar limitation is put upon, or similar power conferred in respect of, packers; and it is the resulting classification which appellant contends contravenes the equal protection clause of the Fourteenth Amendment.

It never has been found possible to lay down any infallible or all-inclusive test by the application of which it may be determined whether a given difference between the subjects of legislation is enough to justify the subjection of one and not the other to a particular form of disadvantage. A very large number of decisions have dealt with the matter; and the nearest approach to a definite rule which can be extracted from them is that, while the difference need not be great, the classification must not be arbitrary or capricious, but must bear some just and reasonable relation to the object of the legislation. A particular classification is not invalidated by the Fourteenth Amendment merely because inequality actually results. Every classification of persons or things for regulation by law produces inequality in some degree; but the law is not thereby rendered invalid (*Atchison, T. & S. F. R. Co.* v. *Matthews*, 174 U. S. 96, 106), unless the inequality produced be actually and palpably unreasonable and arbitrary. *Arkansas Natural Gas Co.* v. *Railroad Commission*, 261 U. S. 379, 384, and cases cited.

The purpose of the legislation under consideration is to prevent unnecessary waste, and to conserve for food the fish supply subject to state jurisdiction. See *People*

v. *Monterey Fish Products Co.,* 195 Cal. 548, 557–559. If the legislature was of the view—as evidently it was—that the process of packing on the whole would not interfere with the effectuation of this policy while the process of reduction would do so, unless carefully limited to prevent excessive operations, we are unable to perceive any reason for saying that such view was without reasonable basis. By the process of packing—that is, canning or preserving—fish, the original form of the edible portions of the fish is not destroyed as it is by the process of reduction, by which those portions are broken down into a loose meal or flour. In the latter case it is obvious that the product may be readily diverted to other purposes than human consumption, such as chicken feed, fertilizer, etc. It is equally obvious that such a diversion is not likely to happen in the case of canning or preserving, where the edible portions retain their original solid form. The state also points out that the process of reduction is simple, and the quantity which can be reduced in a given period of time greatly exceeds what can be utilized by packing, which is a much slower and more complicated process. These differences are enough to bring the classification within the permissible range of state power, so far as the equal protection clause of the Fourteenth Amendment is concerned.

We have considered the arguments of appellant tending to a different conclusion than that which we have reached; but at most these arguments do no more than demonstrate that the question is debatable. And, if so, the effect of the action of the state legislature in passing the statute was to decide this debatable question against the view now advanced by appellant; and since we are unable to say that such a determination by the legislature is clearly unfounded, we are precluded from overturning it. *Radice* v. *New York,* 264 U. S. 292, 294.

Decree affirmed.

WHITFIELD v. OHIO.

CERTIORARI TO THE SUPREME COURT OF OHIO.

No. 377. Argued February 7, 1936.—Decided March 2, 1936.

1. In order that federal questions decided by a state appellate court may be reviewable here, it is not necessary that they should have been raised in the state trial court. P. 436.
2. As applied to a citizen of another State, or to a citizen of the United States residing in another State, a state law forbidding sale of convict-made goods does not violate the privileges and immunities clauses of Art. IV, § 2 and the Fourteenth Amendment of the Federal Constitution, if it applies also and equally to the citizens of the State that enacted it. P. 437.
3. A judgment upon an indictment containing several counts, with a verdict of guilty upon each, will be sustained if any count is good, and sufficient in itself to support the judgment. P. 438.
4. A State may classify as an evil the sale of convict-made goods in competition with goods made by free labor and forbid such sales on the open market. P. 439.
5. In view of the Act of Congress of June 19, 1929, 49 U. S. C., § 60, commonly called the Hawes-Cooper Act, the power of a State to forbid sales on the open market of convict-made goods extends to sales in the original packages of goods shipped in from other States. Pp. 438–440.
6. Where goods are shipped from one State to another, fundamentally the interstate transaction ends with delivery; the rule that the consignee may sell, free from state interference, in the original packages is but incidental and is an impediment to state regulation which, in the case of convict-made goods, may be removed by Act of Congress. P. 440.
7. In providing by the Hawes-Cooper Act that convict-made goods transported into any State shall upon arrival be subject to the operation and effect of the laws of such State to the same extent and in the same manner as though such goods had been manufactured in such State and shall not be exempt therefrom by reason of being introduced in the original package, Congress did not delegate power to the States. P. 441.

49 Ohio App. 530, 197 N. E. 605; 129 Oh. St. 543, 196 N. E. 164, affirmed.

Certiorari, 296 U. S. 561, to review a judgment affirming a conviction and sentence on two counts for violation of an Ohio law against sales of convict-made goods. The affirmance in the first instance was by the Ohio Court of Appeals. The Supreme Court of Ohio dismissed a petition in error.

Mr. Wm. Logan Martin, with whom *Messrs. Perry W. Turner* and *Thomas E. Knight, Jr.*, were on the brief, for petitioner.

In forbidding the sale of prison products in Ohio, the law of Ohio is in conflict with the interstate commerce clause in that it imposes a burden on an article of commerce which cannot be denominated an "outlaw of commerce." It is in conflict with the Tenth Amendment in that, not being a police regulation, the law is an attempt on the part of Ohio to impose its own regulations on the Government of Alabama and on the petitioner, the employee and agent of Alabama. Being without constitutional basis, this law is in conflict with the Fourteenth Amendment in that (1) it discriminates against petitioner, who is engaged in the sale of cotton shirts, and in favor of inhabitants of Ohio engaged in a like calling, and (2) deprives him of the right to follow the business of selling the articles forbidden by such law.

The Hawes-Cooper Act of Congress is not a valid exercise of the powers of Congress to regulate interstate commerce. The goods, the movement of which Congress seeks in this instance to regulate, have no harmful quality. The owners of the goods have a right to use the channels of interstate commerce to transport them from Alabama to Ohio, for such use is not a mere privilege to be extended or withdrawn by Congress. The framers of the Constitution and the people adopting it intended that commerce among the States should be free and that neither Congress nor the States should have the power to impose an embargo among the States; the principal purpose of reposing in Congress the power to regulate commerce was to terminate the conflicting laws then existing among the colonies. The right of transportation includes the right of sale.

The purposes of the Hawes-Cooper Act are set out in the report of the Senate Committee which considered the bill. These purposes are two: (a) to terminate the competition between prison labor and free labor, and the competition between the products manufactured in prisons and those manufactured outside prisons, and (b) to reform state prisons in the Nation by terminating the contract method of using the labor of prisoners.

It is fundamental that the police powers of a State cannot be used to secure commercial advantages; that as to commerce the people of the United States are one people; that any commercial regulation attempted by Congress must bear a real or substantial relation to some part of interstate commerce.

It is, therefore, the contention of the petitioner that the combined asserted power of Congress and of the State of Ohio undertakes to achieve an end which is not authorized under the Constitution.

Mr. John W. Bricker, Attorney General of Ohio, and *Mr. Alfred Clum*, with whom *Messrs. Bon Geaslin, Stephen Gobozy, William S. Evatt, Harry B. Hawes*, and *Raymond A. Walsh* were on the brief, for respondent.

By leave of Court, briefs of *amici curiae* were filed by *Mr. John J. Bennett, Jr.*, Attorney General, and *Mr. Henry Epstein*, Solicitor General, on behalf of the State of New York; and by *Mr. Harry H. Peterson*, Attorney General, on behalf of the State of Minnesota, both urging affirmance of the decision of the court below.

Mr. Justice Sutherland delivered the opinion of the Court.

Petitioner was charged in the Municipal Court of Cleveland with a violation of § 2228–1 of the Ohio General Code, adopted March 23, 1933, which provides:

"After January 19, 1934, no goods, wares or merchandise, manufactured or mined wholly or in part in any other state by convicts or prisoners, except convicts or prisoners on parole or probation, shall be sold on the open market in this state."

By § 2228–2, a violation of this provision subjects the offender to a fine of not less than $25 nor more than $50 for the first offense. An Act of Congress passed January 19, 1929 (effective five years later), c. 79, §§ 1–2, 45 Stat. 1084, Title 49, U. S. C., § 60, commonly called the Hawes-Cooper Act, provides:

". . . All goods, wares, and merchandise manufactured, produced, or mined, wholly or in part, by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal and/or reformatory institutions, except commodities manufactured in Federal penal and correctional institutions for use by the Federal Government transported into any State or Territory of the United States and remaining therein for use, consumption, sale, or storage, shall upon arrival and delivery in such State or Territory be subject to the operation and effect of the laws of such State or Territory to the same extent and in the same manner as though such goods, wares, and merchandise had been manufactured, produced, or mined in such State or Territory, and shall not be exempt therefrom by reason of being introduced in the original package or otherwise."

The information contains two counts. The first count charges that petitioner, upon a day named, and within the City of Cleveland, Ohio, "did unlawfully sell on the open market certain goods, wares or merchandise, to-wit: one dozen Chambray men's work shirts, which said merchandise was manufactured in whole or in part by convicts or prisoners at Wetumpka Prison in the State of Alabama; said prisoners so manufacturing said articles at the time of manufacturing same not being on parole or probation." By the second count it is charged that petitioner "did unlawfully sell for shipment to R. C. Kissack, via railway express from Wetumpka Prison in the State of Alabama to R. C. Kissack in the City of Lakewood, Ohio, . . . six dozen Chambray men's work shirts," manufactured by convicts or prisoners at the same prison in Alabama. The case was tried before the court upon a stipulation of facts substantially the same as those set forth in the information, with the addition, in respect of the first count, that the goods were sold in the original package as shipped by interstate commerce into the State of Ohio, and that there is nothing harmful, injurious, or deleterious about the goods sold; that the six dozen shirts mentioned in the second count were not delivered to Kissack at the time of sale, but were to be shipped to his residence in Lakewood, Ohio, by railway express from the prison in Alabama.

The case was tried without a jury. The court found petitioner guilty upon both counts, and sentenced him to pay a fine of $25 and costs.

An appeal was taken to the Court of Appeals of Ohio, Eighth District, Cuyahoga County, where the judgment was affirmed. 49 Ohio App. 530; 197 N. E. 605. A petition in error to the Supreme Court of Ohio was dismissed by that court on the ground that no debatable constitutional question was involved. 129 Ohio St. 543; 196 N. E. 164. This court granted certiorari.

Petitioner assails the constitutional validity of the Ohio statute and also of the Hawes-Cooper Act. The record fails to show that the points made by petitioner in this court were properly raised in the trial court. But it sufficiently appears from the opinion of the appellate court that that court considered and passed upon the following contentions: that the Ohio statute abridged the privileges and immunities of petitioner as a citizen of the United States in violation of the Fourteenth Amendment, by depriving him of the privilege of selling goods, manufactured in Alabama by prison labor, in competition with citizens of Ohio engaged in selling like goods; that the Ohio statute constituted an unauthorized regulation of and a burden upon interstate commerce; and that the Hawes-Cooper Act constituted an unlawful delegation of the power of Congress to the States. These questions, therefore, are properly here for consideration. *Home Insurance Co.* v. *Dick,* 281 U. S. 397, 405–407; *Erie R. Co.* v. *Purdy,* 185 U. S. 148, 153.

The policy of the state of Ohio for many years, as evidenced by its constitution and laws, has been to protect the products of free labor against competition from similar products brought into existence by prison labor. A section of the state constitution (Art. II, § 41), adopted in 1918, provides:

"Laws shall be passed providing for the occupation and employment of prisoners sentenced to the several penal institutions and reformatories in the state; . . . and goods made by persons under sentence to any penal institution or reformatory without the State of Ohio, and such goods made within the State of Ohio, excepting those disposed of to the state or any political sub-division thereof or to any public institution owned, managed or controlled by the state or any political sub-division thereof, shall not be sold within this state unless the same are conspicuously marked 'prison made.' Nothing herein contained shall be construed to prevent the passage of laws providing that convicts may work for, and that the products of their labor may be disposed of to, the state or any political sub-division thereof, or for or to any public institution owned or managed and controlled by the state or any political sub-division thereof."

1. The court below proceeded upon the assumption that petitioner was a citizen of the United States; and his status in that regard is not questioned. The effect of the privileges and immunities clause of the Fourteenth Amendment, as applied to the facts of the present case, is to deny the power of Ohio to impose restraints upon citizens of the United States resident in Alabama in respect of the disposition of goods within Ohio, if like restraints are not imposed upon citizens resident in Ohio. The effect of the similar clause found in the Fourth Article of the Constitution, as applied to these facts, would be the same, since that clause is directed against discrimination by a state in favor of its own citizens and against the citizens of other states. *Slaughter-House Case,* 1 Woods 21, 28; *Bradwell* v. *State,* 16 Wall. 130, 138. As interpreted by the court below, the laws of Ohio passed in pursuance of the state constitution prohibit the sale in the open market of goods made in Ohio by convict labor. The statutory provision here challenged enforces, without discrimination, the same rule as to the convict-made goods of other states when they are brought into Ohio; and the contention in respect of the privileges and immunities clause must be rejected as without substance. Compare *Scott* v. *Donald,* 165 U. S. 58, 100; *Colgate* v. *Harvey,* 296 U. S. 404.

2. A serious question as to the infringement of the commerce clause of the Constitution is presented by the second count of the information. That count alleges that the prison-made goods described were sold to a purchaser in Ohio for shipment via railway express from a prison in Alabama. Whether the court below intended to sustain this count is not clear; but the state confines its

argument here to a defense of its asserted power to prohibit and penalize the sale of such goods upon the open market and the statute apparently goes no further than this. In any event, for present purposes, we lay that count out of the case, and limit our consideration to the first count. True, the petitioner was found guilty upon both counts, but the penalty imposed upon him does not exceed that which might have been exacted under the first count if it had stood alone. The case, therefore, falls within the rule, frequently stated by this court, that a judgment upon an indictment containing several counts, with a verdict of guilty upon each, will be sustained if any count is good, and sufficient in itself to support the judgment. *Claassen* v. *United States,* 142 U. S. 140, 146; *Evans* v. *United States,* 153 U. S. 584, 595; *Abrams* v. *United States,* 250 U. S. 616, 619; *Brooks* v. *United States,* 267 U. S. 432, 441.

The first count simply charges, in the terms of the statute, that petitioner unlawfully sold on the open market in Ohio certain goods made by prison labor in Alabama. These goods, according to the stipulation of facts, were sold in original packages as they were shipped in interstate commerce into Ohio. When the goods were sold, their transportation had come to an end; and the regulative power of the state had attached, except so far as that power might be affected by the fact that the packages were still unbroken. But any restrictive influence which that fact otherwise might have had upon the state power was completely removed by Congress, if the Hawes-Cooper Act be valid. That act is in substance the same as the Wilson Act with respect to intoxicating liquors, passed August 8, 1890, c. 728, 26 Stat. 313, as construed and upheld by this court. *Rhodes* v. *Iowa,* 170 U. S. 412, 421–423, 426; *In re Rahrer,* 140 U. S. 545, 559–560, 562, 564. In effect, both acts provide (the one as construed and the other in terms) that the subject matter of the interstate shipment shall, upon arrival and delivery in any state or territory, become subject to the operation of the local laws as though produced in such state or territory; and shall not be exempt therefrom because introduced in original packages. Each statute simply permits the jurisdiction of the state to attach immediately upon delivery, whether the importation remain in the original package or not. In other words, the importation is relieved from the operation of any rule which recognizes a right of sale in the unbroken package without state interference—a right the exercise of which never has been regarded as a fundamental part of the interstate transaction, but only as an incident resulting therefrom. *Rhodes* v. *Iowa, supra,* pp. 420, 423–424. The interstate transaction in its fundamental aspect ends upon delivery to the consignee.

The view of the State of Ohio that the sale of convict-made goods in competition with the products of free labor is an evil, finds ample support in fact and in the similar legislation of a preponderant number of the other states. Acts of Congress relating to the subject also recognize the evil. In addition to the Hawes-Cooper Act, the importation of the products of convict labor has been denied the right of entry at the ports of the United States and the importation prohibited. C. 497, § 307, 46 Stat. 689; Title 19 U. S. C. (1934 ed.), § 1307. And the sale to the public in competition with private enterprise of goods made by convicts imprisoned under federal law is forbidden. C. 340, § 5, 46 Stat. 391; Title 18 U. S. C. (1934 ed.), § 744c.

All such legislation, state and federal, proceeds upon the view that free labor, properly compensated, cannot compete successfully with the enforced and unpaid or underpaid convict labor of the prison. A state basing its legislation upon that conception has the right and power, so far as the federal Constitution is concerned, by non-discriminating legislation, to preserve its policy from impairment or defeat, by any means appropriate to the end and not inconsistent with that instrument. The proposition is not contested that the Ohio statute would be unassailable if made to take effect after a sale in the original package. And the statute as it now reads is equally unassailable, since Congress has provided that the particular subjects of interstate commerce here involved "shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case," *In re Rahrer, supra,* p. 562, namely, upon arrival and delivery.

If the power of Congress to remove the impediment to state control presented by the unbroken-package doctrine be limited in any way (a question which we do not now find it necessary to consider), it is clear that the removal of that impediment in the case of prison-made goods must be upheld for reasons akin to those which moved this court to sustain the validity of the Wilson Act. Even without such action by Congress the unbroken-package doctrine, as applied to interstate commerce, has come to be regarded, generally at least, as more artificial than sound. Indeed, in its relation to that commerce, it was definitely rejected in *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506, 508–509, as affording no immunity from state taxation. "The interstate transportation," this court there concluded, "was at an end, and whether in the original package or not, a state tax upon the oil as property or upon its sale in the State, if the state law levied the same tax on all oil or all sales of it, without regard to origin, would be neither a regulation nor a burden of the interstate commerce of which this oil had been the subject."

Whether that view of the doctrine as applied to state taxation should now be given a more general application, the Hawes-Cooper Act, being determinative of the case now under review, makes it unnecessary for us to decide.

3. That the Hawes-Cooper Act does not constitute a delegation of Congressional power to the states is made clear by *In re Rahrer, supra,* pp. 560–561, and by what we have already said under subdivision 2.

Judgment affirmed.

MR. JUSTICE VAN DEVANTER, MR. JUSTICE MCREYNOLDS, and MR. JUSTICE STONE concur in the result.

MATSON NAVIGATION CO. ET AL. v. STATE BOARD OF EQUALIZATION OF CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 346. Argued January 17, 1936.—Decided March 2, 1936.

1. The commerce clause does not prevent a State from imposing upon her corporations, for the privilege of exercising their corporate franchises within the State, a tax measured on the net income justly attributable to their business done within the State, though part of the income so attributable be from interstate and foreign commerce. P. 443.
2. A tax thus laid held consistent with due process. *Hans Rees' Sons* v. *North Carolina,* 283 U. S. 123, distinguished. P. 444.
3. A state tax on the privilege of exercising corporate franchises within the State, measured at a uniform rate on net income attributable to business within the State, does not discriminate unconstitutionally against corporations deriving such income from interstate and foreign as well as from intrastate business because other corporations, having no interstate business, are taxed only on intrastate income, or because foreign corporations engaged in interstate and foreign business exclusively are exempt from the tax. P. 445.
4. A foreign corporation whose sole business in a State is interstate and foreign commerce, cannot be subjected to a privilege tax. P. 446.
5. A discrimination in state taxation required by the commerce clause cannot be held to violate the equal protection clause of the Fourteenth Amendment. P. 446.

3 Cal. (2d) 1; 43 P. (2d) 805, affirmed.

APPEAL from a judgment sustaining, on review, a state tax.

Mr. Maurice E. Harrison, with whom *Messrs. Herman Phleger* and *Gregory A. Harrison* were on the brief, for appellants.

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

MR. JUSTICE BUTLER delivered the opinion of the Court.

The California Bank and Franchise Tax Act declares: Every business corporation, with exceptions not here material, "shall annually pay to the state, for the privilege of exercising its corporate franchises within this state, a tax according to or measured by its net income" to be computed at the rate of four per cent. upon that income for the preceding year. § 4. If all the corporation's business is done in California, the tax shall be computed on its entire net income; if not, on that portion which is derived from business done within the State. § 10. Net income is the revenue from all sources less expenses, losses, bad debts, taxes, depreciation, depletion, etc. §§ 6, 7 and 8.*

Appellants were incorporated under the laws of California and, for purposes of taxation, are deemed affiliated. § 14. Matson Navigation Company and the Oceanic Steamship Company, in addition to doing substantial intrastate business in California, were engaged in transportation between ports on the Pacific coast in the United States and ports in Hawaii, the South Sea Islands, Australia and New Zealand. The Matson Terminals, Inc., had no 1930 net income from interstate or foreign com-

* Act approved March 1, 1929, Cal. Stats. 1929, p. 19, as amended June 11, 1929, Cal. Stats. 1929, p. 1555.

merce. In March, 1931, appellants made a consolidated return showing for 1930 net income from intrastate business of $730,357.81 and from interstate and foreign business of $2,526,148.22. They maintained that the tax should not be more than four per cent. of their net income from intrastate business. But the tax commissioner held that there should be included in the computation the part of their net income from interstate and foreign commerce that was attributable to California, found to be 22.2%, and on that basis he assessed an additional tax. The state board of equalization sustained the additional assessment. The case was taken on writ of review to the state supreme court and there, contrary to appellants' contentions, it was held that the act as construed by the tax commissioner is not repugnant to the commerce clause of the federal Constitution or to the due process or equal protection clause of the Fourteenth Amendment. 3 Cal. (2d) 1; 43 P. (2d) 805.

The only question here is whether consistently with these constitutional provisions there may be included in the base, to which the rate of four per cent. was applied, any part of net income derived from appellants' interstate and foreign commerce.

1. Does the tax burden interstate commerce? There is no controversy as to the amount, if any, that may be apportioned to California for the purpose of computing the tax. The state supreme court held that the act imposes a tax for the privilege of exercising corporate franchises and extends to every corporation, foreign or domestic, which is engaged in interstate or foreign commerce "so long as such corporation is doing some intrastate business." Appellants' franchises, including the right to be corporations empowered to do business in corporate form in accordance with California law, were granted to them by the State, and undoubtedly the State may tax the privilege of exercising the franchises. *St. Louis S. W. Ry.*

v. *Arkansas,* 235 U. S. 350, 366–367. *Detroit Bridge Co.* v. *Tax Board,* 287 U. S. 295. *Anglo-Chilean Nitrate Corp.* v. *Alabama,* 288 U. S. 218, 224. Unquestionably annual profits, gains or net income derived from business done within the State is an indication sufficiently significant to be deemed a reasonable base on which to compute the value of that use. Cf. *Air-Way Corp.* v. *Day,* 266 U. S. 71, 83. Our decisions demonstrate that a state tax on gross earnings derived from interstate commerce is a burden upon that commerce and repugnant to the commerce clause. *Philadelphia & Southern S. S. Co.* v. *Pennsylvania,* 122 U. S. 326. *Galveston, H. & S. A. Ry. Co.* v. *Texas,* 210 U. S. 217. *Meyer* v. *Wells, Fargo & Co.,* 223 U. S. 298, 300. *New Jersey Telephone Co.* v. *Tax Board,* 280 U. S. 338, 346. Cf. *Pullman Co.* v. *Richardson,* 261 U. S. 330, 338. They also definitely show that a State may tax net income derived from a domestic corporation's business—intrastate, interstate and foreign. *U. S. Glue Co.* v. *Oak Creek,* 247 U. S. 321, 328. *Shaffer* v. *Carter,* 252 U. S. 37, 57. *Atlantic Coast Line* v. *Daughton,* 262 U. S. 413, 420, 422. Cf. *Peck & Co.* v. *Lowe,* 247 U. S. 165. *National Paper Co.* v. *Bowers,* 266 U. S. 373, 377. And net income justly attributable to all classes of business done within the State may be used as the measure of a tax imposed to pay the State for the use therein of the corporate franchises granted by it. *Bass, Ratcliff & Gretton, Ltd.,* v. *Tax Commission,* 266 U. S. 271, 277. *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113, 120. Cf. *Hans Rees' Sons* v. *North Carolina,* 283 U. S. 123, 129 *et seq.* The act as construed below does not violate the commerce clause.

2. Appellants suggest that the additional tax has no relation to the privilege of exercising their corporate franchises and that the State, by enforcing it, would deprive them of property without due process of law. They rely on *Hans Rees' Sons* v. *North Carolina, supra.* We

there held that a method of allocating, for taxation, to a State that part of the income of a foreign corporation which bears the same ratio to its entire net income as the value of its tangible property within that State bears to the value of all its tangible property works an unconstitutional result if the part of the income thus attributed to the State is out of all appropriate proportion to the business there transacted by the corporation. There is nothing in that decision to support appellants' contention. In that case the question was as to apportionment of income to the taxing State. The controversy now before us concerns the amount to be paid for the privilege of using in California corporate franchises granted by that State to appellants. No question of apportionment is here involved. The tax commissioner's determination, 22.2%, was not disturbed by the board of equalization or the supreme court and appellants do not in this court challenge the use of that ratio. As above shown, net income from appellants' intrastate, interstate and foreign business attributable to California may be taken into account in computing the tax. As the taxing jurisdiction of California extends to that income, the use thereof to compute the tax may not be said to be arbitrary, capricious or in violation of the due process clause of the Fourteenth Amendment.

3. Appellants insist that by enforcement of the tax in question the State would deny them the equal protection of the laws. They say: The tax is on the doing of business; it would be void if imposed on the doing of interstate and foreign business and can only be upheld as to intrastate business. Many corporations subject to the tax do only the latter. Others do both. The basis of the tax imposed on members of the class first mentioned is net income from intrastate business while the basis of that exacted from members of the other class is net income from all business. The act imposes no tax

on corporations engaged exclusively in interstate and foreign business.

The differences portrayed in the argument of appellants do not deny them equal protection of the laws. The measure of the tax is the total net income attributable to California; it does not depend upon the net derived from business wholly within or that partly within and partly without the State. Gains from intrastate business may be wiped out by losses sustained in interstate or foreign business and vice versa. The basis of the classification is not the kind of business—whether intrastate or otherwise—from which the income is derived; it is the exclusion of all income attributable to business done outside the State. The measure of the exaction does not lack uniformity because of differences in the amounts of net incomes attributable to California. Appellants' contention is not supported by the fact that there are or may be substantial differences between amounts and sources of net incomes of corporations subject to the tax. The rate is uniform; no discrimination results from its application.

There is no merit in the suggestion that failure of the act to extend to foreign corporations exclusively engaged in interstate or foreign commerce in California constitutes an unconstitutional discrimination against appellants. A foreign corporation whose sole business in California is interstate and foreign commerce cannot be subjected to the tax in question. *Alpha Cement Co.* v. *Massachusetts*, 268 U. S. 203, 216 *et seq.* *Anglo-Chilean Nitrate Corp.* v. *Alabama, supra.* The submission by the State to the commerce clause cannot be held to violate the equal protection clause. *Des Moines Nat. Bank* v. *Fairweather*, 263 U. S. 103, 116.

Judgment affirmed.

PENNSYLVANIA RAILROAD CO. *v.* ILLINOIS BRICK CO.

CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

No. 360. Argued February 6, 7, 1936.—Decided March 2, 1936.

1. The Interstate Commerce Commission, acting pursuant to its power to remove discrimination against interstate commerce and to make intrastate transportation yield its just proportion of carrier income, ordered carriers to increase their intrastate rates to the level of rates on interstate traffic previously authorized and established. The order in terms was to continue in force until changed by the Commission, and was accompanied by the Commission's suggestion that individual instances of resulting inequalities be brought to its attention for correction. *Held:* That the carriers were thereby compelled to put into effect increased intrastate rates and to collect them, and that an attempt by state authority to make them pay reparation to a shipper upon the ground that a specific intrastate rate so increased and collected was excessive and discriminatory, was repugnant to the order and the Interstate Commerce Act and beyond the state jurisdiction. Pp. 453, 459.
2. Where a continuing order of the Interstate Commerce Commission requires that the level of intrastate rates be the same as that of interstate rates, and a later order merely requires the carriers to modify a differential between specific interstate rates to remove prejudice to a shipper, changes in such specific interstate rates under the later order must be accompanied by like changes in the corresponding intrastate rates, to preserve the equality commanded by the earlier order. P. 460.
3. An order of the Interstate Commerce Commission allowing carriers a specified time within which to make required changes of rates implies a finding that such time is necessary to enable them to make computations and to prepare and post schedules as required by law. P. 461.
4. The question whether a state commission infringed constitutional rights of railroads by ordering reparation to a shipper who paid rates which the commission, acting within its powers, had previously authorized,—*held* not properly raised in the state trial court by

merely putting in evidence the order and the record upon which it was based and the previous orders. P. 461.

5. This Court, reviewing a judgment of an intermediate state court, lacks jurisdiction to consider constitutional questions which the highest court of the State declined to consider because not raised in the trial court or presented to it in accordance with a well established and reasonable practice. P. 462.

278 Ill. App. 623, reversed.

Certiorari, 296 U. S. 560, to review the affirmance of a judgment on an order of reparation recovered by the Brick Company against the Railroad Company.

Messrs. Frederic D. McKenney and *David L. Dickson*, with whom *Messrs. Frank J. Loesch, Edward M. Burke*, and *Henry Wolf Biklé* were on the brief, for petitioner.

The Illinois Commerce Commission had no power to award reparation on that part of the rates which were established pursuant to order of the Interstate Commerce Commission. This Court has never, so far as we can determine, expressed itself on this point directly; but it is essential to the maintenance of federal authority over interstate commerce that such assumption of power by the State be denied.

The intrastate rates established by the Interstate Commerce Commission by its order in Re Intrastate Rates within the State of Illinois, 60 I. C. C. 92, were mandatory upon the carriers, both by the terms of the order and by virtue of the statute under which it acted. Sec. 13 (4), Interstate Commerce Act, as amended by Transportation Act, 1920. The statute authorizes a general increase, as well as orders designed to remove specific discrimination. In the sweeping language of this statutory mandate there is no discrimination between general orders for revenue purposes, such as the one in this case, and orders relating to particular discriminations. Obedience to both is equally enjoined upon the carriers. *Atlan-*

tic Coast Line R. Co. v. *Florida,* 295 U. S. 301, 311; *United States* v. *Louisiana,* 290 U. S. 70, 75; *Georgia Public Service Comm'n* v. *United States,* 283 U. S. 765, 774; *New England Divisions Case,* 261 U. S. 184, 197. If modifications are to be made in specific instances, they must be made by the Interstate Commerce Commission. This Court has held that the power granted to that Commission to modify specific interstate rates, after an order is entered under § 15a (2), as that section read prior to June 16, 1933, must necessarily be implied as to intrastate rates in orders entered under § 13 (4). *United States* v. *Louisiana,* 290 U. S. 70, 79. Since the power of modification is granted to the Interstate Commerce Commission, it is necessarily withheld from the state commissions, at least as far as award of reparation is concerned.

If the award of reparation made by the Illinois Commission be permitted to stand, the rates charged, which were not only lawful but enjoined by the Interstate Commerce Commission, in effect will be unlawful and the carrier will have been subjected to penalties for its obedience. Either the carrier was not bound to observe orders of the Interstate Commerce Commission at all, or if so bound it should be protected in its obedience. The same act cannot be at once lawful and subject to reparation; for in such case "the confusing anomaly would be presented of a rate being adjudged to be violative of the prescribed standards, and yet continuing to be the legal rate, obligatory on both carrier and shipper." *Robinson* v. *Baltimore & Ohio R. Co.,* 222 U. S. 506, 511.

Secondly, the Illinois Commission's award should not be permitted to stand because the Interstate Commerce Commission cannot protect its order against such attacks. It may be the law that a state commission has the power to establish a *prospective* intrastate rate different in some respects from the rate established by the Interstate Commerce Commission, since the latter could control the matter by entering another order of its own; but a state award of reparation would be beyond the reach of the federal commission. Therefore, if the Illinois Commission can award reparation in this case, the order of the Interstate Commerce Commission preventing discrimination by means of lower intrastate rates is wholly nullified. The Illinois Commission might award reparation on the majority of rates in the State and thus retroactively restore the discrimination against interstate commerce removed by the Interstate Commerce Commission's order.

It is the established rule that when the Interstate Commerce Commission establishes an intrastate scale of rates, "the substituted schedule is prospective only and power has not been granted in such circumstances to give reparation for the past." *Atlantic Coast Line R. Co.* v. *Florida,* 295 U. S. 301, 311. Distinguishing: *Eagle Cotton Oil Co.* v. *Southern Ry. Co.,* 47 F. (2d) 1006, reversed 51 F. (2d) 443, cert. den., 284 U. S. 675; and *Texas & Pacific Ry. Co.* v. *Louisiana Oil Rfg. Corp.,* 7 F. Supp. 1012; 76 F. (2d) 465, cert. den., 294 U. S. 767.

The Illinois Commerce Commission had no power to award reparation on that part of the rates here in question which were previously authorized by it.

The judgment of the court below denied petitioner due process of law, whether that judgment was based on the holding that the court would not review the evidence before the Illinois Commerce Commission, or whether it was based on the holding that the evidence before the Illinois Commission supported its award.

Mr. Abraham R. Miller for respondent.

The Interstate Commerce Commission has power under §§ 13 (4) and 15 (a) of the Interstate Commerce Act to order a general increase in intrastate rates when such increase is necessary in order to eliminate a burden on interstate commerce as a whole. In making such an order the Interstate Commerce Commission does not determine that every specific rate involved in the state structure must be maintained at the figure to which such rate is raised as a result of a general increase. It determines merely that it is necessary that a certain general level of state rates shall be maintained in order that the carriers as a whole may secure the additional revenue to which the Commission has found them entitled under § 15 (a). Consequently, where a state commission thereafter reduces a specific state rate there is no violation of the order of the Interstate Commerce Commission unless such reduction substantially reduces the general level of revenue granted to the carriers by the Interstate Commission. *Minnesota Rate Case,* 230 U. S. 352; *Florida* v. *United States,* 282 U. S. 194, 211; *United States* v. *Louisiana,* 290 U. S. 70, 75; *Wisconsin Railroad Comm'n* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563, 590; *Georgia Public Service Comm'n* v. *United States,* 283 U. S. 765, 772.

No distinction can be drawn in principle between a prospective reduction by state authorities of a specific state rate and a reduction by way of reparations. In both cases the state authorities are acting in the exercise of their inherent power over intrastate commerce. In both cases their action is limited to reductions which do not affect the general level of revenues decreed by the Interstate Commission. In both cases the carrier whose rate is reduced can have his day in court. In the case of a prospective reduction he may test the validity of the reduction by a bill to enjoin the state authorities from putting the rate into effect. In the case of a reparation award, the carrier may urge in the shipper's suit for a judgment on the award exactly the same grounds as a defense to that suit.

The ultimate question which this Court is called upon to decide is this: How far can the federal power over purely intrastate traffic be extended under the claim that it is necessary to protect interstate traffic?

In the *Shreveport* case this Court stated that the federal power over intrastate traffic extends only to "matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security" and efficiency of that traffic. In *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, this Court held that the power can be extended only to matters which have a "direct effect" upon interstate commerce. It is obvious that in the case at bar the award of reparation on an isolated intrastate movement did not have such a close, substantial or direct effect upon interstate traffic as a whole.

MR. JUSTICE BUTLER delivered the opinion of the Court.

December 31, 1924, respondent sued petitioner and the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company, called the Panhandle, in the Circuit Court of Cook County, Illinois, to recover reparation awarded by the Illinois Commerce Commission on the ground that they collected from respondent unreasonable and discriminatory charges for intrastate transportation of brick from Bernice, Illinois, to places within the Chicago switching district.[1] January 1, 1921, the Pennsylvania Railroad Company, through lease, obtained control of the Panhandle. The court gave judgment against the Pennsylvania for $44,428.09.[2] That amount includes reparation, interest and attorney's fee. The reparation adjudged is in respect of transportation on the Pennsyl-

[1] Illinois Public Utilities Act, § 72, Laws Illinois, 1921, p. 745.

[2] The case was dismissed as to the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad.

vania between October 28, 1920, and February 16, 1922, including that on the Panhandle after acquisition by the Pennsylvania. Petitioner appealed directly to the state supreme court and there sought reversal on the ground that, as later to be specified, the reparation order is repugnant to the Interstate Commerce Act, an order of the Commission and the Constitution of the United States. After hearing argument, that court, being of opinion that the case had been erroneously appealed to it, directed transfer to the appellate court. There the judgment was affirmed; the supreme court denied a writ of certiorari.

First for consideration is a question raised by the answer and decided by the appellate court, the highest court of the State in which a decision could be had. 28 U. S. C., § 344 (b). *Chicago, R. I. & P. Ry.* v. *Perry,* 259 U. S. 548, 551. *Home Insurance Co.* v. *Dick,* 281 U. S. 397, 407. *Minneapolis, St. P. & S. S. M. Ry. Co.* v. *Rock,* 279 U. S. 410, 411–412. *Chesapeake & Ohio Ry. Co.* v. *Mihas,* 280 U. S. 102, 104. That question is whether the Illinois statutes under which the state commission acted and its order awarding respondent reparation are repugnant to the Interstate Commerce Act [3] and the order

[3] The Interstate Commerce Act (Title 49, U. S. Code) provides:

Section 13(3). "Whenever . . . there shall be brought in issue any rate . . . made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding." The paragraph provides for conference and coöperation between the Interstate Commerce Commission and the state authorities.

Section 13(4). "Whenever . . . the Commission . . . finds that any such rate . . . causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful it shall prescribe the rate . . . or the maximum of the Interstate Commerce Commission [4] providing for the intrastate rates that became effective February 19, 1921, and continued in force until February 16, 1922, in respect of which the state commission made its award.

The Chicago switching district is a large area in and near that city; it extends into Indiana but by far the larger part is in Illinois.[5] A number of railroads including the Pennsylvania and the Panhandle extend into the district and conduct within it transportation of brick and other commodities in intrastate and interstate commerce. There are many brickyards in the district and elsewhere in Illinois. Respondent has several in the district and two at Bernice in Illinois outside, but close to, the district. One of them is located on the Pennsylvania and the other on the Panhandle.

For a long time prior to federal control of railroads which commenced January 1, 1918, and up to June 25 of that year the rate applicable to interstate and intrastate transportation of brick, by the Pennsylvania and Panhandle respectively, from Bernice into the district and

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or minimum, or maximum and minimum, thereafter to be charged . . . Such rates . . . shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any state authority to the contrary notwithstanding."

As it then stood, § 15a (2) provided: "In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that the carriers as a whole . . . will . . . earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation; *Provided,* That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country."

[4] Intrastate Rates Within Illinois, 60 I. C. C. 92.

[5] For full description see Switching Rates in Chicago District, 177 I. C. C. 669, 712.

between points within the switching district was 25 cents per ton.

June 25, 1918, the federal railroad administration by General Order No. 28 increased rates on brick by two cents per hundred pounds. November 8, 1918, Freight Rate Authority No. 1887 substituted an increase of 25 per cent. for transportation within the district. These changes operated to make the rate from Bernice into the district 70 cents [6] and that between points within the district 30 cents per ton.

The Transportation Act (of February 28), 1920, § 208 (a), directed that existing rates should obtain until changed by federal or state authority or pursuant to authority of law.

March 10, 1920, respondent complained to the Interstate Commerce Commission that the 70-cent rate was unreasonable and discriminatory. The commission made its report and order October 27, 1921, the pertinent substance of which is given below.

July 29, 1920, the commission authorized increases applicable to interstate traffic of 40 per cent. and 35 per cent. respectively, in eastern and western groups and 33⅓ per cent. on intergroup transportation. Ex parte 74.[7] August 10, the Illinois commission authorized a general increase of 33⅓ per cent.[8] August 11, the Interstate Commerce Commission ordered that Illinois territory be treated as within the eastern group for the purpose of applying the authorized increase of 40 per cent. in the rates on interstate traffic between points in that territory.[9]

August 26, rates on intrastate transportation of brick established by the carriers pursuant to authority of the Illi-

[6] General Order 28, § 6 provides that 5 cents or more shall be increased to 10 cents. And so here 65 cents became 70 cents.

[7] Increased Rates, 1920, 58 I. C. C. 220.

[8] Docket No. 10,620, 7 Ill. P. U. C. 1047.

[9] Authority to Increase Rates, 58 I. C. C. 302.

nois commission became effective. They were 93½ cents per ton from Bernice into the switching district in Illinois, and 40 cents between Illinois points within the district. October 18, having regard to the above mentioned order of August 11, the Illinois commission modified its order of August 10 so as to allow increases of 35 per cent. to be made effective November 15, instead of the 33⅓ per cent. it earlier permitted.[10] Accordingly the intrastate rate from Bernice into the switching district became 94½ cents and the rate between points within the district became 40½ cents.

January 11, 1921, the Interstate Commerce Commission dealing with intrastate rates within Illinois, notified and required carriers to cease and desist from practicing the undue prejudice, undue preference and advantage, and unjust discrimination which, as specified in the commission's report it found to exist. The order also notified and required the carriers to

"establish, put in force, and maintain rates and charges for freight services . . . in intrastate commerce within the state of Illinois which shall exceed the rates and charges of the carriers now in force and applicable to such transportation in amounts corresponding to the increases heretofore made by the carriers, now in effect, under Ex Parte 74 . . . in said carriers' rates and charges for freight services . . . in interstate commerce within the state of Illinois and between points in the state of Illinois and points in other states in the eastern group, including the Illinois district. It is further ordered, That this order shall become effective on or before the 7th day of March, 1921, upon notice . . . by not less than five days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and remain in force until the further order of this Commission in the premises."

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[10] Docket No. 10,620, 8 Ill. P. U. C. 31.

And the report, which was made a part of the order, stated:

"Some readjustments may be appropriate in individual instances where substantial injury results . . . Such inequalities as call for readjustment may be brought to our attention in the appropriate way and dealt with as occasion requires . . . The record establishes that the present intrastate charges for freight services . . . lower than the just and reasonable corresponding interstate rates and charges authorized in and established in the eastern group, including the Illinois district, pursuant to Ex Parte 74, afford intrastate traffic and shippers and localities within the state undue preference and subject interstate traffic and shippers and localities outside the state to undue prejudice, and unduly, unjustly, and unreasonably discriminate against interstate commerce." [11]

February 19, 1921, the carriers, in accordance with the commission's order, put in effect and until February 16, 1922, maintained for intrastate transportation a rate of 98 cents on brick from Bernice into the switching district and a rate of 42 cents between points within the district.

October 27, 1921, the Interstate Commerce Commission, dealing with plaintiff's complaint filed March 10, 1920, found the 70-cent rate on brick in interstate commerce from Bernice into the district was not unreasonable but that it was and for the future would be unduly prejudicial to the extent that it exceeded the rates from points within the district to interstate destinations therein by more than 10 cents per ton. It further found that respondent failed to show itself entitled to damages as the result of the undue prejudice.[12] The commission ordered that the carriers "cease and desist, on or before February 16, 1922, . . . from . . . collecting for the transportation of common brick in carloads, from Bernice . . . [and

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[11] Intrastate Rates Within Illinois, 60 I. C. C. 92, 103–104.

[12] Illinois Brick Co. v. Director General, 64 I. C. C. 273.

other named points in Illinois and Indiana] to interstate destinations within the Chicago switching district rates which exceed the rates contemporaneously maintained by them on like traffic from points within said district to interstate destinations within said district by more than 10 cents per net ton."

And it ordered the carriers to

"establish, on or before February 16, 1922, upon notice . . . by not less than 30 days' filing and posting . . . and thereafter to maintain and apply to the transportation of common brick, in carloads, from Bernice . . . [and other named points] to interstate destinations within the Chicago switching district rates which shall not exceed the rates contemporaneously maintained by them on like traffic from points within said switching district to interstate destinations within said district by more than 10 cents per net ton."

Then the carriers established and put in force, effective February 16, 1922, a rate of 50 cents per ton for intrastate and interstate transportation from Bernice into the switching district and between points within it.

October 28, 1922, respondent applied to the Illinois commission for reparation as to intrastate transportation from Bernice into the switching district. November 7, 1923 the commission dismissed the claim as to shipments prior to October 28, 1920, as barred by a statute of limitations. The commission found that, at the time the service in question was rendered (October 28, 1920, to February 16, 1922) 50 cents per ton provided adequate revenue for transportation of brick from Bernice to points within the switching district; that to the extent the rates for that transportation exceeded by more than 10 cents per ton the rates contemporaneously applied between points within the district they were unjustly discriminatory and that respondent had been damaged to the extent that the charges collected by the carrier exceeded those that would have been assessed on a rate of 50 cents per ton. And on that basis the commission fixed the amount of its award.[13]

1. To the extent, if at all, that there is conflict between state and federal regulation, the latter must prevail. Unquestionably the Interstate Commerce Commission was authorized directly to prescribe, or to require the carriers to establish and maintain, intrastate rates to prevent or remove discrimination against interstate commerce or to make intrastate transportation yield its just proportion of the carriers' earnings. *Florida* v. *United States,* 282 U. S. 194, 210. *Public Service Comm'n* v. *Texas & N. O. R. Co.,* 284 U. S. 125, 131. *Florida* v. *United States,* 292 U. S. 1, 4. During the period between February 19, 1921, and February 16, 1922, the intrastate rates in force for transportation of brick by petitioner's railroad from Bernice into the switching district were maintained by petitioner pursuant to and in accordance with the Interstate Commerce Commission's order of January 11, 1921. By that order the commission "notified and required" carriers to cease the prejudice and discrimination against interstate commerce resulting from the application of their intrastate rates in force and also "notified and required" them to increase their intrastate rates and to make them correspond with the interstate rates theretofore increased in pursuance of its order in Ex parte 74. The commission's direction to the carriers that they collect charges based on the intrastate rates required by its order was not less mandatory than was its direction to cease prejudice and discrimination. In order that the prescribed equality between intrastate and corresponding interstate rates should not be disturbed by state authority or by action of the carriers, the commission declared that the order—and necessarily the rates directed—should continue in force until changed by it.

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[13] Docket No. 12,765, 3 Ill. C. C. 165, 300.

And, anticipating possible need for further action, the commission expressly suggested that individual instances of inequalities be brought to its attention for correction. Although respondent's complaint against the 70-cent rate established by Freight Rate Authority No. 1887 was still pending, the record discloses no application by respondent to amend or enlarge the scope of the complaint or any effort to have reduced the 98-cent rate directed by the Interstate Commerce Commission, or to have corrected the inequality resulting from its order of January 11, 1921. There is no suggestion that the intrastate rates in respect of which the Illinois commission awarded reparation were not made in obedience to and in strict accordance with the order of the Interstate Commerce Commission. Save as the rate so prescribed might be dealt with under federal law, the carriers were bound to collect the charges based upon them. .By the Interstate Commerce Act and that order, the State was divested of jurisdiction, by specific order, award of reparation or otherwise, to reduce the charges based on the intrastate rates so established. The order of the Illinois commission, in so far as it awards reparation in respect of transportation covered by rates that petitioner was required to put in force and maintain by the Interstate Commerce Commission's order of January 11, 1921, is plainly repugnant to the Interstate Commerce Act and to that order. To the extent, therefore, that the judgment depends on that part of the award, it is without foundation and cannot be sustained.

2. Under the Interstate Commerce Commission's order of October 27, 1921, petitioner was free, upon the prescribed notice of 30 days, though not required before February 16, 1922, to reduce to not to exceed ten cents the differential between the interstate rate from Bernice into the switching district and that for interstate transportation beween points within the district. That order

dealt only with interstate rates. But the order of January 11, 1921, established the rule of equality between rates for interstate and intrastate transportation from Bernice into the district and also for transportation between points within the district. On the facts found by the Interstate Commerce Commission and the law as applied by it, petitioner was required to maintain equality between these intrastate and interstate rates. There is nothing in the later report or order of October, 1921, to indicate intention on the part of the commission to authorize or permit a change of the one without a like change in the other. The purpose, by exertion of federal authority to control both, persisted. The state commission was not, at any time after the intrastate rates were established under federal authority, authorized to condemn them or to award reparation in respect of transportation to which they applied. By the order of October 27, 1921, requiring adjustment of the interstate rates upon 30 days' notice on or before February 16, 1922, the commission impliedly found that the time allowed was necessary to enable the carriers to compute the rates, prepare the schedules and post them as required by law. There is no support for a claim that, as to transportation in the part of the period between the order October 27, 1921, and February 16, 1922, the Illinois commission had jurisdiction to grant reparation.

3. There remains for consideration the part of the judgment that is based on the award made in respect of transportation between the earliest date within the period fixed by the statute of limitations, October 28, 1920, and the effective date of the commission's order, February 19, 1921. The intrastate rates in effect during that time were made under authority of the State acting through its commission and pursuant to the above mentioned orders of the latter, August 10, 1920, authorizing 33⅓ per cent. increase and October 18, 1920, making the

increase 35 per cent. The rates so increased superseded the 70-cent rate made by the carrier while under federal control. The state's jurisdiction as to them was untrammeled by any order of the Interstate Commerce Commission or other exertion of federal power. The reparation order, so far as it relates to that service, must be sustained unless found repugnant to the due process clause of the Fourteenth Amendment to, or the commerce clause of, the Federal Constitution.

No such question was, by answer, motion or otherwise, expressly raised in the trial court. Petitioner makes no claim that the reparation order was specifically challenged in the trial court as repugnant to either of these clauses, asserts that it was not necessary so to do and maintains that, at the trial, there was by petitioner sufficiently drawn in question the validity of the order on the ground of its being repugnant to these provisions. The sole support for that claim is this: Respondent put in evidence the state commission's reparation order and the record on which it was based. In defense petitioner introduced the same record and the state commission's rate orders authorizing respectively 93½ cents and 94½ cents per ton for transportation from Bernice into the switching district.

Plainly that was not enough. The Illinois statute requires that in cases involving construction of the Federal Constitution appeals from circuit courts shall be taken directly to the supreme court.[14] And, as definitely shown by its decisions, that court will not take jurisdiction unless it appears from the record that the constitutional ques-

[14] Practice Act of 1907, § 118, Laws 1907, p. 443, repealed and replaced by Civil Practice Act of June 23, 1933, §§ 75, 94, effective January 1, 1934, Laws 1933, pp. 805, 811. Smith-Hurd Rev. Stats. 1935, c. 110, §§ 199, 218. *Van Dyke* v. *Illinois Commercial Men's Assn.*, 358 Ill. 458, 464; 193 N. E. 490. *Central Union Telephone Co.* v. *Edwardsville*, 269 U. S. 190, 194.

tion was urged in the lower court, the ruling on it preserved in the record and the error assigned on appeal.[15] While the order of that court transferring the case does not specify the grounds on which it was based, the petitioner states that the supreme court necessarily held the constitutional questions had not been properly raised and that, on the oral argument, the chief justice stated that the transfer would be made because of petitioner's failure properly to raise and preserve the constitutional questions. The appellate court so understood the grounds and effect of the order and held that by transferring the case the supreme court eliminated the constitutional questions. As the highest court of the State declined to consider them because not raised in the circuit court or presented to it in accordance with practice that unquestionably was well established and reasonable, this court is without jurisdiction to consider either of them. *Chicago, I. & L. Ry. Co.* v. *McGuire,* 196 U. S. 128, 131. *Hulbert* v. *Chicago,* 202 U. S. 275. *Cox* v. *Texas,* 202 U. S. 446, 452. *Louisville & Nashville R. Co.* v. *Woodford,* 234 U. S. 46, 51.

4. Petitioner's application for this writ suggests that, by a construction contrary to that theretofore put upon § 68 of the Illinois Public Utilities Act, it was denied an opportunity to be heard on the question whether the evidence before the Illinois commission was sufficient to sustain the reparation award. And upon that basis petitioner claims that there is here presented the question whether by denial of hearing it was deprived of property without due process of law. But, as is shown by the opinion of the appellate court, it did hear petitioner and respondent on that question and decided it in favor of the latter.

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[15] *Foreman-State Nat. Bank* v. *Sistek,* 358 Ill. 525, 529–530; 193 N. E. 513. *Hoffman* v. *Sears Community Bank,* 356 Ill. 598, 601; 191 N. E. 280. *Albrecht* v. *Omphghent Township,* 324 Ill. 200, 202; 154 N. E. 898.

There is no foundation for petitioner's claim that it was denied hearing.

The judgment below will be reversed and the case remanded with directions for proceedings not inconsistent with this opinion.

Reversed.

CALLAGHAN ET AL., RECEIVERS, v. RECONSTRUCTION FINANCE CORP.*

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

No. 539. Argued February 13, 14, 1936.—Decided March 2, 1936.

1. Where a bankruptcy proceeding is superseded by a reorganization proceeding under § 77B of the Bankruptcy Act, the allowances to trustees for services in the bankruptcy proceeding are nevertheless limited by § 48 of the Act. P. 466.
2. This limitation is not removed by § 77B (i), which authorizes the judge in the reorganization proceeding to order payment of "such reasonable administrative expenses and allowances in the prior proceeding as may be fixed by the court appointing" the prior trustee. P. 467.
3. Trustees in bankruptcy are officers of a court, and, like public officers generally, must show clear warrant of law before compensation will be owing to them for the performance of their public duties. P. 468.
4. In recognition of the policy of Congress that proceedings in bankruptcy and under § 77B be economically administered, the limitations upon expenses prescribed by §§ 40 and 48 have been strictly construed, even when the compensation allowed in the particular case was materially less than that which otherwise might have been considered reasonable. P. 468.
5. A reorganization under § 77B is not a confirmation of a composition, and a referee in a proceeding in bankruptcy which was superseded by a reorganization proceeding is not entitled to have his

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* Together with No. 540, *Stitt* v. *Reconstruction Finance Corp.* Certiorari to the Circuit Court of Appeals for the Second Circuit.

compensation computed according to § 40 (a) as in the case of a confirmation of a composition. P. 470.

6. Section 40 (c) of the Bankruptcy Act, relating to the allocation of fees allowed under § 40 (a) in the event that the reference is revoked or the case is specially referred, *held* inapplicable. P. 471.

79 F. (2d) 187, affirmed.

Certiorari, 296 U. S. 570, to review a judgment modifying and reversing orders of the District Court.

Mr. Percival E. Jackson for petitioners in No. 539.

Mr. Theodore Stitt, pro se.

Mr. Eli W. Debevoise, with whom *Solicitor General Reed* and *Messrs. James B. Alley* and *Max O'Rell Truitt* were on the brief, for respondent.

Mr. Justice Stone delivered the opinion of the Court.

Nos. 539, 540.

In these cases certiorari was granted because of the public importance of the questions involved, to review the interpretation by the Court of Appeals for the Second Circuit, 79 F. (2d) 187, of the provisions of § 77 B of the Bankruptcy Act governing allowances to trustees and referees in bankruptcy for their services in bankruptcy proceedings when superseded by reorganization proceedings under that section. Number 539, which relates to the allowances of the trustees in bankruptcy, and No. 540, which relates to the compensation of the referee in bankruptcy, will be separately considered.

No. 539.—*Allowances to Trustees in Bankruptcy.*

Petitioners were trustees in a bankruptcy proceeding which was superseded by a proceeding to reorganize the debtor under § 77 B. The referee in bankruptcy fixed their compensation at $60,000, which the district judge sitting in bankruptcy increased to $90,000. The same judge sitting in the reorganization proceeding ordered payment of this allowance. The Court of Appeals reduced it to $14,628.50, computed, as provided by § 48 (a) and (e) of the Bankruptcy Act, upon the basis of cash disbursed by them. It held that § 77 B (i) requires that allowances to trustees, for their services in the bankruptcy proceeding, be fixed in conformity to § 48, and that the reorganization court, in so far as it finds them reasonable, direct their payment from the property of the debtor.

Section 77 B (i) provides: "If a receiver or trustee of . . . the property of a corporation has been appointed by a federal, state or territorial court," and appropriate proceedings for a reorganization are afterward had under § 77 B, the trustee or receiver appointed in the reorganization proceedings, or the debtor if no trustee is appointed, "shall be entitled forthwith to possession of such property and vested with its title," and, "the judge shall make such orders as he may deem equitable for the protection of obligations incurred by the receiver and prior trustee, and for the payment of such reasonable administrative expenses and allowances in the prior proceeding as may be fixed by the court appointing said receiver or prior trustee."

It is the contention of petitioners that § 77 B (i), when bankruptcy is superseded by reorganization, authorizes the bankruptcy court to fix reasonable allowances for trustee's services, unrestricted by § 48 or other provision of the Bankruptcy Act, and that it requires payment of the allowances thus fixed except that the reorganization court may reduce them if it finds them excessive.

Petitioners thus construe § 77 B (i) as substituting the test of reasonableness for all other statutory restrictions upon the authority of the prior court to compensate trustees, a result which is reached by reading "reasonable" as qualifying the authority to fix compensation given by § 77 B (i) to the appointing court. They argue that § 48 was intended only to apply to bankruptcies in which liquidation results; that when, because of the intervening reorganization proceeding, liquidation does not result, § 77 B (i) makes a new grant of power to the court appointing the trustee to fix reasonable allowances without reference to the limitations of § 48; that the interpretation of the court below is inadmissible because of the hardship of inadequate allowances which would ensue in some instances if it were accepted.

We think these arguments ignore the words of § 77 B (i), the policy disclosed by its legislative history, and the policy as well of the Bankruptcy Act, of which it is an integral part. It is the judge in the reorganization proceeding who is to order payment of such reasonable administrative expenses and allowances in the prior proceeding as may be fixed by the court appointing the "prior trustee." Plainly the word "reasonable" seems designed, by qualifying the action of the judge ordering the payment, to enable him to require that allowances, which the statute permits the prior judge to fix, shall not exceed the limit of reasonableness. Compare *Taylor* v. *Sternberg,* 293 U. S. 470; *Gross* v. *Irving Trust Co.,* 289 U. S. 342; *Hume* v. *Myers,* 242 Fed. 827. Only by a strained construction can it be read as a new grant of power to the latter, by qualifying his action and impliedly relieving him of existing limitations upon his authority to make allowances for services rendered by officers of his own court.

That such a grant of power was not intended is evident from the fact that the section applies to the administrative expenses incurred in state court proceedings as well as in bankruptcy. It would require compelling language to justify the conclusion that Congress has undertaken to enlarge or alter the powers of state courts to fix allowances for their own administrative expenses because payment of them is to be effected by a federal court to which the proceeding has been transferred.

In interpreting the section, it is of importance that it is a part of the Bankruptcy Act, to be read with the other sections relating to allowances, and that the allowances are compensation for officers of the court and for expenses incurred in the course of a judicial proceeding conducted for the purpose, among others, of protecting the interests of creditors in the debtor's property. Trustees in bankruptcy are public officers and officers of a court, and the officers of a court, like public officers generally, "must show clear warrant of law before compensation will be owing to them for the performance of their public duties." *Realty Associates Securities Corp.* v. *O'Connor,* 295 U. S. 295, 299.

It has been the consistent policy of Congress that proceedings in bankruptcy and under § 77 B be economically administered. This is evidenced by explicit limitations in §§ 40, 48 of the Bankruptcy Act on fees of referees, trustees and receivers. To exact strict compliance with these sections, § 72 commands: "Neither the referee, receiver, marshal or trustee shall in any form or guise receive, nor shall the court allow him any other or further compensation for his services than that expressly authorized and prescribed in this Act." In recognition of this policy, the limitations upon expenses prescribed by §§ 40, 48, have been strictly construed, even when the compensation allowed was, in special circumstances, materially less than that which otherwise might have been considered reasonable. See *Realty Associates Securities Corp.* v. *O'Connor, supra; In re Detroit Mortgage Corp.,* 12 F. (2d) 889; *American Surety Co.* v. *Freed,* 224 Fed. 333; compare *In re Consolidated Distributors, Inc.,* 298 Fed. 859; *In re Curtis,* 100 Fed. 784, 792. Occasional hardship to the individual is a consideration outweighed by the public interest and the declared policy of Congress.

One of the controlling reasons for the enactment of § 77 B was the desire to reduce the costs of reorganization. See *Continental Illinois National Bank* v. *Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648, 685; Report No. 194, House Judiciary Committee, June 2, 1933, 73rd Cong., 1st Sess.; Report No. 482, Senate Judiciary Committee, March 15, 1934, 73rd Cong., 2d Sess. Section 76, enacted at the same time as § 77 B, provides: "The compensation allowed . . . a trustee shall in no case be excessive or exorbitant and the court, in fixing such compensation, shall have in mind the conservation and preservation of the estate of the bankrupt, and the interest of the creditors therein." Where the attempted reorganization results in liquidation, §§ 40, 48, regulating the fees of referees, receivers and trustees in bankruptcy, are incorporated by reference in § 77 B (k), and are likewise made to control the fees of such officers in the reorganization proceedings.

In all this we find convincing evidence that the settled policy of the Bankruptcy Act, and its specific restrictions upon the allowances to officers, were not to be disturbed by the inclusion, in a new provision for the transformation of an insolvency proceeding into one for reorganization, of permission to the judge in the former to fix allowances. Only amendatory language plainly indicating a purpose to disregard the restrictions of §§ 40, 48, would justify a different conclusion.

No. 540.—*Allowances to the Referee in Bankruptcy.*

Petitioner was the referee in the proceeding in bankruptcy which was superseded by the reorganization proceeding. The district judge allowed him $25,000 for his services in the bankruptcy proceeding, and the same judge, sitting in the reorganization proceeding, ordered it paid. The Court of Appeals reduced the allowance to $1,038.00, computing it in accordance with § 40 of the Bankruptcy

Act. As there had been no disbursement to creditors, the allowance was limited by § 40 to a filing fee and commissions on creditors' claims filed. Adopting the same conclusion which we have reached in No. 539, petitioner does not contend that § 77 B (i) is authority for disregarding the limitations of the other sections of the Bankruptcy Act upon allowances for administration expenses. But he insists that reorganization under § 77 B is a confirmation of a composition so that he is entitled to the allowance authorized by § 40 (a) of "one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition."

He also relies on § 40 (c), which provides, "In event of the reference of a case being revoked before it is concluded, and when the case is specially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee."

In view of the requirement, already discussed, of strict construction of sections of the Bankruptcy Act fixing fees and allowances of officers, we think neither of the contentions of petitioner is admissible. Section 40 was enacted long before § 77 B, when § 12, dealing *eo nomine* with compositions in bankruptcy, was a part of the Act. Reorganizations now permitted under § 77 B present certain resemblances to compositions under § 12, which have been commented upon as supporting the constitutionality of the reorganization provisions of § 77 or § 77 B. *Continental Ill. Nat. Bank* v. *Chicago, R. I. & P. Ry. Co.*, *supra; In re Central Funding Corp.*, 75 F. (2d) 256; *Campbell* v. *Alleghany Corp.*, 75 F. (2d) 947. But § 77 B contemplates a procedure and results not permissible under § 12. Reorganizations are nowhere referred to in the statute as compositions. Section 77 B (c) (11) applies a different standard of compensation for the master appointed in a reorganization proceeding, with duties corresponding to those of a referee in bankruptcy, from that established by § 40. If reorganization is abandoned in favor of liquidation, a referee may be appointed to whose compensation § 40 is expressly made applicable by § 77 B (k). These are persuasive reasons for concluding that neither § 40 nor § 77 B is to be construed as recognizing that a reorganization is the equivalent of a composition for the purpose of fixing referees' fees under § 40 (a).

Section 40 (c) relates only to the allocation of fees allowed under § 40 (a) in the event that the reference is revoked or the case is specially referred. But here the reference has not been revoked nor the case specially referred, and, for reasons already given, no fees to the referee in addition to those allowed by the court below are authorized under § 40 (a).

Affirmed.

NORTHWESTERN BELL TELEPHONE CO. *v.* NEBRASKA STATE RAILWAY COMMISSION.

APPEAL FROM THE SUPREME COURT OF NEBRASKA.

No. 350. Argued February 6, 1936.—Decided March 2, 1936.

1. The record failing to disclose what, if any, federal questions were presented to the state supreme court, review here is accordingly confined to those which are discussed in the opinion of that court. P. 473.

2. Upon appeal from a judgment of a state supreme court affirming an order of the state commission directing a telephone company doing local and interstate business to use, for purposes of accounting and reporting to the commission, for the year 1934, a composite depreciation rate of 3½% upon all of its depreciable property within the State, *held:*

(1) Assuming, without deciding, that due process requires that the commission's order be upon notice to the company and opportunity to be heard, the procedure followed by the commission in this case satisfied that requirement. P. 473.

(2) The Interstate Commerce Commission not having prescribed rates of depreciation pursuant to § 20 (5) of the Interstate Com-

merce Act, it was within the authority of the state commission to prescribe such rates. P. 477.

(3) The estimated composite rate determined and used by the company, pursuant to the direction of the Interstate Commerce Commission that such rate be used until rates prescribed by that Commission should become effective, cannot be taken as a rate prescribed under § 20 (5). P. 479.

(4) Section 20 (5) cannot be construed as authorizing the Interstate Commerce Commission to supplant state power to regulate depreciation rates of telephone companies otherwise than by prescribing a rate administratively determined by the Commission itself. P. 480.

3. Statutes should be so construed as to avoid doubts of their constitutionality. P. 480.

128 Neb. 447; 259 N. W. 362, affirmed.

Appeal from a judgment affirming an order of the state commission relating to the accounting of the telephone company.

Mr. Charles M. Bracelen, with whom *Messrs. Frank E. Randall* and *Tracy J. Peycke* were on the brief, for appellant.

Mr. Edwin Vail, Assistant Attorney General of Nebraska, and *Mr. John E. Benton,* with whom *Mr. Wm. H. Wright,* Attorney General, was on the brief, for appellee.

By leave of Court, *Messrs. Clyde S. Bailey, John E. Benton,* and *Edwin Vail* filed a brief on behalf of the National Association of Railroad and Utilities Commissioners, as *amicus curiae,* urging affirmance of the judgment of the court below.

Mr. Justice Stone delivered the opinion of the Court.

This case comes here on appeal under § 237 of the Judicial Code from a judgment of the Supreme Court of Nebraska, 128 Neb. 447; 259 N. W. 362, affirming an order of the Nebraska State Railway Commission which directs appellant Telephone Company to use, for purposes of accounting and reporting to the Commision, for the year 1934, a composite depreciation rate of 3½% upon all its depreciable property in Nebraska.

Appellant now assails the order on three grounds: (1) that it was made without such notice and hearing as due process requires; (2) that it is invalid because the Interstate Commerce Commission, pursuant to Congressional legislation, has occupied the field of regulation of telephone company accounting, and has made valid orders conflicting with that of the State Commission; and (3) that it infringes due process because it is unsupported by evidence and deprives appellant of the right to keep accurate books of account.

The record does not disclose what, if any, federal questions were presented to the state supreme court. Its opinion discusses only the first two contentions made here, and we accordingly confine our review to them. See *Miedreich* v. *Lauenstein,* 232 U. S. 236; *Cissna* v. *Tennessee,* 246 U. S. 289; *Saltonstall* v. *Saltonstall,* 276 U. S. 260.

1. Assuming, without deciding, that due process requires that the Commission's order be upon notice to appellant and opportunity to be heard, we think that requirement was satisfied by the procedure followed by the Commission. The challenged order was made at the conclusion of proceedings initiated by the State Commission by its General Order No. 59, directing Class A telephone companies, to which class appellant belongs, to file with the Commission specified schedules of depreciation rates. The order was prefaced by an opinion of the Commission.

The opinion, after reciting the authority conferred upon the Interstate Commerce Commission by § 20 of the Interstate Commerce Act, as amended by the Transportation Act of 1920, 41 Stat. 493, to fix and prescribe depreciation charges for telephone companies, refers to the order of that Commission of July 28, 1931, In Depreciation Charges of Telephone Companies, Docket No. 14,700, 177 I. C. C. 351, which, for the assistance of the Commission in prescribing depreciation charges, required Class A telephone companies to file with their respective state commissions by September 1, 1932, their estimates of composite annual percentage depreciation rates applicable to each class of depreciable property owned or used by them, with supporting data. The order provided for the adoption of a depreciation rate by the Commission, to be effective January 1, 1933. The opinion of the State Commission points out that by later order of the Interstate Commerce Commission the filing date was postponed to August 1, 1934, and the date for the prescribed rate to January 1, 1935.

The opinion also refers to the Depreciation Section Service Circular 7, issued by the Interstate Commerce Commission Bureau of Accounts, which requested that schedules of depreciation rates and statements of estimated service lives and salvage values of telephone property be submitted not later than March 1, 1934, "in order that the Commission may be informed as to the rates contemplated for use" by the telephone companies for the year 1934. The opinion states that it is the view of the State Commission that it has not been deprived of jurisdiction to fix rates for intrastate telephone service, and that, while Congress has given the Interstate Commerce Commission authority to prescribe a uniform system of accounting and rates of depreciation for purposes of accounting to it, the state commissions are not deprived of their authority to fix rates of depreciation so far as their own accounting and reporting system is concerned.

The Commission accordingly ordered that Class A telephone companies file with it, not later than March 1, 1934, a schedule of depreciation rates by primary accounts which they proposed to apply for the calendar year 1934, with such supporting data as is required by the Interstate Commerce Commission, and to file not later than August 1, 1934, their composite annual percentage depreciation rates to be effective January 1, 1935, in accordance with the order of the Interstate Commerce Commission in Docket No. 14,700, and its supplemental orders. The order of the State Commission concludes with the statement that it approves the procedure adopted by the Interstate Commerce Commission for prescribing depreciation rates, except that "It reserves the right to review the findings and conclusions of the Interstate Commerce Commission and enter a final order thereon as to the depreciation rate for accounting purposes to this commission."

In compliance with this order appellant, on March 1, 1934, filed schedules classifying its depreciable property in twelve accounts, with estimated rates of depreciation of each class for 1934, and showing a composite estimated rate of depreciation on all accounts of 4.48%.

Upon examination of these schedules the Commission made a further order, on March 6, 1934, reciting that depreciation rates for 1934 had been filed and that it was not "fully satisfied with the rates proposed," and directing that the case be set "for hearing for oral examination of the members of respondent's staff, who had prepared said schedules, and for the introduction of such evidence as the Commission may desire to submit with opportunity of objections and cross-examination by respondent."

Appellant argues that throughout these proceedings it was not advised that the Commission proposed to make any order with respect to depreciation rates for 1934, or to do more than make recommendations as to the proper depreciation rates to be adopted by the Interstate Commerce Commission for 1935. But it was evident from the opinion and orders of the Commission mentioned that it proposed to deal with two aspects of appellant's depreciation accounting. One was the gathering of data with respect to the proposed rates of depreciation for 1935, which the order of the Interstate Commerce Commission had directed should be filed with the state commissions, and as to which the latter had been requested to submit their recommendations. The other related to the State Commission's asserted authority to fix depreciation rates, its rejection of the proposed rates for 1934 as unsatisfactory, and its direction that hearings be had on them. That the primary purpose of the hearing was to aid the Commission in its rate-making rather than its advisory function seems apparent, the more so as the order for the hearing refers only to the 1934 rates and as the date set for it was in March, four months before August 1, 1934, the date fixed for filing data for the 1935 rate, with respect to which alone the Commission had been asked to exercise its advisory function. Because of subsequent postponements the date for submitting the data for 1935 never arrived.

Possibility of doubt as to the purpose of the hearing was removed in its course before the Commission. At the outset the presiding commissioner announced that the purpose was to fix the 1934 rate, a statement which he repeated later in the course of the hearing on the same day. To this appellant made no objection. The hearing occupied two days. Appellant was represented by counsel. It produced witnesses, including its own engineer and others who had prepared the filed depreciation schedules for 1934, who were examined and cross-examined at length. No evidence tendered by it was rejected. So much of the testimony as is included in the bill of exceptions occupies 151 pages of the printed record. It discloses that both the Commission and the appellant were seeking to establish the proper rate of depreciation to be applied to appellant's property for 1934. The state court rightly concluded that appellant was afforded a full hearing upon adequate notice that the Commission proposed to fix a depreciation rate for 1934, and that the requirements of due process were satisfied.

2. The remaining question is whether the jurisdiction conferred by Congress upon the Interstate Commerce Commission over accounts and depreciation rates of telephone companies, and the exercise of that jurisdiction by the Commission, have operated to curtail state authority over depreciation rates for 1934.

The Interstate Commerce Commission was given no jurisdiction over telephone service rates, but §§ 1 (1), 20 (1) (5) of the Interstate Commerce Act, as amended by Act of June 29, 1906, 34 Stat. 595, see 36 Stat. 555, 556, conferred on the Commission authority, in its discretion, to prescribe a uniform system of accounts for telephone companies, and made it unlawful for them to keep any accounts other than those prescribed or approved by the Commission. Such a system of accounts was required by the Commission February 1, 1913. Effective January 1, 1933, it prescribed a Revised System of Accounts for Class A and Class B Telephone Companies and directed that they keep all accounts in conformity to it.

The Commission never undertook to prescribe rates of depreciation for telephone companies under the Act of 1906. But the Transportation Act of February 28, 1920, again amending § 20 (5) of the Interstate Commerce Act, directed the Commission, "as soon as practicable," to prescribe the classes of property of carriers, including telephone companies, "for which depreciation charges may properly be included under operating expenses and the percentages of depreciation which shall be charged with respect to each of such classes of property." Carriers were forbidden to charge depreciation rates other than those prescribed by the Commission. Since 1920 the Interstate Commerce Commission has taken steps preparatory to the establishment of rates of depreciation for telephone companies, some of which we have mentioned. The adoption of rates has been postponed from time to time and has now been indefinitely postponed by Order of the Communications Commission of May 1, 1935, to which the authority of the Interstate Commerce Commission over telephone companies was transferred by Act of Congress of June 19, 1934, 48 Stat. 1064.

We leave aside the argument of respondent that the federal government is powerless to deny to the states authority to prescribe accounts and depreciation rates to assist them in fixing rates for intrastate telephone service, see *Interstate Commerce Comm'n* v. *Goodrich Transit Co.,* 224 U. S. 194; compare *Pollock* v. *Farmers Loan & Trust Co.,* 157 U. S. 429, 586; *Collector* v. *Day,* 11 Wall. 113, 124; *Ambrosini* v. *United States,* 187 U. S. 1, 7, and pass to the question, decisive of the present case, whether there has yet been any exercise of such power. Both the language of the statute already quoted, and the nature of its subject matter indicate that it contemplated no restriction of state control over depreciation rates until the Interstate Commerce Commission had prescribed its own rates. State commissions were not deprived of power to fix rates for intrastate telephone service, in determining which rates of depreciation chargeable to operating expenses play an important part. See *Lindheimer* v. *Illinois Bell Telephone Co.,* 292 U. S. 151. The statute did not envisage an immediate adoption of depreciation rates by the Interstate Commerce Commission. A long period might elapse, as the event has shown, before the Commission would be prepared to act. It cannot be supposed that Congress intended by the amendment to § 20 (5) to preclude all regulation, state and national, of depreciation rates for telephone companies, for an indefinite time, until the Interstate Commerce Commission could act administratively to prescribe rates. See *Illinois Central R. Co.* v. *Public Utilities Comm'n,* 245 U. S. 493, 510; *Railroad Commissioners* v. *Great Northern Ry. Co.,* 281 U. S. 412, 430. In *Smith* v. *Illinois Bell Telephone Co.,* 282 U. S. 133, 139, this Court pointed out that until the Interstate Commerce Commission has prescribed depreciation rates the prerogative of the state to regulate such rates cannot be gainsaid. See also *Missouri Pacific Ry. Co.* v. *Larabee Flour Mills Co.,* 211 U. S. 612, 623.

When respondent fixed the composite rate of depreciation applicable to all classes of appellant's property for 1934, the Interstate Commerce Commission had prescribed no rate. It had given directions for filing data with state commissions preparatory to establishing a rate for the year 1935, and by the Revised Uniform System of Accounts for Telephone Companies, effective in 1933, it had prescribed, Instruction 81 (A) (C), the method by which depreciation accounts should be kept, directing that there be a composite annual percentage rate of depreciation for each account covering depreciable property, and that until rates "prescribed by this Commission become effective" the company's estimated composite rate be used.

It is said that the company rate, use of which was thus authorized for accounting purposes, must be taken as the prescribed rate until the Commission has fixed its own rate, and that in consequence state commissions are powerless to disturb it. But the order shows on its face that the Commission did not regard the company rates as rates prescribed by the Commission as required by § 20 (5) and we think the purpose of the order, made plain by its language, was to establish a method of accounting, not to prescribe depreciation rates within the meaning of § 20 (5). It thus, without purporting to restrict the power of state commissions over depreciation rates, left the telephone companies free, so far as the Interstate

Commerce Commission was concerned, to use their own depreciation rates for purposes of the required accounting, until the Commission performed the duty to establish rates, imposed upon it by Congress.

In any event, we think that § 20 (5) cannot be read as authorizing the Interstate Commerce Commission to supplant state power to regulate depreciation rates of telephone companies except by prescribing a rate administratively determined by the Commission itself. A direction that the Commission, as soon as practicable, prescribe depreciation rates, is hardly to be read as authority to permit the telephone companies to fix the rates for themselves in defiance of state power. The doubtful constitutionality of the statute if so construed precludes our acceptance of such a construction.

The Commission has thus prescribed no depreciation rates as required by § 20 (5). No exertion of federal authority, through the Interstate Commerce Act, § 20 (5), (6), (7), the orders of the Commission, or otherwise, forbids the making of entries in appellant's accounts or the doing of anything that is by the state commission's order directed to be done. Pending action by the Communications Commission establishing depreciation rates for telephone companies, state control over such rates remains unimpaired. We are not called upon now to consider the effect upon state power of such rates when adopted, or, in view of the state of the record, to consider other objections to the order of the State Commission fixing for appellant a composite depreciation rate of $3\frac{1}{2}\%$.

Affirmed.

Syllabus.

NOBLE ET AL. v. OKLAHOMA CITY.*

CERTIORARI TO THE SUPREME COURT OF OKLAHOMA.

No. 335. Argued February 4, 5, 1936.—Decided March 2, 1936.

1. The Act of Congress of February 18, 1888, and the amending Act of February 13, 1889, authorizing a railroad company to locate and construct a railroad across a portion of the Indian Territory then still held in trust for the Creek Indians, but which was afterwards acquired from them by the United States and opened to settlement, did not make a grant *in praesenti* of a right of way, but granted only a franchise and authorized a taking of land only upon compensation secured or made. Pp. 489, 494.
2. Subsequent related legislation examined and found not to require a different conclusion. P. 491.
3. In view of the nature of the title of the Indians, an intention to grant or impose a servitude upon their lands without compensation to them cannot be imputed to Congress. P. 493.
4. Even if it be assumed that the Act of 1888 granted the railroad a base or limited fee, title nevertheless could not have vested until plats of the location of the line were filed with the Secretary of the Interior for his approval, as required by the Act; and, therefore, the mere staking of a location of a proposed line was ineffectual to prevent the acquisition of superior rights by settlers and occupants under the homestead and townsite laws. P. 494.
5. The provisions made by 43 U. S. C. 912 for transfer of title of abandoned railroad lands relate to such lands as were granted to the railroad by the United States, and do not apply to land which was conveyed to the railroad, subject to reverter, by an entryman who acquired title under the public land laws. P. 495.
6. Whether a habendum clause in a private deed to a railroad operated to revest title in the grantor's heirs upon abandonment of the railroad, *held* a question not of federal but of state law, to be decided by the state court. P. 495.

172 Okla. 182; 44 P. (2d) 135, reversed.

CERTIORARI, 296 U. S. 560, to review a judgment of the state supreme court which affirmed judgments of the trial

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* Together with No. 336, *Higgins et al.* v. *Oklahoma City*. Certiorari to the Supreme Court of Oklahoma.

court in favor of the city in two cases involving title to lands.

Messrs. Charles H. Garnett, Warren E. Libby, and *Joe T. Rogers,* with whom *Messrs. Henry L. Goddard, Fred E. Suits,* and *Fred Ptak* were on the brief, for petitioners.

Messrs. Harlan T. Deupree and *W. H. Brown* for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

These were actions in ejectment tried in a state court. The petitioners in No. 335 sued as the heirs of Naoma Noble, the petitioners in No. 336 as the heirs of Robert W. Higgins. Title to a town lot and a portion of another parcel of land located in the respondent city was in dispute.

The tracts formerly were part of the tribal lands of the Creek Indians. Pursuant to treaties the Creeks removed from east of the Mississippi River to a large area in Indian Territory, now in the State of Oklahoma,[1] and a patent was issued by the President of the United States, granting them the lands "to have and to hold . . . so long as they shall exist as a Nation and continue to occupy the Country hereby conveyed to them."[2] By the Treaty of Washington[3] the tribe ceded to the United States the western half of their domain, which included the site of what is now Oklahoma City, in trust, to be sold and used as homes for civilized Indians whom the United States might desire to settle thereon. This and a prior treaty vested in Congress power to grant railroad rights-of-way through the Creek country. The United

[1] 7 Stat. 366; 7 Stat. 417; 11 Stat. 699.

[2] Vol. 4 of Indian Deeds, in the Office of Indian Affairs, pp. 446–447.

[3] June 14, 1866, 14 Stat. 785.

States did not sell any portion of the ceded area to Indians or permit white settlement in the region of Oklahoma City and the land remained vacant.

By Act of February 18, 1888,[4] Congress authorized the Choctaw Coal and Railway Company to locate and construct a railroad traversing the southeastern portion of the Indian Territory, through lands of the Choctaw Nation whose title was similar to that of the Creek Nation.[5]

The President, on January 19, 1889, negotiated a treaty with the Creeks[6] by which they ceded to the United States full and complete title to the entire western half of their lands, thus freeing the area from the trust under which it had theretofore been held. This treaty was subject to ratification by the council of the Tribe and by Congress. It was confirmed by the former January 31, 1889.

Pending the ratification of the treaty, Congress, on February 13, 1889, amended the Act of February 18, 1888, to authorize the railway company to construct a branch extending from its main line northwestwardly through Choctaw and Creek country.[7] The road so authorized now traverses Oklahoma City. The Creek Tribe then owned the eastern portion of the Creek country through which the branch line was to run, and retained an interest in the western portion. March 1, 1889, Congress ratified the treaty of January 19, 1889, and, in the act of ratification, provided that "the lands acquired by the United States under said agreement shall be a part of the public domain." [8]

By Act of March 2, 1889,[9] Congress directed that the lands acquired from the Creek Nation should be disposed

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[4] 25 Stat. 35.

[5] See Treaty of June 22, 1855, 11 Stat. 611.

[6] 25 Stat. 757.

[7] 25 Stat. 668.

[8] 25 Stat. 757.

[9] 25 Stat. 980, 1004–1005.

of to actual settlers under the homestead laws but that no person should be permitted to enter thereon until the territory was opened for settlement. The release, conveyance, and extinguishment of the Indians' rights was not to inure "to the benefit of or cause to vest in any railroad company any right, title, or interest whatever in or to any of said lands . . . and all grants or pretended grants of said lands or any interest or right therein now existing in or on behalf of any railroad company, except rights of way and depot grounds," were declared forfeited for breach of condition.

March 23, 1889, the President issued a proclamation opening a portion of the lands to settlement at noon April 22, 1889. Before the latter date the railway company had surveyed the line of its proposed railroad through what is now Oklahoma City and marked it by stakes along the centre line of the right-of-way and by signs warning that the land was claimed for right-of-way and station purposes. It appears to have been then known that a town site would be laid out on the quarter-section in which the Noble tract is located. Prior to the opening of the land a plat had been made and, at 12 o'clock, April 22, 1889, surveyors began to run lines and drive stakes to locate the lots and blocks of the town site. On that day many settlers, amongst whom was Naoma Noble, arrived and staked and occupied lots. As the survey proceeded they adjusted their claims and boundaries to the survey lines. In surveying and staking out lots both the surveyors and the ancestor of the petitioners in No. 335 disregarded the right-of-way marks. All the lots in the the original town site, comprising the quarter-section in which the Noble land is situated, were occupied on the day of opening. On the same day Robert C. Higgins, the ancestor through whom the petitioners in No. 336 claim, settled upon the quarter-section adjoining the town site on the west, and undertook to file a homestead entry thereon.

July 13, 1889, the railway company filed with the Secretary of the Interior a map of definite location of its line as staked out through Oklahoma City. The road ran diagonally through the town site quarter-section, included the whole of the Noble lot, and traversed diagonally Higgins' adjoining quarter-section.

The Act of May 2, 1890,[10] organizing the Territory of Oklahoma, provided that "No part of the land embraced within the Territory hereby created shall inure to the use or benefit of any railroad corporation, except the rights of way and land for stations heretofore granted to certain railroad corporations. Nor shall any provisions of this act or any act of any officer of the United States, done or performed under the provisions of this act or otherwise, invest any corporation owning or operating any railroad in the Indian Territory, or Territory created by this act, with any land or right to any land in either of said Territories, and this act shall not apply to or affect any land which, upon any condition on becoming a part of the public domain, would inure to the benefit of, or become the property of, any railroad corporation." Not until May 14, 1890,[11] did Congress pass a town site act applicable to Oklahoma. In the meantime, the citizens had established a form of government and elected officials. A plan of the town site was filed in the office of the City Recorder and provision made by ordinance for recording transfers of the plotted property. The Recorder issued certificates to the occupants of lots and transfers were made by quit-claim deeds. After the passage of the town site act trustees were appointed and the entire quarter-section constituting the original town site was patented to the trustees

[10] 26 Stat. 81, 91.

[11] 26 Stat. 109.

without exception, limitation, or reservation. In due time the trustees issued their deeds for the various lots, including the Noble tract.

From 1889 to 1893 the railway company and the lot claimants were in disagreement, the former contending that the acts of Congress vested it with title to the right-of-way, the latter insisting that their occupation before the filing of the company's plot with the Secretary of the Interior gave them the superior title. The dispute was amicably settled by the company's relinquishing its claim to the diagonal three hundred foot right-of-way as plotted, and relocating it, one hundred feet wide, parallel to the streets and alleys shown on the city plan. The lots or portions of lots required for the relocation were obtained from the owners by deeds or condemnation. March 28, 1891 Naoma and George Noble executed a deed to the railway company containing the following clause:

"Being intended for the use and occupation of said party [grantee], its successors and assigns, as and for its right-of-way for the constructing, operation and maintenance of its railroad and business at or upon the land hereby released and quit claimed: Provided, that in case of abandonment of said premises by said second party, its successors or assigns for the purposes above mentioned, the same shall revert to the grantors, their heirs or assigns."

The right of Higgins to make a homestead entry being involved in a land office contest, the company constructed its road across his quarter-section and was operating trains thereover in 1892. After the contest eventuated in his favor he conveyed to the railroad, in 1898, for a pecuniary consideration, a strip of land one hundred feet wide across his quarter-section "for a right of way for its railroad, Telegraph and Telephone Lines, and for Railroad or Station purposes." The habendum clause was:

"To have and to hold the same by the said Choctaw Oklahoma and Gulf Railroad Company, together with all and singular the rights, privileges and appurtenances thereunto belonging and all the rights and privileges which said company is authorized to have, hold and exercise under and by virtue of the Act of Congress granting the Choctaw Coal and Railway Company a right of way through the Indian Territory, approved February 18th, 1888, and subsequent Acts of Congress amending and extending said Act together with all the rights and privileges granted unto said Choctaw, Oklahoma and Gulf Railroad Company by an Act of Congress approved August 24th, 1894, and the Act of Congress approved April 24th, 1896, and unto its successors, and assigns forever."

The road constructed on the right-of-way so acquired in Oklahoma City was operated by the railway and its successors until December 4, 1930. Pursuant to an agreement made with the city, the then owner and operator secured the approval of the Interstate Commerce Commission of the abandonment of the line,[12] and executed a quit-claim deed to the city for the abandoned portion. A decree was obtained from the United States District Court for the Western District of Oklahoma adjudging that the land had been abandoned for railroad purposes and that the company's title had passed to the city under an Act of Congress of March 8, 1922.[13] None

[12] The railway was reorganized as Choctaw, Oklahoma and Gulf Railroad Company and the reorganized company given the same rights as its predecessor. 28 Stat. 502; 29 Stat. 98. At the time of the abandonment the Chicago, Rock Island and Pacific Railroad Company was operating the line in question under a lease for 999 years.

[13] 42 Stat. 414, 43 U. S. C., § 912: "Whenever public lands of the United States have been or may be granted to any railroad company for use as a right of way for its railroad or as sites for railroad structures of any kind, and use and occupancy of said lands for such purposes has ceased or shall hereafter cease, whether by forfeiture or by

of the petitioners was a party to this proceeding. The city took possession and has since held the strip. These suits were filed shortly thereafter. Petitioners asserted that the Act of February 18, 1888, and the amending Act of February 13, 1889, made no grant *in praesenti* of a right-of-way but merely authorized the company to acquire one by purchase or condemnation; that these statutes applied only to Indian country and not to the public domain; and that on February 13, 1889, the land in question was Creek Indian land and the only title the company acquired to its right-of-way, so far as the tracts in controversy are concerned, was that conveyed by the deeds of petitioners' ancestors under both of which the title, on abandonment for railroad purposes, reverted to their heirs and assigns. The defense to this claim was that the acts presently invested the railway with title to the right-of-way subsequently located, obtained and used, which, upon abandonment of the use, reverted to the United States and was, by the Act of March 8, 1922, conveyed to the respondent.

Petitioners further urged that, even if the acts of Congress operated as grants *in praesenti,* the estate of the

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abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress, then and thereupon all right, title, interest, and estate of the United States in said lands shall, except such part thereof as may be embraced in a public highway legally established within one year after the date of said decree or forfeiture or abandonment be transferred to and vested in any person, firm, or corporation, assigns, or successors in title and interest to whom or to which title of the United States may have been or may be granted, conveying or purporting to convey the whole of the legal subdivision or subdivisions traversed or occupied by such railroad or railroad structures of any kind as aforesaid, except lands within a municipality the title to which, upon forfeiture or abandonment, as herein provided, shall vest in such municipality, and this by virtue of the patent thereto and without the necessity of any other or further conveyance or assurance of any kind or nature whatsoever: . . ."

company endured only so long as the land was devoted to railroad use, with a right of reverter, either vested in the Creek Tribe and conveyed to the United States by the cession effective March 1, 1889, or vested directly in the United States; and the right of reverter passed from the United States by patent to the petitioners' ancestors and from them, by deed and inheritance, to the respective petitioners. Upon the extinguishment of the railroad's estate by abandonment, full title, so they claimed, reverted to them. They alleged the Act of March 8, 1922, does not apply in the circumstances and, if held applicable, is unconstitutional as depriving them of property without due process.

The trial court entered judgments in favor of the city and, on appeal, the Supreme Court of Oklahoma consolidated the cases for hearing and affirmed the judgments.[14] In their applications for certiorari the petitioners asserted that the state court's construction of the Acts of 1888 and 1889 conflicts with the decision of a federal court in respect of an act identical in terms,[15] and stressed the importance of a final adjudication as affecting not only their titles but many others in Oklahoma City, the subject of threatened suits in state and federal courts. On this showing the writ was granted.

First. The Act of February 18, 1888, does not purport to grant lands for right-of-way and station purposes. The title is "An act to authorize the Choctaw Coal and Railway Company to construct and operate a railway through the Indian Territory." By the first section the company is "invested and empowered with the right of locating, constructing, owning, equipping, operating, using, and maintaining a railway." Section 2 provides that the corporation "is authorized to take and use" for railway, but

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[14] 172 Okla. 182; 44 P. (2d) 135.

[15] *United States* v. *Fort Smith & Western R. Co.*, 195 Fed. 211, 214.

for no other purpose, a right-of-way and "to take and use" land for station purposes. Section 3 requires that, before the road shall be constructed through land held by any individual occupant according to Indian usage, full compensation must be made to the occupant, prescribes the method of securing compensation, and creates a tribunal for ascertaining and awarding it, from whose decision a right of appeal to a federal court is given. Section 5 lays on the company the obligation to pay to any tribe through whose unallotted lands the line may run a fixed compensation per mile. If the tribe be dissatisfied with the amount specified in the act the just measure of compensation is to be ascertained by the same procedure as is directed in the case of an individual allottee. The company is permitted to survey and locate its railway immediately; and, by § 6, is required to cause maps, showing the location of its lines, to be filed with the Secretary of the Interior and with the chiefs of the nations or tribes through whose lands they run. The section adds: "After the filing of said maps no claim for a subsequent settlement and improvement upon the right of way shown by said maps shall be valid as against said company." The Secretary of the Interior is to approve of the location before any construction may be begun. Section 13 enacts: "The right of way herein and hereby granted shall not be assigned or transferred in any form whatever prior to the construction and completion of the road, . . ." Except for the words just quoted from § 13 upon which respondent relies the act plainly grants an authority or a franchise rather than physical property. The expression used in that section is not sufficient to enlarge the limited scope of the act disclosed by the enacting sections.

The respondent, and the court below, refer to decisions holding certain right-of-way acts to be grants *in praesenti*, but those acts not only affect the public lands of the United States which are subject to unrestricted disposition by the Government,[16] but explicitly state that "a right of way is hereby granted." [17]

The Act of 1888, considered in its entirety, evinces the intent that the company is to compensate for all lands taken for its use, whether those of individual allottees or of the tribe. No provision for compensation to white settlers was made because at the date of the passage of the statutes none were permitted within the area to be traversed by the railroad. The acts in question were construed by Assistant Attorney General (now Mr. Justice) Van Devanter in an opinion rendered to the Department of the Interior in 1898,[18] as not making grants *in praesenti*, but conferring only the right to locate a railroad and take the necessary land upon making just compensation to its owners or those having an inchoate right of ownership. A similar conclusion was announced by the Circuit Court of Appeals for the Eighth Circuit [19] in respect of the act authorizing the building of the Fort Smith and Western Railroad,[20] which is identical with that under review except for the name of the company and the termini of the projected railroad.

Later statutes respecting the railroad are said to support respondent's view of the nature of the original grant. We think, however, the subsequent legislation is, at best, of doubtful aid in the construction of the Act of 1888. The Act of February 13, 1889, amended § 1 of the orig-

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[16] *Ruddy* v. *Rossi*, 248 U. S. 104, 106.

[17] See, e. g., *Missouri, K. & T. Ry. Co.* v. *Kansas Pacific Ry. Co.*, 97 U. S. 491; *Railroad Co.* v. *Baldwin*, 103 U. S. 426; *United States* v. *Southern Pacific R. Co.*, 146 U. S. 570; *Northern Pacific Ry. Co.* v. *Townsend*, 190 U. S. 267; *United States* v. *Michigan*, 190 U. S. 379. The general railroad act of 1875 (18 Stat. 482) also grants a right-of-way *in praesenti: Jamestown & Northern R. Co.* v. *Jones*, 177 U. S. 125; *Stalker* v. *Oregon S. L. R. Co.*, 225 U. S. 142.

[18] 27 Land Office Decisions, 414.

[19] *United States* v. *Ft. Smith & Western R. Co.*, 195 Fed. 211, 214.

[20] 30 Stat. 1368.

inal act by authorizing the construction of the branch line extending westwardly and northwestwardly from the main line, which branch now runs through the respondent city. It made no other alteration in the provisions of the earlier legislation. The Acts of February 21, 1891,[21] and January 22, 1894,[22] extended the time originally granted for constructing the railroad. The latter act added: "And for such purpose the said company shall have the right to take and occupy the right of way and depot grounds heretofore granted to it by said acts." We think, in the light of the clear provisions of the original authorization, no inference favorable to the respondent's contention is to be drawn from this phrase in the extending act.

On the other hand, Congress has indicated its view that the original act merely authorized the exercise of the right of eminent domain. By the Act of August 24, 1894,[23] the creditors and stockholders of the railway, which had become insolvent, were reorganized into a new corporation, the Choctaw, Oklahoma and Gulf Railroad Company. Section 4 provides: "That it shall and may be lawful for such new corporation to construct and operate branches from its said railroad and for such purpose to take and use rights of way . . . upon making compensation therefor as provided in the case of taking land for its main line . . ."

Respondent also cites a portion of § 18 of the Organic Act for the Territory of Oklahoma quoted *supra* to support the claim that by the Act of 1888 Congress intended to grant *in praesenti*. For the same purpose the court below quoted and relied on one sentence found in the section. We think, however, that the provision was

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[21] 26 Stat. 765.

[22] 28 Stat. 27.

[23] 28 Stat. 502. And see § 2 of the Act of April 24, 1896, 29 Stat. 98; § 2 of the Act of March 28, 1900, 31 Stat. 52.

merely intended to preserve the *status quo* and does not aid in the construction of previous legislation respecting the rights of railroads in the Territory.

Were the Act of 1888 of doubtful import the conditions existing when it and the amending act of 1889 were adopted would be conclusive of the legislative intent. The main line authorized by the first act ran for the greater portion through the lands of the Choctaw and Chickasaw Indians. The title of these tribes was substantially similar to that of the Creeks; and while, in the treaty by which their title was confirmed, there was provision that rights of way for railroads might be granted through their territory, the condition was added that full compensation should be made for any property taken or destroyed in the construction of any such road. The branch line authorized by the Act of 1889 extended westward through the eastern portion of the Creek lands which was unaffected by the treaty of 1866. The treaty of 1856 with this tribe contained a provision similar to that found in the Choctaw Treaty securing compensation for lands taken for railroad rights of way. The branch line also was to traverse the western portion of the Creek Nation's territory but, at the time the branch was authorized (February 13, 1889), that area was not public land of the United States and was held in trust for the settlement of other Indians. The restriction was not removed until March 1, 1889, at which time these lands were declared to be part of the public domain and intended for white settlement.

Both the original and the amending act contemplated that the right-of-way would run through lands owned by Indian tribes or claimed by Indian allottees and none other. In view of the nature of the title of the Indians, we cannot impute to the Congress a purpose by the Act of 1888 to grant any portion of the lands to the company or to impose a servitude without compensation.

For these reasons we are unable to agree with the construction of the act by the Supreme Court of Oklahoma in the present case and in earlier decisions.[24] We hold the legislation granted a franchise, authorized a taking upon compensation secured or made, and was not a grant of land.

Second. Assuming, for the sake of argument, that the Act of 1888 granted the railroad a base or limited fee, as does the general railroad act of March 3, 1875,[25] we think the marked similarity of this special act to the general statute requires that they be given the same construction. It is well settled that the title to right-of-way and station lands conferred by the general railroad act does not accrue to the company until a map of definite location is filed with the Secretary of the Interior for his approval, or the road is actually constructed, and the rights of one claiming by settlement or occupancy antedating such filing or construction, are superior to those of the railroad.[26] Like the general railroad law, the act in question required the filing of plats of the location of the line for the Secretary's approval and, in addition, expressly subordinated to the railroad's rights any claim based on a settlement subsequent to such filing. This was a clear recognition of the principle applied to rights-of-way acquired pursuant to the general law, which was that the staking of a location of the proposed line was ineffectual to prevent the acquirement of rights by settlers and occupants under the homestead and town site laws.[27] It is not to be supposed that a different rule was

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[24] *United States* v. *Choctaw O. & G. R. Co.*, 3 Okla. 404, 41 Pac. 729; *Churchill* v. *Choctaw Ry. Co.*, 4 Okla. 462, 46 Pac. 503.

[25] C. 152, 18 Stat. 482; 43 U. S. C., §§ 934–939. See *Rio Grande Western Ry. Co.* v. *Stringham*, 239 U. S. 44, 47, and cases cited.

[26] *Minneapolis, St. P. & S. S. M. Ry. Co.* v. *Doughty*, 208 U. S. 251; *Great Northern Ry. Co.* v. *Steinke*, 261 U. S. 119.

[27] *Ibid.*

intended by the Act of 1888. The petitioners entered upon their tracts April 22, 1889. The company's map was not filed with the Secretary of the Interior until July 13th of the same year. Whatever the quality of the statutory grant to the railroad company, its rights had their inception after the assertion of, and were inferior to, those of the petitioners' ancestors.

Third. It follows from what has been said that the railroad derived title to the Noble lot by the deed of Naoma and George Noble of March 28, 1891. As no question is made but that the reverter clause in that deed became operative upon abandonment of the line, the Noble title is superior to that of the respondent. It is equally true that when Higgins made his deed to the railroad company in 1898 he had good title to the premises conveyed and by that conveyance the railroad obtained whatever estate it had. The petitioners insist that the habendum clause in the deed operated to clothe them with full title on abandonment of the right of way. They say that the Supreme Court of Oklahoma so held. The opinion seems to proceed on this assumption, but in the view the court took, a decision of the question was unnecessary, and we find no direct ruling upon the point. We express no opinion as to the effect of the habendum clause, since this is a question of state law and appropriately may be decided by the state court.

The grounds stated for our decision make it unnecessary to consider or to decide the other questions raised by the petitioners. The judgment of the Supreme Court of Oklahoma must be reversed and the causes remanded to that Court for further proceedings not inconsistent with this opinion.

Reversed.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* SAN JOAQUIN FRUIT & INVESTMENT CO.

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

No. 379. Argued February 13, 1936.—Decided March 2, 1936.

1. Language used in tax statutes should be read in its ordinary and natural sense. P. 499.
2. Under provisions of the Revenue Acts of 1921, 1924, 1926, and 1928, for determining gain or loss from the sale of property, *held* that real property purchased under an option contained in a lease was "acquired" at the time of the conveyance to the optionee and not at the time of the making of the lease. P. 499.
3. The exercise of the option and the conveyance of the property did not constitute a conversion of two capital assets (the option and the purchase money) into a new capital asset (the land). P. 500.

77 F. (2d) 723, reversed.

CERTIORARI, 296 U. S. 561, to review a judgment reversing a decision of the Board of Tax Appeals, 28 B. T. A. 395, which approved a determination of deficiency in income tax.

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

Mr. George M. Naus, with whom *Messrs. J. R. Sherrod* and *Joseph D. Peeler* were on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

Is real property "acquired," within the meaning of the revenue acts, when a lease is made containing an option to purchase, or when the option is exercised? The question is presented under the relevant sections of the Revenue Acts of 1921, 1924, 1926 and 1928.[1]

October 13, 1906, the Irvine Company leased to the San Joaquin Fruit Company one thousand acres, part of a much larger tract, of bare unirrigated land in California. The lessor was wholly owned by one Irvine, and the lessee was organized by two experienced men who together with Irvine subscribed its capital, in the hope that planting, irrigation, and cultivation would make the land valuable. The lease was for a term of ten years from December 1, 1906; required the lessee to plant the tract as an orchard within four years, to procure and conduct a specified supply of irrigation water to the tract, and to raise certain field crops in connection with the orchard; and embodied an irrevocable option to buy the whole acreage for $200,000, exercisable November 30, 1916. Before October, 1908, the lessee procured the water, planted, and was successfully working the land; and the taking up of the option at the end of the term was then no longer a matter of doubt. By February 28, 1913, the value of the property had greatly increased. On November 30, 1916, the option was closed and conveyance made to the lessee, which subsequently transferred the land to the respondent under circumstances which do not alter the basis for calculation of gain. During the period 1920 to 1928, in-

[1] 42 Stat. 227, 229; 43 Stat. 253, 258; 44 Stat. 9, 14; 45 Stat. 791, 818. The provisions of the Revenue Act of 1924, which are typical, follow:

"Sec. 204 (a). The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that . . .

"(b) The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, shall be (A) the cost of such property . . . or (B) the fair market value of such property as of March 1, 1913, whichever is greater . . ."

Section 202 of the Revenue Act of 1921 speaks of "property, real, personal, or mixed."

clusive, the respondent sold portions of the tract. In computing the tax liability for these years the petitioner determined the property was acquired November 30, 1916, when the option was exercised, and its cost was the $200,000 paid plus the amounts expended for improvements pursuant to the lease. The respondent appealed to the Board of Tax Appeals, contending the lessee acquired a property in the land,—an interest real,—prior to March 1, 1913, and the value of the land at that date was the proper basis for calculating gain on sales. The Board sustained the petitioner.[2] The Circuit Court of Appeals reversed the Board's decision.[3] To resolve an asserted conflict[4] we granted certiorari.

We hold that the respondent acquired the property on November 30, 1916. The option itself was property, and doubtless was valuable. If it had been assignable, and the lessee had sold it at a profit, taxable gain would have resulted from the sale. But the option is admittedly not the same property as the land. So conceding, the respondent still insists that ownership of the option created an interest in the land. This would not be true of a bare option unconnected with a lease;[5] but we are told that because embodied in the lease the agreement became a covenant real and gave the lessee a species of interest or property in the land. The weight of authority is to the contrary,[6] and no cited California decision

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[2] 28 B. T. A. 395.

[3] 77 F. (2d) 723.

[4] See *Commissioner* v. *Cummings,* 77 F. (2d) 670; *Chisholm* v. *Commissioner,* 79 F. (2d) 14.

[5] *Richardson* v. *Hardwick,* 106 U. S. 252, 254; *Todd* v. *Citizens Gas Co.,* 46 F. (2d) 855, 866.

[6] *Willard* v. *Tayloe,* 8 Wall. 557, 564; *Kadish* v. *Lyon,* 229 Ill. 35, 40; 82 N. E. 194; *Bras* v. *Sheffield,* 49 Kan. 702, 710; 31 Pac. 306; *Caldwell* v. *Frazier,* 65 Kan. 24; 68 Pac. 1076; *Luigart* v. *Lexington Turf Club,* 130 Ky. 473, 480; 113 S. W. 814; *Trumbull* v. *Bombard,* 171 App. Div. 700; 157 N. Y. S. 794; *Gamble* v. *Garlock,* 116 Minn. 59; 113 N. W. 175.

supports the position.[7] But even if we should agree that a lessee-optionee acquires, by virtue of the instrument, an equitable interest in the land it would not follow that, within the contemplation of the revenue acts, he acquires the property at the date of the option rather than at the date of conveyance. The word "acquired" is not a term of art in the law of property but one in common use. The plain import of the word is "obtained as one's own." Language used in tax statutes should be read in the ordinary and natural sense.[8] In the common and usual meaning of the term the land was acquired when conveyed to the respondent's predecessor.

The Circuit Court of Appeals thought that to avoid serious doubts concerning the constitutional power to tax gains accruing before March 1, 1913, it was important, if possible, to treat the property as acquired when the option was given. The court therefore resorted to the doctrine that the title when acquired relates back to the date of the option. Cited in support of this application of the theory are cases in which the California courts have invoked it to subordinate the rights of assignees or mortgagees who became such with notice of an outstanding option.[9] The fiction of relation, indulged to defeat those dealing with the legal title with knowledge of the option, can give no aid in solving the question of the time of the optionee's acquirement of property under a statute taxing gain upon a subsequent sale. And there is no need of the fiction to avoid any constitutional question. The power to tax gains which accrued prior to the adoption of the Sixteenth Amendment is not here involved. We suppose

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[7] Compare *Ludy* v. *Zumwalt,* 85 Cal. App. 119; 259 Pac. 52; *Hicks* v. *Christeson,* 174 Cal. 712; 164 Pac. 395.

[8] *Old Colony R. Co.* v. *Commissioner,* 284 U. S. 552; *Reinecke* v. *Smith,* 289 U. S. 172.

[9] *Smith* v. *Bangham,* 156 Cal. 359; 104 Pac. 689; *Chapman* v. *Great Western Gypsum Co.,* 216 Cal. 420; 14 P. (2d) 758.

the amount received by the respondent from a sale includes and is the result of increase in value of the property in the period prior to March 1, 1913. But the gain accruing in that period did not accrue to property owned by the lessee. Neither the land nor the gain so accruing before March 1, 1913, became the lessee's property until 1916 when it took up the option.

An alternative contention is that the exercise of the option and the conveyance on November 30, 1916, constituted merely an exchange of capital assets,—a closed transaction,—and the basis for calculation of gain was the value of the land and improvements at that date. The capital asset, sale of which resulted in taxable gain, was the land. This was not an asset of the taxpayer prior to the exercise of the option. We think it clear that there was no combination of two capital assets,—the option and $200,000 of cash, to form a new capital asset, the land, which was subsequently sold at a profit. The judgment of the Circuit Court of Appeals must be

Reversed.

TERMINAL WAREHOUSE CO. *v.* PENNSYLVANIA RAILROAD CO. ET AL.

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

No. 351. Argued January 15, 16, 1936.—Decided March 2, 1936.

1. An order of the Interstate Commerce Commission adjudging a preference illegal upon complaint of a shipper but refusing to require reparation from the carrier upon the ground that no damage was proved, is not conclusive against the right of the complainant to recover damages from another shipper who enjoyed the preference and who had intervened in the proceedings but against whom no damages were there prayed. P. 511.

2. The remedy of a shipper for impairment of profits in his business alleged to have resulted from illegal privileges and payments granted a competitor by a railroad in interstate commerce, no element of monopoly being involved and no conspiracy beyond the mere agreement between the railroad and the favored shipper for the forbidden preferences, is not by action for treble damages under § 7 of the Anti-Trust Act but is confined to proceedings against the railroad and the favored shipper under the Interstate Commerce Act. P. 511.

So *held* in an action by a warehouse company against a competitor in the same city and a railroad, in which it was claimed that damage to the plaintiff was caused by an arrangement between the defendants, published in the railroad's tariffs and for a time upheld by the Interstate Commerce Commission but later declared unlawful by the Commission and by this Court (*Merchants Warehouse Co.* v. *United States,* 283 U. S. 501), whereby the defendant warehouse company received certain concessions and allowances upon the mistaken assumption that its facilities were part of the railroad's station facilities and that it acted as the railroad's agent in the handling of freight.

78 F. (2d) 591, affirmed.

Certiorari, 296 U. S. 560, to review the reversal of a judgment for treble damages in an action under the Anti-Trust Act.

Messrs. Thomas Raeburn White and *John J. Hickey,* with whom *Messrs. Walter W. Ahrens* and *Wm. A. Schnader* were on the brief, for petitioner.

The denial of reparation by the Interstate Commerce Commission was not a bar to the subsequent suit under the Sherman Act against both respondents for injuries resulting from their violations of that Act. The Commission had no statutory authority to award the damages claimed even against the Railroad Company, because, as the Commission found, they were not "attributable directly" to the unlawful violations of the Interstate Commerce Act of which complaint was made. The action in the case at bar is for damages resulting from the conspiracy to violate the Sherman Act, and the injuries were directly attributable to that cause.

The evidence sustains the verdict of the jury that a contract, combination or conspiracy existed to violate the Sherman Act.

The evidence showed that the two respondents had made an agreement whereby the Railroad Company granted certain favors to the Merchants Company and not to other warehouses on its lines, including allowances ostensibly for handling freight, the furnishing of free siding connections and facilities, active assistance in the solicitation of warehouse freight, and permission to allow inbound loaded cars to remain indefinitely upon its tracks without demurrage charges, and whereby the Merchants Company agreed to give to the Railroad Company all the shipments it could control, to accord preferential treatment to traffic moving over the Railroad Company's lines, and not to extend the use of its facilities to traffic of other railroads. The principal part of warehouse freight moving in and out of the warehouses of the Merchants Company was interstate in character. The agreement was carried out by both parties, and Merchants Company made full use of the advantages and favors granted it by establishing unfair rates and practices which diverted business from other warehouses and from other carriers, and tended to create a monopoly. Citing: *Merchants Warehouse Co.* v. *United States,* 283 U. S. 501, 505; *United States* v. *Standard Oil Co.,* 47 F. (2d) 288, 298; *United States* v. *E. C. Knight Co.,* 156 U. S. 1, 16; *United States* v. *Patten,* 226 U. S. 525, 543; *Anderson* v. *Shipowners Association,* 272 U. S. 359, 363; *Montague & Co.* v. *Lowry,* 115 Fed. 27, 30, aff'd 193 U. S. 38; *New York, N. H. & H. R. Co.* v. *I. C. C.,* 200 U. S. 361, 393; *Swift & Co.* v. *United States,* 196 U. S. 375, 402; *United States* v. *Trans-Missouri Freight Assn.,* 166 U. S. 290; *United States* v. *Joint Traffic Assn.,* 171 U. S. 505;

Ramsay Co. v. *Associated B. P. of U. S. and C.,* 271 Fed. 140, reversed on other grounds, 260 U. S. 501; *Sullivan* v. *Associated B. & D. of U. S.,* 272 Fed. 323, reversed on other grounds, 6 F. (2d) 100; *U. S. Copper Securities Co.* v. *Amalgamated Copper Co.,* 232 Fed. 574; *Binderup* v. *Pathe Exchange,* 263 U. S. 291; *Chattanooga F. & P. Works* v. *Atlanta,* 203 U. S. 390; *Hood Rubber Co.* v. *U. S. Rubber Co.,* 229 Fed. 583; *Local 167* v. *United States,* 291 U. S. 293.

The evidence supports the verdict of the jury as to the damage suffered.

The evidence clearly showed that in carrying out the conspiracy, the Merchants Company established grossly unfair warehouse rates and practices, and that in consequence thereof the petitioner suffered heavy loss in the actual handling of business which passed through its warehouses during the period in suit. No claim was made for business which petitioner lost in consequence of unfair competition, but only actual pecuniary loss sustained by reason of the necessity of giving free service or lowering its rates to meet the unfair competition aforesaid. The verdict was very moderate in amount and no complaint is made of the judge's charge.

Messrs. John Hampton Barnes and *Robert T. McCracken,* with whom *Messrs. George G. Chandler, Frederic D. McKenney,* and *Henry Wolfe Biklé* were on the brief, for respondents.

Mr. Justice Cardozo delivered the opinion of the Court.

In this action under the Anti-Trust Laws (15 U. S. C., §§ 1, 15) for the recovery of treble damages, the Terminal Warehouse Company, petitioner in this court, accuses a competitor, the Merchants Warehouse Company, and the Pennsylvania Railroad Company, an interstate common carrier, of an unlawful combination in restraint of trade and commerce.

The business of Merchants Warehouse Company, which for brevity will be spoken of as Merchants, began in January, 1887. Its site was the City of Philadelphia. At the beginning there were two warehouses, both in convenient proximity to the Pennsylvania's tracks and terminals. Other buildings were added from time to time by purchase or by lease to serve other sections of the city. From the outset Merchants had contracts with Pennsylvania for privileges and payments special to itself. These are the contracts of which Terminal complains. They were renewed as they ran out from 1887 to 1931, a separate contract being made with reference to each building. For present purposes a summary of one contract will serve as a summary of all, though they differ in particulars. For illustration we choose the contract of January 25, 1917, which has to do with the warehouse at Water and Chestnut Streets. By this contract Pennsylvania agrees to maintain tracks adjacent to the warehouse and to make payments at stipulated rates for services rendered by the warehouse in the receipt and delivery of freight. While the contract is in force, there is to be no allowance for such services to any other warehouse company in the City of Philadelphia. In return Merchants agrees to give a preference to Pennsylvania over other lines in the use of its facilities; to load and unload freight promptly and efficiently; to collect charges due for incoming freight, and to be responsible to the railroad company therefor.

No secret was made of the existence of this contract or of any of the others. On the contrary, the substance of the whole arrangement was set forth in the tariffs of the railroad filed with the Interstate Commerce Commission and open to the public. Pennsylvania there showed that it had designated the warehouses of Merchants as stations for the receipt and delivery of freight. It also showed the amount of the payments and allowances to be made to Merchants for services in handling freight at the stations so designated. For many years the practice went unchallenged by any agency of government. The assumption was that the warehouses, though not owned by Pennsylvania, were, none the less, public freight stations supplied by a contractor (*United States* v. *Baltimore & Ohio R. Co.*, 231 U. S. 274, 288), and that the railroad in making payments or allowances for the handling of the freight was paying for transportation services rendered by an agent. Decisions of the Interstate Commerce Commission bring this out in clear relief. Keystone Warehouse Co. *v.* Pennsylvania R. Co., 53 I. C. C. 335; Keystone Elevator & Warehouse Co. *v.* Director General, 73 I. C. C. 273, 274; McCormick Warehouse Co. *v.* Pennsylvania R. Co., 95 I. C. C. 301. Those cases stood unquestioned until 1928, when one of them (McCormick Warehouse Co. *v.* Pennsylvania R. Co., *supra*) was reheard and overruled (148 I. C. C. 299), earlier decisions to the same effect falling along with it. The conclusion was then announced that a warehouse company doing business under such a contract was a consignor or consignee, acting on its own behalf and not as agent for the carrier. With this change in its relation discriminatory payments or allowances became forbidden and unlawful. 49 U. S. C., § 3 (1).

Terminal, a rival warehouse, organized in 1904, was quick to occupy the vantage-ground left open by that ruling. It laid before the Interstate Commerce Commission a complaint charging Pennsylvania with unjust discrimination in the practices described. It asked that a restraining order protect it for the future, and that there be an award of reparation for losses suffered in the past. There were separate complaints as to the acts of other railroads (The Baltimore & Ohio and the Reading), which had terminal arrangements with warehouses of their own selection. Neither of these other roads had given a preference to Merchants, and none of the three was acting in concert with any other. The Commission, adhering to its ruling in the *McCormick Warehouse* case, held that the designated warehouses were in truth not public freight stations, however the carriers might style them. From this it followed that allowances and special privileges accorded on the footing of an agency relation would have to be abandoned. Gallagher *v.* Pennsylvania R. Co., 160 I. C. C. 563. The railroads were required to cancel any tariff provisions whereby "the facilities of the contract warehouses" were made "a part of the respective station facilities" of the lines affected by the order. They were required to "cease and desist" from publishing or making the discriminatory privileges and allowances growing out of the attempt to treat the warehouse companies as agents. On the other hand, the Commission refused an award of reparation. "The evidence is far too vague and indefinite to warrant the conclusion that complainants have suffered actual pecuniary loss attributable directly to the alleged unlawful practices."

The carriers, together with Merchants and other warehouse companies interveners in the proceeding, brought suit in a federal court (three judges sitting) to vacate the order of the Commission. The bills of complaint were dismissed, one judge dissenting. 44 F. (2d) 379. Upon appeal to this court the decree was affirmed. *Merchants Warehouse Co.* v. *United States,* 283 U. S. 501. The opinion there rendered is so exact in its description of the nature and effect of the unlawful practices as to make elaboration useless now. In particular the court points out that a warehouse designated as a station was in a position to receive package freight in less than carload lots, and ship it at carload rates without charge to the customer for assembling the packages and loading them, this by reason of the fact that the warehouse had been paid by the railroad for doing that very work. To that extent it could afford to underbid competitors. For the same reason it had a position of superiority over against its rivals in unloading carload lots, for it could distribute and re-ship in packages at the expense of the carrier. This advantage as to package freight, if permitted to continue, would have taken the life out of rules designed to limit the character of transportation services. By rule 23 of the Consolidated Freight Classification a carrier may not distribute carloads of freight in less than carload lots, nor assemble smaller lots into carloads. 283 U. S. at p. 510. Thus the opinion makes it clear that the whole system of warehouse stations, with its payments and allowances, including the incidental saving of demurrage, had been built upon a false foundation. Adherence to the statute called for its suppression.

We have seen that Terminal asked for reparation as well as for a restraining order at the hands of the Commission. There is no doubt that the Commission had jurisdiction in response to that request to make an award against the railroad for damages suffered by the complainant as a result of the unlawful practices. 49 U. S. C., §§ 8, 9, 16 (1) (2); *Interstate Commerce Comm'n* v. *United States,* 289 U. S. 385; *Louisville & Nashville R. Co.* v. *Ohio Valley Tie Co.,* 242 U. S. 288; *Pennsylvania R. Co.* v. *Jacoby & Co.,* 242 U. S. 89; *Meeker* v. *Lehigh Valley R. Co.,* 236 U. S. 412; *Pennsylvania R. Co.* v. *International Coal Mining Co.,* 230 U. S. 184. The Commission found, however, that no damages had been proved, and its ruling as to that was final, not subject to review by this court or any other. *Interstate Commerce Comm'n* v. *United States, supra,* at p. 388; *Baltimore & Ohio R. Co.* v. *Brady,* 288 U. S. 448; *Standard Oil Co.* v. *United States,* 283 U. S. 235; *Alton R. Co.* v. *United States,* 287 U. S. 229; *Procter & Gamble Co.* v. *United States,* 225 U. S. 282. True, the complainant might have confined itself to a request for a restraining order, and after thus invalidating the preference have asked a court for reparation. 49 U. S. C., § 9. It had a choice, in other words, between a remedy at the hands of the Commission and a remedy by suit, but by express provision of the statute it could not have them both. *Baltimore & Ohio R. Co.* v. *Brady, supra.* Reparation under the Commerce Act was thus permanently barred by the ruling of the Commission as against the offending carrier. The situation was altogether different, however, in respect of the liability of Merchants and other aiders and abettors. As to wrongdoers other than the carrier the complainant had not asked the Commission to fix the quantum of the damages, thus relieving us of the duty to inquire whether jurisdiction would have existed if such relief had been demanded. 49 U. S. C., §§ 9, 16 (1), and compare 49 U. S. C., § 42. Merchants would not have been affected by an award of reparation if the Commission had found the evidence sufficient for that relief, and it gains nothing from the fact that reparation was refused. In saying this we are not unmindful that it intervened in the proceeding. It was interested in the event, for it would be harmed by a restraining order. 49 U. S. C., § 42. Intervention, though permitted, did not broaden the complaint, nor add to the range of enumerated powers. Accordingly the framers of the statute were careful to provide that aiders and abettors should not go unwhipped of justice. In a suit under the Commerce Act, all persons soliciting or procuring the allowance of a forbidden preference were to be liable, jointly or severally, to make good the damage suffered. 49 U. S. C., § 10 (4).* Cf. 49 U. S. C., § 41 (3). Here was

* "*Inducing unjust discrimination; penalty; liability for damages.* If any such person, or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce or attempt to induce any common

an ample remedy to reach a guilty participant in an unlawful discrimination, whether reparation against the carrier had been granted or refused.

Petitioner, not satisfied to proceed under the Commerce Act, put that remedy aside and brought suit under the Sherman and Clayton Acts, hoping by that manoeuvre to charge both carrier and warehouse, and to charge them with treble damages. Every act of wrongdoing proved in the new suit to have been committed by the defendants was proved against them also (with unsubstantial exceptions) in the case before the Commission. Now as before, the head and front of their offending is the use of the warehouses as stations for the carrier with the allowances and privileges, such as exemption from demurrage, growing out of that relation. What is true of the offense is true also of its consequences. There has been no proof of any loss that would not be provable in equal measure in proceedings under the Commerce Act upon a claim for reparation. *Interstate Commerce Comm'n* v. *United States, supra; Louisville & Nashville R. Co.* v. *Ohio Valley Tie Co., supra.* Terminal does not show that there was a conspiracy to establish a monopoly either

carrier subject to the provisions of this chapter, or any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person or such officer or agent of such corporation or company shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding $5,000, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense; and such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom."

of transportation by Pennsylvania or of storage by Merchants, much less that a monopoly was actually attained. There was no monopoly of transportation, for the statistics make it plain that the competing lines in Philadelphia had a large percentage of the business of carrying storage freight. Moreover, Terminal is not here as the representative of the railroads, and may not vindicate their grievances, if grievances there are. More important is the consideration whether there has been a monopoly of storage. There are many warehouses in Philadelphia for the storage of railroad freight. Neither Merchants nor any other company has been able to engross the business or has even attempted to engross it. During the years of the unlawful practices, Merchants' business declined proportionately to the whole, and Terminal's increased, as did also that of other warehouses, so far as the record supplies us with the relevant statistics. Indeed, petitioner does not even claim that by reason of the defendants' acts, it failed to get business that would otherwise have come to it. If there was any claim for such damages at the beginning it was explicitly renounced. What petitioner contends and has contended for is this and nothing more, that to hold and attract customers it had to keep its charges down below the normal rate, diminishing its profit to the extent of the reduction. In a word, its only damages are those resulting, in its view, from the allowances for loading and unloading or like discriminatory acts, and not from any conspiracy transcending these particulars, a conspiracy of which allowances and privileges are a symptom or an incident.

Upon the basis of that evidence the trial judge left it to the jury to say whether Terminal was a sufferer from an unlawful combination in restraint of trade and commerce. The jury found a verdict for $136,125 against both defendants. This verdict was trebled by the court, with the addition of a counsel fee ($27,000), the whole judgment thus amounting to $437,338.81. There was an appeal to the Circuit Court of Appeals for the Third Circuit where the judgment was reversed. The ground of the reversal was that the decision of the Commission refusing reparation was a bar to any claim for damages against either of the defendants in a suit under the Anti-Trust laws as well as under the Commerce Act. 78 F. (2d) 591. This court granted a writ of certiorari to determine the scope and operation of important acts of Congress.

The order of the Commission denying reparation, though it be assumed to be conclusive evidence in favor of the carrier, is plainly not such evidence for the carrier's confederate. We think it better to rest our judgment on grounds applicable to both defendants. Whether such grounds exist is the question next in order.

First. Discriminatory privileges and payments given by a carrier to a consignor or consignee are unavailing without more to make out a combination in restraint of trade or commerce within the meaning of the Anti-Trust Laws. To lead to that result the privileges or payments must be the symptoms or incidents of an enveloping conspiracy with its own illegal ends. In the absence of such a showing a sufferer from discriminatory charges and allowances has his remedy under the Commerce Act for any damage to his business, and that remedy is exclusive against all the parties to the wrong.

Two cases in this court, though not indeed decisive, are apposite and helpful. The first, *Keogh* v. *Chicago & Northwestern Ry. Co.*, 260 U. S. 156, was a suit under the Anti-Trust Laws against railway companies and others who were charged to have combined in establishing uniform rates and thus destroying competition, all to the plaintiff's damage. True the rates had been approved after complaint to the Commission, but this was not enough, or Keogh so contended. He was entitled in his view to the benefit of competitive rates, quite apart from any finding that the rates established by concerted action were reasonable in amount and without discriminatory effect. In upholding a dismissal of the suit, the court called attention to the provisions of the Commerce Act whereby a remedy in damages was given for rates illegally exacted. "If the conspiracy here complained of had resulted in rates which the Commission found to be illegal because unreasonably high or discriminatory, the full amount of the damages sustained, whatever their nature, would have been recoverable in such proceedings. *Louisville & Nashville R. Co.* v. *Ohio Valley Tie Co.,* 242 U. S. 288. Can it be that Congress intended to provide the shipper, from whom illegal rates have been exacted, with an additional remedy under the Anti-Trust Act? See *Meeker* v. *Lehigh Valley R. Co.,* 162 Fed. 354. And if no remedy under the Anti-Trust Law is given where the injury results from the fixing of rates which are illegal because too high or discriminatory, may it be assumed that Congress intended to give such a remedy where, as here, the rates complained of have been found by the Commission to be legal and while in force had to be collected by the carrier?" 260 U. S. at p. 162. These queries were coupled with a warning of the practical inconvenience attendant on any answer different from the one that they suggest. "If a shipper could recover under § 7 of the Anti-Trust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors." *Id.* at 163.

A second case pointing the same way is *United States Navigation Co.* v. *Cunard Steamship Co.,* 284 U. S. 474. The suit was for an injunction under the Sherman Anti-Trust Act and the Clayton Act to restrain a group of steamship companies from continuing a conspiracy in restraint of trade and commerce. The acts charged to be illegal fell within the express prohibitions of the Shipping Act of 1916 as amended, or were in effect, even if not in terms, a component part thereof. 284 U. S. at p. 485; 46 U. S. C., §§ 801, 812, 815, 816, 876. The decision was that the plaintiff must seek redress by application to the Shipping Board. True, the Anti-Trust Laws, since the enactment of the Clayton Act, have been explicit in providing that any one injured by an unlawful combination might have relief by injunction against threatened damage to his business. 15 U. S. C., § 26; *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443; *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Assn.,* 274 U. S. 37. To this there is an exception where the subject matter of the complaint is a wrong within the jurisdiction of the Interstate Commerce Commission, in which case an injunction, if granted, must be at the instance of the government. 15 U. S. C., § 26; *Central Transfer Co.* v. *Terminal Railroad Assn.,* 288 U. S. 469, 474. The exception does not apply, at all events in terms, to wrongs within the jurisdiction of any other board. Even so, the right to sue, however explicit on its face, was held to have been partially superseded in respect of private suitors by the adoption of the Shipping Act, which as to transactions within its range gave the only remedy available. The conclusion was reinforced by a reference to Keogh's case and to the need for a uniformity difficult of attainment when jurisdiction is divided.

What was said in these opinions is precisely applicable here. If a sufferer from the discriminatory acts of carriers by rail or by water may sue for an injunction under the Clayton Act without resort in the first instance to the regulatory commission, the unity of the system of regulation breaks down beyond repair. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426; *Interstate*

Commerce Comm'n v. *Illinois Central R. Co.* 215 U. S. 452; *Robinson* v. *Baltimore & Ohio R. Co.*, 222 U. S. 506; *Northern Pacific Ry. Co.* v. *Solum*, 247 U. S. 477, 483; *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 291; and see 15 U. S. C., § 26, construed in *Central Transfer Co.* v. *Terminal Railroad Assn.*, *supra*. On the other hand, if the regulatory commission has issued a "cease and desist" order, an injunction under the Clayton Act is inappropriate and needless. 49 U. S. C., § 16 (7), (8), (12). The same considerations are applicable, and with undiminished force, where the suit under the Clayton Act is not for an injunction but for damages. There too a finding of undue discrimination by the regulatory board is a necessary preliminary to a suit against the carrier. See cases *supra*. Certain then it is that the Anti-Trust Laws are inapplicable in all their apparent breadth to carriers by rail or water. A consignor or consignee aggrieved by such a wrong must resort to the appropriate administrative agency, at least for many purposes. If he is remitted to the Commerce Act or the Shipping Act to cancel the illegal preference, may he pass over those acts and revert to the Clayton or the Sherman Act for the purpose of recovering damages? The Commerce Act like the Shipping Act embodies a remedial system that is complete and self-contained. It provides the means for ascertaining the existence of a preference, but it does not stop at that point. As already shown in this opinion, it gives a cause of action for damages not only against the carrier, but also against shippers and consignees who have incited or abetted. For the wrongs that it denounces it prescribes a fitting remedy which, we think, was meant to be exclusive. If another remedy is sought under cover of another statute, there must be a showing of another wrong, not canceled or redressed by the recovery of damages for the wrong explicitly denounced. The opinions of this court in their fair and natural extension point to that conclusion. *Keogh* v. *Chicago & Northwestern Ry. Co., supra; United States Navigation Co.* v. *Cunard Steamship Co., supra.* The opinions of other federal courts point the same way with equal, if not greater certainty. *United States Navigation Co.* v. *Cunard S. S. Co.,* 50 F. (2d) 83, 86, 89, reviewing the decisions; *Meeker* v. *Lehigh Valley R. Co.,* 162 Fed. 354, 363; *United States* v. *Atchison, T. & S. F. Ry. Co.,* 142 Fed. 176, 184, 185; *Glenn Coal Co.* v. *Dickinson Fuel Co.,* 72 F. (2d) 885, 888. We follow these signposts to the goal they seem to mark.

In thus holding we do not intimate that never in any circumstances can a carrier become a party to a conspiracy in restraint of trade or commerce with liability for treble damages. This has been made plain already. We enlarge on it for greater certainty. Wherein the case is now deficient will be made clearer by example. One may suppose a business of a manufacturer which has assumed the form and size of a monopoly, or if not already at that stage, is well upon the road thereto. Cf. *Standard Oil Co.* v. *United States,* 221 U. S. 1, 51, 61; *United States* v. *American Tobacco Co.,* 221 U. S. 106; *United States* v. *United States Steel Corp,* 251 U. S. 417; *United States* v. *Swift & Co.,* 286 U. S. 106, 116. One may add a situation in which a carrier has knowingly confederated with the owner to preserve such a business or foster it. Whatever liability grows out of that alliance is untouched by this decision. For present purposes we may assume that if such a situation should develop, the carrier would make itself a participant in the monopoly which it had conspired to produce, though its only overt act was a discriminatory rate of carriage. Again, a group of manufacturers, whose business in combination would not amount to a monopoly, might unite among themselves to lay a burden upon commerce by concerted action as to prices. *Swift & Co.* v. *United States,* 196 U. S. 375;

United States v. *American Linseed Oil Co.*, 262 U. S. 371; *Eastern States Retail Lumber Dealers' Assn.* v. *United States*, 234 U. S. 600. If a carrier were to give a preference in furtherance of that conspiracy, it would become a participant therein, or so we may assume, the damages being measured not merely by the consequences flowing from the preference, but by those flowing from the conspiracy in all its comprehensive unity.

None of these assumptions affects the case at hand. For reasons already stated there was no conspiracy to monopolize the storage business to the destruction of Terminal or of others similarly situated. There was no conspiracy to impose upon that business a burden of any kind, except to the extent that the enjoyment of a preference might increase the opportunities for profit of the warehouse so preferred. Of any combination more far-reaching, more inclusive in its aims, there is silence in the record after every reasonable inference has been drawn from its pages. On the contrary, the history of the relation between Pennsylvania and Merchants indicates strongly that the illegal discrimination, far from being a symptom of a larger combination, was the product of a mistake of law, which was shared for many years by the regulatory commission till the decision in McCormick's case laid down another rule. The mistake does not relieve the carrier from liability for the concession of a privilege which has turned out to be forbidden. It serves, however, as a reminder that the liability must be kept within reasonable limits, and that a preference innocent in purpose should not be magnified into a token of a circumambient conspiracy.

We conclude that for Merchants as well as for Pennsylvania whatever liability was incurred through the forbidden discrimination was under the act to regulate commerce and not for treble damages.

Second. The case having been submitted to the jury on the theory that apart from the unlawful preference there was evidence of a conspiracy in restraint of trade and commerce, and the complaint having been framed on that theory and no other, the suit should have been dismissed as to each of the defendants.

The judgment of the Court of Appeals reversing the judgment of the District Court is accordingly

Affirmed.

Mr. Justice McReynolds concurs in the result.

Mr. Justice Roberts took no part in the consideration or decision of this case.

WASHINGTON v. OREGON.

No. 11, original. Argued February 10, 11, 1936.—Decided March 2, 1936.

1. This Court will not exercise its jurisdiction to control the conduct of one State at the suit of another, unless the invasion of right complained of be of serious magnitude and proved by clear and convincing evidence. P. 522.
2. The mere fact that a dam diverting water for irrigation from a non-navigable stream takes the entire surface flow in times of scarcity gives to an adjacent State lower on the stream no equity to an injunction against the State in which the dam is operated, where water rights in both States are based on appropriation for beneficial uses and where an injunction would wreak great injury upon farmers in the upper State who are dependent upon the diversion and would probably not increase the flow in the lower State because of physical condition of the stream-bed. P. 522.
3. The evidence fails to prove the contention that water diverted from the Walla Walla River and used for irrigation in Oregon, is used wastefully, to the injury of irrigators in Washington; or the contention that the pumping of water in Oregon and its use in irrigating the lands from which it is pumped, materially lessens the quantity of water otherwise available for use in Washington. P. 523.
4. The right of land owners to make reasonable use of percolating water by pumping from wells and applying it to the surface, considered and upheld. P. 525.

5. Oregon and Washington are entitled to their equitable proportions of the water of the Walla Walla, on the basis of priority of appropriations. P. 526.
6. A water priority once acquired, or put in course of acquisition by the posting of a notice, may be lost by abandonment. P. 527.
7. In determining equitable apportionment between States of the waters of a common stream, a priority allotted in one of the States by an adjudication to which the other State and its appropriators were not parties, is not binding on them and will not be counted if, as to them, the claimant of such priority has forfeited his right, by laches, abandonment or other inequitable conduct. P. 528.

Bill Dismissed.

The object of this original suit was to obtain an apportionment between the two States of the waters of the Walla Walla River and tributaries, supported by an injunction. The case was heard on exceptions to the report of the Special Master, William W. Ray, Esquire, of Utah, to whom it had been referred.

Mr. George G. Hannan, Assistant Attorney General of Washington, with whom *Mr. G. W. Hamilton,* Attorney General, and *Mr. Fred J. Cunningham* were on the brief, for complainant.

Messrs. Charles Z. Randall and *George T. Cochran,* with whom *Mr. I. H. Van Winkle,* Attorney General of Oregon, and *Messrs. James A. Fee* and *Colon R. Eberhard* were on the brief, for defendant.

Mr. Justice Cardozo delivered the opinion of the Court.

With leave of court (283 U. S. 801), the State of Washington filed a bill of complaint on July 22, 1931, in which it charged that the State of Oregon was wrongfully diverting the waters of the Walla Walla River to the prejudice of inhabitants of Washington, and prayed an adjudication apportioning the interests of the two states in the river and in tributary streams and restraining any use or diversion of the waters found to be unlawful. To this complaint Oregon filed an answer containing denials and defenses, to which Washington replied. On February 20, 1933, this court appointed a Special Master with authority to take evidence and with directions to make findings of fact and conclusions of law to be submitted to the court with recommendations for a decree. 288 U. S. 592. The case is now here upon exceptions filed by Washington to the Master's report, which finds the facts fully and advises the dismissal of the bill.

The Walla Walla River, a non-navigable stream, rises in the Blue Mountains of northeastern Oregon. For about four miles above the City of Milton it flows through a narrow canyon, the waters for that reach being inaccessible for purposes of irrigation. At Milton the river broadens out in a delta formation. The first division in this formation is at Red Bridge, near the city, where the river breaks into two branches. One, the Tum-a-lum, as it is known in Oregon, or the main Walla Walla, as it is known in Washington, flows through cobble rocks over great depths of gravel till it reaches the McCoy Bridge. There, at the margin of an alluvial fan, springs rise from below the surface, and feed the flow anew. Thus reinforced, the stream moves northwesterly to the line between the two states, and again northwesterly for about thirty miles in Washington to its confluence with the Columbia River. A second branch of the river, starting at the Red Bridge, is known as the Little Walla Walla, which divides after a mile into the Crocket and the Ford. Prongs of the Crocket which contribute little, if any, water during the irrigation season, combine with another stream after crossing the state line, and discharge into the main river above the intake of the canal of the Gardena project. Another prong of the Crocket comes together with the Ford and joins the main river in Washington below the intake of the canal. Still another tributary, known as the Mill Creek, rises in the Blue Mountains, and flows far to the east of the courses just described. After breaking up into other creeks (the Yellowhawk, the Garrison and others), it joins the main stream of the Walla Walla within the state of Washington. No claim is made by the complainant that the waters of Mill Creek have been illegally diverted. Indeed, the fact appears to be that the inhabitants of Washington use the waters of that creek to the exclusion of any use thereof by the inhabitants of Oregon. The claim of wrongdoing has its centre in the use of the waters of the Walla Walla arising above the Red Bridge.

The Walla Walla Basin has a semi-arid climate with warm dry summers and cold wet winters. The streams contributing to the river are supplied in the main from the snows of the Blue Mountains. Upon the coming of spring, these snows are melted, and the river at that season attains its highest flow. Even then there are variations, not only from month to month, but from day to day. With the advance of summer, the flow diminishes greatly, particularly in the latter part of July and August. In such a climate agriculture cannot go on successfully without the aid of irrigation. A sporadic supply of water will not meet the farmer's needs. "To be available in a practical sense the supply must be fairly continuous and dependable." *Wyoming* v. *Colorado,* 259 U. S. 419, 471. A fair division of the water is thus vital to the prosperity of this agricultural community, and even to its life, for agricultural in the main it is. True, there are cities also within the limits of the watershed, Walla Walla in Washington with a population of 15,976; Milton and Freewater in Oregon with a combined population of 2,308. Even so, the welfare of the cities is closely bound up with that of the area about them. Indeed, there has been a unity of growth in the development of the whole community, a development quite independent of the dividing line between the states. As already pointed out, farmers in Washington have had the benefit of Mill Creek, which takes its rise in Oregon.

Complainant and defendant have stipulated that for the purposes of this case the individual rights of the respective land owners and water owners concerned in both states are governed by the doctrine of prior appropriation. *Wyoming* v. *Colorado, supra.* The Washington court made a decree in September, 1928, adjudging the priorities of appropriators in Washington. The Oregon court made one in August, 1912, adjudging the priorities of appropriators in Oregon. Neither state was a party to the judicial proceedings in the other. The stream supply has been sufficient through the aid of the Mill Creek to satisfy rights with priorities up to 1891 under each of the decrees. What Washington complains of chiefly is the deficiency in the supply available for the satisfaction of alleged priorities up to 1892. Particularly it complains of the deficiency of the supply for the Gardena Farms District. By the decree of September, 1928, the District was adjudged the holder of a water right with an 1892 priority for the irrigation of 7,000 acres upon specified conditions. This priority, though recognized in Washington, is contested by Oregon. The project affected by that award was started in 1892 by the Walla Walla Irrigation Company. A canal to connect with the Walla Walla River was to carry water for irrigation to a tract known as the Gardena District, twelve miles or more away. Work on the canal was slow and intermittent, chiefly for lack of funds. About 1903 the engineers discovered that the best land in the District could not be irrigated at all unless the plans were greatly changed. Thereupon a new system of construction was adopted following a different route. Not till 1904 or later was water in the canal applied beneficially to any acreage in Washington except in trifling quantities. Long before that time, beginning in 1880 or earlier and continuously thereafter, irrigators in Oregon had been appropriating to themselves the waters of the river above the Red Bridge.

We turn at this point to a consideration of the acts of appropriation, their nature and effect, in an endeavor to ascertain whether they were legitimate or wrongful. For more than fifty years before the filing of this suit irrigators in Oregon at seasons of shortage maintained crude or temporary dams across the Walla Walla River close to the Red Bridge. During the low water period the effect of the dam was to turn the waters of the river away from the channel of the Tum-a-lum into the channel of the Little Walla Walla, where they were used for agricultural, domestic and kindred purposes. A small quantity of water necessary to supply the right of the East Side Ditch has been permitted to go by the dam without interference. With that exception, which is negligible, all the waters have been diverted without interruption and without protest for more than fifty years. Was this a wrong to Washington?

"Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence." *New York* v. *New Jersey*, 256 U. S. 296, 309; *North Dakota* v. *Minnesota*, 263 U. S. 365, 374; *Connecticut* v. *Massachusetts*, 282 U. S. 660, 669; *Missouri* v. *Illinois*, 200 U. S. 496, 521. The Master has found: "There is no satisfactory proof that to turn down water past the Red Bridge in Oregon during the period of water shortage would be materially more advantageous to Washington users than to permit such water to be applied to surface irrigation in Oregon." This is so because of the nature of the channel of the Tum-a-lum River. During the period of water shortage, only a small quantity of water would go by if the dams should be removed. There is evidence that this quantity, small at the beginning, would be quickly absorbed and lost in the deep gravel beneath the channel. Experiments have proved that it would not reach the McCoy Bridge, only a few miles down the stream. As to this the Master finds: "The channel of the Tum-a-lum River between the Nursery Bridge [which is close to the Red Bridge] and the McCoy Bridge [farther down] is an extremely wasteful channel. Water turned past the Red Bridge sinks and becomes part of the underground waters." "To limit the long established use in Oregon would materially injure Oregon users without a compensating benefit to Washington users." These findings are well supported by the evidence. Complainant has brought forward no adequate reason for disturbing them. *Connecticut* v. *Massachusetts, supra,* at p. 669. Accepting them, as we do, we accept also the conclusion to which they point with inescapable directness. To restrain the diversion at the bridge would bring distress and even ruin to a long established settlement of tillers of the soil for no other or better purpose than to vindicate a barren right. This is not the high equity that moves the conscience of the court in giving judgment between states. *North Dakota* v. *Minnesota, supra; Connecticut* v. *Massachusetts, supra; Kansas* v. *Colorado,* 206 U. S. 46, 109. Far from being that, it is rather "the *summum jus* of power." *Mutual Life Insurance Co.* v. *Johnson,* 293 U. S. 335, 339. In default of reasons for removal more urgent and compelling, the tillers of the soil will be left where they have settled. Cf. *Hough* v. *Porter,* 51 Ore. 318, 415; 95 Pac. 732; 98 Pac. 1083; 102 Pac. 728; *Matheson* v. *Ward,* 24 Wash. 407, 411; 64 Pac. 520.

The question must still be met whether the waters when diverted are misapplied or wasted with ensuing loss to the complainant. As to this the findings are explicit, and they are supported by the evidence. "The use of water by the irrigators within the State of Oregon is not unduly wasteful but is, under the circumstances, a reasonable, beneficial and necessary use." Nor does the evidence sustain the allegation of the bill that through the diversion of the stream and the application of the water to new irrigated lands the underground water supply has been so shifted to the west that it does not return to the river at such a point as to be usable by the inhabitants of Washington. As to this and other charges of damage or wrongdoing, the burden of proof falls heavily on complainant, more heavily, we have held, than in a suit for an injunction where states are not involved. *North Dakota* v. *Minnesota, supra; Connecticut* v. *Massachusetts, supra.* The burden has not been borne. On the contrary, the Master finds on the basis of supporting evidence that "a substantial part of the water applied to irrigation in Oregon . . . goes into the underground water supply," and returns to the river. Indeed, he goes farther and concludes that "the use of water for irrigation within the State of Oregon is beneficial to irrigators within the State of Washington," by feeding the many springs that supply the main river later in its course. Whether this is so or not, certain at least it is that the injury, if there is any, does not appear "by clear and convincing evidence" to be one "of serious magnitude." *Connecticut* v. *Massachusetts, supra; New York* v. *New Jersey, supra.* Between the high contending parties whose interests are involved, nothing less will set in motion the restraining power of the court.

Next to be considered is the practice of the defendant's farmers in sinking wells upon their farms. This is stated in the findings. "In addition to the surface water available for use within the State of Oregon, the farmers have tapped the subsurface water supply by sinking about three hundred wells, from which wells they pump each year approximately 9,000 acre feet of water. The water so pumped is used upon the lands where the several wells are located." A different question would be here if the water when extracted had been sold or otherwise employed for use on distant lands. Such use is unlawful according to the rule in many courts (*Snake Creek Mining & Tunnel Co.* v. *Midway Irrigation Co.*, 260 U. S. 596, aff'g 271 Fed. 157; *Forbell* v. *New York City,* 164 N. Y. 522; 58 N. E. 644; *People* v. *New York Carbonic Acid Gas Co.,* 196 N. Y. 421; 90 N. E. 441; *Bassett* v. *Salisbury Mfg. Co.,* 43 N. H. 569; *Patrick* v. *Smith,* 75 Wash. 407; 134 Pac. 1076), though the decisions are not uniform. *Acton* v. *Blundell,* 12 M. & W. 324.[1] Again, a different question would be here if the waters, though subterranean, followed a defined channel, instead of percolating vagrantly through rocks and sand and gravel. *Snake Creek Mining & Tunnel Co.* v. *Midway Irrigation Co., supra; Boyce* v. *Cupper,* 37 Ore. 256, 260; 61 Pac. 642; *Hayes* v. *Adams,* 109 Ore. 51, 57, 58; 218 Pac. 933; *Meyer* v. *Tacoma Light & Water Co.,* 8 Wash. 144; 35 Pac. 601; *Horne* v. *Utah Oil Refining Co.,* 59 Utah 279; 202 Pac. 815; *Clinchfield Coal Corp.* v. *Compton,* 148 Va. 437; 139 S. E. 308. Here the water level is on such a slope that, without any pumping, gravity would take the water away from the channel of any stream, either above the surface or below it. In such circumstances the right to pump in reasonable quantities for the beneficial enjoyment of the overlying land is allowed even by those courts that have placed the narrowest restrictions on the use of percolating waters. *Maricopa County District* v. *Southwest Cotton Co.,* 39 Ariz. 65, 86, 90, 97, 100; 4 P. (2d) 369; *Los Angeles* v. *Pomeroy,* 124 Cal. 597; 57 Pac. 585; *McClintock* v. *Hudson,* 141 Cal. 275; 74 Pac.

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[1] For a full collection of the cases see 55 A. L. R. 1390.

849; *Los Angeles* v. *Hunter,* 156 Cal. 603; 105 Pac. 755.[2] Cf. *Ide* v. *United States,* 263 U. S. 497, 506. In saying this we do not intimate, either one way or the other, that our conclusion would be different if the geological formation were other than it is. To all this we add that once more as at other stages of the case complainant has been unsuccessful in supplying evidence of damage. As to that the Master finds: "There is no satisfactory proof that the use of the water from these wells materially lessens the quantity of water available for use within the State of Washington." If any wrong has been done, it is unsubstantial and uncertain.

What has been said avails without more to repel the claim of the complainant that by the dams at the Red Bridge or by the use of wells or pumps, the Oregon irrigators are wrongfully diverting or depleting the waters of the river to the prejudice of irrigators resident in Washington. To repel this claim of wrong, however, does not dispose of the whole case. The question remains whether the Oregon irrigators as a result of all their acts are taking to themselves more than their equitable proportion of the waters of the river, priority of appropriation being the basis of division. As to this too the Master has reported in their favor. For the understanding of his ruling and its satisfactory appraisal there is need to recur briefly to the claim of the Gardena Farms.

Washington does not challenge the priorities adjudged in the Oregon decree. Oregon does not challenge those adjudged in the Washington decree, except only the priority allotted to the Gardena Farms. If that priority is excluded, the Oregon irrigators have not exceeded their equitable quota, at all events in any measure so substan-

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[2] Many cases are collected in Kinney, Irrigation and Water Rights, 2d ed., vol. 2, pp. 2162–2167; Wiel, Water Rights in the Western States, 3d ed., vol. 2, §§ 1042 *et seq.*

tial as to call for an injunction in a contest between states. A notice posted in 1892 fixed the locus of the intake of the canal for the Gardena project. This intake was far above the point where the branches of the Little Walla Walla unite with the main stream, if we except a few prongs of insignificant extent. The projectors of the canal were thus informed from the beginning that none of the waters of the Tum-a-lum above the Red Bridge would be available for the canal during the season of summer irrigation as long as the Oregon farmers were permitted to maintain the dams that diverted the waters of the Tum-a-lum into the Little Walla Walla. The physical conditions were notorious and were known to the canal company and, in particular, to its president, the leader of the enterprise. What was done or omitted in keeping the appropriation alive against the Oregon farmers in the vicinity of Milton must be read and interpreted in the light of that knowledge and its resulting obligations.

A priority once acquired or put in course of acquisition by the posting of a notice may be lost to the claimant by abandonment or laches. There must be no waste in arid lands of the "treasure" of a river. *New Jersey* v. *New York*, 283 U. S. 336, 342. The essence of the doctrine of prior appropriation is beneficial use, not a stale or barren claim. Only diligence and good faith will keep the privilege alive. *Seaweard* v. *Pacific Livestock Co.*, 49 Ore. 157, 161; 88 Pac. 963; *Re Rights of Waters of Silvies River*, 115 Ore. 27, 61; 237 Pac. 322; *Re Water Rights of Hood River*, 114 Ore. 112, 131; 22 Pac. 1065; *State ex rel. Ham* v. *Supreme Court*, 70 Wash. 442, 463; 126 Pac. 945.[3] When these are shown to be lacking, the water right will fail, or fail to the extent that equity re-

[3] See Kinney Irrigation and Water Rights, 2d ed., vol. 2, pp. 1978, 1988, 2004, and Wiel, Water Rights in the Western States, 3d ed., vol. I, §§ 371, 567 *et seq.*, collecting the decisions.

quires. Such according to the Master has been the fate of the Gardena filing. True a court in Washington determined in 1928 that the priority was to be recognized as of 1892. The decree was of no force against Oregon or Oregon appropriators not parties to the suit. *United States* v. *Oregon,* 295 U. S. 1, 12; *Priest* v. *Las Vegas,* 232 U. S. 604. As to them priority had lapsed, if the claimant had forfeited it by inequitable conduct. The label of the acts is unimportant, whether laches or estoppel or abandonment. What matters is their quality. Persistence in such conduct may extinguish the equitable right. It may bar an equitable remedy. Irrigators in another state, unaffected by the decree, are at liberty to show the facts, and upon the basis of that showing to fix their user of the stream.

Laches and abandonment, chargeable to the Gardena users, are found in the report. Not till 1930 was there a claim in their behalf to the beneficial use of the waters of the river arising above the bridge. Not till then was such a claim advanced by Washington itself or by any of its residents. Without a sign of challenge the Oregon users were allowed to develop their little settlement in the faith that their enjoyment of the waters was uncontested by any one. During these many years of growth Gardena Farms in particular evinced by many acts its recognition and acceptance of the existing situation. These acts are narrated carefully in the findings of the Master. There is no need to repeat them here. Viewing them collectively he concludes that the Gardena Farms District has never put the waters of the river arising above Red Bridge to a beneficial use during the irrigation season; that the intention to apply them to such a use was abandoned, if it ever existed, before the commencement of this suit; and that for a period of nearly forty years there has been recognition of the superior right of the Oregon appropriators. Here surely is not the diligence that equity exacts of the suitor who invokes its distinctive jurisdiction.

We have dwelt upon the question of abandonment, for it has been much considered in the report and in the arguments of counsel. In so doing we have not meant to hold that in the absence of abandonment there would be an inequitable apportionment calling for relief by injunction, unless indeed the flow of the stream should unexpectedly increase. We are to bear in mind steadily that the controversy is between states, and not between private litigants, the burden and quantum of the proof being governed accordingly. *North Dakota* v. *Minnesota, supra.* At present there would be no benefit to Gardena, or none that has been proved, if the waters of the Tum-a-lum were not obstructed by the dam. In all likelihood they would be lost in the deep gravel of the channel and would not reappear beyond until the shortage season had gone by. So also, there would be no benefit, or none that has been proved, if the use of the Little Walla Walla were less than it has been. The chief points of junction with the main river are below the intake of the canal where Gardena is privileged to tap the waters of the stream. No evidence brought to our notice by either of the parties carries with it a suggestion that other Oregon priorities would be cut down or displaced if the Gardena priority were established to the full. We need not go into the question more fully at this time.

The case comes down to this: the court is asked upon uncertain evidence of prior right and still more uncertain evidence of damage to destroy possessory interests enjoyed without challenge for over half a century. In such circumstances an injunction would not issue if the contest were between private parties, at odds about a boundary. Still less will it issue here in a contest between states, a contest to be dealt with in the large and ample way that alone becomes the dignity of the litigants concerned.

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A decree will be entered confirming the report of the Master, and dismissing the complaint upon the merits, the costs and expenses of the suit to be divided between the parties in accordance with the usual practice. *Michigan* v. *Wisconsin,* 270 U. S. 295, 319, 320; *North Dakota* v. *Minnesota,* 263 U. S. 583.

It is so ordered.

UNITED STATES *v.* RIZZO.

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

No. 272. Argued January 9, 1936.—Decided March 9, 1936.

1. In a suit in admiralty to forfeit a cargo of alcohol for breach of the customs and navigation laws, a claim of the United States for internal revenue taxes on the alcohol, being a non-maritime claim, cannot be set up in the libel; and to defer the presentation of such claim until after the final decree adjudicating the right to the property, is therefore not dilatory conduct. P. 533.
2. The basic tax imposed upon distilled spirits is not a penalty; it is imposed irrespective of the legality of their origin; the lien attaches when the spirits as such come into existence, continues until the tax is paid, and is valid against all transferees, without assessment, distraint, or other administrative proceedings. P. 533.
3. One who claims that alcohol, admittedly not imported, is not subject to tax, must prove payment of the tax. P. 533.
4. The United States, by seeking a forfeiture of distilled spirits for violation of the customs and navigation laws, is not estopped, through election of remedies, from claiming the tax imposed upon the spirits by the internal revenue laws. P. 534.
5. An agreement by the United States, in a proceeding by libel to forfeit distilled spirits, for a judicial sale of the spirits "free and clear of all claims of any kind or character," and transfer of all existing liens from property to proceeds, does not waive a lien on the proceeds for internal revenue taxes. P. 534.
6. The Circuit Court of Appeals, sitting in admiralty in a proceeding to forfeit distilled spirits under the customs and navigation laws, having sold the spirits free of liens and transferred existing

liens to the proceeds of sale, has jurisdiction to entertain a petition of the Government for satisfaction out of such money in *custodia legis* of its lien for internal revenue taxes on the spirits. P. 535.

7. Denial of a claim by the United States for payment of internal revenue taxes on distilled spirits out of the proceeds of their sale in a proceeding by libel for breach of the customs and navigation laws, *held* a final judgment for the purposes of review in this Court,—cases denying review of merely administrative proceedings under a decree are inapplicable. P. 536.

73 F. (2d) 1010, reversed.

CERTIORARI, 296 U. S. 559, to review an order rejecting a petition by the United States that moneys in the custody of the court below, proceeding from a judicial sale of alcohol in a forfeiture suit, be paid into the Treasury in satisfaction of internal revenue taxes.

Mr. Charles E. Wyzanski, Jr., with whom *Solicitor General Reed, Assistant Attorney General Morris,* and *Mr. George F. Foley* were on the brief, for the United States.

Mr. Milton R. Kroopf, with whom *Messrs. Louis Halle* and *Samuel I. Kessler* were on the brief, for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

In December, 1932, a cargo of alcohol was seized by Customs and Coast Guard officials acting together; and the United States filed, in the federal court for New Jersey, a libel in admiralty praying forfeiture for violation of the customs and navigation laws. Rizzo, as claimant, filed an answer. A decree of forfeiture was entered on the ground that the cargo was carried on a vessel employed in a trade other than that for which she was licensed. The Court of Appeals reversed, citing *United States* v. *Chambers,* 291 U. S. 217. While the Government's petition for a rehearing, later denied, was pending, that court ordered, upon application by Rizzo for sale of the alcohol, that it be sold, "free and clear of all claims of any kind or character"; that the proceeds be deposited in the registry; and that they "be substituted in the place and stead of said 146,157 gallons of alcohol, and that all further proceedings herein shall be against said proceeds of sale."

The marshal sold the alcohol for $1.85 per wine gallon. In confirming the sale, the court ordered (1) that the alcohol be delivered to the purchaser free of all government taxes or tax liens and customs duties; (2) that it "shall be treated by the United States Government and any of its departments as tax paid, irrespective of the lack of any stamp or tax certificate affixed thereto on the respective containers in which said alcohol may be deposited or contained"; and (3) that the proceeds of sale be paid into the registry of the court. We denied a writ of certiorari, sought on the ground that the Circuit Court of Appeals lacked authority to include the provision regarding taxes in its order of confirmation. 294 U. S. 709.

Thereupon, the United States filed in the Circuit Court of Appeals a petition asking that the proceeds of the sale be paid into the Treasury of the United States in satisfaction of the lien for taxes due on the alcohol; made proof that the taxes exceeded the proceeds of the sale; and filed with the clerk notices of levy and warrant for distraint. The court ruled that the petition could not be entertained, because the Government had failed to raise the question of taxes when it filed its libel but had waited until after denial of certiorari to seek such relief. Accordingly, the Court directed that the proceeds be paid to the claimant or his assigns.[1] To review this order we granted certiorari, a misconstruction of the statutes

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[1] Rizzo had filed with the clerk notices of assignment of the proceeds in amounts aggregating nearly the whole of the deposit.

concerning tax liens and a departure from the usual course of proceedings being charged.

First. Rizzo does not attempt here to support the order on the ground stated by the Court of Appeals. Nor could he well do so. The claim for taxes, being non-maritime, could not have been set forth in the libel. Compare *The Steamboat Orleans* v. *Phoebus,* 11 Pet. 175, 182. To defer presenting the claims for taxes until after the final decree adjudicating the right to the property was not dilatory conduct. Obviously, there would have been no occasion to proceed against the property for collection of the tax if the alcohol had been declared forfeit to the United States.

Second. Rizzo contends that the tax sought to be recovered is a penalty imposed for violation of the National Prohibition Act; hence uncollectible, because of the repeal of the Eighteenth Amendment. *United States* v. *Chambers,* 291 U. S. 217. But this tax is not a penalty. It is the basic tax upon distilled spirits irrespective of their legal or illegal origin. *United States* v. *One Ford Coupe,* 272 U. S. 321, 328; *Various Items of Personal Property* v. *United States,* 282 U. S. 577, 579. A lien attaches to alcohol "as soon as it is in existence as such" and continues until the tax is paid. Rev. Stat. §§ 3248, 3251; *Thompson* v. *United States,* 142 U. S. 471, 474. That lien is valid against all transferees, without assessment, distraint or other administrative proceedings. *Alkan* v. *Bean,* 1 Fed. Cas. No. 202, p. 418; *United States* v. *Turner,* 28 Fed. Cas. No. 16,548, p. 232.

Rizzo objects here that the alcohol does not appear to have been of domestic manufacture. His answer in the District Court stated that it was not imported; and there is no showing that it was. As the alcohol was subject to the tax, the burden rested upon him to prove payment. Rev. Stat. § 3333, as amended. No evidence to that effect was introduced. The contrary was established.

Third. Rizzo contends that the United States is estopped from collecting the tax, because it elected to seek forfeiture for violation of the National Prohibition Act. But the Government made no such attempt. The libel sought forfeiture on four grounds. Three of them were for violation of provisions in the Tariff Act of 1930, June 17, 1930, c. 497, 46 Stat. 590. The fourth was for violation of the navigation laws. Rev. Stat. § 4377. The District Court decreed forfeiture on the fourth ground, without passing on the other three. The petition presented to the Circuit Court of Appeals has no relation to navigation or customs laws. It states a claim based solely upon the internal revenue laws. The present proceeding is thus founded on a right distinct from, and entirely consistent with, the rights theretofore asserted. Compare *United States* v. *One Ford Coupe,* 272 U. S. 321, 327, 333–334. No reference was made in the libel, and no evidence was introduced in the District Court, with respect to the tax due upon the domestic production of alcohol. There is no basis for the contention that the United States is estopped by an election of remedies. Compare *Southern Pacific Co.* v. *Bogert,* 250 U. S. 483, 490–491.

Fourth. Rizzo contends that the United States is also barred because its counsel agreed, when the terms of sale were framed, that the proceeds should be answerable only to the causes of forfeiture set forth in the libel and that any tax lien should be waived. There was no such agreement. The notice of the "terms and conditions under which the sale will be conducted" (to which counsel for the Government is alleged to have consented) recited: "3. The cargo of alcohol which is being sold is to be sold free and clear of all claims of any kind or character." The order of sale had provided that "all further proceedings herein shall be against said proceeds of sale." Thus it was in the common form authorized by Admiralty Rule 40, which is interpreted as transferring all existing liens from property to proceeds. Compare *The Lottawanna,* 20 Wall. 201, 211, 221; *Schuchardt* v. *Ship Angelique,* 19 How. 239, 241. Since counsel did not agree to waive the tax lien on the proceeds, and since the Court of Appeals made no finding of such a waiver, we need not consider whether a United States Attorney had authority to waive the Government's right. Compare *Utah* v. *United States,* 284 U. S. 534, 545–546.

Fifth. Rizzo contends that the Circuit Court of Appeals sitting in admiralty lacks jurisdiction to enforce the lien for taxes. The argument is that collection of internal revenue taxes must be effected in accordance with prescribed statutory methods; and that the Act of February 26, 1926, c. 27, § 1115, 44 Stat. 117, and Rev. Stat. § 838 provide specifically for collection by the Collector of Internal Revenue through proceedings specified. But compare Rev. Stat. § 3213. The order of the appellate court confirming the sale deprived the Government of two of the statutory methods. First, the right to forfeit the alcohol even after it had been transferred to a bona fide purchaser while in a container not properly stamped. Act of January 11, 1934, c. 1, Title II, § 206, 48 Stat. 317. Second, the right to collect the taxes from the purchaser under the court's order, Rev. Stat. § 3334, as amended by Act of March 1, 1879, c. 125, § 5, 20 Stat. 340. But in ordering sale of the alcohol free of liens, the Court of Appeals in effect provided, in accord with the common practice, that existing liens should attach to the proceeds. Compare *Terre Haute & L. Ry.* v. *Harrison,* 96 Fed. 907, 911. These being *in custodia legis,* it was proper to petition that they be applied towards satisfaction of the tax. Compare *Marshall* v. *New York,* 254 U. S. 380, 384–385; *In re Tyler,* 149 U. S. 164, 182–183, 187. The practice prevails in admiralty as in other courts. In *Schuchardt* v. *Ship Angelique,* 19 How. 239, 241, where proceeds of the sale of a mortgaged ship had been paid into the registry, the Court, refusing to entertain a "libel simply to foreclose a mortgage, or to enforce the payment of a mortgage," said: "As the fund is in the custody of the admiralty, the application must necessarily be made to that court by any person setting up an interest in it. This application by petition is frequently entertained for proceeds in the registry, in cases where a suit in the admiralty would be wholly inadmissible." Admiralty Rule 42; compare *The Lottawanna,* 21 Wall. 558, 582–583; *The J. E. Rumbell,* 148 U. S. 1, 15. The practice prevails in appellate courts as well as in courts of original jurisdiction. Compare *In re Antigo Screen Door Co.,* 123 Fed. 249, 251–252.

Sixth. Finally, Rizzo contends that this Court lacks jurisdiction because the order appealed from does no more than carry out another order not here for review. This is not true. The United States seeks to enforce against property in the possession of the Circuit Court of Appeals a right which had not theretofore been litigated, and which was not barred by earlier proceedings. If the Government had been a stranger to the litigation it would have been entitled to intervene; compare *Savannah* v. *Jesup,* 106 U. S. 563, 564–565; *Krippendorf* v. *Hyde,* 110 U. S. 276, 282–283; *Gumbel* v. *Pitkin,* 113 U. S. 545, 547–548; 124 U. S. 131; and a denial of intervention would have been reviewable as a final judgment; compare *Central Trust Co.* v. *Grant Locomotive Works,* 135 U. S. 207, 224–225; *Credits Commutation Co.* v. *United States,* 177 U. S. 311, 315–316; *Clark* v. *Williard,* 292 U. S. 112, 117–119. Its right to have the new issue adjudicated is not to be denied because it was already a party to the suit. Compare *In the Matters of Howard,* 9 Wall. 175, 183. The cases which hold that merely administrative proceedings under a decree may not be brought here for review have no application. See *Wynkoop, H., C. Co.* v. *Gaines,* 227 U. S. 4. Compare *Collins*

v. *Miller,* 252 U. S. 364, 370–371; *Farmers' Loan & Trust Co., Petitioner,* 129 U. S. 206.

The order is reversed with direction to the Circuit Court of Appeals to pay to the United States the proceeds of the sale now in the registry after deducting the usual court charges.

Reversed.

WRIGHT ET AL. v. CENTRAL KENTUCKY NATURAL GAS CO. ET AL.

APPEAL FROM THE COURT OF APPEALS OF KENTUCKY.

No. 551. Argued March 4, 1936.—Decided March 16, 1936.

A franchise contract between a city and a gas company provided that if rates proposed by the company were deemed excessive by the city, reasonable rates should be prescribed in proceedings before a state commission; that pending such proceedings and any subsequent proceedings in court, the company should charge specified temporary rates, part of the collections from which should be impounded; and that, upon the final fixation of rates, the impounded sums should be distributed, under order of the commission or of the court, to the company or to its several customers, as the final determination should direct. Pursuant to these provisions, proceedings were brought and litigated, but, while they were pending, the city and the company compromised their differences by agreeing upon a rate for the future and by providing for distribution of the impounded sums. Upon appeal from a judgment of the state court upholding the compromise over objections by customers who claimed that their rights in the fund were thereby infringed in violation of the contract clause of the Constitution and the due process clause of the Fourteenth Amendment,—*held*

1. That this Court, in adjudicating these constitutional claims, will examine for itself the franchise contract and the impounding proceedings. P. 542.

2. The customers had no vested rights preventing the city from making the compromise agreement. *Id.*

3. In making the settlement, as well as in making the original franchise contract, the customers were represented by the city. *Id.*

260 Ky. 361; 85 S. W. (2d) 870, affirmed.

Appeal from a judgment upholding an agreement between a gas company and a city, and an enforcing ordinance, in a suit brought by the gas company against the city for a determination of their validity and a declaration of rights. The appeal here is by consumers of gas who came into the case below by consolidation and intervention.

Mr. Lon B. Rogers for appellants.

Messrs. Henry T. Duncan, Dyke L. Hazelrigg, and *Chester J. Gerkin* were on the brief for Central Kentucky Natural Gas Co., appellee.

Messrs. Leo T. Wolford and *William A. Minihan* were on the brief for the City of Lexington, appellee.

Messrs. Joseph A. Edge, John H. Connaughton, and *Raymond M. Hudson,* were on the brief for J. W. Delph et al., appellees.

Per Curiam.

Under an ordinance of the City of Lexington, Kentucky, adopted in January, 1927, the Central Kentucky Natural Gas Company purchased a franchise for the distribution and sale of gas to consumers in that city. The contract with the city provided that the company should promulgate the rates which it proposed to charge and that, if the city deemed them to be excessive, proceedings should be instituted before the Railroad Commission of the State in order to have just and reasonable rates prescribed. It was also stipulated that pending the proceedings before the commission, and any subsequent proceedings in court, the company should have the right to charge specified temporary rates, provided that a certain amount collected under such rates should be impounded pending the final fixation of rates, whereupon the sums impounded, with interest accumulations, should be distributed under the order of the commission, or of the court, to the company or to its several customers as the final determination should direct.

The company promulgated a schedule of rates which the city assailed as excessive and a portion of the amounts collected was impounded. In 1929, the commission made an order prescribing rates and this order was attacked by the company in a suit in the District Court of the United States. By an interlocutory injunction that court enjoined further proceedings under the order and appointed as receiver the custodian of the fund which had been impounded by the commission, directing him to hold any fund required by the franchise contract to be impounded subsequently. On final hearing, the court held the prescribed rate to be confiscatory, but finding that a certain higher rate would be reasonable, directed that a permanent injunction should issue restraining the imposition of the prescribed rate, upon condition that the company file its consent that the fund impounded from the rate collected in excess of that deemed by the court to be reasonable should be distributed. As the company declined so to consent, a final decree was entered denying a permanent injunction and directing the distribution of the impounded fund.

This Court reversed the decree, holding that on the basis of the conclusion of the District Court that the rate prescribed by the commission was confiscatory, that court should have granted appropriate relief without condition, leaving the commission free to exercise its authority to fix a reasonable rate, and the court should have relinquished its control over the impounded fund by directing the receiver to retain it in his capacity as custodian appointed by the commission. *Central Kentucky Natural Gas Co.* v. *Railroad Commission,* 290 U. S. 264, 273, 275. The city and the company then undertook to compromise their differences by agreeing upon a rate for the future and by providing for distribution of the impounded fund. The terms of the agreement were embodied in Resolution No. 74 passed by the Board of Commissioners of the City and accepted by the company. Pursuant to that agreement, the Board of Commissioners passed Ordinance No. 271 amending the existing franchise ordinance and putting into effect the agreed schedule of future rates. A petition for a referendum was filed against the latter ordinance, whereupon the Board of Commissioners repealed both Ordinance No. 271 and Resolution No. 74.

The present suit was then brought by the company against the city in the circuit court of the State for a declaration of the rights of the company and for a determination of the validity of Resolution No. 74 and Ordinance No. 271. Another suit was filed by J. M. Wright (appellant here) in the state court, setting up the adoption of the original franchise ordinance in 1927 and its acceptance by the city, and that he was a consumer of gas, and seeking a mandatory injunction directing the company to furnish gas to him at a specified rate until the proceedings before the Railroad Commission had been finally determined. The two cases were consolidated. Later, J. M. Wright and F. A. Forsythe (the other appellant here) were permitted to file an intervening petition in the company's suit against the city, setting forth their interest as consumers. The circuit court held Resolution No. 74 invalid in its entirety, because (1) it undertook to distribute, without the approval of the court, the fund in which it held the consumers had a vested right, (2) one S. B. Featherstone, who had been a party plaintiff on behalf of himself and all other consumers in earlier proceedings in the state court and before the Railroad Commission, had not agreed to the resolution, and (3) the city was without power to agree upon a distribution of the impounded fund and could only agree on a rate, after which the duty would devolve upon the court and the commission to distribute the fund in accordance with the rate fixed.

That decision was reversed by the Court of Appeals of Kentucky, 260 Ky. 361; 85 S. W. (2d) 870. That court, after observing that it had been "erroneously thought by numerous voters that Ordinance 271 was subject to a referendum," reached the following conclusions: That at the time when Resolution No. 74 was passed the rate theretofore fixed by the Railroad Commission was a nullity; that the city and the company were as free to agree upon the rates to be charged under the franchise contract as they were before the void finding of the Railroad Commission was promulgated; that the consent of the court or commission required in the resolution was purely a formal consent to the method of distribution; and that there "was no reason requiring the consent of the court or commission as to the amounts distributed." In this view, the Court of Appeals deemed the question for its consideration to be whether or not Resolution No. 74 in effect fixed a rate. The court did not consider it necessary that Featherstone should be a party to the agreement, citing *In re Engelhard & Sons Co.*, 231 U. S. 646. "The matter was one entirely between the gas company and the city." The court then concluded that Resolution No. 74 "did in fact fix a reasonable rate for the period of impoundment"; that the city and the company "had the power to deal with the situation in a practical way," and that so long as the result of their action was to agree upon a return for the company that was neither extortionate nor confiscatory, there was no basis for objection to the method adopted. Accordingly, the court held that both Resolution No. 74 and Ordinance No. 271 were valid as contracts and could not be repealed as attempted, and that it was "the plain duty of the public agencies concerned to lend every effort to bring this long-pending litigation to an end."

The case comes here on appeal. Appellants, consumers of gas, contend that the obligations of the original franchise contract have been impaired by the attempted compromise in violation of the contract clause of the Federal Constitution and that appellants have been deprived of vested property rights in the impounded fund without due process of law contrary to the Fourteenth Amendment. On examining the franchise contract and the proceedings for the impounding of amounts collected from consumers (*Appleby* v. *New York City,* 271 U. S. 364, 380; *Larson* v. *South Dakota,* 278 U. S. 429, 433; *Abie State Bank* v. *Bryan,* 282 U. S. 765, 773), we find no warrant for a conclusion that appellants had any vested right which precluded the city from effecting a reasonable adjustment of the controversy over rates and from entering into a contract fixing a reasonable rate for the period during which the fund was impounded as well as for the future. (Compare *Violet Trapping Co.* v. *Grace, ante,* p. 119; *Ingraham* v. *Hanson, ante,* p. 378.) In making that settlement, as well as in the making of the original franchise contract, the consumers were represented by the city. *In re Engelhard & Sons Co., supra.* Compare *Smith* v. *Illinois Bell Telephone Co.,* 270 U. S. 587, 592; *Kentucky* v. *Indiana,* 281 U. S. 163, 174; *Chicago* v. *Chicago Rapid Transit Co.,* 284 U. S. 577.

The judgment of the Court of Appeals is

Affirmed.

GREAT WESTERN POWER COMPANY OF CALIFORNIA *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 525. Argued March 5, 1936.—Decided March 16, 1936.

Under § 234 (a), Revenue Act of 1924, and Treasury Regulations 65, Art. 545, § 3, where bonds of a corporation, sold at a discount, are retired by exchanging for them bonds of another issue and paying a premium, the unamortized discount and expense of issuance allocable to the retired bonds, and the premium paid and expense incurred in the exchange, are part of the cost of obtaining the loan and, for the purpose of deduction in income accounting, should be amortized over the term of the bonds delivered in the exchange. P. 546.

79 F. (2d) 94, affirmed.

CERTIORARI, 296 U. S. 568, to review a judgment reversing a decision of the Board of Tax Appeals, 30 B. T. A. 503, which overruled the Commissioner of Internal Revenue in respect of the disallowance of deductions in the Power Company's income tax return.

Mr. Thomas R. Dempsey, with whom *Mr. A. Calder Mackay* was on the brief, for petitioner.

Mr. John MacC. Hudson, with whom *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. Sewall Key* were on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The parties disagree as to petitioner's right to deduct from gross income for 1924 unamortized discount, premiums, and expenses paid and incurred in that year in connection with the retirement of certain bonds. The petitioner took the deduction in its income tax return.

The respondent disallowed it and determined a deficiency. The petitioner appealed to the Board of Tax Appeals which held the deduction proper.[1] The Circuit Court of Appeals reversed the Board's decision in part.[2] We granted the writ to resolve a conflict.[3]

March 1, 1919, the company executed a mortgage securing four series of bonds, one of which was designated "Series B 7%." February 1, 1921, the company executed another mortgage, securing bonds known as "General Lien Convertible 8% Gold Bonds," and thereby covenanted to deposit and pledge with the trustee Series B 7's equal in par value to the General Lien 8's at any time outstanding. The indenture provided that when this should be accomplished the debtor should have the right to redeem the General 8's at 105 and accrued interest, the holders to have the option to receive cash or Series B bonds, of equal face value, plus five per cent. in cash. The General Lien 8's were issued at a discount of $150,000 and an expense of $22,283.54. Prior to December 31, 1923, certain General Lien 8's had been redeemed for cash and the then unamortized discount and expense allocable to the bonds retired had been charged off in the year of retirement. May 8, 1924, the company called the remaining outstanding General Lien 8's for redemption August 1, 1924. The holders of $2,354,000 face value exercised the option to exchange for Series B 7's at par and a cash premium of five per cent. The total premium paid to them was $117,725 and the expense of the conversion was $1,461.05. The unamortized discount and expense of issuance in respect of the General Lien 8's thus exchanged, at the date of exchange, was $126,176.97. For the remaining General Lien 8's, which were not ex-

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[1] 30 B. T. A. 503.

[2] 79 F. (2d) 94.

[3] *San Joaquin L. & P. Corp. v. McLaughlin, Collector,* 65 F. (2d) 677.

changed for Series B 7's, cash was paid at the rate of 105% of par and the company incurred certain expenses in the transaction. The total of the premium, the expense, and the unamortized discount applicable to all of the bonds redeemed for cash or in exchange for Series B bonds was charged off in 1924 and taken as a deduction from income for that year. The company keeps its accounts on the accrual basis. The Commissioner disallowed the entire deduction, but before the Board he admitted the propriety of so much of it as applied to bonds redeemed for cash. He insisted, however, that as to those retired by exchange of the Series B 7's the discount, premium, and expense should be amortized over the life of the latter. The Board overruled his contention, but the Circuit Court of Appeals sustained it, holding that the items would not be deductible as realized losses until payment or redemption of the Series B bonds, and should be amortized in annual instalments during their term.

Section 234 (a) of the Revenue Act of 1924 [4] directs that in computing the net income of a corporation subject to the tax there shall be allowed as deductions ordinary and necessary expenses paid or incurred during the taxable year in carrying on the business, interest paid or accrued within the year on indebtedness, and losses sustained during the year not compensated by insurance or otherwise. The Treasury promulgated a regulation under the Revenue Act of 1918 covering treatment of discounts and premiums, which, with immaterial changes, has remained in force under all the revenue acts and appears as Art. 545 of Regulations 65 applicable to the Revenue Act of 1924.[5]

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[4] c. 234, 43 Stat. 253.

[5] "ART. 545. Sale and retirement of corporate bonds.— . . .

"(3) (*a*) If bonds are issued by a corporation at a discount, the net amount of such discount is deductible and should be prorated or

Although the article does not expressly cover the items in question other than discount and premiums paid at redemption, expense in connection with the issuance of the securities is deductible on the same theory as unamortized discount.[6] It has accordingly been held that where an issue of bonds is retired for cash, whether the cash be obtained by the sale of a new issue or not, the items in question are deductible in the year of retirement.[7]

The question then is whether, upon an exchange of one obligation for another which is to be retired, the transaction is to be viewed as if the retirement were accomplished by the payment of cash. If the retired bonds had not been called, the expense items incurred in connection with their issuance would properly be amortized over the remainder of their life. Here the petitioner substituted a new obligation for the old. The remaining unamortized expenses of issue of the original bonds and the expense of the exchange are both expenses attributable to the issuance of the new bonds and should be treated as a part of the cost of obtaining the loan. They should, accordingly, be

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amortized over the life of the bonds. (*b*) If thereafter the corporation purchases and retires any of such bonds at a price in excess of the issuing price plus any amount of discount already deducted, the excess of the purchase price over the issuing price plus any amount of discount already deducted (or over the face value minus any amount of discount not yet deducted) is a deductible expense for the taxable year. (*c*) If, however, the corporation purchases and retires any of such bonds at a price less than the issuing price plus any amount of discount already deducted, the excess of the issuing price plus any amount of discount already deducted (or of the face value minus any amount of discount not yet deducted) over the purchase price is gain or income for the taxable year."

[6] *Helvering* v. *Union Pacific R. Co.*, 293 U. S. 282; *Helvering* v. *California Oregon Power Co.*, 64 App. D. C. 125; 75 F. (2d) 644.

[7] *Helvering* v. *California Oregon Power Co.*, *supra; Helvering* v. *Central States Electric Corp.*, 76 F. (2d) 1011; *Helvering* v. *Union Public Service Co.*, 75 F. (2d) 723; T. D. 4603, XIV C. B. 46, p. 3.

amortized annually throughout the term of the bonds delivered in exchange for those retired.

The judgment of the Circuit Court of Appeals is

Affirmed.

WISCONSIN *v.* MICHIGAN.

No. 12, original. Argued March 2, 3, 1936.—Decided March 16, 1936.

Final decree confirming report of special master and establishing boundary between Wisconsin and Michigan.

This suit was brought to correct an earlier decree, 272 U. S. 398, entered after the decision reported 270 U. S. 295. The opinion in the present case, explaining the corrections to be made and directing a second reference to the Special Master, Frederick F. Faville, Esq., of Des Moines, Iowa, is in 295 U. S. 455. The decree printed below is the old decree as now amended.

Mr. Adolph J. Bieberstein, with whom *Mr. James E. Finnegan,* Attorney General of Wisconsin, *Mr. Joseph G. Hirschberg,* Deputy Attorney General, and *Mr. J. E. Messerschmidt,* Assistant Attorney General, were on the brief, for plaintiff.

Mr. Edward A. Bilitzke, with whom *Mr. David H. Crowley,* Attorney General of Michigan, and *Mr. James F. Shepherd,* Deputy Attorney General, were on the brief, for defendant.

DECREE.

Michigan brought suit in this court against Wisconsin to have ascertained and established a part of the boundary between them. March 1, 1926, we announced our decision. 270 U. S. 295. To carry it into effect, the States acting through their counsel agreed upon and submitted a form of decree. November 22, 1926, the court relying upon the agreement and consent of the parties entered the decree proposed. 272 U. S. 398.

November 7, 1932, Wisconsin brought this suit against Michigan, alleging that as a result of mistakes of the parties the decree of November 22, 1926, did not carry our decision into effect as to the tracts called "Grassy Island" and "Sugar Island" on the north bank and a short distance from the mouth of the Menominee River and as to the Green bay section of the boundary. Issue was joined, and a special master took evidence, heard counsel for the States, made findings of fact, stated his conclusions of law and recommended a form of decree. The parties filed exceptions to his report and, after hearing counsel, the court May 20, 1935, decided (295 U. S. 455, 462):

"The decree to be entered in this case will establish the boundary through and along, or near, the middle of the waters of Green bay that are here involved. That line commences at a point midway between the piers at the harbor entrance of the Menominee River; thence east by south seven and one-eighth miles; thence approximately north by east one-eighth east, about eight and seven-eighths miles; thence to and along a line in or near the middle of the bay to a point west of the Rock Island passage; thence easterly by courses and distances to be designated through that passage to the boundary in the middle of Lake Michigan. The decree will appropriately define the tracts called 'Grassy Island' and 'Sugar Island' and declare them to belong to Michigan."

And the court ordered (p. 463):

"The case is referred to the special master, and he is directed to prepare and submit to the court a form of decree which will give effect to this decision. Inasmuch as the preparation of the decree may involve the ascertainment of physical facts and the formulation of technical descriptions, the master is authorized to hear counsel, take evidence and procure such assistance, if any, as may be necessary to enable him conveniently and promptly to discharge the duties here imposed upon him. He may call upon counsel to propose forms of decree. He is directed to give them opportunity to submit objections to the form prepared by him and to include the objections, if any, in his report."

The master took evidence, viewed the locus, heard counsel and in accordance with the court's directions filed his report. It includes a form of decree. Wisconsin objects to the proposed decree in respect of the part of the boundary in Green bay, Rock Island passage and Lake Michigan not defined by our decision of May 20, 1935, and submits for consideration alternative forms of decree. Michigan urges adoption of that proposed by the master.

After hearing counsel for the respective States, the court does hereby order, adjudge and decree:

1. Wisconsin's objections are overruled. The definitions of the boundary recommended by the master are approved and adopted.

2. The decree of this court, entered November 22, 1926, in the suit brought by Michigan against Wisconsin, is modified by striking therefrom the provisions that purport to define the parts of the boundary in the Menominee River downstream from the concrete bridge on United States Highway No. 41 between the cities of Menominee, Michigan, and Marinette, Wisconsin, and in the waters of Green bay, the Rock Island passage and Lake Michigan and by inserting in lieu of the parts of the decree so stricken out, definitions of the boundary recommended by the master.

3. The decree in *Michigan* v. *Wisconsin,* as modified by this decree, defines and establishes the boundary between these States. As modified, it is as follows:

It is ordered, adjudged and decreed:

That the boundary between the States of Michigan and Wisconsin along the following course be and it is hereby fixed and finally established as follows:

From Lake Superior through the middle of the main channel of the Montreal River, to the headwaters thereof, as established in the survey of Captain Cram at the junction of the Pine River and Balsam Creek (also known as Lehman's Creek), thence along the line of the survey of William A. Burt of 1847, to the center of the channel between Middle and South Islands in the Lake of the Desert, thence continuing along the line of said survey to the shore of Lake Brulé, thence along the southerly shore of Lake Brulé to the center of the main channel of the River Brulé, thence down the center of the main channel of the rivers Brulé and Menominee, to the intersection of the longitudinal center line of the concrete bridge on United States Highway No. 41 between the cities of Menominee, Michigan, and Marinette, Wisconsin, with the center line of the stream crossing of said bridge, which said point of intersection bears north forty-two degrees and thirty minutes (42°30′) east, a distance of four hundred twenty-four and five-tenths (424.5) feet from the southerly end of said stream crossing of said bridge, and a distance of nine hundred and ninety-nine and ninety-three hundredths (999.93) feet upon the same course from the center line of Eggner street as now laid out and existing in the city of Marinette, Wisconsin, and which said point also bears south forty-two degrees and thirty minutes (42°30′) west, two thousand three hundred fifty-eight and one-tenth (2,358.1) feet from the south line of Ogden avenue as now laid out and existing in the city of Menominee, Michigan, all these courses being measured along the center line of said bridge and its approaches, thence south seventy-four degrees and twenty-eight minutes (74°28′) east, one thousand one hundred twenty-seven and seven-tenths (1,127.7) feet to a point from which a monument set upon a nearby island consisting of an iron pin set in a concrete block of approximately one-half ton bears south eighteen degrees and fifty-five minutes (18°55′) west, a distance of seventy-one (71) feet, thence south sixty-six degrees and fifty-four minutes (66°54′) east, one thousand seven hundred thirty-nine and three-tenths (1,739.3) feet to a point from which a monument set in a nearby island consisting of an iron pin set in a concrete block of approximately one-half ton bears south nineteen degrees and thirty minutes (19°30′) west, one hundred sixty and two-tenths (160.2) feet, thence along the center line of the dredged channel of the Menominee River through the center of the movable span of the drawbridge between the cities of Menominee and Marinette, and continuing along the center of said dredged channel of said river to a point midway between the outer ends of the Menominee Harbor piers. Provided, that the section of the boundary in the Brulé and Menominee rivers shall follow the main channel thereof, except that where islands occur in the Brulé River or in the Menominee River, down to and inclusive of the Quinnesec Falls, extending to the line between sections 5 and 6, Township 38 north, of Range 20 east, of the Wisconsin Public Survey, extended across said river, the line shall pass through the channel nearest the Wisconsin bank, so as to throw all such islands into Michigan; and where islands occur in the Menominee River below the Quinnesec Falls, and upstream from the above-mentioned concrete bridge on United States Highway No. 41, the line shall pass through the channel nearest the Michigan bank, so as to throw all such islands into Wisconsin.

From a point midway between the outer ends of the Menominee Harbor piers, thence upon a true course of which the azimuth is one hundred one degrees and fifteen minutes (101°15′) for eleven thousand four hundred seventy (11,470) meters, the same being approximately east by south for seven and one-eighth (7⅛) miles.

Thence upon a true course of which the azimuth is eleven degrees and forty-five minutes (11°45′) for fourteen thousand two hundred fifty (14,250) meters, the same being approximately north by east for eight and seven-eighths (8⅞) miles.

Thence upon a true course of which the azimuth is fifty-eight degrees and fifty minutes (58°50′) for eight thousand two hundred ninety (8,290) meters, the same being approximately northeast by east one-fourth east for five and one-eighth (5⅛) miles.

Thence upon a true course of which the azimuth is forty-two degrees and eighteen minutes (42°18′) for sixteen thousand seven hundred eighty (16,780) meters, the same being approximately northeast one-fourth north for ten and one-half (10½) miles.

Thence upon a true course of which the azimuth is twenty-eight degrees and ten minutes (28°10′) for eleven thousand five hundred eighty (11,580) meters, the same being approximately north northeast one-half east for seven and one-fourth (7¼) miles.

Thence upon a true course of which the azimuth is ninety degrees (90°) for twenty-seven thousand one hundred seventy (27,170) meters, the same being approximately east for sixteen and seven-eighths (16⅞) miles.

Thence upon a true course of which the azimuth is one hundred twenty degrees (120°) for forty-five thousand six hundred (45,600) meters, the same being approximately southeast by east three-eighths east for twenty-eight and three-eighths (28⅜) miles to the center of Lake Michigan.

In the descriptions contained in this decree, all azimuths are computed from 0 as true north, clockwise.

The costs of this action, including the fees and expenses incurred by the special master, shall be divided equally between the parties.

SUGAR INSTITUTE, INC. ET AL. v. UNITED STATES.

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

No. 268. Argued February 3, 4, 1936.—Decided March 30, 1936.

1. The restrictions of the Sherman Anti-Trust Act are aimed against such restraints of interstate commerce as are unreasonable. P. 597.
2. The Act does not forbid coöperative adoption by competitors of reasonable means to protect their trade from injurious practices and to promote competition on a sound basis; and such legitimate coöperation is not limited to the removal of evils which are in themselves infractions of positive law. P. 598.
3. The mere fact that correction of abuses in a business by coöperative action of those competing in it may tend to stabilize the business, or to produce fairer price levels, does not stamp their action as unreasonable restraint of trade. P. 598.
4. But, concerted action which produces unreasonable restraint can not be justified by pointing to evils affecting the industry or to a laudable purpose to remove them. P. 599.
5. While the collection and dissemination of trade statistics are in themselves permissible and may be a useful adjunct of fair commerce, a combination to gather and supply information as part of a plan to impose unwarrantable restrictions on competition, as for example to curtail production and raise prices, is unlawful. P. 599.
6. In applying the Sherman Act, each case demands a close scrutiny of its own facts, and questions of reasonableness are necessarily questions of relation and degree. P. 600.
7. Fifteen companies, which refined nearly all of the imported raw cane sugar processed in this country and supplied from 70 to 80% of the refined sugar consumed in it, formed a trade association, called The Sugar Institute, ostensibly for the purpose of doing away with unfair merchandizing practices, especially the granting of secret concessions and rebates to customers, which had grown up in the trade. They agreed that all discriminations between customers should be abolished and, to that end, that each company should publicly announce in advance its prices, terms and conditions of sale and adhere to them strictly until it publicly changed them. They also agreed upon a number of supplementary restrictions (which are considered in detail in this opinion), among which were

(a) restrictions on the employment of brokers and warehousemen (*infra,* 587); (b) restrictions concerning transportation, absorption of freight charges, etc. (*infra,* 589); (c) limitation of the number of consignment points at which sugar was placed for distribution to surrounding areas and limitation of ports of entry to be used (*infra,* 591); (d) prohibition of long-term contracts and restriction of quantity discounts on sales to customers (*infra,* 593); (e) withholding from the purchasing trade of part of the statistical information collected by the Institute for its members and not otherwise available (*infra,* 596). Owing to the position of these refiners in the sugar industry, maintenance of competition between them was a matter of serious public concern; and, since refined sugar is a highly standardized product, that competition must relate mainly to prices, terms and conditions of sales. The strong tendency toward uniformity of price resulting from the uniformity of the commodity, made it the more important that such opportunities as existed for fair competition should not be impaired. *Held:*

(1) The agreement and supporting requirements went beyond the removal of admitted abuses and imposed unreasonable restraints. P. 601.

(2) The vice of the agreement was not in the mere open announcement in advance of prices and terms—a custom previously existing which had grown out of the special character of the industry and did not restrain competition—nor in the relaying of such announcements, but in the steps taken to secure undeviating adherence to the prices and terms announced, whereby opportunities for variation in the course of competition, however fair and appropriate, were cut off. P. 601.

(3) In ending the restraint, the beneficial and curative agency of publicity should not be unnecessarily hampered; publicity of prices and terms should not be confined to closed transactions; if the requirement that there must be adherence to prices and terms openly announced in advance be abrogated and the restraints which followed that requirement be removed, the just interests of competition will be safeguarded and the trade will still be left with whatever advantage may be incidental to its established practice. P. 601.

(4) The refiners should be enjoined from gathering and disseminating among themselves exclusively statistical information which is not readily, fully and fairly available to the purchasing and distributing trade, and in which that trade has a legitimate inter-

business; but the command should not be so broad as to include information in relation to the affairs of refiners which may rightly be treated as having a confidential character and in which distributors and purchasers have no proper interest. P. —.

15 F. Supp. 817, modified and affirmed.

Appeal from a decree of injunction in a suit by the Government under the Anti-Trust Act. The bill named as defendants an incorporated trade association called The Sugar Institute, the fifteen sugar refining corporations composing it, and various individuals. The decree below did not dissolve the Institute, as was prayed, but permanently enjoined the defendants from engaging in forty-five stated activities found to be in restraint of competition in the sugar trade.

Mr. John C. Higgins, with whom *Mr. Edward J. McGratty, Jr.*, was on the brief, for appellants.

The practice of selling only upon open prices and terms without secret discriminations among customers is essential to the functioning of that type of competition which is beneficial to the public interest. It has uniformly been approved by the courts. *United States* v. *U. S. Steel Corp.*, 223 Fed. 55; 251 U. S. 417; *Chicago Board of Trade* v. *United States*, 246 U. S. 231.

American Column & Lumber Co. v. *United States*, 257 U. S. 377, and *United States* v. *American Linseed Oil Co.*, 262 U. S. 371, distinguished.

The *Linseed Oil Company* case did not involve a condemnation of an open competition plan in the real sense of the term. It represented a flagrant example of a scheme of unfair competition masquerading under the name of open competition.

In the case at bar, the Sugar Institute was organized to abolish the system of arbitrary and secret rebates and concessions under which part of the buyers had been given unfair and discriminatory advantages over their competitors. And the abolition of these discriminations was accomplished by making all prices and terms open and public. There was no secret consultation or exchange of information among the sellers about the prices or offers to buyers. There was complete and immediate publicity of all prices and terms and other important trade information to all buyers as well as to sellers. There was no campaign or propaganda for decrease of production or increase of prices. There was no discussion of prices or production at all. The Sugar Institute is the complete antithesis of the Hardwood and Linseed associations in every essential particular, and the case at bar presents none of the elements upon which the *Hardwood* and *Linseed* decisions were based.

The decisions of this Court in *Maple Flooring Assn.* v. *United States,* 268 U. S. 563, and *Cement Manufacturers Assn.* v. *United States,* 268 U. S. 588, recognize both the economic desirability and the legality of concerted measures to protect and promote the type of open competition sought to be achieved by the appellants in the case at bar.

All of the practices of the Sugar Institute in connection with the gathering and dissemination of price and trade information are well within the limits of lawful activities as laid down in the *Maple Flooring* case. In fact, they stop far short of the activities there approved. Each member of the Institute has at all times determined his own selling price in free and open competition with every other member, without any Institute calculation or discussion to guide or influence his action.

The relaying by the Institute of the price change announcements of the members, after they have already been made public by the members in the same way in which they had always been made public before the Institute was organized, is clearly in line with the principle of publicity of market information approved in the *Maple Flooring* case. It merely gives wider and more accurate publicity to what has already been publicly announced. It has none of the qualities of private propaganda for increase of prices, or secret consultation about special offers to favored customers, which were condemned in the *Hardwood* and *Linseed* cases. It is the exact opposite of those furtive practices, and is the closest parallel which can be realized in an industry of this character to the competition of the Stock and Produce Exchanges, which is held up by economists and courts alike as the ideal of free and open competition. In the *Cement Manufacturers* case, this Court definitely upheld the right of competitors to coöperate for their own protection against imposition, misrepresentation and fraud, even though they thereby concertedly restrict a type of competition which they had long practiced and which was not shown to be in any way harmful to the public. This specific application of the sound policy of upholding restraints of competition which have a reasonable basis was also exemplified in the *Chicago Board of Trade* case, *supra,* where this Court sustained an express agreement of all the competitors in the market to eliminate completely a long-established type of competition, not because it involved imposition or fraud upon themselves or others, and not because it was shown to be harmful or destructive competition, but because it was shown not to be as wholesome and beneficial as the type of competition which was substituted for it by agreement of the competitors.

The principles declared by this Court in those cases were reaffirmed in *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344.

Section 2 of the Clayton Act condemns the type of secret discriminations that were practiced in the sugar industry before the Institute was formed; and the concert of action involved in the adoption and observance of this fundamental code provision represents the only effective way of giving practical effect to the express mandate and the underlying policy of that section. *Van Camp & Sons Co.* v. *American Can Co.*, 278 U. S. 245, 254; *American Can Co.* v. *Ladoga Canning Co.*, 44 F. (2d) 763, cert. den., 282 U. S. 899; *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 356–7.

The practice of selling only on publicly announced prices and terms, without secret discriminations in favor of particular purchasers, is the only practical means of protecting both sellers and buyers from widespread deception and fraud, which are an inevitable part of the practice of secret price discriminations.

The steps taken by appellants to give effect to the basic agreement that sugar should be sold only upon open prices and terms, without discrimination among customers, did not constitute an undue or unreasonable restraint of trade.

As for the price reporting system, the price reported to the Institute is a price which has already been publicly announced to the trade by the reporting member; the function of the institute is merely to relay and give further publicity to the price announcement; the Institute relays the announcement not merely to the competitors of the refiner making the announcement, but to the entire trade, including buyers as well as sellers, through the most widely used public channels of trade information; and no comment accompanied these relays and no price or production propaganda of any character was ever indulged in by the Institute, its officers or members.

It is submitted that no case ever decided by this Court affords any basis whatsoever for a contention that the mere reporting of already public price announcements to a central agency in the industry for the purpose of giving them wider publicity is in any respect unlawful.

The findings leave for consideration the naked question whether there is, in the concerted practice of announcing prices before sales, any such inherent tendency to restrain or suppress competition as to require that it be held unlawful under the Sherman Act. We submit that this practice, as carried on in the case at bar, in a trade like the sugar trade, promotes free and wholesome and economic competition, instead of suppressing or restraining it; and it is therefore clearly lawful.

It may be that, in some other industries, selling products which are not standardized, so that price competition cannot immediately express itself with full force when a competitor has announced his prices before sales, it might be argued that announcing the prices after sales would be preferable; but we can see no soundness in such an argument even then. In the *Steel Company* case, *supra,* where the company's practice was to "publicly announce its prices, adhere to them with all buyers alike, and to give timely notice of its purpose to change them," this Court approved the practice as a sound and wholesome one.

It may be also that when competitors agree that they will not reduce their prices without announcing the decline some considerable time before it becomes effective, there is present some element of restraint upon competition. But in the case at bar, as to price declines, no waiting time at all was called for by any rule, or observed in practice. Price declines were not only instantly effective, but it was the practice to make such declines effective on all business entered on the day of the decline, even when the decline had not been announced until late in the day, and this practice was approved by an Institute Code Interpretation. Furthermore, the refiners sometimes repriced all business entered for weeks before a price decline.

As to price advances, it is true that it was the practice of the refiners, approved by a recommendation of the Institute, to announce such advances by 3 o'clock of the day before the advance. But the prior announcement of price advances was not due to the Sugar Institute. It was a part of the sugar move system and had always been the practice in the industry.

It is obvious, of course, that the prior announcement of price advances is an advantage to the buyers, especially when it is practiced as in the sugar industry for the specific purpose of giving customers a reasonable time within which to place their orders for as large a supply of sugar as they want to buy at a present lower price before the advance becomes effective. This practice was no part of any scheme to restrain competition. On the contrary, as the trial court found, there was no consultation among the appellants, and frequently an announcement by one refiner of an advance would result in a series of announcements by others, ultimately leading to a decline. Often, too, the advance would be withdrawn, because one refiner would refrain from following the announcement. Except in a few instances, a decline announcement was followed by all.

This, we submit, is open competition at its best, and upon the state of facts here presented, there can be no reason whatsoever for holding such a price announcement practice unlawful.

The justification for the adoption and observance by the refiners of § 2 of the Code of Ethics, relating to quantity discounts, is based upon the special facts of the sugar refining industry, and upon the ground that in such an industry, subject to the special conditions and surrounding circumstances, quantity discounts inevitably amount to, and can only amount to, discriminatory and arbitrary price concessions. Their abolition by the action of the competitors is therefore a proper and necessary means of eliminating a destructive and uneconomic competitive method, and is justified as a method of giving effect to the Code condemnation of price discrimination between customers.

As found by the trial court, the discounts and rebates given before the formation of the Institute were given to some large customers but not to all; they bore no definite relation to the quantities purchased, and they were not openly available so that, in the language of the court in the *American Can* case, 44 F. (2d) 763, cert. den., 282 U. S. 899, "all customers could learn the amount of purchases necessary to secure the best prices." They were purely arbitrary in the sense that they resulted from secret bargaining in each transaction, and in no sense did they meet the requirement that all purchasers "were entitled to know the amount of purchases necessary to obtain the saving." It must always be remembered in construing the provisions of the Code of Ethics of the Institute that they were directed to practices prevailing in the sugar refining industry and not to a purely abstract situation. The condemnation of quantity discounts was aimed at the kind of discounts which had made their appearance in the sugar industry, and not at an orderly system of graded discounts corresponding to reductions in cost, which might fall within the proviso of § 2 of the Clayton Act.

As for the regulations affecting brokers and warehousemen, in view of the functions performed by the broker and the warehouseman in the marketing of refined sugar, it is clear that the prevention of price discriminations and departures from the policy of open prices publicly announced would be utterly impossible if the refiners were unable to rely upon the observance of that policy by the brokers and warehousemen employed by them and their competitors.

The action taken by the refiners (1) in refusing to deal with carriers by water who refused to announce openly their rates and terms or who violated their openly announced rates and terms by the granting of rebates or concessions, (2) in guarding against participation by buyers, brokers or warehousemen in rates paid by refiners on shipments of their own sugar by private charter, and (3) in refusing to deal with trucking concerns affiliated with buyers, brokers or warehousemen or trucking concerns unwilling to sign non-rebating agreements, was, it is submitted, clearly justified under the same principles as those justifying regulations affecting brokers and warehousemen. The measures taken were both appropriate and necessary to prevent violation by the refiners' own agents of the basic principle of open prices and terms without discrimination among customers.

Transiting and diversion, for the purpose and with the effect of defeating the refiners' openly announced freight applications, obviously involve a fraud upon the refiner if done without his consent; and, if consented to by the refiner, involve quite as clearly a violation of the basic principle of open prices and terms, without discrimination among customers.

Similarly, the recommendations made by the Institute and the action taken by the refiners with respect to such subjects as tolling contracts, used bags, private brands, long-term contracts, pool cars and cargoes, and the like, were, it is submitted, entirely proper and lawful as reasonably necessary and appropriate to give effect to the basic principle. In connection with each of these subjects, there existed opportunities for discriminatory practices, which, unless guarded against, would have nullified in large part the carrying out of the basic principle adopted by the refiners.

The activities of defendants designed to effect more economic methods of production and distribution did not constitute an undue or unreasonable restraint of trade.

That the statistical information which the Institute failed to make generally available to the purchasing trade was of no interest or value whatsoever to buyers, and that buyers were in no way prejudiced by their failure to receive such information, is clearly established by the evidence.

The elimination of unnecessary consignment points throughout the country constituted, in a sense, a "restraint" of competition. The type of competition thus restrained, however, was, as shown by a discussion of the facts, wasteful and uneconomic—productive of no real benefit to the purchasing trade.

The unnecessary multiplication of consignment points at a tremendous cost to the industry—a cost ultimately borne by the buying public—is not, we submit, the type of competition, beneficial to the public interest, which the Anti-Trust Laws were designed to foster and protect.

Messrs. Walter L. Rice and *Angus D. MacLean,* with whom *Solicitor General Reed* and *Messrs. Charles H. Weston* and *Hammond E. Chaffetz* were on the brief, for the United States.

The Institute's "open price" plan is an unreasonable restraint of trade.

In a free competitive market a seller may know what his competitors have charged in the past, but he does not know in advance what prices or terms they will grant in the future. He must anticipate that they may offer more liberal terms as well as lower prices, and he will therefore be alert to initiate better bargains himself. Under the "open price" plan, on the other hand, a seller may confidently wait until his competitors announce better bargains, because he knows that they will not "scoop in" a large volume of orders by being first to initiate attractive offers. They have in effect promised him that they will not grant new prices or terms without advance notice to him. The assurance to each refiner that no competitor would vary his prices without advance notice was sufficient to defer declines and increase prices without justification.

Advance announcement of harsher terms or increased prices, posted with the Institute and relayed by it to members, constituted in effect an invitation to follow the advance. Since the advance became effective at a future time, the refiner first making announcement would lose nothing if other refiners failed to follow. Of the 48 attempted "moves" during the Institute period, 38 resulted in price advances.

The Institute's "open price" plan entailed many collateral restraints upon fair competition. As concluded by the District Court, the requirement of open announcement in advance of sales "necessarily in and of itself ended any possibility of special terms when price negotiations were essential." For example, long-term contracts, which had great economic value, were thus eliminated. Likewise, tolling contracts, used bag allowances, the packing of private brands, pool shipments, private charters, etc., although well recognized mercantile practices, were branded by the Institute as "discriminatory" merely because they had to be negotiated privately.

Under the "open price" plan each individual buyer was at the mercy of a combination of refiners. A buyer seeking better prices or terms had to assume the impossible burden of tearing down the entire price structure. Expert buyers were reduced to mere "order clerks." When buyers become convinced that they cannot obtain even a momentary advantage over their competitors, and that there are no better bargains to be had, they quit negotiating for better bargains, and this defeats true competition. Any system which substitutes "mass bargaining" for individual bargaining unreasonably restrains trade, and particularly where restrictive rules of a trade association arm the sellers for the imagined "mass" encounter with weapons which the buyers do not have at their command.

This Court has condemned "open competition" where buyers agree to adhere to reported prices and terms unless more onerous ones are obtained or unless they notify their association of any deviations. *United States* v. *American Linseed Oil Co.,* 262 U. S. 371. The Court condemned the system not because of its failure to prohibit price variations, but in spite of it. It rejected the plan because as a practical matter it took away competitors' freedom of action "by requiring each to reveal the intimate details of its affairs."

Where a trade association supplements the exchange of statistical information with propaganda designed to limit production or raise prices, its activities constitute an unreasonable restraint of trade. *American Column & Lumber Co.* v. *United States,* 257 U. S. 377.

Such restraints are even more unreasonable under the Institute's program embracing 70% to 80% of the entire sugar industry. The Institute examined refiners' and distributors' records, and held more or less formal trials of refiners to determine Code violations.

In *Maple Flooring Mfrs. Assn.* v. *United States,* 268 U. S. 563, and *Cement Mfrs. Protective Assn.* v. *United States,* 268 U. S. 588, this Court merely approved the collection and wide-spread dissemination of prices in past transactions, where competitors "were left free to base individual initiative on full information of the essential elements of their business."

The exclusive selling agency involved in *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, lacked the power to control prices in any market, and it was not shown that its purpose was to impair "fair competitive opportunities." *Chicago Board of Trade* v. *United States,* 246 U. S. 231, merely involved the regulation of trading hours and bidding on an open commodity exchange, where there is complete freedom of competition.

Appellants concede that immediate publicity given to the prices, terms and conditions in all closed transactions would have resulted in preventing secret concessions and unfair discriminations. The decree does not disturb the system of selling sugar on "moves," whereby refiners make public announcements of price advances and permit buyers to contract for their requirements for the next 30 days at the price prevailing before the advance. The decree enjoins concerted action in selling only upon or adhering to prices and terms announced in advance of sale or refraining from deviating from such announced prices and terms.

Appellants were not primarily interested in eliminating unfair discrimination. The restraints imposed indicate that they regarded as "discriminatory" almost any variation in the net cost of sugar to producers. Under the guise of eliminating unfair discriminations, they barred many legitimate competitive practices which permit buyers to effect economies or obtain advantages.

Although the District Court found that there was no direct agreement among defendants on basic prices or consultation with one another after an advance had been announced by one of them, it found agreement and collusion with reference to specific terms of sale. The Institute rebuked members and non-members for announcing terms, such as freight absorptions, which tended to break down the selling structure. It obtained a written apology from one member for announcing absorption of switching charges, and circulated the apology to members together with a statement in which the Institute acknowledged equal responsibility "in having failed to challenge the announcement." Announcements were sometimes made or prepared in Institute meetings.

Refiners concertedly refused to deal with brokers, jobbers or warehousemen affiliated with each other. Every person engaged directly or indirectly in more than one of such distributive functions was compelled to elect, practically over night, to continue in only one of such functions. The Enforcement Committee of the Institute investigated and "disqualified" brokers or jobbers found to be so affiliated. Honest and efficient warehousemen and brokers were blacklisted because of such affiliations, the refiners recognizing that the "innocent must suffer with the guilty." The Institute acted as "judge, jury and executioner all at once." The primary purpose was not to eliminate secret discriminations and frauds, but to prevent variations in the cost of sugar to purchasers. Customers affiliated with warehouses or brokers were disqualified because they derived a benefit from storage or brokerage which their competitors did not get.

The brokers' pledge required brokers to promise under oath that they would strictly adhere to Institute rules. Competitors may not act in concert to compel brokers and warehousemen, under penalty for violation, to refrain from giving rebates to purchasers.

This Court has consistently condemned concerted action to compel "third parties and strangers involuntarily not to engage in the course of trade except on conditions that the combination impose." *Loewe* v. *Lawlor,* 208 U. S. 274. See also: *Eastern States Retail Lumber Dealers Assn.* v. *United States,* 234 U. S. 600; *United States* v. *First National Pictures, Inc.,* 282 U. S. 44; *Paramount Famous Lasky Corp.* v. *United States,* 282 U. S. 30; *Binderup* v. *Pathe Exchange,* 263 U. S. 291; *Anderson* v. *Ship-Owners Assn.,* 272 U. S. 359.

Section 3 (c) of the Institute's Code was a general agreement not to absorb freight, and to charge all-rail rates on all shipments except those which customers ordered in advance over differential routes. Several refiners took the position that the prohibition against absorbing freight arbitrarily decreased the volume of their shipments to certain states, and operated so as to "parcel out territory."

In 1929 all refiners announced delivered prices for important competitive areas along the Great Lakes and the Warrior River. The delivered prices included arbitrary freight applications. Customers were denied the privilege of purchasing f. o. b. refinery for shipment over waterways and other cheaper differential routes. Sugar could have been shipped to Cleveland, Green Bay and Chicago at 13¢, 20¢, and 23¢, respectively, under the delivered price freight applications. Concerted action in maintaining delivered prices is indicated by the Institute's policing activities, the assurances exacted from nonmembers to adhere to delivered prices, and the reasons given by members for refusing to sell f. o. b. refinery.

The requirement that water carriers openly announce their rates and terms, and the restraints upon private charters, pool shipments, transiting, diversion, trucking, and other transportation privileges, were designed to prevent a lowering of market prices at destination points.

Members eliminated consignment points wherever they were able to reach an agreement. Consigned stocks were valuable to the trade. Refiners sought to shift the cost of maintaining consigned stock ($2,500,000 to $2,900,000 per year) to distributors.

Long-term contracts (providing for delivery more than 30 days after date of contract) were concertedly eliminated because they enabled buyers to obtain sugar at prices lower than those prevailing on the date of delivery. They were mutually advantageous to buyers and sellers. The requirement that long-term contracts be announced in advance of negotiation eliminated them, because such contracts could not be arranged without private negotiation. The Institute exacted a promise from a large distributor to maintain refiners' prices and terms on sugar committed to him under long-term contracts signed before the Institute, for the purpose of preventing the sale of such sugar at prices lower than those prevailing.

The decree enjoins restraints upon discounts reflecting economies in direct or indirect costs. Quantity purchases result in savings in such items as delivery. Even if pre-Institute discounts were given because of savings in method of taking delivery rather than because of the quantity purchased, the injunction against restraints on quantity discounts is proper because the Government is entitled to "effective relief." *Local 167* v. *United States,* 291 U. S. 293, 299.

Tolling contracts, whereby refiners accepted raw sugar and returned a proportionate amount of refined sugar, making a charge for service, were restrained for the very reason that they jeopardized the price structure. Tolling was outlawed only to the extent necessary to preserve uniform prices, the Institute permitting tolling for raw sugar producers on condition that they would sell the sugar in accordance with the Institute's Code. Members were concerned over "discrimination" between customers only to the extent that it represented lower prices.

The restraints upon credit terms, including the 4-payment plan, split billing, and cash discounts, illustrate the purpose and scope of appellants' activities.

The restraints upon price guarantee, resales, and sales of damaged sugar and frozen stocks were designed to prevent variations from announced prices and pressure to reduce the price level. The concerted requirement that buyers elect at the time of making contracts, without privilege of change, the prices and terms in cases where refiners had more than one price or different terms in different or the same territories, deprives buyers of a valuable option. The restraint cannot be justified on the mere ground that it is in conflict with appellants' theory of "open prices."

Substantial savings of 5 to 10¢ per bag could be made by customers re-using their own bags, without great expense to refiners. In prohibiting allowances on used bags, experiments in the use of bulk containers, and the packing of private brands, the Institute deliberately disregarded the public interest in effecting economies. It is immaterial that these privileges could be enjoyed by only a few customers or that the practices were not susceptible to open announcements.

The decree properly enjoined the gathering and dissemination of statistics on production, sales, deliveries, stocks, and volume of sugar moving over differential routes, without making such statistics available to buyers. Purchasers, who were given statistics only on total weekly production and deliveries, were placed at an unfair disadvantage with refiners who interchanged detailed statistics on individual production of each refiner and stocks and deliveries by States. Refiners knew competitive conditions in each area, whereas customers knew only the situation in the country as a whole.

By leave of Court, *Messrs. Goldthwaite H. Dorr, Thurlow M. Gordon, Wilson Compton,* and *Rush C. Butler* filed a brief on behalf of the Cotton Textile Institute, Inc., Window Glass Manufacturers' Assn., National Lumber Manufacturers Assn., and Consumers Goods Industries Committee, as *amici curiae.*

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

This suit was brought to dissolve The Sugar Institute, Inc., a trade association, and to restrain the sugar refining companies which composed it, and the individual defendants, from engaging in an alleged conspiracy in restraint of interstate and foreign commerce in violation of the Sherman Anti-Trust Act. 15 U. S. C. 1. Final decree was entered, which, while it did not dissolve the Institute, permanently enjoined the defendants from engaging directly or indirectly in forty-five stated activities. Defendants bring a direct appeal to this Court under the Act of February 11, 1903, 15 U. S. C. 29.

The record is unusually voluminous.[1] The court rendered an exhaustive opinion and made detailed findings of fact (218 in number) with conclusions of law, describing and characterizing the transactions involved. Numerous assignments of error broadly challenge its rulings, and the case has been presented here in extended oral arguments and elaborate briefs. We shall attempt to deal only with the salient and controlling points of the controversy. These involve (1) the special characteristics of the sugar industry and the practices which obtained before the organization of The Sugar Institute, (2) the purposes for which the Institute was founded, (3) the agreement and practices of the members of the Institute, and (4) the application of the Anti-Trust Act and the provisions of the decree.

First.—The sugar industry and practices prior to the formation of The Sugar Institute.—Domestic refined sugar, beet sugar, and foreign and insular refined sugar, known in the trade as "off-shore" refined, constitute about 99 per cent. of the Nation's supply. The remainder, consisting of domestic cane sugar, refined particularly in Louisiana, does not appear to be an important factor in the national markets. The fifteen defendant companies, members of the Institute, refine practically all the im-

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[1] The court states: "The testimony is transcribed in over 10,000 typewritten pages; more than 900 exhibits covering many thousands of pages were introduced in evidence."

ported raw sugar processed in this country. Their product is known as "domestic refined." Prior to the organization of the Institute in 1927, they provided more than 80 per cent. of the sugar consumed in the United States, and they have since supplied from 70 to 80 per cent. Their proportion of the supply is even greater in the New England and Middle Atlantic States, being more than 90 per cent., while in all but a few States their share is more than 55 per cent. Each of the refiners is engaged extensively in interstate commerce. Their refineries are in the vicinity of Boston, New York, Philadelphia, Baltimore, Savannah, New Orleans, Galveston and San Francisco. The raw cane sugar which they use is imported principally from Cuba and to some extent from the insular possessions.

Beet sugar for many years has been an important factor in the domestic market. It is produced and sold chiefly in the middle and far West, providing in some States over 75 per cent. of the supply, and it competes with other sugars in a number of Southern and Middle Atlantic States. Off-shore sugar is refined principally in Cuba and to some extent in the insular possessions. Its important trade areas have been the Middle, Atlantic and Southern States; in some States it constitutes from 25 to 40 per cent. of the total supply. Both beet sugar and off-shore sugar are sold at a small differential below defendants' sugar. The trial court found that there was no agreement between defendants and the beet sugar manufacturers, or with the off-shore interests, to maintain any differential.

The court found that the defendants' refined cane sugar "is a thoroughly standarized commodity in physical and chemical properties." In exceptional cases and localities, certain of the defendants had built up a preference for brand names "sufficient before and after the Institute was organized to enable such brands to command a higher price than the sugar of the other defendants in sales from sugar dealers to their trade." In sales by refiners to manufacturers of products containing sugar—about one-third of the sugar consumed—"price, not brand, was always the vital consideration." And in the other sales, "one refiner could not ordinarily, by virtue of preference for his brand, obtain a higher price except insofar as another refiner might be giving a lower price by secret concessions."

The court further found that the "basis prices," [2] quoted by the several refiners in any particular trade area, "were generally uniform both before and after the Institute, because economically the defendants' sugar, save for exceptional instances was and is a thoroughly standardized product."

It is a fundamental and earnest contention of defendants that the occasion for the formation of the Institute was the existence of grossly unfair and uneconomical practices in the trade, and that a proper appraisal of the motives and transactions of defendants cannot be made without full appreciation of the sorry condition into which the industry had fallen.

During the years 1917 to 1919, when the industry was under governmental control, prices were fixed and all forms of concessions and rebates were forbidden. The court found that, perhaps as early as 1921 and increasingly thereafter, the practice developed on the part of some, but not all, refiners of giving secret concessions. There were five refiners [3] who never indulged in that prac-

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[2] The "basis price" is the price quoted at so much per pound per one hundred pound bag of "fine granulated" or "granulated" sugar. Contracts are closed with reference to this price but the purchaser has the option at stipulated differentials to specify for delivery an assortment of grades and packages.

[3] It appears that these five refiners accounted for 25.45 per cent. of all sugar produced by defendants; in 1931, for 28.54 per cent.

tice, but the others, called "unethical" refiners, did so to such an extent that at least 30 per cent. of all the sugar sold by the refiners in 1927 carried secret concessions of some kind. The need of secrecy was urgent, for as soon as it was known that a specific concession was granted it would be generally demanded. That concessions were widely granted was generally known in the trade, and while each refiner was able to find out in a general way the approximate prices and terms of his competitors, it was impossible to know with any degree of accuracy the actual prices and terms granted in the innumerable transactions. The court also found that various causes contributed to the development of these selling methods on the part of the unethical refiners, chief among which was an overcapacity since the war of at least 50 per cent. Other probable causes were the lack of statistical information as to amount of production, deliveries and stocks on hand, leading to over-production, the uncertainties prevailing in the market for raw sugar which made the refined sugar industry highly speculative, the fact that, since 1922, most sugar has been sold through brokers, and the standardization of defendants' products which made their sales almost entirely dependent upon prices, terms and conditions. The concessions granted were largely, although not entirely, arbitrary. They were given principally to large buyers, but no system was followed in that respect. Even though there may not have been extensive resort to misrepresentations, "defendants entertained genuine fears that purchasers were falsely representing prices which they said they could procure from competing sellers."

Consumption of sugar in the United States decreased in 1927. The public "slimness campaign" of that year had substantial effect in discouraging the use of sugar. Certain distributors refrained from pushing sales because they could not sell profitably, but others were aggressive and sugar was generally available. While certain smaller distributors suffered because of the advantage enjoyed by some larger ones, that advantage was attributable in the greatest measure to efficiency, and the larger distributors did not obtain monopolies. The court found that there was "no substantial evidence that the situation caused, or would cause, substantial injury to the 'ethical' refiners as a class," although they may have been inconvenienced and probably believed that the sales methods of their competitors were harmful. The declining profits for the year 1927 were attributable at least in large part, the court found, to causes other than the secret concession system, such as the "slimness campaign," over-production and dumping.

But whatever question there may be as to particulars, the evidence and findings leave no doubt that the industry was in a demoralized state which called for remedial measures. The court summed up the facts in the following finding:

"29. The industry was characterized by highly unfair and otherwise uneconomic competitive conditions, arbitrary, secret rebates and concessions were extensively granted by the majority of the companies in most of the important market areas and the widespread knowledge of the market conditions necessary for intelligent, fair competition were lacking. The refiners were disturbed economically and morally over the then prevailing conditions. At least one refiner, American,[4] was concerned about the possibility of liability under the Clayton Act because of the discriminations resulting from the various concessions."

Second.—The purposes for which the Institute was founded.—Defendants emphasize the nature of the proceedings taken in the formation of the Institute. The

[4] The American Sugar Refining Company, which, in 1927, had 25.06 per cent. of all sugar produced by defendants.

court found that the refiners held a series of meetings, beginning in the summer of 1927, for a discussion of conditions "with particular reference to undesirable practices and secret concessions." In September of that year, there were submitted to the Department of Justice a proposed certificate of incorporation and by-laws for a trade association, together with a number of suggestions respecting trade practices. A "Code of Ethics" was likewise submitted to the Department of Justice and discussed with its officials, with the result that some changes were made, and the Code as concertedly adopted in January, 1928, was substantially identical with that worked out when those discussions were held. The court found that "with the exception of two minor changes, the Code has retained its original form." It has been supplemented from time to time by "Interpretations," that is, rulings interpreting or amplifying the provisions of the Code. The Department of Justice made three investigations of the Institute in 1928, 1929 and 1930 and had complete access to the files of the Institute. As new issues of the "Code" and "Interpretations" were printed, copies were forwarded to the Department.

Defendants stress their dealings with the Department of Justice as evidence of their good faith and of the propriety and legality of their purposes. "The functionings of the Institute," they insist, "were always under the eye of the Department." The court, however, found that the Department "was not notified of various important steps taken by the Institute in connection with illegal restraints," nor was it notified "as to those activities charged by the Government and denied by defendants in this case." The Department did not conduct a comprehensive investigation of the restraints here involved until the end of 1930.

Defendants urge that the abolition of the vicious and discriminatory system of secret concessions, through the adoption of the principle of open prices publicly announced, without discrimination, was their dominant purpose in forming the Institute, and that other purposes were the supplying of accurate trade statistics, the elimination of wasteful practices, the creation of a credit bureau, and the institution of an advertising campaign. The court recognized the existence of these purposes in its finding:

"35. Among the purposes of the defendants in organizing the Institute were: (a) the selling of sugar on open, publicly announced prices, terms, and conditions; (b) the gathering of trade statistics not previously available; (c) the elimination of practices which they deemed wasteful; and (d) the institution of an advertising campaign to increase consumption. But these purposes were for the most part only incidental to defendants' actual dominant purposes in forming and operating under the Institute."

The "dominant purposes" were found to be as follows:

"36. I find that defendants' dominant purposes in organizing the Institute were: to create and maintain a uniform price structure, thereby eliminating and suppressing price competition among themselves and other competitors; to maintain relatively high prices for refined, as compared with contemporary prices of raw sugar; to improve their own financial position by limiting and suppressing numerous contract terms and conditions; and to make as certain as possible that no secret concessions should be granted. In their efforts to accomplish these purposes, defendants have ignored the interests of distributors and consumers of sugar."

Defendants charge that the finding as to the illegality of their dominant purposes was "wholly without foundation." They charge that the finding was built upon an "inherent suspicion" and not upon the evidence. The Government answers by pointing to the elaborate review of the evidence in the court's opinion and findings. We think that it is manifest that the finding as to dominant purposes was not based upon any assumption *a priori*, but was an inference of fact which the court drew from the facts it deemed to be established with respect to the scope of the agreement between the members of the Institute and the actual nature and effect of their concerted action. The court found that the defendants "in most of their activities" had "gone much further than was reasonably necessary to accomplish their professed aims of eliminating fraud, waste and secret, unfair or illegal discrimination." The pith of the matter is in the following finding:

"37. At the inception of the Institute, defendants adopted a general agreement ostensibly to abolish all discriminations between customers but which in general purpose and effect amounted to an agreement not to afford different treatment to different customers, regardless of the varying circumstances of particular transactions or classes of transactions and regardless of the varying situation of particular refiners, distributors or customers or classes thereof. Under the guise of performing the agreement, against discriminations, defendants limited and suppressed numerous important contract terms and conditions in the particulars herein set forth, chiefly for the purpose and with the effect of accomplishing the objectives described in finding 36."

We turn to the transactions from which the inference of purpose is drawn.

Third.—The agreement and practices of the members of the Institute.—The evidence consists of the "Code of Ethics" and "Interpretations," oral testimony, the minutes of the Institute, and correspondence. Eliminating charges not sustained, the findings of restraints of trade rest upon the basic agreement of the refiners to sell only upon prices and terms openly announced, and upon certain supplementary restrictions.

1. *The "basic agreement."*—The "Code of Ethics" provided as follows:

"All discriminations between customers should be abolished. To that end, sugar should be sold only upon open prices and terms publicly announced."

There was nothing new in the mere advance announcement of prices. The court found that prior to the Institute, "general price changes were listed on the Refiners' Bulletin Boards, and brokers, customers and news agencies were notified, and frequently, as a courtesy, competitors would be telephoned. Except for notifying the Institute, price changes during the post-Institute period have been announced in this way. . . . Before the Institute, general price changes, including general changes in the selling bases of the 'unethical' refiners, were disseminated and became known to the entire trade very quickly."

These price announcements must be considered in the light of the trade practice known as *"Moves."* The great bulk of sugar, as the court found, "always was and is purchased on what is known in the trade as 'Moves,' although very substantial quantities are sold from time to time apart from moves." A "move" takes place when the refiners make public announcements that at a fixed time they will advance their selling price to a named figure, either higher than the presently current selling price or higher than a reduced price which the announcements offer before the advance. Some period of grace was always allowed during which sugar could be bought at the price prevailing before the advance. And in order to obtain their sugar at the lower price, the trade, unless it was felt that the move occurred at too high a price, would then enter into contracts covering their needs for at least the next thirty days. Defendants point out that in actual practice the initial announcement might be made by any one of the refiners and that the move actually takes place only if all refiners follow a similar course. If any one fails to follow with a like announcement, the others must withdraw their advance, since sugar is a completely standardized commodity.

Under the system of the Institute, there was no obligation to give the Institute the first notice of a change in price. The open announcements to the trade were to be made in the customary manner and notified to the Institute, which would relay the announcements. Prior to the Institute, when an advance in price was announced, the period of grace allowed for purchasing at the old price was uncertain. Sometimes it was very short, a matter of hours; sometimes sugar buyers who did not learn of the move in time, sent their orders in too late to buy at the old price. By an "interpretation," the Institute recommended that the members "announce changes in price not later than three o'clock." In its earlier form, this hour was to be that "of the day before the changed price becomes effective." But these words were deleted in 1929, and thereafter the announced price advances could be made effective at once. In practice, however, price advances continued to be announced to become effective the following day or even later. The court found that the effect of the "Three o'clock Rule," in and of itself, "seems to have been advantageous to the trade in case of a price advance in that the uncertain period of grace has been replaced by a definite one."

The court further found that the refiners "did not consult with one another after an advance had been announced by one of them and that the grace period was not in fact used by them to persuade a reluctant member to follow the example set, despite the business necessity of withdrawing an advance unless it were followed by all." The court found "no agreement among defendants on basis prices in the sense of an agreement to adopt a certain basis price from time to time and to maintain it during any period. Frequently an announcement by one refiner of an advance would result in a series of announcements by others, ultimately leading to a decline. Often, too, the advance would be withdrawn because one refiner would refrain from following the announcement. Except in a few instances, a decline announcement was followed by all." "Data respecting price changes have been circulated by the Institute without comment" and there appear to have been no "price discussions" at Institute meetings.

There had been a practice in the trade called "Repricing,"—of "making price declines retroactive to sales made at previous higher price." That occurred usually when a decline was announced late in the day and was applied to all of that day's business. The court found that during the first few months of the Institute, defendants attempted to prevent repricing, but the prohibition proved impracticable and was abandoned. By a ruling in November, 1928, it was provided that "the custom of the trade permits the customer the benefit of the refiner's lowest price during the day, that is, a contract entered into or sugar delivered in the morning may be repriced at any lower price announced during the day." The court in its finding on this point stated that the ruling was evidently intended to prevent repricing beyond the period stated and "must have had some effect in discouraging it." Defendants challenge this criticism in view of the fact also found that refiners occasionally have repriced beyond the stated period, a practice which defendants say "had never prevailed in the pre-Institute period," and defendants insist that what the Code actually did was "to insure that repricing should be done publicly, with the benefit extended to all customers alike, and not done secretly for the benefit only of the concessionaires."

The distinctive feature of the "basic agreement" was not the advance announcement of prices, or a concert to maintain any particular basis price for any period, but a requirement of adherence, without deviation, to the prices and terms publicly announced. Prior to the Institute, the list prices which many of the "unethical" refiners announced, "were merely nominal quotations and bore no relation to the actual 'selling bases' at which their sugar was sold. . . . The selling price was the price at which they purported to sell; the secret concessions were from this basis." And, in the case of some of the "unethical" refiners, changes in selling bases were made from time to time without formal public announcement in advance. The Institute sought to prevent such departures. As defendants put it: "Having adopted the principle of open prices and terms, without discrimination among customers, as the means of remedying the evils of the secret concession system, the defendants lived up to the principle." The court found:

"40. Under the Institute, defendants agreed to sell, and in general did sell sugar only upon open prices, terms and conditions publicly announced in advance of sales, and they agreed to adhere and in general did adhere without deviation, to such prices, terms and conditions until they publicly announced changes."

It was because of the range and effect of this restriction, and the consequent deprivation of opportunity to make special arrangements, that the court found that the agreement and the course of action under it constituted an unreasonable restraint of trade. The court deemed it to be reasonably certain that "any unfair method of competition caused by the secret concession system" could have been prevented by "immediate publicity given to the prices, terms and conditions in all closed transactions," without an agreement to sell only on the basis "of open public announcement in advance of sales." A "purpose and effect" of that agreement, the court found, was to aid defendants in preventing and limiting "certain types of transactions in which private negotiations are essential." Its operation "tended in fact, as it naturally would tend, toward maintenance of price levels relatively high as compared with raws."

The court found that "the number of price changes for refined as compared to raw sugar" had been relatively less since the Institute than before. This was "too marked to be explained by the drop in raw prices." There was "a marked increase in margin and a substantial increase in profits despite a concededly large excess capacity." The relatively higher price level for the refined sugar, as compared with raw, was such "as to negate the prevalence of free competition." Factors "largely responsible" for this relative stability of prices "and for the maintenance of price levels regardless of supply and demand, observable since the Institute," were the dissemination among the refiners of statistical information, "while withholding it in large part from the buyers," and the steps taken by defendants "to eliminate the possibilities of price variations to distributors or ultimate purchasers at any given time and thereby to deprive them of the opportunity, by underselling, to disturb the price structure." Other factors were "the friendly coöperative spirit which the Institute brought to the Industry" and the assurance to each refiner that he need meet only the prices, terms and conditions announced by his competitors in advance of sales.

The court also took note of the fact that the Institute, in connection with practically all of its activities, had obtained a high degree of coöperation "with the Domestic Sugar Bureau," the trade association of the domestic beet sugar manufacturers. That association had its "code of ethics," substantially identical with that of the Institute. There was also coöperation with the "offshore interests." But in neither case was there any agreement as to prices or price differentials.

Contending that the trial court fell into "fundamental error," defendants assert that the Institute made no change in the historic marketing system of the sugar industry. They say, first, that the code and its interpretations did not *in terms* call for price announcements in advance of sales. As to sales on "moves," they say that the code principle and price announcement interpretations "of course worked out in actual practice into sales only on prices and terms announced in advance of sales, because of the very nature and conditions of a sugar move." As to the "small day-to-day sales between moves," they say that while it was probably "the general understanding" that strict observance of the principle required public announcements of a lowered price or better terms before sale, there was no evidence as to the actual practice in that regard. They explain that the Institute continued to operate "under the move system" because it is "a natural growth essential to the economical conduct of the sugar business." The cost of raw sugar makes up about four-fifths of the cost of the refined sugar. Raw prices fluctuate widely from day to day and substantially control the price of refined. Wholesale and retail distributors sell on a narrow margin of five or ten cents a bag. They cannot afford to stock large supplies because of storage costs, dangers of deterioration and the hazardous nature of the business. But, on the other hand, distributors have to buy considerable quantities in order to take advantage of carload freight rates and handling costs. The result of all these forces is the system "of buying on moves every month or two." To this, both large and small dealers have adapted themselves. By reason of the general practice, they are all on an equal footing as to the periodic fluctuations in price. On each move they have laid in a supply for a month or more. Having bought their current supplies at the same general market level the distributors must "sell out their current supplies with due regard to that level in order to avoid crippling losses from an intervening decline." This, defendants say, is "one of the greatest economic advantages of the move system."

Defendants concede the correctness of the statement of the trial court that if immediate publicity had been given to prices and terms in all "closed transactions," competitive pressure would have been so great that the refiners "would either have had to abandon the discriminatory concessions or extend them to all." They concede that it is "*publicity*" that prevents such concessions and "not the sequence in time between the sale and the publicity." But they raise the fundamental objection that the proposal is not adaptable to the sugar industry. They say that in an industry which "has traditionally, and for good reason, sold its products on 'moves,' through the mechanism of announcing price changes in *advance* of sales in order that buyers may have an opportunity to buy before the price rises, it is not helpful to suggest a system of announcing price changes *after* sales."

Defendants' argument on this point is a forcible one, but we need not follow it through in detail. For the question, as we have seen, is not really with respect to the practice of making price announcements in advance of sales, but as to defendants' requirement of adherence to such announcements without the deviations which open and fair competition might require or justify. The court below did not condemn mere open price announcements in advance of sales. The court was careful to say in its opinion that it found it "unnecessary to pass upon the legality of the use of the Institute" for relaying such announcements, "if each refiner entirely independently of the others voluntarily made his own announcements without obligation to adhere thereto."

Defendants also review at length the relative prices and profits in the periods before and during the Institute. They insist that it is unfair to include in the comparison the earnings for either 1927 or 1928, because each year was abnormal, and they contend that if a truly representative comparison of results were obtained by using the years 1925 and 1926 as the pre-Institute years, and those for 1929 and 1930 as the post-Institute years, it would appear that the increase in the later period of the net earnings of the refiners was less than one-half of one per cent. Accordingly they reach the conclusion that their activities did not actually restrain, or tend to restrain, effective competition.

But we are not left to inferences from trends of prices and profits. The "basic agreement" cannot be divorced from the steps taken to make it effective, and the requirements of the Institute must be viewed in the light of the particular opportunities which they cut off or curtailed. The crucial question—whether, in the ostensible effort to prevent unfair competition, the resources of fair competition have been impaired—is presented not abstractly but in connection with various concrete restrictions to which the decree below was addressed.

2. *Supplementary restrictions.*—The requirements and practices designed to support the basic agreement, and which the trial court condemned, relate to the employment of brokers and warehousemen, transportation, consignment points, long-term contracts, quantity discounts and other contract terms and conditions, and to the withholding of statistical information.

(a) *Brokers and warehousemen.*—Most of defendants' sales are negotiated through brokers who receive their commissions from the refiners. The court found that prior to the Institute, a broker and a warehouseman "were frequently one," and might also be "a merchant or other sugar user"; that concerns which thus combined distribution functions frequently performed a valuable service to the industry; that defendants required an election of but one of these activities and the complete cessation of each of the others; that defendants made and rigorously enforced an agreement that refiners should refuse to deal with a broker, warehouseman or customer who acted directly or indirectly for any of them, or for any other sugar interest, "in other than the one elected capacity"; that each refiner submitted to the Institute lists of its brokers and warehouses which were then circulated among the refiners, and those disqualified were dropped from the lists; that this policy was carried out in a harsh and arbitrary manner without regard to the effect upon third parties; that the commissions to be paid brokers were agreed upon, but there was no substantial evidence that the commissions were not fair, the object being to prevent a growing competition in bidding for brokers' services; that defendants agreed that they would not deal with any broker or warehouseman who did not sign a contract according to a form recommended by the Institute; that the warehouse agreement provided that if the warehouseman granted any concession or rebate, secret or otherwise, to any customer without granting it to all, an equal amount should be forfeited to the employing refiner; that the brokers' agreement prohibited concessions and imposed an obligation to uphold the Institute's code and its interpretations. This course of dealing, the court held, unreasonably restrained trade.

Defendants urge that the broker is the refiner's agent to sell to customers and the warehouseman is the refiner's agent for storage and delivery; that these agents act as a check on each other; that the refiners' concerted adoption of the principle against storing in customers' and brokers' warehouses was essential both to prevent discrimination among customers and to avoid impositions and frauds upon the refiners; that if the warehouseman is himself the purchaser of the sugar, the refiner is deprived of his independence and disinterestedness and the purchaser has control of the sugar with the power of withdrawing it at will and reporting that withdrawal at his pleasure; that similarly storage with brokers facilitated fraudulent practices, and that where the warehouseman and the broker were the same, neither was under any supervision and the broker-warehouseman could do practically what he pleased with the refiner's property and business.

To a considerable degree the court recognized the force of these contentions. The court found that a combination of distribution functions facilitated secret concessions, difficult of detection, and created opportunities for double dealing. But, despite this, it had been common for refiners, before the Institute, to employ brokers and warehousemen engaged in other distribution functions, and that such arrangements from the refiners' viewpoint were not infrequently entirely successful; and that concerns in substantial numbers, which combined distribution functions, maintained entire good faith in their dealings with the refiners. The court concluded that there was a definite possibility of lower prices to ultimate consumers as a result of combination of functions, because the increased income thus made possible, even apart from advantages obtained through secret concessions and fraudulent practices, gave opportunity "to outsell competitors who engage in only one occupation." The most important purpose of defendants, the court found, in compelling the separation of occupations was to aid in preserving "the uniformity of price structure," which would otherwise be threatened. The court deemed it reasonably certain that defendants could have secured adequate protection against illicit practices by means far less drastic, that is, through investigations, inspections, and publicity for which the Institute had unlimited resources.

The finding of purpose and of the adequacy of alternative measures is sharply contested. But, while the parties present their respective views as to the details of evidence, there is no room for doubt as to the nature and effect of the restrictions actually imposed through the Institute. The findings of the court as to agreement and practice are fully supported.

(b) *Transportation.*—The custom of the trade was to quote sugar f. o. b. refinery. Since the price was usually the same or varied but slightly, individual refiners sold in areas enjoying lower freight rates from other refineries by paying or absorbing part of the transportation charges. That is, the refiner added to the refinery price the amount of his "ruling freight basis" or "freight application," which was the amount the customer was to pay as distinguished from the actual cost of the transportation. The freight situation was complicated by the existence of differential routes, involving all-water or a combination of water and rail transportation. Traditionally in the industry, refiners' freight applications on sugar delivered at Great Lakes ports openly broke down during the season of open navigation to the Philadelphia lake and rail rate, and during 1926 and 1927 the freight application on sugar sold in the Warrior River area (Alabama, Tennessee, Kentucky and parts of Indiana) had openly broken down to New Orleans barge rates, regardless of the way in which the sugar actually moved. The areas affected by these breakdowns were of vital importance, as competition there was especially keen.

In the effort to prevent the "sale" of transportation below "cost," the Code of Ethics, paragraph 3 (c), condemned "The use of differential rates on consignments, or otherwise than on direct shipments over differential routes at customers' request." This policy was amplified by an interpretation. The trial court found that but "slight effort was made to enforce Code 3 (c) after the summer of 1928," that it "was abandoned at least by the fall of 1929 and probably much earlier," and that the code interpretation was finally rescinded in September, 1930.

The court found that the transportation problems in the Great Lakes and Warrior River areas were finally solved by a system of delivered prices, with denial of the privilege of purchasing f. o. b. refinery. The court did not find that there was an agreement in introducing the delivered prices, but did find that defendants "agreed to maintain and concertedly maintained the system of delivered prices" in both the areas above mentioned; also that through the Institute defendants "concertedly policed delivered prices and investigated alleged departures therefrom"; and that these prices were "patently unreasonable." Defendants vigorously deny that delivered prices were either introduced or maintained through any concert of action. They submit that the evidence not only does not warrant that finding, but shows affirmatively that delivered prices were introduced independently by individual refiners and resulted solely from unrestrained competition.

As the court said in its opinion, the controversy was chiefly about what defendants had actually done during the Institute period, and the facts were frequently "bitterly disputed." We need not discuss the rival contentions. The court found that defendants' "adoption of Code 3 (c), their actions pursuant thereto, and their concerted maintenance of delivered prices constituted undue and unreasonable restraint of trade." Defendants have waived their assignment of error as to this finding in order to reduce the issues presented on this appeal. And defendants have also waived their assignments of error as to the provisions in the decree enjoining concerted action in "Determining transportation charges or freight applications to be collected from customers, or limiting freight absorptions" and in "Selling only on delivered prices or on any system of delivered prices, including zone prices, or refusing to sell f. o. b. refinery."

Questions are presented with respect to miscellaneous "transportation activities." They relate to defendants' agreement to prevent transiting and diversion by customers when these would defeat freight applications; to concerted action in obtaining an agreement from transportation companies operating on the New York State Barge Canal that they would carry sugar only on the basis of openly announced rates and terms from which they would not deviate without open announcement; to recommendations of the Institute, concertedly observed, that none of the members should ship sugar on his own account by private charter except when the charter was arranged directly between refiner and carrier and refiner was satisfied that no broker, buyer or warehouseman was participating in the rate, and that the terms of every such private charter should be submitted to the scrutiny of the executive secretary of the Institute; to defendants' concerted refusal to participate in pool shipments, with sugar shipped on their own account, in order to aid customers in making up the required minima for cargo or carload rates; and to defendants' agreement "to use only trucking concerns not affiliated with any buyer, broker, or warehouse and then only under non-rebating contracts." The court found that defendants' action went further than was necessary to prevent secret rebating and amounted to unreasonable restraints. We see no reason for disturbing the findings on these subjects.

(c) *Consignment points.*—Prior to 1925, the refiners maintained, on their respective accounts, stocks at a few strategic points from which sugar was distributed to the surrounding areas. During the period 1925 to 1927, refiners placed stocks at numerous points solely for the local trade. Defendants regarded this increase as an outstanding evil and made a concerted effort to bring about reductions. To this end the Institute obtained the coöperation of the Domestic Sugar Bureau and other non-members. In recommending consignment points in the South, ports of entry like reconsignment points were separately classified, and Wilmington, North Carolina, was eliminated.

Defendants insist that the expense involved in maintaining an excessive number of consignment points was an economic waste without any substantial compensating advantage to the consuming public, and that the effort at reduction was a legitimate function of the Institute. The economic questions were fully considered by the trial court which found that the refiners' consignment service "was valuable and beneficial to substantial elements in the trade"; that limitation of ports of entry was more serious than elimination of ordinary consignment points insofar as it shut a competitor out of a particular territory; that while the cost of increased consignment points might well be reflected in a higher general basis price, there was no assurance that the savings through some reductions would be passed on to consumers generally; that the result in either case was "largely speculative"; that communities eliminated as consignment points "suffered as against neighboring ones" because of the advantage accruing to the latter; and that there were also eliminated from distributing agencies one type of jobber called the "desk jobber" who was able to do business without any stock of his own. In summary, the court found that defendants' "concerted conduct with respect to elimination and reduction of consignment points, reconsignment points and ports of entry" unreasonably restrained trade. The controlling facts are established, and the question again is one of justification.

(d) *Various contract terms and conditions.*—One question relates to "*long term contracts,*" that is, those permitting the buyer to take delivery more than thirty days after date. Prior to the World War, thirty day contracts were customary for all except manufacturers who were granted sixty days. While there was no definite practice after the war, long term contracts were not infrequent. They were granted by California refiners to Pacific Coast canners. The court found that long term contracts had "a real economic value to refiner and to consumer"; that some of them tend to bring about greater evenness of production through the year, thus effectuating economies and enabling manufacturers promptly to know the cost of this element of their finished products.

Defendants contest the finding of the court that they engaged in concerted action "in prohibiting all long term contracts," and assert that "they never have had and do not now have any desire to prohibit them." Hence, they add, the court's injunction against such action "does not disturb them." But they object to the finding that concerted action in insisting upon open announcement in advance of entering into such contracts was without justification. This, as defendants say, is but a condemnation of a particular application of their basic principle that sugar should be sold only upon open prices and terms without discrimination. In the view of the trial court, this application is an illustration of its point that an obligation to adhere to such advance announcements "would tend to prevent many entirely fair contracts." Of similar import is the finding that defendants were not justified in acting concertedly to determine whether and to what extent "the rigid enforcement of the thirty day contract" should be relaxed.

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Another question which has received extended consideration is that of "*quantity discounts.*" Prior to the Institute, there was no systematic practice in this respect. The majority of discounts were given to the large buyer but they were often granted to the smaller buyer as well, and the amount of the discount "bore little relation to the amount of the purchases or the method of taking delivery." This, the court found, was the natural result of the "secret concession system" which had prevailed. Carrying out its policy as to discriminations, the Institute condemned "as unbusinesslike, uneconomic and unsound, concessions made to purchasers on the basis of quantity purchased." The court found that this agreement and the practice under it prohibited not only "unsystematic and secret quantity discounts," but also discounts "systematically graded according to quantity." The court examined defendants' contention that quantity discounts would effect no economies. If, said the court, the facts were as defendants insisted, the question would arise whether such a concerted restraint was reasonable. But the court considered the actual facts to be "entirely inconsistent with defendants' position." As to direct costs, the court found that the refiners got no discount for quantity purchases of raws, which constitute about 80 per cent. of the cost of refined; that quantity sales effected no appreciable direct savings in manufacturing costs and no savings in brokerage; but that in sales to those who could take deliveries in carload lots direct from the refinery, there were substantial savings "in delivery, storage, bookkeeping and other incidental expenses." And as to indirect costs, the court found that sales which distribute production more evenly through the year effect substantial savings to the refiners and that the demand for sugar is elastic, so that encouragement of large sales through quantity discounts might reasonably be expected to build up total production and thus effect economies.

Also that a quantity discount to wholesalers selling to manufacturers as well as to manufacturers buying directly from refiners, might well result in a substantial increase in sugar consumption.

Defendants contest these economic conclusions. But we are not convinced that the findings are contrary to the evidence. Moreover, the limited provision of the decree should be regarded. In this relation, the decree enjoins defendants from concerted action in "Preventing, restraining or refusing to grant quantity or other discounts where such discounts reflect, effect, or result in economies to refiners either in direct or indirect costs."

With a single exception, defendants do not ask the court to review the findings with respect to credit arrangements known as "the four payment plan," "split billing" and "cash discount"; or as to "price guarantee" and "second hand sugar or resales." They say that in each case questions of fact alone are raised and they disclaim having taken, or having any desire to take, any action with respect to these subjects which is enjoined by the decree. The exception refers to the practice of "requiring buyers to elect and specify at the time of entering contract, without privilege of change, the prices and/or terms in cases where the refiner had more than one price or different terms in different or the same territories." This restriction is defended as a necessary corollary of the principle of open prices and terms without discrimination, and the question is as to the legality of the restraint in the application of that principle.

Other questions concern practices in relation to "damaged sugar and frozen stocks," "tolling," "used bag allowances," and "private brands." The court found that the restraints imposed in these matters were unreasonable. They appear to be of minor importance and we think it unnecessary to state the particular facts.

(e) *Statistical information.*—Some statistical information collected by the Institute was supplied only to its members; some was supplied as well to representatives of offshore refiners. The data disseminated by the Institute to the purchasing trade consisted of weekly statistics as to the total melt (production) and total deliveries, and monthly statistics of total deliveries, of all sugar, divided so as to show the amount of domestic cane, imported cane, and beet sugar delivered during the period. These statistics were widely distributed through news agencies, banks and brokers. The total refined stocks on hand could be computed by subtracting from the total melt of each week the total deliveries. During recent years when refined stocks were greatly increasing, defendants continued to supply to the trade weekly statistics on melt and deliveries from which the trade could readily calculate the increase. Data as to the capacity of the several refiners were available to the public in substantially similar form to that obtained by the Institute. It also appeared that in May, 1931, after the present suit was begun, statistics were released to the trade showing the total consumption of cane, beet, foreign and insular refined sugar by States, for the years 1928, 1929 and 1930, together with figures showing the *per capita* consumption of each State during the same years.

The trial court found that none of the other statistics supplied to members or offshore refiners were available except through the Institute and none were supplied or available to the trade. What the court considered to be "vital data" relating to production and deliveries of individual refiners, to deliveries by States, to deliveries by States by all the important differential routes, to consigned and in-transit stocks for the several States, "which would have illuminated the situation in the several trade areas where the competitive set-ups differed widely," were withheld from purchasers. The court concluded that, by collecting and circulating only among themselves that information, defendants obtained an unfair advantage with respect to purchasers and effected an unreasonable restraint.

The court took the view that the statistics relating to total production, total deliveries, and calculable stocks, which defendants did make available, could have had only limited significance for the individual purchaser and were even likely to mislead him. Such information reflected only the general situation for the country as a whole and for all refiners. Defendants challenge this criticism and emphasize the value of the information they gave. And with respect to the statistics not disseminated, they say that it did not appear how buyers were prejudiced and that the sole reason that the information was not published was "because the refiners had no reason to believe that the buyers wanted it." We cannot say, however, that the finding of the trial court, in connection with its exhaustive examination of conditions in the trade, is without adequate support. We shall presently consider the criticism from a legal standpoint of the breadth of the provision in the decree relating to the duty of dissemination.

Fourth.—The application of the Anti-Trust Act and the provisions of the decree.—The restrictions imposed by the Sherman Act are not mechanical or artificial. We have repeatedly said that they set up the essential standard of reasonableness. *Standard Oil Co.* v. *United States,* 221 U. S. 1; *United States* v. *American Tobacco Co.,* 221 U. S. 106. They are aimed at contracts and combinations which "by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restraining competition or unduly obstructing the course of trade." *Nash* v. *United States,* 229 U. S. 373, 376; *United States* v. *Linseed Oil Co.,* 262 U. S. 371, 388, 389. Designed to frustrate unreasonable restraints, they do not prevent the adoption of reasonable means to protect interstate commerce from destructive or injurious practices and to promote competition upon a sound basis. Voluntary action to end abuses and to foster fair competitive opportunities in the public interest may be more effective than legal processes. And coöperative endeavor may appropriately have wider objectives than merely the removal of evils which are infractions of positive law. Nor does the fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, require that abuses should go uncorrected or that an effort to correct them should for that reason alone be stamped as an unreasonable restraint of trade. Accordingly we have held that a coöperative enterprise otherwise free from objection, which carries with it no monopolistic menace, is not to be condemned as an undue restraint merely because it may effect a change in market conditions where the change would be in mitigation of recognized evils and would not impair, but rather foster, fair competitive opportunities. *Appalachian Coals* v. *United States,* 288 U. S. 344, 373, 374. Further, the dissemination of information is normally an aid to commerce. As free competition means a free and open market among both buyers and sellers, competition does not become less free merely because of the distribution of knowledge of the essential factors entering into commercial transactions. The natural effect of the acquisition of the wider and more scientific knowledge of business conditions on the minds of those engaged in commerce, and the consequent stabilizing of production and price, cannot be said to be an unreasonable restraint or in any respect unlawful. *Maple Flooring Assn.* v. *United States,* 268 U. S. 563, 582, 583. In that case, we decided that trade associations which openly and fairly gather and disseminate information as to the cost of their product, the volume of production, the actual price which the product has brought in past transactions, stocks of merchandise on hand, approximate costs of transportation, without reaching or attempting to reach an agreement or concerted action with respect to prices or production or restraining competition, do not fall under the interdiction of the Act. *Id.*, p. 586. See, also, *Cement Manufacturers Assn.* v. *United States*, 268 U. S. 588, 604, 606.

The freedom of concerted action to improve conditions has an obvious limitation. The end does not justify illegal means. The endeavor to put a stop to illicit practices must not itself become illicit. As the statute draws the line at unreasonable restraints, a coöperative endeavor which transgresses that line cannot justify itself by pointing to evils afflicting the industry or to a laudable purpose to remove them. The decisions on which defendants rely emphasize this limitation. In *Chicago Board of Trade* v. *United States*, 246 U. S. 231, the Court found the assailed rule to be a reasonable regulation in a limited field. In the case of *Appalachian Coals*, *supra*, p. 375, the Court found that abundant competitive opportunities would exist in all markets where defendants' coal was sold, and that nothing had been shown to warrant the conclusion that defendants' plan would have an injurious effect upon competition in those markets. In *Standard Oil Co.* v. *United States*, 283 U. S. 163, relating to contracts concerning patents for cracking processes in producing gasoline, an examination of the transactions involved led to the conclusion "that no monopoly of any kind or restraint of interstate commerce" had been effected "either by means of the contracts or in some other way." *Id.*, p. 179. And while the collection and dissemination of trade statistics are in themselves permissible and may be a useful adjunct of fair commerce, a combination to gather and supply information as a part of a plan to impose unwarrantable restrictions, as, for example, to curtail production and raise prices, has been condemned. *American Column Co.* v. *United States,* 257 U. S. 377, 411, 412; *United States* v. *Linseed Oil Co., supra; Maple Flooring Assn.* v. *United States, supra,* pp. 584, 585.

We have said that the Sherman Act, as a charter of freedom, has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions. Thus in applying its broad prohibitions, each case demands a close scrutiny of its own facts. Questions of reasonableness are necessarily questions of relation and degree. In the instant case, a fact of outstanding importance is the relative position of defendants in the sugar industry. We have noted that the fifteen refiners, represented in the Institute, refine practically all the imported raw sugar processed in this country. They supply from 70 to 80 per cent. of the sugar consumed. Their refineries are in the East, South, and West, and their agreements and concerted action have a direct effect upon the entire sugar trade. While their product competes with beet sugar and "offshore" sugar, the maintenance of fair competition between the defendants themselves in the sale of domestic refined sugar is manifestly of serious public concern. Another outstanding fact is that defendants' product is a thoroughly standardized commodity. In their competition, price, rather than brand, is generally the vital consideration. The question of unreasonable restraint of competition thus relates in the main to competition in prices, terms and conditions of sales. The fact that, because sugar is a standardized commodity, there is a strong tendency to uniformity of price, makes it the more important that such opportunities as may exist for fair competition should not be impaired.

Defendants point to the abuses which existed before they formed the Institute, and to their remedial efforts. But the controversy that emerges is not as to the abuses which admittedly existed, but whether defendants' agreement and requirements went too far and imposed unreasonable restraints. After a hearing of extraordinary length, in which no pertinent fact was permitted to escape consideration, the trial court subjected the evidence to a thorough and acute analysis which has left but slight room for debate over matters of fact. Our examination of the record discloses no reason for overruling the court's findings in any matter essential to our decision.

In determining the relief to be afforded, appropriate regard should be had to the special and historic practice of the sugar industry. The restraints, found to be unreasonable, were the offspring of the basic agreement. The vice in that agreement was not in the mere open announcement of prices and terms in accordance with the custom of the trade. That practice which had grown out of the special character of the industry did not restrain competition. The trial court did not hold that practice to be illegal and we see no reason for condemning it. The unreasonable restraints which defendants imposed lay not in advance announcements, but in the steps taken to secure adherence, without deviation, to prices and terms thus announced. It was that concerted undertaking which cut off opportunities for variation in the course of competition however fair and appropriate they might be. But, in ending that restraint, the beneficial and curative agency of publicity should not be unnecessarily hampered. The trial court left defendants free to provide for immediate publicity as to prices and terms in all closed transactions. We think that a limitation to that sort of publicity fails to take proper account of the practice of the trade in selling on "moves," as already described, a practice in accordance with which the court found that "the great bulk of sugar always was and is purchased." That custom involves advance announcements, and it does not appear that arrangements merely to circulate or relay such announcements threaten competitive opportunities. On the other hand, such provision for publicity may be helpful in promoting fair competition. If the requirement that there must be adherence to prices and terms openly announced in advance is abrogated and the restraints which followed that requirement are removed, the just interests of competition will be safeguarded and the trade will still be left with whatever advantage may be incidental to its established practice.

The decree.—The court below did not dissolve the Institute. The practices which had been found to constitute unreasonable restraints were comprehensively enjoined. The injunction restrains defendants "individually and collectively, in connection with the sale, marketing, shipment, transportation, storage, distribution or delivery of refined sugar," from engaging with one another or with any competitor through any "*program*" in any of the activities separately described. The decree defines "program" as "any agreement, understanding or concerted action, including, but without limiting the generality of the foregoing, any rule, policy or code provision or interpretation, concertedly adopted or maintained."

Then follow forty-five specifications of prohibited action. As to seventeen of these paragraphs, defendants have withdrawn their assignments of error.

Paragraphs one and two of the specifications enjoin the carrying out of the open price plan so far as it seeks to compel uniform terms, regardless of circumstances, and an adherence to prices, terms, etc. announced in advance. These paragraphs cover any agreement or concerted action in

"1. Effectuating any general plan to give the same terms, conditions, or freight applications to customers, regardless of the varying circumstances of particular transactions or classes of transactions or regardless of the varying situation of particular refiners, distributors or customers or classes thereof;

"2. Selling only upon or adhering to prices, terms, conditions or freight applications announced, reported or relayed in advance of sale or refraining from deviating therefrom."

In view of those provisions, and of the other forty specified restrictions, we think that paragraphs three, four and five with respect to the reporting or relaying of information as to current or future prices should be eliminated. These paragraphs are as follows:

"3. Effectuating any system for or systematically reporting to or among one another or competitors or to a common agency, information as to current or future prices, terms, conditions, or freight applications, or lists or schedules of the same;

"4. Relaying by or through The Sugar Institute, Inc., or any other common agency, information as to current or future prices, terms, conditions, or freight applications or any list or schedule of the same;

"5. Giving any prior notice of any change or contemplated change in prices, terms, conditions, or freight applications, or relaying, reporting or announcing any such change in advance thereof."

Such reporting or relaying, as we have said, permits voluntary price announcements by individual refiners, in accordance with trade usage, to be circulated, and subject to the restrictions imposed by the decree does not appear to involve any unreasonable restraint of competition.

Paragraph seven relates to the collection and dissemination of statistical information, as follows:

"7. Effectuating any system of gathering and/or disseminating statistical information regarding melt, sales, deliveries, stocks on hand, stocks on consignment, stocks in transit, volume of sugar moved by differential or other particular routes or types of routes, new business or any other statistical information of a similar character, wherever and to the extent that said information is not made, or is not readily, fully and fairly available to the purchasing and distributing trade."

This provision was based upon the finding that "Perfect competition and defendants' professed policy of fostering such competition require that the purchasing trade as well as the sellers have the full, detailed information which defendants withheld." That ruling has appropriate reference to the statistical data which are specified in paragraph seven and to the withholding of which we have referred. In those data the purchasing and distributing trade have a legitimate interest. But it does not follow that the purchasing and distributing trade have such an interest in every detail of information which may be received by the Institute. Information may be received in relation to the affairs of refiners which may rightly be treated as having a confidential character and in which distributors and purchasers have no proper interest. To require, under the penalties of disobedience of the injunction, the dissemination of everything that the Institute may learn might well prejudice rather than serve the interests of fair competition and obstruct the useful and entirely lawful activities of the refiners.

In this view we think that the clause in paragraph seven "or any other statistical information of a similar character" should be eliminated. The preceding specifications as to melt, sales, deliveries, stocks on hand, on consignment, or in transit, and as to transportation and new business, appear to be adequate. The words "of a similar character" have no clearly defined meaning and would place the defendants under an equivocal restriction which may do more harm than good. With the removal of that clause and the placing of the word "and" before the words "new business," paragraph seven is approved.

Following the provisions for injunction, the decree properly provides that jurisdiction is retained for the purpose of "enforcing, enlarging or modifying" its terms. It is further provided that the injunction is without prejudice to application by any party for modification in order to permit the adoption of any "program" that may be permissible under "the National Industrial Recovery Act" of June 16, 1933, or the "Emergency Farm Relief Act" of May 12, 1933, or "any other present or future statutes of the United States." This subdivision of the decree should be modified so as to refer simply to "any applicable Act of Congress."

The decree is modified in the particulars above stated and, as thus modified, is affirmed.

Modified and affirmed.

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

McCAUGHN, COLLECTOR OF INTERNAL REVENUE, v. REAL ESTATE LAND TITLE & TRUST CO. ET AL., EXECUTORS.

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

No. 629. Argued March 13, 1936.—Decided March 30, 1936.

A general verdict found by the District Court in an action at law, in which a jury trial has been waived, has the same effect as the verdict of a jury; an appellate court cannot pass upon the weight of the evidence. P. 608.

79 F. (2d) 602, reversed; 7 F. Supp. 742, affirmed.

Certiorari * to review the reversal of a judgment for the above-named executors in an action to recover a tax.

Assistant Attorney General Jackson argued the cause, and *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. David E. Hudson, Sewall Key,* and *Carlton Fox* filed a brief, for petitioner.

Mr. Franklin S. Edmonds for respondents.

By leave of Court, *Messrs. Mansfield Ferry* and *Philip M. Payne* filed a brief as *amici curiae,* urging affirmance of the decision of the Circuit Court of Appeals.

Per Curiam.

On February 9, 1920, Malcolm MacFarlan, a physician of Philadelphia, Pennsylvania, made a transfer of real estate and securities, of the value of upwards of $670,000, in trust for the benefit of his children and their wives and descendants. He died on December 8, 1921. As his death occurred within two years after the transfer, it fell within the terms of the statute creating a pre-

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* See Table of Cases Reported in this volume.

sumption that the transfer was made in contemplation of death. Revenue Act of 1921, c. 136, § 402 (c), 42 Stat. 227, 277, 278. The remaining estate of the decedent, of which disposition was made by will (executed on the same day as the transfer in trust) was worth about $13,000. The Commissioner of Internal Revenue included the property transferred as part of decedent's gross estate, and demanded payment of an estate tax upon that basis. The payment was made, claim for refund was rejected, and this suit was brought by the executors of the decedent against the collector to recover the amount paid.

A jury was waived. After the evidence had been received, both parties submitted requests for conclusions of law, and plaintiffs also requested special findings of fact. The court refused plaintiffs' requests and affirmed certain conclusions of law requested by defendant, and plaintiffs were allowed exceptions.

Referring to decedent's physical condition, the court said in its opinion that the evidence showed that at the time of the transfer decedent was seventy-eight years old, unusually vigorous and clear-minded and, except for a condition common in men of his age, in good health. The court said that the most that could be claimed for that evidence was that it established, and the court specifically found, that the transfer was not made "under any consciousness or belief or apprehension that death was imminent." The substance of the court's conclusion on all the evidence was that "the plaintiffs have failed to show that the motive that induced this transfer, whatever it was, was not of the sort which leads to testamentary disposition, and, consequently have failed to meet the burden of proof placed upon them by the statute." The court then found a general verdict in favor of the defendant and directed judgment accordingly. 7 F. Supp. 742.

The Circuit Court of Appeals reviewed the evidence, decided that the transfer was not made in contemplation of death, and reversed the judgment. 79 F. (2d) 602.

The principles governing the determination whether a gift *inter vivos* is made "in contemplation of death" are set forth in *United States* v. *Wells,* 283 U. S. 102, and need not be restated. The instant case is controlled by the established rules relating to appellate review in actions at law where a jury trial has been waived. R. S. 649, 700; 28 U. S. C. 773, 875. Where a general verdict is found by the trial court, it has the same effect as the verdict of a jury. The appellate court cannot pass upon the weight of evidence. *Norris* v. *Jackson,* 9 Wall. 125, 128; *British Queen Mining Co.* v. *Baker Silver Mining Co.,* 139 U. S. 222; *Lehnen* v. *Dickson,* 148 U. S. 71, 73; *St. Louis* v. *Western Union Telegraph Co.,* 166 U. S. 388; *Law* v. *United States,* 266 U. S. 494; *Fleischmann Construction Co.* v. *United States,* 270 U. S. 349, 356, 357; *Harvey Company* v. *Malley,* 288 U. S. 415, 418, 419; *Eastman Kodak Co.* v. *Gray,* 292 U. S. 332, 336, 337.

Here, plaintiffs' exceptions to the conclusions of law of the trial court, and to the refusal of the court to reach other conclusions as requested, raised no question save the one of law, whether the court's verdict was wholly without evidence to sustain it. That question does not appear to be substantial. The ultimate question for the decision of the trial court was one of fact and its general verdict was conclusive. The Circuit Court of Appeals was without authority to weigh the evidence and to make its own findings.

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

Reversed.

CHANDLER, RECEIVER, v. PEKETZ.

CERTIORARI TO THE SUPREME COURT OF COLORADO.

No. 583. Argued March 4, 1936.—Decided March 30, 1936.

1. A judgment in Minnesota rendered upon application of the receiver of a Minnesota corporation and levying an assessment upon the stockholders pursuant to Minnesota Constitution, Art. 10, § 3, and Mason's Minnesota Statutes, §§ 8025–8028, binds nonresident stockholders not served with process in Minnesota and must be given full faith and credit by the courts of the States of their residence in actions brought by the receiver to collect the assessments. *Bernheimer* v. *Converse,* 206 U. S. 516, and other cases followed. P. 610.
2. Jurisdiction of a court in Minnesota in such a proceeding attaches when the petition of the receiver is filed in accordance with the Minnesota statute, and the resulting judgment of assessment cannot be attacked collaterally for mere errors or procedural irregularities. P. 611.

97 Colo. 268; 49 P. (2d) 425, reversed.

Certiorari, 296 U. S. 571, to review the affirmance of a judgment dismissing the complaint in an action by the receiver of a corporation to enforce an assessment against a stockholder.

Mr. Thomas Vennum, with whom *Messrs. G. Dexter Blount, Harry S. Silverstein,* and *Harold F. Collins* were on the brief, for petitioner.

No appearance for respondent.

Mr. A. D. Quaintance, with whom *Mr. E. B. Evans* was on the brief, as *amici curiae* by leave of Court, in support of the judgment of the court below.

Per Curiam.

By order of the District Court of the United States for the District of Minnesota, petitioner was appointed receiver of the Diamond Motor Parts Company, a Minnesota corporation. In the same suit, on the receiver's application, the court ordered an assessment of 100 per cent. upon the shares of stock of the corporation, in order to enforce the provisions of the Minnesota constitution and laws relating to the double liability of stockholders. Minn. Const., Art. 10, § 3; Mason's Minn. Stat., §§ 8025–8028. The order was affirmed by the Circuit Court of Appeals. *Saetre* v. *Chandler,* 57 F. (2d) 951.

The receiver brought the present suit in the state court of Colorado against respondent John Peketz, a resident of that State and alleged to be a stockholder in the corporation. Respondent demurred to the complaint upon the ground that the action of the District Court in Minnesota was not binding upon him. The demurrer was sustained, the suit was dismissed, and the judgment was affirmed by the Supreme Court of Colorado against the contention of the receiver that full faith and credit had been denied to the order of assessment. Compare *Hancock National Bank* v. *Farnum,* 176 U. S. 640, 645. The state court held that since respondent was not served with process in Minnesota, the court ordering the assessment acquired no jurisdiction over his person, and that the procedure provided by the laws of Minnesota in the interest of nonresident stockholders had not been followed. This Court granted certiorari.

The legislation of Minnesota with respect to the liability of stockholders has been reviewed and its constitutional validity has been sustained by this Court. *Bernheimer* v. *Converse,* 206 U. S. 516; *Converse* v. *Hamilton,* 224 U. S. 243; *Selig* v. *Hamilton,* 234 U. S. 652, 660; *Marin* v. *Augedahl,* 247 U. S. 142. We have held that the Minnesota provisions constituted a reasonable regulation for enforcing the liability assumed by those who became stockholders in corporations organized under the laws of that State; that the order levying the assessment is made conclusive as to all matters relating to the amount and propriety thereof, and the necessity therefor; that it is thus conclusive, although the stockholder may not have been a party to the suit in which it was made or notified that an assessment was contemplated, as the order is not in the nature of a personal judgment against him and he must be deemed, by virtue of his relation to the corporation and the obligation assumed with respect to its debts, to be represented by it in the proceeding; and, further, that one against whom the order of assessment is sought to be enforced is not precluded from showing that he is not a stockholder, or is not the holder of as many shares as is alleged, or has a claim against the corporation which in law or in equity he is entitled to set off against the assessment, or has any other defense personal to himself.

These defenses respondent was entitled to assert in the suit brought against him by the receiver in Colorado. But the present question relates not to any such defense, as none was asserted, but to the binding quality of the order of assessment. The particulars of procedure in the Minnesota suit, which the court in Colorado found faulty, were these. The petition for assessment was filed by the receiver in the Minnesota suit on July 10, 1931. The proceeding was entertained and the court entered an order setting the matter for hearing on August 31, 1931. Notice was mailed on July 25, 1931, to all stockholders, including respondent, the notice being sent to his address at Denver. On August 18, 1931, the court in Minnesota made an order continuing the hearing to September 10, 1931. On August 19, 1931, notice of the hearing on the adjourned date was mailed to each stockholder, including respondent. The state court in Colorado took the view that the Minnesota statute required that the court in proceedings for an assessment shall "appoint a time for hearing, not less than thirty nor more than sixty days" after the order appointing the hearing, and that by reason of the adjournment the hearing was not had within the time which the statute prescribed. Another objection was that the Minnesota laws required the court in ordering an assessment to designate a period for payment, that is, that payment should be directed "within the time specified in such order." Mason's Minn. Stat., *supra*. The order in question required the stockholders to pay the assessment "forthwith" and directed the receiver "forthwith" to institute suits to recover the amounts assessed, with interest to run from thirty days after the date of the order.

The Court is of the opinion that neither of these objections go to the jurisdiction of the District Court in Minnesota in making the assessment. That jurisdiction attached when the petition of the receiver was filed in accordance with the statute. Neither the order for continuing the hearing, nor the provision directing payment, can properly be regarded as ousting that jurisdiction. Errors or procedural irregularities, if any, were subject to correction by the court itself or upon appeal, but afforded no warrant for collateral attack upon the order. *Rose* v. *Himely,* 4 Cranch 241, 278; *Thompson* v. *Tolmie,* 2 Pet. 157, 163; *Fauntleroy* v. *Lum,* 210 U. S. 230, 234, 235, 237; *Briscoe* v. *District of Columbia,* 221 U. S. 547, 553, 554; *Marin* v. *Augedahl, supra.*

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

Reversed.

COMMONWEALTH TRUST COMPANY OF PITTSBURGH ET AL. *v.* BRADFORD, RECEIVER.

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

No. 273. Argued February 5, 6, 1936.—Decided March 30, 1936.

1. The District Court has jurisdiction over suits by receivers of national banks. 28 U. S. C., § 41 (1) and (16). P. 617.
2. A suit by a receiver of a national bank to determine his right of participation as *cestui que trust* in a trust originally set up and administered by the bank but turned over, with the receiver's consent, to a successor trustee appointed by a state court, is a suit within the equity jurisdiction of the federal court. P. 618.
3. Its jurisdiction having been invoked in such a suit, it is the duty of the federal court to determine the issues involved. *Id.*
4. Such a suit is not *in rem;* the decree sought determines the right of the receiver against the trustee, but does not interfere with the trustee's possession or with the power of the state court to order distribution of assets, and its prosecution is not opposed to rules of comity. *Pennsylvania* v. *Williams,* 294 U. S. 176; and *Penn General Casualty Co.* v. *Pennsylvania,* 294 U. S. 189, distinguished. P. 619.
5. Property in the possession of a trustee is not *in custodia legis,* as is property in the possession of a receiver. P. 619.

78 F. (2d) 92, affirmed.

CERTIORARI, 296 U. S. 564, to review the question of jurisdiction and its appropriate exercise in a suit by the receiver of a national bank against a trustee appointed by a state court, to establish the rights of the plaintiff in the trust fund. The court below affirmed with modifications the decree of the district court in favor of the receiver.

Mr. William A. Wilson, with whom *Mr. W. Denning Stewart* was on the brief, for petitioners.

Inasmuch as the subject matter of the suit was a trust fund, without an accounting no adjudication of the rights of the receiver of the bank against the fund being administered by the trustee of the state court is possible. Furthermore, the proceeding in the District Court constituted an interference with the possession and control of the *res* in the custody of the Orphans' Court. *Kline* v. *Burke Construction Co.,* 260 U. S. 226; *Lion Bonding & Surety Co.* v. *Karatz,* 262 U. S. 77.

As the trust *res* was in the prior custody of the state court, the District Court was without jurisdiction to order an accounting. *Waterman* v. *Canal Louisiana Bank,* 215 U. S. 33; *Byers* v. *McAuley,* 149 U. S. 608.

When the state court took jurisdiction of the *res* and the actual possession of it had passed into the hands of its officer, the state court thereby acquired the power to determine all controversies relating to the collection, distribution and status of claims against the property. *Wabash R. Co.* v. *Adelbert College,* 208 U. S. 609, 611.

What the bank did was voluntarily to pay interest to the participants in the pool, which it is not entitled to recover back. *Trust Co.* v. *Ricketts,* 75 F. (2d) 309. The bank was not a creditor of the mortgage pool fund, because that fund is not a legal entity. An estate or a fund has no legal status. *Hess* v. *Reynolds,* 113 U. S. 73. A trust relationship does not create the relationship of debtor and creditor. *Bryan* v. *Welch,* 74 F. (2d) 964, 970. The remedy of a *cestui que trust* is in equity.

If the decree in the case at bar is *res judicata,* then the liquidation of the mortgage pool and the plan of distribution thereof by the Orphans' Court, which has possession of it, has been, in part at least, interfered with by the decree of the federal court. *Riehle* v. *Margolies,* 279 U. S. 218, 222.

If the respondent was aggrieved by the orders of the state court he was bound to seek his redress in the state court. *Grant* v. *Buckner,* 172 U. S. 232, 238.

The necessity of an accounting was inherent in the case as presented by the bill. As there was nothing in the bill, except matters of accounting arising out of a trust *res,* which the state court had within its custody, the District Court had no jurisdiction to entertain the bill. *Byers* v. *McAuley,* 149 U. S. 608, distinguished.

Comity required a dismissal of the suit. *Pennsylvania* v. *Williams,* 294 U. S. 176; *Penn General Casualty Co.* v. *Pennsylvania,* 294 U. S. 189.

The proceeding was fatally defective for want of indispensable parties.

The four individual defendants are not representatives of a class, and they do not represent the four hundred trust participants in the mortgage pool, nor can the interests of all the trust estate participants be presumed to be the same.

Messrs. John G. Frazer and *George P. Barse,* with whom *Mr. Robert L. Kirkpatrick* was on the brief, for respondent.

Mr. Justice McReynolds delivered the opinion of the Court.

The order granting this certiorari limited our consideration "to the question of jurisdiction and its appropriate exercise."

The facts, not in serious dispute, were fully set out by the Circuit Court of Appeals. It will suffice now to restate those bearing particularly on the points for decision.

The Trust Department of The Bank of Pittsburgh National Association—The Bank—acquired real estate mortgages and held them in a pool apart from other assets. It sold participation shares therein to sundry customers and issued appropriate certificates. Interest on the mortgages, when collected, was distributed to these, as agreed. Difficulties arose; many debtors defaulted; and, to meet the demands of certificate holders, The Bank advanced $40,000.

In September, 1931 The Bank failed; the Comptroller of the Currency appointed first Thomas, then Atwood, and finally respondent Bradford, as Receiver to wind up its affairs. Desiring to relinquish control of the mortgage pool, the Receiver consented to the appointment by the Orphans' Court of petitioner, Commonwealth Trust Co., as successor trustee for the pool assets, and delivered all of them to it. The face value of mortgages so delivered exceeded the total outstanding certificates by $291,000.

The Orphans' Court authorized the trustee to distribute among certificate holders funds collected from mortgage debtors, but nothing went to the Receiver of The Bank, "the Court directing that payments to him be suspended pending a judicial determination of" his rights "to participate in such distribution."

Thereupon, the Receiver instituted these equity proceedings in the United States District Court. The Commonwealth Trust Co., as trustee, and four certificate holders were made defendants. The prayer of the bill asked an adjudication of the Receiver's right to be paid the excess of the mortgage debts over outstanding certificates ($291,000) from assets of the pool; also his privilege to receive therefrom the amount advanced by The Bank ($40,000) on account of agreed interest upon the certificates; and for general relief.

The District Court granted relief as prayed. The Circuit Court of Appeals held that the bill stated a cause in equity within the jurisdiction of the trial court and, with certain modifications, affirmed its decree. As so modified and finally approved, this provides:—

1. That there is due and payable to the plaintiff, Avery J. Bradford, Receiver of The Bank of Pittsburgh National Association, out of interest moneys collected and to be collected by the Commonwealth Trust Company

as Trustee of the mortgage pool formerly held by The Bank of Pittsburgh National Association from mortgages in said mortgage pool, the sum of $40,213.58 advanced to the mortgage pool by The Bank of Pittsburgh National Association.

2. That the plaintiff, Avery J. Bradford, Receiver of The Bank of Pittsburgh National Association, is a participant and cestui que trust to the amount of $291,-020.45 in the mortgage pool formerly administered by The Bank of Pittsburgh National Association and now being administered by the defendant, Commonwealth Trust Company as Trustee.

3. That there is now due and payable from the defendant, Commonwealth Trust Company, Trustee as aforesaid, to Avery J. Bradford, Receiver of The Bank of Pittsburgh National Association, the sum of $26,191.84, being the amount withheld from said Receiver under previous distributions to participants other than said Receiver on account of principal, and the sum of $29,225.26, being the amount withheld from said Receiver under previous distributions to participants other than said Receiver on account of income and the sum of $1,254.84, being the interest earned and collected by the Commonwealth Trust Company, Trustee as aforesaid, on the amounts withheld from said Receiver.

4. That this court retain jurisdiction of this cause for the purpose of making such other orders and decrees, if any, as may become necessary.

5. The claims established in paragraphs 1 and 3 shall have priority of payment over any future distribution of assets to participants in the pool.

Petitioners do not deny that ordinarily District Courts of the United States have original jurisdiction of suits by Receivers of National Banks; Title 28, U. S. C. 41 (1 and 16); *Gibson* v. *Peters,* 150 U. S. 342, 344; *In re Chetwood,* 165 U. S. 443, 458; *United States* v. *Weitzel,* 246 U. S. 533, 541; and that the parties were before the trial court.

But they maintain the cause stated by the bill was not one cognizable in equity, since the subject matter was a fund held by a trustee under appointment of the state court against which no adjudication was possible in the absence of an accounting—the necessity of this was inherent in the cause as presented. Also, that to enforce the remedy sought would necessarily interfere with possession and control of the *res* in the custody of the Orphans' Court. And further, that under the rule of comity approved in *Pennsylvania* v. *Williams,* 294 U. S. 176 and *Penn General Casualty Co.* v. *Pennsylvania,* 294 U. S. 189, the trial court should have dismissed the proceedings.

The original bill revealed that the Receiver had been denied participation as a cestui que trust in the assets held by petitioner Trust Company, and asked an adjudication of his rights therein. He did not seek direct interference with possession or control of the assets; he prayed that his right to partake thereof be determined. The claim was an equitable one, within the ordinary jurisdiction of the chancellor. "In all cases in which an action of account would be the proper remedy at law, and in all cases where a trustee is a party, the jurisdiction of a court of equity is undoubted; it is the appropriate tribunal." *Fowle* v. *Lawrason's Executor,* 5 Peters 495, 503; *Clews* v. *Jamieson,* 182 U. S. 461, 479–480; *Alexander* v. *Hillman,* 296 U. S. 222.

Jurisdiction having been properly invoked, it became the duty of the trial court to determine the issues, unless required by rules based on comity to relegate the complainant to the state court. This may not be done except in special and peculiar circumstances not revealed, we think, by the present record. *McClellan* v. *Carland,* 217 U. S. 268, 281, held—

"It, therefore, appeared upon the record presented to the Circuit Court of Appeals that the Circuit Court had practically abandoned its jurisdiction over a case of which it had cognizance, and turned the matter over for adjudication to the state court. This, it has been steadily held, a federal court may not do. *Chicot County* v. *Sherwood*, 148 U. S. 529, 534."

See also *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 234.

The trust here involved was created by The Bank's voluntary action, not by the Orphans' Court. Whatever control the latter possessed resulted solely from appointment of the successor trustee and, for present purposes, did not materially differ from that exercised by probate courts over such fiduciaries as guardians, administrators, executors, etc. The jurisdiction of federal courts to entertain suits against the latter is clear, when instituted in order to determine the validity of claims against the estate or claimants' interests therein. Such proceedings are not *in rem;* they seek only to establish rights; judgments therein do not deal with the property and order distribution; they adjudicate questions which precede distribution. *Byers* v. *McAuley,* 149 U. S. 608, 620; *Security Trust Co.* v. *Black River National Bank,* 187 U. S. 211, 227; *Waterman* v. *Canal-Louisiana Bank & Trust Co.,* 215 U. S. 33, 43; *Riehle* v. *Margolies,* 279 U. S. 218, 223; *Harrison* v. *Moncravie,* 264 Fed. 776, 779. Property in its (the trustee's) posession is not *in custodia legis* as in case of receivers. *Hinkley* v. *Art Students' League,* 37 F. (2d) 225, 226; *Appeal of Hall,* 112 Pa. 42, 54; 3 Atl. 783; *Strouse* v. *Lawrence,* 160 Pa. 421, 425; 28 Atl. 930; *Goodwin* v. *Colwell,* 213 Pa. 614, 616; 63 Atl. 363; *Nevitt* v. *Woodburn,* 190 Ill. 283, 289; 60 N. E. 500.

The trial court properly exercised the jurisdiction which it acquired. The doctrine approved in *Pennsylvania* v. *Williams,* and *Penn General Casualty Co.* v. *Pennsylvania, supra,* is not applicable. In each of those cases we found conflict between the federal court and authorities of the State concerning liquidation of the business and assets of an insolvent local corporation. The question was whether, under the peculiar circumstances disclosed, the federal court should retain jurisdiction; its power generally to render judgment *in personam* against fiduciaries appointed by state courts was expressly recognized. Here there are no extraordinary circumstances. As contemplated by Congress the Receiver sought an adjudication of his rights. The final decree produced no interference with the trustee's possession, nor with the power of the Orphans' Court to order distribution of assets. The Receiver's privilege to participate has been declared; only a judgment *in personam* was rendered.

Congress has empowered Receivers of National Banks to sue in federal courts; the obvious importance of permitting them freely to do so cannot be disregarded.

All necessary parties were brought before the trial court. The claim to the contrary is without merit.

The challenged decree is

Affirmed.

GEORGIA RAILWAY & ELECTRIC CO. ET AL. *v.* DECATUR.

APPEAL FROM THE SUPREME COURT OF GEORGIA.

No. 625. Argued March 9, 1936.—Decided March 30, 1936.

1. This Court reversed the judgment of a state court, at a former hearing, upon the ground that a statute of the State, as apparently construed by that court, deprived the complaining party of property without due process of law; and by its mandate remanded the cause to the state court for further proceedings not inconsistent with this Court's opinion. *Held* that the state court was not inhibited by the mandate from restating its construction of the statute so as to avoid the constitutional objection, and from enforcing the statute as thus explained. P. 628.

2. A State may assess paving costs without regard to benefits, against street railroads occupying the streets paved, while others are assessed only on the basis of benefits. P. 624.
3. Constitutional objections must be properly presented to the state court as a basis for their review in this Court. P. 625.

181 Ga. 187; 182 S. E. 32, affirmed.

Appeal from a decree sustaining a special paving assessment against a street railway company. The case was here on a former appeal, 295 U. S. 165.

Mr. Walter T. Colquitt for appellants.

This Court has jurisdiction only over final decisions of the highest state court. Therefore, whatever was before this Court for decision and was considered, passed upon and decided, is final and conclusive, and becomes the law of the case.

No question, once considered and decided by this Court, can be reëxamined at any subsequent stage of the same case.

A praecipe which directs the state court to proceed consistently with the opinion of this Court has the effect of making the opinion a part of the mandate, as though it had been therein set out at length.

A decision rendered by a majority of this Court is as effective as if all the Justices had concurred therein. A dissenting opinion merely shows that the questions therein discussed were before the Court and were considered and determined by the Court in the decision rendered in the case.

The mandate of this Court directed "that the decree of the said Supreme Court [of Georgia] in this cause be, and the same is hereby reversed." When, on the same record, the Supreme Court of Georgia rendered a judgment of affirmance, it did not comply with the mandate.

The opinion of this Court was that the Georgia assessment statutes in question contemplate "the existence of benefits to the railway company as the basis for the assessment." This Court's construction of said statutes is final and will not be altered, changed or reversed, in the same case, by this Court after the term in which its decision has been rendered.

When this Court adjudicates that a state statute has been construed by the highest court of the State in a certain way, the determination of such question is final and conclusive and the law of the case.

Police power is subject to constitutional limitations, and a party is entitled to a judicial hearing to determine whether or not it has been arbitrarily or unreasonably exercised.

In the previous litigation no claim was made by the municipality that appellants were estopped from contesting their liability therefor. No issue or claim of estoppel was raised or made by the municipality in the present litigation.

The municipality is judicially estopped from claiming an estoppel.

Appellants were given no hearing and no opportunity to be heard on the question of estoppel. The issue of estoppel was not raised by the pleadings. Under the due process clause of the Federal Constitution, appellants are entitled to a notice and a hearing on material issues.

Mr. James A. Branch, with whom *Messrs. William Schley Howard* and *Scott Candler* were on the brief, for appellee.

Mr. Justice McReynolds delivered the opinion of the Court.

April 29, 1935 (295 U. S. 165), we reversed the decree pronounced by the Supreme Court of Georgia in this cause, September 18, 1934 (179 Ga. 471; 176 S. E. 494), and sent it back for further proceedings not inconsistent with the accompanying opinion. That opinion discloses the circumstances of the litigation and our reasons for reversal.

After notice to the parties, the Supreme Court, with felicitous recognition of obligation to do nothing in conflict with the ruling here, again considered the original record. September 30, 1935, after disclaiming any purpose theretofore to construe the pertinent state statutes as unhappily chosen words had led us to conclude, it announced their meaning and once more affirmed the decree of the trial court. A second appeal gives us jurisdiction.

Appellants insist, first, that the decree presently challenged is not consistent with our opinion and mandate; and, second, that, if the Georgia statutes be construed and applied as finally ruled by her Supreme Court, they will be deprived of equal protection and due process of law, contrary to the Fourteenth Amendment.

As appears from our opinion of April 29, 1935, following long established doctrine, we accepted the construction of the statutes placed upon them by the Supreme Court and decreed accordingly. *Elmendorf* v. *Taylor,* 10 Wheat. 152, 159; *Chicago, M., St. P. & P. R. Co.* v. *Risty,* 276 U. S. 567, 570. So regarded, they empowered the municipality to assess paving costs against the utility only upon the basis of benefits received. And, as appellants had been deprived of opportunity to show the absence of advantage, we held due process of law had been denied.

After the first decree was reversed and set aside, the cause went back for disposition by the Supreme Court. Our mandate restricted its powers in that regard so far as necessary to prevent conflict with rulings here, but not otherwise. Only federal questions were open for our determination. We accepted the construction placed upon the statutes by the Supreme Court and held that so to apply them would deprive appellants of a federal right. We suggested no interpretation of our own, and did not affirmatively indicate the further action to be taken. *Schneider Granite Co.* v. *Gast Realty Co.,* 245 U. S. 288, 291. The decree now under consideration is not in conflict with anything said or done by us. Appellants' claim to the contrary is not well founded. Without exceeding the limitations prescribed, the Supreme Court reconsidered the cause, put its own construction upon the statutes, and adjudged accordingly.

In the circumstances disclosed by the record, will appellants be deprived of the equal protection or due process of law if the state statutes, as finally interpreted, are applied to them?

Upon this point, counsel submit:—Under the statutes as construed, other parties would be subject to assessment by the municipality for the cost of paving only upon the basis of benefits; appellants would be liable without regard thereto. Street railways are entitled to the same constitutional protection accorded to others. Also, that if the special assessment was product of the police or taxing power, the utility was entitled to a judicial hearing in respect of its unreasonable or arbitrary exercise.

Considering our declarations in *Durham Public Service Co.* v. *Durham,* 261 U. S. 149, 154, that "There are obvious reasons for imposing peculiar obligations upon a railway in respect of streets occupied by its tracks," we cannot say the Supreme Court erred in concluding there was no violation of the equal protection clause. *Fort Smith Light Co.* v. *Paving District,* 274 U. S. 387.

The power of the municipality to require a street railway to pave streets used by it, without regard to benefits, is clear enough. *Durham Public Service Co.* v. *Durham, supra; Southern Wisconsin Ry. Co.* v. *Madison,* 240 U. S. 457, 461. The court below recognized the general right to demand inquiry concerning arbitrary exercise of the taxing or police power, when adequately alleged. But it found that appellants had not set up that defense, except as implied in the claim that any assessment not based on benefits was arbitrary and unreasonable. The court, we think, correctly said—

"There is no question as to the regularity of the assessment under the general law of the State, and the charter of the city as amended, and the ordinances duly enacted thereunder. It has already been determined that the paving was done and that the assessment therefor was made in conformity to the law. Payment therefor is undertaken to be avoided by the power company on the ground that the pavement was of no benefit to the company. It has been held by this court, in construing the law of the State in reference to street paving and cost thereof, that a street railway could not defend against the payment on the ground of no benefit."

Appellants have failed to show deprivation of any federal right through denial of opportunity to rely upon an adequate defense, properly advanced. We need not, therefore, consider the conclusions of the Supreme Court concerning an estoppel.

The questioned decree must be

Affirmed.

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BINGAMAN, COMMISSIONER OF REVENUE, ET AL. *v.* GOLDEN EAGLE WESTERN LINES, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO.

No. 520. Argued March 5, 1936.—Decided March 30, 1936.

1. Upon the question whether a state gasoline tax is exacted as compensation for use of the highways or is a general excise on the use of gasoline, the construction by the state supreme court controls in a federal court. P. 628.
2. Statutory provisions carried forward without material change into a new statute are continuations and not new enactments. *Posadas* v. *National City Bank,* 296 U. S. 497. P. 628.
3. As respects a carrier by motor vehicle engaged exclusively in interstate commerce, a State has no power to license and tax the importation and use of gasoline for operating the motors. P. 629.

14 F. Supp. 17, affirmed.

APPEAL from a decree of the three-judge District Court which enjoined appellants, state officers, from enforcing certain gasoline taxes and attendant penalties.

Messrs. J. R. Modrall and *Quincy D. Adams,* Assistant Attorneys General of New Mexico, with whom *Mr. Frank H. Patton,* Attorney General, was on the brief, for appellants.

Mr. Ivan Bowen, with whom *Mr. E. R. Wright* was on the brief, for appellee.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Appellee, a corporation organized under the laws of Delaware, is a common carrier operating a line of busses over the public highways of several states, including New Mexico, its business being limited to interstate transportation. It does no intrastate business in New Mexico, and expressly disclaims any intention of doing any such business in the future. The busses are propelled by gasoline, which, so far as this case is concerned, is purchased in another state, placed in tanks attached to the busses, and transported and used exclusively in interstate commerce.

A statute of the state (Chapter 176, § 2, Session Laws of 1933) imposes "an excise tax of five cents (5¢) per gallon upon the sale and use of all gasoline and motor fuel." Section 3 of the act prohibits any "distributor" from importing, receiving, using, selling or distributing any motor fuel, unless such distributor is the holder of an uncancelled annual license issued by the state Comptroller. For the license a fee is exacted of $25 for each distribution station or place of business or agency. A "distributor," as defined by § 1 of the act, includes a corporation consuming and using in the state any motor fuel purchased in and brought from another state. For failure to comply with the statute penalties are incurred. The effect of the statute is to compel a common carrier engaged exclusively in interstate transportation to procure a license as a "distributor" and pay an excise tax upon the use of motor fuel purchased in, and brought from, another state and used only in such transportation.

By an act, passed in 1931, Laws 1931, c. 31, provision is made for refunding taxes collected upon the purchase of gasoline in certain specified quantities and used for other purposes than the operation of motor vehicles upon the streets and highways of the state.

This suit was brought against appellants, state officers, to enjoin the threatened enforcement of the foregoing statutory provisions, together with the penal provisions connected therewith, on the ground, among others, that they constitute a regulation of interstate commerce in contravention of the commerce clause of the federal Constitution. The case was heard by the lower court, consisting of three judges as the federal law requires, and a decree entered in accordance with the prayer of the bill.

The case turns upon the question whether the pertinent statutory provisions exact a charge as compensation to the state for the use of its highways, or impose an excise tax for the use of an instrumentality of interstate commerce. If the former, the tax should be sustained; if the latter, it clearly contravenes the commerce clause and must be held bad. *Helson and Randolph* v. *Kentucky,* 279 U. S. 245, and cases cited. The state supreme court has construed the provisions in *Geo. E. Breece Lumber Co.* v. *Mirabal,* 34 N. Mex. 643; 287 Pac. 699, and *Transcontinental & Western Air, Inc.* v. *Lujan,* 36 N. Mex. 64; 8 P. (2d) 103; and the court below, rightly concluding that it was bound by this construction,* thought that it settled the matter against the validity of the tax. With this view we agree.

The New Mexico decisions dealt with an earlier act, the terms of which, however, without material change, were carried forward into the act of 1933, with the result that the new act became a continuation of the earlier one. *Bear Lake Irrigation Co.* v. *Garland,* 164 U. S. 1, 11-14. Compare *Posadas* v. *National City Bank,* 296 U. S. 497. In the *Breece* case the state court held that the exaction was a general excise tax upon the use of all gasoline in the state, and that it was not imposed for the use of the state roads. The court considered the suggestion that the entire proceeds of the tax were devoted by law to the building and improvement of the state highways, but said that this would not alter the fact that the tax was not exacted for the privilege of using these highways. The *Lujan* case reached the same conclusion. The state

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* *United States* v. *Kombst,* 286 U. S. 424, 426; *Frost Trucking Co.* v. *Railroad Comm'n,* 271 U. S. 583, 591–592.

court drew a sharp distinction between the excise tax on the sale and that on the use of gasoline, holding the first to be valid and the second to be repugnant to the commerce clause of the federal Constitution as applied to an interstate air carrier. Both cases definitely refused to accept the view that the tax was a charge for the use of the highways.

Appellants contend that the refund provisions of the later 1931 statute, *supra,* nevertheless, demonstrate that the state legislature intended that the excise tax now in question should constitute compensation for the use of the highways. But the so-called refund provisions apply only in the case of taxes collected upon the *purchase* of gasoline, not of taxes collected for its *use.* Moreover, the state court in the *Lujan* case, p. 74, considered a like contention and rejected it as without substance.

As applied to appellee, an interstate carrier doing no intrastate business of any description, § 3 of the act, which exacts license fees from distributors, is plainly invalid as imposing a direct burden upon interstate commerce. *Crutcher* v. *Kentucky,* 141 U. S. 47, 58-59; *International Textbook Co.* v. *Pigg,* 217 U. S. 91, 108-113.

Decree affirmed.

PHILLIPS PETROLEUM CO. ET AL. *v.* JENKINS.

APPEAL FROM THE SUPREME COURT OF ARKANSAS.

No. 386. Argued February 7, 10, 1936.—Decided March 30, 1936.

1. Under its power to prescribe the provisions of charters of corporations organized under its laws and to impose conditions for the admission of foreign corporations to do local business, and under power reserved in its constitution to amend corporate charters and to impose like rules upon such foreign corporations, a State may, consistently with the equal protection clause of the

Fourteenth Amendment, make corporations, foreign and domestic, liable for personal injuries sustained by their employees through negligence of fellow employees, while as to individual employers it leaves in force the common-law fellow-servant rule. P. 633.

2. Section 7137, Crawford & Moses Digest of the Arkansas Statutes, which abolishes the fellow-servant rule in suits against corporations, is, as construed by the state supreme court, an exercise of the power reserved by the state constitution to prescribe and alter the terms of the charters of domestic corporations and to subject the foreign corporations which are authorized to do business in the State to the same regulations and liabilities as are imposed on domestic corporations. P. 634.

3. Inasmuch as under the state constitution the power reserved to amend a corporate charter can be exercised only when the General Assembly is of opinion that the charter may be injurious to the citizens of the State, and then only in such manner that no injustice shall be done to the corporators, the enactment of the above mentioned statute necessarily implies legislative determinations in accordance with those requirements; and in the absence of anything in the record, or of which judicial notice may be taken, to negative these implied legislative conclusions or to show that the distinction made by the statute between corporate and individual employers is an arbitrary discrimination against corporations, it will be assumed that conditions in Arkansas warrant that distinction. P. 636.

190 Ark. 964; 82 S. W. (2d) 264, affirmed.

Appeal from a judgment against the Petroleum Company and the surety on its supersedeas bond, based on a verdict for damages in an action against the Company for personal injuries sustained by one of its employees in the course of his employment. A fellow-servant of the plaintiff, whose negligence caused the injuries, was joined as a defendant with the corporation.

Mr. Rayburn L. Foster, with whom *Messrs. Joe K. Mahony* and *R. H. Hudson* were on the brief, for appellants.

Mr. Robert C. Knox, with whom *Mr. L. B. Smead* was on the brief, for appellee.

Mr. Justice Butler delivered the opinion of the Court.

Appellee sued the Phillips Petroleum Company and J. H. Myers in an Arkansas court to recover damages for injuries suffered by him while working for that company. There was a trial by jury. It gave plaintiff a verdict in accordance with which the court entered judgment against both defendants for $50,000. On appeal to the state supreme court, the guaranty company became surety on a supersedeas bond. That court reduced the judgment to $30,000 and held plaintiff entitled to recover that amount from the petroleum company and the surety.

The petroleum company is a Delaware corporation authorized to do business in Arkansas and engaged in that State in the production and transportation of oil. Crawford and Moses' Digest of the Arkansas Statutes, § 7137, enacted March 8, 1907, declares that all corporations shall be liable for injuries sustained by any employee resulting from negligence of any other employee.[1] The Arkansas Constitution, Art. XII, § 6, provides: "Corporations may be formed under general laws, which

[1] "Hereafter all railroad companies operating within this State, whether incorporated or not, and all corporations of every kind and character, and every company whether incorporated or not, engaged in the mining of coal, who may employ agents, servants or employees, such agents, servants or employees being in the exercise of due care, shall be liable to respond in damages for injuries or death sustained by any such agent, employee or servant, resulting from the careless omission of duty or negligence of such employer, or which may result from the carelessness, omission of duty or negligence of any other agent, servant or employee of the said employer, in the same manner and to the same extent as if the carelessness, omission of duty or negligence causing the injury or death was that of the employer."

laws may, from time to time, be altered or repealed. The General Assembly shall have the power to alter, revoke or annul any charter of incorporation now existing and revocable at the adoption of this Constitution, or any that may hereafter be created, whenever, in their opinion, it may be injurious to the citizens of this State, in such manner, however, that no injustice shall be done to the corporators." As to domestic corporations the supreme court has repeatedly held § 7137 to be a reasonable exertion of the State's power to prescribe the terms of charters of corporations organized under its laws.[2] The state constitution authorizes admission of foreign corporations to do business in the State and declares that, as to contracts made or business there done they shall be subject to the same regulations and liabilities as like corporations of that State. Art. XII, § 11. In this case the state court, in harmony with earlier decisions,[3] held that § 7137 applies to a foreign corporation carrying on business in Arkansas.

The substance of the cause of action alleged is this: April 5, 1934, plaintiff and Myers were fellow servants in the service of the petroleum company. They and other employees were engaged in laying pipe. Plaintiff was injured while he and Myers were carrying a length of pipe. Plaintiff, his back toward Myers, had the forward end upon his shoulder; Myers had the other end

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[2] *Ozan Lumber Co.* v. *Biddie,* 87 Ark. 587; 113 S. W. 796. *Soard* v. *Western Anthracite C. & M. Co.,* 92 Ark. 502; 123 S. W. 759. *Missouri & North Arkansas R. Co.* v. *Vanzant,* 100 Ark. 462, 466–467; 140 S. W. 587. See *Graham* v. *Thrall,* 95 Ark. 560, 563; 129 S. W. 532.

[3] *Aluminum Co.* v. *Ramsey,* 89 Ark. 522, 535; 117 S. W. 568; affirmed 222 U. S. 251. *Missouri Valley Bridge & Iron Co.* v. *Malone,* 153 Ark. 454, 461; 240 S. W. 719. *Postal Telegraph-Cable Co.* v. *White,* 190 Ark. 365, 368; 80 S. W. (2d) 633.

and, while shifting the pipe from one shoulder to the other, negligently jerked it and threw plaintiff to the ground and injured him. The court charged that, if plaintiff's injuries were caused by the negligence of Myers, the verdict should be for plaintiff against both defendants. That instruction was in accordance with § 7137 and the verdict and judgment depend upon it. The sole question is whether by that section the State denies to the petroleum company the equal protection of the laws in violation of the Fourteenth Amendment.

Appellant does not suggest discrimination between foreign and domestic corporations or between it and any other corporation. The section by its terms extends to all corporations whether organized in Arkansas or elsewhere. Undoubtedly the power of the State to prescribe the rule of liability as one of the conditions for the admission of foreign corporations is not less than its power to include the rule in the charters of domestic corporations. Appellant's position is the same as, in like circumstances, would be that of an Arkansas corporation. Its complaint is that the State makes corporations liable for personal injuries sustained by an employee through negligence of any other employee while as to individual employers it leaves in force the common law rule that every servant assumes the risk of injuries through the negligence of his fellow servants.

We shall first consider whether consistently with the equal protection clause the State, by exertion of its power to specify provisions of charters of corporations organized under its laws and to impose conditions for the admission of foreign corporations, may prescribe the challenged rule of liability. If, by specifying the terms upon which corporations may be organized under its laws or by the exertion of the reserved power to amend corporate charters, the State may impose the challenged rule upon domestic corporations, then the petroleum company is subject to the same rule. Arkansas Constitution, Art. XII, § 11. And, as unquestionably power to prescribe the terms of corporate charters is at least as great as that reserved to change them, the validity of the provision of § 7137 here in question may be tested as if, by the use of reserved power to amend, it was added to the charter of an Arkansas corporation.

Arkansas might have refrained from enactment of statutes creating or authorizing organization of corporations and might have denied to foreign corporations admission to the State. But it may not enforce any part of the charter of a domestic corporation or any provision of its laws relating to admission of a foreign corporation that is repugnant to the Federal Constitution.[4] If § 7137 is repugnant to the equal protection clause, it is without force as a part of the charter contract or otherwise.

The reservation of power to amend is a part of the contract between the State and the corporation and therefore § 10 of Art. I of the Federal Constitution does not apply. The reserved power is not unlimited and cannot be exerted to defeat the purpose for which the corporate powers were granted, or to take property without compensation, or arbitrarily to make alterations that are inconsistent with the scope and object of the charter

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[4] *Western Union* v. *Kansas*, 216 U. S. 1, 27, 33. *Ludwig* v. *Western Union*, 216 U. S. 146. *Looney* v. *Crane Co.*, 245 U. S. 178, 188. *Terral* v. *Burke Construction Co.*, 257 U. S. 529. *Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426, 434. *Hanover Fire Ins. Co.* v. *Harding*, 272 U. S. 494, 507, *et seq.* *Power Mfg. Co.* v. *Saunders*, 274 U. S. 490. *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389, 400–401. *Washington* v. *Superior Court*, 289 U. S. 361. Cf. *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197, 203. *Western Union* v. *Foster*, 247 U. S. 105, 114. *Frost Trucking Co.* v. *Railroad Comm'n*, 271 U. S. 583, 593, *et seq.* *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1, 13. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 282 U. S. 311, 328.

or to destroy or impair any vested property right.[5] On the other hand, it extends to any alteration or amendment "which will not defeat or substantially impair the object of the grant, or any right vested under the grant, and which the legislature may deem necessary to carry into effect the purpose of the grant, or to protect the rights of the public or of the corporation, its stockholders or creditors, or to promote the due administration of its affairs." [6] As the State may not surrender or bind itself not to exert its police power to guard the safety of workers, the common law fellow-servant rule may be abrogated by statute even when included in the charter of a corporation.[7] But we accept the State's determination that the provision of § 7137 here involved is a part of the charters of corporations organized in Arkansas since its enactment and that, through the power to alter or amend, it is included in the charters of corporations earlier organized under the laws of that State.

Essential to a just consideration of appellant's contention is a definite understanding of what is denied to it by the construction put upon § 7137 by the state supreme court. It was, as described by that court in an earlier case, "the common-law rule that a servant assumes the

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[5] *Tomlinson* v. *Jessup*, 15 Wall. 454, 459. *Miller* v. *State*, 15 Wall. 478, 488, 493 *et seq.* *Shields* v. *Ohio*, 95 U. S. 319, 324. *Beer Co.* v. *Massachusetts*, 97 U. S. 25, 33. *Sinking-Fund Cases*, 99 U. S. 700, 720. *Greenwood* v. *Freight Co.*, 105 U. S. 13, 17 *et seq.* *Close* v. *Glenwood Cemetery*, 107 U. S. 466, 474–476. *Lake Shore & M. S. Ry. Co.* v. *Smith*, 173 U. S. 684, 698. *Fair Haven & W. R. Co.* v. *New Haven*, 203 U. S. 379, 388 *et seq.* *Berea College* v. *Kentucky*, 211 U. S. 45, 57. *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322, 345, 346. *Missouri Pacific Ry. Co.* v. *Kansas*, 216 U. S. 262, 274. *Chicago, M. & St. P. R. Co.* v. *Wisconsin*, 238 U. S. 491, 501. *Sears* v. *Akron*, 246 U. S. 242, 248. *Coombes* v. *Getz*, 285 U. S. 434, 441. *Public Service Comm'n of Puerto Rico* v. *Havemeyer*, 296 U. S. 506.

[6] *Looker* v. *Maynard*, 179 U. S. 46, 52.

[7] *Texas & N. O. R. Co.* v. *Miller*, 221 U. S. 408, 414.

risk of negligence of his fellow servant." [8] That assumption, like the assumption of other risks incident to the employee's work, is an implied one and constitutes a part of the contract of employment. The section as construed below operates merely to negative the implication, to eliminate that term of the contract and, in its stead, to insert in charters of corporations the rule that they shall be liable for injuries suffered by an employee through negligence of another employee. It merely substitutes the rule of respondeat superior for the common law fellow-servant rule.[9]

The power reserved by the state constitution to the general assembly "to alter, revoke or annul" any charter of incorporation is not a general authorization. Amendment may only be made whenever in the opinion of the general assembly the charter "may be injurious to the citizens of this State" and then only "in such manner, however, that no injustice shall be done to the corporators." The enactment of § 7137 necessarily implies legislative determinations in accordance with these requirements. There is nothing in the record or of which judicial notice may be taken to negative the conclusions of the general assembly upon the matters specified or to show that the distinction made by the statute is a groundless and arbitrary discrimination against corporations. For aught that appears, conditions in Arkansas do not warrant belief that enforcement of the common law fellow-servant rule as to employees' claims for damages

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[8] *Aluminum Co.* v. *Ramsey,* 89 Ark. 522, 535; 117 S. W. 568.

[9] *Railroad Company* v. *Fort,* 17 Wall. 553, 559. *Hough* v. *Railway Co.,* 100 U. S. 213, 217. *Randall* v. *Baltimore & Ohio R. Co.,* 109 U. S. 478, 483. *Armour* v. *Hahn,* 111 U. S. 313, 318. *Chicago, M. & St. P. Ry.* v. *Ross,* 112 U. S. 377, 382 *et seq. Northern Pacific R. Co.* v. *Herbert,* 116 U. S. 642, 647. *New York Central R. Co.* v. *White,* 243 U. S. 188, 198–199. Cf. *Standard Oil Co.* v. *Anderson,* 212 U. S. 215, 220.

on account of personal injuries suffered by them in the service of employers other than those covered by § 7137 might be injurious to citizens of the State or that the abrogation of the rule would not be unjust to that class of employers. And justly, we think, it may be assumed that, if in Arkansas there existed facts sufficient to constitute the specified bases for legislative action in accordance with the constitutional provision, the general assembly would have abrogated the fellow-servant rule and extended the one made by § 7137 to all employers. It is therefore plain that the legislative determinations required by the constitution and presumably made by the general assembly adequately support the challenged classification and that as construed by the state supreme court in this case the statute is not repugnant to the equal protection clause of the Fourteenth Amendment.[10]

We need not decide the question whether, independently of the reserved power to amend charters and of the bases for legislative action upon which the state constitution conditions alterations, the provisions of § 7137 under consideration may be sustained as not repugnant to the equal protection clause.

Affirmed.

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[10] *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 78–79. *Rast* v. *Van Deman & Lewis Co.,* 240 U. S. 342, 357. *O'Gorman & Young* v. *Hartford Fire Ins. Co.,* 282 U. S. 251, 257. *Concordia Fire Ins. Co.* v. *Illinois,* 292 U. S. 535, 547. Cf. *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389, 399.

TRIPLETT ET AL. *v.* LOWELL ET AL.*

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

No. 388. Argued March 4, 5, 1936.—Decided March 30, 1936.

1. Neither the disclaimer statute, R. S. §§ 4917, 4922, nor the rules of the common law applicable to successive litigations concerning the same subject matter preclude re-litigation of the validity of a patent claim previously held invalid in a suit against a different defendant. P. 642.
2. The court whose jurisdiction is invoked by a suit for infringement of a patent must determine for itself the validity of the claims asserted, notwithstanding a prior adjudication of invalidity of some of them, unless those issues have become *res judicata* by reason of the fact that both suits are between the same parties or their privies. Only if it holds that the claims are invalid may it be called upon to apply the disclaimer statute and to decide whether the patentee, under all the circumstances presented, has unreasonably delayed or neglected to enter a disclaimer of the claims of whose invalidity he had notice in the prior suit. P. 645.
3. Where suit on a patent is brought in a circuit in which the circuit court of appeals had held some of the claims invalid, the court, in the second suit, must decide whether the issues of law and fact in the two cases are the same; and, if they are not, it is not bound by the earlier decision. P. 648.
4. This Court will not answer on certificate questions covering unstated matter lurking in the record, or which admit of different answers dependent on circumstances not stated; academic questions; or questions the answers to which depend upon other answers for which no basis is laid in the certificate. P. 648.

77 F. (2d) 556, affirmed.
Certificate in No. 590 dismissed.

CERTIORARI, 296 U. S. 570, to review the reversal of a decree dismissing a suit for infringement of a patent. The second case, No. 590, of like character, came up by cer-

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* Together with No. 590, *Mantle Lamp Co.* v. *Aluminum Products Co.* Certificate from the Circuit Court of Appeals for the Seventh Circuit.

tificate from the Circuit Court of Appeals of another circuit.

Mr. Samuel E. Darby, Jr., with whom *Mr. Charles Markell* was on the brief, for Triplett et al.

Mr. Clifton V. Edwards, with whom *Messrs. Gaylord Lee Clark* and *John B. Brady* were on the brief, for Lowell et al.

Mr. George I. Haight, with whom *Messrs. W. H. F. Millar* and *M. K. Hobbs* were on the brief, for Mantle Lamp Co.

Mr. Wm. Nevarre Cromwell for Aluminum Products Co.

MR. JUSTICE STONE delivered the opinion of the Court.

In No. 388 certiorari was granted to resolve questions as to the scope and effect of the disclaimer statute, R. S. §§ 4917, 4922, 35 U. S. C. §§ 65, 71, raised in a suit brought to enjoin infringement of several patent claims, some of which had previously been held invalid in an infringement suit in another circuit against different defendants.

In No. 590 like questions have been argued upon certificate to this Court, under § 239 of the Judicial Code, of the Court of Appeals for the Seventh Circuit.

No. 388.

Respondents in No. 388, before bringing the present suit, had sued in a district court in the third circuit to restrain infringement of Claim 9 of Patent No. 1,635,117, July 5, 1927, to Dunmore, for a signal receiving system, and of Claims 3 and 14 of Patent No. 1,455,141, May 15, 1923, to Lowell and Dunmore, for a radio receiving apparatus. Each claim was held invalid by the Court of Appeals for the Third Circuit, *Radio Corporation* v. *Du-*

bilier Condenser Corp., 59 F. (2d) 305, 309, and petitions to this Court for certiorari were denied, 287 U. S. 648, 650. More than eight months after the denial of certiorari respondents filed, in the Patent Office, purported disclaimers of each of the claims thus held invalid, and more than a month later began the present suit in the district court for Maryland to restrain infringement of the same claims and other claims of the same patents not previously adjudicated. A motion to dismiss the suits as to both patents for unreasonable delay in filing disclaimers of the claims previously held invalid, and because the disclaimers were inadequate, was granted by the District Court upon the latter ground.

The Court of Appeals for the Fourth Circuit reversed and ordered a new trial, 77 F. (2d) 556, holding that respondents were not barred from maintaining the second suit, against different defendants, for infringement of the claims previously held invalid and that the disclaimer of those claims was not prerequisite to maintenance of the suit upon the claims not previously adjudicated. It intimated that the second suit could not be maintained unless brought without unreasonable delay, but it concluded that it could not say that there had been unreasonable delay in the present case.

Whether the respondents' disclaimers are merely an attempted formal alteration of the claims so as to conform them more precisely to the specifications without changing their substance or conceding their invalidity, see *Carnegie Steel Co.* v. *Cambria Iron Co.*, 185 U. S. 403, 435, or whether they are in effect such alterations of the substance of the claims as to bring them within the requirements and limitations of the re-issue statute, R. S. § 4916, 35 U. S. C. 54, so as to render both the old and the new claims invalid, see *Altoona Publix Theatres, Inc.* v. *American Tri-Ergon Corp.*, 294 U. S. 477, 490–492, are questions which have been much argued here and below. In reaching its decision the Court of Appeals assumed, as we shall assume without deciding, that the disclaimers were inadequate because they failed to concede invalidity of the adjudicated claims. It concluded that if the same decision were reached, as to the validity of the claims previously adjudicated, as in the Third Circuit, the respondents' suit must fail both as to them and as to all the other claims, "even though some of them may be good. For it would then be established that the owner of the patent had failed to file disclaimers within a reasonable time after notice of the invalidity of some of the claims had been brought home to him." 77 F. (2d) 556, 561.

Revised Statutes, § 4917, provides that "Whenever, through inadvertence, accident, or mistake, . . . a patentee has claimed more than that of which he was the original or first inventor, . . . his patent shall be valid for all that part which is truly and justly his own, . . ." and authorizes him to file in the Patent Office a written disclaimer of "such parts of the thing patented as he shall not choose to claim." Revised Statutes § 4922 authorizes a patentee who has claimed more than that of which he was the inventor, to maintain a suit for the infringement of "any part" of the patent "which was *bona fide* his own, if it is a material and substantial part of the thing patented, and definitely distinguishable from the parts claimed without right, notwithstanding the specifications may embrace more than that of which the patentee was the first inventor or discoverer," but with the proviso that "no patentee shall be entitled to the benefits of this section if he has unreasonably neglected or delayed to enter a disclaimer."

Petitioners contend that if any claim of a patent is adjudged invalid no further suit can be maintained upon it, or upon other claims of the patent without disclaimer of the claims previously held invalid. This contention is predicated upon the rule that, save for the disclaimer statute, adjudication of invalidity of any claim of a patent renders the entire patent void, and upon the assumption that by force of the statute, if not without it, an adverse decision on any claim is final and conclusive as to its invalidity, in any court, except as modified upon an appellate review. If this view be accepted, it follows that the right to maintain suit for infringement of the separable claims of a patent which already have been held valid, or have not been adjudicated, may alone be saved by disclaimer of all claims held invalid, within a reasonable time after their adjudication; the patentee may not contest again the validity of the claims held invalid and only by abandoning them by timely disclaimer may he litigate other claims.

Neither reason nor authority supports the contention that an adjudication adverse to any or all the claims of a patent precludes another suit upon the same claims against a different defendant. While the earlier decision may by comity be given great weight in a later litigation and thus persuade the court to render a like decree, it is not *res adjudicata* and may not be pleaded as a defense. See *Mast, Foos & Co.* v. *Stover Mfg. Co.*, 177 U. S. 485; *Sanitary Refrigerator Co.* v. *Winters*, 280 U. S. 30, 35. The disclaimer statute was enacted to mitigate the harsh rule[1] that the entire patent was destroyed if any claim

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[1] By § 3 of the Patent Act of 1793, 1 Stat. 318, and § 6 of the Patent Act of 1836, 5 Stat. 117, an accurate description in writing of the invention in the patent application was prerequisite to the award of a patent. Section 6 of the Act of 1793, and § 15 of the Act of 1836, authorized the defendant in a patent suit, by way of defense, to prove that the specification of the patent "contains more than is necessary to produce the desired effect, . . . or that the thing thus secured by the patent was not originally discovered by the patentee, . . ." By the Act of 1832, 4 Stat. 551, it was provided

were held invalid. See *Altoona Publix Theatres, Inc.* v. *American Tri-Ergon Corp., supra,* 490; *Ensten* v. *Simon, Ascher & Co.,* 282 U. S. 445, 452; *Hailes* v. *Albany Stove Co.,* 123 U. S. 582, 589; *Moody* v. *Fiske,* (C. C.) 2 Mason 112, 118, Fed. Cas. No. 9,745. The statute permits the patentee to abandon by disclaimer parts of the patent which he does not choose to claim, and if the disclaimer is timely and adequate it authorizes him to maintain suit for infringement of the separable parts which he does choose to claim. But neither in terms nor by implication does it deny to a patentee the right to bring a second suit for the infringement of a claim already held to be invalid. If such were its construction it would deny to a patentee the right to re-litigate claims held invalid when others are held valid or are not in issue, but would leave that right unaffected when the entire patent is held invalid, since in that case there would be nothing to disclaim. See *Winans* v. *New York & Erie R. Co.,* 21 How. 88, 103. Only a plain legislative command would justify a construction leading to such incongruous results.

While the contention now made is apparently for the first time seriously argued here, this Court has several times held valid the claims of a patent which had been held invalid by a circuit court of appeals in an earlier suit brought by the same plaintiff against another defendant. *Expanded Metal Co.* v. *Bradford,* 214 U. S. 366; *Diamond Rubber Co.* v. *Consolidated Rubber Tire Co.,* 220 U. S. 428; *Abercrombie & Fitch Co.* v. *Baldwin,*

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that whenever any patent shall be invalid by reason of failure to comply with the requirements of § 3 of the Act of 1793, it should be lawful to grant a new patent to the patentee for his invention, upon surrender of the old patent and compliance with § 3 of the Act of 1793. Section 13 of the Act of 1836 similarly authorized the new patent to issue "in accordance with the patentee's corrected description and specification." Section 7 of the Act of 1837, 5 Stat. 191, carried into R. S. 4917, first permitted the patentee to preserve the valid part of his original patent by disclaimer.

245 U. S. 198.[2] Before the establishment of the circuit court of appeals, an adverse decision as to the validity of a patent in one circuit appears not to have foreclosed litigation of the same issue in another, see *Barbed Wire Patent,* 143 U. S. 275; compare *United States* v. *American Bell Telephone Co.,* 128 U. S. 315, 372. That it does not now is implicitly recognized by the practice established under § 240 (a) of the Judicial Code, and Rule 38 (5) of this Court, that certiorari will not usually be granted in patent cases unless there is a conflict in the decisions of circuit courts of appeals. We conclude that neither the rules of the common law applicable to successive litigations concerning the same subject matter, nor the disclaimer statute, precludes re-litigation of the validity of a patent claim previously held invalid in a suit against a different defendant.

It follows that want of disclaimer of claims previously held invalid can never be set up as a bar *in limine* to the maintenance of a second suit upon those claims, and any others of the patent, since the patentee is entitled to invoke in that suit the independent judgment of the court upon the validity of the claims which have been held invalid. In advance of its decision as to validity, that court cannot consistently hold that there is necessity for disclaiming claims which, although previously adjudged invalid, it may hold to be valid. The statute does not command that a court authorized to pass upon the validity of a claim shall accept as conclusive a pre-

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[2] In other cases this Court has held invalid, upon examination of the merits, a patent which had been upheld by one court of appeals after being held invalid by another. *Railroad Supply Co.* v. *Elyria Iron Co.,* 244 U. S. 285; *Meccano, Ltd.* v. *John Wannamaker,* 253 U. S. 136; *New York Scaffolding Co.* v. *Chain Belt Co.,* 254 U. S. 32; *Corona Cord Tire Co.* v. *Dovan Chemical Corp.,* 276 U. S. 358; *Saranac Automatic Machine Corp.* v. *Wirebounds Patents Co.,* 282 U. S. 704.

vious adjudication of invalidity of the same claim for the purpose of ascertaining whether the disclaimer statute applies. On the contrary, § 4922 in terms permits the patentee to "maintain a suit . . . for the infringement of any part" of the patent "which was *bona fide* his own."

The court whose jurisdiction is invoked by such a suit must determine for itself validity and ownership of the claims asserted, notwithstanding a prior adjudication of invalidity of some of them, unless those issues have become *res adjudicata,* by reason of the fact that both suits are between the same parties or their privies. If it determines that the claims previously adjudicated are valid, there is no occasion for disclaimer. In such a case the intimation of the court below that the second suit must be brought within a reasonable time is without support, for if in that court the claims are upheld, there is nothing to disclaim and the statute does not apply. Only if it holds that the claims are invalid may it be called upon to apply the disclaimer statute and to decide whether the patentee, under all the circumstances presented, has unreasonably neglected or delayed to enter a disclaimer of the claim of whose invalidity he had notice in the prior suit.[3]

The disclaimer statute is remedial, and intended for the protection of both the patentee and the public. See *O'Reilly* v. *Morse,* 15 How. 62, 121. Both are protected by the construction which we adopt and which we think is the only admissible one. The patentee is free to preserve some of the claims of his patent by disclaiming

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[3] We do not now determine the effect of the disclaimer statute when the second suit, either from choice or necessity, is confined to claims held valid or not adjudicated in the earlier action. Whether the claims previously held invalid should be deemed abandoned and properly subject to disclaimer would depend upon special circumstances and involve questions not presented in the present suit.

others which have been held invalid, but the statute does not force him to pay that price in order to save them. He may relinquish the privilege of disclaimer and proceed to re-litigate, in another court, the claims which have been declared to be invalid, but at the risk of loss in that court of the other claims of the patent even though valid, if it likewise holds invalid the previously adjudicated claims.

A different question is presented where the claims adjudged invalid are abandoned, whether by a tardy disclaimer or otherwise, and a second suit is brought to restrain infringement of other claims, see *Ensten* v. *Simon, Ascher & Co., supra,* or where in the same suit in which some claims are held invalid the plaintiff seeks to secure without disclaimer the benefits of a favorable decision on other claims. See *R. Hoe & Co.* v. *Goss Printing Press Co.,* 31 F. (2d) 565; *Higgin Mfg. Co.* v. *Watson,* 263 Fed. 378; *Liquid Carbonic Co.* v. *Gilchrist Co.,* 253 Fed. 54; *Herman* v. *Youngstown Car Mfg. Co.,* 191 Fed. 579.

We do not decide whether the purported disclaimers operate to enlarge the claims in such fashion as to render both the old and the new claims invalid by virtue of the reissue statute. See *Altoona Publix Theatres, Inc.* v. *American Tri-Ergon Corp., supra,* 490–492. That question is not presented by the petition for certiorari. The courts below do not appear to have passed upon it, and it may be unnecessary to decide it on the new trial. The decree will be affirmed.

No. 590.

In No. 590 the questions certified are as follows:

"1. Where certain but not all of the claims of a patent are in suit, and all of the claims in suit are held and decreed to be invalid pursuant to a finding and judgment to that effect of the Circuit Court of Appeals of the circuit, may the owner of the patent maintain a suit afterward brought thereon in the same judicial circuit as that in which the first cause was decided, and against a different defendant not involved in the first suit—the second suit being based on the claims held in the prior suit to be invalid and on other claims of the same patent not previously adjudicated—where the owner of the patent wholly failed and omitted to file any disclaimer of the claims held in the first suit to be invalid, and where, between entry of decree of invalidity of the claims in the first suit and the bringing of the second suit in the same circuit, reasonable time had elapsed for filing such disclaimer?

"2. If question 1 is answered in the affirmative, does the intervention of a period of approximately five years between the final judgment in the first suit and the institution in the same circuit of the second suit constitute delay so unreasonable as to bar the second suit for want of disclaimer of the claims which had been held to be invalid?

"3. If question 2 is answered affirmatively, may the institution or pendency of other suits in another judicial circuit or circuits after entry of final decree in the first suit, based on claims of the patent so held invalid and on other claims thereof not previously adjudicated to be invalid, excuse the failure to file disclaimer of the claims held invalid prior to instituting the later suit in the same circuit?"

From the facts stated in the certificate it appears that the district court below, upon hearing the cause, decreed the several claims, on which the plaintiff relied, to be invalid "for various reasons, among them for neglect to file within reasonable time disclaimers" of the claims previously held invalid by the Court of Appeals for the same circuit. It does not appear whether the district court, independently of the defense of want of disclaimer, passed upon the validity of the claims previously adjudicated and decided that they were invalid upon the evidence presented, or whether it held that all inquiry as to their validity was foreclosed by the prior adjudication.

From what we have said in our opinion in No. 388, it is manifest that the effect rightly to be given to the failure to disclaim may turn upon the disposition which the trial court makes of the claims previously held invalid, and that there is no occasion for the application of the disclaimer statute until the trial court has itself passed on the validity of the previously adjudicated claims. The fact that the suit was brought in the same circuit where the court of appeals had previously held some of the claims invalid is immaterial, for the court must decide whether the issues of law and fact in the two cases are the same, and if they are not it is not bound by the earlier decision.

This Court cannot be required, by certificate, to answer, and it should not answer, questions which cover unstated matter "lurking in the record," see *United States* v. *Mayer,* 235 U. S. 55, 66; *Chicago, B. & Q. Ry. Co.* v. *Williams,* 205 U. S. 444, 454; *Cross* v. *Evans,* 167 U. S. 60; *United States* v. *Hall,* 131 U. S. 50, 52; or questions which admit of one answer under one set of circumstances and a different answer under another, neither of which is stated to be the basis of the questions certified. See *White* v. *Johnson,* 282 U. S. 367, 371; *Hallowell* v. *United States,* 209 U. S. 101, 107; *Jewell* v. *Knight,* 123 U. S. 426, 435; *Enfield* v. *Jordan,* 119 U. S. 680.

Moreover, it does not appear that the claims not previously adjudicated constitute "a material and substantial part of the thing patented, and definitely distinguishable" from the claims held invalid, so as to admit of the application of § 4922. We are not required to answer academic questions, or questions which may not arise in the pending controversy. See *White* v. *Johnson, supra,* 373; *United States* v. *Hall, supra; Webster* v. *Cooper,* 10 How. 54, 55. For these reasons the first question is not answered.

The second and third questions, by their terms, require an answer only if the first is answered. In addition, the answers to both turn upon the question whether the patentee has "unreasonably neglected or delayed to enter a disclaimer" within the meaning of § 4922, which can be answered only in the light of all relevant circumstances and the inferences to be drawn from them. Such questions are not properly the subject of a certificate, especially where, as here, it fails to disclose whether all the relevant facts and circumstances have been certified. *Jewell* v. *Knight, supra; Baltimore & Ohio R. Co.* v. *Interstate Commerce Comm'n,* 215 U. S. 216, 221; *Chicago, B. & Q. Ry. Co.* v. *Williams, supra,* 452; *United States* v. *City Bank of Columbus,* 19 How. 385; *United States* v. *Bailey,* 9 Pet. 267, 274.

Such aid as we are able to give in answering questions as to the scope and effect of the disclaimer statute which may be involved in the pending cause is afforded by our opinion in No. 388.

The decree in No. 388 is affirmed.
The certificate in No. 590 is dismissed.

FISHER'S BLEND STATION, INC. *v.* STATE TAX COMMISSION ET AL.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 628. Argued March 9, 1936.—Decided March 30, 1936.

1. The owner of a radio broadcasting station, in conducting under federal license the business of broadcasting advertising "programs" for customers for hire, to listeners within and beyond the State, is engaged in interstate commerce and cannot be subjected to a state occupation tax measured by the entire gross receipts of the business. P. 651.
2. Even though the sounds making up the performances or programs broadcasted are furnished by the customers, it is the broadcaster who effects their transmission by supplying and operating the broadcasting apparatus whereby electro-magnetic waves, vibrating in correspondence with the spoken sound waves, are generated and transmitted to the receiving instruments of the listeners for whom the programs are intended, there to be converted again into sound vibrations. P. 653.
3. There is no basis in this case for holding that the broadcaster merely furnished the customers the broadcasting facilities and that it was the customers who did the broadcasting. P. 653.
4. The communications broadcasted are no less complete and effective, nor any the less effected by the operator of the transmitting station, because he does not own or command the apparatus by which they are received. P. 655.
5. The tax in question is not levied upon or measured by the generation of electro-magnetic waves by the station operated, but by the gross receipts for the service it performs, which includes both the generation of the energy and its transmission as a means of communication interstate; it is therefore unnecessary to decide whether the State could tax the generation of such energy, or other local activity of the operator. P. 656.

182 Wash. 163; 45 P. (2d) 942, reversed.

Appeal from a judgment of the state supreme court which reversed a judgment enjoining the enforcement, as against appellant, of a state tax.

Messrs. Godfrey Goldmark and *Donald G. Graham*, with whom *Messrs. R. J. Venables* and *James B. Howe* were on the brief, for appellant.

Mr. E. P. Donnelly, Assistant Attorney General of Washington, with whom *Mr. G. W. Hamilton*, Attorney General, was on the brief, for appellees.

MR. JUSTICE STONE delivered the opinion of the Court.

This appeal from a judgment of the Supreme Court of the State of Washington, Judicial Code, § 237, presents the question whether a state occupation tax, measured by the gross receipts from radio broadcasting from stations within the state, is an unconstitutional burden on interstate commerce.

Appellant brought suit to enjoin appellees, the State Tax Commission, from collecting the tax, laid by § 2 of Chapter 191 of the Washington Laws of 1933, as an infringement of the commerce clause of the federal Constitution. On demurrer to the bill of complaint, and on stipulation of the parties that the cause might be decided upon the facts there alleged, the state Supreme Court gave final judgment for the appellees.

Appellant maintains, within the state, two broadcasting stations licensed by the Federal Radio Commission (now the Federal Communications Commission). One is licensed to operate with power and a radio frequency enabling it to broadcast throughout the "fifth zone," which comprises eleven western and northwestern states, including Washington, and the Territories of Alaska and Hawaii. The other is licensed to operate as a "clear channel" station, that is to say, a station to which the Commission has assigned a radio frequency to be used at such times and with such power as will enable it to broadcast throughout the United States without interference by other stations. §§ 2, 4, 5, Federal Radio Act of 1927,[1] 44 Stat. 1162; Regulations, Federal Radio Commission, File No. 5–R–B–63 and Official No. 63; File No. 5–R–B–67 and Official No. 67, Nos. 70–75, No. 111, Nos. 116–124. These stations broadcast over the areas for which they are licensed, and the adjacent high seas and a part of Canada.

Broadcasting, according to the allegations of the complaint, is accomplished by the generation, at the broadcasting station, of electro-magnetic waves, which pass through space to receiving instruments which amplify them and translate them into audible sound waves. The essential elements in the broadcasting operation are a supply of electrical energy, a transmitter, the connecting medium or "ether" between the transmission and receiving instruments, and the receiving mechanism.

Appellant's entire income consists of payments to it by other broadcasting companies or by advertisers for broadcasting, from its Washington stations, advertising programs originating there or transmitted to them from other states by wire. Appellant "sells time" to its customers at stipulated rates, during which it broadcasts from its stations such advertising programs as may be agreed upon. During such time as is not sold, it broadcasts, at its own expense, "sustaining" programs, as required by the regulations of the Federal Radio Commission. The customers desire the broadcasts to reach the listening public in the areas which appellant serves, and a large number of persons, many of them in other states, listen to the broadcasts from appellant's stations.

The state Supreme Court recognized that state taxation of gross income derived from interstate commerce is forbidden by the commerce clause. But it upheld the tax on the ground that the business from which appel-

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[1] This Act has been superseded by the Act of June 19, 1934, 48 Stat. 1081. 47 U. S. C. § 301ff.

lant receives its income is not interstate commerce. It conceded, as it had previously held, *Van Dusen* v. *Department of Labor and Industries,* 158 Wash. 414; 290 Pac. 803, that broadcasting is commerce, and that the broadcasting by appellant of its own programs for which it does not receive pay is interstate commerce. But it concluded that appellant's remunerative business is not interstate commerce because it consists of furnishing, within the state, the facilities of its stations to customers who use them for broadcasting their programs, and the business of providing such facilities, like that of providing a bridge for the use of others in crossing state lines, is not commerce. See *Detroit International Bridge Co.* v. *Corporation Tax Appeal Board,* 294 U. S. 83; *Henderson Bridge Co.* v. *Kentucky,* 166 U. S. 510.

We may assume, although it is not alleged, that appellant's customers produce the sounds which are broadcasted. But it sufficiently appears, although the complaint does not specifically so state, that appellant, and not the customer, generates the electric current and controls the apparatus (generator, transmitter and their controls) by which the sounds are broadcasted. The complaint states that appellant operates its stations and conducts the business of broadcasting in the manner already described, and that the license to operate them is granted to appellant by the Federal Radio Commission under the Federal Radio Act. These allegations, read in the light of the statute, which forbids any save licensees to operate broadcasting apparatus, § 1, Federal Radio Act of 1927, 44 Stat. 1162, and of the facts of which we have judicial knowledge, see *Buck* v. *Jewel-LaSalle Realty Co.,* 283 U. S. 191, 200; *DeForest Radio Co.* v. *General Electric Co.,* 283 U. S. 664, 670, *et seq.,* must be taken to state that the broadcasting of radio emanations, as distinguished from the production of the sounds broadcasted, is effected by appellant and not by its customers.

The sounds broadcasted are not transmitted from the microphone to the ears of listeners in other states. They do not pass as sound waves to the receiving mechanisms. They serve only to enable the broadcaster, by the use of appropriate apparatus, to modulate the radio emanations which he generates. These emanations as modulated, are projected through space to the receiving sets. There, by a reverse process, they so actuate the receiving mechanisms as to produce a new set of sound waves, of frequencies identical with those produced at the mircrophone. On the argument it was conceded that, in broadcasting for its customers, appellant, by generating the necessary electric power and controlling the transmitter, produces the radio emanations which actuate the receiving mechanisms located in other states. Upon the facts alleged, we see no more basis for saying that appellant's customers do the broadcasting than for saying that a patron of a railroad or a telephone company alone conducts the commerce involved in his railroad journey or telephone conversation.

Appellant is thus engaged in the business of transmitting advertising programs from its stations in Washington to those persons in other states who "listen in" through the use of receiving sets. In all essentials its procedure does not differ from that employed in sending telegraph or telephone messages across state lines, which is interstate commerce. *Western Union Telegraph Co.* v. *Speight,* 254 U. S. 17; *New Jersey Bell Tel. Co.* v. *State Board of Taxes,* 280 U. S. 338; *Cooney* v. *Mountain States Tel. & Tel. Co.,* 294 U. S. 384; *Pacific Tel. & Tel. Co.* v. *Washington, ante,* p. 403. In each, transmission is effected by means of energy manifestations produced at the point of reception in one state which are generated and controlled at the sending point in another. Whether the transmission is effected by the aid of wires, or through a perhaps less well understood medium, "the ether," is immaterial, in the light of those practical considerations which have dictated the conclusion that the transmission of information interstate is a form of "intercourse," which is commerce. See *Gibbons* v. *Ogden,* 9 Wheat. 1, 189.

Similarly, we perceive no basis for the distinction urged by appellee, that appellant does not own or control the receiving mechanisms. The communications broadcasted are no less complete and effective, nor any the less effected by appellant, because it does not own or command the apparatus by which they are received. The essential purpose and indispensible effect of all broadcasting is the transmission of intelligence from the broadcasting station to distant listeners. It is that for which the customer pays. By its very nature broadcasting transcends state lines and is national in its scope and importance—characteristics which bring it within the purpose and protection, and subject it to the control, of the commerce clause. See *Federal Radio Comm'n* v. *Nelson Bond & Mortgage Co.,* 289 U. S. 266, 279.

It is unnecessary to determine whether, as the court below suggested and appellee argues, like considerations would require us to hold that the exposure of a sign board, in one state, to the view of dwellers in another, is likewise interstate commerce. Whether the practical and scientific aspects of such an operation bring it within the range of those factors which we deem controlling here, may well be left for decision when such a case is presented. See *Pantomimic Corporation* v. *Malone,* 238 Fed. 135.

As appellant's income is derived from interstate commerce, the tax, measured by appellant's gross income, is of a type which has long been held to be an unconstitutional burden on interstate commerce, *Philadelphia & Southern S. S. Co.* v. *Pennsylvania,* 122 U. S. 326; *Leloup* v. *Port of Mobile,* 127 U. S. 640; *Galveston, H. & S. A.*

Ry. Co. v. *Texas,* 210 U. S. 217; *Crew-Levick Co.* v. *Pennsylvania,* 245 U. S. 292. But appellee further contends, as the state court thought, that, even though broadcasting involves interstate commerce, the maintenance and operation of appellant's stations includes intrastate activities which may be subjected to state taxation, as was the generation of electricity, transmitted to points outside the state, in *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165. There the tax was measured by the amount of current generated at the taxpayer's hydro-electric plant, from which electric power was supplied to consumers in other states. This Court held that the operation of generating electrical power, although virtually simultaneous with its transmission, is so distinct and separable from the operation of transmission, in interstate commerce, as to be the appropriate subject of a state tax. The argument now made overlooks the fact that the present tax is not levied upon or measured by appellant's generation of electro-magnetic waves, but by its gross receipts for the service it performs, which includes both the generation of the energy and its transmission as a means of communication interstate.

Whether the state could tax the generation of such energy, or other local activity of appellant, as distinguished from the gross income derived from its business, it is unnecessary to decide. See *Atlanta* v. *Oglethorpe University,* 178 Ga. 379; 173 S. E. 110. It is enough that the present is not such a tax, but is levied on gross receipts from appellant's entire operations, which include interstate commerce. As it does not appear that any of the taxed income is allocable to intrastate commerce, the tax as a whole must fail, *Cooney* v. *Mountain States Tel. & Tel. Co., supra;* cf. *Pacific Tel. & Tel. Co.* v. *Washington, supra,* and the judgment of the state court must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

INTERNATIONAL STEEL & IRON CO. *v.* NATIONAL SURETY CO.

APPEAL FROM THE SUPREME COURT OF TENNESSEE.

No. 252. Argued January 9, 1936 and March 11, 1936.—Decided March 30, 1936.

1. Jurisdiction over an appeal from a state court may be sustained with the aid of a continuance after the case has been reached for argument, by obtaining from the state court, duly certified, and adding to the record, a supplement to its opinion showing that the federal question here relied on by the appellant was raised in and decided by that court. P. 662.
2. A state law relative to the settlement of public construction contracts, which attempts retroactively to release the surety on a bond given by the contractor for the security of the claims of materialmen, and to substitute therefor, without their consent, the obligation of another bond, not merely changes the remedy but destroys substantive obligations in violation of the contract clause of the Constitution. P. 662.
3. A party whose rights under the Federal Constitution are prejudiced by a decision of a state supreme court construing a state statute for the first time, is not estopped from attacking the decision on appeal because he did not anticipate such construction in the earlier stages of the case but relied upon another, not unreasonable, construction of the statute and invoked it in his own behalf. P. 665.
4. The rule that, when the decision of a state court may rest upon a non-federal ground adequate to support it, this Court will not take jurisdiction to determine the federal question, has no application where, as here, the non-federal ground might have been considered by the state court but was not. P. 666.

Reversed.

APPEAL from a judgment affirming a judgment of the state court of appeals, which reversed a decree of the chancellor, in a suit involving the question of the liability of the surety company on a contractor's bond as affected by a statute of the State.

Mr. Cecil Sims, with whom *Messrs. Isidor Kahn* and *F. M. Bass* were on the brief, for appellant.

Mr. Charles C. Trabue, with whom *Messrs. William Hume* and *Geo. H. Armistead, Jr.*, were on the brief, for appellee.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The present appeal challenges a statute of Tennessee on the ground that, as construed and applied, it impairs the obligation of a contract in contravention of Art. I, § 10 of the Federal Constitution.

March 12, 1928, National Construction Company made a contract with the State, through its Department of Highways and Public Works, for the construction of a bridge. An Act of 1917 required such a contractor to furnish a bond with surety to protect the State and to secure payment to persons furnishing materials, supplies, and labor for the project.[1] The company executed

[1] Chapter No. 74 Public Acts of Tennessee 1917 (p. 217). By § 6 (p. 223) it is provided: ". . . All contractors with whom contracts are made by the Department shall enter into good and solvent surety bond in an amount fixed by the Department, conditioned upon the full and faithful performance of every part and stipulation of the contract, especially the payment for all materials purchased and for all labor employed in the contemplated work. . . . Not more than ninety per cent of the contract price shall be paid on any contract until it is completed and the work is accepted. Before final acceptance, the contractor must furnish evidence to satisfy the Department that all the material used by him, his sub-contractors, or his agents, has been fully paid for and all laborers and other employees working for him, his sub-contractors, or his agents, have been fully paid. When this is done, full settlement may be made with the contractor; but not until thirty days' notice in some newspaper . . . that settlement is about to be made and notify [*sic*] all claimants to file notice of their claim with the Secretary of the Department. The Secretary of the Department shall withhold a sufficient sum from the contract price due to pay all claims . . . of which notice is filed with him, for a reasonable time to allow claimants to sue for and prove their claims against the contractor or his agent, in some court of competent jurisdiction."

such a bond with the appellee as surety. The appellant agreed with the Construction Company to furnish certain labor and materials for the erection of the bridge. Upon completion of the structure, the appellant claimed a balance of about $59,000. There remained in the possession of the Highway Department some $77,000 which had been retained out of the contract price as directed by the Act of 1917. In the meantime, the Act had been amended on April 11, 1929,[2] to provide that instead of withholding the retained percentage pending the presentation of claims by sub-contractors, and paying into court so much as might be necessary to answer suits brought on those claims, the Commissioner of Highways might, upon the date of final settlement, release and pay to the principal contractor the amount so retained, against a refunding bond with proper surety, conditioned for the payment of valid claims of sub-contractors.[3] Pursuant to this amendatory act, the Commissioner,

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[2] Public Acts of Tennessee 1929, c. 80, pp. 173–175.

[3] "SECTION 1. . . .

(a) 'The Secretary of the Department (now the Commissioner of Highways and Public Works) shall withhold a sufficient sum from the contract price due to pay all claims, of which notice is filed with him, for a period of sixty days from the date of the last advertising, to allow claimants to sue and prove their claims against the contractor or his agent, in some court of competent jurisdiction. In the event suit is brought against the contractor within the said sixty days from the date of the last advertising, by any claimant, the Department or its officers shall pay the amount of said claim into court. But in all cases where suits are not brought within the said period of sixty days the Secretary shall pay said sum or sums so withheld to the contractor.

(b) 'On the date set for full and final settlement with the contractor, the contractor may make proper refunding bond to the State of Tennessee for the amount of any sum or sums so held for the said period of sixty days, such bond to be approved by the Commission, whereupon the Commissioner or the Department of Highways and Public Works shall pay such contractor in full.'"

without notice to or consent of the appellant, made final settlement with the Construction Company and paid it the retained percentage, taking a refunding bond with the Equitable Casualty and Surety Company as surety. Thereupon, the appellant filed a bill in the Chancery Court of Davidson County against the Construction Company, the appellee as surety on the contractor's bond, the Commissioner, and the Equitable Company as surety on the refunding bond, reciting the facts and praying a decree for the balance due under its contract. The Construction Company answered and cross-claimed for alleged breach of contract, asserting that there was no sum due the appellant. The appellee answered asserting that the payment of the retained percentage and the acceptance of a refunding bond released it as surety from liability to the Department of Highways or to sub-contractors. The Commissioner's answer recited his acts in the premises. The appellant replied to the cross-bill. A decree was entered in favor of the Commissioner against the Construction Company and Equitable Company on the refunding bond. Subsequently the Commissioner informed the court that the Equitable Company had become insolvent and it was proposed to substitute a refunding bond of the Construction Company as principal and Consolidated Indemnity and Insurance Company as surety in the penal sum of $40,000, in place of the original refunding bond, and lodge the new bond in court, such action not to release the Construction Company under the original refunding bond but to operate as a release of the receiver and liquidating agent of the Equitable Company. It was ordered that the bond be taken and lodged in court to await the outcome of the litigation.

The chancellor thereafter heard the cause on the merits, found in favor of the appellant for a balance of approximately $58,000, held that the amendatory act of 1929 did not affect the appellee's liability under the bond, but substituted a refunding bond in lieu of the moneys retained by the Commissioner, that the appellant should look first to the refunding bond and, after its exhaustion, recover from the appellee any amount remaining unpaid. The appellee took the case to the Court of Appeals of the State, where it insisted upon its position that the acceptance of a refunding bond and the release of the retained percentage operated to discharge its bond. That court reversed the chancellor's decision, holding that the act of 1929 was prospective in operation and did not apply to the State's contract with the Construction Company; that the action of the Commissioner in taking a refunding bond and releasing the retained percentage was unlawful, operated to the prejudice of the appellee as surety on the contract bond and released it from liability. Both appellant and appellee were granted writs of certiorari by the Supreme Court of Tennessee. The former assigned error to the holding that the action of the Commissioner in paying over the retained funds and taking a refunding bond released the appellee as surety. The latter assigned error to the holding that the amendatory act of 1929 was inapplicable to the contract in question and that the Commissioner was not authorized thereby to proceed as he did, and thus satisfy and discharge the obligation of appellee's bond.

Upon grounds differing from those stated by the Court of Appeals, the Supreme Court affirmed the decree. It held the amendatory act retroactive and applicable to the contract of the Construction Company; and the Commissioner's action lawful and effective to supersede and annul the contract bond.

In the course of the opinion the Court said: ". . . our construction of Chapter 80 of the Acts of 1929 does not bring that statute into any constitutional difficulty." Except for this statement, the record failed to disclose that a question under the Federal Constitution had been presented or decided. In the circumstances, this court had no jurisdiction upon appeal. Counsel for the appellant requested at the bar a continuance of the cause to afford opportunity for amplification of the record disclosing the basis of decision.[4] The application was granted, a petition was filed in the court below, and, in response thereto, the court added to its opinion a recital that a reargument had been ordered upon "the constitutionality, construction, and applicability" of Chapter 80 of the Acts of 1929, and, prior to reargument, counsel for the appellant had filed a brief raising the federal constitutional question under Article I, § 10, and the Court intended to express the opinion that the Act, as construed by it, "did not impair the obligation of contracts in violation of . . . the contract clause of . . . the Constitution of the United States." These additional proceedings have been certified and added to the record. Upon the record as thus supplemented we have jurisdiction.

The contention is that Chapter 80 of the Acts of 1929, as construed, releases and discharges the obligation of the appellee's bond to pay the balance due the appellant, and that such destruction of the obligation cannot be justified by substituting a right of action on another bond without appellant's consent. The appellant says that under the local law the bond given by the appellee is of a dual nature, running both to the State and to sub-contractors; and its execution created a direct contractual relation between the surety and those who furnished material and labor for the erection of the bridge, the obligation of appellee to appellant coming into existence at the moment the latter made its contract with the Con-

[4] Compare *Lynch* v. *New York*, 293 U. S. 52.

struction Company.[5] The Supreme Court of Tennessee, though so holding, thought the Act of 1929 merely affected the appellant's remedy without impairing its substantive rights. It treated the Act of 1917, pursuant to which appellee gave its bond, as having "the same general purpose as the mechanic's lien statutes." It said: "The beneficiaries of the legislation are given a lien under private contracts, recourse on the bond under public contracts." After stating that it was unnecessary to decide whether a mechanic's lien,—a remedy created by statute and not by the contract of the parties,—may be abolished or modified by statute without impairing the obligation of the contract or, on the contrary, the lienor has a vested interest in the remedy, upon accrual of his lien, of which he cannot be deprived without such impairment, the court disposed of the appellant's contention thus:

"If we concede that the materialman's lien in the one instance, or his recourse on the bond in the other instance, enters into his contract and is a part thereof, and that a remedy so embraced cannot be impaired without impairing the obligation of the contract, still our construction of chapter 80 of the Acts of 1929 does not bring that statute into any constitutional difficulty. We construe the statute as regulating, after its passage, the procedure to be followed by all parties in respect to the final settlement of every highway contract, whether the contract itself was made before or after the enactment of chapter 80 of the Acts of 1929."

This view seems to us to confuse the remedies for the enforcement of two distinct contracts involved in every similar situation. The sub-contractor has a contract with

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[5] *City of Bristol* v. *Bostwick,* 139 Tenn. 304, 310, 317; 202 S. W. 61; *Cass* v. *Smith,* 146 Tenn. 218, 227; 240 S. W. 778, citing and quoting *Equitable Surety Co.* v. *United States,* 234 U. S. 448; *Standard Oil Co.* v. *Jamison Bros.,* 166 Tenn. 53, 55; 59 S. W. (2d) 522.

the principal contractor, but none with the owner. The mechanics' lien law gives the sub-contractor no additional redress against the principal contractor for breach by the latter of his sub-contract. Because the sub-contractor's labor and material go to enhance the value of the owner's property, the law places that property in peril of a lien for payment of the sub-contractor, unless the owner sees that he is paid. Abolition of the lien destroys no remedy which the sub-contractor could have invoked as against his employer, with whom alone he has a contract. The Act of 1917, on the other hand, instead of creating a right of lien against the owner, who is a stranger to the sub-contract, requires that if a bidder for public works is to become the contractor therefor he must procure a bondsman for the payment of his sub-contractors. The statute itself confers no contractual right on any sub-contractor, nor does it by its own force confer upon him any new remedy for the enforcement as against the principal contractor of the obligation of any contract the two may make. A bondsman is invited to come forward and agree to indemnify the sub-contractor. If he does so, he acts voluntarily. For a consideration sufficient to move him, he contracts directly with the sub-contractor to assure the satisfaction of his just claims against the principal contractor. The remedy for a breach of this undertaking is an action at law.

The appellee voluntarily gave its bond. How does Chapter 80 of the Acts of 1929 affect the obligation of that contract? As construed by the Supreme Court of the State, it releases and discharges the obligation of the bond, and substitutes therefor the obligation of another bond without the acquiescence of the obligee. This is not to substitute a new for the old remedy against the surety. It is to declare the surety's obligation unenforceable,—in short, no longer a subsisting obligation.

Beyond doubt the statute thus violates the contract clause of the Constitution.

The respondent insists that as the appellant joined the Equitable Company, surety on the refunding bond, as a defendant, it sought to take advantage of the amendatory act of 1929 and is now estopped to question the constitutional validity of the statute. Appellant replies that the suit went upon the theory adopted by the chancellor that the amendatory act was not retroactive so as to release the earlier bond but intended merely to substitute a refunding bond in the place of the funds retained by the Highway Commissioner which, under the original act, were also held for satisfaction of the appellant's claim. Such a construction of an act which had not been passed upon by any court was permissible and if, as now appears, the appellant was in error in so construing the act, the mistake cannot be made the basis of an estoppel. In both appellate courts the appellant insisted on its original view that the Act of 1929 did not operate to discharge the obligation of the appellee's bond. The appellee asserted no estoppel in either of those tribunals. Not until the decision of the Supreme Court was there a holding that the act retroactively affected the enforcibility of the bond. Not until then was there occasion for appellant to urge that, if so construed, the act would impair the obligation of the bond. As we have indicated, the record discloses that when this construction of the act appeared probable the appellant promptly raised the constitutional question. It cannot be estopped so to do by its previous insistence upon a construction which would render the statute consistent with the Act of 1917 and present no constitutional difficulty.[6] The appellee says that estoppel, a non-federal ground, adequate to

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[6] Compare *Saunders* v. *Shaw*, 244 U. S. 317; *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 367.

support the judgment, was in the case from its inception. The point was not made or considered in the state courts. The validity of the act was adjudged on the issue of impairment of the obligation of the appellee's bond. We do not, therefore, consider the defense of estoppel.

"The rule that, when the decision of a state court may rest upon a non-federal ground adequate to support it, this court will not take jurisdiction to determine the federal question, has no application where, as here, the non-federal ground might have been considered by the state court but was not." [7]

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

Reversed.

ASIATIC PETROLEUM CO., LTD. *v.* INSULAR COLLECTOR OF CUSTOMS.

CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 674. Argued March 13, 1936.—Decided March 30, 1936.

1. The Philippine Tariff Act of 1909 as enacted by Congress is a statute of the United States within the meaning of the Act of February 13, 1925, and this Court has jurisdiction to review a decision of the Supreme Court of the Islands involving its application. P. 668.
2. The Act of 1916 for the government of the Philippine Islands did not operate to repeal the Tariff Act as a law of the United States and convert it into a law of the Philippine Islands, and did not thus abolish the jurisdiction of this Court to review a decision of the Islands Supreme Court involving the application of the Tariff Act. P. 669.
3. The erection of a local legislature in a territory or a possession and the grant of legislative power do not deprive Congress of the reserved power to legislate for the territory or possession, or abrogate existing congressional legislation in force therein. P. 670.

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[7] *Grayson* v. *Harris*, 267 U. S. 352, 358.

4. Section 15 of the Philippine Independence Act of 1934, repealing, except as otherwise provided, "all laws or parts of laws relating to the present government of the Philippine Islands and its administration," *held* not to have repealed the Philippine Tariff Act of 1909. P. 671.
5. Section 21 of the Philippine Tariff Act of 1909, providing for a drawback of customs duties on all fuel oil imported into the Philippine Islands which is afterwards used for the propulsion of "vessels engaged in trade with foreign countries," applies to vessels of foreign registry as well as to vessels of Philippine and American registry. P. 671.

Reversed.

CERTIORARI, *post*, p. 700, to review a judgment affirming a judgment denying a writ of mandamus to compel the respondent to approve drawbacks of customs duties.

Mr. Wm. D. Whitney for petitioner.

Mr. Lee S. Tillotson for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The petitioner seeks review of a decision of the Supreme Court of the Philippine Islands which construed § 21 of the Philippine Tariff Act of 1909.[1] The reasons assigned are the importance of the question involved and conflict with a decision of the Court of Claims under a statute of similar import. The respondent urges that this Court is without jurisdiction to issue the writ, and if it has jurisdiction, should affirm the judgment.

The section in question provides:

"Sec. 21. That on all fuel imported into the Philippine Islands which is afterwards used for the propulsion of vessels engaged in trade with foreign countries, or between ports of the United States and the Philippine Islands, or in the Philippine coastwise trade, a re-

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[1] 36 Stat. 130, 176.

fund shall be allowed equal to the duty imposed by law upon such fuel, less one per centum thereof, which shall be paid under such rules and regulations as may be prescribed by the insular collector of customs."

During the period between June 15, 1932, and April 15, 1933, the petitioner imported into the Philippine Islands fuel oil, paid the prescribed duties thereon, and, in turn, made sales to agents of foreign shipping concerns with the agreement that drawbacks of customs duties paid on the quantities so sold were to be for petitioner's account. The oil was put aboard vessels of British, Swedish, Dutch, Danish and Norwegian registry and used for their propulsion while engaged in trade between the Islands and foreign countries. The petitioner filed with the respondent certificates of the sales; the Surveyor of the Port of Manila superintended the transfer to each vessel and, in his return to the respondent, certified the correct weight of each lading. The petitioner then presented drawback entries and requested a refund of duties paid, as provided by § 21 of the Tariff Act. The respondent refused to authorize or pay the drawbacks on the ground that they are allowable only in respect of fuel imported and sold for use by vessels of Philippine registry. The petitioner applied to the Court of First Instance of Manila for a mandamus requiring the respondent to sign and issue the necessary warrants for refund of tax. The court denied the writ. Upon appeal, the Supreme Court held that the section applied only to fuel used by vessels of American or Philippine registry and affirmed the judgment.

First. This court has jurisdiction. The relevant statute is that of February 13, 1925:[2]

"That in any case in the Supreme Court of the Philippine Islands wherein the Constitution, or any statute or

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[2] C. 229, § 7, 43 Stat. 936, 940.

treaty of the United States is involved, or wherein the value in controversy exceeds $25,000, or wherein the title or possession of real estate exceeding in value the sum of $25,000 is involved or brought in question, it shall be competent for the Supreme Court of the United States, upon the petition of a party aggrieved by the final judgment or decree, to require, by certiorari, that the cause be certified to it for review and determination . . ."

The provision is continued in force by the Philippine Independence Act.[3]

It is incontestable that the Tariff Act of 1909 as enacted by Congress was a statute of the United States within the meaning of the Act of 1925 and that this court would have jurisdiction to review a decision involving its application,[4] were it not for certain provisions of the Act of 1916 for the government of the Islands.[5] The claim is that these repealed the Tariff Act as a law of the United States, converted it into a law of the Philippine Islands, and thus abolished our jurisdiction to review the judgment in question. The argument is grounded upon §§ 5, 6, 7, 8, and 10 of the organic act, which are copied in the margin.[6] Respondent points out that the

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[3] March 24, 1934, § 7 (6), c. 84, 48 Stat. 456, 462; U. S. C. Tit. 48, § 1237. "Review by the Supreme Court of the United States of cases from the Philippine Islands shall be as now provided by law . . ."

[4] *Gsell* v. *Insular Collector of Customs*, 239 U. S. 93. At the time of this decision the appellate jurisdiction of this Court was governed by the Act of July 1, 1902, c. 1369, § 10, 32 Stat. 691, 695, which was substantially identical with the Act of 1925, § 7, except that it provided for review upon appeal or by writ of error instead of by certiorari.

[5] Aug. 29, 1916, c. 416, 39 Stat. 545.

[6] "Sec. 5. That the statutory laws of the United States hereafter enacted shall not apply to the Philippine Islands, except when they specifically so provide, or it is so provided in this Act.

"Sec. 6. That the laws now in force in the Philippines shall continue in force and effect, except as altered, amended, or modified effect of these sections is to give the Philippine Legislature concurrent power with Congress to amend, alter, or repeal laws of the United States effective in the Islands, including tariff laws, with the one exception that in such tariff laws trade relations between the Islands and the United States are to continue to be governed exclusively by congressional legislation. Since 1916 the Tariff Act of 1909 has been repeatedly amended by the local legislature with the approval of the President of the United States, and the contention is that although § 21 has never been amended or repealed, the Act of 1916 and the action taken by the Phillippine Legislature thereunder have converted the Tariff Act into a local law and stripped it of its character as an act of Congress. We do not agree. Section 21 derives force from the legislative action of Congress. Neither the provisions of the organic act nor the amendment of other sections by the Philippine Legislature changed the source of its authority. The erection

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herein, until altered, amended, or repealed by the legislative authority herein provided or by Act of Congress of the United States.

"Sec. 7. That the legislative authority herein provided shall have power, when not inconsistent with this Act, by due enactment to amend, alter, modify, or repeal any law, civil or criminal, continued in force by this Act as it may from time to time see fit.

"This power shall specifically extend with the limitation herein provided as to the tariff to all laws relating to revenue and taxation in effect in the Philippines.

"Sec. 8. That general legislative power, except as otherwise herein provided, is hereby granted to the Philippine Legislature, authorized by this Act.

. . . . . .

"Sec. 10. That while this Act provides that the Philippine government shall have the authority to enact a tariff law the trade relations between the islands and the United States shall continue to be governed exclusively by laws of the Congress of the United States: *Provided*, That tariff acts or acts amendatory to the tariff of the Philippine Islands shall not become law until they shall receive the approval of the President of the United States . . ."

of a local legislature in a territory or a possession and the grant of legislative power do not deprive Congress of the reserved power to legislate for the territory or possession, or abrogate existing congressional legislation in force therein.[7]

It is argued that § 15 of the Independence Act[8] has repealed the Act of 1909. This section is, in part,—

"Except as otherwise provided in this Act, all laws or parts of laws relating to the present government of the Philippine Islands and its administration are hereby repealed as of the date of the inauguration of the government of the Commonwealth of the Philippine Islands."

The respondent contends that tariff acts belong to the administration of government and are within the scope of the repeal. But we think that when the phraseology of the Independence Act is viewed in its setting and is compared with § 2 of Article XV of the Constitution of the Commonwealth of the Philippine Islands, continuing all laws of the Islands in force until the inauguration of the Commonwealth and thereafter until amended, altered, modified, or repealed by the National Assembly, it becomes evident that laws relating to such subjects as the tariff were not repealed but only those dealing with administrative agencies and their procedure which would be inconsistent with the new frame of government. In any event the Independence Act cannot operate retroactively to deprive the petitioner of rights vested before its adoption.

Second. The petitioner must prevail upon the merits. The court below limited the scope of the drawback provision by inserting, in effect, after the word "vessels," as it appears in § 21, the words "of Philippine or American registry." The statute is plain upon its face. The phrase used is "vessels engaged in trade with foreign

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[7] Compare *National Bank* v. *County of Yankton,* 101 U. S. 129.

[8] Mar. 24, 1934, c. 84, § 15, 48 Stat. 456, 464.

countries." The court restricted the scope of the expression upon the view that the drawback was authorized in the interest of the merchant marine of the Islands and that of the United States. We are not referred to any facts to support this conclusion. An equally plausible inference is that the purpose of the provision was to afford Philippine merchants trade opportunities equal to those of foreign merchants in supplying fuel oil to ships. We are not at liberty to limit the application of so clear and unambiguous a statutory direction in the absence of convincing evidence that the intent of Congress was less sweeping than its words import. We hold that the section applies to fuel sold to all vessels, of whatever registry, trading with foreign countries.[9]

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

Reversed.

NEW YORK LIFE INSURANCE CO. *v.* VIGLAS.

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

No. 602. Argued March 6, 1936.—Decided March 30, 1936.

1. A policy holder, entitled by his policy to monthly benefit payments and suspension of premiums if totally and permanently disabled, and who had been in the enjoyment of these rights upon the assumption that such disability existed, was notified by the insurance company that it would no longer make the payments or waive premiums, because it appeared to the company that for some time past he had not been continuously totally disabled within the meaning of the policy; and upon his failure to pay a premium on the next due day, the company noted on its records that the policy

[9] An act of Congress providing, in identical terms, for a drawback of tariff duties, was held by the Court of Claims to apply in respect of all vessels whether of domestic or foreign registry. *Kennedy* v. *United States*, 23 Ct. Cls. 363.

had lapsed. By its terms, even if the policy had lapsed, the insured would still be entitled to stipulated surrender privileges, cash, or new insurance, and to full reinstatement upon proof within six months that the disability existed at the time of default. *Held:*

(1) That the action of the insurance company, *bona fide* though mistaken, did not amount to a repudiation, renunciation, or abandonment of its entire contract but only to a breach of the obligation to pay benefits. P. 676.

(2) The damages recoverable by the insured did not exceed the benefits in default at the commencement of suit. P. 678.

2. In determining whether a breach of contract, short of repudiation or intentional abandonment, avoids the contract as a whole, the relation between the maintenance of the contract and the frustration of the ends it was expected to serve is of much importance, and that which is necessary to work out reparation in varying conditions must be considered. P. 679.

3. Strictly speaking, an "anticipatory" breach of contract is one committed before there is a present duty of performance. P. 681.

78 F. (2d) 829, reversed.

CERTIORARI, 296 U. S. 571, to review the reversal of a judgment dismissing, on demurrer to the complaint, an action for breach of an insurance contract. The ground of dismissal was that the possible recovery was less than the jurisdictional amount.

Mr. Frederick H. Nash, with whom *Messrs. Louis H. Cooke* and *Richard Wait* were on the brief, for petitioner.

Mr. Harris J. Booras, with whom *Mr. George C. Eliades* was on the brief, for respondent.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The case, which is here upon demurrer to a declaration, depends for its solution upon the nature of the breach of contract imputed to the defendant, the petitioner in this court, and upon the measure of the damages recoverable therefor.

From the declaration we learn the following: Respondent received from petitioner on February 7, 1927, a policy of insurance for $2,000 payable at his death. The consideration was a semiannual premium of $38 payable during his life, but for not more than twenty years. If, however, the insured became totally and permanently disabled before the age of sixty, the company, petitioner, was to pay him a monthly income at an agreed rate and was to waive the payment of any premium that would otherwise be due. Disability was to be considered total when the insured was so affected by bodily injury or disease as to be wholly prevented from performing any work, from following any occupation, or from engaging in any business for remuneration or profit. In particular, "the total and irrecoverable loss of the sight of both eyes or of the use of both hands or of both feet or of one hand and one foot" was to constitute "total disability for life." Before making any income payment or waiving any premium the company might demand due proof of the continuance of total disability, not oftener, however, than once a year after such disability had continued for two full years. Upon failure to furnish such proof, or if the insured performed any work, or followed any occupation, or engaged in any business for remuneration or profit, "no further income payments" were to be made, "nor premiums waived." If at the time of a default in the payment of a premium, the insured was disabled within the definition of the policy, the insurance was to be reinstated, provided, however, that within six months after the default proofs of such disability were received by the insurer. In any event, reinstatement would be permitted at any time within five years upon evidence of insurability satisfactory to the insurer and upon payment of overdue premiums with interest at five per cent. Finally, the insured, though in default, was to have the benefit of surrender values in the form either of cash or of temporary insurance or of participating paid-up insurance according to his choice.

On September 11, 1931, the insured, according to the declaration, lost "the total and irrecoverable use" of one hand and one foot, and became totally and permanently disabled. Upon proof of his condition the company paid him the monthly benefits called for by the policy from October 11, 1931, to July 11, 1933, and during the same period waived the payment of semi-annual premiums. It refused to make a monthly payment in August, 1933, and refused the same month to waive a semi-annual premium, "asserting to the plaintiff as its ground for such refusal that since it appeared to the defendant that for some time past the plaintiff had not been continuously totally disabled within the meaning of the disability benefit provision of the policy, the defendant would make no further monthly disability payments, and that the premiums due on and after August 7, 1933, would be payable in conformity with the terms of the contract." Later, upon the expiration of a term of grace, "the defendant, on or about September 19, 1933, declared the policy as lapsed upon its records." Plaintiff has elected to treat the defendant's acts "as a repudiation and denunciation of the entire contract," relieving him on his part from any further obligation.

There are two counts to his declaration. In the first, after stating the foregoing facts, he claims the cash surrender value that the policy will have in February, 1969, if he lives until that time, the date being chosen with reference to his expectancy of life under the American Table of Mortality. This value, $1,408, is less than the amount necessary to give jurisdiction in accordance with the Judicial Code. Judicial Code, § 24; 28 U. S. C., § 41. In the second count, after stating the same facts, he claims for damages the total benefits that will be payable to him during the same period of expectancy, if he lives that long and his disability continues. The damages so computed are $15,900. No deduction is made on account of future premiums, for by hypothesis the disability will continue during life. The defendant demurred to both counts, stating in the demurrer that the declaration sets forth a cause of action for the benefits and premiums accruing prior to the date of the writ, and for nothing in excess thereof. In that view the recovery will be only $98, which is less than the jurisdictional amount. The District Court sustained the demurrer, and gave judgment for the defendant. The Court of Appeals for the First Circuit reversed. 78 F. (2d) 829. A writ of certiorari issued to resolve a claim of conflict with a decision of this court.

Upon the showing made in the complaint there was neither a repudiation of the policy nor such a breach of its provisions as to make conditional and future benefits the measure of recovery.

Repudiation there was none as the term is known to the law. Petitioner did not disclaim the intention or the duty to shape its conduct in accordance with the provisions of the contract. Far from repudiating those provisions, it appealed to their authority and endeavored to apply them. If the insured was still disabled, monthly benefits were payable, and there should have been a waiver of the premium. If he had recovered the use of hand or foot and was not otherwise disabled, his right to benefits had ceased, and the payment of the premium was again a contractual condition. There is nothing to show that the insurer was not acting in good faith in giving notice of its contention that the disability was over. *Mobley* v. *New York Life Insurance Co.*, 295 U. S. 632, 638. If it made a mistake, there was a breach of a provision of the policy with liability for any damages appropriate thereto. We do not pause at the moment to fix the proper measure. Enough in this connection that at that stage of the transaction there had been no renunciation or abandonment of the contract as a whole. *Mobley* v. *New York Life Insurance Co., supra; Dingley* v. *Oler,* 117 U. S. 490, 503; *Roehm* v. *Horst,* 178 U. S. 1, 14, 15; *Pierce* v. *Tennessee Coal, Iron & R. Co.,* 173 U. S. 1, 3, 11.

Renunciation or abandonment, if not effected at that stage, became consummate in the plaintiff's view at the end of the period of grace when the company declared the policy "lapsed upon its records." Throughout the plaintiff's argument the declaration of a lapse is treated as equivalent to a declaration that the contract is a nullity. But the two are widely different under such a policy as this.[1] The policy survived for many purposes as an enforcible obligation, though default in the payment of premiums had brought about a change of rights and liabilities. The insurer was still subject to a duty to give the insured the benefit of the stipulated surrender privileges, cash or new insurance. It was still subject to a duty upon proof within six months that the disability continued to reinstate the policy as if no default had occurred. None of these duties was renounced. None of them was questioned. Indeed, there is lacking an allegation that notice of the entry on the records was given to the plaintiff, or that what was recorded amounted to more than a private memorandum. In that respect the case is weaker for the plaintiff than *Mobley* v. *New York Life Insurance Co., supra,* decided at the last term. There also the controversy turned upon the rejection of a claim of disability under a like contract of insurance. The insurer took the ground that the disability had ended and that premiums would not be waived. Upon default it gave notice to the insured that the policy

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[1] See the cases collected in Vance on Insurance, 2d ed., pp. 283, 301, 302.

had lapsed. We held that the breach fell short of an unconditional abandonment. On the other hand, following the notice and before the service of a summons there were acts and declarations pointing to an understanding between insurer and insured that the lapse was not definitive, but was open to recall. These differences are such as to take from that decision the quality of a controlling precedent, though the analogy it offers is cogent and persuasive. Viewing the case before us independently, we hold that upon the facts declared in the complaint the insurer did not repudiate the obligation of the contract, but did commit a breach for which it is answerable in damages.

What the damages would be if there had been complete repudiation we do not now decide. Cf. *Kelly* v. *Security Mutual Life Insurance Co.,* 186 N. Y. 16; 78 N. E. 584; *O'Neill* v. *Supreme Council A. L. of H.,* 70 N. J. L. 410, 415; 57 Atl. 463. For breach short of repudiation or an intentional abandonment equivalent thereto, the damages under such a policy as this do not exceed the benefits in default at the commencement of the suit. Full justice will thus be done alike to insured and to insurer. The insured, if he proves that the benefits are due, will have a judgment effective to reinstate his policy. The insurer will be saved from a heavy, perhaps a crushing liability as the consequence of a claim of right not charged to have been made as a disingenuous pretense. Cf. *Armstrong* v. *Ross,* 61 W. Va. 38, 48; 55 S. E. 595. So the courts have held with an impressive concord of opinion.[2] *Federal Life Insurance Co.* v. *Rascoe,* 12 F.

[2] *Daley* v. *People's Building, Loan & Saving Assn.,* 178 Mass. 13, 18; 59 N. E. 452; *Howard* v. *Benefit Association of Railway Employees,* 239 Ky. 465, 468; 39 S. W. (2d) 657; *Woods* v. *Provident Life & Accident Insurance Co.,* 240 Ky. 398; 42 S. W. (2d) 499; *Indiana Life Endowment Co.* v. *Reed,* 54 Ind. App. 450, 460, 461; 103 N. E. 77; *Mutual Life Insurance Co.* v. *Marsh,* 186 Ark. 861, 869; 56 S. W.

(2d) 693, one of the few decisions to the contrary, was disapproved in *Mobley's* case (p. 639), and is now disapproved again.

We have no thought to suggest an invariable rule whereby the full value of a bargain may never be recovered for any breach of contract falling short of repudiation or intentional abandonment. All depends upon the circumstances. *Helgar Corporation* v. *Warner's Features, Inc.*, 222 N. Y. 449, 452, 453, 454; 119 N. E. 113.[3] There may be times when justice requires that irrespective of repudiation or abandonment the sufferer from the breach shall be relieved of a duty to treat the contract as subsisting or to hold himself in readiness to perform it in the future. *Roehm* v. *Horst, supra,* pp. 17, 18; *Nichols* v. *Scranton Steel Co.*, 137 N. Y. 471, 487; 33 N. E. 561. Generally this is so where the contract is

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(2d) 433; *Massachusetts Protective Assn.* v. *Jurney*, 188 Ark. 821, 826; 68 S. W. (2d) 455; *Cobb* v. *Pacific Mutual Life Insurance Co.*, 4 Cal. (2d) 565; *Brix* v. *People's Mutual Life Insurance Co.*, 2 Cal. (2d) 446; 41 P. (2d) 537; *Atkinson* v. *Railroad Employes Mutual Relief Society*, 160 Tenn. 158, 167, 168; 22 S. W. (2d) 631; *Atlantic Life Insurance Co.* v. *Serio*, 171 Miss. 726, 730; 157 So. 474; *Allen* v. *National Life & Accident Insurance Co.*, 228 Mo. App. 450, 452; 67 S. W. (2d) 534; *Puckett* v. *National Annuity Assn.*, 134 Mo. App. 501; 114 S. W. 1039; *Garbush* v. *Order of United Commercial Travelers*, 178 Minn. 535, 539; 228 N. W. 148; *Kimel* v. *Missouri State Life Insurance Co.*, 71 F. (2d) 921, 923; *Menssen* v. *Travelers' Insurance Co.*, 5 F. Supp. 114; *Ginsburg* v. *Pacific Mutual Life Insurance Co.*, 5 F. Supp. 296; *Hines* v. *Fidelity Mutual Life Insurance Co.*, 6 F. Supp. 692; *Kithcart* v. *Metropolitan Life Insurance Co.*, 1 F. Supp. 719; *Wyll* v. *Pacific Mutual Life Insurance Co.*, 3 F. Supp. 483; *Parks* v. *Maryland Casualty Co.*, 59 F. (2d) 737; cf. *Kelly* v. *Security Mutual Life Insurance Co.*, 186 N. Y. 16; 78 N. E. 584; *Killian* v. *Metropolitan Life Insurance Co.*, 251 N. Y. 44, 48; 166 N. E. 798.

[3] For a collection of the cases, see Williston, Contracts, vol. 2, §§ 864, 866, 867, 870; vol. 3, § 1290; and cf. Restatement, Law of Contracts, vol. 1, § 275.

a bilateral one with continuing obligations, as where a manufacturer has undertaken to deliver merchandise in instalments. *Norrington* v. *Wright,* 115 U. S. 188; *Wolfert* v. *Caledonia Springs Ice Co.,* 195 N. Y. 118; 88 N. E. 24. Even then, the rights that are his may depend upon the grounds of the rejection or the nature of the default, whether unintentional or wilful. *Helgar Corporation* v. *Warner's Features, Inc., supra.* On the other hand, a party to a contract who has no longer any obligation of performance on his side but is in the position of an annuitant or a creditor exacting payment from a debtor, may be compelled to wait for the instalments as they severally mature, just as a landlord may not accelerate the rent for the residue of the term because the rent is in default for a month or for a year. *McCready* v. *Lindenborn,* 172 N. Y. 400, 408; 65 N. E. 208; cf. *National Machine & Tool Co.* v. *Standard Shoe Machinery Co.,* 181 Mass. 275, 279; 63 N. E. 900; *Wharton & Co.* v. *Winch,* 140 N. Y. 287; 35 N. E. 589. With the aid of this analysis one discovers the rationale of the cases which have stated at times, though with needless generality, that by reason of the subject matter of the undertaking the rule applicable to contracts for the payment of money is not the same as that applicable for the performance of services or the delivery of merchandise. Cf. *Roehm* v. *Horst, supra,* at p. 17; *Moore* v. *Security Trust & Life Insurance Co.,* 168 Fed. 496, 503; *Howard* v. *Benefit Association of Railroad Employees,* 239 Ky. 465, 470; 39 S. W. (2d) 657; *Washington County* v. *Williams,* 111 Fed. 801, 810; Restatement, Law of Contracts, § 316. The root of any valid distinction is not in the difference between money and merchandise or between money and services. What counts decisively is the relation between the maintenance of the contract and the frustration of the ends it was expected to subserve.

The ascertainment of this relation calls for something more than the mechanical application of a uniform formula. To determine whether a breach avoids the contract as a whole one must consider what is necessary to work out reparation in varying conditions.

If that test be applied, the declaration will not stand. The plaintiff does not need redress in respect of unmatured instalments in order to put himself in a position to shape his conduct for the future. If he is already in default for the non-payment of a premium, he will not be in any worse predicament by multiplying the defaults thereafter. On the other hand, if his default is unreal because the premiums had been waived, the insurer will be estopped from insisting upon later premiums until the declaration of a lapse has been canceled or withdrawn. Besides, if the disability is permanent, there will be nothing more to pay. The law will be able to offer appropriate relief "where compensation is wilfully and contumaciously withheld." *Cobb* v. *Pacific Mutual Life Insurance Co.*, 4 Cal. (2d) 565; 51 P. (2d) 84.

We have refrained in what has been written from developing the distinction between an anticipatory breach and others. The line of division between the two has not always been preserved with consistency or clearness. To blur it is prejudicial to accuracy of thought as well as precision of terminology. Strictly an anticipatory breach is one committed before the time has come when there is a present duty of performance. *Roehm* v. *Horst, supra;* Pollock on Contracts, 9th ed., p. 293; Williston, Contracts, vol. 3, § 1296 *et seq.*, collecting the decisions. It is the outcome of words or acts evincing an intention to refuse performance in the future. On the other hand, there are times, as we have seen, when the breach of a present duty, though only partial in its extension, may confer upon the injured party the privilege at his election to deal with the contract as if broken altogether. A loose practice has been growing up whereby the breach on such occasions is spoken of as anticipatory, whereas in truth it is strictly present, though with consequences effective upon performance in the future. The declaration in the case at hand makes a showing of a present breach. It does not make a showing of a breach so wilful and material as to make acceleration of future benefits essential to the attainment of present reparation. *Helgar Corporation* v. *Warner's Features, Inc., supra.*

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

Reversed.

NORFOLK & WESTERN RAILWAY CO. *v.* NORTH CAROLINA EX REL. MAXWELL, COMMISSIONER OF REVENUE.

APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA.

No. 610. Argued March 6, 1936.—Decided March 30, 1936.

1. For ascertaining the net income of an interstate railway taxable within a particular State, a formula allocating operating revenues and operating expenses to the lines within that State by applying the average mileage prorate of the entire railway system, is generally speaking valid, though it may produce unconstitutional results in particular instances. P. 684.
2. A railway claiming that the use of such a formula operated arbitrarily to attribute net income to its lines within the State out of proportion to the income earned by them and thus in effect to tax income derived from its business outside of the State, was under the burden of proving this clearly; and the burden was not satisfied by proof that the lines in question were exceptionally expensive to operate unaccompanied by evidence to combat the possibility that they produced revenue correspondingly above the system average. P. 686.

208 N. C. 397; 181 S. E. 248, affirmed.

APPEAL from a judgment in favor of the State in a suit by the Railway Company to recover money exacted as income taxes.

Mr. F. M. Rivinus, with whom *Messrs. Theodore W. Reath, W. W. Coxe, Murray Allen,* and *Burton Craige* were on the brief, for appellant.

Mr. A. A. F. Seawell, Attorney General of North Carolina, with whom *Mr. Harry McMullan,* Assistant Attorney General, and *Mr. I. M. Bailey* were on the brief, for appellee.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The question is whether a statute of North Carolina laying a tax upon the net income of interstate railway companies has been so applied to the appellant as to violate the prohibitions of the Constitution of the United States.

The Norfolk & Western Railway Company, a Virginia corporation, has lines of railway in North Carolina, Virginia, Maryland, West Virginia, Kentucky and Ohio. Its lines in North Carolina are branches, connecting with the main line at Roanoke, Lynchburg and Abingdon, and running from those points of junction to Winston-Salem, Durham and Elkland. For the years 1927, 1928, and 1929, it made return to the Commissioner of Revenue of North Carolina that it had no taxable income. The Commissioner notified the company that the returns were erroneous, and made reassessments as follows: for 1927, \$29,727.04; for 1928, \$27,481.57; and for 1929, \$29,213.10, in all \$86,421.71. The amount so fixed was paid, and this suit was brought in accordance with an applicable statute to recover back the payment. The Superior Court of Wake County, refusing to confirm the report of a referee in favor of the taxpayer, gave judgment for the state. The Supreme Court of North Carolina affirmed, 208 N. C. 397; 181 S. E. 248, and the case is here upon appeal. Judicial Code, § 237, 28 U. S. C., § 344.

The net income of interstate railways doing business in North Carolina is taxed in accordance with the following formula (Public Laws of 1927, chapter 80, § 312; Public Laws of 1929, chapter 345, § 312): "And when their business is in part within and in part without the State, their net income within this State shall be ascertained by taking their gross 'operating revenues' within the State, including in their gross 'operating revenues' within this State the equal mileage proportion within this State of their interstate business, and deducting from their gross 'operating revenues' the proportionate average of 'operating expenses' or 'operating ratio' for their whole business, as shown by the Interstate Commerce Commission standard classification of accounts." The formula thus adopted is not void upon its face. *Pittsburgh, C., C. & St. Louis R. Co.* v. *Backus,* 154 U. S. 421, 430, 431; *State Railroad Tax Cases,* 92 U. S. 575, 608, 611; Louisville Board of Trade *v.* Indianapolis, C. & S. Traction Co., 34 I. C. C. 640, 642; Low Moor Iron Co. *v.* Chesapeake & Ohio Ry. Co., 42 I. C. C. 221, 227; cf. *Atlantic Coast Line R. Co.* v. *Doughton,* 262 U. S. 413. A division of revenues and costs in accordance with state lines can never be made for a unitary business with more than approximate correctness. There is a tendency, none the less, for rates to be so adjusted to expenses over different portions of a system as to produce, when averages are considered, a uniformity of net return, or a fair approach thereto.[1]

[1] See Huang, State Taxation of Railways in the United States, Columbia University Press, 1928, pp. 97, 98, 100, 188, 189; cf. Seligman, Essays in Taxation, 9th ed., p. 283; Census Bureau Bulletin 21, Commercial Valuation of Railway Operating Property in the U. S.: 1904, pp. 45, 50.

Thus mileage may have at times a relation to a tax upon net income which it may not bear to a property tax or even to one upon the value of a franchise. Cf. *Rowley* v. *Chicago & N. W. Ry. Co.,* 293 U. S. 102, 111; *Wallace* v. *Hines,* 253 U. S. 66, 69. Taxpayer and state would be swamped with administrative difficulties if left to struggle through every case without the aid of a formula of ready application. In the perplexities besetting the process of assessment the statute is the outcome of a reasonable endeavor to arrive at a proportion of general validity. *Pittsburgh, C., C. & St. L. Ry. Co.* v. *Backus, supra.* No contention to the contrary is made by the appellant.[2]

This is not to say that the tax is valid as imposed. A formula not arbitrary on its face or in its general operation may be unworkable or unfair when applied to a particular railway in particular conditions. Cf. *Hans Rees' Sons* v. *North Carolina,* 283 U. S. 123, 129, 132; *Southern Ry. Co.* v. *Kentucky,* 274 U. S. 76, 83, 88. A segment of the line may operate under handicaps resulting from the nature of the traffic, the topography of the country, the maladjustment or inadequacy of passenger or freight tariffs in one district or another. As applied to such a segment the average mileage prorate of the entire railway system may be an arbitrary test of the relation between revenue and expenses. Cf. *Northern Pacific Ry. Co.* v. *Department of Public Works,* 268 U. S. 39, 44; Low Moor Iron Co. *v.* Chesapeake & Ohio Ry. Co., *supra.* If this is made to appear with an ensuing burden on the taxpayer grossly in excess of the results of a more accurate apportionment, the statute to that extent

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[2] "In cases of the class examined, including the present case, the statutory formula is not invalid on its face without regard to the particular circumstances of the taxpayer." Appellant's brief, p. 40. "Clearly enough the Railway case must be proved specifically." p. 41.

is an unconstitutional endeavor to tax the income of a business in another jurisdiction. *Hans Rees' Sons* v. *North Carolina, supra.*

Appellant now insists, as it insisted in the courts below, that the operating expenses for its North Carolina branches were far in excess of those allowed by the Commissioner, who refused to depart from the statutory formula. There is evidence in the record giving support to that position, though its weight is contested by counsel for the state. If the evidence be accepted, the higher cost may be attributed to the mountainous terrain and the low density of traffic as well as to other causes which it is needless to develop. Up to that point the Railway took upon itself the burden of making out a case for the rejection of the formula. There, however, it stopped, declining to go farther. From the testimony of its witnesses we learn that actual expenses were greater in North Carolina than the average expenses apportioned to that state on the basis of the ratio between state and system mileage. We learn nothing from these witnesses as to the ratio between revenues, average and actual. For all that appears in the case developed by the Railway, actual gross revenues in North Carolina may have been so far in excess of average gross revenues computed under the statute as to neutralize the discrepancy between actual and average costs of operation. If such a counterbalance exists, appellant has not been injured through the application of the formula.

The state took up the case where the railway put it down. Witnesses for the state maintain that through the application of the formula the gross revenues of operation are underestimated to a greater extent than operating costs. They tell us that the effect of the rejection of the formula will be to allocate to the state 159% of the revenues produced by applying it. In support of that conclusion they make elaborate studies and analyses, which are exhibits in the case. From their testimony it appears that the general level of rates in territory classified as Southern is higher than that in territory classified as Northern or "Official." Cf. Sloss-Sheffield Steel & Iron Co. *v.* Louisville & N. R. Co., 35 I. C. C. 460, 467; Corporation Commission *v.* Norfolk & Western R. Co., 19 I. C. C. 303, 311; Southern Class Rate Investigation, 100 I. C. C. 513, 520, 645, 671; 109 I. C. C. 300, 324; 113 I. C. C. 200; 128 I. C. C. 567, 580. There is emphasis besides on a concession by the railway that the average system revenue per mile of line is only five times greater than that for the North Carolina branches, though the traffic density for the system is seven and a half times greater. Accountants for the railway criticize the studies and analyses with the accompanying computations as defective and misleading. They also take the position that there is no method of allocating revenues with any greater approach to certainty than by means of a mileage prorate. Whether for that reason or some other, they have not made an attempt to ascertain receipts, no matter how approximately, by any other method, as assuredly they would have tried to do if the statutory formula had been abolished altogether. By implication, if not expressly, the trial judge refused to yield assent to their position. Without finding the exact figures either for revenue or for expenses, he approved, at least in its main outline, the position of the state. "The evidence seems persuasive that if the actual gross operating revenues should be determined, the amount returned by the defendant [i. e., the railway] would be increased by a much greater proportion than the operating expenses in North Carolina are increased over the operating expenses determined by the use of the statutory formula." Upon appeal to the Supreme Court of the state, this finding was approved.

We are unable to accept the argument for the appellant that its burden was discharged when it gave evidence of the ratio between actual and average expenses while keeping silent as to the ratio between actual and average receipts. The statutory formula is not framed on an assumption that gross operating revenues are uniform actually for every mile throughout the system. It is not framed on an assumption that for every mile of the system there is uniformity of expense. Such assumptions, if made, would be contrary to notorious facts. What the formula does assume is this, that barring exceptional conditions there will be throughout the system such an average relation between revenues and expenses as will cause the net income of a part to vary, in proportion to the mileage, with the net income of the whole. The implications of the formula being what they are, a taxpayer does not escape the application of the statute by evidence directed to only one of the related terms. Its evidence to be effective must be directed to each of them alike, for only thus can the assumed relation between them be proved to be unreal. This taxpayer disclaims the duty and even the endeavor to respond to such a test. It varies the numerator of the fraction while accepting the denominator.

A finding that the statute, though fair upon its face, is oppressive toward the railway in its practical operation cannot rest upon so fragmentary and partial a showing of facts. We must bear in mind steadily that the burden is on the taxpayer to make oppression manifest by clear and cogent evidence. *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113, 121; *Maxwell* v. *Kent-Coffey Mfg. Co.,* 204 N. C. 365, 372, 374, 168 S. E. 397; 291 U. S. 642; *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Comm'n,* 266 U. S. 271, 280, 283. For 1927, it has had to pay a certain tax, for 1928 another, for 1929, another, a total of $86,421.71. Would it have had to pay less if net income had been ascertained without reference to mileage? Would the difference have been so great as to overpass the bounds of reason? In the evidence for the railway, there is no answer to those questions. On the other hand, the judge, who was the appointed trier of the facts, found the evidence for the state persuasive that the tax would have been as heavy and even heavier if the test of a mileage prorate had been excluded from the reckoning. The railway does not help its case greatly by its criticism of this evidence in one feature or another. The computations for the state may have been charged here and there with errors and omissions. They were not shattered so completely that the trier of the facts could not build on them at all. The criticisms too were not invulnerable, but were subject to the possibility of explanation or rejoinder. Indeed, apart from the computations, there was significance, if not compulsion, in facts admitted by the railway, though with the addition of many a gloss supposed to minimize their force. What weight should be ascribed to the whole composite mass was thus an inference of fact for the judge appointed to the task, and may not be disposed of here as an inference of law. All this becomes the plainer when we recall that the state in presenting computations did not lift the burden from the railway of satisfying the court, after all the evidence was in, that it was a victim of oppression. If different or supplementary computations were needful to that end, the railway, not the state, was under a duty to submit them.

In what has been written we have assumed that revenue can be apportioned between one state and another by a method more accurate than by that of a mileage prorate, however useful such a formula may be in expressing a relation between revenue and expenses. The appellant denies, though, it seems, rather guardedly, that the possibility exists. Even so, the trier of the facts was at liberty to discredit the denial. There was impeachment of the denial in the evidence for the state. There was impeachment as effective in the failure of appellant to lay before the court such studies as its accountants could supply, figuring out a fair apportionment to the best of its ability and then appraising the results. Something more was to be expected in the way of genuine endeavor before a sweeping *non possumus* could be accepted as conclusive. We do not now determine how incapacity, if made out, would affect the application of the statutory formula. For present purposes it suffices that there is no such showing now.

The judgment is

Affirmed.

DECISIONS PER CURIAM, FROM JANUARY 7 TO AND INCLUDING MARCH 30, 1936.*

No. 218. Cahn, Executor, *v.* United States. On writ of certiorari to the Court of Claims. Argued January 7, 8, 1936. Decided January 13, 1936. *Per Curiam:* The judgment is reversed upon the authority of *Knox* v. *McElligott,* 258 U. S. 546. *Mr. John W. Townsend,* with whom *Mr. Claude E. Koss* was on the brief, for petitioner. *Mr. Guy Patten,* with whom *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. Sewall Key* were on the brief, for the United States. By leave of Court, *Mr. E. J. Dimock* filed a brief as *amicus curiae* supporting the position of petitioner. Reported below: 81 Ct. Cls. 308; 10 F. Supp. 577.

No. —. In the Matter of Ralph J. Baker. January 13, 1936. The clerk of this Court having reported the failure of Ralph J. Baker, a member of the Bar of this Court to deposit a check of the clerk of this Court for $15.45 issued to him on November 10, 1934, as counsel for petitioner in the case of *Central Iron & Steel Co.* v. *United States,* No. 80, October Term, 1934; and it appearing to the Court that Ralph J. Baker had failed to answer or respond to four letters sent him by the Clerk of this Court under dates of February 1, 1935, February 28, 1935, April 6, 1935, and November 2, 1935, with respect to the said check; and a rule having issued December 9, 1935, directing him to show cause why he should not be disbarred from the practice of the law in this Court for conduct unbecoming a member of the Bar of this Court; and

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* For decisions on applications for certiorari, see *post,* pp. 699, 702; for rehearing, *post,* p. 726.

Ralph J. Baker, having made return to the rule, apologizing for his neglect, and the check issued to him having been deposited.

It is ordered that the respondent, Ralph J. Baker, be, and he is hereby, reprimanded for unjustified failure in a duty owed by him as a member of the Bar of this Court to respond to communications addressed to him by the Clerk of this Court pertaining to the business of the Court;

And it is further ordered that the rule to show cause aforesaid be, and it is hereby, discharged.

Mr. Ralph J. Baker, pro se.

No. —. In re Deppe. January 13, 1936. The petition for reconsideration of order denying motion of October 25, 1935, is denied. *Mr. William P. Deppe, pro se.*

No. —. In re Steele-Beck. January 13, 1936. Petition for leave to file suit against the State of Ohio is denied. *Florence Steele-Beck, pro se.*

No. —, original. Ex parte Minchella. January 13, 1936. The motion for leave to file petition for writ of habeas corpus is denied. *Mr. Charles Minchella, pro se.*

No. —, original. Ex parte Kattelman. January 13, 1936. The motion for leave to file petition for writ of prohibition is denied. *Mr. Patrick H. Cullen* for petitioner.

No. —, original. In re Marks. January 13, 1936. The application for leave to file petition for writ of habeas corpus is denied. *Mr. Laurence Marks, pro se.*

No. 12, original. Wisconsin *v.* Michigan. January 13, 1936. The supplemental report of the Special Master is received and ordered filed.

No. 14, original. Arkansas *v.* Tennessee. January 13, 1936. The answer and cross-bill of defendant is received and ordered filed. *Mr. Roy H. Beeler,* Attorney General of Tennessee, was on the Answer and Cross-Bill of defendant.

No. 15, original. Texas *v.* New Mexico et al. January 13, 1936. Motion of defendants to dismiss bill of complaint presented. *Mr. Frank H. Patton,* Attorney General of New Mexico, and *Messrs. A. T. Hannett* and *Pearce C. Rodey* for defendants, in support of the motion.

No. —, original. Ex parte Hauptmann. January 16, 1936. Motion for leave to file petition for writ of habeas corpus and for a stay of execution submitted by *Mr. Neil Burkinshaw* for the petitioner. Motion for leave to file petition for writ of habeas corpus denied.

No. 637. Helvering, Commissioner of Internal Revenue, *v.* Stevens et al. On petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit. January 20, 1936. *Per Curiam:* Petition for writ of certiorari granted. Judgment reversed on authority of *Helvering* v. *City Bank Farmers Trust Co.*, 296 U. S. 85. *Solicitor General Reed* for petitioner. *Mr. Carroll G. Walter* for respondents. Reported below: 79 F. (2d) 490.

No. —, original. Ex parte Duke. January 20, 1936. The motion for leave to file petition for writ of mandamus is denied. *Mr. Jesse C. Duke, pro se.*

No. 577. RICKERT RICE MILLS, INC., *v.* FONTENOT;
No. 578. DORE *v.* SAME;
No. 579. UNITED RICE MILLING PRODUCTS CO., INC., *v.* SAME;
No. 580. BATON ROUGE RICE MILL, INC., *v.* SAME;
No. 581. SIMON *v.* SAME;
No. 585. LEVY RICE MILLING CO., INC., *v.* SAME;
No. 586. FARMERS RICE MILLING CO., INC., *v.* SAME; and
No. 587. NOBLE-TROTTER RICE MILLING CO., INC., *v.* SAME. *Ante,* p. 110. January 20, 1936. Motion of counsel for petitioners that mandate issue forthwith granted; order to release funds signed and entered.

No. 16, original. GEORGIA *v.* MORGENTHAU ET AL. January 20, 1936. The motion to dismiss and answer of the defendants received and ordered filed. *Solicitor General Reed* for defendants, in support of the motion.

No. 657. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* COXEY. On petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit. February 3, 1936. *Per Curiam:* The petition for writ of certiorari is granted. Judgment reversed on authority of *Douglas* v. *Willcuts,* 296 U. S. 1; *Helvering* v. *Schweitzer,* 296 U. S. 551; *Helvering* v. *Blumenthal,* 296 U. S. 552; *Helvering* v. *Stokes,* 296 U. S. 551. *Solicitor General Reed* for petitioner. *Mr. Clarence E. Hall* for respondent. Reported below: 79 F. (2d) 661.

No. —, original. EX PARTE BROWN. February 3, 1936. The motion for leave to file petition for writ of habeas corpus is denied. *Mr. John Brown, pro se.*

No. 54. Legg *v.* St. John, Trustee. February 3, 1936. It is ordered by this Court that the opinion of this Court in this case be, and it hereby is, amended as follows:

That the word "recognized" appearing in line 5 from the bottom of page 3 be deleted and that the word "common" be substituted therefor so that the sentence will read as follows: "The term 'insurance' as there used referred only to legal reserve life insurance, the kind of insurance to which a cash surrender value was a common incident."

Reported as amended, 296 U. S. 489.

No. 312. Baltimore & Ohio R. Co. et al. *v.* United States et al. February 3, 1936. It is ordered that this case be restored to the docket and assigned for reargument on Monday, March 2 next.

No. 725. Levell *v.* Simpson, Warden. Appeal from the Supreme Court of Kansas. Jurisdictional statement distributed February 1, 1936. Decided February 10, 1936. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Moore* v. *Missouri,* 159 U. S. 673; *McDonald* v. *Massachusetts,* 180 U. S. 311; *Graham* v. *West Virginia,* 224 U. S. 616. *Mr. Harold E. Neibling* for appellant. No appearance for appellee. Reported below: 142 Kan. 892; 52 P. (2d) 372.

No. 396. Gause *v.* Detroit Trust Co., Receiver. Appeal from the Supreme Court of Michigan. Argued February 10, 1936. Decided February 17, 1936. *Per Curiam:* The motion of the appellee to dismiss the appeal herein is granted, and the appeal is dismissed for reason that the judgment sought here to be reviewed is based upon a non-federal ground adequate to support it. *Bell Tele-*

phone Co. v. *Van Dyke,* 296 U. S. 533; *Enterprise Irrigation District* v. *Canal Co.,* 243 U. S. 157, 162, 165; *Hale* v. *Lewis,* 181 U. S. 473, 479, 480; *Eustis* v. *Bolles,* 150 U. S. 361, 368, 370. *Messrs. Henry B. Graves* and *Mark L. Rowley* for appellant. *Mr. Jason L. Honigman,* with whom *Messrs. Alex J. Groesbeck* and *A. W. Sempliner* were on the brief, for appellee. Reported below: 271 Mich. 600; 261 N. W. 90.

No. —, original. Ex parte O'Dell. February 17, 1936. Motion for leave to file petition for writ of habeas corpus denied. *Mr. Henry C. O'Dell, pro se.*

No. —, original. Ex parte Phillips. February 17, 1936. Motion for leave to file petition for writ of habeas corpus denied. *Mr. Charles E. Phillips, pro se.*

No. —, original. Ex parte Maish. February 17, 1936. Motion for leave to file petition for writ of habeas corpus denied. *Mr. Earl Maish, pro se.*

No. 729. Jewish Mental Health Society *v.* Village of Hastings et al. Appeal from the Supreme Court of New York. Jurisdictional statement distributed February 15, 1936. Decided March 2, 1936. *Per Curiam:* The motion of the appellees to dismiss the appeal herein is granted, and the appeal is dismissed for the want of a substantial federal question. *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365, 387–389; *Jack Lewis, Inc.,* v. *Mayor and City Council of Baltimore et al.,* 290 U. S. 585; *Cusack Co.* v. *Chicago,* 242 U. S. 526, 530, 531; *Hadacheck* v. *Los Angeles,* 239 U. S. 394; *Reinman* v. *Little Rock,* 237 U. S. 171, 176, 177. *Messrs. Sidney Newborg* and *Edward M. Bassett* for appellant. *Mr. Frank H. Myers* for appellees. Reported below: 268 N. Y. 458; 198 N. E. 30.

No. 762. LANSING DROP FORGE CO. *v.* AMERICAN STATE SAVINGS BANK. Appeal from the Supreme Court of Michigan. Motion to dismiss distributed February 21, 1936. Decided March 2, 1936. *Per Curiam:* The motion of the appellee to dismiss the appeal herein granted, and the appeal is dismissed for the reason that the judgment sought here to be reviewed is based upon a non-federal ground adequate to support it. *Fox Film Corp.* v. *Muller,* 296 U. S. 207, 210, 211; *Petrie* v. *Nampa Irrigation District,* 248 U. S. 154, 157; *Enterprise Irrigation District* v. *Canal Co.,* 243 U. S. 157, 163, 164. *Mr. Alva M. Summins* for appellant. *Mr. Walter S. Foster* for appellee. Reported below: 273 Mich. 124; 262 N. W. 756.

No. —, original. EX PARTE GIBBONS. March 2, 1936. The motion for leave to file petition for writ of habeas corpus is denied. *Mr. Peter Gibbons, pro se.*

No. 555. GROSJEAN, SUPERVISOR OF PUBLIC ACCOUNTS OF LOUISIANA, ET AL. *v.* TEXAS COMPANY. Appeal from the District Court of the United States for the Eastern District of Louisiana. Argued March 5, 6, 1936. Decided March 9, 1936. *Per Curiam:* The decree granting an interlocutory injunction is affirmed. *Alabama* v. *United States,* 279 U. S. 229, 231; *United Gas Co.* v. *Public Service Comm'n,* 278 U. S. 322, 326, 327; *Langer* v. *Grandin Farmers Coöperative Elevator Co.,* 292 U. S. 605; *Baldwin, Commissioner,* v. *G. A. F. Seelig, Inc.,* 293 U. S. 522. *Messrs. Justin C. Daspit* and *E. L. Richardson,* with whom *Mr. Gaston L. Porterie,* Attorney General of Louisiana, and *Mr. F. A. Blanche* were on the brief, for appellants. *Mr. Roberts C. Milling,* with whom *Messrs. Charles H. Blish* and *Wm. K. Hall* were on the brief, for appellee.

No. 15, original. TEXAS *v.* NEW MEXICO ET AL. Argued March 3, 1936. Decided March 9, 1936. The motion to dismiss the bill of complaint is denied and the defendants are allowed twenty days within which to answer the bill. *Messrs. A. T. Hannett* and *Pearce C. Rodey,* with whom *Mr. Frank H. Patton,* Attorney General of New Mexico, was on the brief, for the defendants, in support of the motion. *Messrs. Richard F. Burges* and *H. Grady Chandler,* with whom *Mr. William McCraw,* Attorney General of Texas, and *Messrs. Walter S. Howe* and *Edwin Mechem* were on the brief, for the plaintiff, in opposition to the motion.

No. 638. MORAN, RECEIVER, *v.* LOUDOUN NATIONAL BANK OF LEESBURG, VIRGINIA. Appeal from the Supreme Court of Appeals of Virginia. Argued March 13, 1936. Decided March 16, 1936. *Per Curiam:* The motion of the appellee to dismiss the appeal herein is granted, and the appeal is dismissed for the want of a final judgment. *Haseltine* v. *Central Bank of Springfield,* 183 U. S. 130; *Schlosser* v. *Hemphill,* 198 U. S. 173, 175; *Louisiana Navigation Co.* v. *Oyster Commission,* 226 U. S. 99, 100, 101; *Coe* v. *Armour Fertilizer Works,* 237 U. S. 413, 418, 419. *Mr. Brice Clagett,* with whom *Messrs. Challen B. Ellis, George P. Barse, John S. Barbour,* and *Charles Pickett* were on the brief, for appellant. *Messrs. Edwin E. Garrett, J. Jordan Leake, A. S. Buford, Jr.,* and *Littleton M. Wickham* were on the brief for appellee. Reported below: 164 Va. 536; 180 S. E. 548.

No. 12, original. WISCONSIN *v.* MICHIGAN. March 16, 1936. Final Decree. See *ante,* p. 547.

No. —, original. EX PARTE UNITED STATES NATUROPATHIC ASSN. ET AL. March 16, 1936. The motion for leave to file petition for writ of mandamus is denied. *Mr. Julius I. Peyser* for petitioners.

No. —, original. ARIZONA *v.* CALIFORNIA ET AL. March 30, 1936. The motion for leave to file petition to intervene of Fred T. Colter et al. is denied.

DECISIONS GRANTING CERTIORARI, FROM JANUARY 7 TO AND INCLUDING MARCH 30, 1936.

No. 637. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* STEVENS ET AL. See *ante,* p. 693.

No. 629. MCCAUGHN, COLLECTOR OF INTERNAL REVENUE, *v.* REAL ESTATE LAND TITLE & TRUST CO. ET AL. January 20, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General Reed* for petitioner. *Mr. Franklin S. Edmonds* for respondents. Reported below: 79 F. (2d) 602.

No. 657. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* COXEY. See *ante,* p. 694.

No. 640. JONES *v.* SECURITIES AND EXCHANGE COMMISSION. February 3, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. H. I. Fishbach, Bainbridge Colby, James M. Beck, Harry O. Glasser,* and *J. N. Saye* for petitioner. *Solicitor General Reed* and *Mr. Charles E. Wyzanski, Jr.,* for respondent. Reported below: 79 F. (2d) 617.

No. 643. United States *v.* Knott, State Treasurer, et al. February 3, 1936. Petition for writ of certiorari to the Supreme Court of Florida granted. *Solicitor General Reed* for the United States. *Mr. C. L. Waller* for respondents. Reported below: 120 Fla. 580; 163 So. 64.

No. 674. Asiatic Petroleum Co., Ltd. *v.* Insular Collector of Customs. February 3, 1936. Petition for writ of certiorari to the Supreme Court of the Philippine Islands granted. *Mr. William D. Whitney* for petitioner. *Mr. Lee S. Tillotson* for respondent.

No. 659. Hines, Administrator of Veterans' Affairs, *v.* Stein, Guardian. February 3, 1936. Petition for writ of certiorari to the Superior Court of Pennsylvania granted. *Messrs. James T. Brady* and *Y. D. Mathes* for petitioner. *Mr. David A. Reed* for respondent. Reported below: 118 Pa. Super. Ct. 549; 180 Atl. 577.

No. 664. Tipton *v.* Atchison, Topeka & Santa Fe Ry. Co. February 10, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Herman A. Bachrack* for petitioner. *Messrs. Robert Brennan* and *Charles H. Woods* for respondent. Reported below: 78 F. (2d) 450.

No 667. The Arizona et al. *v.* Anelich, Administratrix. February 17, 1936. Petition for writ of certiorari to the Supreme Court of Washington granted. *Mr. Ralph S. Pierce* for petitioners. *Mr. Samuel B. Bassett* for respondent. Reported below: 183 Wash. 467; 49 P. (2d) 3.

No. 676. Beadle *v.* Spencer. February 17, 1936. Petition for writ of certiorari to the Supreme Court of California granted. *Mr. Harold M. Sawyer* for petitioner. *Mr. John L. McNab* for respondent. Reported below: 4 Cal. (2d) 313; 48 P. (2d) 678.

No. 696. Chicago Great Western R. Co. *v.* Rambo, Administratrix. February 17, 1936. Petition for writ of certiorari to the Supreme Court of Minnesota granted. *Mr. Harry S. Stearns* for petitioner. *Messrs. H. E. Stassen* and *Elmer J. Ryan* for respondent. Reported below: 195 Minn. 331; 263 N. W. 112.

No. 766. Zimmern et al. *v.* United States. March 2, 1936. The motion for leave to proceed *in forma pauperis* is granted. The petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit is also granted. *Mr. Lawrence Koenigsberger* for petitioners. No appearance for the United States. Reported below: 79 F. (2d) 703.

No. 747. Wallace, Secretary of Agriculture, et al. *v.* Cutten. March 9, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Solicitor General Reed* for petitioners. No appearance for respondent. Reported below: 80 F. (2d) 140.

Nos. 767 and 768. Duplate Corporation et al. *v.* Triplex Safety Glass Co. March 30, 1936. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. William Watson Smith* and *Leon E. Hickman* for petitioners. *Messrs. William B. Greeley, Ambrose L. O'Shea,* and *Drury W. Cooper* for respondent. Reported below: 81 F. (2d) 352.

No. 774. Koshland *v.* Helvering, Commissioner of Internal Revenue. March 30, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. John C. Altman* for petitioner. *Solicitor General Reed* for respondent. Reported below: 81 F. (2d) 641.

No. 782. Missouri *v.* Ross, Trustee, et al. March 30, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Gilbert Lamb* for petitioner. *Mr. Edgar H. Wayman* for respondents. Reported below: 80 F. (2d) 329.

No. 838. Morehead, Warden, *v.* People ex rel. Tipaldo. March 30, 1936. Petition for writ of certiorari to the Supreme Court of New York granted. *Mr. Henry Epstein* for petitioner. *Messrs. Nathan L. Miller, Challen B. Ellis, Arthur Levitt,* and *Harold Allen Gates* for respondent. Reported below: 270 N. Y. 233.

DECISIONS DENYING CERTIORARI, FROM JANUARY 7 TO AND INCLUDING MARCH 30, 1936.

No. 665. Mathy, Administratrix, *v.* Chicago & Northwestern Ry. Co. January 13, 1936. Petition for writ of certiorari to the Supreme Court of Michigan and motion for leave to proceed further *in forma pauperis* denied. *Mr. Meredith P. Sawyer* for petitioner. *Mr. William T. Faricy* for respondent. Reported below: 273 Mich. 301; 262 N. W. 917.

No. 613. McKinley, Trustee, *v.* Hirschfeld, Executor. January 13, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Thomas A. Flynn* for petitioner. *Mr. Henderson Stockton* for respondent. Reported below: 78 F. (2d) 124.

No. 624. Wexler *v.* United States. January 13, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Julius I. Puente* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. Sewall Key, Earl C. Crouter,* and *W. Marvin Smith* for the United States. Reported below: 79 F. (2d) 526.

No. 653. Wilson *v.* Bernitz Furnace Appliance Co. January 13, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Louis Necho* for petitioner. *Mr. Harrison F. Lyman* for respondent. Reported below: 79 F. (2d) 442.

No. 633. Bishop, Administrator, et al. *v.* St. Joseph-Chicago Steamship Co. January 20, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit and motion for leave to proceed further *in forma pauperis* denied. *Mr. Justus Chancellor* for petitioners. *Messrs. Charles R. Hickox* and *Frederick L. Leckie* for respondent. Reported below: 78 F. (2d) 984.

No. 621. Pennsylvania ex rel. Margiotti, Attorney General, *v.* Kyle, Acting Collector, et al. January 20, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Charles J. Margiotti* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. David E. Hudson, Sewall Key,* and *Joseph M. Jones* for respondents. Reported below: 79 F. (2d) 520.

No. 627. Minton *v.* Coast Property Corp. et al. January 20, 1936. Petition for writ of certiorari to the Supreme Court of Oregon denied. *Sadie Minton, pro se. Mr. John S. Coke* for respondents. Reported below: 151 Ore. 208; 46 P. (2d) 1029.

No. 630. Timmons *v.* Virginia. January 20, 1936. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia denied. *Messrs. Charles C. Collins* and *John Joseph Baecher* for petitioner. *Mr. John N. Sebrell* for respondent.

No. 632. Aetna Insurance Co. et al. *v.* Atlantic Coast Line R. Co. January 20, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Alexander H. Sands* and *J. Gordon Bohannan* for petitioners. *Mr. Thomas W. Davis* for respondent. Reported below: 79 F. (2d) 463.

No. 647. Fretwell *v.* Gillette Safety Razor Co. January 20, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Herbert J. Jacobi* and *I. H. Perskin* for petitioner. *Mr. George P. Dike* for respondent. Reported below: 78 F. (2d) 868.

No. 652. PHILADELPHIA *v.* STANDARD OIL CO. January 20, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. G. Coe Farrier* for petitioner. *Mr. Wm. Clarke Mason* for respondent. Reported below: 79 F. (2d) 764.

No. 666. COMPANIA DE INVERSIONES INTERNACIONALES *v.* INDUSTRIAL MORTGAGE BANK OF FINLAND. January 20, 1936. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Jerome S. Hess* for petitioner. *Mr. Gordon M. Buck* for respondent. Reported below: 269 N. Y. 22; 198 N. E. 617.

No. 707. SHORES *v.* UNITED STATES. February 3, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Otto Christensen* for petitioner. *Solicitor General Reed, Assistant Attorney General Keenan,* and *Mr. Wm. W. Barron* for the United States. Reported below: 80 F. (2d) 942.

No. 634. BENTON *v.* UNITED STATES. February 3, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Murray Allen* for petitioner. *Solicitor General Reed, Assistant Attorney General Keenan,* and *Mr. Mahlon D. Kiefer* for the United States. Reported below: 80 F. (2d) 162.

No. 639. JONES *v.* SECURITIES AND EXCHANGE COMMISSION. February 3, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. H. I. Fishbach, James M. Beck, Harry O. Glasser, J. N. Saye,* and *Bainbridge Colby* for petitioner.

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Solicitor General Reed and *Mr. Charles E. Wyzanski, Jr.*, for respondent. Reported below: 79 F. (2d) 617.

No. 644. WITHERS, COMMISSIONER OF BANKING, *v.* KNOTT, STATE TREASURER, ET AL.; and

No. 645. SAME *v.* SNEDIGAR ET AL. February 3, 1936. Petition for writs of certiorari to the Supreme Court of Florida denied. *Messrs. Saul Nemser* and *Herbert V. Feibelman* for petitioner. *Messrs. C. L. Waller* and *Otto C. Stegemann* for respondents in No. 644. *Messrs. Robert H. Anderson* and *Thomas H. Anderson* for respondents in No. 645. Reported below: 120 Fla. 580, 596; 163 So. 64, 71.

No. 654. KNOTTS *v.* FIRST CAROLINAS JOINT STOCK LAND BANK. February 3, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Cole L. Blease* for petitioner. *Messrs. J. E. Belser* and *Irvine F. Belser* for respondent. Reported below: 79 F. (2d) 1001.

No. 661. BASFORD *v.* STANDARD SHIPPING CO. February 3, 1936. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Silas B. Axtell* for petitioner. *Messrs. Vernon Sims Jones* and *Raymond Parmer* for respondent. Reported below: 244 App. Div. 780; 280 N. Y. S. 785.

No. 690. WHITE, GUARDIAN, *v.* O'NEAL, RECEIVER. February 3, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Wm. B. R. Guion* and *R. A. Nunn* for petitioner. No appearance for respondent. Reported below: 79 F. (2d) 835.

No. 635. Wilson *v.* Carroll et al. February 3, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Leslie R. Hewitt* for petitioner. No appearance for respondents. Reported below: 79 F. (2d) 1022.

Nos. 641 and 642. Tetzke *v.* Trust No. 2988. February 3, 1936. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Meyer Abrams* and *Max Shulman* for petitioner. *Messrs. Benjamin V. Becker* and *Max Swiren* for respondent.

Nos. 668 and 669. Trust Company of Chicago, Successor Trustee, *v.* Trust No. 2988. February 3, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Bernhardt Frank* for petitioner. *Messrs. Benjamin V. Becker* and *Max Swiren* for respondent. Reported below: 81 F. (2d) 1022, 1023.

No. 646. Delaware, Lackawanna & Western R. Co. *v.* Industrial Board. February 3, 1936. Petition for writ of certiorari to the Appellate Division of the Supreme Court of New York denied. *Mr. Louis L. Babcock* for petitioner. *Messrs. Henry Epstein* and *Jos. A. McLaughlin* for respondent.

No. 662. Hunt, Receiver, *v.* American Steel Foundries. February 3, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Charles P. Taft* and *Edward P. Moulinier* for petitioner. *Messrs. Joseph S. Graydon* and *Gregor B.*

Moormann for respondent. Reported below: 79 F. (2d) 558.

No. 680. Alford, Domiciliary Administrator, et al. *v.* Cornell. February 3, 1936. Petition for writ of certiorari to the Surrogate's Court, New York County, New York, denied. *Messrs. W. Morton Carden* and *Denton Dunn* for petitioners. *Mr. Walter H. Merritt* for respondent. Reported below: 242 App. Div. 562, 276 N. Y. S. 14; 267 N. Y. 456, 196 N. E. 396.

No. 683. John E. Moore Co. *v.* Pan American Petroleum & Transport Co.; and

No. 684. Pan American Petroleum & Transport Co. *v.* The Margaret A. Moran. February 3, 1936. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Anthony V. Lynch, Jr.*, for petitioner in No. 683. *Mr. Chauncey I. Clark* for respondent in No. 683 and petitioner in No. 684. *Mr. Horace L. Cheyney* for respondent in No. 684. Reported below: 79 F. (2d) 2.

No. 721. Taylor et al. *v.* United States. February 10, 1936. 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. Hal Lindsay* for petitioners. No appearance for the United States. Reported below: 80 F. (2d) 604.

No. 726. Hector *v.* Smith, Warden, et al. February 10, 1936. Petition for writ of certiorari to the Supreme Court of California, and motion for leave to proceed further *in forma pauperis*, denied. *Mr. Ed Hector, pro se.* No appearance for respondents.

No. 672. Gleckman *v.* United States. February 10, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Patrick J. Ryan* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. John MacC. Hudson, Sewall Key,* and *Earl C. Crouter* for the United States. Reported below: 80 F. (2d) 394.

No. 673. Emrich et al. *v.* Erickson, Trustee. February 10, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. William M. Giller* for petitioners. *Mr. Benjamin Segal* for respondent. Reported below: 78 F. (2d) 858.

No. 682. Remington Rand, Inc. *v.* General Fireproofing Co. February 10, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Harrison M. Brooks* for petitioner. No appearance for respondent. Reported below: 77 F. (2d) 666.

No. 685. Lucas *v.* United States. February 10, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. Cleo Thompson* for petitioner. *Solicitor General Reed, Assistant Attorney General Keenan,* and *Messrs. William W. Barron* and *Lee A. Jackson* for the United States. Reported below: 80 F. (2d) 372.

No. 695. Hogue et al. *v.* Wise. February 10, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. John A. Marzall, Theodore A. Hostetler,* and *Walter F. Murray* for petitioners. *Mr. Charles W. Gore* for respondent.

No. 700. Madden *v.* United States. February 10, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Thomas H. Mahony* for petitioner. *Solicitor General Reed, Assistant Attorney General Keenan,* and *Messrs. Paul A. Freund* and *William W. Barron* for the United States. Reported below: 80 F. (2d) 672.

No. 675. Perkins *v.* United States. February 17, 1936. Petition for writ of certiorari to the Court of Claims denied. *Mr. H. H. Shelton* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. John MacC. Hudson* and *Norman D. Keller* for the United States. Reported below: 81 Ct. Cls. 898; 12 F. Supp. 481.

No. 677. Electric Boat Co. *v.* United States. February 17, 1936. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Sol M. Stroock, Frederic D. McKenney, John S. Flannery,* and *G. Bowdoin Craighill* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Paul A. Sweeney* and *Lee A. Jackson* for the United States. Reported below: 81 Ct. Cls. 361.

No. 678. National Cash Register Co. *v.* United States. February 17, 1936. Petition for writ of certiorari to the Court of Claims denied. *Mr. Bernhard Knollenberg* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. J. Louis Monarch* for the United States. Reported below: 81 Ct. Cls. 471; 10 F. Supp. 687.

No. 687. Wichita Association of Credit Men et al. *v.* Depew et al.; and

No. 688. SAME *v.* KANSAS EX REL. BECK, ATTORNEY GENERAL. February 17, 1936. Petition for writs of certiorari to the Supreme Court of Kansas denied. *Mr. W. L. Cunningham* for petitioners. No appearance for respondents. Reported below: 142 Kan. 403; 49 P. (2d) 1041.

No. 694. OHIO HARDWARE MUTUAL INSURANCE CO. *v.* NORTHEAST GEORGIA LAND CO., INC. ET AL. February 17, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Alex W. Smith, Jr.,* for petitioner. *Mr. Edgar Watkins* for respondents. Reported below: 79 F. (2d) 753.

No. 697. GALATAS *v.* UNITED STATES;

No. 698. FARMER *v.* SAME; and

No. 699. MULLOY *v.* SAME. February 17, 1936. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. James Daleo* and *Wm. G. Lynch* for petitioners. *Solicitor General Reed* and *Messrs. Brian McMahon* and *William W. Barron* for the United States. Reported below: 80 F. (2d) 15.

No. 701. N. P. SEVERIN CO. ET AL. *v.* YOUNG. February 17, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Walter L. Clark* for petitioners. No appearance for respondent. Reported below: 79 F. (2d) 884.

No. 702. VEOLAY, INC., ET AL. *v.* UNITED STATES. February 17, 1936. Petition for writ of certiorari to the Court of Customs and Patent Appeals denied. *Mr.*

Thomas M. Lane for petitioners. *Solicitor General Reed* and *Mr. Joseph R. Jackson* for the United States. Reported below: 23 C. C. P. A. (Cust.) 101.

No. 765. KRISTY *v.* CALIFORNIA. March 2, 1936. Petition for writ of certiorari to the Supreme Court of California, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Joseph Kristy, pro se.* No appearance for respondent. Reported below: 4 Cal. (2d) 504; 50 P. (2d) 798.

No. 517. TRINIDAD ET AL. *v.* THE ROMAN CATHOLIC ARCHBISHOP OF MANILA. March 2, 1936. The motion of the respondent for writ of certiorari to correct a diminution of the record is granted. The petition for writ of certiorari to the Supreme Court of the Philippine Islands is denied. *Mr. Antonio M. Opisso* for petitioners. *Mr. Gabriel La O* for respondent.

No. 658. GALVESTON *v.* UNITED STATES. March 2, 1936. Petition for writ of certiorari to the Court of Claims denied. *Messrs. T. W. Lain* and *Bryan F. Williams* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. John MacC. Hudson* and *Sewall Key* for the United States. Reported below: 81 Ct. Cls. 371; 10 F. Supp. 810.

No. 681. FOURCHY *v.* UNITED STATES. March 2, 1936. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Hyman M. Goldstein, William E. Leahy,* and *William J. Hughes, Jr.,* for petitioner. *Solicitor General Reed* and *Assistant Attorney General Morris* for the United States. Reported below: 81 Ct. Cls. 967.

No. 689. The Lambs *v.* United States. March 2, 1936. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Harvey L. Rabbitt* and *Loring M. Black* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. Sewall Key* for the United States. Reported below: 81 Ct. Cls. 216; 8 F. Supp. 737.

No. 691. Dixie Margarine Co. *v.* United States. March 2, 1936. Petition for writ of certiorari to the Court of Claims denied. *Mr. George N. Murdock* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. John MacC. Hudson* and *Sewall Key* for the United States. Reported below: 81 Ct. Cls. 944; 12 F. Supp. 543.

No. 693. Stock Market Finance, Inc., et al. *v.* Securities and Exchange Commission. March 2, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Joseph Glass* for petitioners. *Solicitor General Reed* and *Mr. Charles E. Wyzanski, Jr.,* for respondent. Reported below: 79 F. (2d) 1010.

No. 703. Metropolitan Building Co. *v.* United States. March 2, 1936. Petition for writ of certiorari to the Court of Claims denied. *Messrs. James H. Douglas* and *Charles D. Hamel* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. Sewall Key* for the United States. Reported below: 81 Ct. Cls. 924; 12 F. Supp. 537.

No. 704. United States ex rel. Pattison, Administrator, et al. *v.* Ickes, Secretary of the Interior.

March 2, 1936. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Webster Ballinger* and *Thomas L. Sloan* for petitioners. *Solicitor General Reed, Assistant Attorney General Blair,* and *Messrs. Paul A. Freund* and *Pedro Capo-Rodriquez* for respondent. Reported below: 65 App. D. C. 116; 80 F. (2d) 708.

No. 705. County of Prince William *v.* United States. March 2, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Raymond M. Hudson* for petitioner. *Solicitor General Reed, Assistant Attorney General Blair,* and *Mr. G. A. Iverson* for the United States. Reported below: 79 F. (2d) 1007.

No. 706. Twin City Barge & Gravel Co. *v.* Whalen. March 2, 1936. Petition for writ of certiorari to the Appellate Court of Illinois, Third District, denied. *Messrs. Edwin A. Swingle, W. E. Moser, William H. Allen,* and *H. F. Driemeyer* for petitioner. *Messrs. Henry I. Green* and *Emil J. Verlie* for respondent. Reported below: 280 Ill. App. 596.

No. 708. Rice et al. *v.* United Electric Coal Companies. March 2, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. George W. Dowell* and *Frank K. Nebeker* for petitioners. *Messrs. William M. Acton* and *Ralph F. Lesemann* for respondent. Reported below: 80 F. (2d) 1.

No. 711. Oregon Short Line R. Co. *v.* Claris. March 2, 1936. Petition for writ of certiorari to the Supreme Court of Idaho denied. *Mr. George H. Smith* for petitioner. *Mr. Roy L. Black* for respondent. Reported below: 56 Idaho 169; 51 P. (2d) 217.

No. 713. Alton R. Co. *v.* Industrial Commission of Illinois et al. March 2, 1936. Petition for writ of certiorari to the Circuit Court of McLean County, Illinois, denied. *Messrs. Silas H. Strawn* and *Harold A. Smith* for petitioner. *Mr. James A. Light* for respondents.

No. 716. Breslin *v.* Boston & Maine Railroad. March 2, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Edward O. Proctor* for petitioner. *Mr. Carl C. Jones* for respondent. Reported below: 80 F. (2d) 749.

No. 719. Berthold-Jennings Lumber Co. et al. *v.* St. Louis, Iron Mountain & Southern Ry. Co. et al. March 2, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Lee B. Ewing, Samuel A. Ettelson,* and *Erwin M. Treusch* for petitioners. *Mr. Thomas T. Railey* for respondents. Reported below: 80 F. (2d) 32.

No. 728. Bliss *v.* Bliss. March 2, 1936. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Julius I. Peyser* for petitioner. *Mr. George P. Hoover* for respondent. Reported below: 65 App. D. C. 147; 81 F. (2d) 411.

No. 736. Simpkins *v.* McDermott. March 2, 1936. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Raymond M. Hudson* for petitioner. No appearance for respondent. Reported below: 65 App. D. C. 123; 81 F. (2d) 257.

No. 714. LOUGHMAN, RECEIVER, *v.* WITTNEBEL. March 2, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. George P. Barse, Charles E. Wainwright,* and *Brice Clagett* for petitioner. *Mr. Charles H. Tuttle* for respondent. Reported below: 80 F. (2d) 222.

Nos. 717 and 718. BRUCE ET AL. *v.* GLOBE INDEMNITY CO. March 2, 1936. Petition for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Charles Kerr* for petitioners. *Mr. Ralph A. Barney* for respondent. Reported below: 81 F. (2d) 143.

No. 720. JEFFERSON ISLAND SALT MINING CO., INC. ET AL. *v.* LOUISIANA. March 2, 1936. Petition for writ of certiorari to the Supreme Court of Louisiana denied. MR. JUSTICE BUTLER took no part in the consideration or decision of this application. *Messrs. John D. Miller* and *Walter J. Burke* for petitioners. *Messrs. Gaston L. Porterie, E. Howard McCaleb,* and *Eugene H. Walet, Jr.,* for respondent. Reported below: 183 La. 304; 163 So. 145.

No. 722. NORTHERN PACIFIC TERMINAL CO. *v.* PORTLAND ET AL. March 2, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. John F. Reilly* and *James G. Wilson* for petitioner. *Mr. Frank S. Grant* for respondents. Reported below: 80 F. (2d) 738.

No. 723. Southeastern Brewing Co. *v.* Blackwell, Secretary of State, et al. March 2, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Hughes Spalding, John A. Sibley,* and *R. Beverly Herbert* for petitioner. *Mr. Paul B. Eaton* for respondents. Reported below: 80 F. (2d) 607.

No. 730. Grand Trunk Western R. Co. *v.* H. W. Nelson Co., Inc. March 2, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. H. V. Spike* for petitioner. *Mr. Bigham D. Eblen* for respondent. Reported below: 80 F. (2d) 986.

No. 738. Shepherd, Trustee in Bankruptcy, *v.* Banking & Trust Company of Jonesboro, Trustee, et al. March 2, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Robert Burrow* for petitioner. *Messrs. J. H. Winston* and *Samuel C. Williams* for respondents. Reported below: 79 F. (2d) 767.

No. 778. Jones *v.* Florida. March 9, 1936. Petition for writ of certiorari to the Supreme Court of Florida, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Michael C. Jones, pro se.* No appearance for respondent. Reported below: 122 Fla. 307; 165 So. 33.

No. 724. Cinema Supplies, Inc. et al. *v.* Western Electric Co., Inc. et al. March 9, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Stanley B. Houck* for petitioners. *Mr. A. C. Paul* for respondents. Reported below: 80 F. (2d) 106.

No. 731. Street, Trustee, *v.* Pacific Indemnity Co. March 9, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Clarence A. Linn* for petitioner. *Mr. Charles A. Strong* for respondent. Reported below: 79 F. (2d) 68.

No. 732. Richards *v.* United States. March 9, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Robert W. Wilson* for petitioner. *Solicitor General Reed* and *Messrs. John MacC. Hudson, Sewall Key,* and *John G. Remey* for the United States. Reported below: 79 F. (2d) 797.

No. 734. Mann *v.* Schneeberger. March 9, 1936. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Frederick A. Mann, pro se. Mr. Eugene Van Voorhis* for respondent. Reported below: 269 N. Y. 558; 199 N. E. 669.

No. 735. Calf Leather Tanners' Assn. et al. *v.* Morgenthau, Secretary of the Treasury. March 9, 1936. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. A. K. Shipe* for petitioners. *Solicitor General Reed, Assistant Attorney General Morris,* and *Mr. Paul A. Sweeney* for respondent. Reported below: 65 App. D. C. 93; 80 F. (2d) 536.

No. 737. Peoples Bank & Trust Co. *v.* United States Fidelity & Guaranty Co. et al. March 9, 1936.

Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Leonard Belford* and *Roswell S. Nichols* for petitioner. No appearance for respondents. Reported below: 79 F. (2d) 642.

No. 740. R. J. Reynolds Tobacco Co. *v.* Robertson, Collector of Internal Revenue. March 9, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Alexander H. Sands* for petitioner. *Solicitor General Reed* and *Messrs. John MacC. Hudson, Sewall Key, J. Louis Monarch,* and *Joseph M. Jones* for respondent. Reported below: 80 F. (2d) 966.

No. 744. Newton, Trustee in Bankruptcy, *v.* Colorado National Bank. March 9, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Henry E. Lutz* for petitioner. *Mr. Frank N. Bancroft* for respondent. Reported below: 80 F. (2d) 696.

No. 750. Lawyers Mortgage Co. *v.* Anderson, Collector of Internal Revenue. March 9, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Harry W. Forbes* for petitioner. *Solicitor General Reed* and *Messrs. Sewall Key* and *Maurice J. Mahoney* for respondent. Reported below: 79 F. (2d) 1001.

No. 790. Driscoll *v.* United States. March 16, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Clyde A. Driscoll, pro se.* No appearance for the United States. Reported below: 80 F. (2d) 59.

No. 739. Wisconsin Tax Commission *v.* Newport Company et al. March 16, 1936. Petition for writ of certiorari to the Supreme Court of Wisconsin denied. *Messrs. J. E. Finnegan* and *Herbert H. Naujoks* for petitioner. *Mr. Edmund B. Shea* for respondents. Reported below: 219 Wis. 293; 261 N. W. 884.

Nos. 741 and 742. Fourth National Bank *v.* Gainesville National Bank et al. March 16, 1936. Petition for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Paul McMahon* for petitioner. No appearance for respondents. Reported below: 80 F. (2d) 490, 492.

No. 748. Carpenter et al., Trustees, *v.* White, Collector of Internal Revenue; and

No. 749. Parkhill Manufacturing Co. *v.* Same. March 16, 1936. Petition for writs of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Burton E. Eames* and *R. Gaynor Wellings* for petitioners. *Solicitor General Reed* and *Messrs. Sewall Key, John G. Remey,* and *Lee A. Jackson* for respondent. Reported below: 80 F. (2d) 145.

No. 751. Title Guarantee & Trust Co. *v.* Bowers, Executor. March 16, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Joseph V. McKee* for petitioner. *Solicitor General Reed* and *Messrs. Sewall Key* and *Maurice J. Mahoney* for respondent. Reported below: 79 F. (2d) 1013.

No. 753. Fradkin *v.* United States. March 16, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Osmond K. Fraenkel* for petitioner. *Solicitor General Reed* and *Messrs. Brian McMahon* and *William W. Barron* for the United States. Reported below: 81 F. (2d) 56.

No. 754. Ridder *v.* Ridder. March 16, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. J. George Silberstein* for petitioner. *Mr. Max D. Steuer* for respondent. Reported below: 79 F. (2d) 524.

No. 755. Mississippi Cottonseed Products Co. *v.* Sheldon, Collector of Internal Revenue. March 16, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Marcellus Green* and *Garner W. Green* for petitioner. *Solicitor General Reed* and *Messrs. John MacC. Hudson* and *Sewall Key* for respondent. Reported below: 81 F. (2d) 169.

No. 756. New York Central R. Co. *v.* Cooley, Administrator. March 16, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles E. Nichols* for petitioner. *Mr. Arthur B. Lanphier* for respondent. Reported below: 80 F. (2d) 816.

No. 808. Bimbo *v.* United States. March 30, 1936. 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. *Messrs. Stanley H. Fischer* and *Norman Fischer* for petitioner. *Solicitor General Reed* and *Messrs. Brian Mc-*

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Mahon and *Wm. W. Barron* for the United States. Reported below: 82 F. (2d) 852.

No. 733. BLUME *v.* UNITED STATES. March 30, 1936. The motion for certiorari to correct a diminution of the record is denied. Petition for writ of certiorari to the Court of Claims denied. *Mr. Thomas D. Aitken* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Paul A. Sweeney* and *James A. Cosgrove* for the United States. Reported below: 81 Ct. Cls. 210.

No. 757. LEE, COMPTROLLER, ET AL. *v.* FREEMAN ET AL., RECEIVERS. March 30, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Cary D. Landis, H. E. Carter,* and *J. V. Keen* for petitioners. No appearance for respondents. Reported below: 79 F. (2d) 868.

No. 761. GILLIS *v.* WELCH, COLLECTOR OF INTERNAL REVENUE. March 30, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Ralph W. Smith, George H. Koster,* and *L. A. Luce* for petitioner. *Solicitor General Reed* and *Messrs. John MacC. Hudson* and *Sewall Key* for respondent. Reported below: 80 F. (2d) 165.

No. 764. NEW YORK, CHICAGO & ST. LOUIS RAILROAD CO. *v.* MEEK, ADMINISTRATRIX. March 30, 1936. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. Lon O. Hocker, James C. Jones, Frank Y. Gladney,* and *James C. Jones, Jr.,* for petitioner. *Mr. William H. Allen* for respondent. Reported below: 337 Mo. 1188; 88 S. W. (2d) 333.

No. 771. Scranton-Lackawanna Trust Co., Trustee, *v.* Commissioner of Internal Revenue. March 30, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. H. Kennedy McCook* for petitioner. *Solicitor General Reed, Assistant Attorney General Jackson,* and *Messrs. Sewall Key, J. Louis Monarch,* and *A. F. Prescott* for respondent. Reported below: 80 F. (2d) 519.

No. 795. E. K. Wood Lumber Co. *v.* Andersen, Administratrix. March 30, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Cassius E. Gates* and *Claude E. Wakefield* for petitioner. No appearance for respondent. Reported below: 81 F. (2d) 161.

No. 759. Mitchell Irrigation District *v.* Nebraska ex rel. Sorenson, Attorney General, et al. March 30, 1936. Petition for writ of certiorari to the Supreme Court of Nebraska denied. *Messrs. James A. Greenwood, Thomas M. Morrow,* and *William Morrow* for petitioner. *Messrs. William H. Wright, Claibourne G. Perry,* and *Thomas F. Neighbors* for respondents. Reported below: 129 Neb. 586; 262 N. W. 543.

No. 760. Cole et ux. *v.* Norristown-Penn Trust Co.; and

No. 801. Norristown-Penn Trust Co. *v.* Cole et ux. March 30, 1936. Petitions for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. H. Tallichet* for Cole et ux. *Mr. Cloyd H. Read* for Norristown-Penn Trust Co. Reported below: 80 F. (2d) 888.

No. 763. Wingert et al., Executors, *v.* Smead et al., Trustees. March 30, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Miller Wingert* for petitioners. No appearance for respondents. Reported below: 79 F. (2d) 1023.

No. 769. Jno. P. Nutt Co., Inc. et al. *v.* South Carolina ex rel. Daniel, Attorney General. March 30, 1936. Petition for writ of certiorari to the Supreme Court of South Carolina denied. *Mr. R. M. Jefferies* for petitioners. *Messrs. John M. Daniel, J. Ivey Humphrey,* and *Eugene S. Blease* for respondent. Reported below: 180 S. C. 19; 185 S. E. 25.

No. 775. Vanderbilt *v.* Whitney. March 30, 1936. Petition for writ of certiorari to the Supreme Court of New York, Appellate Division, denied. *Mr. Edmund M. Toland* for petitioner. *Mr. Walter G. Dunnington* for respondent. Reported below: 245 App. Div. 211; 281 N. Y. S. 171.

No. 781. Small, Administrator, *v.* Pennsylvania Railroad Co. March 30, 1936. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. James C. Wilkes* for petitioner. *Messrs. Frederic D. McKenney, John S. Flannery,* and *G. Bowdoin Craighill* for respondent. Reported below: 65 App. D. C. 112; 80 F. (2d) 704.

Nos. 834 and 835. Burco, Inc. *v.* Whitworth et al., Trustees, et al. March 30, 1936. Petition for writs of certiorari to the Circuit Court of Appeals for the Fourth

Circuit denied. *Mr. Edward Ward McMahon* for petitioner. *Messrs. John W. Davis, James Piper, Edwin F. Blair, William L. Rawls,* and *Carlyle Barton* for respondents. Reported below: 81 F. (2d) 721.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM JANUARY 7 TO AND INCLUDING MARCH 30, 1936.

No. 102. General Outdoor Advertising Co., Inc. et al. *v.* Callahan et al.;

No. 103. Same *v.* Hoar et al.; and

No. 104. Brink *v.* Callahan et al. Appeals from the Supreme Judicial Court of Massachusetts. February 3, 1936. Appeals dismissed with costs on motion of *Messrs. Lowell A. Mayberry* and *Arthur L. Brown* for appellants. *Mr. Henry P. Fielding* for appellees in Nos. 102 and 104. *Mr. Robert E. Goodwin* for appellees in No. 103. Reported below: 289 Mass. 149; 193 N. E. 799.

Nos. 670 and 671. Gustin *v.* Worthington Mower Co. On petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit. February 3, 1936. Dismissed per stipulation of counsel. *Messrs. Hugh M. Morris, Amasa C. Paul, Harold Olsen, Maurice M. Moore,* and *Charles H. Howson* for petitioner. *Messrs. Thomas G. Haight, Harry G. Kimball,* and *Oscar W. Jeffery* for respondent. Reported below: 80 F. (2d) 594.

No. 712. United States *v.* Layton et al. Appeal from the District Court of the United States for the District of Minnesota. February 3, 1936. Appeal dismissed on motion of *Solicitor General Reed* for the United States. No appearance for appellees.

No. 16, original. GEORGIA *v.* MORGENTHAU ET AL. March 2, 1936. Bill of complaint dismissed on motion of *Messrs. M. J. Yeomans, B. D. Murphy,* and *Barry Wright* for complainant. *Solicitor General Reed* for defendants.

No. 443. UNITED STATES *v.* CERTAIN LANDS IN THE CITY OF LOUISVILLE. On writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit. March 5, 1936. Dismissed on motion of *Solicitor General Reed* for the United States. *Mr. Charles G. Middleton* for respondent. Reported below: 78 F. (2d) 684.

No. 679. UNITED STATES *v.* CLARKE ET AL. On petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit. March 5, 1936. Dismissed on motion of *Solicitor General Reed* for the United States. No appearance for respondents.

No. 784. UNITED STATES *v.* H. & B. AMERICAN MACHINE CO. On petition for writ of certiorari to the Court of Claims. March 30, 1936. Dismissed per stipulation of counsel. *Solicitor General Reed* for the United States. *Mr. Howe P. Cochran* for respondent. Reported below: 81 Ct. Cls. 584; 11 F. Supp. 48.

PETITIONS FOR REHEARING DENIED, FROM JANUARY 7 TO AND INCLUDING MARCH 30, 1936.*

No. 577. RICKERT RICE MILLS, INC. *v.* FONTENOT;
No. 578. DORE *v.* SAME;

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* See Table of Cases Reported in this volume for earlier decisions in these cases, unless otherwise indicated.

No. 579. UNITED RICE MILLING PRODUCTS CO., INC. *v.* SAME;

No. 580. BATON ROUGE RICE MILL, INC. *v.* SAME;

No. 581. SIMON *v.* SAME;

No. 585. LEVY RICE MILLING CO., INC. *v.* SAME;

No. 586. FARMERS RICE MILLING CO., INC. *v.* SAME; and

No. 587. NOBLE-TROTTER RICE MILLING CO., INC. *v.* SAME. January 20, 1936. *Ante*, p. 110.

No. 75. UNITED STATES *v.* SAFETY CAR HEATING & LIGHTING CO.; and

No. 76. ROGERS, COLLECTOR OF INTERNAL REVENUE, *v.* SAME. February 3, 1936. *Ante*, p. 88.

No. 115. PUBLIC SERVICE COMMISSION OF PUERTO RICO *v.* HAVEMEYER ET AL. February 3, 1936. 296 U. S. 506.

No. 606. RICHARDSON *v.* CHICAGO, ROCK ISLAND & GULF RY. CO. February 3, 1936. 296 U. S. 646.

No. 608. ANDERSON ET AL. *v.* ST. LOUIS COKE & IRON CORP. ET AL. February 3, 1936. 296 U. S. 656.

No. 617. ALLEN *v.* CLOISTERS BUILDING CORP. ET AL. February 3, 1936. 296 U. S. 657.

No. 631. RAILWAY ENGINEERING EQUIPMENT CO. ET AL. *v.* OREGON SHORT LINE R. CO. February 3, 1936. 296 U. S. 658.

No. 665. MATHY, ADMINISTRATRIX, *v.* CHICAGO & NORTHWESTERN RY. CO. February 3, 1936.

Nos. 375 and 376. MEYER ET AL. *v.* KENMORE GRANVILLE HOTEL CO. February 17, 1936. *Ante*, p. 160.

No. 627. MINTON *v.* COAST PROPERTY CORP. ET AL. February 17, 1936.

No. 287. Treigle *v.* Acme Homestead Assn.;

No. 288. Same *v.* Thrift Homestead Assn.;

No. 289. Treigle Sash Factory, Inc. *v.* Conservative Homestead Assn.;

No. 290. Same *v.* Union Homestead Assn.; and

No. 316. Mitchell *v.* Conservative Homestead Assn. March 2, 1936. *Ante,* p. 189.

No. 226. Manhattan General Equipment Co. *v.* Commissioner of Internal Revenue; and

No. 227. Collier Service Corp. *v.* Same. March 2, 1936. *Ante,* p. 129.

Nos. 403 and 404. Ashwander et al. *v.* Tennessee Valley Authority et al. March 2, 1936. *Ante,* p. 288.

Nos. 641 and 642. Tetzke *v.* Trust No. 2988. March 2, 1936.

No. 680. Alford, Domiciliary Administrator, et al. *v.* Cornell. March 2, 1936.

No. 725. Levell *v.* Simpson, Warden. March 2, 1936.

No. 199. Dismuke *v.* United States. March 9, 1936. *Ante,* p. 167.

No. 695. Hogue et al. *v.* Wise. March 9, 1936. *Ante,* p. 709.

No. 346. Matson Navigation Co. et al. *v.* State Board of Equalization of California et al. March 30, 1936. *Ante,* p. 441.

No. 360. Pennsylvania Railroad Co. *v.* Illinois Brick Co. March 30, 1936. *Ante,* p. 447.

No. 379. Helvering, Commissioner of Internal Revenue, *v.* San Joaquin Fruit & Investment Co. March 30, 1936. *Ante,* p. 496.

No. 399. Southern Railway Co. *v.* Lunsford, Administratrix. March 30, 1936. *Ante,* p. 398.

No. 720. Jefferson Island Salt Mining Co., Inc. et al. *v.* Louisiana. March 30, 1936. Mr. Justice Butler took no part in the consideration or decision of this application.

ORDER.

It is ordered by this Court that George Wharton Pepper, of Philadelphia, Pennsylvania, be, and he hereby is, appointed a member of the Advisory Committee appointed June 3, 1935, to assist the Court in the preparation of a unified system of general rules for cases in equity and actions at law in the District Courts of the United States and in the Supreme Court of the District of Columbia, in place of George W. Wickersham, deceased.

February 17, 1936.

AMENDMENT OF RULES.

ORDER

It is ordered by this Court that paragraph 1 of Rule 12 of the Rules of this Court, be amended so as to read as follows:

"1. Upon the presentation of a petition for the allowance of an appeal to this court, from any court, to any judge or justice empowered by law to allow it, there shall be presented by the applicant a separate typewritten statement particularly disclosing the basis upon which it is contended that this court has jurisdiction upon appeal to review the judgment or decree in question. The statement shall refer distinctly (a) to the statutory provision believed to sustain the jurisdiction; (b) to the statute of the state, or statute or treaty of the United States, the validity of which is involved (giving the volume and page where the statute or treaty may be found in the official edition), setting it out verbatim or appropriately summarizing its pertinent provisions; and (c) to the date of judgment or decree sought to be reviewed and the date upon which the application for appeal is presented.

"The statement shall show that the nature of the case and of the rulings of the court was such as to bring the case within the jurisdictional provisions relied on, including a statement of the grounds upon which it is contended the questions involved are substantial (*Zucht* v. *King,* 260 U. S. 174, 176, 177), and shall cite the cases believed to sustain the jurisdiction.

"If the appeal is from a state court the statement shall specify the stage in the proceedings in the court of first instance, and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e. g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e. g., ruling on exception, portion of the court's charge and exception thereto, assignment of error), [such] as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this court.

"The applicant shall append to the statement a copy of any opinions delivered upon the rendering of the judgment or decree sought to be reviewed, including earlier opinions in the same case, or opinions in companion cases, reference to which may be necessary to ascertain the grounds of the judgment or decree.

"If the appeal is from an interlocutory decree of a specially constituted District Court of the United States (Judicial Code, sec. 266; U. S. C., Tit. 28, sec. 380), the statement must also include a showing of the matters in which it is claimed that the court has abused its discretion in granting or denying the interlocutory injunction. (*Alabama* v. *United States,* 279 U. S. 229.)"

It is further ordered that this amendment shall apply to all petitions for appeals presented on or after July 1, 1936.

March 2, 1936.

AMENDMENT OF BANKRUPTCY RULES.

ORDER.

It is ordered that Rule XLIX of the General Orders in Bankruptcy be, and it hereby is, amended, effective immediately, to read as follows:

XLIX.

PROCEEDINGS UNDER SECTION 77 OF THE ACT.

The following additional rules shall apply to proceedings under section 77 of the Act:

1. Each Circuit Court of Appeals shall cause written notice to be given to the judges of the district courts within the circuit of the names and addresses of the persons from time to time designated and qualified to act as special masters under the provisions of subsection (c) of section 77.

2. The clerk of the district court in which proceedings under section 77 are brought shall forthwith transmit to the Interstate Commerce Commission copies of (a) the answer, if any, of the railroad corporation, or the pleading of any creditor controverting facts alleged in the petition; (b) the order approving or dismissing the petition; (c) any order (1) directing the debtor to give notice and fixing the date of a hearing on the appointment of a trustee or trustees, (2) appointing or removing a trustee, or (3) confirming the appointment of legal counsel for the trustee or trustees, or removing such counsel; (d) any application by a trustee for authority to issue certificates, and any order authorizing such issuance; (e) such schedules and reports as may be submitted by the officers of the corporation or trustees with respect to the conduct of the debtor's affairs and the fairness of any

proposed plan, and all orders issued to the trustee or trustees with respect to the operation of the corporation's business, together with the petitions upon which the orders were based; (f) the lists of bondholders, creditors, and stockholders required to be filed under paragraph (4) of subsection (c) of section 77, and any other information concerning the security holders filed pursuant to the order of the court; (g) any order determining the time within which the claims of creditors may be filed or evidenced, the manner in which such claims may be filed or evidenced and allowed, and the division of creditors and stockholders into classes, and any order respecting the exercise of any power by any person or committee representing any creditor or stockholder; (h) any order allowing or rejecting such claims, or extending the time within which they may be filed or evidenced; (i) any order directing the trustee or trustees to report facts pertaining to irregularities, fraud, misconduct, or mismanagement, and any report made pursuant to such order; (j) any order directing the debtor or the trustee or trustees to keep records and accounts, in addition to those prescribed by the commission, for the segregation and allocation of earnings and expense; (k) any order approving the special employment of assistants requested by the commission; (l) any application for allowances of compensation and expenses under the provisions of paragraphs (2) and (12) of subsection (c) of section 77, upon receipt of which the commission shall determine the maximum limits of such allowances and file with the court its report and order thereon, and any order making allowances for compensation and expenses under said paragraphs; (m) any order issued upon the petition of the commission for the reference of particular matters to a special master, and the report of such master thereon; (n) any order allowing interested parties to intervene in the proceedings, any minute of appearance by a person other than interveners, and any rule defining matters upon which notice shall be given to other than interveners; (o) any order extending the time for filing a plan; (p) any motion to dismiss the proceedings because of undue delay in a reasonably expeditious reorganization of the debtor, and notice of any hearing with reference to dismissing the proceedings for such cause; (q) any notice of the time within which parties in interest may file with the court objections to the plan approved by the commission, and any objection to such plan and any claim for equitable treatment filed by a party in interest; (r) any order affirming a finding of the commission affecting the requirement that the plan be submitted to creditors or stockholders as provided in the second paragraph of subsection (e) of section 77; (s) any order entered on the disapproval of the plan, and the judge's opinion stating his conclusions and reasons for such disapproval; (t) if the plan is not confirmed, the order, with the judge's opinion stating his conclusions and reasons therefor, dismissing the proceedings or referring the case back to the commission for further proceedings, and, if the case is referred back to the commission, a copy of the evidence received in any hearings with reference to confirmation; (u) the order confirming the plan, with the judge's opinion stating his conclusions and reasons therefor, and any order directing the transfer or other disposition of the property;. (v) the final decree; and (w) such other papers filed in the proceedings as the commission may request of the clerk or the court may direct him to transmit. All papers filed with the court shall have attached thereto such copies as the clerk may require in carrying out this general order.

3. The commission shall forthwith cause to be filed in the district court having jurisdiction of the proceedings, copies of (a) any order ratifying the appointment of a trustee or trustees; (b) each report and order authorizing the issue of trustees' certificates; (c) each order or call for a hearing, with a statement of its purposes; (d) each plan of reorganization, other than the debtor's, filed with the commission; (e) any report finding a plan to

be prima facie impracticable; (f) any order refusing to approve a plan, together with the commission's report stating fully the reasons for its conclusions; (g) any petition for further hearing on a plan, and any supplemental order modifying any plan, together with the report stating the reasons for such modification; (h) the written acceptances of any plan which is finally approved; (i) any order granting authority for the issuance of securities or for other steps contemplated by the plan; (j) any order issued to the trustee or trustees with respect to the operation of the corporation's business; (k) any order issued under the provisions of subsection (p) of section 77 authorizing the solicitation, use, employment or action under or pursuant to proxies, authorizations, or deposit agreements; and (l) such other papers filed in the proceedings as the court may direct or the commission deem pertinent. All proceedings before the commission under section 77 shall be conducted in accordance with its rules of practice and such special instructions, rules, and regulations as it may issue pursuant to the provisions of said section.

4. All process to be served outside of the district in which proceedings under section 77 are pending shall be returnable at such time as the judge shall determine, and shall be directed to and served by the United States marshal for the district in which service is to be effected.

March 30, 1936.

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