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UNITED STATES REPORTS

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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1936

FROM FEBRUARY 1, 1937, TO AND INCLUDING
APRIL 11, 1937

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Errata.

P. 114, footnote 7, line 2, "208" should be 308.

In *Helvering* v. *Tex-Penn Oil Co.*, p. 481, it should appear that Mr. John E. Hughes filed a brief on behalf of Leo Propper et al., as *amicus curiae*.

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, Marshal.

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

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

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

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

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

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

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

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

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

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

For the Eighth Circuit, Pierce Butler, Associate Justice.

For the Ninth Circuit, George Sutherland, Associate Justice.

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

March 28, 1932.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1936.

TABER, TREASURER OF PAYNE COUNTY, *v.* INDIAN TERRITORY ILLUMINATING OIL CO.

CERTIORARI TO THE SUPREME COURT OF OKLAHOMA.

No. 280. Argued January 6, 1937.—Decided February 1, 1937.

A non-discriminatory state tax, *ad valorem*, on equipment used by a private corporation in operating for oil and gas under a lease to it of restricted Indian allotments, *held* valid, against the claim that it was an unconstitutional burden on a federal instrumentality. P. 3.

177 Okla. 67; 57 P. (2d) 1167, reversed.

CERTIORARI, 299 U. S. 528, to review the affirmance of a judgment against Taber, County Treasurer, in an action by the Oil Company to recover money paid under protest as taxes.

Mr. Leon J. York, with whom *Messrs. Guy L. Horton* and *L. O. Lytle* were on the brief, for petitioner.

Mr. Donald Prentice, with whom *Mr. William P. McGinnis* was on the brief, for respondent.

The application of the doctrine of implied immunity of a federal instrumentality from state taxation should have regard to the circumstances disclosed. While in one aspect the extent of the exemption depends upon the

effect of the tax, still the nature of the instrumentality and the part it plays may not be disregarded, for it may be of such a character that any taxation of it would impose a direct burden upon the functions of government. *Metcalf* v. *Mitchell,* 269 U. S. 514; *Union Pacific R. Co.* v. *Peniston,* 18 Wall. 5; *Safe Deposit & Trust Co. v. Virginia,* 280 U. S. 83; *Wright* v. *Nagle,* 101 U. S. 791.

An agency created and controlled by the Federal Government to enable it to develop restricted Indian land for oil and gas is of such a character, and so intimately connected with the performance of the functions of government, that it is immune from state taxation and the immunity extends to the property used in its operations. *Metcalf* v. *Mitchell,* 269 U. S. 514; *Gillespie* v. *Oklahoma,* 257 U. S. 501; *Choctaw, O. & G. R. Co.* v. *Harrison,* 235 U. S. 292; *Jaybird Mining Co.* v. *Weir,* 271 U. S. 609; *Indian Territory Oil Co.* v. *Oklahoma,* 240 U. S. 522; *Large Oil Co.* v. *Howard,* 248 U. S. 549; *Howard* v. *Gypsy Oil Co.,* 247 U. S. 503.

The *ad valorem* tax sought to be levied by the State of Oklahoma upon the equipment used by respondent in its operations would impose a direct burden upon the functions of government. *Metcalf* v. *Mitchell,* 269 U. S. 514; *Burnet* v. *Jergens Trust,* 288 U. S. 508; *Large Oil Co.* v. *Howard,* 248 U. S. 549; *Howard* v. *Gypsy Oil Co.,* 247 U. S. 503.

The immunity of a federal instrumentality from state taxation is not dependent on the amount of the tax, or the extent of the resulting interference, but is absolute. *Fox Film Corp.* v. *Doyal,* 286 U. S. 123; *Indian Motocycle Co.* v. *United States,* 283 U. S. 570; *Trinityfarm Construction Co.* v. *Grosjean,* 291 U. S. 466; *Metcalf* v. *Mitchell,* 269 U. S. 514; *Gillespie* v. *Oklahoma,* 257 U. S. 501.

Distinguishing: *Federal Compress Co.* v. *McLean,* 291 U. S. 17; *Susquehanna Power Co.* v. *State Tax Comm'n,* 283 U. S. 291; *Alward* v. *Johnson,* 282 U. S. 509; *Thomas*

v. *Gay,* 169 U. S. 264; *Wagoner* v. *Evans,* 170 U. S. 588; *Baltimore Shipbuilding Co.* v. *Baltimore,* 195 U. S. 375; *Choctaw, O. & G. R. Co.* v. *McKey,* 256 U. S. 531; *Indian Territory Oil Co.* v. *Board of Equalization,* 288 U. S. 325; *Union Pacific R. Co.* v. *Peniston,* 18 Wall. 5; *Metcalf* v. *Mitchell,* 269 U. S. 514.

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

The respondent, Indian Territory Illuminating Oil Company, holds an oil and gas lease covering lands of restricted Pawnee Indians. The question relates to the constitutional authority of the State of Oklahoma to tax certain property used by the respondent in its operations as lessee. The Supreme Court of Oklahoma held that the property was not taxable because the lessee was a federal instrumentality and Congress had not consented to its taxation. 177 Okla. 67; 57 P. (2d) 1167. We granted certiorari. October 12, 1936.

The property is described as "one dwelling, portable, one garage, one tool house, engines, pump, water well equipment, tanks, derricks, casing, tubing, rods, pipelines, and one trailer truck, of the aggregate value of $15,869.23." The tax is an *ad valorem* tax for the year 1933–34. There is no allegation or finding that the tax was discriminatory, the sole contention being that the property was not subject to *ad valorem* taxation because of its use as an adjunct to the production of oil and gas from the leasehold.

Our decisions distinguish between a non-discriminatory tax upon the property of an agent of government and one which imposes a direct burden upon the exertion of governmental powers. In the former case where there is only a remote, if any, influence upon the exercise of governmental functions, we have held that a non-dis-

criminatory *ad valorem* tax is valid, although the property is used in the operations of the governmental agency. This distinction, recognized by Chief Justice Marshall in *McCulloch* v. *Maryland,* 4 Wheat. 316, 436, was stated and applied after full consideration in *Thomson* v. *Pacific Railroad,* 9 Wall. 579, 591, and *Railroad Company* v. *Peniston,* 18 Wall. 5, 31–36. Recent illustrations are found in *Alward* v. *Johnson,* 282 U. S. 509, 514, where the tax which was sustained was laid upon property used in operating an automotive stage line between points in California under a mail carrier's contract; and in *Tirrell* v. *Johnston,* 293 U. S. 533, where a tax known as the "gasoline road toll" was held to be payable by a rural mail carrier who delivered the mail by means of his own motor vehicle. See, also, *Thomas* v. *Gay,* 169 U. S. 264, 273; *Baltimore Shipbuilding Co.* v. *Baltimore,* 195 U. S. 375, 382; *Choctaw, O. & G. R. Co.* v. *Mackey,* 256 U. S. 531, 536, 537; *Willcuts* v. *Bunn,* 282 U. S. 216, 226; *Susquehanna Power Co.* v. *Tax Commission (No. 1),* 283 U. S. 291, 294; *Eastern Air Transport* v. *Tax Commission,* 285 U. S. 147, 153.

In *Indian Territory Illuminating Oil Co.* v. *Board of Equalization,* 288 U. S. 325, an *ad valorem* tax upon crude oil, held by the company in its storage tanks, was sustained against the claim that the oil was exempt because in its production the taxpayer was operating as an instrumentality of the United States. There the taxpayer relied, as does the state court here, upon the ruling in *Jaybird Mining Co.* v. *Weir,* 271 U. S. 609, where an *ad valorem* tax upon ores mined under a lease of restricted Indian land and in the bins on that land was held to be invalid. But we pointed out that in the *Jaybird* case the tax "was assessed on the ores in mass; and the royalties and equitable interests of the Indians had not been paid or segregated." *Indian Territory*

Illuminating Oil Co. v. *Board of Equalization, supra,* p. 327. In those circumstances the tax was regarded as an attempt to tax an agency of the federal government. Emphasizing that distinction, we said in reference to the *Indian Territory Illuminating Oil Company*: "Such immunity as petitioner enjoyed as a governmental instrumentality inhered in its operations as such, and being for the protection of the Government in its function extended no farther than was necessary for that purpose." *Id.,* p. 328.

In that view, the immunity cannot be said to extend to a nondiscriminatory *ad valorem* tax upon the property of the petitioner which is involved in the instant case. The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed.

BLAIR *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 247. Argued January 5, 1937.—Decided February 1, 1937.

1. A judgment of the Circuit Court of Appeals holding a beneficiary named in a trust taxable upon trust income notwithstanding assignments previously made by him, and basing this conclusion upon the ground that, under the local law, the trust was a spendthrift trust giving the beneficiary no power to assign,—*held* inapplicable as *res judicata* in favor of the Government in proceedings to collect taxes from the same person, for subsequent years, the situation having been changed meanwhile by a decision of the state court construing the trust and upholding the assignments. *Tait* v. *Western Maryland Ry. Co.,* 289 U. S. 620, distinguished. P. 8.
2. Whether a testamentary trust is a spendthrift trust barring the voluntary alienation of his interest by the beneficiary depends

upon the law of the State in which the donor resided and in which the trust was created and the property situated. P. 9.

3. A decision by the intermediate appellate court of Illinois upholding the right of the life beneficiary of a trust to assign parts of his interest, in a suit brought by the trustees for instructions and impleading the beneficiary and his assignees,—*held* conclusive of the validity of the assignments. P. 10.
4. In the general application of the Revenue Acts, income tax liability is attached to ownership. P. 11.
5. Provisions of the Revenue Acts (1921, § 219 (a) (d); 1924 and 1926, § 219 (a) (b); 1928, § 162 (a) (b)) imposing upon the beneficiary of a trust liability for the tax upon the income "distributable" to him, refer to the owner of the beneficial interest, whether he was such initially or becomes such by an assignment valid under the local law governing the trust. P. 12.
6. Assignments of interests, of specified amounts each year thereafter, in the net income which the assignor was then or might thereafter be entitled to receive during his life under a trust,—*held* assignments not merely of the right to receive income, but of corresponding interests in the trust estate. P. 12.
7. A beneficiary entitled during life to the income of property held in trust is the owner, not of a chose in action merely, but of an equitable interest in the corpus of the property; and that interest, in the absence of a valid restraint upon alienation, he may assign in part, or as a whole. P. 13.

83 F. (2d) 655, 662, reversed.

CERTIORARI, 299 U. S. 527, to review a judgment which reversed a decision of the Board of Tax Appeals, 31 B. T. A. 1192, overruling income tax assessments.

Messrs. J. F. Dammann and *William B. McIlvaine* for petitioner.

Mr. David E. Hudson, with whom *Solicitor General Reed, Assistant Attorney General Jackson,* and *Messrs. Sewall Key* and *John G. Remey* were on the brief, for respondent.

By leave of Court, briefs *amici curiae* were filed by *Mr. Edward N. Perkins* and *Mr. John E. Hughes.*

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

This case presents the question of the liability of a beneficiary of a testamentary trust for a tax upon the income which he had assigned to his children prior to the tax years and which the trustees had paid to them accordingly.

The trust was created by the will of William Blair, a resident of Illinois who died in 1899, and was of property located in that State. One-half of the net income was to be paid to the donor's widow during her life. His son, the petitioner Edward Tyler Blair, was to receive the other one-half and, after the death of the widow, the whole of the net income during his life. In 1923, after the widow's death, petitioner assigned to his daughter, Lucy Blair Linn, an interest amounting to $6000 for the remainder of that calendar year, and to $9000 in each calendar year thereafter, in the net income which the petitioner was then or might thereafter be entitled to receive during his life. At about the same time, he made like assignments of interests, amounting to $9000 in each calendar year, in the net income of the trust to his daughter Edith Blair and to his son, Edward Seymour Blair, respectively. In later years, by similar instruments, he assigned to these children additional interests, and to his son William McCormick Blair other specified interests, in the net income. The trustees accepted the assignments and distributed the income directly to the assignees.

The question first arose with respect to the tax year 1923 and the Commissioner of Internal Revenue ruled that the income was taxable to the petitioner. The Board of Tax Appeals held the contrary. 18 B. T. A. 69. The Circuit Court of Appeals reversed the Board, holding that under the law of Illinois the trust was a spendthrift trust

and the assignments were invalid. *Commissioner* v. *Blair,* 60 F. (2d) 340. We denied certiorari. 288 U. S. 602.

Thereupon the trustees brought suit in the Superior Court of Cook County, Illinois, to obtain a construction of the will with respect to the power of the beneficiary of the trust to assign a part of his equitable interest and to determine the validity of the assignments he had made. The petitioner and the assignees were made defendants. The Appellate Court of Illinois, First District, after a review of the Illinois decisions, decided that the trust was not a spendthrift trust and upheld the assignments. *Blair* v. *Linn,* 274 Ill. App. 23. Under the mandate of the appellate court, the Superior Court of Cook County entered its decree which found the assignments to be "voluntary assignments of a part of the interest of said Edward Tyler Blair in said trust estate" and as such adjudged them to be valid.

At that time there were pending before the Board of Tax Appeals proceedings involving the income of the trust for the years 1924, 1925, 1926 and 1929. The Board received in evidence the record in the suit in the state court and, applying the decision of that court, the Board overruled the Commissioner's determination as to the petitioner's liability. 31 B. T. A. 1192. The Circuit Court of Appeals again reversed the Board. That court recognized the binding effect of the decision of the state court as to the validity of the assignments but decided that the income was still taxable to the petitioner upon the ground that his interest was not attached to the corpus of the estate and that the income was not subject to his disposition until he received it. *Commissioner* v. *Blair,* 83 F. (2d) 655, 662.

Because of an asserted conflict with the decision of the state court, and also with decisions of circuit courts of appeals, we granted certiorari. October 12, 1936.

First. The Government contends that the judgment relating to the income for 1923 is conclusive in this pro-

ceeding as *res judicata*. *Tait* v. *Western Maryland Ry. Co.*, 289 U. S. 620. Petitioner insists that this question was not raised before the Board of Tax Appeals and hence was not available before the Circuit Court of Appeals. *General Utilities Co.* v. *Helvering*, 296 U. S. 200, 206; *Helvering* v. *Salvage*, 297 U. S. 106, 109. The Government responds that the answers before the Board of Tax Appeals in the instant case had been filed before the first decision of the Circuit Court of Appeals was entered, and that, while the case was heard before the Board without amended pleadings, the whole matter was actually before the Board and the question of *res judicata* was raised by an assignment of error on the petition for review before the Circuit Court of Appeals.

It is not necessary to review the respective contentions upon this point, as we think that the ruling in the *Tait* case is not applicable. That ruling and the reasoning which underlies it apply where in the subsequent proceeding, although relating to a different tax year, the questions presented upon the facts and the law are essentially the same. *Tait* v. *Western Maryland Ry. Co.*, *supra*, pp. 624, 626. Here, after the decision in the first proceeding, the opinion and decree of the state court created a new situation. The determination of petitioner's liability for the year 1923 had been rested entirely upon the local law. *Commissioner* v. *Blair*, 60 F. (2d) 340, 342, 344. The supervening decision of the state court interpreting that law in direct relation to this trust cannot justly be ignored in the present proceeding so far as it is found that the local law is determinative of any material point in controversy. Compare *Freuler* v. *Helvering*, 291 U. S. 35; *Hubbell* v. *Helvering*, 70 F. (2d) 668.

Second. The question of the validity of the assignments is a question of local law. The donor was a resident of Illinois and his disposition of the property in that State was subject to its law. By that law the character

of the trust, the nature and extent of the interest of the beneficiary, and the power of the beneficiary to assign that interest in whole or in part, are to be determined. The decision of the state court upon these questions is final. *Spindle* v. *Shreve,* 111 U. S. 542, 547, 548; *Uterhart* v. *United States,* 240 U. S. 598, 603; *Poe* v. *Seaborn,* 282 U. S. 101, 110; *Freuler* v. *Helvering, supra,* p. 45. It matters not that the decision was by an intermediate appellate court. Compare *Graham* v. *White-Phillips Co.,* 296 U. S. 27. In this instance, it is not necessary to go beyond the obvious point that the decision was in a suit between the trustees and the beneficiary and his assignees, and the decree which was entered in pursuance of the decision determined as between these parties the validity of the particular assignments. Nor is there any basis for a charge that the suit was collusive and the decree inoperative. *Freuler* v. *Helvering, supra.* The trustees were entitled to seek the instructions of the court having supervision of the trust. That court entertained the suit and the appellate court, with the first decision of the Circuit Court of Appeals before it, reviewed the decisions of the Supreme Court of the State and reached a deliberate conclusion. To derogate from the authority of that conclusion and of the decree it commanded, so far as the question is one of state law, would be wholly unwarranted in the exercise of federal jurisdiction.

In the face of this ruling of the state court it is not open to the Government to argue that the trust "was, under the Illinois law, a spendthrift trust." The point of the argument is that, the trust being of that character, the state law barred the voluntary alienation by the beneficiary of his interest. The state court held precisely the contrary. The ruling also determines the validity of the assignment by the beneficiary of parts of his interest. That question was necessarily presented and expressly decided.

Third. The question remains whether, treating the assignments as valid, the assignor was still taxable upon the income under the federal income tax act. That is a federal question.

Our decisions in *Lucas* v. *Earl,* 281 U. S. 111, and *Burnet* v. *Leininger,* 285 U. S. 136, are cited. In the *Lucas* case the question was whether an attorney was taxable for the whole of his salary and fees earned by him in the tax years or only upon one-half by reason of an agreement with his wife by which his earnings were to be received and owned by them jointly. We were of the opinion that the case turned upon the construction of the taxing act. We said that "the statute could tax salaries to those who earned them and provide that the tax could not be escaped by anticipatory arrangements and contracts however skilfully devised to prevent the same when paid from vesting even for a second in the man who earned it." That was deemed to be the meaning of the statute as to compensation for personal service, and the one who earned the income was held to be subject to the tax. In *Burnet* v. *Leininger, supra,* a husband, a member of a firm, assigned future partnership income to his wife. We found that the revenue act dealt explicitly with the liability of partners as such. The wife did not become a member of the firm; the act specifically taxed the distributive share of each partner in the net income of the firm; and the husband by the fair import of the act remained taxable upon his distributive share. These cases are not in point. The tax here is not upon earnings which are taxed to the one who earns them. Nor is it a case of income attributable to a taxpayer by reason of the application of the income to the discharge of his obligation. *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716; *Douglas* v. *Willcuts,* 296 U. S. 1, 9; *Helvering* v. *Stokes,* 296 U. S. 551; *Helvering* v. *Schweitzer,* 296 U. S. 551; *Helvering* v. *Coxey,* 297 U. S.

694. See, also, *Burnet* v. *Wells,* 289 U. S. 670, 677. There is here no question of evasion or of giving effect to statutory provisions designed to forestall evasion; or of the taxpayer's retention of control. *Corliss* v. *Bowers,* 281 U. S. 376; *Burnet* v. *Guggenheim,* 288 U. S. 280.

In the instant case, the tax is upon income as to which, in the general application of the revenue acts, the tax liability attaches to ownership. See *Poe* v. *Seaborn, supra; Hoeper* v. *Tax Commission,* 284 U. S. 206.

The Government points to the provisions of the revenue acts imposing upon the beneficiary of a trust the liability for the tax upon the income distributable to the beneficiary.[1] But the term is merely descriptive of the one entitled to the beneficial interest. These provisions cannot be taken to preclude valid assignments of the beneficial interest, or to affect the duty of the trustee to distribute income to the owner of the beneficial interest, whether he was such initially or becomes such by valid assignment. The one who is to receive the income as the owner of the beneficial interest is to pay the tax. If under the law governing the trust the beneficial interest is assignable, and if it has been assigned without reservation, the assignee thus becomes the beneficiary and is entitled to rights and remedies accordingly. We find nothing in the revenue acts which denies him that status.

The decision of the Circuit Court of Appeals turned upon the effect to be ascribed to the assignments. The court held that the petitioner had no interest in the corpus of the estate and could not dispose of the income until he received it. Hence it was said that "the income was *his*" and his assignment was merely a direction to pay over to others what was due to himself. The question was considered to involve "the date when the income became transferable." 83 F. (2d), p. 662. The

[1] Revenue Acts of 1921, § 219 (a) (d); 1924 and 1926, § 219 (a) (b); 1928, § 162 (a) (b).

Government refers to the terms of the assignment,—that it was of the interest in the income "which the said party of the first part now is, or may hereafter be, entitled to receive during his life from the trustees." From this it is urged that the assignments "dealt only with a right to receive the income" and that "no attempt was made to assign any equitable right, title or interest in the trust itself." This construction seems to us to be a strained one. We think it apparent that the conveyancer was not seeking to limit the assignment so as to make it anything less than a complete transfer of the specified interest of the petitioner as the life beneficiary of the trust, but that with ample caution he was using words to effect such a transfer. That the state court so construed the assignments appears from the final decree which described them as voluntary assignments of interests of the petitioner "in said trust estate," and it was in that aspect that petitioner's right to make the assignments was sustained.

The will creating the trust entitled the petitioner during his life to the net income of the property held in trust. He thus became the owner of an equitable interest in the corpus of the property. *Brown* v. *Fletcher,* 235 U. S. 589, 598, 599; *Irwin* v. *Gavit,* 268 U. S. 161, 167, 168; *Senior v. Braden,* 295 U. S. 422, 432, 433; *Merchants' Loan & Trust Co.* v. *Patterson,* 308 Ill. 519, 530; 139 N. E. 912. By virtue of that interest he was entitled to enforce the trust, to have a breach of trust enjoined and to obtain redress in case of breach. The interest was present property alienable like any other, in the absence of a valid restraint upon alienation. *Commissioner* v. *Field,* 42 F. (2d) 820, 822; *Shanley* v. *Bowers,* 81 F. (2d) 13, 15. The beneficiary may thus transfer a part of his interest as well as the whole. See Restatement of the Law of Trusts, §§ 130, 132 *et seq.* The assignment of the beneficial interest is not the assignment of a chose in action but of the "right, title and

estate in and to property." *Brown* v. *Fletcher, supra; Senior* v. *Braden, supra.* See Bogert, "Trusts and Trustees," vol. 1, § 183, pp. 516, 517; 17 Columbia Law Review, 269, 273, 289, 290.

We conclude that the assignments were valid, that the assignees thereby became the owners of the specified beneficial interests in the income, and that as to these interests they and not the petitioner were taxable for the tax years in question. The judgment of the Circuit Court of Appeals is reversed and the cause is remanded with direction to affirm the decision of the Board of Tax Appeals.

Reversed.

HONEYMAN *v.* HANAN, EXECUTOR.

APPEAL FROM THE SUPREME COURT OF NEW YORK.

No. 370. Argued January 14, 1937.—Decided February 1, 1937.

1. To constitute jurisdiction over an appeal from a state court, it must appear, affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause. P. 18.
2. Whether these requirements have been met is itself a federal question. *Id.*
3. In deciding whether it has jurisdiction, this Court must determine whether a federal question was necessarily decided by the state court; the determination must rest upon an examination of the record; and while a certificate or statement by the state court that a federal question has been presented to it and necessarily passed upon may aid this Court in such examination of the record, it cannot avail to foreclose the inquiry or to import a federal question into the record. *Id.*
4. In the exercise of appellate jurisdiction, this Court may make such disposition of the case as justice shall require. A case may be remanded to a state court to afford opportunity for an amendment of the record appropriate to show definitely the precise nature of the federal question, how it was raised, and the grounds of its

disposition by the state court, to the end that this Court may be able to decide whether a substantial question within its jurisdiction was necessarily determined. P. 25.

271 N. Y. 564; 3 N. E. (2d) 186, judgment vacated.

APPEAL from the affirmance of a judgment of the Supreme Court of New York, Appellate Division (246 App. Div. 781; 285 N. Y. S. 527), which had affirmed a judgment of the Special Term dismissing the complaint in a suit to recover a deficiency judgment on a collateral bond which had been executed as additional security for a bond and mortgage debt.

Mr. Robert B. Honeyman for appellant.

Mr. James S. Brown, Jr., with whom *Messrs. Anthony F. Tuozzo* and *William Gilligan* were on the brief, for appellee.

Mr. John F. X. McGohey, Assistant Attorney General of New York, with whom *Mr. John J. Bennett, Jr.*, Attorney General, *Mr. Henry Epstein*, Solicitor General, and *Mr. Benjamin Heffner*, Assistant Attorney General, were on the brief, on behalf of the State of New York, as *amicus curiae*, by special leave of Court, urging affirmance of the judgment below.

By leave of Court, briefs were filed by *Mr. Harold J. Treanor*, on behalf of the Real Estate Board of New York, Inc., and by *Mr. William Gilligan*, as *amici curiae*, urging affirmance of the judgment below.

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

Upon the filing of the jurisdictional statement, the appellee moved to dismiss the appeal upon the ground that the decision of the federal question now raised was not necessary to the determination of the cause. Rule 12,

par. 3. Further consideration of the motion was postponed to the hearing upon the merits.

The record is brief. The suit was brought against the executor of the estate of Herbert W. Hanan, deceased, to recover a deficiency judgment upon a bond secured by a mortgage which had been foreclosed in an earlier suit in which the mortgaged property had been sold and an application for a deficiency judgment had been refused. The judgment in the present suit dismissed the amended complaint upon the ground that it did not state facts sufficient to constitute a cause of action.

The amended complaint alleged that in 1907 the John H. Hanan Realty Company, with John H. Hanan, had executed a bond for $118,000, and as collateral security the John H. Hanan Realty Company had made a mortgage covering certain premises in the city of New York; that later the bond and mortgage were assigned to John H. Hanan; that in 1920 John H. Hanan, together with Herbert W. Hanan (defendant's testator) and Addison G. Hanan, had executed their joint and several bond to the guardians of the estates of certain infants in the sum of $60,000 and as collateral security therefor John H. Hanan had assigned to the obligees the bond and mortgage first mentioned; and that thereafter the bond of John H. Hanan, Herbert W. Hanan and Addison G. Hanan had been assigned, together with the bond and mortgage first mentioned, to the plaintiff.

A copy of the bond in suit was annexed. It recited that it was executed as additional security for the payment of the first mentioned bond and mortgage, upon which the principal sum of $60,000 remained unpaid, and that the time for payment had been extended as provided in a contemporaneous agreement. The condition of the obligation was the payment of that sum with interest as the

same should become due and payable according to the terms and conditions of the bond and mortgage first mentioned and the extension agreement.

The amended complaint further alleged that the John H. Hanan Realty Company had failed to comply with the terms of the bond and mortgage first mentioned and had failed to pay the taxes on the mortgaged premises or the interest on the bond; that thereupon, in September, 1933, the plaintiff had brought an action to foreclose the mortgage and that the defendant herein was a party to that action; that pursuant to judgment therein the mortgaged premises were sold and the proceeds were applied on account of the indebtedness due the plaintiff; that the referee's report of sale was confirmed; that thereafter a motion was "duly made for a deficiency judgment" which was denied and the foreclosure action was discontinued as to the defendant herein by the filing of a stipulation; that the deficiency due the plaintiff was $58,523.35, upon which $554.01 had been received by the plaintiff from the receiver in the foreclosure action, leaving due $57,969.34, which the decedent, Herbert W. Hanan, became bound to pay.

The amended complaint and the motion to dismiss for the insufficiency of its allegations contained no mention of a federal question. The trial court granted the motion with the mere statement that "The mortgage moratorium laws apply to the facts alleged in the said complaint." The judgment of dismissal was affirmed by the Appellate Division without opinion. 246 App. Div. 781; 285 N. Y. S. 527. The Court of Appeals granted leave to appeal and in May, 1936, affirmed the judgment, also without opinion. 271 N. Y. 564; 3 N. E. (2d) 186. In the entire progress of the cause to this point of determination by the highest court of the State, the record discloses no reference to a federal question.

In June, 1936, upon motion, the Court of Appeals amended its remittitur by adding the following:

"A question under the Federal Constitution was presented and necessarily passed upon by this court. The plaintiff contended that chapter 794 of the Laws of the State of New York, enacted in 1933, as amended (Sections 1083-a and 1083-b of Civil Practice Act), impair the obligations of contracts, and thus violate Article I, Section 10, of the Constitution of the United States. This court held that such laws do not violate said provision of Article I, Section 10, of the Constitution of the United States." 271 N. Y. 662; 3 N. E. (2d) 473.

It is solely upon this statement in the amended remittitur that we are asked to review the judgment and to pass upon the constitutionality of the state statute. We are not aided by any discussion by the state court of the question thus described, or by its explication or construction of the statute cited, or by a statement of the particular application of the statute to which the paragraph in the amended remittitur is addressed.

Before we may undertake to review a decision of the court of a State it must appear affirmatively from the record, not only that the federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause. *Lynch* v. *New York ex rel. Pierson,* 293 U. S. 52, 54, and cases there cited. Whether these requirements have been met is itself a federal question. As this Court must decide whether it has jurisdiction in a particular case, this Court must determine whether the federal question was necessarily passed upon by the state court. That determination must rest upon an examination of the record. A certificate or statement by the state court[1] that a fed-

[1]As to the insufficiency of a certificate by the chief justice or presiding justice of the state court, see *Railroad Co.* v. *Rock,* 4 Wall.

eral question has been presented to it and necessarily passed upon is not controlling. While such a certificate or statement may aid this Court in the examination of the record, it cannot avail to foreclose the inquiry which it is our duty to make or to import into the record a federal question which otherwise the record wholly fails to present.

In *Commercial Bank of Cincinnati* v. *Buckingham's Executors,* 5 How. 317, this Court was asked to decide a question which was said to be presented under the contract clause with respect to the validity of a statute of Ohio. The Supreme Court of that State entered upon its record an elaborate certificate stating that the validity of the statute was drawn in question upon the ground that as applied to the charter of the plaintiffs in error it "impaired the obligations thereof, and was repugnant to the constitution of the United States, and that the decision of this court [the Ohio court] was in favor of the validity of the said act of the legislature as so applied." Notwithstanding the certificate, the case was dismissed for want of jurisdiction. *Id.,* p. 343. The Court said:

"It is not enough, that the record shows that 'the plaintiff in error contended and claimed' that the judgment of the court impaired the obligation of a contract, and violated the provisions of the constitution of the United States, and 'that this claim was overruled by the court'; but it must appear, by clear and necessary intendment, that the question must have been raised, and

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177, 178, 180; *Powell* v. *Brunswick County,* 150 U. S. 433, 439; *Sayward* v. *Denny,* 158 U. S. 180, 183; *Henkel* v. *Cincinnati,* 177 U. S. 170, 171; *Home for Incurables* v. *New York,* 187 U. S. 155, 158; *Fullerton* v. *Texas,* 196 U. S. 192, 194; *Louisville & Nashville R. Co.* v. *Smith, Huggins & Co.,* 204 U. S. 551, 561; *Seaboard Air Line Ry.* v. *Duvall,* 225 U. S. 477, 481; *Connecticut General Life Ins. Co.* v. *Johnson,* 296 U. S. 535; *Purcell* v. *New York Central R. Co.,* 296 U. S. 545.

must have been decided, in order to induce the judgment. Let us inquire, then, whether it appears on the face of this record, that the validity of a statute of Ohio, 'on the ground of its repugnancy to the constitution or laws of the United States' was drawn in question in this case." *Id.*, p. 341.

Pursuing that essential inquiry, the Court found that the question decided by the state court was one of the construction of the statute and not of its validity.

In *Lawler* v. *Walker,* 14 How. 149, the Supreme Court of Ohio certified that the validity of statutes of the State had been drawn in question as being in violation of the Federal Constitution and that the court had held the statutes to be valid. The certificate in that case was found to be vague and indefinite but the Court also restated the above-quoted ruling of *Commercial Bank of Cincinnati* v. *Buckingham's Executors, supra.* While in *Parmelee* v. *Lawrence,* 11 Wall. 36, the certificate was made by the presiding judge of the state court and not by the court itself, we took occasion to say:

"We will add, if this court should entertain jurisdiction upon a certificate alone in the absence of any evidence of the question in the record, then the Supreme Court of the State can give the jurisdiction in every case where the question is made by counsel in the argument. The office of the certificate, as it respects the Federal question, is to make more certain and specific what is too general and indefinite in the record, but it is incompetent to originate the question within the true construction of the 25th section [of the Judiciary Act]." *Id.*, p. 39.

This statement was quoted with approval in *Powell* v. *Brunswick County,* 150 U. S. 433, 439.

The case of *Brown* v. *Atwell,* 92 U. S. 327, affords another illustration of the rule. The judgment was rendered in the Court of Appeals of New York and an entry was made in its record that on the argument of the

appeal it was claimed by the appellant that the Act of Congress of 1836, known as the Patent Act, governed the effect of the several transfers relating to the letters patent appearing in the case, and that the court had decided against the claims urged under that act. This Court observed that, until the certificate of the Court of Appeals, it nowhere appeared in the record that any question was raised as to the effect of the patent laws upon the title under consideration. And the Court said (*id.*, pp. 329, 330):

"We have often decided that it is not enough to give us jurisdiction over the judgments of the State courts for the record to show that a Federal question was argued or presented to that court for decision. It must appear that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it. *Commercial National Bank of Cincinnati* v. *Buckingham's Executors,* 5 How. 341; *Lawler et al.* v. *Walker et al.,* 14 *id.* 154; *R. R. Co.* v. *Rock,* 4 Wall. 180; *Parmelee* v. *Lawrence,* 11 *id.* 38.

"The same cases also establish the further rule, that 'the office of the certificate, as it respects the Federal question, is to make more specific and certain that which is too general and indefinite in the record, but is incompetent to originate the question'."

The Court found that the record did not present the federal question to which the certificate referred and the case was accordingly dismissed.

The rule was succinctly stated in *Rector* v. *City Deposit Bank Co.,* 200 U. S. 405, 412, as follows:

"It is elementary that the certificate of a court of last resort of a State may not import a Federal question into a record where otherwise such question does not arise, it is equally elementary that such a certificate may serve to elucidate the determination whether a Federal question exists."

Thus the true function of a certificate or statement of a state court, by way of amendment of, or addition to, the record, is to aid in the understanding of the record, to clarify it by defining the federal question with reasonable precision and by showing how the question was raised and decided, so that this Court upon the record as thus clarified may be able to see that the federal question was properly raised and was necessarily determined. Our decisions in cases where certificates have been found useful should be read in the light of that fundamental consideration. In *Marvin* v. *Trout,* 199 U. S. 212, 223, as explained in *Consolidated Turnpike Co.* v. *Norfolk & Ocean View Ry. Co.,* 228 U. S. 596, 599, there was "a record disclosure of the existence of the Federal question," which was also certified. In the latter case it was assumed that the certificate, made by order of the state court, operated to show that some federal question was decided, but on examining the record this Court found the question to be unsubstantial and denied rehearing, the case having previously been dismissed for want of jurisdiction. *Id.,* p. 603. The record in *Cincinnati Packet Co.* v. *Bay,* 200 U. S. 179, 182, showed that the federal question had been raised and the certificate aided in disclosing that the question was not treated as having been raised too late under the local procedure, a point upon which the state court was the judge. Applying the rule, in *Rector* v. *City Deposit Bank Co., supra,* the Court concluded that as the suit was brought by a trustee in bankruptcy by virtue of the authority conferred upon him by the act of Congress the certificate made "clear the effect, if it were otherwise doubtful, that rights under the bankrupt law were relied upon and passed upon below." See, also, *Capital City Dairy Co.* v. *Ohio,* 183 U. S. 238, 243, 244. It was in the light of these decisions that the question was presented in *Whitney* v. *California,* 274 U. S. 357, 360–362. The writ of error had been dismissed

for want of jurisdiction (269 U. S. 530) and a motion for rehearing was granted. *Id.*, p. 538. The Court of Appeal of the State, as an addition to the record, entered an order stating that the question whether the California Criminal Syndicalism Act and its application were repugnant to the Fourteenth Amendment to the Federal Constitution was considered and passed upon by the court. While this Court said that the record did not show that the defendant had raised or the state court had decided a federal question except as it appeared from that order, the record did disclose facts indicating the presence of the federal question which the order of the state court said was actually presented and decided, and accordingly jurisdiction was entertained. And it has been in recognition of the established principle governing the exercise of our jurisdiction, and not as a departure from it, that we have said that opportunity might be afforded upon seasonable application to obtain a certificate from the state court where it appeared that an appropriate certificate might lead to a better understanding of the record. See *Lynch* v. *New York ex rel. Pierson, supra; International Steel Co.* v. *Surety Co.*, 297 U. S. 657, 662.

In some of the cases cited above, we found from our examination of the record that, notwithstanding the certificate, the decision of the state court rested upon an adequate non-federal ground and hence we were without jurisdiction. See *Commercial Bank of Cincinnati* v. *Buckingham's Executors, supra; Brown* v. *Atwell, supra; Powell* v. *Brunswick County, supra.* A similar result follows where, even assuming that the state court has formally determined a federal question, it does not appear to have been a substantial one. See *Consolidated Turnpike Co.* v. *Norfolk & Ocean View Ry. Co., supra.* In other cases an examination of the record has left the Court in doubt as to what has actually been determined. That is the situation in the present case.

The appellee points to the provision of § 1078 of the Civil Practice Act of New York (enacted long before the so-called moratorium acts) that, after final judgment for the plaintiff in a foreclosure action, no other action shall be maintained to recover any part of the mortgage debt without leave of the court in which the former action was brought. In the instant case the amended complaint does not allege that such leave was obtained. We are also advised of decisions by the state court, prior to the one here sought to be reviewed, construing Chapter 794 of the Laws of New York of 1933 (§§ 1083–a and 1083–b of the Civil Practice Act) to which the amended remittitur refers. That act (§ 1083–a) forbids a judgment for any residue of the debt, remaining unsatisfied after sale of the mortgaged property, except as therein provided. Provision is made for an application by the creditor in the foreclosure action for leave to enter a deficiency judgment, and thereupon the court is to determine the fair and reasonable market value of the mortgaged premises and is to make an order directing the entry of a deficiency judgment, which is to be for an amount equal to that remaining due less the market value as determined or the sale price of the property whichever shall be the higher; and if no motion for a deficiency judgment is thus made, the proceeds of the foreclosure sale are to be regarded as full satisfaction of the mortgage debt "and no right to recover any deficiency in any action or proceeding shall exist." Section 1083–b provides that in actions, other than foreclosure actions, to recover for an indebtedness secured solely by a mortgage on real property and originating simultaneously with such mortgage and secured thereby, against any one "directly or indirectly or contingently liable therefor," the party against whom the money judgment is demanded shall be entitled to set off the reasonable market value of the mortgaged property less prior liens.

The Court of Appeals had sustained the constitutional validity of this legislation which would seem to be applicable to an action upon a collateral bond such as that described in the amended complaint herein. See *Klinke* v. *Samuels,* 264 N. Y. 144; *City Bank Farmers Trust Co.* v. *Ardlea Incorporation,* 267 N. Y. 224.

With these recent decisions in mind, it may be, as has been suggested, that the Court of Appeals considered the federal question, which it described in the amended remittitur as relating to the validity of §§ 1083-a and 1083-b, to be no more than a challenge of the requirement that the right to a deficiency judgment should be heard and determined in the foreclosure action, and sustained the validity of that requirement, without reviewing, or deeming it necessary to review, the questions which could have been raised, and if properly raised could have been brought to this Court in the foreclosure action to which both the plaintiff and defendant herein had been parties. Whether this view of the action of the state court is the correct one, we are unable satisfactorily to determine. If its decision was in truth based upon the theory that by a proper construction of the statute or for any other reason the extent of the deficiency or the right to recover it had been finally determined in a prior litigation, there was no longer a necessity to inquire whether the statute would be constitutional in its application to a different case—a case lacking the feature of any prior determination—, and an answer to that inquiry would be superfluous, even if attempted.

In the exercise of our appellate jurisdiction we have power not only to correct errors in the judgment under review but to make such disposition of the case as justice requires. We have applied this principle to cases coming from state courts where supervening changes had occurred since the entry of the judgment, and where the record failed adequately to state the facts underlying

the decision of the federal question. See *Patterson* v. *Alabama,* 294 U. S. 600, 607; *Villa* v. *Van Schaick,* 299 U. S. 152. We have afforded an opportunity for appropriate presentation of the question by an amendment of the record as the state court might be advised. *Villa* v. *Van Schaick, supra.* We think that a similar opportunity should be accorded here in order that uncertainty may be removed and that the precise nature of the federal question, how it was raised and the grounds of its disposition, may be definitely set forth, so that we may be able to decide whether a substantial question within our jurisdiction has necessarily been determined.

For that purpose the judgment is vacated and the cause is remanded for further proceedings.

Judgment vacated.

O'CONNOR ET AL. *v.* MILLS ET AL.

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

No. 442. Submitted January 12, 1937.—Decided February 1, 1937.

1. Paragraph (k) of § 77B of the Bankruptcy Act makes §§ 24 and 25 of the Act applicable to appeals from orders and judgments entered in reorganization proceedings under § 77B. P. 27.
2. A judgment of the District Court disapproving and dismissing a petition for reorganization of a corporation under § 77B of the Bankruptcy Act is in the same category, for the purposes of appeal, as a judgment refusing to adjudge the defendant a bankrupt, and under § 25 (a), cl. (1) is appealable as of right to the Circuit Court of Appeals. P. 27.

85 F. (2d) 1017, reversed.

CERTIORARI, 299 U. S. 536, to review an order dismissing an appeal.

Mr. J. A. Tellier submitted for petitioners.

Mr. J. W. House submitted for respondents.

PER CURIAM.

Petitioners filed a creditors' petition under § 77B of the Bankruptcy Act proposing the reorganization of White & Black Rivers Bridge Company, a corporation. The debtor answered, seeking approval of the petition. Members of a bondholders' protective committee, holding bonds issued by the corporation, filed a response to the petition, alleging that it was not filed in good faith and asking that it be disapproved and dismissed. Petitioners replied. After allowing thirty days to afford an opportunity to ascertain the possibility of the submission of a feasible plan of reorganization, the District Court, upon hearing, dismissed the petition as insufficient to meet the requirements of § 77B.

The District Court allowed an appeal upon the giving of a bond and the appeal was perfected accordingly. The appellees moved to dismiss the appeal upon the ground that it was unauthorized by law as it had not been allowed by the Circuit Court of Appeals. That court granted the motion and the appeal was dismissed. We issued a writ of certiorari. November 16, 1936.

Paragraph (k) of § 77B provides that the other sections of the Bankruptcy Act shall apply to proceedings under § 77B, 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 consequences and effect as an order of adjudication." The effect of this provision is to make §§ 24 and 25 of the Bankruptcy Act applicable to appeals from orders and judgments entered in proceedings under § 77B.

Section 25 (a) provides that appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit courts of appeals in the cases enumerated, the first of which is—"from a judgment adjudging or refusing to adjudge the defendant

a bankrupt." While paragraph (k) refers to "the order approving the petition or answer" under § 77B, which is to have "the same consequences and effect as an order of adjudication," we think that to carry out the manifest intent of the statute, an order disapproving the petition or answer under § 77B should have the same effect for the purpose of appeal as an order refusing adjudication. Interpreting the statute in that sense, we said in *Meyer* v. *Kenmore Hotel Co.*, 297 U. S. 160, 163, 164:

"The appeal provisions of §§ 24 and 25 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 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 instant case is not one where the petition had been approved and the appeal was from a subsequent order denying an application to dismiss the proceeding or from an order confirming or refusing to confirm a plan of reorganization. See *Meyer* v. *Kenmore Hotel Co., supra,* pp. 161, 162, 164, 166; *Humphrey* v. *Bankers Mortgage Co.*, 79 F. (2d) 345, 349, 350. The appeal is from a judgment which disapproved and dismissed the petition and should be treated as in the same category as an appeal from a judgment refusing to adjudicate the defendant a bankrupt and hence as appealable under

§ 25 (a). The Circuit Court of Appeals should have entertained the appeal and disposed of it upon the merits.

The order of the Circuit Court of Appeals is reversed and the cause is remanded for further proceedings in conformity with this opinion.

Reversed.

WAYNE COUNTY BOARD OF REVIEW ET AL. *v.* GREAT LAKES STEEL CORP.

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

No. 253. Argued January 12, 13, 1937.—Decided February 1, 1937.

A statute of Michigan establishing a county board of review of tax assessments, applicable only to counties having a population in excess of 500,000, violates § 30 of Art. V of the Michigan constitution, which forbids the passing of a local or special Act in any case where a general Act can be made applicable.

12 F. Supp. 55, affirmed.

Messrs. Albert E. Champney and *Oscar A. Kaufman,* with whom *Mr. Jason L. Honigman* was on the brief, for appellants.

Mr. Prewitt Semmes, with whom *Mr. Elmer R. Milburn* was on the brief, for appellee.

PER CURIAM.

Appellee brought this suit to restrain the enforcement, in relation to an assessment upon its property, of a statute of Michigan establishing a county board of review. Act No. 33, Public Acts of Michigan, First Extra Session, 1934.

The Act established a county board of review of assessments for counties having a population in excess of

500,000. The Act was attacked as invalid under both the state and federal constitutions. Interlocutory and permanent injunctions were sought. The District Court, three Judges sitting (28 U. S. C. 380), held that the requisite jurisdictional amount was in controversy and that there was ground for the exercise of equitable jurisdiction.

With respect to the state constitution, appellee contended that the statute, by reason of the requirement as to population, was limited in effect to Wayne County and thus was a local and special act in a case where a general act could be made applicable, and violated § 30 of Article V of the constitution of Michigan, which provides:

"The legislature shall pass no local or special act in any case where a general act can be made applicable, and whether a general act can be made applicable shall be a judicial question."

The District Court of the Eastern District of Michigan, composed of three judges especially versed in the jurisprudence of the State, sustained that contention and granted a permanent injunction. 12 F. Supp. 55. We are unable to conclude that the court erred in deciding this question of state law and we accordingly affirm its decree.

Decree affirmed.

UNITED STATES EX REL. WILHELM, TRUSTEE, ET AL. *v.* CHAIN, EXECUTRIX.

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

No. 335. Argued January 8, 1937.—Decided February 1, 1937.

1. A bond, with sureties, given by a national bank pursuant to the bankruptcy law and orders, to induce the appointment of the bank as a designated depository of bankruptcy funds, is not a mere offer, like a continuing guaranty of future performances revocable until something is done under it, but is a contract given upon present, adequate and indivisible consideration—i. e., the designation of the bank as depository—which becomes binding when delivered to and approved by the bankruptcy court. P. 32.
2. The obligation of a surety on such a bond, in the absence of any stipulation to the contrary, survives his death and binds his personal representative for defaults committed by the depository after the death in respect of deposits made after the death. P. 34.

84 F. (2d) 138, reversed; District Court affirmed.

CERTIORARI, 299 U. S. 531, to review the reversal of a judgment recovered by a Trustee in Bankruptcy against the executrix of a deceased surety on the bond given by the bank as a depository of funds of bankrupt estates.

Mr. F. E. Parrack for petitioners.

Mr. Frank Cox submitted for respondent.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This was an action on the bond of a designated depository for money of bankrupt estates. The case will be stated.

July 22, 1924, a national bank at Kingwood, West Virginia, was designated by the bankruptcy court of that district as a depository for funds of bankrupt estates, subject to the requirement that the bank give a bond in the

penal sum of $5,000 and that the bond have the court's approval. Later in the same month the bond was given by the bank and approved by the court. Thereupon the bank became an authorized depository, and it continued to be such, without giving any further bond, until June 22, 1931, when it failed.

The bond was under seal; named the United States as obligee; was signed by the bank and two individual sureties, as obligors; declared that the obligors were thereby binding themselves, their heirs, executors, administrators, and successors, jointly and severally; recited the designation of the bank as a depository; and was conditioned for the faithful discharge and performance by the bank of all duties pertaining to it as a depository.

Between August 12, 1930, and June 22, 1931, Charles P. Wilhelm, as trustee for the estate of W. H. Pentony, a bankrupt, deposited in the bank, as a designated depository, various sums of money belonging to that estate, and made authorized withdrawals, with the result that, of the deposits so made, there remained in the bank on June 22, 1931, a balance of $3,190.72 to the credit of the trustee. On that day the bank became insolvent, closed its doors, refused to pay to the trustee the balance so owing to the bankrupt estate, and thereby broke the condition of its bond.

In March, 1926, which was after the bond was given and approved and before Wilhelm, trustee, made any deposit in the bank, James W. Flynn, one of the sureties on the bond, died and Nellie Flynn Chain became executrix of his estate. Flynn did not at any time during his life seek to revoke or terminate his suretyship; nor did his executrix subsequently take any step to that end.

The action on the bond was in the name of the United States for the use of Wilhelm, trustee, and was brought

against the bank, the surviving surety and the executrix of the deceased surety.

The district court gave judgment against the defendants for the balance due Wilhelm, trustee. The executrix of the deceased surety appealed, and the court of appeals reversed the judgment as to the estate of that surety. 84 F. (2d) 138. Certiorari was granted by this Court.

Pertinent statutes and a related general bankruptcy order are copied in the margin.[1]

The crucial question for decision, as was said by the court of appeals, is whether the obligation of an individual surety on such a depository bond terminates with his death. That court answered in the affirmative, one judge dissenting. It likened such a bond to a continuing guaranty whereby the guarantor, without present

[1] Bankruptcy Act of 1898.

Sec. 47 (a) Trustees shall respectively . . . (3) deposit all money received by them in one of the designated depositories; (4) disburse money only by check or draft on such depositories in which it has been deposited; . . .

Sec. 50 (h) Bonds of . . . designated depositories shall be filed of record in the office of the clerk of the court and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions.

Sec. 61 (a) Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories. [c. 541, 30 Stat. 544.]

General Order XXIX. No moneys deposited as required by the Act shall be drawn from the depository unless by check or warrant, signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge . . . [298 U. S. 697.]

consideration, guarantees a series of future performances, such as payment of the purchase price of goods to be sold, or repayment of money to be advanced, from time to time in the future; and it applied the usual rule that such a guaranty is merely an offer and does not ripen into a contract in respect of any sale or advance until the same is made, and that the guaranty, in so far as it remains merely an offer, may be revoked by the guarantor and is terminated by his death.[2]

The court rightly recognized that a continuing guaranty, if supported at the outset by a sufficient consideration, is a binding contract which is neither revocable by the guarantor nor terminable by his death, although the acts guaranteed may cover a long or indefinite period of time.[3] But it pronounced this rule inapplicable because it regarded the bond as more nearly analogous to a continuing guaranty without present consideration.

We are of opinion that the bond was not a mere offer but was given upon a present and sufficient consideration, and therefore became a binding contract when it was delivered to and approved by the bankruptcy court. The inducement, as also the occasion, for the bond was the designation of the bank as a depository. This was a present, adequate and indivisible consideration.[4] Without the bond the bank would not have been

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[2] *Davis Sewing Machine Co.* v. *Richards,* 115 U. S. 524, 527; *Jordan* v. *Dobbins,* 122 Mass. 168; Rest. Contracts, §§ 35 (e), (f), 44, 48.

[3] *Davis* v. *Wells,* 104 U. S. 159, 165–167; *Zimetbaum* v. *Berenson,* 267 Mass. 250, 254; 166 N. E. 719; *National Eagle Bank* v. *Hunt,* 16 R. I. 148, 151; 13 Atl. 115; *Kernochan* v. *Murray,* 111 N. Y. 306, 308–309; 18 N. E. 868; *Bennett* v. *Checotah State Bank,* 176 Okla. 518; 56 P. (2d) 848; Williston Contracts, Rev. Ed. § 1253; Rest. Contracts, § 46; 1 Brandt Suretyship and Guaranty, 2d ed., § 133.

[4] *Lloyd's* v. *Harper,* L. R. 16 Ch. Div. 290, 314, 317, 319; *In re Crace,* L. R. 1902 (1) Ch. Div. 733, 738; Williston Contracts, Rev. Ed., § 1253.

entitled to the advantages of the designation; while with the bond it was entitled to them. In this regard the bond was like that of a collector of customs, county treasurer, sheriff, clerk of court, administrator, guardian or cashier, as to which it is well settled that the selection of the officer or employe whose fidelity is assured constitutes a present consideration amply supporting the undertaking of the obligors—sureties as well as principals.[5]

"It is a presumption of law that the parties to a contract bind not only themselves but their personal representatives. Executors, therefore, are held to be liable on all contracts of the testator which are broken in his lifetime, and, with the exception of contracts in which personal skill or taste is required, on all contracts broken after his death." [6]

The bond in suit is a contract for the conditional payment of money, not the exercise of personal skill or taste, and therefore is one to which the presumption applies. No doubt it is admissible to restrict the presumption by a stipulation limiting a surety's obligation to defaults occurring within his lifetime, but the present bond does not contain such a stipulation, or anything indicating that such a limitation was intended. On the contrary, its terms are in full accord with the presumption, for in it the obligors expressly declare their purpose to bind not only themselves, but also their executors, administrators and successors, jointly and severally, for the performance of the obligation set forth.

In a long line of decisions relating to bonds not distinguishable from the one in suit it has been held that

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[5] *Estate of Rapp* v. *Phoenix Insurance Co.*, 113 Ill. 390, 395; *Lloyd's* v. *Harper*, L. R. 16 Ch. Div. 290, 314, 317, 319; *In re Crace*, L. R. 1902 (1) Ch. Div. 733, 738; Williston Contracts, Rev. Ed., § 1253.

[6] 1 Chitty Contracts, 11th Am. Ed., 138; 2 Parsons Contracts, 6th ed., 530–531.

a surety's obligation does not terminate with his death but binds his personal representatives for past and subsequent defaults, as it would bind him if living.[7] The principle underlying these decisions is the same that prevails in respect of other related contracts, and we regard it as well sustained in reason and supported by the preponderant weight of authority.

Cases are brought to our attention in which it is held that a surety may terminate his obligation as respects future defaults by giving notice to that effect to the obligee. But these cases are not apposite. In some the instrument sued upon was held to be only a continuing offer without a supporting consideration and therefore revocable as to future transactions. Others rest upon a power so to terminate expressly reserved in the bond or in the applicable statute. Here the bond is a binding contract supported by an adequate consideration, and there is no reservation of a right to terminate in the bond or in the statute under which it was given. Nor has there been any effort to effect such a termination.

Whether the bankruptcy court may, upon appropriate application and showing, discharge a surety on an existing bond, as respects possible future defaults, and require the depository to give another and substituted bond, need not be considered, for no such application or showing appears to have been attempted.

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[7] *Broome* v. *United States,* 15 How. 143; *Hecht* v. *Weaver,* 34 Fed. 111; *United States* v. *Keiver,* 56 Fed. 422, 423; *Fewlass* v. *Keeshan,* 88 Fed. 573, 574; *Pond* v. *United States,* 111 Fed. 989, 997; *In re Crace,* L. R. 1902 (1) Ch. Div. 733; *Calvert* v. *Gordon,* 3 Man. & Ry. 124; *Green* v. *Young,* 8 Greenl. 14; *Royal Insurance Co.* v. *Davies,* 40 Iowa 469; *Moore* v. *Wallis,* 18 Ala. 458; *Knotts* v. *Butler,* 10 Rich. Eq. 143; *Hecht* v. *Skagg,* 53 Ark. 291; 13 S. W. 930; *Shackamaxon* v. *Yard,* 150 Pa. 351, 358; 124 Atl. 635; *Mundorff* v. *Wangler,* 44 N. Y. Sup. Ct. 495, 506; *Voris* v. *State,* 47 Ind. 345; 349–350; *Exchange Bank* v. *Barnes,* 7 Ontario 309, 320; *Snyder* v. *State,* 5 Wyo. 318, 323; 40 Pac. 441.

While the bond was under seal we need not consider the effect to be given to this under the local law, for it affirmatively appears that the bond was given for a present and adequate consideration, which leads to the same result as if the seal were given the effect which would be accorded to it at common law.

It results that the judgment of the court of appeals must be reversed and that of the district court affirmed.

Reversed.

ELMHURST CEMETERY COMPANY OF JOLIET *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 255. Argued January 5, 6, 1937.—Decided February 1, 1937.

1. Where there is substantial evidence to support a finding of the Board of Tax Appeals upon a question of fact, its decision of such question is conclusive upon review. P. 40.
2. *Held,* there was substantial evidence in this case to support the finding of the Board in respect to the March 1, 1913 value of cemetery lots subsequently disposed of, and the reversal of its decision of that question by the Circuit Court of Appeals amounted to an unwarranted substitution of the court's judgment concerning facts for that of the Board. P. 40.

83 F. (2d) 4, reversed; B. T. A. affirmed.

CERTIORARI, 299 U. S. 527, to review a judgment reversing a decision of the Board of Tax Appeals (unreported) which set aside an order of the Commissioner determining a deficiency of income tax.

Mr. Elden McFarland, with whom *Mr. Edward J. Quinn* was on the brief, for petitioner.

Mr. Thurman Arnold, with whom *Solicitor General Reed, Assistant Attorney General Jackson,* and *Messrs.*

Sewall Key and *J. Louis Monarch* were on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Petitioner, in 1909, purchased one hundred and thirty-seven acres of land near Joliet, Illinois, for $60,000.00. Thirty-seven acres were divided into plots and developed for cemetery purposes by grading, constructing drives, planting shrubbery, etc., at a cost of $35,000.00. Grave plots, varying in area from 150 to 1,500 square feet, were sold from time to time under contracts for perpetual care.

Some 36,000 square feet were disposed of during the years 1909 to 1913 at prices ranging from 70.2 cents to 79.5 cents. The average between March 1, 1912, and March 1, 1913, was 76.6 cents. In the three years 1926, 1927, and 1928, 42,000 square feet were sold for $1.55 to $1.77. To determine the taxable gains realized from the latter sales it became necessary to ascertain the value of the lots as of March 1, 1913. The petitioner's return estimated this at 76.6 cents. The Commissioner adopted 23.96 cents and assessed deficiencies accordingly.

Upon petition for redetermination the Board of Tax Appeals, after considering the evidence, approved the 76.6 cent valuation and found no deficiencies. The evidence consisted of a stipulation by counsel concerning sales in 1909 to 1913 as detailed above, and the testimony of the Cemetery Superintendent.

He stated the original cost of the one hundred and thirty-seven acres, expense of development, area sold in 1926, 1927, 1928, and prices obtained. He affirmed familiarity with the property on March 1, 1913, prices then prevailing, and stated that the sales of 1912 and 1913 were in normal course without extra effort. Also that "the purchase price was established by my visiting

a good many cemeteries that I figured were practically of the same class as that cemetery and situated near cities of about the same population, and I established a price from the price they were selling at." Further that "every grave and lot in the cemetery sold since its organization is under perpetual care, and when perpetual care is provided, it means keeping the roads and drives in proper repair, keeping the drainage system in proper repair, keeping the fences in repair, cutting the grass, pruning the trees, shrubs, and keeping it in good condition." "We hope for a gradual increase in sales every year because, as a general rule, for every head of a family that is buried you secure four new families. That is the rule cemetery companies have adopted." He thought it might take seventy-five years to dispose of all lots.

The Board declared "the parties are now concerned only with the value as of March 1, 1913, of that thirty-seven acres of petitioner's lands which have been improved and from which sales have been made." "Beyond statements of counsel to the effect that respondent [Commissioner] has attempted by formula to reduce the value of the improved land as of March 1, 1913, to present value, we are uninformed as to the method by which he chose the figures at which he fixes the basis for determining gain. Petitioner, however, has chosen as the footage valuation as of March 1, 1913, the selling price of its grave lots during the year just preceding that date—76.6 cents—which is less than the average sales price during the month of March, 1913. We are of opinion that the valuation for which petitioner contends is reasonable and should be allowed. It is based upon actual sales, and consequently comes as closely as may be to that fair market value, so often judicially defined as the price which property will bring when offered by a willing seller to a willing buyer, neither being obligated to buy or sell."

Lots disposed of in 1912 and 1913 went with agreements for perpetual care; so did those sold in 1926, 1927, and 1928; prices obtained in the latter years may be compared with those received in the earlier ones—they were for like things.

The Commissioner asked review by the Circuit Court of Appeals. He there urged that March 1, 1913, values should be ascertained by discounting sale prices during the preceding twelve months because of the time which would be required in order to dispose of the whole. The Court said: "The facts in this case necessitate the rejection of the selling price as the sole determinator of value. Far more equitable is the selling price less discount for years required to realize said selling price." "The Commissioner was liberal with the taxpayer." Accordingly it reversed the Board and directed affirmance of the Commissioner's assessment.

This action, we think, amounted to an unwarranted substitution of the Court's judgment concerning facts for that of the Board. There was substantial evidence, as appears above, to support the latter's conclusion, and in such circumstances this must be accepted. It is the function of the Board to weigh the evidence and declare the result. We undertook to state the applicable rule in *Helvering* v. *Rankin,* 295 U. S. 123, 131, and *General Utilities & Operating Co.* v. *Helvering,* 296 U. S. 200, 206.

The judgment here complained of must be reversed. The action of the Board of Tax Appeals is affirmed.

Reversed.

Counsel for Parties.

UNITED STATES *v.* GILES.

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

No. 329. Argued January 13, 1937.—Decided February 1, 1937.

1. The rule that criminal statutes must be strictly construed does not require that the words be given their narrowest meaning or that the evident intent be disregarded. P. 48.
2. A bank teller who, for the purpose of concealing a shortage in his cash, withholds deposit slips which in the ordinary course of business will go to the bookkeeping department for entry, as a result whereof the ledger understates the amount of the bank's liability to the depositors, violates R. S., § 5209, as amended, which denounces as a misdemeanant "any officer, director, agent, or employee of any Federal reserve bank, or a member bank . . . who *makes* any false entry in any book, report, or statement of such . . . bank, with intent in any case to injure or defraud . . ." Pp. 48–49.

   To hold the statute broad enough to include deliberate action from which a false entry by an innocent intermediary necessarily follows, gives to the words employed their fair meaning and is in accord with the evident intent of Congress. To hold that it applies only when the accused personally writes the false entry or affirmatively directs another to do so would emasculate the statute—defeat the very end in view.

84 F. (2d) 943, reversed; D. C. affirmed.

CERTIORARI, 299 U. S. 531, to review a judgment reversing a judgment of conviction for violation of R. S., § 5209.

Assistant Attorney General McMahon, with whom *Solicitor General Reed* and *Messrs. William W. Barron,* and *W. Marvin Smith* were on the brief, for the United States.

Citing, *inter alia, Morse* v. *United States,* 174 Fed. 539, cert. den., 215 U. S. 605; *Lewis* v. *United States,* 22 F. (2d) 760; *Richardson* v. *United States,* 181 Fed. 1; *McKnight* v. *United States,* 97 Fed. 208, 213; *United*

States v. *Fish,* 24 Fed. 585, 593–594. Cf. *United States* v. *Gooding,* 12 Wheat. 460, 469; *Commonwealth* v. *White,* 123 Mass. 430, 434; *Seifert* v. *State,* 160 Ind. 464, 466; *Maxey* v. *United States,* 30 App. D. C. 63, 74–75; *Rex* v. *DeMarny* [1907] 1 K. B. 388; *People* v. *Lewis,* 124 Cal. 551; *Thornton* v. *State,* 107 Ga. 683.

Mr. Will A. Morriss, with whom *Mr. Nat L. Hardy* was on the brief, for respondent.

Citing, *inter alia,* 12 U. S. C. 592; 18 U. S. C. 550; *United States* v. *McClarty,* 191 Fed. 518, 523; *United States* v. *Herrig,* 204 Fed. 124; *United States* v. *Booker,* 98 Fed. 291; *Twining* v. *United States,* 141 Fed. 41; *State* v. *Asal,* 79 Mont. 385; *United States* v. *Eqe,* 49 Fed. 852, 853.

Mr. Justice McReynolds delivered the opinion of the Court.

Section 5209, R. S.,[1] as amended by Act Sept. 26, 1918, c. 177, 40 Stat. 967, 972 (U. S. C., Title 12, § 592) provides:

[1] Sec. 5209 R. S., Title LXII, National Banks, Ch. 3. "Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

"Any officer, director, agent, or employee of any Federal reserve bank, or of any member bank . . . who *makes* any false entry in any book, report, or statement of such Federal reserve bank or member bank, with intent in any case to injure or defraud such Federal reserve bank or member bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such Federal reserve bank or member bank, or the Comptroller of the Currency, or any agent or examiner appointed to examine the affairs of such Federal reserve bank or member banks, or the Federal Reserve Board . . . shall be deemed guilty of a misdemeanor, and upon conviction thereof in any district court of the United States shall be fined not more than $5,000 or shall be imprisoned for not more than five years, or both, in the discretion of the court."

Count three of an indictment in the United States District Court, Western District of Texas, charged that respondent Giles, while employed as teller by the Commercial National Bank of San Antonio, Texas, a member of the Federal Reserve National Bank of Dallas, did "unlawfully, knowingly, wilfully, fraudulently, and feloniously *make and cause to be made* in a book of the said The Commercial National Bank of San Antonio, Texas, known as the Individual Ledger, in the account designated 'S. A. Public Service Company,' under date of 'Jul 25 '33' in the column bearing the printed heading 'Balance,' being the fifth entry from the top of the column aforesaid, and directly opposite the machine printed date thereon 'July 25 33,' a certain false entry in the following figures, to wit, '7,874.07,' which said entry so made as aforesaid, purports to show and does in substance and effect indicate and declare that The Commercial National Bank of San Antonio, Texas, was indebted and liable to the San Antonio Public Service Company in the amount of Seven Thousand Eight Hundred Seventy-Four

Dollars and Seven Cents ($7,874.07) on July 25, 1933, whereas in truth and in fact said indebtedness and liability on said date was a different and much larger amount."

Count four made a like charge relative to the account of the National Life and Accident Insurance Company.

He was tried, found guilty, and sentenced under both counts. The point for our decision is whether the trial court erred in refusing to direct a verdict of not guilty. The essential facts are not in dispute.

From the evidence it appears—

Giles, once bookkeeper for the Commercial National Bank, became first paying and receiving teller with custody each day of some $35,000.00 cash. His duty was to receive deposits and place accompanying slips or tickets where they would reach the bookkeepers for entry. Eighteen months prior to the alleged offense, he discovered shortage in his cash but made no report to his superiors. To cover up the shortage he resorted to the practice of withholding selected deposit slips for three or four days before permitting them to reach the bookkeeping department. This caused the ledger to show false balances. Other shortages occurred; July 25, 1933, the total stood at $2,650.00.

On that day he accepted deposits with proper tickets from San Antonio Public Service Company and National Life and Accident Insurance Company for $1,985.79 and $663.27 respectively, accompanied by cash and checks. Together these approximated his shortage. He withheld both tickets from the place where they should have gone and secreted them. If placed as usual and as his duty required, they would have reached the bookkeeper during the day. Entries on the ledger would have shown the depositors' true balances.

The Bank closed July 29th. The slips never reached the bookkeeper. The individual ledger accounts at the

end of the 25th and thereafter understated the liability of the Bank to the depositors.

The respondent acknowledged his purpose in withholding the deposit tickets was to prevent officers and examiners from discovering his shortage. Some excerpts from his testimony are in the margin.[2]

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[2] "My actual shortage was $2,650.00 that had shown up without my having any responsibility for it. The only way it could be carried was holding out deposit tickets to offset the shortage in the cash, and on the 25th of July withholding these two deposits, the San Antonio Public Service and the National Life & Accident, and depositing the two tickets that had been held over from the 21st.

"Asked if I selected those two deposit slips that day to withhold them because they, together, made up the amount of the shortage, that was the reason I selected those two, because it covered the amount of the shortage.

"The bank got the money for both of those deposits. I did not make any false entries with reference to those items. It is true that all I did was simply put the deposit slips in the cigar box and withheld them for the time being, until I could recover the shortage. I did not make any report to any bookkeeper. As to how the bookkeeping department received its information on which they keep their books, the bookkeepers came in three or four times a day and lots of days oftener, and took the deposit tickets and checks out of the drawers. The business of the day was represented by the tickets and checks. I would put those in the drawers; I had a special drawer for them, divided into sections. As to whether I took them to the bookkeepers or they came to the drawers whenever they wanted to and get them—they came and got them whether I was there or not. I had no control or direction whatever over the bookkeeping department or any bookkeeper. Mr. Crowther had control and direction over the bookkeepers; really, Mr. Roberts handled them, but Mr. Crowther was over the bookkeepers. If the entries were made on any given date showing the balance of any depositors, etc., I did not have anything whatever to do with making the entries or causing them to be made. They simply came to the drawers and got the checks and deposit slips, and from that made up their entries. These two deposit slips that were withheld and stuck in the cigar box that day would have gone right on into the books in time if the bank had not closed. . . . They were simply withheld that way to

At the conclusion of the evidence counsel moved for a directed verdict of not guilty. This was denied. The jury found guilt under both counts; an appeal, with many assignments of error, went to the Circuit Court of Appeals.

That Court declared: "The serious question presented for decision is whether the law will support a conviction on an indictment charging that defendant caused the false entries to be made."

"Of course, in a sense, one who makes a false entry causes it to be made. If he makes an entry himself or directs another to make it, an allegation in the indictment that he caused it to be made may be treated as surplusage and harmless, but where the defendant has neither made a false entry nor directed another to do so, the same allegation is material and injurious. A charge that one has caused a false entry to be made is very much broader than the charge that he made it." "We consider the allegation of the indictment that defendant

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make my cash balance; that was the only way I had of doing that. . . . I withheld deposit tickets from time to time in order that my cash shortage would not be discovered.

"With regard to the two deposits that are directly in question in this case, one to the National Life & Accident Company and one to the San Antonio Public Service Company, each on the 25th of July, 1933, I withheld those two deposit tickets from the bookkeepers. Asked if instead of putting them in the drawer with the balance of the deposit tickets for that day, I put them in a different place where I knew the bookkeepers would not look for them, yes, sir, I put them in the cigar box. The bookkeepers had nothing to do with the cigar box. The bookkeepers would go to the regular place where the deposit slips were kept to get them. The reason I put the two deposit tickets in the cigar box was for the sole and only purpose of keeping them from the bookkeepers to keep them from going through, to keep them from going on the account of the depositors.

"Asked if by putting deposit slips in a place where he would not get them and I knew he would not get them, I had that much control

did 'cause to be made a certain false entry in a book of the bank,' charged a degree and classification of the offense not within the letter or intent of the law." "The evidence in the record conclusively shows that defendant neither made the false entries nor did anything that could be considered as a direction to the bookkeeper to make them. Without the charge that he caused the entries to be made he could not have been convicted. It follows that it was prejudicial error to overrule the motion for a directed verdict of acquittal."

Dissenting, one judge said:

"This statute plainly intends to punish the falsification of bank records with intent to deceive or defraud. If false entries are deliberately produced, although through an ignorantly [sic] innocent agent, the bank em-

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over the bookkeepers, yes, sir, by holding them out, of course, he would not get them.

"Q. Now I show you one of the Government's Exhibits, which is the individual ledger account of the San Antonio Public Service Company in the right hand column, the 5th line from the top of the page, an entry under date of July 25th, 1933, under the column head 'new balance' which is the last balance of that account shown for July 25th, 1933, of $7,874.07; was that the true balance of that account on that date? A. That was the true balance of everything that went through to the account. Q. That is right, but was that a true balance on the account; do the figures, 7,874.07, represent the liability of the Commercial National Bank to the San Antonio Public Service Company at the close of business on July 25th, 1933? A. No, sir; the deposit slip was in my cage of $1,985.79.

"Q. And then this entry of $7,874.07 is not correct, because you did not let the bookkeepers have the deposit ticket? A. We often held deposit tickets over. Q. But you withheld it for a purpose, didn't you? A. Yes, sir. Q. Your intention in withholding it was so that it would not go on the ledger sheet, wasn't it? A. Yes, sir; I put it in the cigar box.

"I did not make any entries or figures of any sort from which the bookkeepers might have got it off the entries. The only entry I ever made was in the depositor's pass book. I therefore made no other entries."

ployee who concocts the plan and achieves the result is, in my opinion, guilty. This innocent bookkeeper was the teller's real though unconscious agent in making the entries; as truly so as if the false entries had been requested in words." ". . . the present case is not one of a mere failure to prevent a consequence, but is one of contriving that consequence and so fathering it as to make it wholly the contriver's own. The bookkeeper in making these false entries was doing the will of the teller, though he did not know it. The false entries are in law the acts of the teller who planned them and did all he needed to do to produce them."

Counsel for the respondent now affirm: "There is no dispute as to the facts." "The act committed by the defendant was the withholding by him and the failure by him to turn over to the Bookkeeping Department in the usual course of the bank's business a deposit slip." He did not *cause* any false entry to be made. Personally he made no such entry; he did not affirmatively direct one. By withholding the ticket he prevented an entry; he caused none.

The rule, often announced, that criminal statutes must be strictly construed does not require that the words of an enactment be given their narrowest meaning or that the lawmaker's evident intent be disregarded. *United States* v. *Corbett,* 215 U. S. 233, 242. Here the purpose to insure the correctness of bank records by prescribing punishment for any employee who, with intent to deceive, etc., deliberately brings about their falsification is plain enough. The statute denounces as criminal one who with intent, etc., "makes any false entry." The word "make" has many meanings, among them "To cause to exist, appear or occur," Webster's International Dictionary, 2nd ed. To hold the statute broad enough to include deliberate action from which a false entry by

an innocent intermediary necessarily follows, gives to the words employed their fair meaning and is in accord with the evident intent of Congress. To hold that it applies only when the accused personally writes the false entry or affirmatively directs another so to do would emasculate the statute—defeat the very end in view.

Morse v. *United States,* 174 Fed. 539, 547, 553—Circuit Court of Appeals, Second Circuit—gave much consideration to an indictment and conviction under R. S., § 5209. The Court said: "It is true that the defendant did not make any of the entries in the books or reports with his own pen. All of them were made by the employees of the bank as part of their routine work. If it were necessary to prove against a director that he actually made the entry charged to be false, conviction under the statute would be impossible, as these entries are invariably made by subordinates in the executive department. Congress was not seeking to punish the ignorant bookkeeper who copies items into the books as part of his daily task, but the officers who conceived and carried out the fraudulent scheme which the false entry was designed to conceal. It is wholly immaterial whether such officer acts through a pen or a clerk controlled by him." "It seems to us that defendant is as fully responsible for any false entries which necessarily result from the presentation of these pieces of paper which he caused to be prepared as he would if he had given oral instructions in reference to them or had written them himself."

We agree with the view so expressed in that opinion. *United States* v. *McClarty,* 191 Fed. 518 and 523, apparently is in conflict with our conclusion.

The record leaves us in no doubt that the false entries on the ledger were the intended and necessary result of respondent's deliberate action in withholding the deposit tickets. Within the statute he made them.

The judgment of the Circuit Court of Appeals must be reversed. The District Court will be affirmed.

Reversed.

KELLY, TRUSTEE IN BANKRUPTCY, *v.* UNITED STATES ET AL.

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

No. 309. Submitted January 8, 1937.—Decided February 1, 1937.

1. Where, upon an appeal to the Circuit Court of Appeals from a judgment of the District Court, the record contains no properly authenticated statement of the evidence or agreed statement of the case as required by Equity Rules 75 (b) and 77, and the judgment is affirmed on that ground, although the cause was heard without objection to the record, denial by the Circuit Court of Appeals, upon a petition for rehearing, of an opportunity to secure proper authentication of the record is an abuse of discretion. P. 54.
2. While orderly procedure demands that the Equity Rules be enforced with the strictness necessary to effectuate their essential purpose, yet when, as here, there is mere omission of some step which has escaped the attention of both parties, and when rigorous enforcement without fair opportunity to correct the error would defeat hearing on the merits and entail unnecessary hardship, appropriate relief promptly asked for should be afforded. P. 54.
3. In this case, permission to supply authentication of the record would have occasioned no material injury to any party, nor interfered seriously with the business of the court. P. 55.

83 F. (2d) 783, 84 F. (2d) 541, reversed.

CERTIORARI, 299 U. S. 528, to review a judgment affirming a judgment, 12 F. Supp. 11, which disaffirmed an order of the Referee in Bankruptcy and allowed a claim of the United States for income taxes against the estate of a bankrupt. The tax liability had previously been sustained by the Board of Tax Appeals, 29 B. T. A. 514.

Mr. W. B. Stratton submitted for petitioner.

Solicitor General Reed, with whom *Assistant Attorney General Jackson, Messrs. Sewall Key, J. Louis Monarch,* and *Charles A. Horsky,* and *Miss Helen R. Carloss* were on the brief, submitted for respondents.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

In a proceeding begun January 9, 1934, the District Court, Western District of Washington, adjudged the Carlisle Packing Company bankrupt, February 9, 1934. The United States presented their claim for income taxes for 1927, 1928, and 1929, and the trustee filed objections, June 18, 1934. He asserted that the Company received no taxable income during 1927 but suffered loss sufficient to offset any gains for 1928 and 1929. The Referee received copy of the duly authenticated judgment by the Board of Tax Appeals, which sustained the tax in question, took other evidence, and upon the whole record concluded that the Company lost as averred during 1927. He disallowed the claim and explained this action by an opinion.

Exceptions challenged the Referee's refusal to treat the decision of the Tax Board as conclusive and hold the Bankruptcy Court lacked power to consider the merits of the assessments. A petition for review by the District Court alleged finality of the Board's judgment, lack of power in the Bankruptcy Court, and asked disallowance of the claim.

From an abstract of the proceedings returned by the Referee it appears—

That the United States had unsuccessfully objected to the introduction of any testimony concerning the merits of the questioned tax upon the ground that the Board's

judgment in respect of the same matter had become final and conclusive.

That the bankrupt had borrowed large sums from the Bank of California, and in 1927 when unable otherwise to meet its obligations had transferred to the Bank much property and received therefor its own cancelled notes for $650,000.00. The Company claimed no profit arose from this transaction and that it sustained large loss during 1927. The Collector ruled to the contrary and assessed delinquencies for three years. The Board of Tax Appeals sustained him, approved the assessments, and adjudged accordingly, January 4, 1934. On January 12, 1934, he made summary assessments. The time for contesting the Board's judgment had not expired when petitioner was adjudged bankrupt.

Upon motion of the United States the District Court directed that the bankrupt's tax returns be made parts of the record. It then heard the cause, considered whether the decision of the Board was conclusive, and held: "To reach the conclusion that a deficiency determined by the Board of Tax Appeals may be re-examined and re-decided by the Judge of a District Court or a Referee in Bankruptcy is, on its face, inconsistent with the intent and purpose on the part of Congress shown that a review of the Board's decision should be by such an appellate court." Accordingly it rendered an opinion, disaffirmed the Referee's action, and allowed the claim.

Thereupon the trustee appealed to the Circuit Court of Appeals. Among other things he assigned as error the ruling that the Bankruptcy Court lacked power to determine anew questions which the Board of Tax Appeals had adjudicated. Portions of the record in the District Court, certified as correct by the Clerk, were filed. Counsel for the United States obtained leave to make part of the transcript the District Court's opinion. This was

omitted, he said, through inadvertence only recently discovered.

It is asserted and not denied that the cause was heard by the Court without objection to the record, and that both sides treated the statement of the evidence as correct. Undoubtedly, the record was not properly authenticated within the requirements of Equity Rules Number 75 (b)[1] and 77.[2]

Upon its own motion the Circuit Court of Appeals raised the point and decided "appellant has not com-

[1] Equity Rule 75 (b), as amended, 286 U. S. 570, 28 U. S. C. A. § 723:

"The evidence to be included in the record, except expert testimony, shall not be set forth in full, but shall be stated in simple and condensed form, all parts not essential to the decision of the questions presented by the appeal being omitted and the testimony of witnesses being stated only in narrative form, save that if either party desires it, and the court or judge so directs, any part of the testimony shall be reproduced in the exact words of the witness. The duty of so condensing and stating the evidence shall rest primarily on the appellant, who shall prepare his statement thereof and lodge the same in the clerk's office for the examination of the other parties at or before the time of filing his praecipe under paragraph (a) of this rule. He shall also notify the other parties or their solicitors of such lodgment and shall name a time and place when he will ask the court or judge to approve the statement, the time so named to be at least ten days after such notice. At the expiration of the time named or such further time as the court or judge may allow, the statement, together with any objections made or amendments proposed by any party, shall be presented to the court or the judge, and if the statements be true, complete and properly prepared, it shall be approved by the court or judge, and if it be not true, complete, or properly prepared, it shall be made so under the direction of the court or judge and shall then be approved. When approved, it shall be filed in the clerk's office and become a part of the record for the purposes of the appeal."

[2] Equity Rule 77, 226 U. S. 672, 28 U. S. C. A. § 723:

"When the questions presented by an appeal can be determined by the appellate court without an examination of all the pleadings and

plied with either of these rules, but has disregarded them both. There is no statement of the evidence, nor is there any agreed statement of the case. In the absence of any such statement, we indulge the presumption that the evidence supports the judgment and warrants its affirmance."

The trustee asked for a rehearing, also that the record be returned to the District Court for settlement and proper authentication. Both things were denied. One of the Judges dissented, and from his unquestioned statement it appears: "Neither party raised the point on which the opinion was based. The point took its origin from the bench without suggestion from or reference to either party and in the face of extended argument and voluminous briefs based upon the statement of evidence contained in the abstract." He thought the petition for rehearing should have been granted and opportunity afforded to secure proper authentication of the record.

Manifestly the Equity Rules should be enforced with the strictness necessary to effectuate their essential purpose; orderly procedure so demands. But when, as here, there is mere omission of some step which has escaped the attention of both parties, and when rigorous enforcement without fair opportunity to correct the error would defeat hearing on the merits and entail unnecessary hardship, we think appropriate relief promptly asked for

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evidence, the parties, with the approval of the district court or the judge thereof, may prepare and sign a statement of the case showing how the questions arose and were decided in the district court and setting forth so much only of the facts alleged and proved, or sought to be proved, as is essential to a decision of such questions by the appellate court. Such statement, when filed in the office of the clerk of the district court, shall be treated as superseding, for the purposes of the appeal, all parts of the record other than the decree from which the appeal is taken, and, together with such decree, shall be copied and certified to the appellate court as the record on appeal."

should be afforded. Permission to supply authentication of the record would have occasioned no material injury to any party, nor interfered seriously with the business of the Court. In the circumstances we must regard the denial of an opportunity to amend as an abuse of discretion—a violation of the spirit if not the letter of the Rules.

The judgment of the Circuit Court of Appeals must be reversed. The cause will be remanded there for further proceedings in harmony with this opinion.

Reversed.

THOMPSON ET AL. *v.* CONSOLIDATED GAS UTILITIES CORP. ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

No. 89. Argued November 18, 19, 1936.—Decided February 1, 1937.

1. Under the common law of Texas (apart from statute), the owner of land has title to the natural gas in place, including that which migrates there from other lands of the gas field, and may produce all that will flow from his well, and may drill off-sets to get his full share from the common supply. P. 68.
2. In support of administrative regulations purporting to be made under legal authority, there is a presumption of the existence of facts justifying the specific exercise. P. 69.
3. Orders limiting and prorating the production of gas by the several owners of land in a gas field must be held invalid if shown to bear no reasonable relation either to the prevention of waste or to the protection of correlative rights, or if shown to be otherwise arbitrary. P. 69.
4. *Quaere* whether c. 120, Texas Acts, 1935, should be construed as attempting to authorize the State Railroad Commission to reduce the production of gas from wells owned by the owners of private pipe-lines, for the sole purpose of making them buy gas produced by others who lack pipe-line connections. P. 73.
5. This Court is reluctant to pass upon a seriously controverted question of the meaning of a state statute, because its decision,

although disposing of the particular case, cannot settle the proper construction of the statute. P. 74.

6. In construing, on appeal, a state statute which has not been construed by the state courts, this Court is disposed to accept the construction given it by the lower federal court, particularly when that court is composed wholly of citizens of the State. P. 74.
7. Where one party's case depends upon a construction of a state statute bringing it plainly in conflict with the Federal Constitution, and where the proper construction of the statute has not been settled by the state courts but is gravely doubtful, this Court will rest its decision on the Constitution, and will not undertake to decide the question of construction, as to which it lacks the power to give a definitive answer. P. 75.
8. One person's property may not be taken for the benefit of another private person, even though compensation be paid. Pp. 77–79.
9. Some of the owners of wells in a Texas gas field had established contract light and fuel markets for their gas in distant places by means of their privately owned pipe-lines. The other owners of wells could not operate because there was no local light and fuel market for gas and they had no pipe-lines to transport it elsewhere, and because to employ it in the manufacture of natural gasoline and carbon black was forbidden by the State as wasteful. The Texas Railroad Commission, claiming authority under a statute (c. 120, Texas Acts, 1935), made an order purporting to limit the total daily production of the field and to prorate the allowed production among the several wells. Although the pipe-line owners were operating their wells without waste and without injury to others, and although their supply was ample to supply their market needs, the order, if enforced, would have reduced their production so drastically that, to fulfill their contract obligations to their customers, they must purchase gas from the other well owners and must suffer other losses through curtailment of plant activity and through migration of gas underground away from their wells to other parts of the field where the pressure was lower. The purpose of the order, as plainly shown by evidence and court findings, was neither to prevent waste nor to prevent undue drainage from the reserves of other well owners, but was solely to compel the pipe-line owners to furnish a market to those who had no pipe-line connections. *Held* the order is void under the Federal Constitution as a taking of private property for private benefit. Pp. 76–79.

10. A private party is not estopped to attack provisions of a statute that are harmful to his interests merely because he sought the enactment of other and separable provisions in it, beneficial to him in an incidental way, but neither relied on by him nor brought in question, in the litigation. P. 80.

14 F. Supp. 318, affirmed.

APPEAL from decrees of the District Court, of three judges, which permanently enjoined the Railroad Commission of the State of Texas and the Attorney General from enforcing an order of the Commission limiting production of gas in the Panhandle Fields. The two cases were consolidated for purpose of appeal. See also 12 F. Supp. 462, a decision on motion for a preliminary injunction.

Messrs. Wm. Madden Hill, Assistant Attorney General of Texas, and *C. C. Small,* with whom *Mr. William McCraw,* Attorney General, and *Messrs. William C. Davis* and *W. J. Holt,* Assistant Attorneys General, and *Maurice Cheek* were on the brief, for appellants.

Mr. S. A. L. Morgan, with whom *Messrs. C. C. Mount, J. J. Hedrick, C. H. Keffer,* and *D. H. Culton* were on the brief, for appellees.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This case challenges the validity of a gas proration order issued by the Railroad Commission of Texas for the Panhandle fields on December 10, 1935, and carried forward in supplemental orders.[1] The orders were en-

[1] The complainants' original bills challenged earlier orders issued by the Railroad Commission under the Act here in question, notably the orders of August 28, and September 25, 1935. These orders were the subjects of temporary injunctions granted in *Texas Panhandle Gas Co.* v. *Thompson,* 12 F. Supp. 462. Upon the issuance of the order of December 10, 1935, complainants amended their bills to make that order and its supplements the object of their attack.

tered under Chapter 120 of the Texas Acts, 1935, Forty-Fourth Legislature, Regular Session, commonly known as House Bill 266. Under the orders the production of sweet gas from the plaintiffs' wells is limited to an amount below their market requirements under existing contracts, below their present production, and below the capacity of their transportation and marketing facilities. It is charged that the purpose of so limiting the production is not to prevent waste, or to prevent invasion of the legal rights of co-owners in the common reservoir, but solely to compel the plaintiffs, and others similarly situated, to purchase gas from those well owners who have not provided themselves with a market and marketing facilities—well owners who under existing law are obliged to stop production, for want of a market, unless some marketing outlet is found.

Two suits to enjoin enforcement of the order were brought in the federal court for western Texas. One was by Texas Panhandle Gas Utilities Company, for which Consolidated Gas Utilities Corporation has been substituted as plaintiff; the other by Texoma Natural Gas Company. In each suit the members of the Railroad Commission and the Attorney General of the State were made defendants. The properties for which the plaintiffs seek protection are their sweet gas wells and reserves in the Texas Panhandle; their pipe lines extending into other States; their compressors and marketing facilities for use in connection therewith; and contracts which they have made for the supply of the gas to distributors in other States. The plaintiffs claim that the order takes this property without warrant in law. They contend that the order is in excess of the authority which House Bill 266 confers upon the Commission; and that if the statute be construed as conferring the authority exercised, it violates the Federal Constitution and that of the State. The District Judge issued a restraining order. The cases

were considered together. The court, three judges sitting, granted temporary injunctions, *Texas Panhandle Gas Co.* v. *Thompson,* 12 F. Supp. 462,[2] and made them permanent, *Consolidated Gas Utilities Corp.* v. *Thompson,* 14 F. Supp. 318. The cases were consolidated for purposes of appeal. The jurisdiction, federal and equitable, was not questioned. The record is extensive; the findings of fact explicit; the briefs in this Court occupy over 500 pages.

The Texas Panhandle contains the largest natural gas field in the United States, an enormous reservoir of natural gas and oil extending through seven counties for a distance of 125 miles with a width of from 10 to 40 miles. The development of the gas industry which began there in 1926 has proceeded at a rapid rate since 1933. The field produces both sweet and sour gas.[3] Wasteful use of sweet gas is prohibited by the statute; and, within the statutory definition, practically the only non-wasteful use is for heat and light. For such use there is substantially no local market,[4] as the region is sparsely settled. Gas cannot be stored. To utilize the sweet gas of the Panhandle field, it must be delivered to the ultimate consumer by pipe lines in a continuous flow from the wells to the burner tips of the consumer. Prior to the entry of the orders challenged, the owners of approximately 80 percent of the total area in the Panhandle fields

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[2] Compare note 1, *supra.*

[3] Only sweet gas is fit for lighting and heating. Sour gas is that contaminated by sulphur compounds. It is now used in this field principally in the manufacture of carbon black. When the act was passed, plants supplying 70% of the carbon black manufactured in the United States were operating in this field.

[4] The small market for sweet gas within the field is limited to fuel for the drilling of wells and the operation of industries incident to the oil and gas business; to small pipe lines supplying gas to communities near the field; and to purchases by two companies with pipe lines to distant cities. These have made 30 new connections with wells of others and are taking rateably from these wells.

proven productive of sweet gas had constructed six major pipe lines from the West Panhandle field,[5] and three from the East Panhandle field, extending to Chicago, Des Moines, Omaha, Sioux City, Kansas City, St. Paul, Indianapolis, Denver, Minneapolis, Fort Worth, Dallas, and other distant points. Six or seven of these major pipe line companies, including the plaintiffs', have produced and transported to the markets only gas produced from their own leases.

Under the restrictions imposed by the present statute, there is substantially no market outlet for the sweet gas of these fields except such as may be provided by pipe lines. The owners of 180 wells in the West Panhandle field, and of 121 wells in the East Panhandle field, together representing about 20 per cent of the proven reserves of sweet gas in the whole field, neither own nor control any pipe line. And they have no access to any;[6] since none of the pipe lines here involved is a common carrier. The plaintiffs and most of the other owners of pipe lines have no economic occasion to purchase gas from wells of the non-pipe line producers, as the potential capacity of their own wells far exceeds their market demand.[7] There appears no legal obstacle, under the law of

[5] For administrative purposes the territory is divided into the East Panhandle and the West Panhandle zones. The West zone alone contains any sour gas area. The sweet gas area of the West Panhandle field embraces 723,000 acres. In it there are 517 wells, 180 of which do not have an outlet for light and fuel purposes. The sweet gas area of the East Panhandle field embraces 181,000 acres. In it there are 322 wells, of which 121 do not have an outlet for light and fuel purposes. Gas from the Panhandle field is supplied for domestic and industrial light and fuel purposes to approximately 10,000,000 persons in the United States.

[6] The only exception to this is in the case of the few independent wells with which two of the pipe line companies have made connections. See note 4, *supra*.

[7] Thus at the time of the hearing below, Texoma Natural Gas Co. was "producing" its wells at the rate of about 10 per cent of their

Texas, to the construction of additional pipe lines to serve the owners of wells in the Panhandle fields now without such connections. It is said that there are communities in other States which would afford markets if pipe lines were constructed to reach them. But the financial difficulties are obvious.

Prior to House Bill 266, several efforts, statutory and administrative, had been made to compel, or induce, the owners of existing pipe lines to purchase the sweet gas of those well owners who lack pipe line facilities. Orders entered under statutes enacted prior to 1933 were enjoined as unconstitutional or *ultra vires*.[8] By chapter

daily potential capacity, and the average throughout the year, it was found, had been and would be substantially less than this figure. The highest percentage of the daily potential ever taken over a period of one month for all of the wells of Consolidated Gas Utilities Corporation has been 6.53 per cent. The wells of other pipe line owners in these fields have likewise been "produced" at low percentages of capacity.

[8] (a) Chapter 28, Acts 1931, Forty-Second Legislature, First Called Session, known as The Common Purchaser Act, was construed and applied by the Railroad Commission as requiring private pipe line companies engaged theretofore only in producing and transporting gas from their own leases to purchase without discrimination, under regulations of the Commission, quantities of gas offered them by producers in the field lacking their own pipe lines. The Act was held unconstitutional as in violation of the due process and commerce clauses of the Federal Constitution, and enforcement of the orders was enjoined, in *Texoma Natural Gas Co.* v. *Railroad Commission*, 59 F. (2d) 750.

(b) Purporting to act under the general conservation laws of the State, as amended by Chapter 26, Acts 1931, Forty-Second Legislature, First Called Session, the Railroad Commission subsequently issued orders completely closing down some portions of the Panhandle field, and limiting production from pipe line companies' wells in other portions. Enforcement of these orders was enjoined on the ground that the Commission's action was *ultra vires*, in *Texoma Natural Gas Co.* v. *Terrell*, 2 F. Supp. 168.

(c) By Chapter 2, Acts 1932, Forty-Second Legislature, Fourth Called Session, the Railroad Commission was meantime authorized,

100, Acts 1933, Forty-Third Legislature, Regular Session,[9] the use of natural gas was permitted for other purposes than light or fuel, including the manufacture of natural gasoline, where no reasonable market for light or fuel was available to the owner. Production under authority of this statute and the permits issued thereunder was found to involve intolerable waste.[10] Such was the situation, when on May 1, 1935, the Legislature enacted House Bill 266, under which the order here challenged was issued.

The Act undertakes by drastic provisions to end the waste of sweet gas. It provides:

"Sec. 3. The production, transportation, or use of natural gas in such manner, in such amount, or under such conditions as to constitute waste is hereby declared to be unlawful and is prohibited. The term 'waste' among

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whenever the full production from wells producing gas from a common reservoir should exceed reasonable market demand, to limit production to such demand and allocate the allowable production. Orders purporting to be issued under the authority of this Act were enjoined in *Canadian River Gas Co.* v. *Terrell*, 4 F. Supp. 222, on the ground that they were *ultra vires* because the statute authorized regulation only to prevent waste, and the court concluded that the orders did not bear any reasonable relation to that end.

(d) Then followed the enactment of the statute now under consideration.

[9] As amended by Chapter 88, Acts 1933, Forty-Third Legislature, First Called Session. Compare *F. C. Henderson, Inc.* v. *Railroad Commission*, 56 F. (2d) 218; *Sneed* v. *Phillips Petroleum Co.*, 76 F. (2d) 785.

[10] According to evidence presented by the State, in July, 1935, before the prohibitions of House Bill 266 became effective against uses therein declared wasteful, there were in the West Panhandle field 41 stripping plants producing natural gasoline, consuming daily 1,847,339 M. C. F. sweet gas, from which the gasoline production saved only 3 per cent of the fuel value of the gas in its original state. Between February 1, 1933, and August 1, 1935, 709 billion cubic feet of gas were said to have been blown into the air after the natural gasoline content had been extracted.

other things shall specifically include: [then follow specifications (a) to (m) inclusive].

"(h) The production of natural gas in excess of transportation or market facilities, or reasonable market demand for the type of gas produced."

The defendants contend that the Act likewise requires restriction of production regardless of the existence of waste, for the adjustment of rights of owners in a common reservoir of gas. And as we read the substance of defendants' argument, they also construe the statute as authorizing gas proration orders, to provide a market for the sweet gas of those wells which, because they lack pipe line connections, have heretofore sold their gas for inferior, wasteful uses. These claims are rested primarily on the following provision:

"Sec. 10. It shall be the duty of the Commission to prorate and regulate the daily gas well production from each common reservoir in the manner and method herein set forth. The Commission shall prorate and regulate such production for the protection of public and private interests: (a) In the prevention of waste as 'waste' is defined herein; (b) In the adjustment of correlative rights and opportunities of each owner of gas in a common reservoir to produce and use or sell such gas as permitted in this Article."

This provision is supplemented by others including those set forth in the margin.[11]

[11] "SECTION 1. Declaration of policy: In recognition of past, present, and imminent evils occurring in the production and use of natual [natural] gas, as a result of waste in the production and use thereof in the absence of correlative opportunities of owners of gas in a common reservoir to produce and use the same, this law is enacted for the protection of public and private interests against such evils by prohibiting waste and compelling ratable production."

"SEC. 11. The Commission shall exercise the authority to accomplish the purpose designated under item (a) of Section 10 when the presence or imminence of waste is supported by a finding based

On December 10, 1935, the Railroad Commission, after hearings held, issued the basic order here challenged, which provides, among other things:

"It is ordered, That effective, 7 o'clock A. M., December 11, 1935, the daily allowable gas production, computed on the basis set forth in House Bill No. 266, is as follows:

East Panhandle Field..... 181,174,000 cubic feet daily
West Sweet Panhandle Field..... 608,552,000 cubic feet daily
West Sour Panhandle Field..... 451,137,000 cubic feet daily

"It is ordered, That the daily allowable production of gas for individual wells in the East and West Panhandle Fields shall be determined by dividing the reasonable market demand into two parts, and that these parts shall be distributed to each well in proportion to the relative

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upon the evidence introduced at a hearing to be held as herein provided.

"The Commission shall exercise the authority to accomplish the purpose designated under item (b) of Section 10 when evidence introduced at a hearing to be held as herein provided will support a finding made by the Commission that the aggregate lawful volume of the open flow or daily potential capacity to produce of all gas wells located in a common reservoir, is in excess of the daily reasonable market demand for gas from gas wells that may be produced from such common reservoir, to be utilized as permitted in this Article.

"Sec. 12. On or before the twentieth (20th) day of each calendar month the Commission shall hold a hearing . . . for the purpose of determining the aggregate daily capacity to produce of all gas wells in a common reservoir, and as nearly as possible, the daily volume of gas from each common reservoir that will be produced from gas wells during the following month to be utilized as permitted in this Article. Upon such determination, the Commission, based upon evidence introduced at such hearing, shall allocate to each gas well producing gas from such common reservoir a percentage of the daily productive capacity of each well which may be produced daily during the following month from each gas well producing gas from such common reservoir. Such percentage of the daily producing capacity

producing ability of these individual wells and the number of acres containing each of these wells, but in no case shall more than one hundred sixty (160) acres in the East Panhandle Field and not more than Six Hundred Forty (640) acres in the West Panhandle Field, in both sweet and sour zones, be allocated to any one well for the purpose of proration.

"It is ordered, That the total daily allowable production of gas from gas wells in the East and West Pan-

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of each well shall be regarded as its daily allowable production of such daily volume required for utilization from such common reservoir. . . .

"SEC. 14. It shall be the duty of the Commission, after notice and hearing, to ascertain and determine the reasonable market demand for gas from gas wells to be used for light and fuel purposes and for all other lawful purposes to which sweet gas may be put under the terms of this Article and by proper order to restrict the production of gas from all gas wells in said field producing such gas to an amount equal to market demand or to an amount which may be produced without waste as otherwise defined; provided, however, the production of such gas shall in any event be restricted to the amount of the reasonable market demand therefor. In such order the Commission shall allocate, distribute or apportion the total allowable production from such field among the various gas wells affected by the order on a reasonable basis, and as provided in Section 13. . . .

"SEC. 16. It shall be unlawful for any person to produce gas from a gas well as herein defined in excess of the daily allowable production in such schedule of allowable production. . . .

"SEC. 20. In the event the Commission finds that the owner of any gas well has failed or refused to utilize or sell the allowable production from his well when such owner has been offered a connection or market for such gas at a reasonable price, such well shall be excluded from consideration in allocating the daily allowable production from the reservoir or zone in which same is located until the owner thereof signifies to the Commission his desire to utilize or sell such gas. In all other cases all gas wells shall be taken into account in allocating the allowable production among wells producing the same type of gas."

handle Fields shall be distributed and prorated among the individual wells on the following basis and in the following manner, to-wit: Fifty (50%) per cent of the reasonable market demand of the field shall be allocated on the ratio of the individual well acreage to the sum of the total well acreage in the field; and fifty (50%) per cent of the reasonable market demand of the field shall be allocated on the ratio of the individual well potential to the sum of the total well potentials in the field."

The order reduces plaintiffs' allowable production to a volume far below their requirements. The plaintiffs and other pipe line owners acquired, at large cost, their markets in distant States and their transportation and marketing facilities.[12] By means of their pipe lines all the sweet gas produced by the plaintiffs (and likewise all produced by other pipe line owners) was, and is, marketed under contracts with distant distributors, chiefly in other States. These markets are not free markets. The plaintiffs necessarily bound themselves to supply the requirements of the distributors; and the distributors bound themselves to take their requirements from the plaintiffs. In order to fulfill their contractual obligations, the plaintiffs developed the capacity of their wells and acquired large reserves to provide for their future needs so that they have no occasion to purchase gas from other wells. By limiting the plaintiffs' allowable production, the order disables them from perform-

[12] The Texoma Natural Gas Company (with an affiliate) has, at a cost of about $72,000,000, acquired 200,000 acres of leases in the West Panhandle field known to be capable of producing sweet gas; drilled about 90 wells; erected a compressor plant; constructed a pipe line to its Chicago market; and secured marketing contracts for distribution in other States. Similarly, the Consolidated Gas Utilities Company (with affiliates) has expended a smaller sum in acquiring and developing gas reserves in the East Panhandle field and in constructing pipe lines to, and securing contracts for marketing its gas in Kansas.

ing their contracts unless they purchase gas from non-pipe-line wells. Such purchases would at least involve the cost of the gas and the loss resulting from failure to make fuller use of their own property.

The plaintiffs do not contest that the State has power to conserve its natural resources for the public, as well as to protect private rights,[13] or that the Legislature has power to confer upon the Railroad Commission authority to make and enforce regulations to that end; or that to limit production to the aggregate reasonable market demand is, as a conservation measure, clearly proper in the interest of the public and of the private persons owning the right to draw from a common reservoir; or that the Commission has authority to issue regulations to that end. The plaintiffs do not deny that the Legislature may confer upon the Railroad Commission also authority to prorate the total allowable production among all the individual wells which draw from the common reservoir, provided the proration is in accordance with their respective market demands and due consideration is given to existing reserves. But they insist that House Bill 266 has not conferred that authority. And as to the order, the plaintiffs assert that, while restrictive in form, it is in fact coercive; that its purpose and effect are not to prevent waste of gas in the common reservoir nor to prorate the opportunities of production as distinguished from marketing; that the limitation of the production of the wells is merely a device to compel the individual plaintiffs, and other pipe line owners, to purchase gas for which they have no need; that the real purpose and

[13] Section 59 of Article 16 of the Constitution of Texas, which article was proclaimed October 2, 1917, provides, in part:

"The conservation and development of all the natural resources of this State . . . and the preservation and conservation of such natural resources of this State are each and all hereby declared public rights and duties, and the Legislature shall pass all such laws as are appropriate thereto. . . ."

effect of the order are to prorate not production, but distant markets and the facilities for serving them; and that, thus, the order takes their property without warrant in law.

First. Prior to the enactment of House Bill 266,[14] the property rights of the plaintiffs were substantially those conferred by the common law of the State. Under it, the owner of land has title to oil and gas in place and, likewise, to the oil and gas which migrate to formations under his land through drainage from other lands.[15] Under that rule, he may produce all the oil and gas that will flow out of the well on his land, subject to the exercise by other landowners of the same right of capture through drilling offsetting wells, so as to get their full share.[16] This common law rule, declared in an unbroken line of authorities, has been widely applied.[17] While a producer who negligently uses explosives in his operations will be liable if he causes physical damage to his

[14] House Bill 266 amends Article 6008 of the Revised Civil Statutes, which is the statute particularly dealing with the production and use of natural gas. That article was amended by Chap. 26 of Acts of 1931, Forty-Second Legislature, First Called Session, p. 46. It was again amended by Chap. 100 of the Acts of 1933, called the "Sour Gas Law," Forty-Third Legislature, Regular Session, p. 222; also by Chap. 88 of the Acts of 1933, Forty-Third Legislature, First Called Session, p. 229, which remained in force until August 1, 1935, when House Bill 266 became effective.

[15] See *Texas Co.* v. *Daugherty,* 107 Tex. 226, 176 S. W. 717; *Stephens County* v. *Mid-Kansas Oil & Gas Co.,* 113 Tex. 160, 254 S. W. 290; *Grayburg Oil Co.* v. *State,* 50 S. W. (2d) 355.

[16] *Prairie Oil & Gas Co.* v. *State,* 231 S. W. 1088 (Tex. Comm. App.); compare *Houston & Texas Central R. Co.* v. *East,* 98 Tex. 146, 81 S. W. 279.

[17] Compare, e. g., *Hermann* v. *Thomas,* 143 S. W. 195 (Tex. Civ. App.); *United North & South Oil Co.* v. *Meredith,* 258 S. W. 550 (Tex. Civ. App.), affirmed, 272 S. W. 124 (Tex. Comm. App.); *Hunt* v. *State,* 48 S. W. (2d) 466 (Tex. Civ. App.); *Malone* v. *Barnett,* 87 S. W. (2d) 523 (Tex. Civ. App.). See *Brown* v. *Humble Oil & Refining Co.,* 83 S. W. (2d) 935 (Tex. Sup. Ct.).

neighbors' gas and oil bearing strata and thus impairs the productivity thereof,[18] the common law of the State did not, apparently, afford a remedy against depleting the common supply by wasteful taking or use of oil or gas drawn from the wells on one's own property. But since 1899 the Legislature of the State has prohibited, or curbed, certain practices in the production of gas and oil which it recognized as wasteful.[19]

Second. The defendants contend that the order assailed is a regulation duly promulgated for the prevention of waste, and the protection of correlative rights of owners in the common pool, and was so applied. It may be assumed that House Bill 266 should be construed as authorizing regulations to prevent waste, and to create and protect correlative rights of owners in a common reservoir of gas to their justly proportionate shares thereof, free of drainage to neighboring lands. It may be assumed, also, that the statute, so construed, is a valid exercise of the State's undoubted power to legislate to those ends; and that it validly delegates to the Railroad Commission authority to promulgate regulations therefor. It is settled that to all administrative regulations purporting to be made under authority legally delegated, there attaches a presumption of the existence of facts justifying the specific exercise. *Pacific States Box & Basket Co.* v. *White,* 296 U. S. 176, 185. But, obviously, the proration orders would not be valid if shown to bear no reasonable relation either to the prevention of waste or the protection of correlative rights, or if shown to be

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[18] See *Comanche Duke Oil Co.* v. *Texas Pacific Coal & Oil Co.,* 298 S. W. 554 (Tex. Comm. App.).

[19] See *Danciger Oil & Refining Co.* v. *Railroad Commission,* 49 S. W. (2d) 837, 840 (Tex. Civ. App.), reversed and dismissed as moot, 122 Tex. 243; 56 S. W. (2d) 1075 (Tex. Comm. App.); *Brown* v. *Humble Oil & Refining Co.,* 83 S. W. (2d) 935, 940, 941 (Tex. Sup. Ct.).

otherwise arbitrary. The plaintiffs have assumed the heavy burden of overcoming the presumption and of establishing that the order is an arbitrary taking of their property. They assert, among other things, that they have, at all times, conducted their operations prudently and without waste; that they have, in fact, taken only a small part of the gas in the ground which they own or lease; and that there is no present danger that the pipe line owners will, by continuing to operate as they have done, cause waste or prejudice either to any public interest, or to a property right of any other person. We think the plaintiffs have sustained the burden resting upon them. For their assertions are adequately supported by the following special findings of the lower court:

1. "The owners of wells connected to pipe lines, including complainants, have always produced their wells in a prudent and skilful manner and in accordance with the most approved methods of production, without committing or causing physical waste."

2. "Before House Bill 266 went into effect, grossly wasteful practices in the production of natural gas in the Panhandle field were occurring," but "most of this waste was due to the extravagant production of natural gas from oil wells and to the production of gas from gas wells and processing such gas for the extraction of a very small quantity of natural gasoline therefrom and popping or wasting to the air the residue gas, which constituted 97% of the fuel value of the gas in its original state. . . . No evidence was offered—indeed, it was not even seriously claimed—that anything complainant had done or contemplated doing has, in the slightest degree, contributed or will contribute to that waste."

3. Even if the effect of the Texas legislation be to halt production by other well owners, "the production from their own wells by complainant and other pipe lines of the quantity of gas required from time to time to fulfill

their marketing contracts and requirements will cause no coning or channeling of water, no trapping off of recoverable oil or gas, no underground waste of oil, gas or reservoir energy or reduction of the total quantity of recoverable gas from the field, even though the other wells in the sweet gas area of the West Panhandle field be produced at a much lower rate or be not produced."

4. Large and wasteful production of gas in connection with production of oil in the Panhandle field, and, more recently, in connection with the operations of plants "stripping" the gas of its natural gasoline content, "has resulted in the migration of tremendous quantities of natural gas from the southwestern side of the field to the northeastern side of the field. Many of these areas of low pressure are situated in the sour gas producing area, with the result that tremendous quantities of sweet gas have moved out from the sweet gas area into the sour gas area," and have thus become unfit for use as fuel for lighting and heating purposes. Drainage away from the areas of complainants' holdings is found to have been intensified by disproportionate production of gas from gas wells not connected to pipe lines. In the East Panhandle field "the leases on which the wells connected to pipe lines are located have produced an average—[of] 8,116,000 cubic feet of gas per acre, and those on which the wells connected to stripping plants are located have produced an average of 16,662,000 cubic feet per acre." In the West Panhandle field, production at the time of trial of this case had aggregated 4,427,642,131,000 cubic feet. "Of this total the pipe lines, with an ownership of 56% of the total reserves, have produced only 529,545,454,000 cubic feet, while the owners of the other 44% have produced 3,898,096,776,000 cubic feet. Complainant, with an ownership of approximately 20% of the total reserves, had produced only 98,808,409,000 cubic feet, or 2.25% of the total withdrawals from the West Panhandle field."

The average rock pressure of the wells not connected to pipe lines is materially lower than that of complainants' and other pipe line companies' wells. Hence, in the West Panhandle field, "by reason of these differentials in pressure between the wells connected to pipe lines and those not connected, the migration or drainage as a whole is from the wells connected to pipe lines, including those connected to complainant's pipe lines, to the wells not connected to pipe lines." Likewise, "all along the northeast slope of the structure in the East Panhandle field there is an extremely low pressure area, where tremendous quantities of gas have been produced in connection with the operation of oil wells and wells connected to stripping plants. The general drainage in the East Panhandle field is from the areas of high pressure toward and to these low pressure areas. The majority of the wells not connected to pipe lines are situated in these low pressure areas, or between these low pressure areas and the high pressure areas to the south and west thereof, in which areas of higher pressure the wells connected to the pipe lines are situated. . . . Very large quantities of gas have migrated from the reserves of the pipe lines, including the reserves of complainants, to the low pressure areas in and around the oil fields on the northeast slope of the reservoir and to the areas on which most of the 391 wells belonging to others than the pipe lines in the West Panhandle field are situated." Further, past losses do not complete the story. "Without regard to the rate of withdrawal in the existing areas of low pressure, the migration of gas from the reserves of the pipe lines to those areas of low pressure will continue over a long period of time."

In the light of these findings the lower court concluded that the order was not intended to prevent waste attributable to plaintiffs; and that it was not intended to adjust correlative rights in the common reservoir for the

purpose of averting unjust drainage from the reserves of those wells lacking pipe line connections. On the other hand, the court concluded that the proration ordered, with its drastic limitation of output from wells now connected to pipe lines, will obviously not protect those wells against undue drainage to other parts of the field, but will deprive their owners of the protection which fuller production would offer. These findings are adequately supported by the evidence.

On the other hand, the assertion of the defendants that the order will, by requiring a uniform and rateable system of production by all the wells, result in the ultimate recovery of a larger amount of gas than would otherwise be produced; and, likewise, the assertion that the plaintiffs, by their present production, are depriving, or threaten to deprive, non-pipe-line owners of their opportunity to share rateably in the gas in the common reservoir, are not sustained. By the assignment of errors in this Court, defendants challenged the correctness of many of the findings. But we are of opinion that, so far as here material, all their contentions, and also the findings of the Railroad Commission in its order of December 10, prophesying "waste" if the proration ordered is not carried out, are unfounded.

Third. The defendants contend, apparently, that House Bill 266 should be construed as authorizing the Commission to reduce the production of the plaintiffs and of other pipe line owners, even if the sole purpose of doing so is to furnish a market for the sweet gas of those wells now without pipe line connections. On the other hand, the plaintiffs insist that House Bill 266 should be construed as authorizing the proration of production only in connection with, and as part of, waste prevention; and that since their operations do not involve, or threaten waste, the order was without statutory authority. That contention the lower court sustained. It did so, on the

ground that to authorize the restriction of non-wasteful production by the pipe line well owners solely for the purpose of compelling them to furnish other wells with a market, would be a change of the common law of Texas so radical that, if the Legislature had so intended, it would have expressed that intention in language more explicit than any used in the Act. Moreover, the court pointed out that, under the established rule of construction, the interpretation urged by defendants should be avoided because the statute so construed would be of doubtful validity.[20]

We are always reluctant to pass upon a seriously controverted question of the meaning of a state statute, because our decision, although disposing of the particular case, cannot settle the issue of the proper construction of the statute.[21] No court of the State has construed the Act. The defendants might, perhaps, have secured its construction by the state court. For the amendment of § 266 of the Judicial Code made in 1913, provides that upon the institution of an appropriate suit in a state court, a stay may be had of the proceedings in the federal court to await adjudication by the state court.[22] But no suit in a state court was instituted by the defendants to that end. When not instructed by some decision of a state court, we are disposed, in exercising appellate jurisdiction, to accept the construction given by the lower federal court to a statute of the State, particularly when that court is composed, as in this in-

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[20] *Harriman* v. *Interstate Commerce Comm'n,* 211 U. S. 407, 422; *United States* v. *Delaware & Hudson Co.,* 213 U. S. 366, 408.

[21] Compare *Pullman Co.* v. *Knott,* 235 U. S. 23, 27; *Lee* v. *Bickell,* 292 U. S. 415, 425; *Fox* v. *Standard Oil Co. of New Jersey,* 294 U. S. 87, 97.

[22] Act of March 4, 1913, c. 160, 37 Stat., p. 1013. Compare Welch Pogue, "State Determination of State Law and the Judicial Code," 41 Harv. L. Rev. 623, 626, *et seq.*

stance, wholly of citizens of the State, familiar with the history of the statute, the local conditions to which it applies, and the character of the State's laws.[23] But, being under duty to make an independent study of the question, we have done so.[24] That study leaves us in grave doubt whether the lower court has correctly interpreted the intention of the lawmakers.[25] On the other hand, we are clearly of opinion that if the Act were construed as the defendants contend it should be, and as the Commission has applied it, it would violate the Federal Constitution. As a general rule it is no less true with reference to State than to Federal legislation that this Court will not decide an issue of constitutionality if the case may justly and reasonably be decided upon a

[23] Compare *Wilson Cypress Co.* v. *Del Pozo y Marcos*, 236 U. S. 635, 657; *Hammond* v. *Schappi Bus Line, Inc.*, 275 U. S. 164, 169. See *Bowman* v. *Continental Oil Co.*, 256 U. S. 642, 647; *Louisiana Public Service Comm'n* v. *Morgan's Louisiana & Texas Railroad & Steamship Co.*, 264 U. S. 393, 397; *Wabash Valley Electric Co.* v. *Young*, 287 U. S. 488, 497; *Marion* v. *Sneeden*, 291 U. S. 262, 271. This Court has consistently accorded great deference to the construction of territorial legislation adopted by the local courts, whether the prevailing system was the common or the civil law, and this though in such cases this Court possesses authority to make a definitive construction which it lacks in the case of the legislation of a State. See *Fox* v. *Haarstick*, 156 U. S. 674, 679; *Kealoha* v. *Castle*, 210 U. S. 149, 153; *Phoenix Ry. Co.* v. *Landis*, 231 U. S. 578, 579; *Diaz* v. *Gonzalez*, 261 U. S. 102, 105, 106; compare *Reynolds* v. *Fewell*, 236 U. S. 58, 67.

[24] See *St. Louis-San Francisco Ry. Co.* v. *Middlekamp*, 256 U. S. 226, 230; *Bratton* v. *Chandler*, 260 U. S. 110, 114; *South Utah Mines & Smelters* v. *Beaver County*, 262 U. S. 325, 331; *Corporation Commission* v. *Lowe*, 281 U. S. 431, 438; *Fox* v. *Standard Oil Co. of New Jersey*, 294 U. S. 87, 95, 96. Compare *Philippine Sugar Estates Development Co.* v. *Philippine Islands*, 247 U. S. 385, 390; *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500, 522, 523.

[25] Compare *Van Dyke* v. *Geary*, 244 U. S. 39, 46; *Palmetto Fire Insurance Co.* v. *Conn*, 272 U. S. 295, 305; *Lee* v. *Bickell*, 292 U. S. 415, 424; *Fox* v. *Standard Oil Co. of New Jersey*, 294 U. S. 87, 96.

construction of the statute under which the act is clearly constitutional. Compare *Bratton* v. *Chandler*, 260 U. S. 110, 114; *South Utah Mines & Smelters* v. *Beaver County*, 262 U. S. 325, 331; *Hopkins* v. *Southern California Telephone Co.*, 275 U. S. 393, 403. But where one party's case depends upon a construction of a state statute under which it plainly must be held to violate the Federal Constitution, and where the proper construction of the statute is a matter of grave doubt, this Court will rest its decision on the Constitution, and will not undertake to decide the question of construction as to which it lacks the power to give a definitive answer. Compare *Pacific Telephone & Telegraph Co.* v. *Kuykendall*, 265 U. S. 196, 204; *Michigan Public Utilities Comm'n* v. *Duke*, 266 U. S. 570, 578; *Sterling* v. *Constantin*, 287 U. S. 378, 396. We, therefore, accept, for the purposes of our decision, the defendants' construction; and pass to the discussion of constitutional questions.

Fourth. Either production greater than the demand or use for an inferior purpose would necessarily involve overground waste of gas. The manner, place, or extent of production might lead to underground waste. We assume that the prohibition of any wasteful conduct, whether primarily in behalf of other owners of gas in the common reservoir, or because of the public interests involved, is consistent with the Constitution of Texas and that of the United States, and that to prevent waste production may be prorated.[26] We assume, also, that the State may constitutionally prorate production in order to

[26] *Ohio Oil Co.* v. *Indiana* (*No. 1*), 177 U. S. 190; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61; *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229; *Walls* v. *Midland Carbon Co.*, 254 U. S. 300; *Bandini Petroleum Co.* v. *Superior Court*, 284 U. S. 8; *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210; *Sterling* v. *Constantin*, 287 U. S. 378.

prevent undue drainage of gas from the reserves of well owners lacking pipe line connections.[27] If proration were lawfully applied for any such purposes, the fact that thereby other private persons would incidentally and gratuitously obtain important benefits would present no constitutional obstacle. And the fact that plaintiffs' gas is to be sold in interstate commerce would not preclude such exercise of the State's power. Compare *Champlin Refining Co.* v. *Corporation Commission,* 286 U. S. 210, 235.

But the sole purpose of the limitation which the order imposes upon the plaintiffs' production is to compel those who may legally produce, because they have market outlets for permitted uses, to purchase gas from potential producers whom the statute prohibits from producing because they lack such a market for their possible product. Plaintiffs' operations are neither causing nor threatening any overground or underground waste. Every well owner in the field is free to produce the gas, provided he does not do so wastefully. He is legally and, so far as appears, physically free to provide himself with a market and with transportation and marketing facilities. There is no basis for a claim that his right, or opportunity, will be interfered with by a disproportionate taking by any one of those who may legally produce.

The lower court found specifically:

"The terms and provisions of the orders attacked, the necessary operation and effect of such orders, the history of the field and other pertinent facts as disclosed by this record conclusively establish that the purpose of the Commission underlying the orders was, upon a theory of protecting correlative rights to coerce complainant and other [others] similarly situated to buy gas from, and thus to share their private marketing contracts and commitments and the use of their pipe lines and other facil-

[27] Compare cases cited in note 26, *supra.*

ities for transmitting their gas to market with, the owners of wells not now connected to pipe lines, who have not contributed in money, services, negotiations, skill, forethought or otherwise to the development of such markets and the construction of such pipe lines and other facilities. In short to compel complainants to afford markets to those having none.

"The necessary operation and effect of such orders is to take from complainant and others similarly situated substantial and valuable interests in their private marketing contracts and commitments and in the use of their pipe lines and other facilities for transmitting their gas to their markets, without compensation, and to confer same upon the owners of the approximately 180 sweet gas wells in the field not connected to pipe lines."

The use of the pipe line owner's wells and reserves is curtailed solely for the benefit of other private well owners. The pipe line owner, a private person, is, in effect, ordered to pay money to another private well owner for the purchase of gas which there is no wish to buy.[28] Moreover, he is thus prevented from protecting himself, to the extent that he is able to market his gas, against the losses which the court below finds are occurring and will continue to occur due to drainage from the high pressure areas, wherein plaintiffs' wells are located, to the existing low pressure areas, in which are located the majority of the wells not connected to pipe lines. There is here no taking for the public benefit; nor is payment of compensation provided. Plaintiffs' pipe lines are private property. So far as appears, they are constructed on private lands. There is no suggestion that

[28] Plaintiffs claim that they will be obliged to incur further expense in the construction of gathering lines to connect their pipe lines with the wells of others. There is no finding of willingness on the part of non-pipe line well owners to assume or share such expense.

any of them is a common carrier of gas. The purpose of the owners in constructing the pipe lines was for the transport of gas only from their own leases, and such has been their consistent policy. Unlike the property involved in *The Assigned Car Cases,* 274 U. S. 564, the pipe lines are not used in connection with the operation of any public utility in Texas.[29]

The purpose of this order is the same as that which the Legislature sought to achieve by the "Common Purchaser Act," of August 12, 1931, held unconstitutional in *Texoma Natural Gas Co.* v. *Railroad Commission,* 59 F. (2d) 750. The effect upon the property of the pipe line owners of the two statutes and the orders issued thereunder is, likewise, the same. There is a difference in the means employed; but the difference is not of legal significance. The 1931 Act attempted to compel the purchase by frankly commanding it, under sanctions criminal and civil. The 1935 Act operates by indirection. Its command is no less compelling; its penalties not significantly different. The order disables the plaintiffs from performing their contracts except by means of purchases. Resort to those means necessarily results in depriving the plaintiffs of property. Under each statute, if obeyed, the State takes from the pipe line owner the money with which the purchase is made, the money lost through curtailed use of properties developed at large expense, the money lost because of the drainage away from his land of the gas which he is forbidden to produce for himself, but must buy from those towards whose lands it migrates.

Our law reports present no more glaring instance of the taking of one man's property and giving it to another.

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[29] Compare *Producers Transportation Co.* v. *Railroad Commission,* 251 U. S. 228, 230, 231; *Michign Public Utilities Comm'n* v. *Duke,* 266 U. S. 570, 577, 578; *Smith* v. *Cahoon,* 283 U. S. 553, 563.

In *Missouri Pacific Ry Co.* v. *Nebraska,* 164 U. S. 403; *Missouri Pacific Ry. Co.* v. *Nebraska,* 217 U. S. 196; [30] *Great Northern Ry. Co.* v. *Minnesota,* 238 U. S. 340; *Great Northern Ry. Co.* v. *Cahill,* 253 U. S. 71; *Delaware, L. & W. R. Co.* v. *Morristown,* 276 U. S. 182; and *Chicago, St. P., M. & O. Ry. Co.* v. *Holmberg,* 282 U. S. 162, expenditures directed to be made for the benefit of a private person were held invalid, although the party ordered to pay was a common carrier. In *Loan Association* v. *Topeka,* 20 Wall. 655, and *Cole* v. *La Grange,* 113 U. S. 1, the payments ordered for the benefit of a private person were declared invalid, although the money was to be raised by general taxation. In *Myles Salt Co.* v. *Board of Commissioners,* 239 U. S. 478, the exaction was held unlawful, though imposed under the guise of an assessment for alleged betterments. Compare *Georgia Railway & Electric Co.* v. *Decatur,* 295 U. S. 165. And this Court has many times warned that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid. See *Hairston* v. *Danville & Western Ry. Co.,* 208 U. S. 598, 605, 606; *Rindge Co.* v. *County of Los Angeles,* 262 U. S. 700, 705. Compare *Cincinnati* v. *Vester,* 281 U. S. 439, 446, 449.

Fifth. The defendants contend that the situation in the Panhandle field presented a conflict of private interests so serious as to become a matter of public concern; and that the Legislature has power to adopt measures to prevent the harmful discord. They insist, moreover, that the plaintiffs, having invoked the legislative action to stop the wasteful and disproportionate drawing of sweet gas by others—a prohibition of which they are now reaping the benefits—may not deny the legislative power to

[30] See *Chicago & Northwestern Ry. Co.* v. *Ochs,* 249 U. S. 416, 421, 422.

authorize the incidental limitations of its own production; since the Legislature would not have prohibited the waste, or inferior uses of the gas, without providing for its purchase by the pipe line companies. Whether the latter assertion is true in fact, we do not know. But it is clear that there is no basis in law for the argument, since there is no claim that plaintiffs ever consented to inserting any such provision in the Act. Indeed, they insist, as a matter of construction, that the Legislature has not done so. And, House Bill 266 is so much more drastic a statute than the restrictions upon inferior uses of gas which were apparently the object of plaintiffs' efforts before the Legislature, that in their present situation plaintiffs cannot fairly be said to be receiving the benefits and evading the burdens of a measure which they initiated. Moreover, plaintiffs do not assert rights under the statute which they assail. They have not taken, and are not obliged to take, any affirmative steps thereunder to obtain whatever benefits may accrue to them because of the restrictions imposed on production for inferior uses. Compare *Daniels* v. *Tearney,* 102 U. S. 415, 421; *Wall* v. *Parrot Silver & Copper Co.,* 244 U. S. 407, 411; *Booth Fisheries Co.* v. *Industrial Commission,* 271 U. S. 208, 211. Those benefits result incidentally from the enactment of other provisions of the Act, the constitutionality of which is not questioned, and which seem clearly separable from the sections here challenged. Compare *Hurley* v. *Commission of Fisheries,* 257 U. S. 223; *United Fuel Gas Co.* v. *Railroad Commission,* 278 U. S. 300, 308.[31]

Affirmed.

[31] Cases are collected in Notes, 34 Col. L. Rev. 1495; 48 Harv. L. Rev. 988.

ICKES, SECRETARY OF THE INTERIOR, *v.* FOX ET AL.*

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

No. 266. Argued January 6, 1937.—Decided February 1, 1937.

1. Suits to which the United States is an indispensable party defendant may be maintained only when the Congress has so provided. P. 96.
2. Upon the facts alleged in the bills, *held* that, under the Reclamation Act, the laws of Washington, and contracts between the Government and owners of land in an irrigation project, the rights of landowners to use the water in the quantity per acre required for irrigating their respective lands were not mere rights of contract with the Government, but were vested property rights, appurtenant to their lands and wholly distinct from the interest of the Government in the irrigation works. P. 96.
3. The Federal Government, as owner, had the power to dispose of the land and water of the public domain together or separately; and by the Desert Land Act, if not before, Congress established the rule that for the future the lands should be patented separately. P. 95.
4. By the Desert Land Act, acquisition of the government title to a parcel of land did not carry with it a water right; but all non-navigable waters were reserved for the use of the public under the laws of the various arid-land States. P. 95.
5. By the laws of the arid-land States generally, and of the State of Washington in particular, and by express provision of the Reclamation Act with respect to lands in federal irrigation projects, the right to use water for irrigation, which can only be acquired by prior appropriation and application to that beneficial use, is a property right and part and parcel of the land upon which it is applied. P. 95.
6. In a suit against a government officer to enjoin the enforcement of an order which would unlawfully deprive the plaintiff of vested

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* Together with No. 267, *Ickes, Secretary of the Interior,* v. *Parks et al.;* and No. 268, *Ickes, Secretary of the Interior,* v. *Ottmuller.* On writs of certiorari to the United States Court of Appeals for the District of Columbia.

property rights, the truth of allegations as to the ownership of the rights is conceded by a motion to dismiss; but even if the allegations were denied, a presumption that the plaintiff might be able to prove them will be indulged in favor of the jurisdiction of the trial court. P. 96.

7. The United States is not an indispensable party to suits brought to enjoin the Secretary of the Interior from enforcing an order which would wrongfully deprive the plaintiffs of vested property rights that were not only acquired under Acts of Congress, state laws and government contracts but settled and determined by his predecessors in office. Pp. 96–97.

66 App. D. C. 128; 85 F. (2d) 294, affirmed.

Writs of certiorari, 299 U. S. 528, to review judgments affirming, upon special appeals, orders of the trial court denying motions to dismiss amended bills in three suits against the Secretary of the Interior.

Assistant Attorney General Blair, with whom *Solicitor General Reed* and *Messrs. D. B. Hempstead* and *Frederick Bernays Wiener* were on the brief, for petitioner.

The United States is an indispensable party.

If the United States was the appropriator and is the owner of the water rights in question, the respondents can have no claim apart from their contracts with the United States. The suits on such contracts were therefore rightly dismissed. *Wells* v. *Roper,* 246 U. S. 335; *Transcontinental & Western Air* v. *Farley,* 71 F. (2d) 288, cert. den., 293 U. S. 603. The relief sought would be the equivalent of specific performance of a contract with the United States, which no court has jurisdiction to award. *Goltra* v. *Weeks,* 271 U. S. 536, 546; *United States ex rel. Shoshone Irrigation District* v. *Ickes,* 70 F. (2d) 770, 773, cert. den., 293 U. S. 571; *Boeing Air Transport* v. *Farley,* 75 F. (2d) 765, cert. den., 294 U. S. 728.

Whether the circumstances give the respondents any sort of a property right in the water must be determined in the light of state law, to which the reclamation ac-

tivities of the Federal Government are expressly made subject. Act of June 17, 1902, c. 1093, § 8, 32 Stat. 390. Does the mere use of water supplied under contract with the operator of a storage and irrigation system give title to the water independently of the contract?

Some of the arid States, by statute or by decision, have modified the doctrine of first appropriation to require that there be actual beneficial use by the appropriator. See Wiel, Water Rights in the Western States, II, c. 57, pp. 1235–1248 (3d ed.). Colorado seems to have gone farther in this direction than has any other State. Under the law of that State, the fact of storage and distribution does not constitute appropriation, but merely makes the carrier of the water a trustee for the consumer, in whom the property right rests. *Highland Ditch Co.* v. *Union Reservoir Co.,* 53 Colo. 483; *Pioneer Irrigation Co.* v. *Union Reservoir Co.,* 53 Colo. 483; *Pioneer Irrigation Co.* v. *Board of Commissioners,* 236 Fed. 790, 792.

Under the applicable Washington law, the one who diverts water for sale or distribution to others has made a full appropriation and has full title to the water.

Prior to 1917, the appropriation of water was governed by the Act of 1891 (Laws of Wash., 1891, p. 327, § 1; 2 Remington's Code, 1915, § 6316). Under this Act one who impounds water and distributes it under contract with agricultural users is the appropriator, and those who contract with him have no property rights in the water from its use, but merely their contract rights against the distributor. *Lanham* v. *Wenatchee Canal Co.,* 48 Wash. 337; *Shafford* v. *White Bluffs Co.,* 63 Wash. 10; *Black* v. *Baker,* 126 Wash. 604. Other Washington cases have assumed as a matter of course that the remedy for failure to supply the agreed water is one for breach of contract, or for its specific performance. [Citing many Washington cases.]

Ergo the United States is the appropriator and respondents have merely contract rights against the United States. *United States* v. *Union Gap Irrigation Co.*, 209 Fed. 274, 276; *West Side Irrigation Co.* v. *United States*, 246 Fed. 212, 217. Any doubts as to this are set at rest by the Washington statute authorizing appropriations of water for federal reclamation projects. Laws of 1905, c. 88, p. 180. Under the Reclamation Act the United States is the appropriator of water. *Ide* v. *United States*, 263 U. S. 497.

Section 8 of the Reclamation Act, declaring that the right to the use of the water acquired under its provisions shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right, was designed only to prevent speculative profits, by forbidding alienation of the water right for use on other lands or for other purposes. H. Rep. No. 1468, 57th Cong., 1st Sess., p. 7; 35th Cong. Rec. 1385, 6679.

The foundation of the bills is the allegation that the Secretary of the Interior threatens to interfere with the respondents' water rights which are owned independently of the contracts by which the United States agrees to furnish the water. The very claim that the United States is not a necessary party rests upon a request that the court adjudicate that the claim of the United States to ownership of the water must fall before the claims of the respondents. The United States is therefore an indispensable party. *American Falls Reservoir District* v. *Crandall*, 82 F. (2d) 973; *Arizona* v. *California*, 298 U. S. 558; *Goldberg* v. *Daniels*, 231 U. S. 218, 221–222.

These suits seek also to interfere with the operation and management of the reservoirs and distribution system of the United States. In effect, the relief sought is that respondents be restored to their former "rights and privileges" to receive the additional amounts of

water. This would require that water be stored in the reservoirs, that the headgates be adjusted, and that water be delivered to the respondents in the amounts to be fixed by the decree. These bills contemplate a direct interference with the rights of property and management which are guaranteed by § 6 of the Reclamation Act (43 U. S. C. 498).

This conclusion is reinforced when the interest of the United States is viewed not only as one relating to its ownership of property but as one affecting a basic element of its reclamation policy. The orders attacked by the respondents recite that the water furnished them must be limited to the amount specified in their contracts, in order to supply water to the Kittitas division. The situation thus appears to be one in which respondents seek to have enforced a right in opposition to the interest of the United States in (1) making an equitable distribution of a limited supply of water, and (2) in fulfilling the terms of its contracts with other landowners.

Mr. Stephen E. Chaffee for respondents.

The effect of the public notices and orders sought to be annulled is arbitrarily to reduce the measure of respondents' right to much less than the measure of *"beneficial use,"* as fixed by the Reclamation Law, by the contracts, by the legislation and judicial decisions of Washington, by practice on all federal reclamation projects and by the determination of a former Secretary of Interior. *In re Waters of Crab Creek,* 134 Wash. 7, 14, 15; *Longmire* v. *Smith,* 26 Wash. 439; *California Oregon Power Co.* v. *Beaver Portland Cement Co.,* 295 U. S. 142; *Ament* v. *Bickford,* 139 Wash. 494, 495; *Madison* v. *McNeal,* 171 Wash. 675; *Geddis* v. *Parish,* 1 Wash. 587, 591.

Determination by the Secretary prior to August 13, 1914, of respondents' right to the use of water acquired pursuant to contract, fixed the right and cannot be an-

nulled by a successor. *Wilbur* v. *Burley Irrigation District,* 58 F. (2d) 871; *Noble* v. *Union River Logging Co.,* 147 U. S. 164, 176.

The public notices sought to be vacated increase the construction charges after they were fixed by public notice; strike down and destroy water rights which are appurtenant to respondents' lands; and violate the fundamental doctrine "first in time, first in right," which the Secretary of the Interior is required to observe in carrying out the provisions of the Reclamation law.

The cases of *Wells* v. *Roper; Transcontinental & Western Air* v. *Farley; Boeing Air Transport* v. *Farley;* and *United States ex rel. Shoshone Irrigation District* v. *Ickes,* are clearly distinguishable. In those suits the plaintiffs sought to control the discretion and judgment of executive officers on matters entrusted them by Congress. Furthermore, those cases involved breach of a contract by the United States. Congress had entrusted the matters involved to the discretion of the Postmaster General in the first three cases and to the Secretary of the Interior in the last case; and the executive official was acting within the statutory authority and jurisdiction so entrusted to him in discretionary matters. None of these elements exist in the suits at bar. The difference between the illegal seizure of the property and cancellation of a contract is clearly pointed out in *Goltra* v. *Weeks,* 271 U. S. 536. See *Ballinger* v. *United States,* 216 U. S. 240; *Miguel* v. *McCarl,* 261 U. S. 442; *American School of Magnetic Healing* v. *McAnnulty,* 187 U. S. 94; *Payne* v. *Central Pacific Ry. Co.,* 255 U. S. 228; *Ickes* v. *Virginia-Colorado Development Co.,* 295 U. S. 639; *United States* v. *Lee,* 106 U. S. 197; *Sterling* v. *Constantin,* 287 U. S. 378.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The sole question in each of these three cases is whether the United States is an indispensable party de-

fendant. The suits were brought in the Supreme Court of the District of Columbia. That court, on motion of petitioner, deeming the presence of the United States to be indispensable, dismissed the bills as amended. Thereupon, by permission of the court, second-amended bills were filed. Petitioner renewed his motions to dismiss, which the court then denied. A special appeal was allowed by the court below, and resulted in an affirmance of the decree of the trial court. 66 App. D. C. 128; 85 F. (2d) 294. The allegations of the three second-amended bills of complaint differ in some particulars; but whether these differences will affect the extent or measure of the rights of the respective respondents or the final disposition of the suits so as to require unlike decrees, we do not determine. They are not such as to necessitate diverse rulings in respect of the question which now is presented for decision. In this view, we confine our statement, except as otherwise noted, to the allegations of the bill of complaint in the Fox case, No. 266.

Petitioner, as Secretary of the Interior, has charge of the administration of the Reclamation Act of June 17, 1902 (32 Stat. 388), as amended. In 1906, the then Secretary of the Interior approved a reclamation project known as the "Sunnyside Unit of the Yakima Project"; and purchased from the Washington Irrigation Company the Sunnyside Canal, together with the water appropriations and irrigation system connected therewith. At the time of the purchase, certain arid and unirrigated lands, described in the bill, thereafter and now owned by respondents, were within the unit embraced by the project.

The then owners of the lands, predecessors of respondents in title, and other owners of similar lands, incorporated the Sunnyside Water Users Association under the laws of the State of Washington, put their lands within

the reclamation project, and agreed to take water from the project to irrigate such lands.

The association, on May 7, 1906, entered into a contract with the United States, the recitals of which in substance, so far as pertinent, are that these lands are desert and arid in character and will remain so unless the waters of the Yakima River and its tributaries be impounded and the flow regulated and controlled; that the Secretary contemplates the construction of irrigation works under the Reclamation Act for the irrigation and reclamation of these lands; that the incorporators and shareholders of the association are required to be owners and occupants of lands within the area to be irrigated, and already are in some cases appropriators of water for the irrigation thereof; that they are required to initiate rights to the use of water from the proposed irrigation works as soon as may be, and complete the acquisition thereof as prescribed by the Secretary, "which rights shall be, and thereafter continue to be, forever appurtenant to designated lands owned by such shareholders."

Following these recitals, it was agreed that only those who became members of the association should be accepted as applicants for rights to the use of water; that the aggregate amount of such rights should not exceed the number of acres of land capable of irrigation by the total quantity of water available—namely, the quantity now appropriated by shareholders of the association and the quantity to be delivered from all sources in excess of the water now appropriated; that the Secretary should determine the number of acres capable of such irrigation, "to be based upon and measured and limited by the beneficial use of water"; that water rights should be paid for in ten annual installments; that the association guarantees payment for that part of the cost of the irrigation works apportioned to its shareholders—times

and methods of payment being stipulated in detail; that rights to water where the same have vested were to be defined, determined, and enjoyed in accordance with the Reclamation Act and other acts of Congress on the subject of the acquisition and enjoyment of such rights, and by the laws of the State of Washington.

Some time after the execution of the foregoing contract, the predecessors in title of respondents, upon officially-approved forms, made applications for water-rights for the irrigation of the lands here involved. By the terms of the applications, the measure of the water-right for the land was stated to be that quantity which shall be beneficially used for the irrigation thereof, not exceeding the share proportionate to irrigable acreage of the water supply actually available, to be paid for [in ten annual instalments] in an amount which was fixed in each application.[1] The applicants agreed that the construction charge and the annual charges for operation and maintenance should be and were made a lien upon the lands and all water-rights then or thereafter appurtenant or belonging thereto, together with all improvements thereon.

It further is alleged that a former Secretary of the Interior determined that the total cost of the water rights for all the lands in the unit would be $52 per acre, and that such sum would be sufficient to return to the reclamation fund the total cost of the project; that, pursuant to the terms of the Reclamation Act, he fixed the

[1] In the Parks case the quantity of water applied for was stated to be three acre-feet of water per annum per acre, or as much more as will be required to successfully irrigate the land. In the Ottmuller case the quantity was stated to be three acre-feet of water per annum per acre, or so much thereof as shall constitute the proportionate share per acre from the water supply actually available for the lands under the project.

construction charge for the land here involved at that amount per acre, and issued public notice and order accordingly; that thereafter the successive Secretaries of the Interior uniformly construed the Reclamation Act and the contractual obligations, to the effect that the owners of the lands had purchased a sufficient quantity of water to beneficially and successfully irrigate their lands, to be determined by representatives of the Secretary having physical charge of the water distribution, from a factual investigation and personal examination of the lands and the crops growing thereon and the water requirements thereof.

Pursuant thereto, it was determined by representatives of the successive Secretaries that 4.84 acre-feet of water per annum per acre was necessary to beneficially and successfully irrigate respondents' lands; that, thereupon, the Secretaries of the Interior, through their representatives, have, for a period of more than twenty years, delivered to such lands the necessary quantity of water; that after the construction of the irrigation system and reservoirs of sufficient capacity to beneficially and successfully irrigate all lands within the unit, an act of Congress was passed providing that no increase of construction charges could be made after they had been fixed by public notice and order, except by agreement between the secretary and a majority of the water-right applicants. On September 24th, 1914, the then Secretary of the Interior issued a public notice and order, declaring that there would be no increase in the construction charges against the lands.

Respondents and their predecessors, it is alleged, have fully complied with the terms of the Reclamation Act and all obligations in connection with their water-rights, and have paid to the government all sums due on account of construction charges, and all operation and maintenance charges, and have acquired vested water-

rights sufficient to beneficially and successfully irrigate their lands—namely, 4.84 acre-feet of water per acre per annum; and that such water-rights are appurtenant to their lands.

The bill further alleges that in 1930 the Commissioner of Reclamation desired to construct the Cle Elum Reservoir to store water for the irrigation of lands in the Kittitas Reclamation District and other lands, the canal and distributing system in that district being then in process of construction. But finding that the cost of the reservoir would exceed, by $1,000,000, the amount which would be returned to the reclamation fund, and without consulting respondents or other water users in the Sunnyside Unit of the Yakima Project, the commissioner charged the sum of $1,000,000 to that unit and district, and informed the secretary to that effect. Neither respondent nor any other water users in that unit or district ever agreed to this arrangement; but the then-secretary certified to the President that provision had been made for the repayment to the reclamation fund of the total cost of the reservoir, and that $1,000,000 thereof was to be obtained by rentals from the Sunnyside Division of the Yakima Project.

The bill further alleges that the secretary and other officials agreed with designated persons to attempt to force and coerce respondents, and other water users in the district, to induce the district to agree to pay the additional sum; otherwise, to force and coerce them to sign water-rental applications or be deprived of a portion of the water owned by them. In pursuance thereof, public notice was given and an order issued limiting their rights to three acre-feet per acre, and exacting a specified rental charge for additional water. Respondents and the other water users were notified that they would be deprived of all water in excess of the three acre-feet per acre unless they made application for ad-

ditional water in a form and manner prescribed. Respondents and the other water-right users, however, refused to make such applications.

It is further alleged that three acre-feet of water per acre is not, never has been, and will not in the future be sufficient to beneficially irrigate respondents' lands; but would leave a large part thereof barren and nonproductive, thereby forcing about half of their lands to bear construction and maintenance charges, taxes and assessments upon the whole thereof. The bill shows that irreparable loss and damage will result if the order of the secretary is enforced; and that respondents have no adequate or complete remedy at law, but that effective relief can be administered only by a court of equity. The prayer is for a decree requiring the secretary to vacate, set aside and hold for naught the notices and orders set forth in and attached to the bill, and that respondents be restored to their former rights and privileges.

The bill goes into greater detail in respect of the facts; but the foregoing general statement of the allegations is enough for present purposes. Succinctly stated, the case comes to this: The United States, under the Reclamation Act, constructed an irrigation system for the purpose of storing and distributing water for irrigation of arid lands. Respondents own water-rights under the system for lands of that kind; and these lands require artificial irrigation to render them productive. So far as these respondents are concerned, the government did not become the owner of the water-rights, because those rights by act of Congress were made "appurtenant to the land irrigated"; [2] and by a Washington statute, in force at least since 1917,

[2] "The right to the use of water acquired under the provisions of the reclamation law shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." Act of June 17, 1902, c. 1093, § 8, 32 Stat. 388, 390; Title 43 U. S. C. § 372.

were "to be and remain appurtenant to the land." [3] Moreover, by the contract with the government, it was the land owners who were "to *initiate* rights to the use of water," which rights were to be and "continue to be forever appurtenant to designated lands owned by such shareholders."

Respondents had made all stipulated payments and complied with all obligations by which they were bound to the government, and, long prior to the issue of the notices and orders here assailed, had acquired a vested right to the perpetual use of the waters as appurtenant to their lands. Under the Reclamation Act, *supra,* as well as under the law of Washington, "beneficial use" was "the basis, the measure and the limit of the right." And by the express terms of the contract made between the government and the Water Users Association in behalf of respondents and other shareholders, the determination of the secretary as to the number of acres capable of irrigation was "to be based upon and measured and limited by the beneficial use of water." Predecessors of petitioner, accordingly, had decided that 4.84 acre-feet of water per annum per acre was necessary to the beneficial and successful irrigation of respondents' lands; and upon that decision, for a period of more than twenty years prior to the wrongs complained of, there was delivered to and used upon the lands that quantity of water.[4] Although the government diverted, stored and distributed the water, the contention of petitioner that thereby ownership of the water or water-rights became vested in

[3] "The right to the use of water which has been applied to a beneficial use in the state shall be and remain appurtenant to the land or place upon which the same is used: . . ." Laws of Wash., 1917, c. 117, § 39, p. 465; Laws of Wash., 1929, c. 122, § 6, p. 274; Rem. Rev. Stat. § 7391, vol. 8, p. 425.

[4] In the Parks case and in the Ottmuller case, the quantity of water thus determined and delivered and used was 6 acre-feet and 5.56 acre-feet of water per acre per annum, respectively.

the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the land owners; and by the terms of the law and of the contract already referred to, the water-rights became the property of the land owners, wholly distinct from the property right of the government in the irrigation works. Compare *Murphy* v. *Kerr,* 296 Fed. 536, 544, 545. The government was and remained simply a carrier and distributor of the water (*ibid.*), with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works. As security therefor, it was provided that the government should have a lien upon the lands *and the water-rights* appurtenant thereto—a provision which in itself imports that the water-rights belong to another than the lienor, that is to say, to the land owner.

The federal government, as owner of the public domain, had the power to dispose of the land and water composing it together or separately; and by the Desert Land Act of 1877 (c. 107, 19 Stat. 377), if not before, Congress had severed the land and waters constituting the public domain and established the rule that for the future the lands should be patented separately. Acquisition of the government title to a parcel of land was not to carry with it a water-right; but all non-navigable waters were reserved for the use of the public under the laws of the various arid-land states. *California Power Co.* v. *Beaver Cement Co.,* 295 U. S. 142, 162. And in those states, generally, including the State of Washington, it long has been established law that the right to the use of water can be acquired only by prior appropriation for a beneficial use; and that such right when thus obtained is a property right, which, when acquired for irrigation, becomes, by state law and here by express provi-

sion of the Reclamation Act as well, part and parcel of the land upon which it is applied.

We are thus brought to the decisive question—is the United States an indispensable party defendant? If so, the suits, however meritorious, must fail, since no rule is better settled than that the United States cannot be sued except when Congress has so provided; and here that has not been done. Petitioner's contention that the United States is an indispensable party defendant and, as it cannot be sued, the suits should have been dismissed, is based upon the propositions, as we understand them, that the United States is the owner of the water-rights; that respondents' claims rest entirely upon executory contracts; and that the relief sought is the substantial equivalent of specific performance of these contracts.

The fallacy of the contention is apparent, because the thus-far undenied allegations of the bill, as already appears, demonstrate that respondents have fully discharged all their contractual obligations; that their water-rights have become vested; and that ownership is in them and not in the United States. The motion to dismiss concedes the truth of these allegations; but even if they were denied, we should still be obliged to indulge the presumption, in favor of the jurisdiction of the trial court, that respondents might be able to prove them. *United States* v. *Lee,* 106 U. S. 196, 218, 219; cf. *Tindal* v. *Wesley,* 167 U. S. 204, 213 *et seq.* In support of his contention, petitioner relies upon *American Falls Reservoir District* v. *Crandall,* 82 F. (2d) 973; but that decision, in so far as it is not in harmony with the view which we have just taken, must be disapproved.

The suits do not seek specific performance of any contract. They are brought to enjoin the Secretary of the Interior from enforcing an order, the wrongful effect of which will be to deprive respondents of vested property rights not only acquired under Congressional acts, state

laws and government contracts, but settled and determined by his predecessors in office. That such suits may be maintained without the presence of the United States has been established by many decisions of this court, of which the following are examples: *Noble* v. *Union River Logging R. Co.*, 147 U. S. 165, 171–2, 176; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619; *Goltra* v. *Weeks*, 271 U. S. 536, 544; *Work* v. *Louisiana*, 269 U. S. 250, 254; *Payne* v. *Central Pacific Ry. Co.*, 255 U. S. 228, 238. These decisions cite other cases to the same effect. The recognized rule is made clear by what is said in the *Stimson* case:

"If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. . . . And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. . . .

"The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States."

The decree of the court below is

Affirmed.

OSAKA SHOSEN KAISHA LINE *v.* UNITED STATES.

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

No. 224. Argued January 4, 1937.—Decided February 1, 1937.

1. In penal statutes, no less than in others, the language, if clear, is conclusive. P. 101.
2. General expressions in an opinion which go beyond the case in which they were used, may be respected, but ought not to control the judgment in a subsequent suit presenting the very point for decision. P. 103.
3. Section 10 (a) of the Immigration Act of 1917, as amended, makes it the duty of every person, including owners, masters, officers, and agents of vessels or transportation lines, "bringing an alien to, or providing a means for an alien to come to, the United States, to prevent the landing of such alien in the United States at any time or place other than as designated by the immigration officers." Penalties were prescribed for failure to comply. *Held:*

   (1) The word "alien," as used in the section, was not intended to include an alien sailor. P. 103.

   (2) To constitute the act of "bringing an alien to the United States," it is not essential that there be an intent to leave him here. Decided thus in a case involving an alien passenger, en route from Brazil to Japan, who debarked at a port of call in the United States. *Taylor* v. *United States,* 207 U. S. 120, limited. P. 104.

   (3) Under § 10 it is not necessary that a detention order be issued by the immigration officials; the landing of an alien is forbidden unless permitted. P. 101.

   (4) The meaning of § 10 (a) is not restricted by subdivision (b) of § 10, which simply provides a rule of evidence affecting the burden of proof. P. 104.

84 F. (2d) 482, affirmed.

CERTIORARI, 299 U. S. 526, to review a decree reversing a decree of the District Court, which dismissed with prejudice a libel by the United States to recover a penalty under the Immigration Act.

Mr. Robert Eikel, Jr., with whom *Mr. J. Newton Rayzor* was on the brief, for petitioner.

Mr. Charles E. Wyzanski, Jr., with whom *Solicitor General Reed, Assistant Attorney General McMahon,* and *Messrs. William W. Barron, Albert E. Reitzel,* and *Edward J. Garrahan* were on the brief, for the United States.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Section 10 (a) of the Immigration Act of February 5, 1917, as amended, Title 8 U. S. C. § 146, makes it the duty of every person, including owners, masters, officers, and agents of vessels or transportation lines, "bringing an alien to, or providing a means for an alien to come to, the United States, to prevent the landing of such alien in the United States at any time or place other than as designated by the immigration officers." Failure to comply with the provision constitutes a misdemeanor punishable by fine or imprisonment or both. If the Secretary of Labor is of opinion that a prosecution is impracticable or inconvenient, a penalty of $1,000 is imposed and a lien upon the vessel is created for which such vessel shall be libeled in the appropriate United States court.

By subdivision (b) of § 10, proof that the alien failed to present himself at the time and place designated by the immigration officers constitutes *prima facie* evidence that the alien has landed at a time or place other than that designated.

On June 11, 1932, the Santos Maru came into the port of New Orleans with Salvatore Sprovieri, an alien passenger, on board. The passenger was en route from Brazil to Japan upon a through ticket; and was not entitled to enter the United States. On arrival of the steamship, the immigration officers at New Orleans issued a written order to the steamship to hold the alien

on board at all ports of the United States at which the ship might touch—the order being duly served upon the officers of the ship. A few days later, the ship arrived at the port of Galveston, Texas; and there, by the negligence of the ship, its officers and crew, the alien passenger was allowed to escape and land in the United States without permission of the immigration officers and in violation of their order. Officers of the ship notified the immigration authorities of the escape of the passenger; but the ship sailed before his arrest. Subsequently, the passenger was arrested and deported on another vessel of the same line.

The Secretary of Labor was of opinion that it was impracticable and inconvenient to prosecute the matter criminally; and a libel was filed on behalf of the United States in the appropriate federal district court, praying a decree for the $1,000 penalty and to enforce the lien therefor against the ship.

The district court took the view that, the alien passenger not being bound for the United States but en route from Brazil to Japan, the ship was not liable, and dismissed the libel with prejudice. The circuit court of appeals held otherwise, reversed the decree and remanded the cause with instructions to enter a decree for the United States. 84 F. (2d) 482.

The basic contention of petitioner, in its assault upon the latter decree, is that one who transports an alien passenger from one foreign country to another, does not bring him to the United States, within the meaning of § 10, by entering, with the alien on board, an American port of call on the way. If it were not for a sentence contained in the opinion of this court in *Taylor* v. *United States, infra,* of which we shall speak later, we might dispose of this contention by simply saying that it is contrary to the unambiguous terms of the section. Nothing can be plainer than that a ship which enters

one of our ports has come to the United States; and a passenger on board obviously has come with the ship, and consequently has been brought by the ship to the United States. And this remains none the less the fact, although the ship continue on her way to a foreign port, and although it was intended that the passenger should go with her, and not be left in the United States. To say that the passenger has not been brought to the United States unless the intent was to leave him here, is not to construe the statute but to add an additional and qualifying term to its provisions. This we are not at liberty to do under the guise of construction, because, as this court has so often held, where the words are plain there is no room for construction. *United States* v. *Wiltberger,* 5 Wheat. 76, 95–96; *Hamilton* v. *Rathbone,* 175 U. S. 414, 419, 421; *United States* v. *Hartwell,* 6 Wall. 385, 396; *Crooks* v. *Harrelson,* 282 U. S. 55, 59–60.

It is urged that the statute is highly penal in character and should therefore be construed strictly. But the object of all construction, whether of penal or other statutes, is to ascertain the legislative intent; and in penal statutes, as in those of a different character, "if the language be clear, it is conclusive." *United States* v. *Hartwell, supra,* pp. 395–396; *United States* v. *Corbett,* 215 U. S. 233, 242; *Sacramento Navigation Co.* v. *Salz,* 273 U. S. 326, 329–330.

The duty of the ship is to prevent the landing of through alien passengers except by permission. The United States is under no obligation to permit the temporary landing of such passengers at its ports at all. A detention order is not necessary, although one was issued in this instance; for the case is not one where landing is permitted if not forbidden by the immigration officials, but where it is forbidden unless permitted. Section 10 is not like, for example, § 20 of the Immigration Act of 1924, which imposes a fine upon the owner, charterer,

agent, consignee, or master of a vessel arriving in the United States who fails, after inspection, to detain an alien seaman employed on the vessel "if required" by the immigration officer in charge of the port to do so. Under that provision, "A duty so to detain does not arise unless and until such detention is required by the immigration officer." *Compagnie Generale* v. *Elting,* 298 U. S. 217, 223. Under § 10, however, the duty is imposed by the statute and not by requirement of the immigration officials. The matter is taken care of by a regulation of the Secretary of Labor (Rule 3, subdivision H, ¶ 6, "Immigration Laws and Rules of January 1, 1930," p. 125), which provides that through alien passengers "may land temporarily without visaed passports, for the limited period of time during which the vessel lies over in port, in cases where the examining officer is satisfied that they will depart on the vessel at the time it proceeds on the same voyage . . ."

The main reliance of petitioner is on *Taylor* v. *United States,* 207 U. S. 120, 124, 125. That case arose under § 18 of the Immigration Act of March 3, 1903, which imposes the duty upon a ship bringing an alien to the United States to adopt due precautions to prevent the landing of such alien at any time or place other than that designated by the immigration officers. This court held that the provision did not apply "to the ordinary case of a sailor deserting while on shore leave." In the course of the opinion it was said that the phrase "bringing an alien to the United States" meant "transporting with intent to leave in the United States and for the sake of transport—not transporting with intent to carry back, and merely as incident to employment on the instrument of transport." "Intent to leave" is right enough as applied to a seaman on the ship, but it may not be extended to include an alien through passenger.

The court there was dealing with and thinking of a sailor, and not of an alien through passenger; and its

language must be read accordingly, for—"It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision." *Cohens* v. *Virginia,* 6 Wheat. 264, 399; *Humphrey's Executor* v. *United States,* 295 U. S. 602, 626–627. The point to be observed in the *Taylor* case is that the transportation of the sailor was merely as an "incident to employment on the instrument of transport." That is to say, the sailor was one of the agencies which brought the ship in, rather than an alien brought in by the ship. "It is true," Chief Justice Marshall said in *The Wilson* v. *United States,* 1 Brock. 423, 30 Fed. Cas. 239, 244, "that a vessel coming into port, is the vehicle which brings in her crew, but we do not in common language say, that the mariners are 'imported,' or brought in by a particular vessel; we rather say they bring in the vessel." The generality of the affirmative phrase, "transporting with intent to leave in the United States," is obviously qualified by the negative form of expression immediately following, "not transporting with intent to carry back and *merely as incident to employment on the instrument of transport.*" (Italics supplied.)

When we consider the relation of the sailor to the ship—that he is, for all practical purposes, a part of it and not, like a passenger, apart from it—it is quite apparent that the word "alien" as used in § 10 does not, and was not intended to, include an alien sailor. Some of those engaged in the operation of a vessel must go ashore. They may be required to load and unload the cargo, to communicate with the local representatives of the line, and necessarily to perform a variety of duties which require their presence ashore. A denial of the privi-

lege would be so likely to adversely affect commerce as to require much plainer language than we find in § 10 to justify the conclusion that Congress had denied it. To adopt that conclusion would be to declare that the act was violated whenever a member of the crew was sent ashore to perform an act imperatively necessary in the service of the ship.

Petitioner cites, also in support of its contention, *The Alfonso XIII,* 53 F. (2d) 124, 126; *Dollar S. S. Line* v. *Elting,* 51 F. (2d) 1035; and *The Habana,* 63 F. (2d) 812; but those decisions were expressly based upon what was regarded as the controlling effect of the phrase which we have quoted from the *Taylor* case; and from a reading of the opinions it seems quite evident that but for that the decisions would have been otherwise. For example, Judge Woolsey, in *The Alfonso XIII,* said that if he were dealing with the matter *de novo,* uninstructed by judicial authority above him, he would have found it difficult to give the words "bringing an alien to the United States" a meaning different from what they literally mean.

We reject the notion that in the case with which we are now concerned it is necessary to constitute the act of bringing an alien to the United States that there should be an intent to leave him here.

We see nothing in the suggestion that subdivision (b) of § 10 sustains petitioner's view of the case. That subdivision simply provides a rule of evidence affecting the burden of proof, and we think does not in any way restrict the plain meaning of § 10 (a) as we have found it.

Decree affirmed.

HILL, WARDEN, *v.* UNITED STATES EX REL. WEINER.

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

No. 171. Argued January 11, 1937.—Decided February 1, 1937.

1. The provision of § 22 of the Clayton Act fixing a term of six months as the maximum penalty of imprisonment for contempt, is limited to prosecutions arising out of cases instituted by private litigants, and is inapplicable to contempts arising out of suits brought or prosecuted in the name of, or on behalf of, the United States. These, by § 24, are excepted from the provisions of §§ 21, 22, 23, and 25. P. 108.
2. The due process clause of the Fifth Amendment does not preclude Congress from prescribing a heavier penalty for an offense involving the rights and property of the United States than for a similar offense involving the rights or property of a private person. P. 109.

84 F. (2d) 27, reversed.

CERTIORARI, 299 U. S. 526, to review a judgment affirming an order of the District Court, 11 F. Supp. 195, discharging the relator upon a writ of habeas corpus.

Assistant Attorney General Dickinson, with whom *Solicitor General Reed,* and *Messrs. Wendell Berge* and *Walter L. Rice* were on the brief, for petitioner.

Mr. Seth W. Richardson, with whom *Messrs. Samuel H. Kaufman* and *Eugene M. Parter* were on the brief, for respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The relator, Weiner, was convicted in a federal district court of violating a decree entered against him and numerous others by that court in a suit in equity brought by the United States under the Sherman Anti-trust Act, Title 15 U. S. C., §§ 1, 2, 4. He, with others, was charged

by information with the commission of several specified acts in violation of the decree, constituting criminal contempts. Upon a trial before the court sitting without a jury, he was found guilty and sentenced for certain of the contempts to imprisonment for six months in the House of Detention, and for other contempts for two years additional in the penitentiary. Upon his application and consent, the first part of the sentence was increased from six months in the House of Detention to a year and a day in the penitentiary, but to run *concurrently* with the two years' imprisonment.

On June 5, 1935, he was committed to the penitentiary. At the end of eleven months, he applied by petition to another federal district court to be discharged on habeas corpus, on the ground that the first court was without power to sentence him for a period of more than six months; and, having served that long, that he was entitled to be set at liberty.

The district court accepted that view, granted the writ, and ordered the relator discharged. 11 F. Supp. 195. Upon appeal, the court below affirmed the order. 84 F. (2d) 27.

The case involves a consideration of §§ 21, 22 and 24 of the Clayton Act, Title 28 U. S. C. §§ 386, 387 and 389.* Section 21, so far as pertinent, provides that any person who shall willfully disobey any lawful decree of the federal district court by doing any act or thing thereby forbidden to be done by him, if of a character to constitute also a criminal offense under any statute

* Sec. 21. Any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed, shall

of the United States or laws of any state in which the act was committed, shall be proceeded against as thereafter provided. Section 22 provides for trial by the court or, upon demand of the accused, by a jury. If found guilty, punishment is to be either by fine or imprisonment or both, in the discretion of the court, "but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months." Section 24, however, provides that "nothing herein contained [§§ 21, 22, 23, 25] shall be construed to relate to contempts committed in disobedience of any lawful . . . decree . . . entered in any suit or action brought or prosecuted in the name of, or on behalf

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be proceeded against for his said contempt as hereinafter provided. Title 28 U. S. C. § 386.

SEC. 22. . . . In all cases within the purview of this Act such trial may be by the court, or, upon demand of the accused, by a jury; . . .

If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the court. Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months. Title 28 U. S. C. § 387.

SEC. 24. Nothing herein contained [that is in §§ 21, 22, 23, 25] shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section twenty-one of this Act, may be punished in conformity to the usages at law and in equity prevailing on October 15, 1914. Title 28 U. S. C. § 389.

of, the United States, but the same, and all other cases of contempt not specifically embraced within section twenty-one . . . may be punished in conformity to the usages at law and in equity prevailing on October 15, 1914." If § 24 applies, the sentence was within the statutory authority of the court.

First. The court below held, and relator here contends, that the limitation of imprisonment to six months is not affected by the provisions of § 24. A similar question was before this court in *United States* v. *Goldman,* 277 U. S. 229, and was there decided contrary to the views of the court below. In that case, an information was presented by the United States to a federal district court, charging Goldman and others with criminal contempts committed by acts in violation of an injunction decreed by that court in an equity suit brought by the United States. The information was dismissed on the ground that under § 25 of the Clayton Act, the prosecution was barred by the statute of limitations. This court reversed. Section 25 provides that no proceeding for contempt shall be instituted unless begun within one year of the act complained of; but we held that the specific exception contained in § 24—"nothing herein contained"—applied to all provisions of the act relating to prosecutions for criminal contempts, and therefore applied to § 25, "as well as to the other sections," and that the one-year limitation prescribed by § 25 was without application to a case brought for the disobedience of a decree entered in a suit prosecuted by the United States.

That decision controls here. The object of § 24 clearly was to limit the application of the provisions of § 22, and the other sections named, to prosecutions for contempt arising out of cases instituted by private litigants.

Second. We find nothing in the further contention that this view of the statute results in a discrimination

in the matter of punishment so arbitrary as to deny due process of law to relator. Whatever may be the restraint against discriminatory legislation imposed by the due process of law clause of the Fifth Amendment, it is not encountered by the legislation here. The constitutional power of Congress to prescribe greater punishment for an offense involving the rights and property of the United States than for a like offense involving the rights or property of a private person reasonably cannot be doubted. Compare *Pace* v. *Alabama,* 106 U. S. 583.

Judgment reversed.

MIDLAND REALTY CO. *v.* KANSAS CITY POWER & LIGHT CO.

APPEAL FROM THE SUPREME COURT OF MISSOURI.

No. 217. Argued December 17, 1936.—Decided February 1, 1937.

1. As construed by the state supreme court, which construction binds this Court upon appeal, rates established pursuant to the provisions of the public service commission law of Missouri (R. S., 1929, c. 33) supersede all existing contract rates. P. 113.
2. A State has power to annul and supersede rates previously established by contract between public utilities and their customers. P. 113.
3. The public service commission law of Missouri does not violate the contract clause of the Federal Constitution (Art. I, § 10) or the due process clause of the Fourteenth Amendment, although, as construed by the state supreme court, existing contract rates are abrogated thereunder by (1) the mere filing, pursuant to the statute, of a rate schedule by the utility; or (2) the filing of a schedule pursuant to a rate order promulgated by the commission—it appearing that, under the statute, the party now insisting on its contract rates had opportunity, of which it did not avail itself, to support the contract rates and to test before the commission and in the state supreme court the validity of the filed schedules. Pp. 112–114.
4. It is not essential that there be specific adjudication in respect of existing contract rates in order that these may be susperseded by

the State in the exercise of its power to prescribe and enforce reasonable and non-discriminatory rates. P. 114.

5. The fact that the Missouri law, as construed by the state supreme court, permits a utility to recover the difference between rates fixed by contract and the higher rates established pursuant to the statute, even though the service had been furnished and paid for in accordance with the contract before the suit was brought, the customer having refused to pay the lawful rate, *held* not to render the statute violative of the aforementioned clauses of the Constitution. P. 114.

338 Mo. 1141; 93 S. W. (2d) 954, affirmed.

APPEAL from a judgment in favor of the Power & Light Company in its suit to recover the difference between rates fixed in a contract with the Realty Company and higher rates established under the state public service commission law. From a judgment of the trial court which allowed recovery in part, both parties had appealed to the state supreme court.

Mr. Elliott H. Jones, with whom *Mr. William C. Scarritt* was on the brief, for appellant.

Messrs. Ludwick Graves and *Irvin Fane,* with whom *Mr. William Chamberlain* was on the brief, for appellee.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The questions for decision are whether, as construed in this case by the highest court of Missouri, the statutes of that State regulating public utilities violate Art. I, § 10 of the Constitution of the United States, declaring that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .," or § 1 of the Fourteenth Amendment declaring "nor shall any State deprive any person of life, liberty, or property, without due process of law."

Appellee was plaintiff and appellant defendant below. They made a contract whereby the former for specified rates agreed to furnish the latter steam for heating its buildings in Kansas City for a term of five years ending

August 31, 1913, with option to defendant to extend the contract for an additional five years. March 17, 1913, the state public service commission law was enacted.[1] May 29, following, defendant exercised its option and so extended the term of the contract to August 31, 1918.

June 28, 1917, plaintiff in pursuance of the statute [2] filed with the commission a schedule of steam heating rates to become effective August 1, 1917; they were higher than those specified in the contract. The city and numerous users other than defendant objected; the commission, without attempting to apportion operating expenses and values between plaintiff's heating and electric service, found that the rates filed were unreasonably high and prescribed, as just and reasonable, rates lower than those filed but higher than the contract rates and made them effective March 1, 1918. 5 Mo. P. S. C. 664. Plaintiff filed a new schedule in accordance with the commission's order.

June 11, 1918, it complained that these rates were confiscatory. The commission, after apportioning operating expenses and values between the electrical and steam services, found the rates "inadequate, unjust and unreasonably low," that during none of the time was "heating revenue sufficient to even meet the fuel expense alone," and that "heretofore the steam heating business has been carried at a loss, and this loss has been borne either by the light and power consumers or by the company." Thereupon, it ordered new and higher rates effective December 1, 1919. 8 Mo. P. S. C. 223, 292, 296. The findings and order of the commission were approved by the supreme court in *State ex rel. Case* v. *Public Service Comm'n,* 298 Mo. 303; 249 S. W. 955.

For steam furnished defendant after August 1, 1917, plaintiff regularly sent bills based on the rates it had

[1] Missouri R. S., 1929, c. 33, §§ 5121 *et seq.*

[2] Missouri R. S., 1929, §§ 5190 (12), 5209.

filed with the commission. Claiming the contract rates still to be applicable, defendant paid amounts calculated in accordance with them. Plaintiff gave defendant credit for the payments it made. After expiration of the period covered by the contract as extended, plaintiff brought this suit. For steam furnished after August 1, 1917, and before March 1, 1918, it sought to recover on the basis of the charges specified in the first schedule filed. For steam furnished after March 1, 1918, to the end of the contract term, it sought to recover on the basis of charges of the schedule promulgated by the commission. The trial court held plaintiff not entitled to recover on its claim in respect of the first period but gave judgment in its favor in respect of the other one. Both parties appealed. The Missouri supreme court ruled the contract rates not applicable, held plaintiff entitled to recover on its claim in respect of both periods and directed that it have judgment for the sums calculated on the basis of the schedules filed with the commission.

Defendant's contention is not that the State lacked power by appropriate action to establish and enforce just and reasonable rates but that, as against the constitutional provisions invoked, the action taken under the public service commission law was not sufficient to abrogate the contract rates.

Specifically, its complaints are that the court construed the statute (1) to make (a) mere filing of plaintiff's schedule and (b) the later promulgation of a schedule by the commission effective to abrogate the contract rates and (2) to require that, although the contract was in due time fully performed and defendant prior to the commencement of the suit had paid plaintiff the contract rates, it was bound to pay additional amounts calculated on the basis of the higher rates specified in plaintiff's published schedules. It is upon these grounds that de-

fendant contends that the state law violates the quoted clauses of the Constitution.

These questions are to be decided upon the construction that the state supreme court put upon the statute. And that law is to be taken as if it declared that rates made in accordance with its provisions shall supersede all existing contract rates.[3] There is here involved no question as to the validity of the rates prior to the passage of the statute. Without expression of opinion, we assume that then the parties were bound by the contract. But the State has power to annul and supersede rates previously established by contract between utilities and their customers.[4] It has power to require service at nondiscriminatory rates, to prohibit service at rates too low to yield the cost rightly attributable to it,[5] and to require utilities to publish their rates and to adhere to them.[6] Under the challenged statute, defendant had opportunity to support the contract rates and to test before the commission and in the state supreme court—

[3] *Fulton* v. *Public Service Comm'n,* 275 Mo. 67; 204 S. W. 386; *Sedalia* v. *Public Service Comm'n,* 275 Mo. 201, 209; 204 S. W. 497; *Kansas City Bolt & Nut Co.* v. *Kansas City Light & Power Co.,* 275 Mo. 529; 204 S. W. 1074; affirmed 252 U. S. 571. *State ex rel. Washington University* v. *Public Service Comm'n,* 308 Mo. 328, 342; 272 S. W. 971; *State ex rel. Public Service Comm'n* v. *Latshaw,* 325 Mo. 909, 917–918; 30 S. W. (2d) 105; *State ex rel. Kirkwood* v. *Public Service Comm'n,* 330 Mo. 507, 521; 50 S. W. (2d) 114.

[4] *Union Dry Goods Co.* v. *Georgia Public Service Corp.,* 248 U. S. 372. *Producers Transportation Co.* v. *Railroad Commission,* 251 U. S. 228, 232. *Kansas City Bolt & Nut Co.* v. *Kansas City Light & Power Co.,* 252 U. S. 571. *Sutter Butte Canal Co.* v. *Railroad Commission,* 279 U. S. 125, 137–138.

[5] *Public Service Comm'n* v. *Utilities Co.,* 289 U. S. 130, 135–136. Cf. *Northern Pacific Ry. Co.* v. *North Dakota,* 236 U. S. 585, 604.

[6] *Armour Packing Co.* v. *United States,* 209 U. S. 56, 81. *Louisville & Nashville R. Co.* v. *Maxwell,* 237 U. S. 94, 97.

as others did—the validity of the filed schedule.[7] It failed to do so. And it here insists that the contracts could not be abrogated "without a proper hearing, finding and order of the commission with respect thereto." It does not, and reasonably it could not, contend that immediate exertion by the legislature of the State's power to prescribe and enforce reasonable and nondiscriminatory rates depends upon or is conditioned by specific adjudication in respect of existing contract rates.[8] It is clear that, as against those specified in the contract here involved, the rates first filed by plaintiff and those promulgated by the commission in accordance with the statute have the same force and effect as if directly prescribed by the legislature.[9]

Lacking in merit is defendant's contention that the statute violates the clauses of the Constitution invoked because held by the court to require that, although before this suit the service had been furnished and paid for in accordance with the contract, defendant was bound to pay more. As shown above, the rates specified in the schedules were held applicable from and after their respective effective dates. Defendant was not injured by plaintiff's failure to withhold service or more promptly to sue for the difference between its lawful charges and the amount paid. It cannot derive any advantage from refusal to pay.[10]

Plainly, enforcement of the rates in accordance with the statute did not violate either the contract clause of

[7] Missouri R. S., 1929, §§ 5191, 5232–5237. See *State ex rel. Washington University* v. *Public Service Comm'n,* 208 Mo. 328; 272 S. W. 971.

[8] *Louisville & Nashville R. Co.* v. *Mottley,* 219 U. S. 467.

[9] *Public Service Comm'n* v. *Pavilion Natural Gas Co.,* 232 N. Y. 146, 150–151; 133 N. E. 427; *North Hempstead* v. *Public Service Corp.,* 231 N. Y. 447, 450; 132 N. E. 144.

[10] *Louisville & Nashville R. Co.* v. *Central Iron Co.,* 265 U. S 59, 65.

the Constitution or the due process clause of the Fourteenth Amendment.

Affirmed.

CUMMINGS, ATTORNEY GENERAL, ET AL. *v.* DEUTSCHE BANK UND DISCONTOGESELLSCHAFT.

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

No. 254. Argued January 4, 5, 1937.—Decided February 1, 1937.

1. A suit under § 9 of the Trading With the Enemy Act, as amended by § 11 of the Settlement of War Claims Act, against the Attorney General (successor to the Alien Property Custodian) and the Treasurer of the United States, to recover property seized from a former enemy owner, is a suit against the United States. P. 118.
2. The consent of the United States to be so sued was not withdrawn by Public Resolution No. 53, of June 27, 1934. *Id.*

   This Public Resolution provides, *inter alia*, that all deliveries of money or property authorized or directed by the statutes above cited, shall be postponed and the money or property reserved, as long as Germany remains in arrears in payments under the debt funding agreement between Germany and the United States, dated June 23, 1930, respecting Germany's obligations on account of awards of the Mixed Claims Commission, etc.
3. In postponing restoration of property to former enemy owners, as allowed and provided for by the Settlement of War Claims Act, Public Resolution No. 53, *supra*, did not infringe their rights under the Fifth Amendment. P. 120.
4. Seizures under the Trading With the Enemy Act divested the enemy owners of all right to the property seized and vested absolute title in the United States. *Id.*
5. The fact that Congress manifested from the beginning its intention after the War to deal justly with former owners of seized enemy property, and by restitution or compensation to ameliorate hardship resulting from such seizures, detracted nothing from the title acquired by the United States or its power to retain or dispose

of the property upon such terms and conditions as from time to time Congress might direct. P. 120.

6. In a suit under the Settlement of War Claims Act, a former enemy owner could not gain title to the property claimed, prior to final judgment. P. 121.

7. The grant of the privilege of becoming reëntitled to seized property, extended to former enemy owners upon specified conditions by the Settlement of War Claims Act, was a matter of grace and was subject to withdrawal by Congress. P. 122.

65 App. D. C. 297; 83 F. (2d) 554, reversed.

CERTIORARI, 299 U. S. 527, to review the reversal of a judgment dismissing a suit for the recovery of property seized and held under the Trading With the Enemy Act.

Assistant Attorney General Morris, with whom *Solicitor General Reed* and *Messrs. Harry LeRoy Jones* and *Charles A. Horsky* were on the brief, for petitioners.

Messrs. James J. Lenihan and *Otto C. Sommerich,* with whom *Mr. Thomas H. Creighton, Jr.,* was on the brief, for respondent.

By leave of Court, *Messrs. Hartwell Cabell* and *Milton B. Ignatius* filed a brief on behalf of the Swiss National Insurance Co., Ltd., as *amicus curiae,* urging affirmance of the judgment below.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This is a suit in equity brought October 3, 1934, by respondent in the supreme court of the District of Columbia [1] against petitioners praying a decree directing delivery of property seized by the Alien Property Custodian and withheld by petitioners under the Trading with the Enemy Act from "Direction der Disconto Gesellschaft,"

[1] Now the "district court of the United States for the District of Columbia." Act of June 25, 1936, 49 Stat. 1921.

an alien enemy. Petitioners moved to dismiss the bill upon the ground that the court had no jurisdiction to entertain it because by Public Resolution No. 53 of June 27, 1934, 48 Stat. 1267, the return of the money and property sought has been postponed. The court sustained the motion and dismissed the bill. The court of appeals reversed. 65 App. D. C. 297; 83 F. (2d) 554. This court granted a writ of certiorari.

In substance the bill alleges: Respondent, a German corporation, was created in 1929 by consolidation of Deutsche Bank and Direction der Disconto Gesellschaft. After the merger, the assets of the latter became respondent's property. The Custodian determined the Disconto Gesellschaft to be an alien enemy and seized its money and property in this country, which was held by the Custodian and deposited in the Treasury. Respondent, acting under the Settlement of War Claims Act and in accordance with the Custodian's rules and regulations, filed notice of claim to the property and applied to the President for its return. Before commencement of this suit, the Custodian found it entitled to the property. In March, 1931, Sprunt and others brought an action in the supreme court of the District of Columbia against respondent; a warrant of attachment issued and, pursuant to it, the marshal levied on the money and property so held; because of the attachment petitioners refused to deliver it to respondent and retained custody. In May, 1934, that action was discontinued by plaintiffs and the attachment was released. July 1, 1934, the office of Custodian ceased; his powers and duties were transferred to the Department of Justice; all money and property held by or in trust for him was transferred to the Attorney General. Before commencement of this suit, respondent demanded and petitioners refused delivery of that here in question. Their refusal was based on Public Resolution No. 53.

The questions for decision are whether that resolution withdrew from the trial court jurisdiction to entertain the bill, and whether it deprives respondent of its property without due process of law in contravention of the Fifth Amendment.

1. This is in substance a suit against the United States. *Banco Mexicano* v. *Deutsche Bank,* 263 U. S. 591, 603. *Becker Steel Co.* v. *Cummings,* 296 U. S. 74, 78. By the Trading with the Enemy Act of 1917, § 9 (a) (b) (c),[2] as amended by the Settlement of War Claims Act, § 11,[3] the United States consented, in respect of claims such as the one here in question, to be sued in the supreme court of the District of Columbia. Petitioners maintain Resolution No. 53 withdrew that consent.

The recitals of that resolution disclose reasons for its adoption. They are: A joint resolution of July 2, 1921,[4] declared that property of German nationals held under the Trading with the Enemy Act should be retained and no disposition thereof made, except as specifically provided by law, until the German Government should make suitable provision for the satisfaction of claims of American nationals against it. The Treaty of Berlin, August 25, 1921,[5] accorded to the United States all rights and advantages specified in the resolution of July 2, 1921, including those stipulated for its benefit in the Treaty of Versailles,[6] not ratified by the United States. The agreement of August 10, 1922,[7] established a Mixed Claims

[2] Act of October 6, 1917, § 9, 40 Stat. 419, as amended by Acts: July 11, 1919, 41 Stat. 35; June 5, 1920, 41 Stat. 977; February 27, 1921, c. 76, 41 Stat. 1147; December 21, 1921, c. 13, 42 Stat. 351; December 27, 1922, c. 13, 42 Stat. 1065; March 4, 1923, § 1, 42 Stat. 1511; May 7, 1926, c. 252, 44 Stat. 406.

[3] Act of March 10, 1928, 45 Stat. 270.

[4] 42 Stat. 105.

[5] 42 Stat. 1939.

[6] Sen. Doc. No. 348, 67th Cong., 4th Sess., p. 3329.

[7] 42 Stat. 2200.

Commission to adjudicate claims of American nationals against Germany. And, in the debt-funding agreement of June 23, 1930,[8] Germany agreed to pay the United States on account of its awards 40,800,000 reichmarks in each year until 1981. Germany was in arrears under that agreement and had failed to make provisions for satisfaction of claims established against it.

Therefore, the resolution declared: So long as Germany is in arrears in respect of obligations mentioned, all deliveries of property authorized to be made under the Trading with the Enemy Act of 1917, as amended, or the Settlement of War Claims Act of 1928 as amended, "whether or not a judgment or decree has been entered with respect thereto, shall be postponed and the money or property, or the income, issues, profits, and/or avails thereof reserved . . . Provided . . . That the President may, in his sole discretion, remove the restriction as to any of the cases . . . in relation to which . . . deliveries have been postponed under this resolution . . ."

The consent of the United States to be sued was revocable at any time. *Lynch* v. *United States,* 292 U. S. 571, 581. It has not been expressly recalled and, unless by Resolution No. 53 impliedly withdrawn, the supreme court of the District had jurisdiction to entertain the complaint. Continuation of the consent was not inconsistent with the purpose of the resolution. The measure was adopted because of Germany's default which, as indicated by the context, was assumed not to be permanent. It was intended only temporarily to postpone final disposition of the seized property, merely to stay deliveries whether directed by administrative order or judgment of a court. Claimants may have deliveries whenever Germany ceases to be in arrears. Fulfillment of her promises will end the restraint imposed

[8] Report of the Secretary of the Treasury, 1930, p. 341.

by the resolution. Postponement of deliveries does not suggest intention to withdraw consent to be sued. It was given and long continued in order to safeguard former owners against erroneous administration of measures enacted for their benefit. Neither need nor reason has been suggested for change of policy in that regard. In the absence of unmistakable expression of purpose to that end, it may not reasonably be inferred that Congress intended to withdraw that protection. Cf. *Becker Steel Co.* v. *Cummings, supra,* 80. We find nothing to warrant that inference. *District of Columbia* v. *Eslin,* 183 U. S. 62, gives no support to petitioners' contention. Clearly the trial court had jurisdiction to entertain the complaint.

2. Public Resolution No. 53 is not repugnant to the Fifth Amendment. By exertion of the war power, and untrammeled by the due process or just compensation clause, Congress enacted laws directing seizure, use and disposition of property in this country belonging to subjects of the enemy. Alien enemy owners were divested of every right in respect of the money and property seized and held by the Custodian under the Trading with the Enemy Act. *United States* v. *Chemical Foundation,* 272 U. S. 1, 9–11. *Woodson* v. *Deutsche, etc. Vormals,* 292 U. S. 449, 454. The title acquired by the United States was absolute and unaffected by definition of duties or limitations upon the power of the Custodian or the Treasurer of the United States. Congress reserved to itself freedom at any time to dispose of the property as deemed expedient and right under circumstances that might arise during and after the war. Legislative history and terms of measures passed in relation to alien enemy property clearly disclose that from the beginning Congress intended after the war justly to deal with former owners and, by restitution or compensation in whole or part, to ameliorate hardships falling upon them as a

result of the seizure of their property.[9] But that intention detracted nothing from title acquired by the United States or its power to retain or dispose of the property upon such terms and conditions as from time to time Congress might direct. As the taking left in enemy owners no beneficial right to, or interest in, the property, the United States did not take or hold as trustee for their benefit.

Respondent maintains that § 11 of the Settlement of War Claims Act of 1928, amending § 9 of the Trading with the Enemy Act of 1917 as amended, vested in former owners an immediate right to the return of their property and that, having complied with the provisions of the Act, they cannot be deprived of that right. It argues that its interest in the property taken was not "completely and irrevocably destroyed" and that the Settlement of War Claims Act was an Act under which it "could and did obtain a vested interest in its property." To the extent that the argument rests upon the assumption that the taking did not divest enemy owners of every right or that the United States did not acquire absolute title, it is fallacious and need not be noticed.

The Settlement of War Claims Act was not a conveyance and did not grant former owners any right or title to, or interest in, the money or property taken by the Custodian. As amended by it, pertinent provisions of the Trading with the Enemy Act are indicated in the margin.[10]

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[9] Sen. Rep. No. 113, 65th Cong., 1st Sess. Trading with the Enemy Act of October 6, 1917, § 12, 40 Stat. 423. Public Resolution No. 8, July 2, 1921, § 5, 42 Stat. 106. Cong. Rec., Vol. 61, Part 4, p. 3249. Winslow Act of March 4, 1923, § 2, 42 Stat. 1516, adding § 23 to Trading with the Enemy Act. Sen. Rep. No. 273, 70th Cong., 1st Sess., pp. 12–13. Settlement of War Claims Act of March 10, 1928, 45 Stat. 254.

[10] Section 9 (b) of the Trading with the Enemy Act, as amended by § 11 of the Settlement of War Claims Act, 45 Stat. 270—in substance

No change of title was effected by that Act; and in proceedings under it none takes place before delivery to claimant. As the United States owned all, claimant's consent to postponement of delivery of part did not improve its position as to the rest. The President did not order delivery. Action by him was neither a condition precedent nor a bar to suit. The statute, § 9 (a), required the money and property to be retained by the Custodian or Treasurer until final judgment for claimant should be satisfied by delivery, or until final judgment against claimant. It is clear that when the resolution was adopted respondent had neither title nor vested right to have delivery.

The grant to former alien enemy owners of the privilege of becoming entitled upon conditions specified to have

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so far as pertinent here—declares that if the President shall determine that the owner at the time of the taking was a German corporation and that written consent (provided for in subsection (m) of § 9 as amended) to postponement of return of 20 percent of the money or property has been filed, then the President without any application being made therefor "may order the payment, conveyance, transfer, assignment, or delivery of such money or other property held by the Alien Property Custodian or by the Treasurer of the United States" to the owner from whom taken.

Section 9 (c) declares that any person whose property the President is authorized to return under the provisions of subsection (b) (and plaintiff's predecessor is such a person) may serve notice of claim for the return of the money or property taken from him as provided in subsection 9 (a) (which relates to claims by others than enemies for property taken from them by the Custodian) and thereafter "may make application to the President for allowance of such claim and/or may institute suit in equity to recover such money or other property, as provided in said subsection, and with like effect. The President or the court, as the case may be, may make the same determinations with respect to citizenship and other relevant facts that the President is authorized to make under the provisions of subsection (b) hereof."

And § 9 (a) provides that any person not an enemy or ally of an enemy claiming money or property taken by the Custodian may file

returned to them the property of which they had been deprived by exertion of the war power of the United States was made by the Congress in mitigation of the taking and in recognition of "the humane and wise policy of modern times." *Brown* v. *United States*, 8 Cranch 110, 123. In *United States* v. *White Dental Co.*, 274 U. S. 398, it appears that during the war the German government sequestered the property of a German corporation which, through ownership of all its capital stock, was controlled by an American corporation. Speaking of the taking we said (pp. 402–403): "What would ultimately come back to it [the American owner], as the event proved, might be secured not as a matter of right, but as a matter either of grace to the vanquished or exaction by the victor . . . It would require a high degree of optimism to discern in the seizure of enemy property by the German government in 1918 more than a remote hope of ultimate salvage from the wreck of the

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with him a notice of claim under oath and in form and substance as required; and the President, if application is made by claimant, may order the payment or delivery to claimant of the money or property so held by the Custodian or Treasurer. If the President shall not so order within 60 days or if the claimant shall have filed the required notice and made no application, then claimant may institute a suit in equity "to establish the interest, right, title . . . so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated."

war." We think it clear that the grant by the Settlement of War Claims Act was made as a matter of grace and so was subject to withdrawal by Congress. *United States* v. *Teller,* 107 U. S. 64, 68. *Frisbie* v. *United States,* 157 U. S. 160, 166. *Lynch* v. *United States, supra,* 577. The resolution does not infringe the Fifth Amendment.

Reversed.

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

RICHMOND MORTGAGE & LOAN CORP. *v.* WACHOVIA BANK & TRUST CO. ET AL., EXECUTORS.

APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA.

No. 235. Argued January 4, 1937.—Decided February 1, 1937.

1. A North Carolina statute providing that when the mortgagee, payee, or other holder of an obligation secured by real estate causes a sale of the property by a trustee, becomes the purchaser for a sum less than the amount of the debt and afterwards brings an action for the deficiency, the defendant may show, by way of defense and set-off, that the property sold was fairly worth the amount of the debt or that the sum bid was substantially less than the true value of the property, and thus defeat the claim in whole or in part, *held* valid in application to notes secured by deed of trust executed prior to the passage of the law. P. 129.
2. The obligation of a contract is not impaired by a law limiting the remedy, if a remedy adequate for enforcing the obligation remains or is substituted. P. 128.

210 N. C. 29; 185 S. E. 482, affirmed.

In an action to collect a balance due on a mortgage debt, the plaintiff, appellant here, was defeated in a General County Court in North Carolina. The judgment was affirmed by the Superior Court, whose judgment was in turn affirmed by the Supreme Court of the State.

Mr. Kester Walton, with whom *Mr. John Y. Jordan, Jr.,* was on the brief, for appellant.

The parties contracted with reference to the laws then in existence and such laws enter into and form part of the contract. This is true of the laws providing remedies to enforce performance. *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398; *United States ex rel. Von Hoffman* v. *Quincy,* 4 Wall. 535; *Sturges* v. *Crowninshield,* 4 Wheat. 122; *Green* v. *Biddle,* 8 Wheat. 1; *Bateman* v. *Sterrett,* 201 N. C. 59; *Green* v. *Asheville,* 199 N. C. 516; *Trust Company* v. *Hudson,* 200 N. C. 688.

The Act in question changed the law of North Carolina, whereby the beneficiary in a deed of trust, after foreclosure under power of sale, is required to accept the fair value of the property as payment on the indebtedness in lieu of recovery of money judgment. *In re Crystal Ice & Fuel Co.,* 283 Fed. 1007; *Richmond Mortgage & Loan Corp.* v. *Bank,* 210 N. C. 29; *Jones* v. *Williams,* 155 N. C. 179; *Koonce* v. *Fort,* 204 N. C. 426; *Woltz* v. *Deposit Co.,* 206 N. C. 239; *Chadbourn* v. *Johnston,* 119 N. C. 282; *Davis* v. *Life Insurance Co.,* 197 N. C. 617; *Haywood* v. *Bank,* 207 N. C. 695; North Carolina Session Laws, 1933, c. 275; North Carolina Code, § 2593 (b), (c), (d), (e), and (f).

This law, while acting only on the remedy, impaired substantial rights under the contract, and therefore is unconstitutional as applied to this case. *Sturges* v. *Crowninshield,* 4 Wheat. 122; *McCracken* v. *Hayward,* 2 How. 608; *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398; *Planters Bank* v. *Sharp,* 6 How. 301; *Haywood* v. *Bank,* 207 N. C. 695; *Worthen Co.* v. *Kavanaugh,* 295 U. S. 56; *Antoni* v. *Greenhow,* 107 U. S. 769; *Bronson* v. *Kinzie,* 1 How. 311; *Howard* v. *Bugbee,* 24 How. 461; *Walker* v. *Whitehead,* 16 Wall. 314; *Edwards* v. *Kearzey,* 96 U. S. 595; *Barnitz* v. *Beverly,* 163 U. S. 118; *Adams* v. *Spillyards,* 61 S. W. (2d) 686; *Vanderbilt* v.

Bruton Piano Co., 169 Atl. 177; *Langever* v. *Miller*, 76 S. W. (2d) 1025.

Mr. S. G. Bernard, with whom *Mr. Robert R. Williams* was on the brief, for appellees.

The statute deals solely with the remedy and is constitutional. Public Laws, North Carolina, 1933, pp. 402, 403; *Wilson* v. *Standefer*, 184 U. S. 399, 416; *Bernheimer* v. *Converse*, 206 U. S. 516, 530; *Tennessee* v. *Sneed*, 96 U. S. 69, 74; *Oshkosh Water Works* v. *Oshkosh*, 187 U. S. 437, 439; *National Surety Co.* v. *Architectural Co.*, 226 U. S. 276, 283; *Waggoner* v. *Flack*, 188 U. S. 595, 602; *New Orleans R. Co.* v. *Louisiana*, 157 U. S. 219, 224; *Crane* v. *Hahlo*, 258 U. S. 142, 147; *Sturges* v. *Crowninshield*, 4 Wheat. 122, 200.

The judgment is fully sustained by the facts and the law of the case. *Great Northern Ry. Co.* v. *Donaldson*, 246 U. S. 121, 124; *Campbell* v. *Olney*, 262 U. S. 352, 354; *United States* v. *Yuen Pak Sune*, 183 Fed. 260, 266; 191 Fed. 825; *Hanes* v. *Shapiro*, 168 N. C. 24, 27; *Baker* v. *Edwards & Son*, 176 N. C. 229, 234; *Adams* v. *Spillyards*, 61 S. W. (2d) 686; *Vanderbilt* v. *Bruton Piano Co.*, 169 Atl. 177; *Newark Savings Institution* v. *Forman*, 33 N. J. Eq. 436; *Langever* v. *Miller*, 76 S. W. (2d) 1025.

Mr. Justice Roberts delivered the opinion of the Court.

This is an appeal from a judgment of the Supreme Court of North Carolina [1] sustaining the validity of a statute claimed to impair the obligation of a contract, contrary to Article I, § 10, of the Federal Constitution. The act provides that when the mortgagee, payee, or other holder of an obligation secured by real estate or personal property causes a sale of the property by a

[1] 210 N. C. 29, 185 S. E. 482.

trustee, becomes the purchaser for a sum less than the amount of the debt and afterwards brings an action for the deficiency, the defendant may show, by way of defense and set-off, that the property sold was fairly worth the amount of the debt or that the sum bid was substantially less than the true value of the property, and thus defeat the claim in whole or in part. The provision is copied in full in the margin.[2]

In 1928 the appellees borrowed $8,000 from the appellant for which they executed negotiable promissory notes. As security they delivered a deed of trust pledging real estate. Upon default the appellant demanded that the trustee declare the indebtedness due, in accordance with the terms of the notes and deed of trust, and exercise the power of sale given by the deed. The trus-

[2] Section 3 of Chapter 275, of the Laws of 1933:

"When any sale of real estate or personal property has been made by a mortgagee, trustee, or other person authorized to make the same, at which the mortgagee, payee or other holder of the obligation thereby secured becomes the purchaser and takes title either directly or indirectly, and thereafter such mortgagee, payee or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation whose property has been so purchased, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and off-set, but not by way of counter-claim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and, upon such showing, to defeat or off-set any deficiency judgment against him, either in whole or in part; *Provided,* this section shall not affect nor apply to the rights of other purchasers or of innocent third parties, nor shall it be held to affect or defeat the negotiability of any note, bond or other obligation secured by such mortgage, deed of trust or other instrument; *Provided, further,* this section shall not apply to foreclosure sales made pursuant to an order or decree of court nor to any judgment sought or rendered in any foreclosure suit nor to any sale heretofore made and confirmed."

tee advertised the property, as required by the deed and the laws of the state, and made sale June 19, 1933; and one acting in appellant's interest purchased the land for $3,000. Upon expiration of a ten day period of redemption the property was conveyed to the purchaser. The appellant credited on the notes the sum realized by the sale, which left $4,534.79, with interest, due and unpaid, and on June 18, 1934, brought action to recover this balance. The appellees pleaded the statute and alleged that the property, at the time and place of sale, was fairly worth the amount of the debt. In reply the appellant asserted that, as the notes and deed of trust had been executed prior to the passage of the law, the statute violated the contract clause of the Federal Constitution. At the trial exception was taken to the court's refusal to enter judgment for the appellant on the pleadings. The court, over the appellant's objection and exception, submitted to the jury the question of the fair value of the property at the time and place of sale, and the jury found its value to be $8,000. An intermediate appellate court, and the Supreme Court of the State, affirmed judgment for the appellees.

Although admitting that the challenged legislation affects only a remedy for enforcement of the contract, the appellant urges that the alteration is so substantial as to impair the obligation of the contract. The applicable principle is not in dispute. The legislature may modify, limit or alter the remedy for enforcement of a contract without impairing its obligation, but in so doing, it may not deny all remedy or so circumscribe the existing remedy with conditions and restrictions as seriously to impair the value of the right.[3] The particular remedy existing at the date of the contract may be altogether abrogated if another equally effective for the

[3] *Worthen Co.* v. *Kavanaugh*, 295 U. S. 56, and cases cited.

enforcement of the obligation remains or is substituted for the one taken away.[4] The matter in dispute is whether the questioned enactment falls beyond the boundary of permissible regulation of the remedy for enforcement of the appellant's contract.

The loan rendered the appellees debtors to the appellant. For that debt the borrower pledged real estate as security. The contract contemplated that the lender should make itself whole, if necessary, out of the security, but not that it should be enriched at the expense of the borrower or realize more than would repay the loan with interest. The state provided remedies whereby the security could be made available for solution of the debt.

When the loan was made two such remedies were available. The mortgagee could proceed by bill in equity to foreclose the security. If it did the chancellor who controlled the proceeding could set aside a sale if the price bid was inadequate. In addition, he might award a money decree for the amount by which the avails of the sale fell below the amount of the indebtedness, but his decree in that behalf would be governed by well understood principles of equity. An alternative remedy sanctioned by state law was available if the deed of trust so provided. This was the sale of the pledged property by the trustee. If this were the remedy authorized by the contract, and the mortgagee himself became the purchaser at the trustee's sale, he might thereafter, in an action at law, recover the difference between the price he had bid and the amount of the indebtedness. The statute under attack effected certain alterations of this remedy. Sections 1 and 2, not here in issue, provide that if the mortgaged property be sold under power of sale, and

[4] *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 434, and cases cited, note 13.

the sum bid be inadequate so that consummation of the sale would be inequitable, the mortgagor may apply to the superior court for an order enjoining such consummation, and the judge may direct a resale by a trustee or by a commissioner appointed for the purpose, upon terms he may deem just and equitable. These sections modifying the procedure under a power of sale so as to assimilate it to the procedure in strict foreclosure, have been sustained as constitutional by the State Supreme Court.[5] The section with which we are concerned adds that if the mortgagee becomes the purchaser at the trustee's sale, and afterwards brings an action at law for a deficiency, the jury shall determine the actual amount needed by him to make him whole for his debt by finding the true or fair value of the property at the date of sale, the judgment being for the difference between that value and the amount of the debt remaining unpaid, or, if the value found equals the amount of the debt, for the defendant. The statute has no application if the purchaser at the trustee's sale be other than the mortgagee. The act alters and modifies one of the existing remedies for realization of the value of the security, but cannot fairly be said to do more than restrict the mortgagee to that for which he contracted, namely, payment in full. It recognizes the obligation of his contract and his right to its full enforcement but limits that right so as to prevent his obtaining more than his due. By the old and well known remedy of foreclosure a mortgagee was so limited because of the chancellor's control of the proceeding. That proceeding, as has been said, has always been available to the mortgagee in North Carolina. Granting that by the alternative remedy of trustee's sale the mortgagee

[5] *Woltz* v. *Asheville Safe Deposit Co.*, 206 N. C. 239, 173 S. E. 587; *Hopkins* v. *Swain*, 206 N. C. 439, 174 S. E. 409; *Miller* v. *Shore*, 206 N. C. 732, 175 S. E. 133; *Barringer* v. *Wilmington Savings Trust Co.*, 207 N. C. 505, 177 S. E. 795.

might perchance obtain something more, or might obtain only that which was his due somewhat more expeditiously, than he could in chancery, it remains that the procedure to foreclose in equity is, and has been, the classical method of realization upon mortgage security and has always been understood to be fair to both parties to the contract and to afford an adequate remedy to the mortgagee. If, therefore, the legislature of the State had elected altogether to abolish the remedy by trustee's sale we could not say that it had not left the mortgagee an adequate remedy for the enforcement of his contract. But the legislature has by no means gone so far. The law has merely restricted the exercise of the contractual remedy to provide a procedure which, to some extent, renders the remedy by a trustee's sale consistent with that in equity. This does not impair the obligation of the contract.

The judgment is

Affirmed.

WAYNE UNITED GAS CO. *v.* OWENS-ILLINOIS GLASS CO. ET AL.

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

No. 305. Argued January 7, 8, 1937.—Decided February 1, 1937.

1. A corporation involved in foreclosure and liquidation proceedings in a state court, in which a sale of all its property had been ordered, applied to the federal court before the sale was consummated for a reorganization under § 77B of the Bankruptcy Act. Creditors who had participated in the state case secured an order of the federal court dismissing the petition for reorganization, and while the reviewability of the order was before this Court by petition for certiorari, they went forward with the proceedings in the state court and obtained a confirmed sale and

conveyance of the assets to their nominee. *Held* that they had not thereby acquired a status precluding further examination of the petition for reorganization in the federal court, and that a motion to dismiss the petition for certiorari as moot must be overruled. P. 134.

2. A court of bankruptcy has no terms, but sits continuously. P. 135.
3. The rule denying power to a court of equity to vacate a decree after expiration of the term in which it was entered, is, therefore, inapplicable to a court of bankruptcy. *Id.*
4. A court of bankruptcy, in a proceeding under § 77B of the Bankruptcy Act, has power, in the exercise of sound discretion, to reopen an order dismissing the petition for reorganization, notwithstanding that the time allowed for appeal from the order has expired. P. 136.
5. The bankruptcy court, in the exercise of a sound discretion, if no intervening rights will be prejudiced by its action, may grant a rehearing upon application diligently made, and rehear the case upon the merits; and even though it reaffirm its former action and refuse to enter a decree different from the original one, the order entered upon rehearing is appealable, and the time for appeal runs from its entry. P. 137.

84 F. (2d) 965, reversed.

CERTIORARI, 299 U. S. 528, to review the dismissal of an appeal from a decree of the district court entered on rehearing and dismissing, for the second time, a petition for reorganization under § 77B of the Bankruptcy Act.

Mr. Robert S. Spilman, with whom *Mr. Fred O. Blue* was on the brief, for petitioner.

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

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The Circuit Court of Appeals has decided that a District Court is without power to set aside its order dismissing a petition for reorganization under § 77B of the Bankruptcy Act and to rehear the cause after the ex-

piration of the period allowed by the Act for appeal from the order.[1] To resolve a conflict of decisions[2] we granted certiorari.

November 25, 1935, the petitioner filed in the District Court for Southern West Virginia a petition and, on December 10th, an amended and supplemental petition for corporate reorganization under § 77B of the Bankruptcy Act as amended.[3] February 7, 1936, the respondents filed objections and motions to dismiss. March 2nd the petitions were dismissed. March 20th the petitioner presented to the Circuit Court of Appeals a petition for appeal, pursuant to § 24 (b) of the Bankruptcy Act.[4] April 15th the court denied the appeal,[5] holding that the petitioner should have proceeded under § 25 (a).[6] April 17th petitioner notified respondents that on April 24th it would present a petition to the District Court praying vacation of the order of March 2nd and a rehearing and review of all matters arising in the proceedings because of errors committed by the court in dismissing its petitions, and that, upon rehearing, the court would be asked to enter an order approving the original and amended petitions. After presentation of the petition for rehearing and argument thereon the court directed

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[1] 84 F. (2d) 965.

[2] See *West* v. *McLaughlin's Trustee,* 162 Fed. 124; *Cameron* v. *National Surety Co.,* 272 Fed. 874. This court has adverted to the question without deciding it. *Conboy* v. *First National Bank,* 203 U. S. 141, 146.

[3] Act of June 7, 1934, 48 Stat. 911; Act of August 20, 1935, c. 577, 49 Stat. 664; Act of August 29, 1935, c. 809, 49 Stat. 965; 11 U. S. C. § 207.

[4] Act of July 1, 1898, c. 541, § 24 (b), 30 Stat. 553; 11 U. S. C. § 47.

[5] *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.,* 83 F. (2d) 98. See *O'Connor* v. *Mills,* decided this day, *ante,* p. 26.

[6] Act of July 1, 1898, c. 541, § 25 (a), 30 Stat. 553, 11 U. S. C. § 48 (a).

that it be filed, took the matter under advisement, and, on May 12th, set aside the order of March 2nd, granted a rehearing and review and fixed May 22nd for a hearing on all questions arising on the record. The court found that good cause existed justifying vacation of its previous order and reconsideration of the cause. It further found that the application had been seasonably presented and no rights had vested under the order of March 2nd which would be disturbed by setting the order aside. By leave of court the petitioner, on May 22nd, presented a second amended and supplemental petition, which incorporated the earlier petitions for reorganization, and asked the court to find that the original and supplemental petitions were filed in good faith and complied with § 77B. The respondents objected. May 28th the court, after a hearing, sustained the respondents' objections and dismissed the petitions for reasons set forth in findings of fact and conclusions of law. June 11th petitioner's application to the judge of the District Court, under § 25 (a) of the Act, for an appeal, with supersedeas, was granted. The Circuit Court of Appeals, on respondents' motion, dismissed the appeal.

1. The respondents have moved to dismiss the writ of certiorari on the ground that the controversy has become moot. In support of the motion they show that for some time prior to the institution of the 77B proceedings the debtor's property had been in possession of a receiver appointed by a state court; that the trustee of a first mortgage had intervened in the receivership proceeding and sought foreclosure; that the state court had ordered a sale of all the debtor's property and the decree of sale had become final before the presentation of the petition for reorganization. They show that subsequently to the order of March 2nd dismissing the petition for reorganization further action by the state court resulted in the confirmation of a commissioner's sale, payment of

the purchase price partly in cash and partly in first mortgage bonds of the debtor and execution and delivery of a deed to the purchaser, a nominee of respondents. It appears not only that the respondents were parties to the 77B proceeding but that, prior to the consummation of the sale, the state court was fully advised of the steps taken in the federal courts and of the pendency of the petition for certiorari in this court to review the order of the Circuit Court of Appeals dismissing the appeal.

The respondents went forward with the proceedings in the state court, looking to a sale of the debtor's property, with full knowledge that a rehearing might be granted and that the order entered thereon might be appealed. They are not entitled, therefore, to rely on any status acquired in the state court suit as precluding further consideration of the petition for reorganization. The motion must accordingly be overruled.

2. The petitioner asserts that the grant or refusal of a rehearing rested in the sound discretion of the District Court, and since in the proper exercise of that discretion the court entertained the application and reheard the case upon the merits, its action again dismissing the petition for reorganization was a final order and the appeal therefrom was timely. The respondents contend that the first order of dismissal having terminated the cause, and the thirty days allowed by the bankruptcy act for appeal from the order having expired, the District Court was without power to entertain a petition for rehearing and its second order of dismissal was a nullity. Wherefore, they say, the appeal taken more than thirty days from the date of the original order of March 2, 1936, if considered as challenging that order, was out of time, and the motion to dismiss was properly granted by the Circuit Court of Appeals. We hold the petitioner's position is sound and the appeal should have been entertained.

Though a court of bankruptcy sits continuously and has no terms,[7] respondents urge that, as courts of bankruptcy are courts of equity, the rules applicable to the rehearing of a suit in equity should be applied in bankruptcy cases, and as it appears the term of the District Court expired April 20, 1936, the court had lost its power to disturb the order of March 2nd. A court of equity may grant a rehearing, and vacate, alter, or amend its decree, after an appeal has been perfected and after the time for appeal has expired, but not after expiration of the term at which the decree was entered.[8] It is true the bankruptcy court applies the doctrines of equity, but the fact that such a court has no terms, and sits continuously, renders inapplicable the rules with respect to the want of power in a court of equity to vacate a decree after the term at which it was entered has ended.

In the alternative the respondents argue that where, as here, an adjudication is refused, and the case is retired from the docket, the requirement that an appeal shall be perfected within thirty days from the order of dismissal deprives the court of power to reinstate and rehear the cause after the expiration of the time limited for appeal. They insist that the act contemplates the speedy disposition of causes in bankruptcy and therefore fixes a brief period for appealing from orders therein. To permit the court to rehear a cause after the time for appeal has expired, and to enter a fresh order which is appealable, would, they urge, tend unduly to extend the proceedings, create uncertainty as to the rights of the debtor and creditors, and ignore the intent of Congress.

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[7] *Sandusky* v. *National Bank*, 23 Wall. 289, 293; *In re Lemmon & Gale Co.*, 112 Fed. 296, 300; *Freed* v. *Central Trust Co.*, 215 Fed. 873, 876; *In re Rochester Sanitarium & Baths Co.*, 222 Fed. 22, 26.

[8] Equity Rule 69; *Aspen Mining Co.* v. *Billings*, 150 U. S. 31, 36; *Voorhees* v. *Noye Mfg. Co.*, 151 U. S. 135; *Zimmern* v. *United States*, 298 U. S. 167.

But we think the court has the power, for good reason, to revise its judgments upon seasonable application and before rights have vested on the faith of its action. Courts of law and equity have such power, limited by the expiration of the term at which the judgment or decree was entered and not by the period allowed for appeal or by the fact that an appeal has been perfected.[9] There is no controlling reason for denying a similar power to a court of bankruptcy or for limiting its exercise to the period allowed for appeal. The granting of a rehearing is within the court's sound discretion, and a refusal to entertain a motion therefor, or the refusal of the motion, if entertained, is not the subject of appeal.[10] A defeated party who applies for a rehearing and does not appeal from the judgment or decree within the time limited for so doing, takes the risk that he may lose his right of appeal, as the application for rehearing, if the court refuse to entertain it, does not extend the time for appeal.[11] Where it appears that a rehearing has been granted only for that purpose the appeal must be dismissed.[12] The court below evidently thought the case fell within this class. On the contrary, the rule which governs the case is that the bankruptcy court, in the exercise of a sound discretion, if no intervening rights will be prejudiced by its action, may grant a rehearing upon application diligently made and rehear the case upon the merits; and even though it reaffirm its former action and

[9] *United States* v. *Mayer,* 235 U. S. 55; *United States* v. *Benz,* 282 U. S. 304; and cases cited in Note 8.

[10] *Brockett* v. *Brockett,* 2 How. 238; *Steines* v. *Franklin County,* 14 Wall. 15; *Hardin* v. *Boyd,* 113 U. S. 756; *Boesch* v. *Gräff,* 133 U. S. 697; *San Pedro Co.* v. *United States,* 146 U. S. 120.

[11] *Roemer* v. *Bernheim,* 132 U. S. 103, 106; *Morse* v. *United States,* 270 U. S. 151, 154; *Clarke* v. *Hot Springs Elec. L. & P. Co.,* 76 F. (2d) 918, 921.

[12] *In re Stearns & White Co.,* 295 Fed. 833; *Bonner* v. *Potterf,* 47 F. (2d) 852, 855; *United States* v. *East,* 80 F. (2d) 134, 135.

refuse to enter a decree different from the original one, the order entered upon rehearing is appealable and the time for appeal runs from its entry.[13] The District Court's action conformed to these conditions. Two days after the Circuit Court of Appeals dismissed the petition for allowance of appeal from the original order of March 2, 1936, petitioner notified respondents of its intention to apply for rehearing. Prompt application was made and the cause was promptly heard. A supplemental petition was presented and entered upon the files by leave of court. The original, the amended, and the supplemental petitions were considered upon the merits, and the court made findings and announced conclusions of law with respect thereto. There is no indication that the petition for rehearing was not made in good faith or that the court received it for the purpose of extending petitioner's time for appeal. The court found that no rights had intervened which would render it inequitable to reconsider the merits. There was no abuse of sound discretion in granting the motion and reconsidering the cause.

The judgment is reversed and the cause is remanded to the Circuit Court of Appeals for further proceedings in conformity to this opinion.

Reversed.

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[13] Compare *Aspen Mining Co.* v. *Billings, supra,* p. 37; *Voorhees* v. *Noye Mfg. Co., supra,* p. 137; *Citizens Bank* v. *Opperman,* 249 U. S. 448, 450; *Morse* v. *United States, supra,* p. 154.

Syllabus.

ISBRANDTSEN-MOLLER CO., INC. *v.* UNITED STATES ET AL.

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

No. 307. Argued January 15, 1937.—Decided February 1, 1937.

1. An order of the Secretary of Commerce requiring a steamship company to file a copy or summary of its books and records for a specified period, which should show each commodity carried from the United States to a foreign country, with point of shipment, point of destination, and rate charged or collected, the effective date of the rate, and trans-shipment and terminal charges and rules affecting rates or value of the service rendered, *held* within the purview of § 21 of the Shipping Act of 1916. P. 144.
2. An administrative order justified by a lawful purpose is not rendered illegal by the existence of another motive in the mind of the officer issuing it. P. 145.
3. An order not calling for the production, or demanding an inspection, of books or documents, but calling for a copy or a summary, is not a search or seizure within the Fourth Amendment. P. 145.
4. An order made under § 21 of the Shipping Act of 1916, directed to a single carrier, *held* not to have been shown to be discriminatory against that carrier in favor of competitors. P. 146.
5. Abolition of the Shipping Board and transfer of its functions to the Department of Commerce, by Executive Order, if not authorized by Title IV of the Legislative Appropriation Act of June 30, 1932, as amended, was impliedly ratified by the Merchant Marine Act of 1936, which refers to the functions of the Shipping Board as "now vested in the Department of Commerce pursuant to Section 12 of the President's Executive Order No. 6166." P. 146.
6. Even assuming that an order of the Secretary of Commerce requiring an ocean carrier to furnish data as to rates, etc., under § 21 of the Shipping Act, was invalid upon the ground that the transfer of the duties of the Shipping Board to the Commerce Department by Executive Order involved an unconstitutional delegation of legislative power to the President, the question is rendered moot by § 204 (a) of the Merchant Marine Act of 1936, which provides that all functions, etc., of the Shipping Board, "now vested in the Department of Commerce" by the President's order, are transferred to the United States Maritime Commission,

and by an order of that Commission providing that such orders of the Secretary of Commerce shall continue in effect, etc. P. 148.

7. Such an administrative order, which merely calls for data concerning the carrier's business, need not be preceded by notice and hearing. P. 149.

14 F. Supp. 407, affirmed.

APPEAL from a decree of the District Court, of three judges, which denied an interlocutory injunction and dismissed the bill, in a suit by an ocean carrier to enjoin the enforcement of an order made by the Secretary of Commerce under the Shipping Act.

Mr. James W. Ryan for appellant.

Assistant Attorney General Dickinson, with whom *Solicitor General Reed* and *Messrs. Hugh B. Cox, Edward Dumbauld,* and *R. H. Hallett* were on the brief, for the United States et al., appellees.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This is an appeal from the final decree of a specially constituted district court of three judges for the Southern District of New York denying an interlocutory injunction and dismissing the appellant's bill for failure to state facts sufficient to constitute a cause of action.[1] The suit was brought to restrain enforcement of an order issued November 18, 1935, by the Secretary of Commerce pursuant to § 21 of the Shipping Act, 1916,[2]

[1] 14 F. Supp. 407.

[2] Act of Sept. 7, 1916, c. 451, § 21, 39 Stat. 728, 736, 46 U. S. C. § 820. The suit was instituted under § 31 of the Shipping Act, 39 Stat. 738, 46 U. S. C. § 830, whereby the venue and procedure in suits to restrain enforcement of an order of the Shipping Board are made the same as in similar suits respecting orders of the Interstate Commerce Commission. (Judicial Code, § 208, 28 U. S. C. 46, and the Act of October 22, 1913, c. 32, 38 Stat. 219, 28 U. S. C. §§ 43, 44, 45, and 47, whereby the venue of a suit brought to set aside an order

requiring the appellant to file with the Secretary on December 16, 1935, a copy or summary of its books and records for the period September 1 to November 12, 1935, which should show each commodity carried from the United States to a foreign country, with point of shipment, point of destination, and rate charged or collected, the effective date of the rate, and trans-shipment and terminal charges and rules affecting rates or value of the service rendered. The order recites that it appears full information as to rates in connection with transportation of certain property from the United States to foreign countries by carriers by water in foreign commerce subject to the Shipping Act 1916 is necessary to the proper administration of the regulatory provisions of the act and that the appellant is engaged in such transportation.

The complaint sets forth five causes of action. The first is that the order is invalid because Congress did not intend by the Legislative Appropriation Act of 1932 [3] to authorize the President to abolish the Shipping Board and transfer its functions to an executive officer such as the Secretary of Commerce, and that if Congress did so intend the Act is unconstitutional as attempting to make the head of an executive department also a judicial officer

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of the Interstate Commerce Commission is the judicial district in which the petitioner has its principal office.) The complainant named and attempted to serve as defendants, in addition to the United States, the Department of Commerce, the Shipping Board Bureau of the Department of Commerce, Daniel C. Roper, individually and as Secretary of Commerce, James C. Peacock, individually and as Director of the Shipping Board Bureau, and Lamar Hardy, United States Attorney for the Southern District of New York. The suit was dismissed as to many of these defendants for want of service or for want of proper joinder as defendants but the action was maintainable as the United States is, by the statutes, made the proper party defendant in such cases. No point is here made as to the action below dismissing defendants from the cause.

[3] Act of June 30, 1932, c. 314, 47 Stat. 382, 413.

and a legislative officer of the United States and in failing to set up an adequate declaration of policy or standard of action, and, further, that the President promulgated the order of transfer without adequate hearings or findings of fact on which to base it.

The second cause of action is that the Secretary's order is invalid as in substance the attempt of a competitor to regulate or stabilize the appellant's rates and to compel it to charge rates fixed by a shipping monopoly of which appellant's competitor is a member. The charge is that before the order was issued the Secretary had transferred all his Shipping Board functions to one Peacock, who was president of a private shipping corporation (The United States Merchant Fleet Corporation) which was actively operating vessels in competition with those of appellant and was a member of a conference or shipping combination whose interests were opposed to those of appellant, which is an independent or non-conference operator; and that the order had been issued for the financial benefit of the competitor. The further allegation is that the constitutional separation of powers between legislative, judicial, and executive branches and the Fifth Amendment of the Constitution forbid the exercise of regulatory or quasi-judicial functions such as were entrusted to the United States Shipping Board, by persons or agencies having the interests described, and require that the Secretary's order be held for naught.

The third cause of action is that the order was issued not for a public purpose authorized by Congress but in furtherance of a concerted plan to compel the appellant, an independent non-conference carrier, either to join a conference or shipping monopoly, or else suffer damage by disclosure to competitors of current business records showing rates charged and commodities transported. The Secretary's order is alleged to have been issued to promote and foster a monopoly of appellant's competitors.

The fourth cause of action is that the order is an unjust discrimination against appellant which is forbidden by the Fifth Amendment because it requires appellant to file a record of actual transactions, whereas the Secretary requires appellant's competitors, the conference lines or members of the shipping combination, merely to file general rate schedules for the future which are not always observed and need not be observed. Further, that the order issued under § 21 entails penalties for disobedience whereas orders issued by the Secretary to appellant's competitors were not issued under § 21 or any other section of the act, carried no penalties for non-observance, and called only for information which those competitors were already required by law to file under § 15 of the Shipping Act of 1916 [4] because of their having joined in a conference or shipping combination.

The fifth cause of action is that the order should be enjoined because the Secretary rejected appellant's offer to file records on condition that they would not be communicated to appellant's competitors to the damage of appellant and because the Secretary stated his purpose was to turn the records over to the public, which would result in fostering unfair competition and ruin appellant's business. It is charged that the appellant cannot comply with the order without prejudice or losing its equitable, legal, and constitutional rights.

An injunction affidavit was filed by the appellant and two reply affidavits by the United States. We find it unnecessary to consider them as we are of opinion that the decree dismissing the bill must be affirmed.

The grounds of complaint fall into two general classes. Upon the assumption that the powers and duties of the Shipping Board were effectively transferred to the Secre-

[4] Act of September 7, 1916, § 15, c. 451, 39 Stat. 728, 733, 46 U. S. C. § 814.

tary of Commerce, the claim is that the order was beyond the statutory authority conferred by the Shipping Act, amounted to an illegal search and seizure, and was invalid because arbitrary and unreasonable. But, in addition, it is asserted that transfer of the board's powers and duties to the Secretary was unauthorized by action of Congress and, if so authorized, was in violation of the Constitution.

First. The order is plainly within the terms of § 21 of the Shipping Act, 1916, which provides:

"The board may require any common carrier by water, or other person subject to this chapter, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this chapter. Such report, account, record, rate, charge, or memorandum shall be under oath whenever the board so requires, and shall be furnished in the form and within the time prescribed by the board. Whoever fails to file any report, account, record, rate, charge, or memorandum as required by this section shall forfeit to the United States the sum of $100 for each day of such default."

The appellant suggests that the section grants power merely to subpoena records, reports, and information, to be exercised only in hearings upon complaints of violation of the act. This view ignores the fact that § 27 explicitly authorizes the issuance of subpoenas,[5] including subpoenas *duces tecum,* for hearings upon alleged violations. It is inconceivable that this is mere tautology. The purpose of § 21 is not far to seek. Other sections forbid allowance of rebates, require the filing of agreements fixing or regulating rates, granting special rates, accommodations or privileges, which may be disapproved,

[5] 46 U. S. C. 826.

cancelled or modified if the board finds them unjustly discriminatory or violative of the act, prohibit undue or unreasonable preferences or the cutting of established rates and unjust discrimination between shippers or ports.[6] To enable it to perform its functions the board may well need such information as that which the section gives it power to demand. Indeed the order recites that in this instance such information is so required.

Despite its recitals of legitimate purpose, the order, so the complaint alleges, sprang from illegal motives, namely, to regulate and stabilize freight rates for the benefit of carriers belonging to steamship conferences, to compel appellant to join a conference, and to create a monopoly in trans-oceanic shipping.

Aside from the principle that if the order is justified by a lawful purpose, it is not rendered illegal by some other motive in the mind of the officer issuing it,[7] the allegations of the complaint are mere conclusions unsupported by any facts pleaded and are, therefore, insufficient.[8]

The argument that the order amounts to an unreasonable search and seizure forbidden by the Fourth Amendment, is answered by the fact that it does not call for the production or inspection of any of appellant's books or papers.[9]

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[6] 46 U. S. C. 812–816.

[7] *Dakota Central Telephone Co.* v. *South Dakota,* 250 U. S. 163, 184. *Philadelphia & Trenton R. Co.* v. *Stimpson,* 14 Pet. 448, 458, 459; *United States* v. *Chemical Foundation,* 272 U. S. 1, 14, 15.

[8] *Moore* v. *Greene,* 19 How. 69, 72; *St. Louis & San Francisco Ry. Co.* v. *Johnston,* 133 U. S. 566, 577; *Garrett* v. *Louisville & N. R. Co.,* 235 U. S. 308, 313; *Nortz* v. *United States,* 294 U. S. 317, 324–5; *Einstein* v. *Schnebly,* 89 Fed. 540, 548.

[9] *Interstate Commerce Comm'n* v. *Baird,* 194 U. S. 25, 45, 46. Compare *Olmstead* v. *United States,* 277 U. S. 438, 463; *Baltimore & Ohio R. Co.* v. *Interstate Commerce Comm'n,* 221 U. S. 612.

The complaint asserts the appellant is the only carrier which has been required, pursuant to § 21, to file a record of rates actually charged. The section, however, plainly authorizes the making of such an order directed to a single carrier. Nevertheless, the appellant charges such action is unreasonable and arbitrary and violates the Fifth Amendment. The bill itself discloses the conference carriers have filed schedules of their rates and the act requires that if any contract for a change of those rates is made the new rates may be charged only after the board has approved the agreement.[10] The gravamen of the complaint does not appear to be that the appellant is required to supply information not furnished by the conference lines, or different information from that which the conference lines file with the Secretary, but that the conference lines are not compelled to adhere to the rates named in their schedules. There is, however, no showing that this circumstance injures the appellant. The data called for related to rates charged in the past,—rates fixed by the appellant without constraint; and the bill makes no charge that compliance with the order will in any wise restrict the appellant's freedom to deviate from those past rates in the future. The case made by the bill fails to exhibit discrimination in fact as between appellant and its competitors, much less arbitrary and unjustifiable discrimination.

Second. It is earnestly contended that Title IV of the legislative appropriation act of June 30, 1932, as amended,[11] did not authorize the abolition of the Shipping Board and the transfer of its functions to the Department of Commerce by executive order. Title III of the act reorganized the Shipping Board; and it is said that Congress would not have taken this action had it

[10] 46 U. S. C. 814.

[11] 47 Stat. 413; 47 Stat. 1517.

intended to include the Shipping Board within the scope of § 402 of the act, which defines executive agencies the President may abolish or whose functions he may transfer as "any commission, board, bureau, division, service, or office in the executive branch of the government." That this is true is attested by the fact that § 406 withheld from the President the authority to abolish or transfer the functions of the Shipping Board. But when the act was amended March 3, 1933,[12] the prohibition was omitted and the phrase "independent establishment" was added to the enumeration of executive agencies in § 402. After these changes were made the President, by Executive Order dated June 10, 1933, made the transfer. As required by the act of June 30, 1932, he transmitted a copy of the order to the Congress, which adjourned a few days after its receipt. Whatever doubt may be entertained as to the intent of Congress that the Shipping Board should be subject to transfer by the President, and, if so, whether the order lay before Congress the requisite number of days to satisfy the statutory mandate, Congress appears to have recognized the validity of the transfer and ratified the President's action by the appropriation acts of April 7, 1934,[13] March 22, 1935,[14] and May 15, 1936,[15] all of which make appropriations to the Department of Commerce for salaries and expenses to carry out the provisions of the shipping act as amended and refer to the executive order. The appellant insists that these references were casual and are not to be taken as ratifying the President's action. We need not stop to consider the argument since, by the Mer-

[12] 47 Stat. 1517.

[13] C. 104, Title III, 48 Stat. 529, 566.

[14] C. 39, Title III, 49 Stat. 67, 99.

[15] C. 405, 49 Stat. 1309, 1345.

chant Marine Act of 1936,[16] § 204 (a), the functions of the former Shipping Board are referred to as "now vested in the Department of Commerce pursuant to § 12 of the President's Executive Order No. 6166."

It remains to deal with the contentions that Congress lacked the power either to transfer or to ratify the transfer of the duties of the Shipping Board to the Secretary of Commerce by delegating to the President authority so to do by executive order, subject to the approval of Congress, and that the President, in exercising the power delegated to him, exceeded his authority because he acted without notice and hearing and failed in the order adequately to specify the grounds for his action. We find it unnecessary to decide the questions sought to be raised in this connection. On June 29, 1936, Congress adopted the Merchant Marine Act. By § 204 (a) of that statute it was provided:

"All the functions, powers, and duties vested in the former United States Shipping Board by the Shipping Act, 1916, . . . and amendments, . . . and now vested in the Department of Commerce pursuant to Section 12 of the President's Executive Order of June 10, 1933, are hereby transferred to the United States Maritime Commission . . ."

The Commission is created by the Act. By § 204 (b) it is authorized to adopt all necessary rules and regulations to carry out the powers, duties, and functions vested in it by the act. October 21, 1936, after organization, the Commission promulgated an order (General Order No. 2) [17] in which it declared:

". . . all orders, . . . which have been issued or authorized by . . . the Department of Commerce, in the exercise of the functions, powers, and duties transferred

[16] June 29, 1936, c. 858, 49 Stat. 1985.

[17] The Federal Register, No. 159, October 23, 1936, p. 1917.

to this Commission by the Merchant Marine Act, 1936, and which are in effect at the time of such transfer, shall continue in effect, insofar as not in conflict with said Act, until modified, terminated, superseded, or repealed by this Commission or by operation of law; . . ."

We are of opinion that the Act of 1936 and the Commission's order render moot the constitutional questions sought to be raised by the appellant even though we assume, without deciding, that the Secretary of Commerce had no power to issue the order of November 18, 1935. That order was administrative in character. It determined no rights and prescribed no duties of the appellant as an ocean carrier. It demanded the filing of data. No notice or hearing was prerequisite to its issue. It was still *in fieri* when the United States Maritime Commission came into existence. By virtue of the action of that commission it is continued in force and the appellant is commanded to obey it. The appellant concedes that if the order was within the constitutional and statutory powers of the Shipping Board, and had been made by that board, there could be no question of its validity. As it has become an outstanding administrative order of a commission having the powers and duties formerly vested in the Shipping Board the appellant is in no position to contend that, as it now affects the appellant, the order is void because issued in the alleged unconstitutional exercise of the powers of the Shipping Board by the Secretary of Commerce.

The decree is

Affirmed.

DUPONT ET AL. *v.* UNITED STATES.

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

No. 332. Argued January 11, 1937.—Decided February 1, 1937.

1. A broker trading on the New York Cotton Exchange was instructed by a customer, for whose account cotton for future delivery was being held, to transfer the account to other brokers. The instructions were given at the request of the broker, who wished to be relieved of the account, and no commission was charged on the transaction. The transfer was effected, according to the custom on the exchange in respect of all transfers from one member to another, by the broker's delivering a "sold" memorandum to the transferees, and receiving a "bought" memorandum in return. *Held:*

   (1) The stamp tax imposed by § 800, Schedule A (4) of the Revenue Act of 1926 upon "each sale, agreement of sale, or agreement to sell (not including so-called transferred or scratch sales) . . . at, or under the rules or usages of any exchange . . . for future delivery. . . ." was applicable. P. 153.

   (2) The transaction was not a "transferred" or "scratch" sale within the meaning of the prescribed exemption. P. 152.

   (3) Under the rules and practice of the Cotton Exchange the transaction was an actual sale. P. 153.

2. The tax imposed by § 800, Schedule A (4) of the Revenue Act of 1926 is not a tax upon the business transacted but is an excise upon the privilege, opportunity, or facility offered at exchanges for the transaction of the business. P. 153.

83 F. (2d) 951, affirmed.

CERTIORARI, 299 U. S. 531, to review a judgment affirming a judgment dismissing the complaint in a suit to recover taxes paid.

Mr. Irving Mariash, with whom *Mr. I. Maurice Wormser* was on the brief, for petitioners.

Mr. Thurman Arnold, with whom *Solicitor General Reed, Assistant Attorney General Jackson,* and *Messrs.*

Sewall Key and *George H. Zeutzius* were on the brief, for the United States.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

Section 800, Schedule A (4) of the Revenue Act, 1926,[1] imposes a stamp tax upon "each sale, agreement of sale, or agreement to sell (not including so-called transferred or scratch sales) . . . at, or under the rules or usages of, any exchange . . . for future delivery." Whether the tax is payable upon a broker's transfer of a customer's account in cotton futures to another broker through the cotton exchange is the matter in controversy. The Circuit Court of Appeals has held the transaction taxable.[2] A conflict of decision moved us to grant certiorari.[3]

Petitioners are members of a partnership trading on the New York Cotton Exchange. On behalf of a customer they purchased cotton for future delivery. They were instructed by the customer to transfer the account to other brokers. To accomplish this petitioners delivered a "sold" memorandum to the transferee of the account, who, in turn, delivered a "bought" memorandum to the petitioners. No commission was charged because the instructions to transfer had been given at petitioners' request, as they desired to be relieved of the account. In order to record such a transfer with the exchange the custom was to use bought and sold memoranda in the form invariably employed by members of the exchange in purchase and sale of cotton for future delivery. The petitioners affixed to the sold memorandum stamps in the proper amount and after denial of a refund, brought action for the amount of the tax.

[1] 26 U. S. C. 903.

[2] 83 F. (2d) 951.

[3] See *United States* v. *Uhlmann Grain Co.*, 84 F. (2d) 901.

The petitioners contend that no sale, agreement of sale or agreement to sell was in fact made, though for convenience, and because of lack of other medium to evidence the transfer, papers in form agreements of sale were employed. The government insists that the tax is essentially upon the privilege of using the facilities of an exchange and petitioners here exercised this privilege and a sale was in fact made. We hold the tax was lawfully imposed and the petitioners are not entitled to recover the value of the stamps.

1. The transaction was not a "scratch" or "transferred" sale within the meaning of the exemption found in the section. A scratch or transferred sale is one in which there is an offsetting purchase and sale at the same price on the same day. Where a broker, in order to fill a customer's order, buys a larger amount and sells the excess to a third broker, directing the selling broker to deliver the excess to the broker who has purchased it, and directing the broker who purchases the excess to take delivery from the selling broker, the name of the intermediate broker is erased from the records of the exchange so that the sale of the excess appears as a sale direct from the one to the other of the two remaining brokers. The exemption also covers trading by a scalping broker who makes his profit in fractional movements on the exchange, buying and selling with great rapidity, thus often purchasing and selling the same amount of the commodity at the same price within a few moments or hours. By agreement amongst the members his name is scratched out of the records of the exchange and his temporary rights and liabilities do not appear upon its records. Accordingly, the Treasury Regulations in force since 1918 require that purchase and sale be consummated on the same day if the exemption is to apply

and that the intermediate broker instruct the broker who sold to him to deliver to the other who bought from him.[4]

2. The tax is not upon the business transacted but is an excise upon the privilege, opportunity, or facility offered at exchanges for the transaction of the business. It is an excise upon the facilities used in the transaction of the business separate and apart from the business itself.[5] In this view it is immaterial whether the transfer of the account constituted a sale. Unquestionably the petitioners used the facilities of the exchange for offsetting their obligation as a purchasing broker by arranging that another broker should take over that obligation under the rules of the exchange. Such a transaction comes within the intent of the statute and renders petitioners liable for the tax.

3. Under the rules and practice of the Cotton Exchange the transaction taxed was an actual sale. The fact that the sale was made for the purpose of transferring a brokerage account is irrelevant. When the petitioners purchased on the exchange the future contracts for their customer the selling broker handed the petitioners a memorandum agreeing to deliver at the date and price therein specified and the petitioners gave the selling broker a similar purchase memorandum. This each was required to do by the by-laws of the exchange. As a result of the operations of the clearing house the petitioners would, at the close of the day's business, be under obligation to pay the clearing house upon delivery being made at the future date and they would have a correlative right to receive from the clearing house the cotton purchased. Although the broker who made the sale to the

[4] Treasury Regulations 40 under R. A. 1918, Articles 23 (a) and 33 (3) (c). Treasury Regulations 71, Articles 44 (a) and 125 (3) (c).

[5] *Nicol* v. *Ames*, 173 U. S. 509, 519, 523.

petitioners would have a right to receive from his principal the necessary cotton to make delivery according to the sale, and although the petitioners who had bought the cotton would be under an obligation to their customer to deliver to him, both brokers were, under the by-laws of the exchange, principals in the transaction. When, therefore, the customer ordered the transfer of the account the petitioners could only effect this by selling the futures to the substituted broker who, in turn, became obligated, so far as the exchange was concerned, as principal, to accept delivery of the cotton according to his purchase from the petitioners. The obligation assumed by the petitioners when they entered into purchase contracts could be satisfied by making payment to the clearing house or offset by selling to another broker and so obtaining that broker's contract to take delivery of the cotton from the clearing house. In no other way could the petitioners relieve themselves of that obligation.

The judgment is *Affirmed.*

GREAT NORTHERN RAILWAY CO. *v.* WASHINGTON.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 20. Submitted October 14, 1936. Restored to the Docket October 26, 1936. Argued December 7, 8, 1936.—Decided February 1, 1937.

1. A State may require a railroad company engaged in interstate commerce to pay a fee, in addition to general taxation of its property in the State, to cover the expense of local inspection and supervision within the State's police power; but the exaction violates both the commerce clause and the Fourteenth Amendment if, beyond those legitimate purposes, it is made and used to defray the cost of other activities of the State, such as local reparation proceedings and litigation before the Interstate Commerce Commission, in behalf of shippers. P. 159.
2. A statute (c. 107, L. Wash., 1929) requires public utilities generally, including railroads, to pay into a common fund each year

a fee of $\frac{1}{10}$th of one per cent. of gross operating revenue of the year preceding, for use in administering the state public service commission law. *Held:*

(1) That the statute is not void on its face, as applied to an interstate railroad, merely because it exacts fees at the same rate from the railroad and other public utilities as well, or because the proceeds compose a common fund which may be used not only for expense of inspection and supervision, but for other purposes. P. 161.

(2) But, to sustain the exaction in the case of an interstate railroad, the burden rests upon the State to show that the sums collected from the railroad do not exceed what is reasonably needed in its case for inspection and supervision service. *Foote & Co.* v. *Stanley,* 232 U. S. 494. P. 162.

(3) This burden was not sustained by the evidence in this case. P. 165.

3. When a claim of federal right has been denied by a state court upon the basis of a finding of fact or of mixed fact and law, this Court must examine the evidence and determine whether it supports the decision against the federal claim. *Norris* v. *Alabama,* 294 U. S. 587. P. 165.

184 Wash. 648; 52 P. (2d) 1274, reversed.

APPEAL from a judgment which reversed a judgment for the Railway Company in its action to recover fees claimed to have been unconstitutionally exacted by the State.

Messrs. Thomas Balmer and *L. B. daPonte,* with whom *Messrs. F. G. Dorety* and *Edwin C. Matthias* were on the brief, for appellant.

Mr. George G. Hannan, Assistant Attorney General of Washington, with whom *Mr. G. W. Hamilton,* Attorney General, was on the brief, for appellee.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This is an appeal from a judgment of the Supreme Court of Washington [1] in an action brought by the ap-

[1] 184 Wash. 648; 52 P. (2d) 1274.

pellant to recover fees for the years 1929–1933 paid under protest to the State Department of Public Works. The relevant statutory provisions are: [2]

"Section 1. That hereafter every person, firm or corporation engaged in business as a public utility and subject to regulation as to rates and charges by the department of public works, except auto transportation companies and steamboat companies holding certificates under chapter 248 of the Laws of 1927, shall, on or before the first day of April of each year, file with the department of public works a statement on oath showing its gross operating revenue for the preceding calendar year or portion thereof and pay to the department of public works a fee of 1/10 of one per cent of such gross operating revenue: *Provided,* That the fee so paid shall in no case be less than ten dollars."

"Sec. 2. All sums collected by the director of public works under the provisions of this act shall within thirty days after their receipt be paid to the state treasurer, and by him deposited in a fund to be known as the public service revolving fund."

The Supreme Court of the State has defined the exaction as a regulatory or inspection fee, and has declared that the fund created by the sums collected must be used solely for administering the state public service commission law.[3]

The complaint [4] alleges that the Department of Public Works exercises jurisdiction and supervision over sundry

[2] C. 107 Washington Session Laws of 1929. (Remington's Revised Statutes §§ 10417, 10418.) This act amended § 1 of c. 113 of the Laws of 1921, as amended by § 1, c. 107 of the Laws of 1923. It left § 2 of c. 113, Laws of 1921, in effect.

[3] *Pacific T. & T. Co.* v. *Seattle,* 172 Wash. 649; 21 P. (2d) 721; affirmed on other questions, 291 U. S. 300. See also the opinion below, 184 Wash., pp. 650, 651; 52 P. (2d) p. 1275.

[4] The complaint as filed sought recovery also of sums paid pursuant to other statutory provisions. The appellant, however, abandoned these items of claim.

public utilities, including common carriers by rail, electric and street railways, gas, electrical and water companies, telegraph and telephone companies, wharfingers, warehousemen, and carriers by water, engages in many activities disconnected from, and unrelated to, the inspection and supervision of rail carriers, and has a variety of duties in the enforcement of the State's police power. The complaint affirms that the fee is not based upon or restricted to the cost of legitimate regulation or supervision but is used to defray the costs of other activities in connection with railroads and also of supervising and inspecting unrelated public utilities and of performing other duties the expense of which cannot legitimately be imposed upon carriers by rail; that the fee is grossly in excess of the reasonable cost of inspection and regulation of railroads; that, to January 1, 1933, there had accumulated from the fees collected more than $250,000 in excess of the amount expended by the department in the discharge of all its duties; that the statute is in truth a revenue measure; that the State taxes plaintiff's property and other like property on an *ad valorem* basis. The complaint charges that the fee is a burden on, and a regulation of, interstate commerce in violation of Article I, § 8 of the Constitution; is so arbitrary, excessive, discriminatory and unequal as to deny the plaintiff equal protection of the laws and to deprive it of property without due process of law, in violation of the Fourteenth Amendment.

The answer admits plaintiff's payment under protest; admits that the Department of Public Works exercises jurisdiction and supervision over many classes of public utilities, including common carriers, and that the plaintiff's property within the State is assessed on an *ad valorem* basis for taxes like other property; admits plaintiff's capacity to sue, but denies substantially all other allegations of the complaint.

The case was tried without a jury. The evidence largely consisted of the annual reports of the department. By the uncontradicted evidence and by the relevant statutes the following facts were established. The department has jurisdiction of various classes of public utilities, including railroads, electric and street railways, gas, electric and water companies, telegraph and telephone companies, wharfingers, warehousemen, and carriers by water, in respect of which it exercises many regulatory and supervisory duties. As respects railroads, the department constantly exercises functions unrelated to inspection and supervision, including the statutory duties of taking part in litigation before the Interstate Commerce Commission affecting the citizens of the State, and of acting judicially in decreeing refunds of overcharges. These functions, unrelated to the inspection and regulation of railroads, entail large expense. Between 1929 and 1933 the legislature made no appropriation from the State's general fund for the expenses of the department's activities, all being paid indiscriminately out of the department's fund derived from the fees collected from businesses subject to its jurisdiction. During this period the surplus accumulated from such receipts was $224,193.95, which was expended in 1934 in carrying on investigations of, and litigation with, public utility corporations other than railroads. No separate accounts are kept, or required by law to be kept, with respect to the expense of these various activities, and it is impossible to determine from the records and accounts of the department the expense of inspecting and regulating railroads separate and apart from the expense of regulating other utilities or other functions of the department.

The plaintiff called the department's auditor who testified that the charge of one-tenth of one per cent of gross income collected from utilities goes to build up a fund

from which all the department's expenses are paid; that he had figures classifying the expenditures according to the various kinds of utilities with which the department is concerned. These calculations he had made for himself, there being no duty under the law to keep accounts on this basis. He testified that, in computing the expenditures in connection with railroads, he lumped them as railroad charges and made no separation of the costs of inspection and regulation, the costs of rate hearings, and the costs of reparation proceedings, although the evidence establishes that many of the railroad charges had to do with reparation cases and litigation before the Interstate Commerce Commission. At the close of plaintiff's case, the defendant recalled the auditor as its own witness. He testified that the disbursements chargeable to the railroads for the period 1929 to 1933, inclusive, exceeded the receipts from railroads in the same period by $37,833. He did not, however, qualify what he had previously stated, that, in making up these figures, he had lumped all railroad charges, whether for inspection and regulation or interstate commerce cases or reparation cases. Upon cross-examination it developed that the figures he submitted were not official, and, so far as they covered salary items, had been made up from slips which the various employes, at his request, had turned in monthly allocating the time each employe spent in the various branches of the work, and the witness had no personal knowledge of the accuracy of these slips. Plaintiff objected to the testimony and moved to strike it on the ground that it was hearsay but the court let it stand, subject to the objection. A judgment awarded the plaintiff by the trial court was reversed by the Supreme Court.

The principles governing decision have repeatedly been announced and were not questioned below. In the exercise of its police power the state may provide for the supervision and regulation of public utilities, such as rail-

roads; may delegate the duty to an officer or commission; and may exact the reasonable cost of such supervision and regulation from the utilities concerned and allocate the exaction amongst the members of the affected class without violating the rule of equality imposed by the Fourteenth Amendment.[5] The supervision and regulation of the local structures and activities of a corporation engaged in interstate commerce, and the imposition of the reasonable expense thereof upon such corporation, is not a burden upon, or regulation of, interstate commerce in violation of the commerce clause of the Constitution.[6] A law exhibiting the intent to impose a compensatory fee for such a legitimate purpose is *prima facie* reasonable.[7] If the exaction be so unreasonable and disproportionate to the service as to impugn the good faith of the law [8] it cannot stand either under the commerce clause or the Fourteenth Amendment.[9] The state is not bound to adjust the charge after the fact, but may, in anticipation, fix what the legislature deems to be a fair fee for the expected service, the presumption being that if, in practice, the sum charged appears inordinate the legislative body will reduce it in the light of experience.[10] Such a statute may, in spite of the presumption of validity, show on its

[5] *Charlotte, C. & A. R. Co.* v. *Gibbes,* 142 U. S. 386; *New York* v. *Squire,* 145 U. S. 175, 191.

[6] *Atlantic & Pacific Tel. Co.* v. *Philadelphia,* 190 U. S. 160; *Mackay Telegraph Co.* v. *Little Rock,* 250 U. S. 94, 99.

[7] *Western Union* v. *New Hope,* 187 U. S. 419, 425; *Pure Oil Co.* v. *Minnesota,* 248 U. S. 158, 162.

[8] *McLean* v. *Denver & R. G. R. Co.,* 203 U. S. 38, 55. Compare *Red "C" Oil Co.* v. *North Carolina,* 222 U. S. 380, 393. *Western Union* v. *New Hope, supra.*

[9] *Brimmer* v. *Rebman,* 138 U. S. 78, 83; *Postal Telegraph-Cable Co.* v. *Taylor,* 192 U. S. 64; *Pure Oil Co.* v. *Minnesota, supra,* p. 162.

[10] *Atlantic & Pacific Tel. Co.* v. *Philadelphia, supra,* p. 164; *Postal Telegraph-Cable Co.* v. *Taylor, supra,* p. 69. *Foote & Co.* v. *Stanley,* 232 U. S. 494, 503, 504.

face that some part of the exaction is to be used for a purpose other than the legitimate one of supervision and regulation and may, for that reason, be void.[11] And a statute fair upon its face may be shown to be void and unenforceable on account of its actual operation.[12] If the exaction be clearly excessive it is bad *in toto* and the state cannot collect any part of it.[13]

The contention is that the challenged statute is void on its face since it discloses that the fee charged the appellant is not imposed for, or limited by, the reasonable cost of supervision or regulation of its business; and, if this is not so, the case made in respect of the act's operation cast on the appellee the burden of proof, which it failed to carry.

The Supreme Court of the state based its decision in favor of the validity of the statute on two grounds: First, that the act is not unconstitutional on its face; secondly, that, as the answer denied the material allegations of the complaint concerning the operative effect of the act, the plaintiff had the burden of proof, which it failed to sustain; and, if the burden was shifted by the case made by the plaintiff, the evidence preponderated in favor of the defendant.

First. The statute does not exhibit a failure reasonably to adjust the fee to the expense of the supervision and regulation of railroads. The legislation is to be accorded the presumption of fairness and regularity. It cannot be deduced from the provisions of the act that the amounts collected from the railroads grossly exceed those legitimately expended for inspection and regulation. The ap-

[11] *Foote & Co.* v. *Stanley, supra,* p. 505; *Lugo* v. *Suazo,* 59 F. (2d) 386.

[12] *Western Union* v. *New Hope, supra,* p. 425; *Foote & Co.* v. *Stanley, supra,* p. 507.

[13] *Postal Telegraph-Cable Co.* v. *New Hope,* 192 U. S. 55; *Foote & Co.* v. *Stanley, supra,* p. 508.

pellant insists that such is the necessary inference from the circumstance that the same fee is exacted from public utilities generally, and the collections go into a single fund and are indiscriminately disbursed for the many branches of the department's work. But these facts, without more, do not prove that the amounts derived from the railroads are in excess of the legitimate expenses of inspection and regulation. It may be that, in spite of this lumping of receipts and expenditures, the fees paid by the railroads are no more than enough to defray such expenses. The court below was, therefore, justified in refusing to hold the statute void on its face.

Second. The court thought the plaintiff had the burden of showing that the sums exacted from rail carriers substantially exceeded the amounts expended for regulation and supervision, and the proofs offered were insufficient to shift the burden to the defendant. This view was erroneous. *Foote & Co.* v. *Stanley*, 232 U. S. 494.

In that case it appeared that the plaintiffs were packers of oysters taken from the waters of Maryland, Virginia, and New Jersey, and shipped to Baltimore. A statute of Maryland required that the oysters be inspected at Baltimore. It imposed a charge of one cent a bushel "to help defray the expenses of such inspection and the other expenses of the State Fishery Force, upon all oysters unloaded from vessels at the place where said oysters are to be no further shipped in bulk in vessels." The plaintiffs refused to pay the exaction and, upon threat of enforcement, filed a bill in a state court for injunction alleging the fee was excessive, a burden on interstate commerce, and a violation of the constitutional provision that "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws." The Maryland Court of Appeals [117 Md. 335; 82 Atl. 380] affirmed a decree dismissing the bill and this

court reversed its decision. The plaintiff asserted that as the act laid the fee for the expense of inspection, "and other expenses," it was obvious that the state had provided for the collection of more than was necessary for inspection. To this the state answered that the section levying the fee was but a part of an elaborate system of inspection imposed upon the state fishery force. It appeared from the evidence, as it does here, that the fishery force had duties other than those of inspection which were to be paid for out of the fund produced by the fees. This court said (p. 503):

"But while the two duties may sometimes overlap, there is a difference between policing and inspection, and if the State imposes upon one set of officers the performance of the two duties and pays the whole or a part of the joint expenses out of inspection fees, *it must be made to appear that such tax does not materially exceed the cost of inspection—the burden in such cases being on those seeking to collect the combined charge.*"

And said further (p. 506):

"But the commingling of these various duties, paid for out of a fund raised for inspection, does not necessarily show that the fee is excessive. For the presumption of invalidity arising from such intermingling might be met by carrying the burden of showing that, while the statute required payment out of such joint fund, the collections were not sufficient, but only helped, to pay the definitely ascertained expenses of inspection. The question of reasonableness, therefore, may be considered in the light of the practical operation of the law with a view of determining, with reasonable certainty, the permanent relation between the amount collected and the cost of inspecting."

The court examined the evidence as to the operation of a prior law which levied the same charge per bushel and which the challenged act superseded, consisting of the

annual reports of the comptroller, and found therefrom that one-third of the amount collected was sufficient to pay the cost of inspection and the other two-thirds had been appropriated to "other expenses of the Fishery Force." In the light of the operation of the previous act, and the failure of the state to show that the amount collected under the new law would not be more than was necessary for the expenses of inspection proper, the challenged statute was held void.

There are factual distinctions between the cited case and the instant one, but they do not affect the binding authority of the former. The law under consideration in the *Foote* case was purely an inspection measure. That here under review is characterized by the state court as one for regulation and inspection. The specific mandate of the Federal Constitution limiting state inspection fees to an amount absolutely necessary for executing a state's inspection laws was treated in the *Foote* case as raising the same issue as was presented in earlier decisions with respect to the bearing of the commerce clause upon the imposition of regulatory and inspection fees imposed upon local property of interstate enterprises. And the cases decided under the commerce clause dealing with the reasonableness of regulation and inspection fees have been treated by this court as apposite to the guarantees of the Fourteenth Amendment. In the *Foote* case reference to the accounts and records kept by state authority disclosed the extent of the excess of receipts over expenditures, whereas here it is demonstrated that while expenses other than those of inspection and regulation of railroads are paid out of the fees, the amount of the excess over what is necessary for regulation and inspection cannot be ascertained from the department's accounts. The *Foote* case is authority that in such circumstances the burden is on those seeking to collect the charge.

The State Supreme Court, after holding that the plaintiff failed to carry its burden, and that no duty of showing the amount necessary for inspection and regulation of railroads lay upon the defendant, proceeded to discuss the evidence and reached the conclusion that the proof preponderated in favor of the defendant. This conclusion was based upon the testimony of the department auditor that he had found from memoranda furnished him, and data collected by him, what had been expended in connection with railroads exceeded what they had paid. As already noted the appellant insists that this evidence was inadmissible and lacked value because hearsay.

The state court said:

"While the account kept by the auditor was not official, in the sense that of itself it was admissible in evidence, yet what the auditor did in that respect qualified him to testify as to the ultimate fact. Without further detailing the evidence, we will say that in our opinion, and in so far as there was any evidence on the subject, it preponderated against the findings made by the court as to the cost of supervising and regulating railroads."

Passing the appellant's contention that a federal right may not be denied under the guise of the application of a state rule of evidence,[14] we come to the question whether, when the asserted right has been denied, this court is concluded by a finding of fact or a mixed finding of law and fact made by the state court. We have repeatedly held that in such case we must examine the evidence to ascertain whether it supports the decision against the claim of federal right. A recent exposition

[14] Compare *Mackay* v. *Dillon,* 4 How. 421, 447; *Dower* v. *Richards,* 151 U. S. 658, 667; *Cleveland, C., C. & St. L. Ry.* v. *Backus,* 154 U. S. 439, 443; *Cedar Rapids Gas Co.* v. *Cedar Rapids,* 223 U. S. 655, 668; *Bailey* v. *Alabama,* 219 U. S. 219, 239; *Central Vermont Ry.* v. *White,* 238 U. S. 507, 512; *Hill* v. *Smith,* 260 U. S. 592, 594.

of the doctrine is found in *Norris* v. *Alabama*, 294 U. S. 587, a case coming here from a state court, in which the appellant claimed that he had been denied due process by the systematic and intentional exclusion of negroes from the jury lists. The state court held that the evidence did not establish such exclusion. This court reviewed the evidence, reached a conclusion contrary to that of the state court, and reversed the judgment. At pp. 589–590 it was said:

"The question is of the application of this established principle to the facts disclosed by the record. That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied. When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is encumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured."

In *Beidler* v. *South Carolina Tax Comm'n*, 282 U. S. 1, the validity of a state inheritance tax act was challenged in a state court, the claim being that the act operated to take property without due process if held to apply to property having no situs in the state. The state court held that intangible property, the transfer of which was sought to be taxed, had acquired a business situs in South Carolina. This court reëxamined the question, in the light of the evidence, and overruled the state court's decision, saying (p. 8):

"But a conclusion that debts have thus acquired a business situs must have evidence to support it, and it is our province to inquire whether there is such evidence when the inquiry is essential to the enforcement of a right suitably asserted under the Federal Constitution."

In *Johnson Oil Co.* v. *Oklahoma,* 290 U. S. 158, there was drawn in question the validity of *ad valorem* taxes laid under a state statute upon the entire fleet of the appellant's tank cars. It was charged that the cars did not have a situs within the state and there was, therefore, no jurisdiction to tax them. The Supreme Court of the state held that all the cars had their taxable situs within the state. This court examined the evidence, reached a contrary conclusion, and reversed the judgment, saying (pp. 159–160):

"As the asserted federal right turns upon the determination of the question of situs, it is our province to analyze the facts in order to apply the law, and thus to ascertain whether the conclusion of the state court has adequate support in the evidence."

Citation of authority for the same principle might be multiplied indefinitely.[15]

While holding the testimony of the department auditor competent, the state court omits to refer to the fact that the figures he presented were not allocated so as to show the amounts spent for inspection and regulation and those expended for other so-called railroad charges which could not be imposed upon the railroads.

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[15] *Kansas City Southern Ry.* v. *Albers Commission Co.,* 223 U. S. 573, 591; *Creswill* v. *Knights of Pythias,* 225 U. S. 246, 261; *Northern Pacific Ry.* v. *North Dakota,* 236 U. S. 585, 593; *Interstate Amusement Co.* v. *Albert,* 239 U. S. 560, 566; *Truax* v. *Corrigan,* 257 U. S. 312, 324; *Ward & Gow* v. *Krinsky,* 259 U. S. 503, 511; *Aetna Life Insurance Co.* v. *Dunken,* 266 U. S. 389, 394; *Fiske* v. *Kansas,* 274 U. S. 380, 385; *Ancient Order* v. *Michaux,* 279 U. S. 737, 745; *Consolidated Textile Corp.* v. *Gregory,* 289 U. S. 85, 86.

As has been pointed out, the evidence is uncontradicted and conclusive that the sums he mentioned as having been expended for railroad account did include substantial, and apparently large, amounts for activities in the interest of interstate shippers and for the trial of reparation cases. It is impossible to sustain the state court's conclusion that such testimony had any probative value upon the sole issue in the cause, which was whether the statute subjects the railroads to an unreasonably excessive charge for inspection and regulation. As was said in the *Foote* case, the state is at liberty to intermingle duties involving costs properly chargeable to the railroads, with others involving costs not so chargeable, but if it does so, and the exaction is challenged, it must assume the burden of showing that the sums exacted from the appellant do not exceed what is reasonably needed for the service rendered. The State failed to carry this burden.

It results that the judgment must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE CARDOZO, dissenting.

To show that the revolving fund was used as a common pot for the regulation of public utilities generally, irrespective of their special function, does not make out a case of wrong to railroads considered as a separate class or to appellant in particular. For the purposes of this case there is no need to inquire whether anything in the Fourteenth Amendment forbids the recognition of a single and all-inclusive class of public service corporations without further subdivision. If the prohibition be assumed, still the burden is on the railroads to satisfy the court that what was contributed by them was more than what was expended for their account, since otherwise the common pot may have been a help and not a hurt.

That burden was not discharged. Far from being discharged, there was a disclaimer of any attempt or purpose to discharge it. And so the case must fail. *Norfolk & Western Ry. Co.* v. *North Carolina,* 297 U. S. 682, 688, 689, 690.

The decision in *Foote* v. *Stanley,* 232 U. S. 494, much relied on by appellant, is inapplicable here. That was a case under Article I, § 10, of the Constitution, which provides that "no State shall, without the consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws." Maryland passed an act for the payment of charges, characterized as inspection fees, upon imports of oysters from neighboring states. The "inspectors" did more than inspect the oysters; they policed the waters of Chesapeake Bay, being thus policemen as well as inspectors. On its face the act provided that a fee of one cent per bushel should be "levied to help pay the salary of the inspectors and the other expenses of the State Fishery Force." 232 U. S. at 505. In these circumstances the ruling was that in a suit for an injunction brought by the importers the state had the burden of showing that the fee was not an unreasonable one for the service of inspection as distinguished from the other services covered thereby. Imposts upon interstate commerce being generally prohibited, and being lawful only when "absolutely necessary" for the purpose of inspection, a charge covering the service of inspection and also something else must collapse in its entirety unless the state is in a position to break it up into its elements. A power has been granted to be used in exceptional conditions. The state must bring itself within the exception if it seeks to act within the grant.

A very different situation confronts us in the case at hand. Here the statute of the state does not trespass upon a field of legislation where entry is forbidden with-

out the license of the nation. What has been done is well within the field of general legislative power, with every presumption of validity back of it. In such circumstances the burden of making good a claim of invalidity and thus establishing an exception is on the assailants of the rule, and not on its proponents. The conclusion becomes clearer when the statute is analyzed more closely. All that it does is to exact of public utilities generally (with particular exceptions) a fee of 1/10th of one per cent of their gross revenues, confined, however, to operations in intrastate commerce, the fee when collected to be paid into a revolving fund. Laws of Washington, 1929, c. 107; Laws of 1923, c. 107; Laws of 1921, c. 113. Another statute (Laws of Washington, 1929, c. 108) lays a heavier tax (1%), to be paid into the same fund, upon the receipts of auto-transportation companies. Steamship companies of a stated class are subject to a special rule, the fee in their case being 1/5th of one per cent. Laws of Washington, 1927, c. 248. Plainly there is no presumption that these varying contributions are out of proportion to the expenses incurred in supervising and regulating the several classes of contributors. Illegality, if there is any, is to be found in the administration of the statute, and not in anything inherent in its essential scheme and framework. That being so, the taxpayer may not rest upon a showing of possible overpayment. There must be a showing of an overpayment not merely possible but actual, and one substantial in amount. *Norfolk & Western Ry. Co.* v. *North Carolina, supra; Foote* v. *Stanley, supra.* To hold otherwise would be to go counter to the settled rule that "one who would strike down a state statute as obnoxious to the Federal Constitution must show that the alleged unconstitutional feature injures him." *Premier-Pabst Sales Co.* v. *Grosscup,* 298 U. S. 226, 227. Analogies drawn from the law of trusts are inapposite and mis-

leading. The state does not collect the taxes or place them in the fund as trustee for the contributor or for any one else. It receives the moneys and expends them as an owner, charged with no other duty to a particular group of taxpayers than to members of the public generally.

The burden resting on the railroads to show that the use of the common pot has resulted to their damage, the record must be scrutinized to see whether the burden has been borne. In that scrutiny there is no denial of a duty to inquire whether the decision of the state court, irrespective of its surface protestations, amounts in substance and reality to the denial of a federal right. *Norris* v. *Alabama,* 294 U. S. 587, 589; *Beidler* v. *South Carolina Tax Comm'n,* 282 U. S. 1, 8. There is a recognition of the duty, and an endeavor to fulfill it.

1. The trial court suggested to counsel for appellant that it would be interesting to know whether the amount that had been collected through the tax upon the railroads was in excess of the amount expended for their benefit. Counsel responded that he would not embark on that inquiry. His position was stated to be that the act was invalid on its face, in which event it would be vain to pursue the subject further. This court by its opinion has rejected that contention. The act is not invalid on its face, whether valid or invalid otherwise.

2. Explaining or at least supplementing the refusal to compare disbursements and receipts, counsel stated on the trial that there were no records available. But the contrary was clearly proved. The auditor of the Department of Public Works caused the employees of the Department to submit vouchers or slips descriptive of their services with an appropriate segregation and apportionment among the several classes of utilities. He testified on the basis of these reports, which were on file in his office, that disbursements for account of the rail-

roads were in excess by $37,833.14 of the railroads' contributions. Counsel for appellant expresses his belief that inspection and discovery of the contents of the vouchers would have yielded inadequate information. His business was to look and see.

3. The objection will not hold that the documents might be ignored for the reason that, if produced, they would be incompetent as evidence. Apart from the possibility of examining the men who made them, it is the law of the state of Washington, declared in this very case, that the slips and vouchers so filed in the course of the business of the bureau were sufficient to support the testimony of the auditor as to the conclusions to be drawn from them. Referring to that subject, the court said: "While the account kept by the auditor was not official, in the sense that of itself it was admissible in evidence, yet what the auditor did in that respect qualified him to testify as to the ultimate fact. Without further detailing the evidence, we will say that in our opinion, and in so far as there was any evidence on the subject, it preponderated against the findings made by the [trial] court as to the cost of supervising and regulating railroads."

Whether the evidence thus accepted and relied upon would be rejected by other courts either as hearsay or on other grounds is quite beside the point. The Fourteenth Amendment does not confine the states to the common law rules of evidence, however well established. *West* v. *Louisiana,* 194 U. S. 258, 262, 263; *Brown* v. *New Jersey,* 175 U. S. 172, 174, 175; *Twining* v. *New Jersey,* 211 U. S. 78, 101; *Luria* v. *United States,* 231 U. S. 9, 25. "The State is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at the common law." *Brown* v. *New Jersey, supra.* The acceptance of the testimony of the auditor does not touch the privilege of confrontation in a prose-

cution for a crime. *Snyder* v. *Massachusetts,* 291 U. S. 97, 106. It does not substitute hearsay for direct testimony generally or as to every possible issue arising in a case. At most it is an enlargement of the common law rule as to entries in books of account or in public or official documents. Cf. Wigmore, Evidence, vol. 3, § 1517 *et seq;* § 1630 *et seq.*

Hearsay is competent evidence by the law of many enlightened countries. Stumberg, Guide to the Law and Legal Literature of France, pp. 148, 149; Encyclopedia of the Social Sciences, Title "Evidence"; vol. v., pp. 646, 647. Even at common law it is competent at certain times and for certain purposes, though narrowly restricted. Wigmore, Evidence, vol. 3, § 1420 *et seq.;* Thayer, A Preliminary Treatise on Evidence at the Common Law, p. 518. The range of its competence has been greatly enlarged by statutes in many of the states, as, e. g., in the administration of Workmen's Compensation Laws, and by the relaxation of ancient rules as to entries in accounts. Dodd, Administration of Workmen's Compensation, pp. 227–236; Wigmore, Evidence, Supplement, 1934, §§ 1519, 1520; Morgan and others, The Law of Evidence, p. 51; New York Civil Practice Act, § 374 a; cf. *Massachusetts Bonding & Insurance Co.* v. *Norwich Pharmacal Co.,* 18 F. (2d) 934; *Cub Fork Coal Co.* v. *Fairmont Glass Co.,* 19 F. (2d) 273; *United States* v. *Cotter,* 60 F. (2d) 689. The question may be laid aside whether a change in the law of evidence might be so radical and unjust as to work a destruction of fundamental rights and thus a denial of due process. *Brown* v. *New Jersey, supra,* p. 175. Assuming such a possibility, there is nothing in this ruling to make it a reality. If the legislature of Washington had passed a statute to the effect that vouchers in a public office, filed by the employees at the bidding of a superior, should be *prima facie* evidence of the truth of their contents, it is not open

to doubt that such a statute would be valid. It would not even involve an extreme departure from common law analogies rooted in the presumption of official regularity. What a state may do in changing the rules of evidence through the action of its legislature, it may do with equal competence through the action of its judges, for anything to the contrary in the Constitution of the United States.

4. Appellant did not discharge its burden by proving in a vague way that some of the disbursements classified by the auditor as a charge against the railroads were incidental to proceedings conducted before the Interstate Commerce Commission or elsewhere for the benefit of private shippers and were not properly a part of the expense of local regulation.

The Attorney General takes the ground that disbursements from the revolving fund, if made for that purpose, were without authority of law. If that be so, they cannot avail to invalidate the statute, though they may lay the basis for a remedy in behalf of the state or others against the officers or agents guilty of unintentional misfeasance. Aside, however, from that objection, there was no attempt by appellant to prove the amount of these or like withdrawals in even the roughest fashion. There was no suggestion, much less evidence, that they would wipe out the excess of $37,833.14 stated by the auditor. An inquiry directed to the point would have yielded in all likelihood an estimate at least approximately correct. If such inquiry was inadequate, the slips and vouchers were available for scrutiny and dissection. Examination of the auditor in connection with the documents would have shown forth the truth.

The presumption of validity which sustains an act of legislation is unbroken by the evidence.

The CHIEF JUSTICE, MR. JUSTICE BRANDEIS and MR. JUSTICE STONE join in this opinion.

STOCKHOLDERS OF THE PEOPLES BANKING CO. *v.* STERLING, RECEIVER.*

APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

No. 298. Argued January 6, 7, 1937.—Decided February 1, 1937.

The Maryland Constitution, (1867) Art. III, § 39, forbids the chartering of banks except upon condition that the stockholders shall be liable to the amount of their respective shares for the debts of the bank; and an early statute, couched in the constitutional language, was construed by the state courts as conferring upon the creditor of an insolvent bank a supplementary right of action, *ex contractu*, against its stockholders, but only those stockholders who were such when his credit was contracted,—a liability which followed the stockholder after he had ceased to be such, and which was subject to any right of set-off or counterclaim available to the stockholder against the bank at the time of the creditor's suit. A later enactment abolished this method and made the stockholders' liability an asset of the corporation for the benefit ratably of all the depositors and creditors, and enforcible only against stockholders who were such at the time of the bank's liquidation, and by proceedings by a receiver, assignee or trustee of the corporation acting under the orders of a court. *Held* that the later statute did not infringe the rights of stockholders under the contract clause of the Federal Constitution, because:

(a) The Maryland constitutional provision fixed the substantive stockholder liability; the statutes merely afforded remedies for its enforcement. Pp. 178, 181.

(b) The effect upon contracts, wrought by change in judicial construction of antecedent state laws or constitutional provisions, is not within the contract clause of the Federal Constitution. P. 182.

(c) Stockholders who became such while the first statute was in force were chargeable with notice that a new remedy might be adopted if the one first chosen was inadequate; and this independently of a power of alteration or repeal reserved in the bank's charter. P. 181.

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* Together with No. 299, *Stockholders of the Hagerstown Bank & Trust Co.* v. *Sterling, Receiver.* Appeal from the Court of Appeals of Maryland.

(d) When a corporate charter is subject to the condition that it may be altered or repealed by the Legislature, there is no unconstitutional change of the obligation of a contract by a subsequent enlargement of the liability of stockholders as to debts afterwards contracted, though the shares so affected were acquired before the charter was so amended. P. 183.

(e) The Maryland constitutional liability of stockholders in banks is not a maximum, but a minimum, and the Legislature does not transcend the bounds of legislative power by increasing it, as to existing stockholders, under its reserved power to alter or amend charters. P. 183.

Whether the legislative changes involved in this case would have gone too far if they had been made applicable to debts existing at date of enactment is not decided. See *Smith* v. *Sherman*, 1 Black 587, 594. The burden of proving that such debts existed was on the appellants, and in this they failed.

169 Md. 678, 182 Atl. 558; 169 Md. 696, 182 Atl. 566, affirmed.

APPEALS, in two cases, from decrees reversing a lower court and sustaining special assessments against protesting stockholders, in two proceedings to liquidate banks.

Messrs. Charles F. Wagaman and *John Wagaman*, with whom *Messrs. D. Angle Wolfinger, Martin V. B. Bostetter, C. Walter Baker*, and *Daniel W. Doub* were on the brief, for appellants.

Mr. William H. Bovey, with whom *Mr. Elias B. Hartle* was on the brief, for appellee in No. 298.

Mr. Robert H. McCauley, with whom *Mr. J. Lloyd Harshman* was on the brief, for appellee in No. 299.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

Stockholders in banking corporations, charged with personal liability, contend that a statute of Maryland defining the form of liability and its measure offends against the Constitution of the United States by impairing the obligation of contracts previously made.

In No. 298, the liability in controversy is that of stockholders in the Peoples Banking Company of Smithsburg, which was incorporated under the laws of Maryland, January 24, 1910, and closed its doors June 29, 1931. The Bank Commissioner of the state, after being appointed receiver, filed a petition with a Circuit Court in Maryland for an order assessing the stockholders of record in an amount equal to 100% of the par value of their shares. An order was made accordingly in conformity with the provisions of Acts, 1910, Chapter 219 (Code of Maryland, Article II, § 72). Thereafter the appellants filed petitions for the revocation of the order, alleging the invalidity of the statute imposing liability, and alleging also that those of them who had paid the assessments before joining in the petitions had done so by mistake. At the date of liquidation appellants were the holders of over 2000 shares of stock. Thirteen appellants had become the holders of a relatively small portion of these shares (345) before the enactment of the applicable statute. Nearly all the appellants were depositors in the insolvent bank and were thus creditors as well as stockholders. The Circuit Court for Washington County, Maryland, granted the petitions, holding the statute void as an impairment of existing contracts. The Court of Appeals reversed, and adjudged the statute valid. *Ghingher* v. *Bachtell,* 169 Md. 678; 182 Atl. 558. The case is here upon appeal. Judicial Code, § 237; 28 U. S. C. § 344.

In No. 299, the liability in controversy is that of stockholders in the Hagerstown Bank and Trust Company, which was incorporated in 1902. The trust company was closed in February, 1933, and in January, 1935, an order was made for the assessment of all the stockholders to the extent of 100% of the par value of their shares, provided that no good cause was shown to the contrary within a stated time. The appellants in this case, unlike some of the appellants in No. 298, acquired

their shares after the enactment of the 1910 statute. Even so, they appeared within the time limit in opposition to the assessment, asserting that the statute was invalid as to them. The Circuit Court of Washintgon County sustained their opposition, and the Court of Appeals reversed. *Ghingher* v. *Kausler,* 169 Md. 696; 182 Atl. 566. In this case also the controversy is here upon appeal.

The questions in the two cases will be considered separately.

First: The case of the Peoples Banking Company of Smithsburg.

The Constitution of Maryland provides that "the General Assembly shall grant no charter for Banking purposes . . . except upon the condition that the Stockholders shall be liable to the amount of their respective share or shares of stock in such Banking Institution, for all its debts and liabilities upon note, bill or otherwise." Maryland Constitution, 1867, Article III, § 39. This provision was effective without more to impose a substantive liability upon stockholders in banks. *Ghingher* v. *Bachtell, supra,* pp. 688, 690. On the other hand, it did not take from the legislature the power to implement the liability with statutory remedies, nor in the absence of such statutes did it take that power from the courts. *Ghingher* v. *Bachtell, supra.* In January, 1910, when the Smithsburg bank was organized, the only applicable statute was Chapter 206 of the Acts of 1870. The Act shows by its title that it is one "to create State Banking Institutions to enable the several Banks in this State—State and National—to avail of the provisions thereof." It provides (§ 11) that "the continuance of the said several corporations shall be on the condition that the stockholders and directors of each of said corporations shall be liable to the amount of their respective share or shares of stock in such corporation, for all its debts and

liabilities upon note, bill or otherwise, and upon this further condition, that this Act and every part of it may be altered from time to time, or repealed by the Legislature." The Maryland courts have held in a series of decisions that the liability thus recognized was not enforcible by the bank itself in the event of its insolvency, or by a liquidator or receiver suing in its behalf. *Ghingher* v. *Bachtell, supra; Miners Bank* v. *Snyder,* 100 Md. 57, 67; 59 Atl. 707; *Colton* v. *Mayer,* 90 Md. 711, 714; 45 Atl. 874. The right of action was no part of the assets of the insolvent corporation. The meaning of the statute was thought to be that every creditor of the corporation in assuming that relation acquired for his individual use, and not as a class representative, a supplemental right of action against the holders of the shares. To rationalize this right of action, it was said to rest upon an implied contract between the creditor on the one side and on the other the holders of the shares at the creation of the debt. *Ghingher* v. *Bachtell, supra.* Contract being the basis of the statutory remedy, the courts deduced the consequence that the liability did not extend to stockholders who became such after the debt was in existence. For the same reason any stockholder was free to reduce his liability by the use of set-offs or counterclaims available at the time of suit against the primary obligor. *Ghingher* v. *Bachtell, supra,* p. 694; *Cahill* v. *Original Big Gun Assn.,* 94 Md. 353; 50 Atl. 1044.

In June, 1910, less than five months after the incorporation of this bank, a statute was enacted, abrogating the remedy under the then existing statute and substituting another. Acts of 1910, c. 219; Maryland Code, Article II, § 72 "Stockholders of every bank and trust company shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of every such corporation, to the extent of the amount of their stock therein, at the par

value thereof, in addition to the amount invested in such stock . . . and the liability of such stockholders shall be an asset of the corporation for the benefit ratably of all the depositors and creditors of any such corporation, if necessary to pay the debts of such corporation, and shall be enforceable only by appropriate proceedings by a receiver, assignee or trustee of such corporation acting under the orders of a court of competent jurisdiction." A like remedy had previously been created against stockholders in trust companies. Acts of 1904, c. 101; Acts of 1908, c. 153. Through these amendatory acts, the cause of action formerly enforcible by the creditors separately, each suing for himself, became enforcible by the receiver as the representative of all. As a consequence of the new procedure, the assessment was to be laid upon all the holders of shares at the time of liquidation without reference to their relation to the bank at the creation of the debts, though stockholders dropping out sooner might escape a liability which under the earlier law would have clung to them indefinitely. Moreover, offsets and counterclaims were no longer to be available to reduce the several assessments and thus establish inequality. Stockholders when sued by the receiver would contribute to the fund ratably, and then prove their claims against the bank in the same way as other creditors. Such in outline is the effect of the statutory changes as the highest court of Maryland has defined them in this very case.

Do changes of that order impair the obligation of a contract between the corporation and the stockholders in contravention of the provisions of the Constitution of the United States?

The answer must be "no," and this for two reasons, first, because the changes are directed to the implementing remedies rather than the substantive liability, and second, because a change of substantive liability was

made permissible by the reservation of a power of alteration or repeal.

(1) The obligation laid upon the shareholders by the Maryland Constitution, though susceptible of legislative and judicial regulation in respect of the mode of its enforcement, was a substantive liability to which every stockholder subjected himself upon the acquisition of his stock. The legislature did not exhaust the measure of that constitutional liability by the creation of a particular remedial device. The remedy adopted was interpreted judicially as having in view a suit by a creditor against the particular group of stockholders who had undertaken by implication to answer for his debt. This does not mean that a different form of remedy, for example a suit by a receiver, would have been a departure from the Constitution, if the statute had prescribed that method of enforcement. The broad but indefinite words of the constitutional command gave permission to the legislature to establish any remedies reasonably appropriate to the general end in view. Cf. *Whitman* v. *Oxford National Bank,* 176 U. S. 559, 562; *Bernheimer* v. *Converse,* 206 U. S. 516, 529. So, the broad but indefinite words of the legislation first adopted, the Act of 1870, gave freedom to the courts to develop through the process of construction a cause of action enforcible at the instance of a creditor without asserting in so doing that a different cause of action, enforcible through a receiver, would have been an inappropriate implement of the constitutional liability, in the event that the legislature or the courts had chosen to adopt it. Stockholders who became such while the first statute was in force were chargeable with notice that a new remedy might be adopted if the one first chosen was inadequate. They would have been chargeable with such notice though nothing had been said. They were chargeable, as it happens, by the wording of the statute, the charter being

granted upon the condition that the Act or any part of it might be altered or repealed.

The remedy first established was found to be unworkable. *Ghingher* v. *Bachtell, supra,* at p. 692; *Murphy* v. *Wheatley,* 102 Md. 501, 515; 63 Atl. 62. Still acting within the limits of the constitutional command, the legislature of Maryland announced another remedy, less unwieldy and confusing. In the view of the state court, the substantive liability as the Constitution had created it was the same under the new procedure as it had been from the beginning. *Ghingher* v. *Bachtell, supra.* The court was far from holding that the statute had enlarged it. What had happened was merely this, that another remedy had been established to implement a liability created long ago. Cf. *Pittsburgh Steel Co.* v. *Baltimore Equitable Society,* 226 U. S. 455; *Hill* v. *Merchants' Mutual Ins. Co.,* 134 U. S. 515; *Fourth National Bank* v. *Francklyn,* 120 U. S. 747; 755; *Shriver* v. *Woodbine Savings Bank,* 285 U. S. 467, 474, 479. We cannot see in this an attempt to lay upon the stockholders by force of later legislation a new and different burden from that accepted at the outset. Nor would it help the appellants anything to assume in their behalf that the Constitution of the State has been given a new meaning, if the new meaning is not due to the compulsion of a statute. Change by judicial construction of antecedent legislation does not impair a contract, at least in the forbidden sense, if it be granted *arguendo* that such a change can be discovered. *Tidal Oil Co.* v. *Flanagan,* 263 U. S. 444, 450; *Fleming* v. *Fleming,* 264 U. S. 29, 31; *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. 673, 680; *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co.,* 287 U. S. 358, 364. The new meaning, if there is any, is not ascribed to the Constitution because a later statute has said it must be done. The new meaning is the product of the independent judg-

ment of a court. So the state court has told us, and the good faith of its declaration is not successfully impeached. *Broad River Power Co.* v. *South Carolina,* 281 U. S. 537, 540. To changes thus wrought the Constitution of the United States does not offer an impediment.

(2) The result would not be different if the effect of the statutory amendments were to be viewed as an enlargement of the substantive liability for debts afterwards contracted, the enlargement being applicable to stockholders without exception, present as well as future. The charter was accepted subject to the condition that the personal liability then prescribed by statute should be subject thereafter to repeal or alteration. This court has held that when such a condition attaches to a charter, there is no unconstitutional change of the obligation of a contract by a subsequent enlargement of the liability of stockholders as to debts afterwards contracted, though the shares so affected were acquired before the change was made. *Sherman* v. *Smith,* 1 Black 587, affirming 21 N. Y. 9; *Looker* v. *Maynard,* 179 U. S. 46, 53; cf. *McGowan* v. *McDonald,* 111 Cal. 57, 66; 43 Pac. 418; *Perkins* v. *Coffin,* 84 Conn. 275, 295; 79 Atl. 1070; *Pate* v. *Bank of Newton,* 116 Miss. 666, 686; 77 So. 601. Stockholders who subscribe to stock subject to such a condition assume the risk that their relation to the corporation may be altered to their prejudice. Nor is their position any stronger because the new liability is heavier (if so it be assumed to be) than that imposed upon them directly by the Constitution of the State. The constitutional liability is not a maximum, but a minimum, and the legislature does not transcend the bounds of legislative power by increasing it thereafter. *Murphy* v. *Wheatley, supra,* pp. 514, 515, 516; *Davis* v. *Moore,* 130 Ark. 128, 135; 197 S. W. 295; *Parker* v. *Carolina Savings Bank,* 53 S. C. 583, 592; 31 S. E. 673; *Duke* v. *Force,* 120 Wash. 599, 606; 208 Pac. 67.

Sherman v. *Smith, supra,* left unanswered an inquiry (1 Black at p. 594) whether the amendment would have gone too far if it had been made applicable to debts existing at the date of its enactment as well as to existing stockholders. We may leave the question open now. Appellants have failed to show that any debts of the corporation to be enforced in these proceedings were debts existing on June 1, 1910, when the present statute became law, still less that the subtraction of those debts would have made the assessment lower than the par value of the shares. The extent of the deficiency is persuasive, in the absence of evidence to the contrary, that the assessment must have been the same if the old debts had been disregarded. Such of them as exist must have been contracted in the brief interval between January 24, 1910 and June 1 following. At all events, the burden was on the appellants to show themselves harmed through the operation of the statute challenged as unlawful. *Premier-Pabst Sales Co.* v. *Grosscup,* 298 U. S. 226, 227; *Hatch* v. *Reardon,* 204 U. S. 152, 160, 161. This they have not done. As to debts to be contracted afterwards, if not also as to others, the statute is impregnable.

What has been written is not at war with anything decided or even intimated in *Coombes* v. *Getz,* 285 U. S. 434, 441, 442, much relied on by appellants. There *creditors* were complaining of the destruction of a cause of action whereby they were left without a remedy. Here the record does not tell us that any creditors who were such when the first statute was repealed have claims still outstanding for debts contracted then. In the usual course of business deposits made so long ago must almost certainly have been paid through the application of the principle that the first drawings out are to be attributed to the first payments in. *Carson* v. *Federal Reserve Bank,* 254 N. Y. 218, 232; 172 N. E. 475. At

any rate, there is nothing to the contrary in the pages of this record. The fact is thus apparent that the contract rights of creditors are not involved at all. Whatever complaint is heard as to the substitution of a new remedy in 1910 is not from creditors of that date, unable to collect their debts. The complaint comes to us from stockholders, who took their stock with notice that the remedies against them might be changed from time to time.*

Second: The case of the Hagerstown Bank and Trust Company.

As already pointed out, all the complaining stockholders in this company acquired their shares after the adoption of the Act of 1910, with its new remedial devices. What has been said as to the stockholders in the Peoples Banking Company of Smithsburg applies with redoubled force to the stockholders in the trust company.

The decree in each case should be

Affirmed.

MORLEY CONSTRUCTION CO. ET AL. *v.* MARYLAND CASUALTY CO.

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

No. 325. Argued January 8, 1937.—Decided February 1, 1937.

1. A wrongful purpose is not an element of a cause of action for exoneration. P. 189.

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* "The authority of a state under the so-called reserved power is wide; but it is not unlimited. The corporate charter may be repealed or amended, and, within limits not now necessary to define, the interrelations of state, corporation and stockholders may be changed; but neither vested property rights nor the obligation of contracts *of third persons* may be destroyed or impaired." *Coombes* v. *Getz, supra*, pp. 441, 442.

2. The right of a surety to be exonerated from obligations of the principal does not entitle the surety to custody or control of the fund directed to be used for the purpose. P. 192.
3. In the absence of a cross-appeal, the appellee, to support the decree, may urge argument contradictory of the reasoning of the lower court, or may adduce matter in the record which the court overlooked or ignored, but cannot attack the decree to enlarge his own rights under it or to lessen his adversary's. P. 191.
4. The fact that findings, if against the weight of the evidence, may be revised on appeal in equity at the instance of an appellant, does not mean that they may be revised at the instance of an appellee, at least where their revision would carry with it as an incident a revision of the judgment. P. 191.
5. A surety on a bond to secure the performance of a public construction contract and payment of laborers and materialmen, made a supplementary contract with the contractor to advance money for use in carrying on the work, to be deposited in a special joint account, under their joint control, in which also the contractor was to deposit all payments received from the Government. The contractor having failed to deposit its final payment from the Government (the warrant for which was impounded) the District Court held that the surety, being itself partly in default, could not have specific performance of the supplementary agreement but was entitled, apart from agreement, to be exonerated from present liabilities, and it therefore decreed that the proceeds of the warrant be placed in a bank to be chosen by the contractor, as a special trust fund for the payment of bills for labor and material, no provision being made for any control in the surety. Upon the contractor's appeal, the Court of Appeals made its own finding that the surety's default was innocent and unsubstantial and directed that a decree of specific performance be substituted for the decree of exoneration. *Held* that the appellate court had exceeded its power. P. 192.

84 F. (2d) 522, 526, reversed.

CERTIORARI, 299 U. S. 529, to review a decree directing that a decree of the District Court for exoneration of a surety be modified to a decree for specific performance of a supplementary agreement between the surety and its principal.

Mr. Martin J. O'Donnell, with whom *Mr. William Buchholz* was on the brief, for petitioners.

Mr. Spencer F. Harris, with whom *Messrs. John C. Grover, Paul G. Koontz, George F. Cushwa,* and *Roger J. Whiteford* were on the brief, for respondent.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The power of an appellate court to modify a decree in equity for the benefit of an appellee in the absence of a cross-appeal is here to be admeasured.

Morley Construction Company, a petitioner in this court, made a contract with the United States, acting by the Veteran's Administration Department, for the construction of a veterans' hospital at Batavia, New York. In conformity with statute (40 U. S. C. § 270) it gave a bond for the completion of the contract and for the payment of all bills for material and labor, the respondent Maryland Casualty Company signing the bond as surety. During the progress of the work, the contractor found itself in need of a loan of money to enable it to go on. Accordingly a supplementary agreement was made between the contractor and the surety to relieve the situation. By that agreement, dated April 28, 1933, the contractor agreed to deposit in a designated trust company in Buffalo $5,000 to be used in the performance of the work and to deposit in the same account for the same purpose all moneys received from the United States as payments upon the contract. The surety agreed to deposit in the same account $5,000 as a loan to be secured by the contractor's note, and additional moneys sufficient to pay the present and future bills of plasterers, amounting, as the evidence shows, to $5,700. The contractor and the surety were to have joint control

of the account, and no moneys were to be withdrawn therefrom without the approval of the surety by designated representatives, the approval to be indicated upon the check or draft in writing.

Following this supplementary agreement, the contractor went on with the work, and brought it to completion. The surety made the first payment of $5,000 in accordance with its promise but refused to pay the $5,700 owing to the plasterers. In the meantime a series of payments became owing from the Government upon estimates of value in advance of completion and acceptance. Warrants for these payments were forwarded by the Government to the trust company in Buffalo to be placed in the joint account, notice having been given by the contractor to issue them accordingly. However, a different course was followed when the final payment became due. Apparently through inadvertence, the Government sent a warrant for that payment ($59,780.82) to the contractor itself at its office in Kansas City, Missouri. The contractor endorsed the warrant, delivered it to the Merchants Bank of Kansas City, one of the petitioners in this court, and directed the bank to issue a cashier's check for a like amount to the order of the contractor's president. The bank made out the check, but held it to await the payment of the warrant, which it deposited in a Federal Reserve Bank to be forwarded, in the usual course of collection, to the Treasury at Washington. Neither check nor warrant has been paid as a consequence of an injunction obtained by the respondent.

Upon learning from the Veterans' Administration Department of the transmission of the warrant, the surety began two suits, one in the District of Columbia, where the payment of the warrant was stayed by an injunction, the other the suit at bar. It recounts in its complaint the facts or most of them already stated in this opinion,

adding thereto that outstanding bills for more than $100,000 are covered by its bond. It says that it is entitled to the specific performance of the supplementary agreement and to a decree depositing the warrant in the trust company at Buffalo to be applied upon the joint account. It says also that by reason of the unpaid bills of materialmen and laborers there is a duty on the part of the contractor to exonerate the surety from loss or liability and to apply the warrant to that purpose. Finally, it makes claim to a right of subrogation to the position of the contractor over against the Government, a claim which apparently has been abandoned and will not engage us further. The bill of complaint ends with a prayer for relief appropriate to the several theories of liability put forward by the pleader, the theory of specific performance, the theory of exoneration, and the theory of subrogation. To render the relief effectual, the bank in Kansas City was joined as a defendant.

The District Judge held that the surety was not entitled to the specific performance of the agreement, having failed to pay the plasterers and being therefore in default itself. He held, however, that apart from any agreement the contractor was subject to a duty to exonerate the surety from present liabilities. True, there was no purpose on the part of the contractor to divert the proceeds of the warrant from the uses of the contract. As to this the finding is explicit. Even so, a cause of action for exoneration does not include among its elements the presence of a wrongful purpose. *Glades County* v. *Detroit Fidelity Co.,* 57 F. (2d) 449; *West Huntsville Cotton Mills* v. *Alter,* 164 Ala. 305; 51 So. 338; *Pavarini* v. *Title Guaranty & Surety Co.,* 36 App. D. C. 348; *Hutchinson Grocer Co.* v. *Brand,* 79 Kan. 340; 99 Pac. 592. The decree conforms to the findings in its distribution of relief. It adjudges the complainant to be entitled to exoneration but not to specific performance.

The proceeds of the warrant are to be placed in a bank to be chosen by the contractor, the deposit to be "designated as a special trust fund for the payment of bills for labor and material used on the United States Veterans Hospital in Batavia, New York." No provision is made that the surety, or indeed any one other than the contractor, shall have any control thereof.

From that decree the contractor appealed to the Circuit Court of Appeals for the eighth circuit. There was no cross-appeal by the surety. The Court of Appeals states in its opinion, "We are in grave doubt whether exoneration can properly be granted." Preferring by reason of that doubt to put its decision on some other ground, it concludes that there should be specific performance of the supplementary agreement. It concedes that the surety is in default for failing to live up to the agreement strictly, but it finds that the default was not unconscionable or fraudulent, and that a court of equity in its discretion may overlook an unsubstantial wrong. Recognizing the necessity of modifying the decree if exoneration is to be exchanged for specific performance, the opinion states that "an injunction against using the moneys except as agreed upon, and an order to place said moneys when received in the joint account and disburse the same in payment of just claims for labor or materials, would meet the requirements and rights of plaintiff and would not be impossible of performance" and that "a decree along such lines should be granted by the trial court." 84 F. (2d) 522, 526. Accordingly, the mandate of the appellate court provides that the cause be remanded to the District Court with directions to modify its decree in accordance with the views expressed in the opinion. We granted certiorari to fix the measure of relief available to a non-appealing suitor.

The substitution of specific performance for exoneration at the instance of the surety was not an affirmance

of the decree below, as if the reasons only had been changed with the decision standing firm. Alike in substance and in form there was a modification of the decree itself, the facts being found anew and differently, the law declared anew and differently, and the relief remodeled and adapted to the new law and the new facts. Without a cross-appeal, an appellee may "urge in support of a decree any matter appearing in the record although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." *United States* v. *American Railway Express Co.,* 265 U. S. 425, 435. What he may not do in the absence of a cross-appeal is to "attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below." *Ibid.* The rule is inveterate and certain. *Canter* v. *American Insurance Co.,* 3 Pet. 307, 318; *Chittenden* v. *Brewster,* 2 Wall. 191, 196; *The Maria Martin,* 12 Wall. 31, 40, 41; *Field* v. *Barber Asphalt Co.,* 194 U. S. 618, 621; *Landram* v. *Jordan,* 203 U. S. 56, 62; *Union Tool Co.* v. *Wilson,* 259 U. S. 107, 111; *Peoria & Pekin Union Ry. Co.* v. *United States,* 263 U. S. 528, 536; *Langnes* v. *Green,* 282 U. S. 531, 538; *Alexander* v. *Cosden Co.,* 290 U. S. 484, 487. Findings may be revised at the instance of an appellant, if they are against the weight of evidence, where the case is one in equity. This does not mean that they are subject to like revision in behalf of appellees, at all events in circumstances where a revision of the findings carries with it as an incident a revision of the judgment. There is no need at this time to fix the limits of the rule more sharply. "Where each party appeals each may assign error, but where only one party appeals the other is bound by the decree in the court below, and he cannot assign error in the

appellate court, nor can he be heard if the proceedings in the appeal are correct, except in support of the decree from which the appeal of the other party is taken." *The Maria Martin, supra.**

The surety laid claim to relief upon the basis of a contract, and to other relief by force of an equitable doctrine independent of contract. The decree of the District Court rejected the first claim because the contract had been broken, and accepted the second because the breach was then irrelevant. The decree was responsive to the claim that had been accepted, and not to any other. If there was to be specific performance of the contract, the surety, together with the contractor, would control the distribution of the fund, for so the parties had agreed. If there was to be exoneration and nothing more, the contractor or perhaps the court would control the application and the surety would stand aside. *Stulz-Sickles Co.* v. *Fredburn Construction Corp.*, 114 N. J. Eq. 475, 478; 169 Atl. 27; cf. *Glades County* v. *Detroit Fidelity Co., supra;* Arant, Suretyship, pp. 318, 319 and cases cited. Exoneration "does not entitle the surety to custody or control of the fund." *Stulz-Sickles Co.* v. *Fredburn Construction Corp., supra.* The decision of the Court of Appeals puts an end to this nice adjustment of the relief to the law and of the law to the facts as found. A decree appropriate to exoneration is annulled, and one appropriate to specific performance is given in its place. This is to find the facts anew and differently, for the trial judge

* State decisions on the question of the review of findings at the instance of an appellee who has not taken a cross-appeal exhibit a wide variance of procedure. For cases of the stricter type, see *Turner* v. *East Side Canal Co.*, 168 Cal. 103, 108; 142 Pac. 69; *Clark* v. *Corser*, 154 Minn. 508; 191 N. W. 917; *Cox* v. *Stokes*, 156 N. Y. 491; 51 N. E. 316; *Werdebach's Estate*, 280 Pa. 26; 124 Atl. 268. With these contrast the following: *Bullman* v. *Cooper*, 362 Ill. 469; 200 N. E. 173; *Wyatt* v. *Manning*, 217 Iowa 929; 250 N. W. 141; *Oppenheimer* v. *Bank*, 97 Tenn. 19; 36 S. W. 705; *Huntington* v. *Love*, 56 Wash. 674; 106 Pac. 185.

had held, at least by implication, that the breach by the surety, viewed in the light of all the circumstances, was something more than unsubstantial. It is to find the law anew and differently, for the trial judge had held that a surety chargeable with such a breach was not entitled to a decree upon the footing of the contract. Even more important, it is to give a new measure of relief, for the trial judge had ruled that the fund was not to be held upon the restrictions stated in the contract, but upon different restrictions originating in the conscience of the Chancellor. True, the relief proper to the theory accepted at the trial is almost as favorable from the view-point of the protection of the surety as the one adopted on appeal, though distinctly less burdensome from the view-point of the principal. Exoneration is not the same as specific performance, but it is not very different, and may be nearly, if not quite, as good. This is surely not a reason why an appellate court should be at liberty to treat the two as interchangeable. One might as well say that at the instance of a non-appealing plaintiff a judgment for specific performance could be made to take the place of one for the recovery of damages.

The decree should be reversed and the cause remanded to the Court of Appeals to pass upon the question, not yet definitively answered, whether relief in the form of a decree for exoneration is proper in the circumstances, and for other proceedings in accord with this opinion.

Reversed.

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KNOX NATIONAL FARM LOAN ASSN. ET AL. *v.* PHILLIPS.

CERTIORARI TO THE COURT OF APPEALS OF OHIO.

No. 389. Argued January 14, 15, 1937.—Decided February 1, 1937.

1. A judgment of a state court against an insolvent association for a sum of money is final, although accompanied by provisions requiring the debtor to turn over all of its property to a receiver for liquidation of its business and payment of the debt. P. 197.
2. Under the Federal Farm Loan Act, a national farm loan association cannot be required to retire, and repay the par value of, shares subscribed for and pledged with it by a member in connection with the procurement of a loan from a federal land bank, while the bank refuses to retire, and make re-payment for, the corresponding shares of bank stock subscribed for by the association in that connection and pledged with the bank. P. 198.
3. A shareholder of a farm loan association, subject by statute to an extra personal liability for its debts, is not entitled to have his shares retired and his subscription payment repaid when the association is insolvent and corresponding subscriptions to the stock of the federal land bank that made the loan have not been canceled and refunded. P. 201.
4. A receivership for the purpose of satisfying a judgment, falls with the judgment. P. 202.
5. A national farm loan association is an instrumentality of the Federal Government; the time and manner of its liquidation are governed by the federal statute; and jurisdiction does not reside in the tribunals of a State to wind up the business of this governmental agency either by a receivership or otherwise. P. 202.

54 Oh. App. 334, reversed.

CERTIORARI, 299 U. S. 533, to review the affirmance of a decree against the National Farm Loan Association for the par value of certain of its shares, accompanied by provisions for placing the Association in the hands of a receiver for the liquidation of its business.

Mr. Peyton R. Evans, with whom *Messrs. Roger D. Branigin, Gerald E. Lyons,* and *John M. Rankin,* and *Miss May T. Bigelow* were on the brief, for petitioners.

Mr. William E. Richardson, with whom *Mr. Harvey B. Cox* was on the brief, for respondent.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The controversy in this case makes it necessary to determine the remedies available to a shareholder in an insolvent farm loan association upon the refusal of a demand for the retirement of his shares.

Respondent is the owner of a farm in Knox County, Ohio. His vendors were members of the Knox National Farm Loan Association, a coöperative membership corporation chartered under federal law. Federal Farm Loan Act, July 7, 1916, c. 245, § 7, 39 Stat. 365; 12 U. S. C. § 711. Through that association they procured a loan from the Federal Land Bank of Louisville, giving a mortgage as security. Part of the proceeds of the loan (i. e., 5% thereof) they used for the purchase of stock in the coöperative association, there being a requirement of the statute that "any person desiring to borrow on farm land mortgage through a national farm loan association shall make application for membership and shall subscribe for shares of stock in such farm loan association to an amount equal to 5 per centum of the face of the desired loan, said subscription to be paid in cash upon the granting of the loan." Federal Farm Loan Act, § 8; 12 U. S. C. § 733; cf. § 9; 12 U. S. C. 745. The statutory plan has already been expounded in opinions of this court. *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180, 203; *Federal Land Bank* v. *Gaines*, 290 U. S. 247; *Federal Land Bank* v. *Priddy*, 295 U. S. 229.

Upon the purchase of the farm by respondent in October, 1927, he assumed the payment of the mortgage debt, succeeding at the same time to the interests of his vendors in the stock of the association and to the attendant liabilities. The shares were of the par value of $265. They had been pledged with the association, in accordance with the requirements of the statute (§ 8; 12 U. S. C. § 733) as security for the loan. The association on its part had subscribed for an equal amount of the shares of the federal land bank, the lender of the

money, leaving the shares so subscribed for as a pledge for the security of the lender. This too was a procedure called for by the statute. Section 7; 12 U. S. C. § 721. From time to time thereafter there were payments on account with the result that the loan had been reduced by March, 1933, to $2122.46, at which time respondent made an effort to clear the farm of the mortgage and to put an end also to his liability as shareholder. To that end he paid the association $1857.46 to be transmitted to the bank, insisting that the deficiency ($265) be satisfied through the retirement of the shares. The bank accepted the payment as one upon account, but refused to discharge the mortgage without payment of the balance. At that time, by concession, the association was insolvent. Its capital was impaired; it was indebted to the bank upon other mortgage loans, being liable as endorser or otherwise when it borrows for a member (*Federal Land Bank* v. *Gaines, supra*); it had no moneys in its treasury wherewith the shares could be retired.

The courts took up the controversy. Respondent joined the bank and the association as defendants in a suit in the Court of Common Pleas of Knox County, Ohio. He prayed for judgment against the bank that the mortgage be held to have been cancelled and extinguished and for judgment against the association that the shares of stock be paid off and retired, and that the business of the association be wound up and liquidated. For answer, the bank and the association took the ground that the partial payment made was insufficient to discharge the mortgage; that there could be no retirement of the shares while the association was insolvent; that the state court was without jurisdiction to liquidate the business of the association, an instrumentality of the federal government, and that jurisdiction in that behalf resided in the federal government exclusively.

Two decrees were rendered by the Court of Common Pleas. The first, filed October 7, 1935, provides that the

mortgage lien shall be canceled by the bank upon tender by the plaintiff of $265 in addition to the payment previously made, the tender to be kept good by payment into court. The second, filed November 18, 1935, directs the farm loan association to retire the respondent's shares, and gives him judgment against the association for the par value thereof. It appearing that the association was unable to pay the judgment by reason of insolvency, a receiver was appointed to take possession of the assets and liquidate the business, the association and its officers being required forthwith, upon the demand of the receiver, to surrender any property in their possession or under their control. From the decree of November 18, the defendants prosecuted an appeal to the Ohio Court of Appeals, which affirmed with an opinion. A petition for review by the Supreme Court of the state was submitted and denied. We granted certiorari to set at rest far-reaching questions as to the meaning and administration of an important Act of Congress.

At the outset a doubt as to our jurisdiction calls for scrutiny and judgment. The case being here after a decision of a state court, jurisdiction is not given us unless the decree to be reviewed is final. Judicial Code, § 237; 28 U. S. C. § 344. Respondent has been adjudged entitled to the payment of a specific sum of money, but he is also to have a receiver who is to liquidate a business, the court reserving the right to control the conduct of its officer and to rescind or modify its order. Does the appointment of a receiver postpone the stage of finality until his work is at an end?

The primary purpose of the suit was the recovery of a judgment for the par value of the shares. Any other relief prayed for or awarded was tributary to that recovery; it was a form of equitable execution to make collection possible. When the amount invested in the stock was adjudged to constitute a debt, whatever followed in

the decree was auxiliary and modal. The Association and its officers were not directed to account, and to surrender what was found owing at the close of the accounting. They were directed to make delivery and to make delivery at once. We think they were subjected to a present obligation as immediate and absolute as if the assets were to be wrested from them by execution directed to the sheriff. *Winthrop Iron Co.* v. *Meeker,* 109 U. S. 180, 183; *St. Louis, I. M. & S. R. Co.* v. *Southern Express Co.,* 108 U. S. 24, 28, 29; *Thomson* v. *Dean,* 7 Wall. 342; *McGourkey* v. *Toledo & Ohio Central Ry. Co.,* 146 U. S. 536; *Collins* v. *Miller,* 252 U. S. 364, 371; *Chase* v. *Driver,* 92 Fed. 780, 785; *Des Moines* v. *Des Moines Water Co.,* 230 Fed. 570, 573; *Victor Talking Machine Co.* v. *George,* 69 F. (2d) 871, 879.

Accepting jurisdiction, we are brought to a consideration of the merits.

A national farm loan association is a coöperative enterprise. Its members must subscribe for its shares to the extent of five per cent of the loan to be procured in their behalf. Federal Farm Loan Act, § 8; 12 U. S. C. § 733. The association in its turn, upon the procurement of the loan, subscribes to stock of the land bank to an equivalent extent. Section 7; 12 U. S. C. § 721. With few exceptions, the only assets which a farm loan association has or can have are the shares which it takes in the federal land bank to counterbalance the shares of its own stock taken by the borrower, together with dividends distributed by the bank, and reasonable charges for necessary expenses, not in excess of "1 per centum of the amount of the loan applied for." *Byrne* v. *Federal Land Bank,* 61 N. D. 265, 277; 237 N. W. 797; cf. § 11; 12 U. S. C. 761, subd. 3. To add to the protection of the bank and other creditors, the shareholders in the association are chargeable under the law as it stood at the date of these transactions with personal liability up to a designated maximum. "Shareholders of every national farm-loan association shall be held individually

responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association to the extent of the amount of stock owned by them at the par value thereof, in addition to the amount paid in and represented by their shares." Section 9; 12 U. S. C. § 744.[1] Upon evidence that an association has failed to meet its obligations the Farm Credit Administration may declare it insolvent and appoint a receiver, subject to the proviso that this shall not be done until the total defaults shall amount to at least $150,000 in the federal land bank district, unless such association shall have been in default for a period of two years. Section 29; 12 U. S. C. § 961. There shall be no voluntary liquidation without the consent of the supervising federal authority. Section 29; 12 U. S. C. § 965.

The background has now been indicated against which we must view the question whether a member of an association who has paid his loan in full may have his shares retired and recover their par value when the association is insolvent. In support of such a recovery respondent relies upon two sections of the statute. By § 7 (12 U. S. C. § 721) an association borrowing from a land bank "shall subscribe for capital stock of said land bank to the amount of 5 per centum of such loan," the stock to be held by the bank as collateral security. By the same section, such stock [i. e., the stock of the land bank] shall be "paid off and retired upon full payment of the mortgage loan." If that is done, "the national farm loan association shall pay off at par and retire the corresponding shares of its stock which were issued when said land bank stock was issued." [2]

[1] The liability has been changed in respect of contracts, debts or engagements entered into after June 16, 1933, without affecting liabilities incurred before that time. Act of June 16, 1933, c. 98, § 72, 48 Stat. 271; 12 U. S. C. § 744 a.

[2] The following is the text of the section as embodied in § 721 of the United States Code: "Whenever any national farm loan association shall desire to secure for any member a loan on first mortgage

Complementary to that section is § 8 of the Act (12 U. S. C. § 733), which regulates the relation between the association and its members. Upon applying for a loan, the applicant "shall subscribe for shares of stock in such farm loan association to an amount equal to 5 per centum of the face of the desired loan," the subscription at his election to be paid out of the proceeds, and the stock to be held by the association as collateral security. "Said capital stock shall be paid off at par and retired upon full payment of said loan." *Ibid.*

These provisions for retirement, despite their apparent breadth, are not to be extended to a situation such as the one before us here, and this for two reasons.

In the first place, § 8 of the statute, as already pointed out, is complementary to § 7. We are to read the two together. The association is not to retire its own shares and repay to the subscriber the amount of his subscription until the land bank has retired the corresponding shares of bank stock subscribed for by the association, and has paid back to the association the par value thereof. Only thus can the association be put in funds wherewith to make payment to its own subscribers. The record makes it plain, however, that this indispensable condition has never been fulfilled. The bank refuses to retire the

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from the Federal land bank of its district it shall subscribe for capital stock of said land bank to the amount of 5 per centum of such loan, such subscription to be paid in cash upon the granting of the loan by said land bank. Such capital stock shall be held by said land bank as collateral security for the payment of said loan, but said association shall be paid any dividends accruing and payable on said capital stock while it is outstanding. Such stock may, in the discretion of the directors, and with the approval of the Farm Credit Administration, be paid off at par and retired, and it shall be so paid off and retired upon full payment of the mortgage loan. In such case the national farm loan association shall pay off at par and retire the corresponding shares of its stock which were issued when said land bank stock was issued." (12 U. S. C. § 721.)

shares of bank stock subscribed for by the association upon the loan to the respondent, or to refund the subscriptions wholly or in part. The scheme of the statute would be fatally disrupted if the association could be held when the bank refused to pay.

In the second place, neither the bank nor the association is under a duty to retire stock when the association is insolvent, and thus to give to the withdrawing member through the return of his subscription a preference over others. The statute is misread if the sentences regulating withdrawal are taken out of the setting of a coöperative scheme and viewed in isolation. Under the law as it stood when respondent became a member, the shareholders were subjected to a personal liability for all the contracts, debts, and engagements of the association "to the extent of the amount of stock owned by them at the par value thereof, in addition to the amount paid in and represented by their shares." § 9; 12 U. S. C. 744. The association is already in default in the payment of its mortgage debts, and already its capital is impaired. In such circumstances, to return to respondent the amount paid in and represented by his shares would frustrate the statutory mandate that the amount so paid in shall constitute a fund for the benefit of creditors to be supplemented in case of need by personal liability for as much more as the investment. Indeed, altogether apart from any pledge of personal liability, the whole structure of the association is built upon the implication of equal rights and duties on the part of the coöperating members. To permit a member to withdraw when the association is insolvent would be to cast upon his fellow members the responsibility for defaults for which all should answer ratably in proportion to their interests. To guard against that inequity the statute makes it clear that shares in the association shall not be subject to retirement until the corresponding subscriptions to the land bank have been

canceled and refunded. We are not required to determine whether a member of an association will have rights enforcible against the bank when the association has been wound up in accordance with the federal statute. Cf. § 29; 12 U. S. C. § 966. No such question is before us. Enough for present purposes that in the existing situation, with insolvency conceded, the shares of the association are not subject to withdrawal.

The conclusion thus arrived at is in accord with well considered opinions in North Dakota and Arkansas where the same question was involved. *Byrne* v. *Federal Land Bank, supra; Western Clay National Farm Loan Assn.* v. *Lilly,* 189 Ark. 1004; 76 S. W. (2d) 55. It has the support of persuasive analogies in the law of building and loan associations, which have much in common with farm loan associations incorporated by act of Congress. The settled rule is that the shares of building and loan associations are not subject to retirement when the association is insolvent, and that any refund made at such a time may be reclaimed by a receiver. *Towle* v. *American Bldg., L. & I. Society,* 61 Fed. 446; *Sullivan* v. *Stucky,* 86 Fed. 491, 493; *Coltrane* v. *Blake,* 113 Fed. 785; *Aldrich* v. *Gray,* 147 Fed. 453, 456; *Christian's Appeal,* 102 Pa. 184; *Colin* v. *Wellford,* 102 Va. 581; 46 S. E. 780; cf. *Fidelity Savings & Loan Assn.* v. *Burnet,* 62 App. D. C. 131; 65 F. (2d) 477, 479, 481.

In holding that a judgment for the par value of the shares is inconsistent with the federal statute and impliedly forbidden, we cut the ground away from the auxiliary receivership, which must fall with the judgment it was intended to enforce. To this we add, however, that a national farm loan association is an instrumentality of the federal government; that the time and manner of liquidation are governed by the federal statute; and that jurisdiction does not reside in the tribunals of a state to wind up the business of this governmental agency

either by a receivership or otherwise. 12 U. S. C. §§ 931, 961; *Federal Land Bank* v. *Priddy, supra,* pp. 231, 234; *Cook County National Bank* v. *United States,* 107 U. S. 445, 448; *Easton* v. *Iowa,* 188 U. S. 220, 233; *Jennings* v. *U. S. F. & G. Co.,* 294 U. S. 216, 226; *Brusselback* v. *Chicago Joint Stock Land Bank,* 69 F. (2d) 598; *Partridge* v. *St. Louis Joint Stock Land Bank,* 76 F. (2d) 237; *Boyd* v. *Schneider,* 131 Fed. 223, 227.

Whether the respondent may vote upon his stock, after his mortgage has been paid in full, until the shares have been redeemed, and whether he has a remedy to compel the Farm Credit Administration to liquidate the business promptly, are questions that have been considered in the briefs, but that do not call for answer upon the record now before us.

The decree should be reversed and the cause remanded to the Court of Appeals of the State of Ohio for further proceedings not inconsistent with this opinion.

Reversed.

AMERICAN LIFE INSURANCE CO. *v.* REESE SMITH STEWART ET AL.*

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

No. 440. Argued January 15, 1937.—Decided February 1, 1937.

1. Fraud in the procurement of insurance is provable as a defense in an action at law upon the policy. P. 212.
2. A "contest," within the purview of a provision of a life insurance policy that it shall be incontestable after a period defined, has generally been held to mean a present contest in a court, not a notice of repudiation or of a contest to be waged thereafter. P. 212.
3. No action at law having been brought on the policy, an insurer whose attack upon the ground of fraud is endangered by the running of the time limited by the policy for contest may sue in equity for cancelation. P. 212.

In the present cases the period allowed for contest was two years from the date of the two policies. The Insurance Company's suits for cancelation were brought when six months and ten days of that period had passed.

4. Where equity can give relief, plaintiff ought not to be compelled to speculate upon his chance of obtaining relief at law, or to incur the danger that witnesses may disappear and evidence be lost if he waits to be sued by his antagonist. P. 213.
5. A remedy at law does not exclude one in equity unless it is equally prompt and certain and in other ways efficient. P. 214.
6. A remedy at law is not adequate if its adequacy depends upon the will of the opposing party. P. 214.
7. Equitable jurisdiction existing at the filing of the bill is not destroyed by the subsequent availability of an adequate legal remedy. P. 215.

In these cases the equity jurisdiction which attached on the filing of the bills by the Insurance Company, was not lost when actions on the policies were brought in the same court; though the court, if requested, might have tried the law suits first.

80 F. (2d) 600; 85 *id.* 791, reversed.

CERTIORARI, 299 U. S. 536, to review the reversal of decrees for the cancelation and surrender of policies of life insurance.

Mr. William C. Michaels, with whom *Messrs. Earle W. Evans* and *Joseph G. Carey* were on the brief, for petitioner.

Cancellation of instruments procured by fraud is a well-settled field of equity jurisdiction. The incontestable clause required contest in court to preserve petitioner's rights, and no law action was pending at the time the bills were filed in which contest could be made by answer. These facts demonstrate that petitioner did not have any remedy at law, adequate or otherwise, and presented a "special circumstance" authorizing petitioner to bring its

* Together with No. 441, *American Life Insurance Co.* v. *Ora Inez Stewart et al.* Certiorari to the Circuit Court of Appeals for the Tenth Circuit.

bills to cancel when and as the bills were filed. *Mutual Life Ins. Co.* v. *Hurni Packing Co.*, 263 U. S. 167, 174, 176; Story, Eq. Juris. (13th ed.), § 995; 2 Black, Rescission & Cancellation, § 655, p. 1497; 9 C. J. 1160.

When a court of equity properly acquires jurisdiction it will retain it until complete justice is done between the parties. *McGowan* v. *Parish*, 237 U. S. 285, 296; *Alexander* v. *Hillman*, 296 U. S. 222, 242; 21 C. J. 134, § 117.

Whether an equity court has jurisdiction depends on the facts and circumstances existing at the time the bill is filed and not on those that may subsequently develop. A remedy at law cannot be adequate if its adequacy depends upon the will of the opposing party. *Boyce's Executors* v. *Grundy*, 3 Pet. 210, 215; *Sullivan* v. *Portland R. Co.*, 94 U. S. 806, 811; *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. 288, 296; *Busch* v. *Jones*, 184 U. S. 598, 600; *Clark* v. *Wooster*, 119 U. S. 322, 325; *Bank of Kentucky* v. *Stone*, 88 Fed. 383, 391.

The case is controlled by the rule announced by this Court in *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. 288, 296, that equitable jurisdiction is not "lost because since the filing of the bill an adequate legal remedy may have become available." See also *Busch* v. *Jones*, 184 U. S. 598, 600.

The foregoing points have been the subject of discussion and decision in policy cancellation cases, similar to the ones at bar, in other Circuit Courts of Appeals, and such decisions declare the principles above stated. This decision of the Circuit Court of Appeals for the Tenth Circuit is in direct conflict with decisions in other Circuits in like cases. (Fourth Circuit) *Jefferson Standard Life Ins. Co.* v. *Keeton*, 292 Fed. 53, 54–56; *Jones* v. *Reliance Life Ins. Co.*, 11 F. (2d) 69, 70; *Brown* v. *Pacific Mutual Life Ins. Co.*, 62 F. (2d) 711, 712; *New York*

Life Ins. Co. v. *Truesdale,* 79 F. (2d) 481, 485; *Pacific Mutual Life Ins. Co.* v. *Parker,* 71 F. (2d) 872, 874. (Fifth Circuit) *Jefferson Standard Life Ins. Co.* v. *McIntyre,* 294 Fed. 886, 888. (Sixth Circuit) *New York Life Ins. Co.* v. *Seymour,* 45 F. (2d) 47, 48, 49; *Rose* v. *Mutual Life Ins. Co.,* 19 F. (2d) 280, 282. (Seventh Circuit) *Harnischfeger Sales Corp.* v. *National Life Ins. Co.,* 72 F. (2d) 921, 922, 923. (Eighth Circuit) *Peake* v. *Lincoln National Life Ins. Co.,* 15 F. (2d) 303, 305, 306; *Lincoln National Life Ins. Co.* v. *Hammer,* 41 F. (2d) 12, 17. (Ninth Circuit) *Massachusetts Bonding & Ins. Co.* v. *Anderegg,* 83 F. (2d) 622, 624, cert. den., 299 U. S. 567. It appears also to be in conflict with *Enelow* v. *New York Life Ins. Co.,* 293 U. S. 379, 384, upon which it professes to be based.

Section 384, 28 U. S. C., providing that no equity suit shall be maintained if plaintiff has an adequate remedy at law, may be waived by defendant, and was waived in these cases both by pleading to the merits only, by stipulating in writing for trial of the equity suits in advance of the law actions, and by proceeding to trial without objecting to equity jurisdiction. *American Mills Co.* v. *American Surety Co.,* 260 U. S. 360, 363; *Duignan* v. *United States,* 274 U. S. 195, 199; *Twist* v. *Prairie Oil Co.,* 274 U. S. 684, 689–691; *Perego* v. *Dodge,* 163 U. S. 160, 164; *Reynes* v. *Dumont,* 130 U. S. 354, 395; *Kilbourn* v. *Sunderland,* 130 U. S. 505, 514; *Tyler* v. *Savage,* 143 U. S. 79, 96–97; *Southern Pacific R. Co.* v. *United States,* 200 U. S. 341, 349; *Brown* v. *Lake Superior Iron Co.,* 134 U. S. 530, 536; *Singer Sewing Machine Co.* v. *Benedict,* 229 U. S. 481, 484; *Lyons Milling Co.* v. *Goffe & Carkener,* 46 F. (2d) 241, 245; *Sanders* v. *Riverside,* 118 Fed. 720, 722.

The decrees cancelling the policies were justified and should be affirmed. *New York Life Ins. Co.* v. *Griffith,* 35 F. (2d) 945, 946.

Mr. Charles G. Yankey for respondents.

The claims were pure legal claims and the defenses legal defenses. *Enelow* v. *New York Life Ins. Co.,* 293 U. S. 379; *Adamos* v. *New York Life Ins. Co.,* 293 U. S. 386. The beneficiaries were guaranteed a right to trial by jury. Const., Seventh Amendment; Judiciary Act, c. 20, § 16, 1 Stat. 82; Jud. Code, § 267; 28 U. S. C. 384.

The right of the court of equity to intercede was entirely dependent upon the possible or threatened loss of complainant's defense, if a controversy was not instituted within the period allowed. Necessarily, the right was dependent entirely upon the probability of losing it. See *Mutual Life Ins. Co.* v. *Hurni Packing Co.,* 263 U. S. 167, and cases cited in *Enelow* v. *New York Life Ins. Co.,* 293 U. S. 379, 384.

Under the allegations, we have merely an abstract question; at most a mere apprehension or fear of a remote injury. No allegations are made or facts stated to justify even an inference that the beneficiaries would not commence actions within the period.

This case is of that type of equity jurisdiction which is to prevent injury as distinguished from the types which determine controversies and adjudicate rights dependent upon facts which have occurred. It is a fixed principle that the occurrence or continuance of the injury must be probable and imminent. *Connecticut* v. *Massachusetts,* 282 U. S. 660; *New York* v. *Illinois,* 274 U. S. 488; *New Jersey* v. *Sargent,* 269 U. S. 328; *Texas* v. *Interstate Commerce Comm'n,* 258 U. S. 158; *Marye* v. *Parsons,* 114 U. S. 325; *Foster* v. *Mansfield C. & L. M. R. Co.,* 146 U. S. 88; *Stearns* v. *Wood,* 236 U. S. 75.

Petitioner, having a plain, adequate, and complete remedy at law, was not entitled to a stay in equity. *Smith* v. *American National Bank,* 89 Fed. 832, 838; *Griesa* v. *Mutual Life Ins. Co.,* 169 Fed. 509, cert. den., 215 U. S. 600.

The Insurance Company has submitted to the jurisdiction of the court in the law actions by filing motions to stay proceedings. Moreover, the following well-considered cases hold that the legal remedy of the Insurance Company became plain, adequate and complete notwithstanding the pendency of the equity suits, upon the filing of the law actions within the contest period by the respondents. *Great Southern Life Ins. Co.* v. *Burwell*, 12 F. (2d) 244, cert. den., 271 U. S. 683; *New York Life Ins. Co.* v. *McCarthy*, 22 F. (2d) 241; *New York Life Ins. Co.* v. *Thompson*, 78 F. (2d) 946; *Rohrbach* v. *Mutual Life Ins. Co.*, 82 F. (2d) 291. And see *Griesa* v. *Mutual Life Ins. Co.*, 169 Fed. 509, cert. den., 215 U. S. 600; *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379; *Adamos* v. *New York Life Ins. Co.*, 293 U. S. 386.

The motions to dismiss were considered as leveled at both the original and the supplemental bills herein, since the application for injunction against the prosecution of the law actions, which came on for hearing at the same time, is found only in the supplemental bills. The supplemental bills recite that the law actions have been filed by the respondents. Therefore, the pleadings of the petitioner show upon their face that petitioner had a plain, adequate and complete remedy at law within the contestable period, at the time the motions to dismiss were considered. Under such circumstances it is held that the actions to cancel the policies for fraud will not be entertained in a court of equity. *Cable* v. *United States Life Ins. Co.*, 191 U. S. 288; *Phoenix Mutual Life Ins. Co.* v. *Bailey*, 13 Wall. 616; *Di Giovanni* v. *Camden Fire Ins. Co.*, 296 U. S. 64; *Nichols* v. *Pacific Mutual Life Ins. Co.*, 84 F. (2d) 896; *Griesa* v. *Mutual Life Ins. Co.*, 169 Fed. 509, cert. den., 215 U. S. 600; *Riggs* v. *Union Life Ins. Co.*, 129 Fed. 207;

Rohrbach v. *Mutual Life Ins. Co.,* 82 F. (2d) 291; *New York Life Ins. Co.* v. *Thompson,* 78 F. (2d) 946.

The records show the actions at law upon the policies were at issue two months and twenty-three days before the trial of these equity suits in the same court, and four months and thirteen days before the expiration of the contest period. The Insurance Company had thus instituted a contest of the policies in actions at law. A dismissal of the law actions thereafter would not deprive the company of the benefit of that contest. *Cable* v. *United States Life Ins. Co.,* 191 U. S. 288, 309; *New York Life Ins. Co.* v. *Miller,* 73 F. (2d) 350; *New York Life Ins. Co.* v. *Hurt,* 35 F. (2d) 92, 96; *Thomas* v. *Life Insurance Co.,* 135 Kan. 381.

Moreover, the Insurance Company after the pendency of the law action could plead as a counterclaim or cross-petition the very same cause of action which is set out in the bill of complaint to cancel the policy for fraud. By the Kansas Code of Procedure, the dismissal of an action by the plaintiff does not dismiss any counterclaim pleaded by the defendant. See *Northern Life Ins. Co.* v. *Walker,* 123 Wash. 203.

Respondents did not waive the right to trial by jury.

Jurisdiction in equity upon the ground that the complainant is without an adequate remedy at law, cannot be conferred by consent or waiver. Jud. Code, § 267; 28 U. S. C. 384.

Whenever at any stage it appears that there is a plain, adequate and complete remedy at law, the court must dismiss the suit and leave the parties to their legal remedy, even though the point is not raised by the pleadings nor suggested by counsel. *Hipp* v. *Babin,* 19 How. 279; *Oelrichs* v. *Williams,* 15 Wall. 211; *Lewis* v. *Cocks,* 23 Wall. 466; *Boise Water Co.* v. *Boise City,* 213 U. S. 276; *Phoenix Life Ins. Co.* v. *Bailey,* 14 Wall. 616; *Singer Sewing Machine Co.* v. *Benedict,* 229 U. S. 481.

Trial by jury is a valuable right; every reasonable assumption should be indulged against its waiver. *Hodges* v. *Easton,* 106 U. S. 408; *Baylis* v. *Travelers Ins. Co.,* 113 U. S. 316.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

In these cases suits have been brought for the cancellation of policies of life insurance on the ground of fraud in their procurement, the policies providing that they shall cease to be contestable unless contest shall be begun within a stated time. The question to be determined is the existence, in the circumstances, of a remedy in equity.

On February 23, 1932, petitioner, a Colorado corporation, issued to Reese Smith Stewart, a citizen of Kansas, two policies of life insurance, each for $5,000, one payable to his son, who is a respondent in No. 440, and the other payable to his wife, who is a respondent in No. 441. Each policy contains a provision that it "shall be incontestable, except for non-payment of the premium, after one year from its date of issue if the Insured be then living, otherwise after two years from its date of issue." On May 31, 1932, three months and eight days after obtaining the insurance, the insured died, having made in his application fraudulent misstatements, or so the insurer charges, as to his health and other matters material to the risk. On September 3, 1932, the insurer brought suit to cancel the insurance, a separate suit for each policy, the executrix of the insured being joined as a defendant with the respective beneficiaries. The complaint in each suit refers in a paragraph numbered 8 to the provision that the policy shall be incontestable after the lapse of two years. In the same paragraph it states in substance that the beneficiary may delay the commencement of the action at law till the time for contest

has gone by, or, beginning such an action within the period, may afterwards dismiss it and then begin anew. The insurer asks the court to act while yet the barrier is down.

On September 26, 1932, the defendants moved in each suit to dismiss the bill for want of equity. On October 11, 1932, the beneficiaries began actions at law in the same court to recover the insurance. On October 29, the insurer filed its supplemental bills setting forth the pendency of the actions at law, and praying an injunction against their continued prosecution. On July 28, 1933, the District Court denied the motions to dismiss, without passing, however, on motions made by the insurer to enjoin the actions at law. On August 29, a stipulation was signed and filed in each case that "the suit in equity shall be tried" by the court "before said law action is tried, Provided, however, that the issues in said law action shall in the meantime be made up in order that said law issues thus joined shall stand ready for trial, with the understanding that said law issues, if any remain for trial, shall be tried as soon after the trial of the suit in equity as the court shall determine," and this stipulation was approved by the court and an order made accordingly. On October 10, 1933, the defendants in each of the equity suits filed their answers to the bills, denying the fraud, admitting the making of the "incontestability clause" as stated in paragraph 8, and as to the other allegations of that paragraph denying any knowledge or information sufficient to form a belief. The answers did not state that the remedy at law was adequate.

Upon the trial of the suits in equity, the District Court found the fraudulent representations charged in the complaints, and decreed the cancellation and surrender of the policies. There was an appeal to the Court of Appeals for the Tenth Circuit, where the decree was reversed, one judge dissenting, the court holding that the insurer

had an adequate remedy at law. 80 F. (2d) 600; 85 F. (2d) 791. We granted certiorari to settle an important question, and one likely to recur, as to the scope of equitable remedies.

No doubt it is the rule, and one recently applied in decisions of this court, that fraud in the procurement of insurance is provable as a defense in an action at law upon the policy, resort to equity being unnecessary to render that defense available. *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379, 385; *Adamos* v. *New York Life Ins. Co.*, 293 U. S. 386; *Insurance Co.* v. *Bailey*, 13 Wall. 616; *Cable* v. *United States Life Ins. Co.*, 191 U. S. 288, 306. That being so, an insurer, though the victim of a fraud, may commonly stand aside and await the hour of attack. But this attitude of aloofness may at times be fraught with peril. If the policy is to become incontestable soon after the death of the insured, the insurer becomes helpless if he must wait for a move by some one else, who may prefer to remain motionless till the time for contest has gone by. A "contest" within the purview of such a contract has generally been held to mean a present contest in a court, not a notice of repudiation or of a contest to be waged thereafter. See, e. g., *Killian* v. *Metropolitan Life Ins. Co.*, 251 N. Y. 44, 48; 166 N. E. 798; *New York Life Ins. Co.* v. *Hurt*, 35 F. (2d) 92, 95; *Harnischfeger Sales Corp.* v. *National Life Ins. Co.*, 72 F. (2d) 921, 922. Accordingly an insurer, who might otherwise be condemned to loss through the mere inaction of an adversary, may assume the offensive by going into equity and there praying cancellation. This exception to the general rule has been allowed by the lower federal courts with impressive uniformity.[1] It

[1] From the fourth circuit: *Jefferson Standard Life Ins. Co.* v. *Keeton*, 292 Fed. 53, 54–56; *Jones* v. *Reliance Life Ins. Co.*, 11 F. (2d) 69, 70; *Brown* v. *Pacific Mutual Life Ins. Co.*, 62 F. (2d) 711, 712; *New York Life Ins. Co.* v. *Truesdale*, 79 F. (2d) 481, 485;

has had acceptance in the state courts.[2] It was recognized only recently in an opinion of this court, though the facts were not such as to call for its allowance. *Enelow* v. *New York Life Ins. Co., supra,* at p. 384.[3]

The argument is made, however, that the insurer, even if privileged to sue in equity, should not have gone there quite so quickly. Six months and ten days had gone by since the policies were issued. There would be nearly a year and a half more before the bar would become absolute. But how long was the insurer to wait before assuming the offensive, and how was it to know

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Pacific Mutual Life Ins. Co. v. *Parker,* 71 F. (2d) 872, 874. From the fifth circuit: *Jefferson Standard Life Ins. Co.* v. *McIntyre,* 294 Fed. 886, 888. From the sixth circuit: *New York Life Ins. Co.* v. *Seymour,* 45 F. (2d) 47, 48, 49; *Rose* v. *Mutual Life Ins. Co. of New York,* 19 F. (2d) 280, 282. From the seventh circuit: *Harnischfeger Sales Corp.* v. *National Life Ins. Co.,* 72 F. (2d) 921, 922, 923. From the eighth circuit: *Peake* v. *Lincoln National Life Ins. Co.,* 15 F. (2d) 303, 305, 306; *Lincoln National Life Ins. Co.* v. *Hammer,* 41 F. (2d) 12, 17. From the ninth circuit: *Massachusetts Bonding & Ins. Co.* v. *Anderegg,* 83 F. (2d) 622, 625. From the tenth circuit: *New York Life Ins. Co.* v. *Thompson,* 78 F. (2d) 946, 947 (semble). From the District of Columbia: *Densby* v. *Acacia Mutual Life Assn.,* 64 App. D. C. 319; 78 F. (2d) 203, 206.

[2] *New York Life Ins. Co.* v. *Rigas,* 117 Conn. 437; 168 Atl. 22; *Ebner* v. *Ohio State Life Ins. Co.,* 69 Ind. App. 32; 121 N. E. 315; *Aetna Life Ins. Co.* v. *Daniel,* 328 Mo. 876; 42 S. W. (2d) 584; *New York Life Ins. Co.* v. *Cobb,* 219 Mo. App. 609; 282 S. W. 494; *New York Life Ins. Co.* v. *Steinman,* 103 N. J. Eq. 403; 143 Atl. 529; *American Trust Co.* v. *Life Ins. Co. of Virginia,* 173 N. C. 558; 92 S. E. 706; *Prudential Ins. Co.* v. *Tanenbaum,* 53 R. I. 355; 167 Atl. 147.

[3] "The instant case is not one in which there is resort to equity for cancellation of the policy during the life of the insured and no opportunity exists to contest liability at law. Nor is it a case where, although death may have occurred, action has not been brought to recover upon the policy, and equitable relief is sought to protect the insurer against loss of its defense by the expiration of the period after which the policy by its terms is to become incontestable."

where the beneficiaries would be if it omitted to strike swiftly? Often a family breaks up and changes its abode after the going of its head. The like might happen to this family. To say that the insurer shall keep watch of the coming and going of the survivors is to charge it with a heavy burden. The task would be hard enough if beneficiaries were always honest. The possibility of bad faith, perhaps concealed and hardly provable, accentuates the difficulty. There are statements by judges of repute which suggest a possibility that the contest barrier may stand though the holder of the policy has gone to foreign lands. *New York Life Ins. Co.* v. *Panagiotopoulos,* 80 F. (2d) 136, 139. There are statements that it will stand though an action at law, brought within the period, had been dismissed or discontinued later. See *New York Life Ins. Co.* v. *Seymour,* 45 F. (2d) 47, 48; *Harnischfeger Sales Corp.* v. *National Life Ins. Co.,* 72 F. (2d) 921, 925; *New York Life Ins. Co.* v. *Truesdale,* 79 F. (2d) 481, 485, with which contrast *New York Life Ins. Co.* v. *Miller,* 73 F. (2d) 350, 355; *Thomas* v. *Metropolitan Life Ins. Co.,* 135 Kan. 381, 387; 10 P. (2d) 864, and *Powell* v. *Mutual Life Ins. Co.,* 313 Ill. 161, 170; 144 N. E. 825. Whether such statements go too far we are not required to determine, for a slight variance in the facts, as, e. g., in the rule prevailing in the jurisdiction where the final suit is brought, may have a bearing on the conclusion. At least in such warnings there are possibilities of danger which a cautious insurer would not put aside as visionary. "Where equity can give relief plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law." *Davis* v. *Wakelee,* 156 U. S. 680, 688. To this must be added the danger that witnesses may disappear and evidence be lost. A remedy at law does not exclude one in equity unless it is equally prompt and certain and in other ways efficient. *Boyce's Executors* v. *Grundy,* 3

Pet. 210; *Drexel* v. *Berney,* 122 U. S. 241; *Walla Walla* v. *Walla Walla Water Co.,* 172 U. S. 1; *Union Pacific R. Co.* v. *Weld County,* 247 U. S. 282, 287. "It must be a remedy which may be resorted to without impediment created otherwise than by the act of the party." *Cable* v. *United States Life Ins. Co., supra,* at p. 303. Here the insurer had no remedy at law at all except at the pleasure of an adversary. There was neither equality in efficiency nor equality in certainty nor equality in promptness. "The remedy at law cannot be adequate if its adequacy depends upon the will of the opposing party." *Bank of Kentucky* v. *Stone,* 88 Fed. 383, 391; cf. *Lincoln National Life Ins. Co.* v. *Hammer,* 41 F. (2d) 12, 16. To make a contract incontestable after the lapse of a brief time is to confer upon its holder extraordinary privileges. We must be on our guard against turning them into weapons of oppression.

The argument is made that the suits in equity should have been dismissed when it appeared upon the trial that after the filing of the bills, and in October, 1932, the beneficiaries of the policies had sued on them at law. But the settled rule is that equitable jurisdiction existing at the filing of a bill is not destroyed because an adequate legal remedy may have become available thereafter. *Dawson* v. *Kentucky Distilleries Co.,* 255 U. S. 288, 296; *Lincoln National Life Ins. Co.* v. *Hammer, supra; New York Life Ins. Co.* v. *Seymour, supra.* There is indeed, a possibility that the bringing of actions at law might have been used by the respondents to their advantage if they had not chosen by a stipulation to throw the possibility away. A court has control over its own docket. *Landis* v. *North American Co.,* 299 U. S. 248. In the exercise of a sound discretion it may hold one lawsuit in abeyance to abide the outcome of another, especially where the parties and the issues are the same. *Ibid.* If request had been made by the respondents to suspend

the suits in equity till the other causes were disposed of, the District Court could have considered whether justice would not be done by pursuing such a course, the remedy in equity being exceptional and the outcome of necessity. Cf. *Harnischfeger Sales Corp.* v. *National Life Ins. Co.*, 72 F. (2d) 921, 922, 923. There would be many circumstances to be weighed, as, for instance, the condition of the court calendar, whether the insurer had been precipitate or its adversaries dilatory, as well as other factors. In the end, benefit and hardship would have to be set off, the one against the other, and a balance ascertained. *Landis* v. *North American Co., supra.* But respondents, as already indicated, gave that possibility away. They stipulated that the issues in equity should be tried in advance of those at law, and that only such issues, if any, as were left should be disposed of later on. The cases were allowed to stand as if challenge to the suits had been made by a demurrer only. So challenged, they prevail.

The decree should be reversed, and the cause remanded to the Court of Appeals for a consideration of the merits and for other proceedings in accord with this opinion.

Reversed.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* MIDLAND MUTUAL LIFE INSURANCE CO.

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

No. 257. Argued January 7, 1937.—Decided February 15, 1937.

1. Where a life insurance company, at foreclosure sale, bid the principal of its mortgage loan plus accrued interest and took over the property in satisfaction of the whole debt without payment and repayment of any cash, *held* that the amount of the interest was taxable as income "received during the taxable year from

interest," Revenue Act 1928, § 202 (a), even though the property, when so acquired, was worth less than the amount of the principal. P. 222.

The bid was made without regard to the value of the property apparently for the purpose of avoiding loss of investment in case of redemption by the mortgagor. The property was carried on the company's books as an asset, valued at the principal of the loan plus certain expenses. The interest was not entered either as asset or as income.

2. The term "interest" in the Act, *supra,* is used generically. P. 223.
3. A receipt of interest is taxable as income, whether paid in cash or by credit. *Id.*
4. Bookkeeping entries, though in some circumstances of evidential value, are not determinative of tax liability. *Id.*
5. A mortgagee who, at foreclosure sale, acquires the property by bid of principal and interest, acquires the same rights *qua* purchaser as the stranger who buys for cash, and in either case the debt, including the interest, is paid. *Id.*
6. Where the legal effect of a transaction fits the plain letter of a tax act, the transaction is included unless a definite intent to exclude it is clearly revealed in the Act or its history. P. 224.
7. Tax laws are construed with a view to their efficient administration. P. 225.
8. The tax in this case is not inconsistent with rights of mortgagees as defined in *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555. P. 226.

83 F. (2d) 629, reversed.

CERTIORARI, 299 U. S. 527, to review a judgment reversing a decision of the Board of Tax Appeals sustaining an increased income tax assessment.

Mr. David E. Hudson, with whom *Solicitor General Reed, Assistant Attorney General Jackson,* and *Messrs. Sewall Key* and *Maurice J. Mahoney* were on the brief, for petitioner.

Mr. Wm. Marshall Bullitt, with whom *Mr. F. J. Wright* was on the brief, for respondent.

The fair market value of the property, at the time the company acquired it, was only $114,500, which was

about $9,000 less than the principal debt, exclusive of all interest. This express finding of the Board of Tax Appeals, in exact accord with the uncontradicted testimony, was an express finding "upon the ultimate question of fact upon which the rights of the parties depend," *Botany Mills* v. *United States,* 278 U. S. 282, 290, which is not open to review here. *Botany Mills* v. *United States, supra; Phillips* v. *Commissioner,* 283 U. S. 589, 600; *Burnet* v. *Leininger,* 285 U. S. 136, 138–9.

The company did not "receive," in cash or in property, the accrued interest or any part thereof and, therefore, the amount was not "gross income" under § 202, Revenue Act of 1928.

Indeed, the company actually lost nearly $9,000 of its principal and its entire $15,538.60 accrued interest—an actual $24,462.17 total money loss on its mortgage investment.

The company did not capitalize any part of the delinquent interest; did not treat it as income in any way; did not, directly or indirectly, carry it as any part of the cost of the properties or as an asset; and did not include such interest as an asset, or otherwise, in its annual statement or in its reports to the insurance department.

A "bid" price is not conclusive as to "fair value." *Ballentyne* v. *Smith,* 205 U. S. 285. The bids of a mortgagee and a third party occupy essentially different relations to the property's "fair value." The two situations are very different. *Louisville Bank* v. *Radford,* 295 U. S. 555, 594.

The whole point of the *Radford* case, *supra,* was that no matter what the fair or market value was, the mortgagee had the right to full cash payment, with interest, or to take the property itself.

So here. The company was unable to collect its debt with interest in cash. Consequently, it took the proper-

ty; but the act of taking did not establish—certainly did not conclusively establish—what its "fair value" was.

When a mortgagee "buys in" property, he does not pay in cash as a stranger does; neither does he pay his bid with anything that is worth in cash even the amount of the bid—he simply gets the thing pledged, through a judicial foreclosure sale, instead of by a strict foreclosure.

If, in order to avoid foreclosure expenses, etc., the mortgagor voluntarily conveys the property to the mortgagee in full satisfaction of the debt and interest, and the property is worth less than the debt, the Commissioner now concedes that no income has been received, and that the mortgagee has not "received" any interest. *Helvering* v. *Missouri State Life Ins. Co.*, 78 F. (2d) 778, 780, reversing the Board of Tax Appeals' decision (29 B. T. A. 408) in favor of the Commissioner on that point. Cf. Prudential Insurance Co., 33 B. T. A. 334; American Central Life Ins. Co., 30 B. T. A. 1190 (a).

Gain or profit is the essential idea of "income"; and in determining what constitutes "income," substance and fact rather than form are to be given controlling weight.

The stability of life insurance is based upon the assumption that the company will earn compound interest at the rate assumed in the calculation of the premium.

The Commissioner's theory that a life insurance company "receives" interest, when, in point of fact, it cannot collect the interest from the mortgagors and has to take over real estate of a "fair market value" greatly less than even the principal of the debt (thereby losing all of its interest), is obviously untenable, because the company could not pay its policy claims with such non-existent purely theoretical interest.

Distinguishing: *Missouri State Life Ins. Co.* v. *Commissioner,* 78 F. (2d) 778; and *National Life Ins. Co.* v. *United States,* 4 F. Supp. 1000.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Since 1921, the Revenue Acts have made this provision for taxing the income of life insurance companies.[1] The gross income is limited to that "received during the taxable year from interest, dividends, and rents." Upon the net income, ascertained by making prescribed deductions, the tax under the Act here applicable is 12 per cent.[2] The general provisions of the Revenue Acts concerning capital "gains and losses" and "bad debts" are not applicable to life insurance companies.[3]

In 1930, the Midland Mutual Life Insurance Company of Ohio caused to be foreclosed several mortgages on real estate given to secure loans which were in default. It was the only bidder; its bid was accepted; the property was conveyed to it; and in no case was there redemption. At each foreclosure sale the company had bid an amount which included interest as well as the principal. The interest so bid, aggregating on the foreclosed mortgages $5,456.99, was not included in the company's income tax return. The Commissioner of Internal Revenue decided that this interest was taxable and, accordingly, determined a deficiency in the company's income tax for 1930. His determination was approved by the Board of Tax Appeals. The Circuit Court of Appeals reversed the decision of the Board, 83 F. (2d) 629. We granted certiorari because of conflict with *Helvering* v. *Missouri State Life*

[1] See *National Life Insurance Co.* v. *United States*, 277 U. S. 508, 522.

[2] Revenue Act of 1928, § 201 (b) (1), 45 Stat. 791, 842.

[3] Compare §§ 244 (a), 245 (a), of the Revenue Acts of 1921, 42 Stat. 227, 261; 1924, 43 Stat. 253, 289; 1926, 44 Stat. 9, 47; §§ 202 (a), 203 (a), of the Revenue Acts of 1928, 45 Stat. 791, 842; 1932, 47 Stat. 169, 224; 1934, 48 Stat. 680, 731, 732; 1936, 49 Stat. 1648, 1710. See *Helvering* v. *Independent Life Insurance Co.*, 292 U. S. 371, 377, 379; U. S. Treas. Reg. 74, Art. 951.

Ins. Co., 78 F. (2d) 778, and *National Life Ins. Co.* v. *United States,* 4 F. Supp. 1000.

The following additional facts stipulated were adopted by the Board of Tax Appeals as its findings: The Company kept its books on a "calendar year" "cash receipts and disbursements" basis, entering only payments of interest actually made to it during the year. Upon its acquiring title to the foreclosed properties, the investments were transferred on its books from the mortgage loan account to the real estate account and were carried thereon as assets at amounts which were equal to the principal of the loans secured by the mortgages plus any disbursements made for taxes, court costs, attorneys fees or insurance premiums. The amount of interest included in the bids on foreclosure was not carried on the books as part of the cost of the properties or as an asset. Nor was it entered on the books or likewise treated as income. All of the properties here involved were located in States where a period of redemption from foreclosure is allowed. The company issued to its representatives having charge of foreclosures in those States general instructions to bid on its behalf such sums as would enable the company to realize no loss on account of its investment in case of redemption. The bids here involved were made pursuant to those instructions, without regard to the then actual value of the mortgage property.[4]

[4] A large majority of the properties were located in Michigan. By Michigan law, it is said, the mortgagor is allowed one year from the date of the foreclosure sale within which he may redeem the property by paying to the purchaser the amount bid for the property plus interest from the time of the sale at the rate borne by the mortgage, even though the amount of such bid be less than the total amount of the mortgagee's investment in the property. See Comp. Laws 1929, c. 266, §§ 14435, 14436; compare *Vosburgh* v. *Lay,* 45 Mich. 455; 8 N. W. 91. The purchaser cannot, under the local law, acquire title until after the expiration of the redemption period. See Comp. Laws 1929, c. 266, § 14434. The mortgagee may, "fairly and

The company introduced evidence that the fair market value of the properties was, at the dates of foreclosure and of acquiring title, less than the amount of the principal due on the mortgages. This evidence was deemed by the Board immaterial; and it accordingly made no finding as to fair market value.[5]

First. The company contends that it did not "receive" the $5,456.99 (or any part thereof) either in cash or in property; and, hence, that it was not "gross income." Confessedly no interest was received in cash. The company insists that none was received in property. It argues that its bid may not be taken as conclusive evidence of the value of the property, invoking *Ballentyne* v. *Smith,* 205 U. S. 285; that the Board's refusal to consider the evidence as to value requires us to hold that the real estate acquired on foreclosure was of a fair value less than the amount of the principal of the mortgage debt; that the proceeds of a mortgage sale must be applied first to the satisfaction of the principal before income may be held received, citing *Doyle* v. *Mitchell Bros. Co.,* 247 U. S. 179, 185; and that since the value did not equal the principal, there were no proceeds of the sales applicable to the interest, hence, no taxable income. In support of this argument, the company points to the fact that it did not, on its books, treat the delinquent interest as income; did not, directly or indirectly, carry the

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in good faith," bid the property in, (*id.,* § 14432), and he enjoys the same rights as purchaser as would a third party. See *Ledyard* v. *Phillips,* 47 Mich. 305, 308; 11 N. W. 170.

[5] The order of the Court of Appeals, which reversed the decision of the Board, remanded the cause for further proceedings. We are told by counsel for the company that thereafter the Board found, on the evidence above referred to, that the values of the several properties were less than the principal of the loans. This finding, made after the filing of the petition for certiorari, though apparently before its allowance, was not made part of the record. It is, therefore, disregarded.

interest as part of the cost of the properties or as an asset; and did not include the interest as an asset in its annual statement or in its reports to insurance departments.

The arguments rest upon a misconception. The terms "interest," "dividends," and "rents," employed in the statute simply and without qualification or elaboration, were plainly used by Congress in their generic meanings, as broadly descriptive of certain kinds of "income." Compare *Lynch* v. *Hornby,* 247 U. S. 339, 344; *Helvering* v. *Stockholms Enskilda Bank,* 293 U. S. 84, 86. We cannot say that Congress did not intend to include in its definition a case like the present merely because the taxpayer received a credit rather than money or other tangible property. Compare *Raybestos-Manhattan, Inc.* v. *United States,* 296 U. S. 60, 62, 64. A receipt of interest is taxable as income whether paid in cash or by a credit. Compare *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716; *United States* v. *Boston & Maine R. R., id.,* 732. This credit, it is true, was not entered on the taxpayer's books as interest or as an asset. But book-keeping entries, though in some circumstances of evidential value, are not determinative of tax liability. Compare *Doyle* v. *Mitchell Bros. Co.,* 247 U. S. 179, 187. The intent to use the full extent of power being clearly evident, we must not confine the legislation within narrower forms than the statutory language would indicate. Compare *Irwin* v. *Gavit,* 268 U. S. 161, 166; *Helvering* v. *Stockholms Enskilda Bank, supra,* 89.

Second. The company argues that uncontradicted evidence shows the fair market value of the mortgaged properties to have been less than the principal of the debts and that therefore the interest paid was not income within the meaning of the Act. A mortgagee who, at foreclosure sale, acquires the property pursuant to a bid of the principal and accrued interest is, as purchaser and grantee, in a position no different from that of a

stranger who acquires the property on a bid of like amount. It is true that the latter would be obliged to pay in cash the amount of his bid, while the formality of payment in cash is ordinarily dispensed with when the mortgagee acquires the property on his own bid. But the rights acquired *qua* purchaser are the same in either case; and, likewise, the legal effect upon the mortgage debt is the same. In each case the debt, including the interest accrued, is paid. Where the stranger makes the purchase, the debt is discharged by a payment in cash; where the mortgagee purchases the property, the debt is discharged by means of a credit. The amount so credited to the mortgagor as interest paid would be available to him as a deduction in making his own income tax returns.[6] It would be strange if the sum deductible by the mortgagor debtor were not chargeable to the mortgage creditor as income received. Where the legal effect of a transaction fits the plain letter of the statute, the tax is held payable, unless there is clearly revealed in the Act itself or in its history a definite intention to exclude such transactions from the operation of its applicable language. See *Central National Bank* v. *United States,* 137 U. S. 355, 364; [7] *Treat* v. *White,* 181 U. S. 264, 268; *Provost* v. *United States,* 269 U. S. 443, 456, 457, 458; *Old Colony R. Co.* v. *Commissioner,* 284 U. S. 552, 560, 561. Respondent here makes no such showing.

Third. The company argues that taxation is a practical matter; that we should be governed by realities; that the reality is, that all the company got was the property; and that the property was worth less than the principal of the debt. The "reality" of the deal here involved

[6] See Revenue Act of 1928, § 23 (b), 45 Stat. 791, 799.

[7] See also *Kentucky Improvement Co.* v. *Slack,* 100 U. S. 648, 658, 659; *Bailey* v. *Railroad Co.,* 106 U. S. 109, 115, 116; compare *Cary* v. *Savings Union,* 22 Wall. 38, 41.

would seem to be that respondent valued the protection of the higher redemption price as worth the discharge of the interest debt for which it might have obtained a judgment. Moreover, the company's argument ignores the needs of an efficient system of taxation. The administration of the income tax law would be seriously burdened if it were held that when a mortgagee bids in the property for a sum including unpaid interest, he may not be taxed on the interest received except upon an inquiry into the probable fair market value of the property.[8] "At best, evidence of value is largely a matter of opinion, especially as to real estate." *Montana Railway Co.* v. *Warren,* 137 U. S. 348, 353. There is nothing unfamiliar in taxing on the basis of the legal effect of a transaction. Income may be realized upon a change in the nature of legal rights held, though the particular taxpayer has enjoyed no addition to his economic worth. Compare *Lynch* v. *Hornby,* 247 U. S. 339, 344, 346; *United States* v. *Phellis,* 257 U. S. 156, 170, 171; *Marr* v. *United States,* 268 U. S. 536, 540; *Burnet* v. *Commonwealth Improvement Co.,* 287 U. S. 415, 419, 420. "The income tax laws do not profess to embody perfect economic theory. They ignore some things that either a theorist or a business man would take into account in determining the pecuniary condition of the taxpayer." *Weiss* v. *Wiener,* 279 U. S. 333, 335. Compare *Nicol* v. *Ames,* 173 U. S. 509, 516; *Tyler* v. *United States,* 281 U. S. 497, 503.[9]

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[8] Compare *Bell's Gap R. Co.* v. *Pennsylvania,* 134 U. S. 232, 236; *Hatch* v. *Reardon,* 204 U. S. 152, 159; *Paddell* v. *New York,* 211 U. S. 446, 449, 450; *New York* v. *Latrobe,* 279 U. S. 421, 427.

[9] Taxability has frequently been determined without reference to factors which the accountant, economist or business man might deem relevant to the computation of net gain. Compare *Brushaber* v. *Union Pacific R. Co.,* 240 U. S. 1; *Tyee Realty Co.* v. *Anderson,* 240 U. S. 115; *Weiss* v. *Wiener,* 279 U. S. 333; *Helvering* v. *Independent*

Fourth. The company contends that to tax the mortgagee as upon interest received is inconsistent with the rule declared in *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555, 594, that the mortgagee is entitled to have "the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of the proceeds of a fair competitive sale or by taking the property itself." The charge of inconsistency is unfounded. The company exercised its right to have a sale. At the sale, it was free either to bid or to refrain from bidding. If it bid, it was free to bid such sum as it pleased. It chose to bid the full amount of principal and interest. Thus it obtained, in legal contemplation, full payment of the interest as well as the principal. To tax the company upon the full amount of interest received as a result of its own bid in no way impairs its rights as mortgagee. Compare *Texas & Pacific Ry. Co.* v. *United States,* 286 U. S. 285, 289. If the bid had been insufficient to yield full payment of the mortgage debt, principal and interest, the company would have been entitled to a judgment for the deficiency. If the company had refrained from bidding, and a stranger had bid more than the principal, the company would obviously have been taxable upon the excess up to the amount of the interest due. Perhaps it was the company's custom of bidding the full amount of principal and interest which deterred bidding by others.

Reversed.

MR. JUSTICE McREYNOLDS, dissenting.

The judgment below, I think, is correct and should be affirmed. A well-considered opinion supports it.

Life Insurance Co., 292 U. S. 371. The exigencies of a tax determined on an annual basis may lead to the inclusion as income of items which might be shown to involve no gain if the transactions were viewed as a whole over several years. Compare *Burnet* v. *Sanford & Brooks Co.,* 282 U. S. 359, 364, 365; *Brown* v. *Helvering,* 291 U. S. 193, 199; *Spring City Foundry Co.* v. *Commissioner,* 292 U. S. 182, 189, 190.

The notion that Congress intended to tax the mere hope of recouping a loss sometime in the future should be definitely rejected.

To support the assertion that here the company collected interest, when in fact everything received was worth less than the sum loaned, requires resort to theory at war with patent facts. The Company got nothing out of which to pay the exactment; its assets were not augmented. Like imaginary "receipts" of interest often repeated and similarly burdened would hasten bankruptcy.

Divorced from reality taxation becomes sheer oppression.

AETNA LIFE INSURANCE CO. *v.* HAWORTH ET AL.

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

No. 446. Argued February 4, 1937.—Decided March 1, 1937.

1. The Federal Declaratory Judgment Act deals with "controversies" in the constitutional sense and is procedural only. P. 239.
2. In the exercise of its control over practice and procedure of the lower federal courts, Congress is not limited to traditional forms or remedies but may create and improve as well as abolish or restrict. P. 240.
3. A controversy, in the constitutional sense and in the sense of the Declaratory Judgment Act, must be justiciable—it must be definite and concrete, touching the legal relation of parties having adverse legal interests—it must be a real and substantial controversy admitting of specific relief through a conclusive decree, as distinguished from an opinion advising what the law would be upon a hypothetical statement of facts. P. 240.
4. There may be adjudication of the rights of parties without award of process or payment of damages and where no allegation of irreparable injury is made. P. 241.
5. Where the holder of life insurance policies claims, under disability benefit clauses, that, notwithstanding nonpayment of premiums, the policies, by reason of his total and permanent dis-

ability, remain in force and entitle him to cash benefits, and makes repeated and persistent demands upon the insurer accordingly; whereas the insurer denies that such disability existed and insists that the policies have lapsed because the premiums were not paid, there is an "actual controversy" on which suit may be maintained by the insurer against the insured under the Federal Declaratory Judgment Act P. 242.

84 F. (2d) 695, reversed.

CERTIORARI, 299 U. S. 536.

This suit by the Insurance Company, under the Federal Declaratory Judgment Act, was dismissed by the District Court upon the ground that there was no justiciable controversy. 11 F. Supp. 1016. The decree was affirmed by the court below.

Mr. E. R. Morrison, with whom *Messrs. Berkeley Cox* and *Douglas Stripp* were on the brief, for petitioner.

The Declaratory Judgment Act is constitutional. *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288; *Nashville, C. & St. L. Ry.* v. *Wallace,* 288 U. S. 249.

The bringing of this suit does not deprive respondents of a jury trial. The Act makes express provision for submission of questions of fact to a jury.

There is an actual controversy within the meaning of the Declaratory Judgment Act and the Federal Constitution.

The allegations of the petition show there is a controversy of a definite, specific and substantial character. The claims of the policy-holder have been clearly and repeatedly asserted in writing, and petitioner's denials of these claims have been equally specific and consistent. The respective rights of the parties depend upon a determination of the single clear-cut issue—whether disability existed when payment of premiums ceased. The right of the petitioner to treat the policies as lapsed became complete when premium payments ceased, if the

requisite disability did not then exist. On the other hand, the right of the insured to disability benefits and the maintenance of the policies in force during the continuance of disability then became complete if such disability did exist.

This is not an attempt to obtain an opinion based on an uncertain or hypothetical state of facts, as in *Liberty Warehouse Co.* v. *Grannis,* 273 U. S. 70.

The claims of the insured are not mere expressions of opinion in private conversation, as in *Willing* v. *Chicago Auditorium Assn.,* 277 U. S. 274, 288, nor indefinite and unspecific as in *New Jersey* v. *Sargent,* 269 U. S. 328. On the contrary, they are couched in formal language, attested before a notary public, and accompanied by a physician's sworn certificate. At frequent intervals and at least thirteen times, beginning in 1930, these claims have been reasserted in similar form.

The present suit is similar in its essential characteristics to *Nashville, C. & St. L. Ry.* v. *Wallace,* 288 U. S. 249. See also *Gully* v. *Interstate Natural Gas Co.,* 82 F. (2d) 145, cert. den., 298 U. S. 688; *Travelers Insurance Co.* v. *Helmer,* 15 F. Supp. 355; *New York Life Ins. Co.* v. *London,* 15 F. Supp. 586.

The allegations of the petition disclose a situation which would enable the policyholder to maintain an action against the petitioner.

A party who would normally be defendant under other forms of procedure may seek a declaration under the Act. *Fidelity National Bank & Trust Co.* v. *Swope,* 274 U. S. 123; *Travelers Insurance Co.* v. *Helmer, supra; New York Life Ins. Co.* v. *London, supra.*

There are other decisions by the federal district courts holding that suits may be brought under the Act by the party to the controversy who would normally otherwise be the defendant. *Ohio Casualty Co.* v. *Plummer,* 13 F. Supp. 169; *Commercial Casualty Co.* v. *Humphrey,* 13 F.

Supp. 174; *Black* v. *Little,* 8 F. Supp. 867; *Lionel Corp. v. De Filippis,* 11 F. Supp. 712; *Zenie Bros.* v. *Miskend,* 10 F. Supp. 779; *McKesson & Robbins* v. *Charsky,* 15 F. Supp. 209.

Like holdings have been made in numerous cases under state declaratory judgment acts. *American Motorists Ins. Co.* v. *Central Garage,* 86 N. H. 362; *Owen* v. *Fletcher Savings & Trust Co.,* 99 Ind. App. 365; *Pulsifer* v. *Walker,* 85 N. H. 434; *Hess* v. *Country Club Park,* 213 Cal. 613; *Tolle* v. *Struve,* 124 Cal. App. 263; *Utica Mutual Ins. Co.* v. *Glennie,* 132 Misc. Rep. 899; *Woodward* v. *Fox West Coast Theaters,* 36 Ariz. 251. Also in England. *Guaranty Trust Co.* v. *Hannay & Co.,* (C. A.) 2 K. B. 536, 555 (1915). See *Faulkner* v. *Keene,* 85 N. H. 147, 155; Borchard in Chicago Law Review, 1936, Vol. 4, No. 1.

The report of the Senate Committee on the Judiciary accompanying the bill to amend the Judicial Code by adding a new section to be numbered 274D, Report No. 1005, 73d Cong., 2d Sess., May 10, 1934; Borchard, Declaratory Judgments, p. 634, states the elements required for rendering a declaratory judgment. It is not indicated that there must be either a pending suit or a threat of immediate suit by the parties against whom the declaration is sought. The cases do not make such a requirement.

One of the primary purposes of declaratory judgment procedure is to provide means for the prompt settlement of controversies. This objective would not be attained if a party asserting a claim could prevent his adversary from instituting an action by the simple expedient of not stating when he proposed to sue to enforce the claim.

Petitioner is entitled to prompt and efficient relief and should not be compelled to wait until such time as its adversaries choose to bring suit. *Bank* v. *Stone,* 88 Fed. 383, 391, opinion by Judge Taft with whom sat Mr.

Justice Harlan and Judge Lurton; *Mutual Life Ins. Co.* v. *Pearson,* 114 Fed. 295; *Lincoln National Life Ins. Co.* v. *Hammer,* 41 F. (2d) 12. See *Tolle* v. *Struve,* 124 Cal. App. 263; *Petition of Kariher,* 284 Pa. 455, 463.

The repeated, formal assertions of claim by the policyholder in the case at bar are far more conclusive as showing a determination to enforce these claims by court action than would be a mere threat to sue.

A decision in this suit will be a final determination of the controversy. *Fidelity National Bank & Trust Co.* v. *Swope,* 274 U. S. 123.

The fact that rights which might subsequently accrue cannot be determined in this suit is no ground for refusing to determine present rights asserted in the form of a justiciable controversy.

The cases cited by respondents in this connection simply lay down the rule that the judgment must finally dispose of the then existing controversy. Cf. *Lewis* v. *Greene,* L. R. (1905), 2 Ch. Div. 340.

The fact that the respondents could obtain a final judgment in their favor on the cause of action disclosed in the petition for a declaratory judgment would seem to be conclusive proof that a declaratory judgment rendered under the petition would possess all the essential elements of finality.

The right to be free from an unfounded claim, or to know whether a claim is well founded, and the right to treat a contract as ended, may well be considered rights within the meaning of the Act.

But the Act does not limit declarations to declarations of rights. It provides for a declaration of "rights and *other* legal relations." Rights must have been considered legal relations by the Congress, else the word "other" would not have been included. If a right is a legal relation, then the corresponding obligation must necessarily be a legal relation. Therefore, whether or not petitioner

has rights to be declared, it is entitled to come into court and ask for a declaration as to its obligations.

There is ample authority for the proposition that a declaration of immunity from asserted claims is a proper one under the Act. Sen. Rep. No. 1005, 73d Cong., 2d Sess., 1934. See *Nashville, C. & St. L. Ry.* v. *Wallace, supra; Gully* v. *Interstate Natural Gas Co., supra; Guaranty Trust Co.* v. *Hannay & Co.*, C. A. 2 K. B. 536 (1915); *Societe Maritime & Commercial* v. *Venus S. S. Co.*, 9 Comm. Cas. 289 (1904); Borchard, Declaratory Judgments, pp. 74 *et seq.*

However, petitioner's claim that there are rights and other legal relations disclosed by the petition which are properly the subject of a declaration, does not need to be based entirely upon the proposition that immunity from obligation comes within that phrase of the Act. If it is determined that the policyholder has been totally disabled, then the relationship of the insured and insurer exists between him and petitioner, and the relationship of creditor and debtor also. If a declaration is granted as prayed by petitioner, then neither of these relationships exist between it and the policyholder. Cf. *Columbian National Life Ins. Co.* v. *Foulke*, 13 F. Supp. 350, 352.

Irreparable injury need not be alleged, but is alleged and exists in this case.

The plaintiff is required annually to set aside substantial reserves for each of the policies until it is judicially determined that they have lapsed and are null and void. The setting aside of these reserves constitutes more than a bookkeeping entry, and we submit that the court of appeals was in error in holding that the company's "control over such funds is neither modified nor affected" by the notices served upon petitioner by the respondents.

The status of insurance reserves was considered by this Court in *Maryland Casualty Co.* v. *United States*, 251 U. S. 342, 350.

So long as these reserves are required to be set up by the company, they constitute in a very real sense both a segregation of assets and a liability of the company.

Not only the company, but all of its policyholders are interested in seeing that premiums are promptly collected on all outstanding policies, and that in all cases of defaulted premiums the policies shall be promptly forfeited or cancelled. All matters affecting the rights and interests of the policyholder directly affect the business of the company. *New York Life Ins. Co.* v. *Statham,* 93 U. S. 24, 29.

There are other reasons why a denial of the relief prayed for and the resulting delay in the determination of this controversy would be injurious to petitioner. By § 5929, Rev. Stats., Missouri, 1929, an insurer may be subjected to a penalty of 10% of the claim, and the payment of opposing party's attorney's fee, for vexatious delay in claimed payment. This added liability is ordinarily held to be a question for the jury. *Gueringer* v. *Fidelity & Deposit Co.,* 184 S. W. 936. If suit should be brought for accumulated disability benefits and petitioner should be held liable therefor, it would be compelled to pay interest at the rate of 6% per annum from the date that the respective payments were due, under the provisions of § 2839, Rev. Stats., Missouri, 1929.

It is unconscionable that the respondents should have the right to hold this claim "as a menace and threat over the head of the complainant," while in the meantime evidence may become "lost or unavailable." *Schmidt* v. *West,* 104 Fed. 272. Relief in equity has often been granted to avoid postponement of litigation to a "time when the facts are no longer capable of complete proof or have become involved in the obscurities of time." Story, Eq. Juris., § 705.

Mr. Rees Turpin for respondents.

The petition does not present an actual or justiciable controversy. The Declaratory Judgment Act does not

change the essential requisites for the exercise of judicial power. Nor does it for the purposes of the Act make that a controversy which before its enactment was not a controversy in the constitutional sense. *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288.

The petitioner asks the court to determine a fact, the only value of which determination would be that it could be employed by the petitioner as a defense in the event of a future suit on any of the policies.

When the petition was filed there was no present right of recovery of an amount sufficient to give a federal court jurisdiction. The petition, therefore, does not present a case or controversy between the parties as to the right of either to a money judgment against the other in a federal court. The controversy cognizable here, if any there be, must, therefore, be about something other than a present right to a judgment for money.

The petitioner says its petition presents a controversy of fact, the adjudication of which in its favor will be a good defense to a possible future suit upon policies written in the face amount of more than $3,000.00. It argues therefrom that the determination of such fact would be a declaration of rights or legal relations involving the jurisdictional amount.

The respondents say no controversy in the constitutional sense is presented.

A dispute out of court about the present existence of a mutable fact, which may become an element in the determination of an action at law that may be commenced at some future time, is not a controversy in the sense in which that word is used in the Constitution. *Piedmont & Northern Ry.* v. *United States,* 280 U. S. 469; *Nashville, C. & St. L. Ry.* v. *Wallace,* 288 U. S. 249; *Fidelity National Bank* v. *Swope,* 274 U. S. 123; *Willing* v. *Chicago Auditorium Assn.,* 277 U. S. 274; *Arizona* v. *California,* 283 U. S. 423; *Alabama* v. *Arizona,* 291 U. S.

286; *United States* v. *West Virginia,* 295 U. S. 463; *New Jersey* v. *Sargent,* 269 U. S. 328; *Ashwander* v. *Tennessee Valley Authority, supra.*

It is generally recognized that declaratory judgments are not applicable to every difference, or to every controversy, that may arise between prospective litigants. In all jurisdictions it has been declared that the court has a discretion in determining whether under the law it should declare a judgment at all in any particular case. *Newsum* v. *Interstate Realty Co.,* 152 Tenn. 302; 3 Freeman on Judgments, 5th ed., par. 1356; *Ziegler* v. *Pickett,* 46 Wyo. 283.

The purpose of the proceeding is not to settle any present "rights or other legal relations," but to settle one particular fact that may later be called into question in a possible suit. The dispute is not even as to a completed fact capable of exact and final ascertainment, but as to a fact probably changing and resting somewhat in opinion. If the insured should now establish the questioned fact, he would not be entitled to a present judgment against the Insurance Company; it would not determine finally his right to a judgment in a future action; the adjudication would not be susceptible of violation and could not call for enforcement; it would not finally adjudicate the standing of the parties.

The declaratory procedure is inappropriate to a judicial investigation of disputed facts, or to an inquiry where, as here, if the decision should go in one way it might involve further litigation, or to an inquiry, as here, that would not necessarily lead to a final determination of the right of one litigant to recover against the other. The discretion of the court to refuse to declare a judgment in such cases is generally recognized. *Lewis* v. *Green,* L. R. (1905) 2 Ch. Div. 340; *Ziegler* v. *Pickett,* 46 Wyo. 283; *Newsum* v. *Interstate Realty Co.,* 152 Tenn. 302; 3 Freeman, Judgments, 5th ed., par. 1356;

Ladner v. *Siegel,* 294 Pa. 368; *Washington Detroit Theater Co.* v. *Moore,* 249 Mich. 673; 41 Yale L. J., June, 1932, p. 1195; 45 Harv. L. Rev., p. 1089.

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

The question presented is whether the District Court had jurisdiction of this suit under the Federal Declaratory Judgment Act. Act of June 14, 1934, 48 Stat. 955; Jud. Code, § 274D; 28 U. S. C. 400.[1]

The question arises upon the plaintiff's complaint which was dismissed by the District Court upon the ground that it did not set forth a "controversy" in the constitutional sense and hence did not come within the legitimate scope of the statute. 11 F. Supp. 1016. The decree of dismissal was affirmed by the Circuit Court of Appeals. 84 F. (2d) 695. We granted certiorari. November 16, 1936.

[1] The Act provides:

"(1) In cases of actual controversy the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

"(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

"(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not."

From the complaint it appears that plaintiff is an insurance company which had issued to the defendant, Edwin P. Haworth, five policies of insurance upon his life, the defendant Cora M. Haworth being named as beneficiary. The complaint set forth the terms of the policies. They contained various provisions which for the present purpose it is unnecessary fully to particularize. It is sufficient to observe that they all provided for certain benefits in the event that the insured became totally and permanently disabled. In one policy, for $10,000, issued in 1911, the company agreed, upon receiving the requisite proof of such disability and without further payment of premiums, to pay the sum insured, and dividend additions, in twenty annual instalments, or a life annuity as specified, in full settlement. In four other policies issued in 1921, 1928 and 1929, respectively, for amounts aggregating $30,000, plaintiff agreed upon proof of such disability to waive further payment of premiums, promising in one of the policies to pay a specified amount monthly and in the other three to continue the life insurance in force. By these four policies the benefits to be payable at death, and the cash and loan values to be available, were to be the same whether the premiums were paid or were waived by reason of the described disability.

The complaint alleges that in 1930 and 1931 the insured ceased to pay premiums on the four policies last mentioned and claimed the disability benefits as stipulated. He continued to pay premiums on the first mentioned policy until 1934 and then claimed disability benefits. These claims, which were repeatedly renewed, were presented in the form of affidavits accompanied by certificates of physicians. A typical written claim on the four policies is annexed to the complaint. It states that while these policies were in force, the insured became

totally and permanently disabled by disease and was "prevented from performing any work or conducting any business for compensation or profit"; that on October 7, 1930, he had made and delivered to the company a sworn statement " for the purpose of asserting and claiming his right to have these policies continued under the permanent and total disability provision contained in each of them"; that more than six months before that date he had become totally and permanently disabled and had furnished evidence of his disability within the stated time; that the annual premiums payable in the year 1930 or in subsequent years were waived by reason of the disability and that he was entitled to have the policies continued in force without the payment of premiums so long as the disability should continue.

With respect to the policy first mentioned, it appears that the insured claimed that prior to June 1, 1934, when he ceased to pay premiums, he had become totally and permanently disabled; that he was without obligation to pay further premiums and was entitled to the stipulated disability benefits including the continued life of the policy.

Plaintiff alleges that consistently and at all times it has refused to recognize these claims of the insured and has insisted that all the policies had lapsed according to their terms by reason of the non-payment of premiums, the insured not being totally and permanently disabled at any of the times to which his claims referred. Plaintiff further states that taking loans into consideration four of the policies have no value and the remaining policy (the one first mentioned) has a value of only $45 as extended insurance. If, however, the insured has been totally and permanently disabled as he claims, the five policies are in full force, the plaintiff is now obliged to pay the accrued instalments of cash disability benefits for which two of the policies provide, and the insured

has the right to claim at any time cash surrender values accumulating by reason of the provisions for waiver of premiums, or at his death, Cora M. Haworth, as beneficiary, will be entitled to receive the face of the policies less the loans thereon.

Plaintiff thus contends that there is an actual controversy with defendants as to the existence of the total and permanent disability of the insured and as to the continuance of the obligations asserted despite the nonpayment of premiums. Defendants have not instituted any action wherein the plaintiff would have an opportunity to prove the absence of the alleged disability and plaintiff points to the danger that it may lose the benefit of evidence through disappearance, illness or death of witnesses; and meanwhile, in the absence of a judicial decision with respect to the alleged disability, the plaintiff in relation to these policies will be compelled to maintain reserves in excess of $20,000.

The complaint asks for a decree that the four policies be declared to be null and void by reason of lapse for nonpayment of premiums and that the obligation upon the remaining policy be held to consist solely in the duty to pay the sum of $45 upon the death of the insured, and for such further relief as the exigencies of the case may require.

First. The Constitution limits the exercise of the judicial power to "cases" and "controversies." "The term 'controversies,' if distinguishable at all from 'cases,' is so in that it is less comprehensive than the latter, and includes only suits of a civil nature." Per Mr. Justice Field in *In re Pacific Railway Comm'n,* 32 Fed. 241, 255, citing *Chisholm* v. *Georgia,* 2 Dall. 419, 431, 432. See *Muskrat* v. *United States,* 219 U. S. 346, 356, 357; *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716, 723, 724. The Declaratory Judgment Act of 1934, in its limitation to "cases of actual controversy," manifestly

has regard to the constitutional provision and is operative only in respect to controversies which are such in the constitutional sense. The word "actual" is one of emphasis rather than of definition. Thus the operation of the Declaratory Judgment Act is procedural only. In providing remedies and defining procedure in relation to cases and controversies in the constitutional sense the Congress is acting within its delegated power over the jurisdiction of the federal courts which the Congress is authorized to establish. *Turner* v. *Bank of North America,* 4 Dall. 8, 10; *Stevenson* v. *Fain,* 195 U. S. 165, 167; *Kline* v. *Burke Construction Co.,* 260 U. S. 226, 234. Exercising this control of practice and procedure the Congress is not confined to traditional forms or traditional remedies. The judiciary clause of the Constitution "did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts." *Nashville, C. & St. L. Ry. Co.* v. *Wallace,* 288 U. S. 249, 264. In dealing with methods within its sphere of remedial action the Congress may create and improve as well as abolish or restrict. The Declaratory Judgment Act must be deemed to fall within this ambit of congressional power, so far as it authorizes relief which is consonant with the exercise of the judicial function in the determination of controversies to which under the Constitution the judicial power extends.

A "controversy" in this sense must be one that is appropriate for judicial determination. *Osborn* v. *United States Bank,* 9 Wheat. 738, 819. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. *United States* v. *Alaska S. S. Co.,* 253 U. S. 113, 116. The controversy must be definite and concrete, touching the legal relations of parties having

adverse legal interests. *South Spring Gold Co.* v. *Amador Gold Co.,* 145 U. S. 300, 301; *Fairchild* v. *Hughes,* 258 U. S. 126, 129; *Massachusetts* v. *Mellon,* 262 U. S. 447, 487, 488. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. See *Muskrat* v. *United States, supra; Texas* v. *Interstate Commerce Comm'n,* 258 U. S. 158, 162; *New Jersey* v. *Sargent,* 269 U. S. 328, 339, 340; *Liberty Warehouse Co.* v. *Grannis,* 273 U. S. 70; *New York* v. *Illinois,* 274 U. S. 488, 490; *Willing* v. *Chicago Auditorium Assn.,* 277 U. S. 274, 289, 290; *Arizona* v. *California,* 283 U. S. 423, 463, 464; *Alabama* v. *Arizona,* 291 U. S. 286, 291; *United States* v. *West Virginia,* 295 U. S. 463, 474, 475; *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 324. Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages. *Nashville, C. & St. L. Ry. Co.* v. *Wallace, supra,* p. 263; *Tutun* v. *United States,* 270 U. S. 568, 576, 577; *Fidelity National Bank* v. *Swope,* 274 U. S. 123, 132; *Old Colony Trust Co.* v. *Commissioner, supra,* p. 725. And as it is not essential to the exercise of the judicial power that an injunction be sought, allegations that irreparable injury is threatened are not required. *Nashville, C. & St. L. Ry. Co.* v. *Wallace, supra,* p. 264.

With these principles governing the application of the Declaratory Judgment Act, we turn to the nature of the controversy, the relation and interests of the parties, and the relief sought in the instant case.

Second. There is here a dispute between parties who face each other in an adversary proceeding. The dispute relates to legal rights and obligations arising from the contracts of insurance. The dispute is definite and concrete, not hypothetical or abstract. Prior to this suit, the parties had taken adverse positions with respect to their existing obligations. Their contentions concerned the disability benefits which were to be payable upon prescribed conditions. On the one side, the insured claimed that he had become totally and permanently disabled and hence was relieved of the obligation to continue the payment of premiums and was entitled to the stipulated disability benefits and to the continuance of the policies in force. The insured presented this claim formally, as required by the policies. It was a claim of a present, specific right. On the other side, the company made an equally definite claim that the alleged basic fact did not exist, that the insured was not totally and permanently disabled and had not been relieved of the duty to continue the payment of premiums, that in consequence the policies had lapsed, and that the company was thus freed from its obligation either to pay disability benefits or to continue the insurance in force. Such a dispute is manifestly susceptible of judicial determination. It calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts.

That the dispute turns upon questions of fact does not withdraw it, as the respondent seems to contend, from judicial cognizance. The legal consequences flow from the facts and it is the province of the courts to ascertain and find the facts in order to determine the legal consequences. That is every day practice. Equally unavailing is respondent's contention that the dispute relates to the existence of a "mutable fact" and a "changeable condition—the state of the insured's health." The in-

sured asserted a total and permanent disability occurring prior to October, 1930, and continuing thereafter. Upon that ground he ceased to pay premiums. His condition at the time he stopped payment, whether he was then totally and permanently disabled so that the policies did not lapse, is not a "mutable" but a definite fact. It is a controlling fact which can be finally determined and which fixes rights and obligations under the policies. If it were found that the insured was not totally and permanently disabled when he ceased to pay premiums and hence was in default, the effect of that default and the consequent right of the company to treat the policies as lapsed could be definitely and finally adjudicated. If it were found that he was totally and permanently disabled as he claimed, the duty of the company to pay the promised disability benefits and to maintain the policies in force could likewise be adjudicated. There would be no difficulty in either event in passing a conclusive decree applicable to the facts found and to the obligations of the parties corresponding to those facts. If the insured made good his claim, the decree establishing his right to the disability benefits, and to the continuance of the policies in force during the period of the proved disability, would be none the less final and conclusive as to the matters thus determined even though a different situation might later arise in the event of his recovery from that disability and his failure after that recovery to comply with the requirements of the policies. Such a contention would present a distinct subject matter.

If the insured had brought suit to recover the disability benefits currently payable under two of the policies there would have been no question that the controversy was of a justiciable nature, whether or not the amount involved would have permitted its determination in a federal court. Again, on repudiation by

the insurer of liability in such a case and insistence by the insured that the repudiation was unjustified because of his disability, the insured would have "such an interest in the preservation of the contracts that he might maintain a suit in equity to declare them still in being." *Burnet* v. *Wells,* 289 U. S. 670, 680; *Cohen* v. *N. Y. Mutual Life Ins. Co.,* 50 N. Y. 610, 624; *Fidelity National Bank* v. *Swope, supra.* But the character of the controversy and of the issue to be determined is essentially the same whether it is presented by the insured or by the insurer. Whether the District Court may entertain such a suit by the insurer, when the controversy as here is between citizens of different States or otherwise is within the range of the federal judicial power, is for the Congress to determine. It is the nature of the controversy, not the method of its presentation or the particular party who presents it, that is determinative. See *Gully* v. *Interstate Natural Gas Co.,* 82 F. (2d) 145, 149; *Travelers Insurance Co.* v. *Helmer,* 15 F. Supp. 355, 356; *New York Life Insurance Co.* v. *London,* 15 F. Supp. 586, 589.

We have no occasion to deal with questions that may arise in the progress of the cause, as the complaint has been dismissed *in limine.* Questions of burden of proof or mode of trial have not been considered by the courts below and are not before us.

Our conclusion is that the complaint presented a controversy to which the judicial power extends and that authority to hear and determine it has been conferred upon the District Court by the Declaratory Judgment Act. The decree is reversed and the cause is remanded for further proceedings in conformity with this opinion.

Reversed.

LAWRENCE, GUARDIAN, *v.* SHAW ET AL.

CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

No. 549. Argued February 12, 1937.—Decided March 1, 1937.

Bank credits of a veteran of the World War, or his guardian, which do not represent or flow from his investments, but result from the deposit of the warrants or checks received from the Government in payment of benefits, are exempted from local taxation by the World War Veterans' Act, § 22, and the Act of August 12, 1935, §§ 3 and 5, when such deposits are made in the ordinary manner, so that the proceeds of collection are subject to draft upon demand for the veteran's use. *Trotter* v. *Tennessee,* 290 U. S. 354, distinguished. P. 248.

210 N. C. 352; 186 S. E. 504, reversed.

CERTIORARI, 299 U. S. 537, to review the affirmance of a judgment against Lawrence in a proceeding to recover a sum paid, under protest, as a tax.

Mr. John E. Benton, with whom *Mr. Lloyd J. Lawrence* was on the brief, for petitioner.

Mr. W. D. Boone for respondents.

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

The controversy in this case relates to the liability to local taxation of certain bank deposits made by the petitioner as guardian of an incompetent veteran of the World War. Immunity was claimed under the federal statutes. World War Veterans Act, 1924, § 22,[1] 43 Stat.

[1] Section 22 provides:

"Sec. 22. That the compensation, insurance, and maintenance and support allowance payable under Titles II, III, and IV, respectively, shall not be assignable; shall not be subject to the claims of creditors of any person to whom an award is made under Titles II, III, or IV; and shall be exempt from all taxation: *Provided,* That such compen-

606, 613, 38 U. S. C. 454; Act of August 12, 1935, §§ 3 and 5,[2] 49 Stat. 607, 609. The Supreme Court of North Carolina denied the immunity (210 N. C. 352; 186 S. E. 504) and this Court granted a writ of certiorari, January 4, 1937.

The controversy was submitted to the state court upon an agreed case. It appeared that petitioner was appointed guardian in May, 1929, and that the veteran then owned no property other than claims against the United States for unpaid compensation and insurance. The tax date in North Carolina for property taxation is April 1st. In 1930 the guardian listed for taxation the property of his ward but the tax paid was refunded under a ruling of the Attorney General of the State, and in consequence no property of the ward was listed and no tax was paid in the subsequent years. In October, 1935,

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sation, insurance, and maintenance and support allowance shall be subject to any claims which the United States may have, under Titles II, III, IV, and V, against the person on whose account the compensation, insurance, or maintenance and support allowance is payable. . . ."

[2] Sections 3 and 5 of the Act of 1935 provide:

"Sec. 3. Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. Such provisions shall not attach to claims of the United States arising under such laws nor shall the exemption herein contained as to taxation extend to any property purchased in part or wholly out of such payments. Section 4747 of the Revised Statutes and section 22 of the World War Veterans' Act, 1924, are hereby repealed, and all other Acts inconsistent herewith are hereby modified accordingly. . . ."

"Sec. 5. That this Act shall take effect and be in force from and after its passage, but the provisions hereof shall apply to payments made heretofore under any of the Acts mentioned herein."

however, the tax officials assessed the ward's property for each of the years 1931 to 1935, inclusive. The property consisted of deposits in banks and real estate loans. No question is raised by the petitioner with respect to the taxability of the latter. See *Trotter* v. *Tennessee,* 290 U. S. 354.

The agreed case showed the bank deposits as they stood on April 1st of each year.[3] It does not appear when the amounts making up these annual balances had been deposited or whether there was any special agreement relating to them. They are scheduled as "deposits in bank," without more. The stipulation states that they "represented and, in fact, were the collections from warrants or checks drawn and issued by the United States Government in payment of compensation and insurance" due to the ward, that these warrants or checks were deposited by the guardian and credited in his bank account, and that the items assessed were "the unexpended and uninvested balances," in the hands of the guardian, of the payments thus made by the Government.[4] Petitioner paid the taxes under protest and demanded refund which was refused.

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[3] They were $5787.72 in 1931, $3868.42 in 1932, $3704.76 in 1933, $987.48 in 1934, and $2730.93 in 1935.

[4] The paragraph of the agreed case upon this point is as follows:

"That each of the said items set out and shown in paragraph 16 as 'Deposits in Banks,' for each of said years, represented and, in fact, were the collections from warrants or checks drawn and issued by the United States Government in payment of Compensation and Insurance due by it to plaintiff's ward, which said warrants or checks were deposited by plaintiff in such depositories and credited by them in the plaintiff's account as guardian aforesaid; and the amounts of said assessments and levies made up by said defendants on the items aforesaid, and shown in said paragraph, represented and were, in fact, the unexpended and uninvested balances in the hands of the said guardian of payments aforesaid by the U. S. Government, of warrants or checks issued by it for compensation and insurance due by it to the said veteran."

We are not concerned with the questions submitted to the state court upon the agreed case so far as they related to the authority of officials under the state law to impose the tax in 1935 for the preceding years. The present contention is presented by the answer to the first question which was as follows:

"Where a guardian of a World War Veteran receives from the Veterans' Bureau of the United States Government, warrants or checks issued by said Government in payment of adjusted compensation or insurance due the guardian's ward, and such warrants or checks are deposited by the guardian in a depository, collected by it, and the proceeds are credited in the guardian's account carried in such depository, are such deposits subject to taxation by county or municipal authorities?"

The state court answered this question in the affirmative, denying the federal right asserted.

In *Trotter* v. *Tennessee, supra,* we considered the provision of § 22 of the World War Veterans' Act, 1924,[5] in relation to investments by the guardian of an incompetent veteran of the moneys received from the Government for compensation and insurance. We held that land purchased by the guardian with such moneys was not exempt. We said: "The statute speaks of 'compensation, insurance, and maintenance and support allowance payable' to the veteran, and declares that these shall be exempt. We see no token of a purpose to extend a like immunity to permanent investments or the fruits of business enterprises. Veterans who choose to trade in land or in merchandise, in bonds or in shares of stock, must pay their tribute to the State." *Id.,* pp. 356, 357.

Having no doubt that the moneys payable by the Government to the veteran were exempt until they came

[5] See Note 1.

into his hands or those of his guardian, we left the question open "whether the exemption remained in force while they continued in those hands or on deposit in a bank." The World War Veterans' Act, 1924, provided that the compensation and insurance allowances should be "exempt from all taxation." The Act of 1935 [6] is more specific, providing that the payments shall be exempt from taxation and shall not be liable to process "either before or after receipt by the beneficiary." There was added the qualification that the exemption should not extend "to any property purchased in part or wholly out of such payments." This more detailed provision was substituted for that of the earlier Act and was expressly made applicable to payments theretofore made. We think it clear that the provision of the later Act was intended to clarify the former rather than to change its import and it was with that purpose that it was made retroactive.[7]

The state court found no distinction with respect to taxability "between stocks and bonds, and notes and bank deposits and other solvent credits." Amplifying this position, counsel for respondent at this bar, while conceding that the warrants or checks issued by the Government would be exempt, and that if they were cashed the moneys thus received would likewise be exempt until they were invested, contended that if the guardian instead of cashing the warrants or checks deposited them in bank, the resulting bank credits would be taxable. We think that this contention is inadmissible. Congress has declared that the payments of benefits by the Government shall be exempt not only before but "after receipt by the beneficiary." We cannot conceive that it was the intent of Congress that the veteran should lose the bene-

[6] See Note 2.

[7] See report of the Committee on Finance of the Senate, Sen. Rep. No. 1072, 74th Cong., 1st Sess.

fit of this immunity, which would attach to the moneys in his hands, by depositing the government warrants or checks in bank to be collected and credited in the usual manner. These payments are intended primarily for the maintenance and support of the veteran. To that end neither he nor his guardian is obliged to keep the moneys on his person or under his roof. As the immunity from taxation is continued after the payments are received, the usual methods of receipt must be deemed available so that the amounts paid by the Government may be properly safeguarded and used as the needs of the veteran may require.

The provision of the Act of 1935 that the exemption should not apply to property purchased out of the moneys received from the Government shows the intent to deny exemption to investments, as was ruled in the *Trotter* case. It is of course true that deposits in bank may be made under a special agreement by which the deposits assume the character of investments and would lose immunity accordingly. No such agreement is shown here. Nor are the bank balances shown to be the proceeds of investments. They are stipulated to be "uninvested balances" of the government payments. Some reference was made at the bar to the possible effect of an allowance of interest upon bank deposits. It does not appear that there was such an allowance in this instance and we do not suggest that a mere allowance of interest upon deposits would be enough to destroy an immunity where it would otherwise attach. We hold that the immunity from taxation does attach to bank credits of the veteran or his guardian which do not represent or flow from his investments but result from the deposit of the warrants or checks received from the Government when such deposits are made in the ordinary manner so that the proceeds of the collection are subject to draft upon demand for the veteran's use. In order to carry out the

intent of the statute, the avails of the government warrants or checks must be deemed exempt until they are expended or invested.

The answer by the state court is broad enough to cover bank deposits of that sort and we consider the ruling in that application to be contrary to the federal statute. The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed.

SUMI *v.* YOUNG.

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

No. 406. Argued February 3, 1937.—Decided March 1, 1937.

1. An order of the District Court for Alaska involving no statute or treaty of the United States nor any authority exercised thereunder, nor any monetary value in excess of $1,000.00, is not appealable to the Circuit Court of Appeals under § 128, Jud. Code, as amended by the Act of February 13, 1925, nor under § 943 of the Act of June 6, 1900, the Alaska Code, Compiled Laws of Alaska (1933), § 4574. P. 252.
2. Provisions of the Alaska Civil Code are not laws of the United States within the intendment of § 128, Jud. Code. They are special or local laws designed to meet conditions peculiar to that Territory. P. 253.

83 F. (2d) 752, affirmed.

CERTIORARI, 299 U. S. 534, to review a judgment dismissing an appeal from a probate order made by the District Court in Alaska.

Mr. Herman Weinberger, with whom *Mr. Louis K. Pratt* was on the brief, for petitioner.

Mr. Cecil H. Clegg, with whom *Mr. Robert W. Jennings* was on the brief, submitted for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

In the Probate Court, Fairbanks, Alaska,—October, 1934,—a contest arose over the appointment of a guardian for two minor children. Petitioner's application failed. Respondent was designated. The District Court heard the matter *de novo* and approved this action.

Upon motion, the Circuit Court of Appeals for the Ninth Circuit dismissed the appeal for lack of jurisdiction. The motion averred: (1) the cause involves no question arising under the Constitution, statute or treaty of the United States, or any authority exercised thereunder; (2) no monetary value exceeding $1,000.00 is involved; (3) the petitioner was not a party in the Probate Court. Section 128, Judicial Code,[1] also § 943, Act of June 6, 1900,[2] were relied upon in opposition.

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[1] Judicial Code, § 128, 28 U. S. C. § 225; Act March 3, 1911, amended Feb. 13, 1925, c. 229, 43 Stat. 936:

"(a) *Review of final decisions.* The circuit courts of appeal shall have appellate jurisdiction to review by appeal or writ of error final decisions—

" . . .

"*Third.* In the district courts for Alaska or any division thereof, and for the Virgin Islands, in all cases, civil and criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; in all other civil cases wherein the value in controversy, exclusive of interest and costs, exceeds $1,000; in all other criminal cases where the offense charged is punishable by imprisonment for a term exceeding one year or by death, and in all habeas corpus proceedings; and in the district court for the Canal Zone in the cases and mode prescribed in sections 1307, 1324, 1336, and 1341 to 1357 of Title 48."

[2] Act June 6, 1900, c. 786, 31 Stat. 480. (§ 943 Carter's Annotated Codes; § 1775 Compiled Laws of Alaska 1913; § 4574 Compiled Laws of Alaska 1933):

"Sec. 943. Upon such hearing the District Court or judge thereof shall determine the issues so raised according to the very right of the matter and make such order in the premises as he may see fit,

The Circuit Court of Appeals could find no question under the Constitution, statute or treaty of the United States, or authority exercised thereunder; nor any controversy concerning money, property, or property rights. It concluded that § 128, Judicial Code, gave no jurisdiction; also that § 943, Act June 6, 1900, confers none since it only directs that orders of the District Court of Alaska in probate cases shall be deemed judgments subject to appeal as provided by § 128.

The petitioner insists that the cause involves construction and application of several sections Alaska Civil Code,[3] and that jurisdiction is conferred by § 128; also that § 943, Act June 6, 1900, is applicable.

Considering *Summers* v. *United States,* 231 U. S. 92, we cannot regard provisions of the Alaska Civil Code as laws of the United States within the intendment of § 128. They are special or local laws designed to meet conditions peculiar to that Territory. It follows that this section does not authorize the appeal under consideration. This view is aided by the words "in all other civil cases wherein the value in controversy, exclusive of interest and costs, exceeds $1,000 . . . and in all habeas corpus proceedings." If every case arising under the Civil Code involves a statute of the United States, this clause is inappropriate.

Moreover, to bring within the appellate jurisdiction of the Circuit Court of Appeals every order of the District Court of Alaska concerning guardianship claims against estates, distributions, etc., would hinder the manifest pur-

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which order shall be entered in a docket to be kept by the clerk of the court for that purpose, properly indexed, and a copy of the same shall be forwarded to the commissioner before whom the exceptions were filed, who shall thereupon proceed in accordance with such order. Such orders shall be deemed a judgment, subject to appeal in the manner provided for appeals from judgments in the District Court."

[3] 31 Stat. 321.

pose to limit and definitely establish the jurisdiction of that Court disclosed by Judicial Code, 1911, and the amending Act of 1925. The Alaska Civil Code is an elaborate Act of Congress—230 printed pages—which undertakes to prescribe the law on a great many subjects.

The provision of § 943, Act of June 6, 1900, applicable to appeals in probate cases in Alaska, appears in the margin, *ante* note 2.

Counsel maintain that this must be interpreted as if it read:

"An order of the District Court made in a probate case on appeal to it, shall be deemed a judgment. Such judgment is appealable. The manner or mode of taking and perfecting such appeal shall be the same manner or mode which is provided for the taking and perfecting of an appeal from other appealable judgments made and entered in the District Court."

This proposal is in conflict with the purpose and limitations of the later Acts of 1911 and 1925. These are of general application, and any provision of the Alaska Code concerning appeals to the Circuit Court of Appeals inconsistent with them is ineffective.

Moreover, we cannot accept the view that the words "in the manner provided" found in § 943 were intended to permit appeals in probate matters without restriction—to relieve them of requirements generally applicable to causes in the courts of the Territory.

The court below reached the proper conclusion.

Affirmed.

MR. JUSTICE STONE and MR. JUSTICE CARDOZO concur in the result, but as they think the case made on the record is not one "involving" provisions of the Alaska Code it seems unnecessary to resolve the more doubtful question whether they are statutes of the United States.

HOFFMAN *v.* RAUCH, ADMINISTRATOR.

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

No. 563. Argued February 12, 1937.—Decided March 1, 1937.

1. Bonds held by a national bank for safe keeping only, were sold by the cashier, without authority from their owner, and the price was charged to the buyer's deposit account in the bank. Later, the bank was declared insolvent and a receiver took charge. *Held* that the owner of the bonds was not a preferred creditor. P. 256.

   Nothing of value was added to the bank's property. Nothing new came into its treasury. A credit entry against an outstanding obligation represented the only possible benefit. Its total liabilities were not reduced since a new obligation arose to pay to the owner the value of the bonds.

2. When a claim is made for preference against funds held by the receiver of a national bank, the burden is upon the claimant to establish his title; he must definitely trace something of value which belonged to him, or the avails therefrom, into the receiver's possession. A mere showing that the bank wrongly used property of another in discharging its indebtedness does not suffice to establish a preferred claim against the receiver. P. 257.

85 F. (2d) 1000, reversed.

CERTIORARI, 299 U. S. 538, to review the affirmance of a judgment recovered against the receiver of a national bank by the administrator of one whose bonds the bank, while holding for safe keeping, had wrongfully sold.

Mr. George P. Barse, with whom *Mr. John F. Anderson* was on the brief, for petitioner.

Mr. Leland W. Walker for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The First National Bank, Boswell, Pennsylvania, was declared insolvent January 26, 1932. Shortly thereafter a receiver took charge.

January 21, 1932, the bank's cashier, without her consent, sold four Liberty Bonds ($100.00 each), belonging to Mrs. Rauch and held by it for safekeeping, to the Lohrs. The purchase price was charged to their deposit account.

Mrs. Rauch died June 2, 1932. Claiming a preference, respondent, her administrator, refused the receiver's offer of a general claim against the estate and brought suit. Upon a directed verdict the administrator obtained judgment as a preferred creditor. The court was of opinion "that the assets of the bank were augmented when the bank received from its customer the price agreed upon for said bonds and, therefore, that the plaintiff is entitled to participate in the distribution of the assets of the defendant bank as a preferred creditor." The Circuit Court of Appeals affirmed with an opinion which states: "With the District Judge, we think that the proceeds of these bonds augmented the assets of the bank. They certainly reduced its liability to others."

Petitioner maintains that the bank's assets were not increased through sale of the bonds; that nothing arose therefrom which in original or changed form can be traced into the hands of the receiver.

Respondent submits that since the bank used the bonds in discharge of a liability it "was thereby saved the use of its own funds for that purpose and the assets of the bank at the time of closing were therefore larger in amount than they otherwise would have been. A discharge or reduction of a liability produces a corresponding increase in assets. For every debit there must be a credit."

Obviously, nothing of value was added to the bank's property. Nothing new came into its treasury. A credit entry against an outstanding obligation represented the only possible benefit. Its total liabilities were not reduced since a new obligation arose to pay to the owner the value of the bonds.

Here it is accepted doctrine that when a claim is made for preference against funds held by the receiver of a national bank the burden is upon the claimant to establish his title; he must definitely trace something of value which belonged to him, or the avails therefrom, into the receiver's possession. *Schuyler* v. *Littlefield,* 232 U. S. 707, 713; *Texas & Pacific Ry. Co.* v. *Pottorff,* 291 U. S. 245, 261. Also, a mere showing that the bank wrongly used property of another in discharging its indebtedness does not suffice to establish a preferred claim against the receiver.

Accordingly, we must hold that the courts below were in error and reverse the challenged judgment.

The applicable legal principles were much discussed in *Blakey* v. *Brinson,* 286 U. S. 254; *Texas & Pacific Ry. Co.* v. *Pottorff, supra; Jennings* v. *United States Fidelity & Guaranty Co.,* 294 U. S. 216; *Old Company's Lehigh, Inc.* v. *Meeker,* 294 U. S. 227; *Adams* v. *Champion,* 294 U. S. 231; and *Farmers' National Bank* v. *Pribble,* 15 F. (2d) 175, 176.

Jennings v. *United States Fidelity & Guaranty Co., supra,* pp. 224-225, said: "But the situation is very different when what has been received by the collecting agent is not a thing at all, but a reduction of liabilities by set-off or release . . . A debt does not furnish a continuum upon which a trust can be imposed after cancellation or extinguishment has put the debt out of existence . . . The dividend that would be due upon the debts canceled through the set-off if they were now to be revived is the measure of any benefit accruing to the creditors." In *Old Company's Lehigh, Inc.* v. *Meeker, supra,* p. 229, we asserted: "What was done by the Mamaroneck bank on January 14, 1933, did not involve in its doing the creation of a special deposit or an augmentation of the assets. What was done had no effect except to diminish liabilities by reducing the indebtedness due to a depositor." And *Adams* v. *Champion, supra,* denied prefer-

ence in respect of so much of a bank credit arising from the wrongful disposal of bonds as had been withdrawn prior to the receivership. Only the balance came to the receiver. We said, (239): "Evidence is lacking that it was withdrawn in such a form or for such purposes as to be represented by any assets forming part of the estate today."

Respondent was not entitled to a preference. His right to participation as a general creditor is conceded.

The cause must go back to the District Court with directions to proceed in accordance with this opinion.

Reversed.

HENDERSON COMPANY *v.* THOMPSON ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

No. 397. Argued February 2, 3, 1937.—Decided March 1, 1937.

Under a Texas statute regulating production and use of natural gas, "sweet" gas, i. e., gas containing not more than 1½ grains of hydrogen sulphide per 100 cubic feet, and therefore suitable for heating and lighting, may not be used for the manufacture of carbon black; but that substance may be manufactured from "sour" gas, i. e., gas containing a greater percent. of hydrogen sulphide, not suitable in its natural state for heating and lighting. As applied to a company producing or otherwise acquiring "sweet" gas in the Panhandle field for which it had no market other than to sell for manufacture of carbon black, *held:*

1. The evidence does not sustain the contention that the prohibition will not operate to conserve "sweet" gas, as intended, but will serve only to deprive the complainant of the gas to which it is entitled,—such contention being based on the hypothesis that the gas, if not extracted by the company will wander subterraneously to a "sour" gas area of the field and become "sour" gas. P. 264.

2. There is no basis in the evidence for holding the classification of "sweet" and "sour" gas arbitrary upon the hypothesis that the hydrogen sulphide may be removed from the latter at trifling expense. P. 264.

3. There is no basis in the evidence for the contention that the statute discriminates unreasonably by preventing the plaintiff and others in like position from extracting "sweet" gas and selling it for the only purpose available, and by suffering it to drain away meanwhile only to augment the supplies of "sour" gas producers. P. 265.

4. The evidence does not support the objection that the statute discriminates illegally by prohibiting the use of sweet gas in carbon black manufacture while permitting its use as fuel by manufacturers of other articles. P. 266.

5. The effect of the statute upon the contracts of the company for taking "sweet" gas from producers and delivery to a carbon black manufacturer is merely incidental and does not violate the Texas Constitution. *Travelers' Insurance Co.* v. *Marshall,* 124 Tex. 45; 76 S. W. (2d) 1007, distinguished. P. 266.

6. In case of doubt, and in the absence of definitive construction by the state courts, this Court defers to the lower federal court's understanding of the state constitution. P. 266.

7. The needs of conserving gas in a natural gas field are to be determined by the legislature; the prohibition of the use of "sweet" gas in the manufacture of carbon black is not shown in this case to be an arbitrary exercise of legislative power. *Walls* v. *Midland Carbon Co.,* 254 U. S. 300. Pp. 264, 267.

14 F. Supp. 328, affirmed.

APPEAL from a decree of the District Court of three judges denying a permanent injunction in a suit to restrain enforcement of a Texas statute, c. 120, Acts of 1935, and orders of the Railroad Commission thereunder, relative to the use of natural gas in the manufacture of carbon black. The lower court's opinion on an application for a preliminary injunction is reported in 12 F. Supp. 519. See also *Thompson* v. *Gas Utilities Corp., ante,* p. 55.

Mr. L. M. Fischer, with whom *Mr. F. W. Fischer* was on the brief, for appellant.

Mr. Wm. Madden Hill, Assistant Attorney General of Texas, and *Mr. Wm. McCraw,* Attorney General, with

whom *Messrs. Earl Street,* Assistant Attorney General and *C. C. Small* were on the brief, for appellees.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The question for decision is whether the prohibition by Texas of the use of sweet natural gas for the manufacture of carbon black in the Panhandle field is valid.

The suit is brought in the federal court for western Texas by the Henderson Company, a Maine Corporation. It challenges the validity of the following provisions of Chapter 120 of the Acts of the Legislature of Texas, 1935, Forty-fourth Regular Session, commonly known as House Bill 266: Subdivisions (g) and (h) of § 2, which define sweet and sour gas; [1] subdivision (j) of § 3, which prohibits the use of sweet gas for the manufacture of carbon black; [2] and subdivision (l) of § 7, which defines the purposes for which sweet gas may be used.[3] See *Thompson* v. *Consolidated Gas Utilities Corp., ante,* p. 55. The suit challenges, also, the validity of orders entered by the Railroad Commission pursuant to the statute.

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[1] "Sec. 2.

"(g) The term 'sour gas' shall mean any natural gas containing more than one and one-half (1½) grains of hydrogen sulphide per one hundred (100) cubic feet or more than thirty (30) grains of total sulphur per one hundred (100) cubic feet, or gas which in its natural state is found by the Commission to be unfit for use in generating light or fuel for domestic purposes.

"(h) The term 'sweet gas' shall mean all natural gas except 'sour gas' and 'casinghead gas.'"

[2] "Sec. 3. The production, transportation, or use of natural gas in such manner, in such amount, or under such conditions as to constitute waste is hereby declared to be unlawful and is prohibited. The term 'waste' among other things shall specifically include: . . .

"(j) The use of sweet gas produced from a gas well for the manufacture of carbon black. . . ."

[3] "Sec. 7. After the expiration of ten (10) days from the time of encountering gas in a gas well, no gas from such well shall be per-

The Henderson Company owns and operates in the Panhandle gas field a casinghead gasoline plant which is connected with 21 gas wells; holds oil and gas leases under which some of these wells are operated; and is under contract to take gas from the other wells. Prior to the statute, it received at its plant the gas from all these wells; extracted therefrom the gasoline content; and had contracted to supply the residue gas to the Combined Carbon Company. The orders challenged classified fourteen of the wells as sweet gas wells and prohibited both taking the gas therefrom for the purpose of processing the same for its gasoline content and delivery of the residue for the manufacture of carbon black. The seven remaining wells, classified as sour, cannot furnish the quantity of gas required by the company in its gasoline plant and to perform its contract with the Carbon Company. A supply from other sour gas wells is not available; and for the gas from the fourteen wells classified as sweet there is no other use.

The bill charges that the statute and the orders entered thereunder violate the Federal Constitution—the due process and equal protection clauses of the Fourteenth Amendment and the contract clause; also provisions of the Constitution of Texas. The members of the Commission and the Attorney General of Texas are made de-

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mitted to escape into the air, and all gas produced therefrom shall be utilized for the following purposes:

"(1) No sweet gas shall be utilized except for:

"(a) Light or fuel.

"(b) Efficient chemical manufacturing, other than the manufacture of carbon black.

"(c) Bona fide introduction of gas into oil, or gas bearing horizon, in order to maintain or increase the rock pressure or otherwise increase the ultimate recovery of oil or gas from such horizon.

"(d) The extraction of natural gasoline therefrom when the residue is returned to the horizon from which it is produced."

fendants. The relief sought is to enjoin enforcement of the statute, temporarily and permanently.

The jurisdiction, federal and equitable, was not questioned. Answers were filed. An application for a restraining order was denied. That for a preliminary injunction, promptly heard before three judges, was also denied, 12 F. Supp. 519. And on final hearing upon an extensive record a decree was entered denying the permanent injunction and dismissing the bill, 14 F. Supp. 328. Findings of fact and conclusions of law were filed in compliance with Equity Rule 70½. The case is here on appeal.

The findings contain, as in *Thompson* v. *Consolidated Gas Utilities Corp.*, a description of the character and the development of the Panhandle gas field. In the western field the sweet gas zone lies to the south, occupying about two-thirds of it; the sour gas zone lies to the north and occupies about one-third. Plants which strip the gas of its gasoline content and carbon black plants which use the residue are apparently accessible to both zones. For those purposes either sweet or sour gas can be used. For the sweet gas of the Panhandle field there is also a large demand for fuel and light. For the sour gas in its natural state there is practically no use other than in the stripping and the carbon black plants. There are 29 carbon black plants in the Panhandle field. These produce more than 70 per cent. of all carbon black manufactured in the United States; and they consume, on the average, about 550,000,000 cubic feet per day. Intolerable waste had resulted by use of sweet gas under permits issued by the Railroad Commission under Chapter 100, Acts 1933, Forty-third Legislature, Regular Session, which allowed the use of sweet gas for inferior purposes where there was no fuel and light market. It was primarily to prevent such waste that the Legislature prohibited by House Bill

266 the use of sweet gas in the manufacture of carbon black.

The court found, among other things:

"There is enough sour gas in reserve in the Panhandle field to fulfill the world's requirements of carbon black for many years to come. There is also a tremendous supply of casinghead gas in the Panhandle field. There is now available for use in the manufacture of carbon black sufficient allotments under the orders of the Railroad Commission of sour and casinghead gas to supply all the demands and needs of such plants with an excess of 100,000-000 cubic feet of casinghead gas over and above the demand of the carbon black plants.

". . . A producer of sweet gas, if he is able to market the same for light and fuel purposes, receives about three or four cents per 1000 cubic feet in the field. When such gas is delivered at the burner tips it sells for various greater amounts. The producers of gas who sell to the companies who strip it and burn it for carbon black receive less than a cent per 1000 cubic feet."

The company contends that our decision in *Walls* v. *Midland Carbon Co.*, 254 U. S. 300, which upheld certain action of Wyoming in prohibiting as wasteful the use of natural gas for the production of carbon black, is inapplicable to the issues here presented. The company concedes that Texas may, for the purpose of preventing waste, regulate both the production and the use of natural gas. It does not deny that when one natural resource is fitted for two uses and another resource only for one, the Legislature has the power to marshal these resources by classifying them, and designating the uses to which each may be put. Nor does it deny that the classification and the limitation of the use of sweet gas may "when considering all of the gas fields in Texas as a whole, bear a reasonable relation to the purposes sought

to be accomplished." But it insists that as applied to the Panhandle field the classification and prohibition are void, because, there, they bear no reasonable relation to the object sought to be attained, and are arbitrarily discriminatory.

First. The contention that in the Panhandle field the prohibition of the use of sweet gas in the manufacture of carbon black is arbitrary and unreasonable rests primarily upon the fact that the sour and the sweet gas wells are in the same reservoir. The argument is that pressures in the sour gas area are lower than those in the sweet gas area; that, since there is no free market for sweet gas for fuel and light, it will, if not used in carbon black manufacture, and if withdrawals of sour gas are permitted to the extent of the requirements of the carbon black industry, migrate into lower pressure areas and become a part of the sour gas supply; that, therefore, the supply of sweet gas will not be conserved; and that the effect of the prohibition of its use in the manufacture of carbon black will be merely to deprive the company, through the migration, of the gas to which it is entitled. But the lower court found that the length of time required for such migration is not definitely known and that the demand for sweet gas for fuel and light is increasing. The needs of conservation are to be determined by the Legislature. See *Walls* v. *Midland Carbon Co.*, 254 U. S. 300, 324. The loss of sweet gas by migration may be relatively negligible. The court concluded that there is "an abundance of factual support for the legislative prohibition against the burning of sweet gas for carbon black." No facts have been found, or established by the evidence, which would justify us in pronouncing the action of the Legislature arbitrary.

Second. The company insists, also, that the prescribed prohibition is void, because the difference between sweet gas and sour is solely the presence in the latter of a

quantity of hydrogen sulphide; that by processing the sulphide can be eradicated from sour gas at a slight expense; and that the sour gas when so purified is fit for use for fuel and light. The distinction between sweet and sour gas fixed by the Legislature at 1½ grains of hydrogen sulphide per 100 cubic feet, is found by the court to be apt. The evidence as to the cost of purifying is widely conflicting. The cost might depend, among other things, upon the extent of the sulphur content. The classification made has ample support in the evidence. We are unable to find in the regulation anything arbitrary or unreasonable. Compare *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78; *Walls* v. *Midland Carbon Co., supra,* 324.

Third. The company contends that the provisions of the statute as applied discriminate unreasonably between it and other producers similarly situated. The statute applies equally to all sweet gas wells. The discrimination suggested is in favor of the sour gas well owners. The argument is that the company has now no fuel and light market for its sweet gas; that gas may drain into a sour well; and, if it does, will become sour and be usable in the manufacture of carbon black. It is not known when the expected drainage will occur. Long before that time there may be a fuel and light market for the company's sweet gas. It is also urged that the statute discriminates illegally by prohibiting the use of sweet gas in carbon black manufacture while permitting its use as fuel by manufacturers of other articles. There are several differences which would justify the classification. Among them, this: The daily average consumption of the 29 carbon black plants is only slightly less than the average daily amount taken by the pipe lines for fuel and light purposes. For the carbon black plants in the Panhandle field the sour gas there affords an ample supply. For the fuel uses served by the interstate pipe lines sweet gas is practically indispensable.

Compare *Ohio Oil Co.* v. *Indiana (No. 1)*, 177 U. S. 190, 211; *Walls* v. *Midland Carbon Co., supra,* 317, 322, 324.

Fourth. The company claims that the statute impairs the obligation of contracts, since it prohibits performance of the company's contracts with producers to take sweet gas for its stripping plant and its contract to deliver the residue after stripping to the Combined Carbon Company. The contention is that the contract clause of the Texas Constitution, unlike that of the Federal Constitution, prevents the State from enacting a police measure which will result in impairing a contract. In support of that proposition, the company cites *Travelers' Ins. Co.* v. *Marshall,* 124 Tex. 45; 76 S. W. (2d) 1007, decided by the Supreme Court of Texas in 1934. But that case does not support the proposition. The statute there held void was a moratorium statute specifically directed against the terms of contracts. The statute here challenged is not directed against any term of any contract. It deals merely with the use of an article of commerce; and its effect upon contracts is incidental. The distinction was pointed out by the district court, which said that the Constitution of the State of Texas "has never been held to avoid a police statute dealing directly with physical things in the interest of the public welfare, and touching contractual relationships only incidentally as they may have attached to those physical things prior to the passage of the statute." 14 F. Supp. 328, 334. That ruling accords with constitutional doctrine long established in this and other courts. If we felt any doubt as to its application here, in the absence of a definitive construction of the Constitution of the State by its highest court, we should defer to the federal court's understanding of the state law. See *Thompson* v. *Consolidated Gas Utilities Corp., supra.*

Fifth. The contention that our decision in the *Walls* case is inapplicable is rested in part on the difference,

as to the title to gas in place, between the law of Wyoming and that of Texas. It is urged that, in the absence of waste, the legislature lacks power to regulate production in Texas, since there the law gives the owner of land title to the gas in place and to that which migrates to formations under his land; whereas in Wyoming regulation for the purpose of protecting correlative rights of other owners in a common pool is permissible. Upon this argument we need not pass. One principle established by the *Walls* case is that the Legislature may, for the purpose of conserving natural resources, regulate their production and use. The findings of the district court in this case support the reasonableness of the present statute on that basis. It is also urged that there is this vital difference in the facts: that in the Panhandle field the challenged prohibition will not prevent waste, or conserve the supply of sweet gas, since the sweet gas, if not used, will drain into the sour gas area, because of the lower pressures there. Moreover, it is insisted that, unlike the *Walls* case, there is here in the record convincing evidence that the use of sweet gas in the manufacture of carbon black is not wasteful. Our decision in that case rested upon no particular theory of the nature of the carbon black industry. It was based simply upon the determination that the statute in question was not shown to have been an arbitrary exercise of legislative power. Such, likewise, is our judgment here.

Affirmed.

FOUNDERS GENERAL CORP. *v.* HOEY, COLLECTOR OF INTERNAL REVENUE.*

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

No. 398. Argued January 8, 11, 1937.—Decided March 1, 1937.

1. Where the certificates for corporate shares subscribed for by A are, by his direction and for his own convenience, issued to B, his nominee and agent for this purpose, there is a transfer from A to B of the "right to receive" the certificates which is taxable under § 800, Schedule A–3 of the Revenue Act of 1926, although the arrangements between A and B were such that, as against A, B could not have compelled issuance of the certificates to himself and acquires no beneficial interest in the securities and has no part in the management or disposal of them. P. 273.
2. A new corporation took over the assets of an old one and agreed to issue its shares to the old stockholders, but in pursuance of an irrevocable agreement and power of attorney previously executed by the stockholders, portions of their new allotments, *pro rata,* were issued directly to their attorney for purposes of sale. *Held* that there was a taxable transfer, from stockholders to attorney, of the "right to receive" shares, under § 800, Schedule A–3 of the Revenue Act of 1926. *Raybestos-Manhattan, Inc.* v. *United States,* 296 U. S. 60. P. 274.
3. A taxpayer whose transaction is within a taxing statute cannot be relieved upon the ground that by adopting another form of dealing he could have achieved his ultimate purpose and avoided the statute. P. 275.

84 F. (2d) 976, affirmed.
84 F. (2d) 908, reversed.
83 Ct. Cls. 593; 15 F. Supp. 70, reversed.

CERTIORARI, 299 U. S. 534, 531, to review judgments in suits for the recovery of moneys alleged to have been wrongfully exacted as taxes on stock transfers, and as

* Together with No. 331, *United States* v. *A. B. Leach & Co.,* certiorari to the Circuit Court of Appeals for the Seventh Circuit; and No. 330, *United States* v. *Automatic Washer Co.,* certiorari to the Court of Claims.

interest and penalties. In No. 398, the judgment of the District Court (12 F. Supp. 290) dismissing the complaint was affirmed by the court below. In No. 331 a recovery in the District Court was affirmed by the court below. In No. 330 there was a judgment for the taxpayer in the Court of Claims.

Mr. Royal E. T. Riggs for petitioner in No. 398.

Mr. J. P. Jackson, with whom *Solicitor General Reed, Assistant Attorney General Jackson,* and *Messrs. Sewall Key* and *George H. Zeutzius* were on the brief, for respondent in No. 398 and petitioner in Nos. 331 and 330.

Mr. George K. Bowden for respondent in No. 331.

Mr. Jesse I. Miller for respondent in No. 330.

By leave of Court, *Mr. Thaddeus G. Benton* filed a brief in No. 330 on behalf of the Middle States Petroleum Corp., as *amicus curiae,* urging affirmance of the judgment below.

Mr. Justice Brandeis delivered the opinion of the Court.

These three cases present, in the main, the same question: When, at the instance of one entitled to receive stock, the certificates therefor are, at his request and for his convenience, issued by the corporation in the name of a nominee who receives no beneficial interest therein, does the transaction involve a transfer by the beneficial owner requiring a documentary stamp pursuant to § 800, Schedule A-3, of the Revenue Act of 1926, February 26, 1926, c. 27, Title VIII, 44 Stat. 99, 101?

The taxpayers seek to recover the amounts alleged to have been wrongfully exacted for the tax, with interest and penalties. In No. 398, the claim of Founders Gen-

eral Corporation for $4,733.33, was denied by the Circuit Court of Appeals for the Second Circuit, 12 F. Supp. 290; 84 F. (2d) 976. In No. 331, the claim of A. B. Leach & Co., Inc., for $16,526.40 was allowed by the Circuit Court of Appeals for the Seventh Circuit. 84 F. (2d) 908. In No. 330, the claim of Automatic Washer Company for $1,593.63 was allowed by the Court of Claims, 83 Ct. Cls. 593; 15 F. Supp. 70. Because of the conflict, we granted certiorari.

1. In the suit brought by the Founders Corporation, the complaint, setting forth the following facts, was dismissed: On September 10, 1929, that corporation agreed with the United States Electric Power Corporation to subscribe for 100,000 shares of its common stock, to be delivered on September 17th, each share to be accompanied by a warrant entitling the holder to subscribe before January 2, 1940 for an additional share. After making the agreement and before delivery of the shares, the Founders Corporation directed that the securities be issued in the name of Benton & Co., as its nominee. Benton & Co. was a partnership, organized in 1928 solely to hold in its name securities belonging to the plaintiff, and to transfer them at plaintiff's request. For acting as nominee, the partnership received from plaintiff an annual fee of $1500. By contract between Benton & Co. and plaintiff, neither the partnership nor any member thereof could claim any beneficial interest in any securities held by the firm, and plaintiff was appointed agent of Benton & Co. for the sale and transfer of securities registered in the partnership name. The stock issued by the Electric Power Corporation in the name of Benton & Co. was delivered to the Founders Corporation.

Stamp taxes were confessedly payable on the original issue, and on the transfer of any securities from Benton & Co. to the public. The only tax challenged is that upon the alleged transfer by plaintiff to Benton & Co.

of the right to receive the stock of the Electric Power Corporation.

2. In the suit brought by A. B. Leach & Co., Inc., the declaration upon demurrer to which the recovery was had, set forth the following facts: That concern, being engaged in the business of selling securities to the public, organized five corporations; subscribed for all their stock; and directed that the stock be issued in the name of Vercouter, an employee. It is conceded that he had no beneficial interest in the stock; had no authority to act except as directed by A. B. Leach & Co., Inc.; and received the certificates solely for its benefit and convenience in connection with future sales to the public.

Stamp taxes were confessedly payable on the original issue, by the five corporations. The only tax challenged is that upon the alleged transfer by the taxpayer to Vercouter of the right to receive the stock of the five corporations.

3. In the suit brought by Automatic Washer Company, the facts found on which recovery was allowed are these: An agreement, dated June 22, 1928, between Folds, Buck & Company, bankers, and Nelson, a stockholder and officer of the Washer Company's corporate predecessor, provided that Nelson proposed to cause the latter concern to be reorganized as a Delaware corporation which should acquire the assets and assume the liabilities of the old company; that the new company should issue therefor 140,000 shares of common and 40,000 shares of preferred; and that the bankers should have the option of acquiring for $1,000,000 40,000 shares of the common and 40,000 shares of the preferred. On September 17, 1928, the stockholders of the old company agreed with Nelson to contribute ratably the shares in the new which were to be sold to the bankers. To this end, each irrevocably appointed Nelson and one Gallagher attorneys in fact to receive the stock of the new company and to

make sale thereof to the bankers. The new company, the taxpayer, was organized. On September 27, 1928, the two companies agreed that the assets should be transferred to the new in consideration of its issuing its common and preferred stock to the stockholders of the old. The agreement recited the arrangement with the bankers and that:

"In order to carry out this plan . . . each of the stockholders of the Old Company has irrevocably constituted and appointed H. E. Nelson and W. N. Gallagher his attorneys in fact to receive the respective securities of the New Company to which such stockholder may be entitled and to make sale of that portion thereof to be contributed by such stockholder for the purpose of carrying out said agreement of sale with the Bankers. . . . Accordingly, the New Company . . . shall issue such certificates in such names and for such amounts as shall be specified in the joint order of the said H. E. Nelson and W. N. Gallagher, the attorneys in fact . . . and deliver the same to said attorneys in fact . . ."

The 74,538 shares designed to be sold to the bankers were issued to Nelson.[1] Of these, 13,173 were the pro rata contribution of Nelson.

The taxpayer concedes now that stamp taxes were payable on the original issue of all the stock by the new company; on the old company's transfer to its stockholders (including Nelson) of its right to receive the new company's stock; on Nelson's transfer to the bankers; and on the bankers' sales to the public. The Government concedes now that taxes are not payable on Nelson's alleged transfer to himself of his 13,173 shares which were to go to the banker. The tax challenged is

[1] In the eventual determination of the pro rata contribution by the old company's stockholders to the stock to be sold to the bankers, the amount of preferred to be sold was reduced to 34,538 shares. See 15 F. Supp. 70, 74.

that on the alleged transfer to Nelson of the right to receive the 61,365 shares which the other stockholders contributed.

The applicable part of § 800, Schedule A—Stamp Taxes, is as follows:

"3. Capital stock, sales or transfers: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to shares or certificates of stock or of profits or of interest in property or accumulations in any corporation, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not, on each $100 of face value or fraction thereof, 2 cents, and where such shares are without par or face value, the tax shall be 2 cents on the transfer or sale or agreement to sell on each share: *Provided,* That it is not intended by this title to impose a tax upon an agreement evidencing a deposit of certificates as collateral security for money loaned thereon, which certificates are not actually sold, nor upon the delivery or transfer for such purpose of certificates so deposited, nor upon mere loans of stock nor upon the return of stock so loaned: *Provided further,* That the tax shall not be imposed upon deliveries or transfers to a broker for sale, nor upon deliveries or transfers by a broker to a customer for whom and upon whose order he has purchased same, but such deliveries or transfers shall be accompanied by a certificate setting forth the facts . . ."

First. In each case, the person originally entitled to receive the certificate directed, for his own convenience and purposes, that it be issued in the name of a nominee. It is argued in the *Automatic Washer Company* case,

that the stockholders of the old company never acquired the "right to receive" that portion of their stock which was designed for transfer to the bankers; that they did not become entitled to receive shares in the new company until the contract with it was made on September 27th; that prior thereto, they had irrevocably agreed that Nelson should receive and sell the shares which were to go to the bankers; and that, thus, the stockholders of the old company had, prior to the original issue of the stock in the new, relinquished "the power to command the disposition of the shares" and, therefore, never exercised that power, held taxable in *Raybestos-Manhattan, Inc.* v. *United States,* 296 U. S. 60. But essentially the same argument was made and rejected in the *Raybestos* case, page 62. There the transaction was held to have involved a taxable transfer of rights to stock, though the old companies had no right to the stock in the consolidated company prior to the execution of the contract whereby the issue to their stockholders was directed. "The reach of a taxing act whose purpose is as obvious as the present is not to be restricted by technical refinements." *Id.,* 63. Compare *Helvering* v. *Midland Mutual Life Insurance Co., ante,* p. 216. The situation here is in substance the same as in the *Raybestos* case. When the powers of attorney were executed, there was nothing upon which they could operate. The rights to receive the stock in the new company, and the transfer thereof, were effected at one time by the same document.

Second. It is true that in none of the three cases did the transaction involve the transfer of a beneficial interest. But that fact is, in view of the language of the Act, without legal significance. The tax is exacted because the taxpayer transferred "the right to receive" the certificate. Likewise it is without legal significance that, under power of attorney from nominee to beneficial owner, the former may have no part in the management or disposal of the securities. Nor is it material that in no case did the

nominee have a right, at least as against the taxpayer, to compel issuance of the stock to himself. The legal title to the shares was received by the nominee from the newly formed corporation; but the authorization rendering his holding lawful was received from the taxpayer. The legality of the issuance of the stock in the names of the nominees rests on the fact that the taxpayers authorized such issuance and granted their nominees the right to receive the stocks entered in their names. The grant of that authority is a transfer of "the right to receive" within the meaning of the Act; and we are not to look beyond the Act for further criteria of taxability. See *Burnet* v. *Harmel,* 287 U. S. 103, 110.

The statute defines the scope of the tax in terms whose breadth is emphasized by the careful particularity of its provisos. Especially indicative of Congressional intention that nominee transactions generally should be subject to the tax are the provisos added by the Revenue Act of 1932, June 6, 1932, c. 209, § 723, 47 Stat. 273, and the Act of June 29, 1936, c. 865, 49 Stat. 2029, which except certain specifically described transfers to nominees.

Third. It is suggested that in each case the taxpayer might have attained his ultimate purpose by a form of transaction which would not have subjected him to the tax. The suggestion, if true, furnishes no reason for relieving him of tax when, for whatever reason, he chooses a mode of dealing within the terms of the Act. Compare *United States* v. *Isham,* 17 Wall. 496, 506; *Provost* v. *United States,* 269 U. S. 443, 457, 458. To make the taxability of the transaction depend upon the determination whether there existed an alternative form which the statute did not tax would create burden and uncertainty. "There must be a fixed and indisputable mode of ascertaining a stamp tax." *Hatch* v. *Reardon,* 204 U. S. 152, 159.

In Number 398, judgment affirmed.
In Number 331, judgment reversed.
In Number 330, judgment reversed.

POWELL ET AL., RECEIVERS, *v.* UNITED STATES ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

No. 295. Argued January 12, 1937.—Decided March 1, 1937.

1. An order of the Interstate Commerce Commission, in proceedings begun on the complaint of a carrier, directed that there be stricken from the Commission's files a tariff filed by another carrier purporting to extend the switching limits of the latter to include receiving and delivery tracks belonging to the United States at a military post, and to oblige that carrier to furnish transportation to and from the post under other tariffs applicable over its own lines to and from a junction. *Held* that, in purpose and effect the order was affirmative, and that a suit to annul it, brought by the carrier whose tariff was thus rejected, was within the jurisdiction of the District Court of three judges under 28 U. S. C. 47. P. 284.
2. With the consent of the Secretary of War, the lessees of a railroad owned by the United States in a military reservation were employed by a connecting trunk-line carrier as its agents to transport over the leased tracks to and from the military post freight coming from or destined for the trunk line; and the trunk line was given permission to perform the transportation with its own engines and crews, the lessees reserving the right to render like services to other carriers when required by the Secretary. *Held:*

   (1) That, in respect of the traffic covered by the trunk line's tariff, the lessees, as its agents, were common carriers, and they and the service performed by them were subject to the jurisdiction of the Interstate Commerce Commission. P. 285.

   (2) That whether the leased tracks were, within the meaning of § 1 (18) of the Interstate Commerce Act, an extension or addition, or, within the meaning of § 1 (22), spur, industrial, team, switching or side tracks, the transportation over them by or for the trunk line must be covered by a tariff filed in accordance with § 6 (7) of the Act. P. 286.

   (3) The action of the Secretary of War was not inconsistent with proper exertion of the Commission's authority under §§ 1 (18) and 1 (20). P. 286.

(4) The leased tracks covered by the tariff were part of, and extended to or included a station on, the line of the railroad company within the meaning of § 6. P. 286.

3. The purpose of §§ 1 (18) to 1 (22) of the Act was to empower the Commission in proceedings instituted by a carrier proposing to engage in transportation over or by means of an additional or extended line authoritatively to decide whether it would be in the public interest. P. 286.
4. Upon presentation by the carrier of application for a certificate, the Commission, for the purpose of determining whether it is authorized by the Act to consider the merits, may pass incidentally upon the question whether the project is one covered by § 1 (18). But the decision of that question is for the court in a suit to set aside an order granting a certificate or in a suit under § 1 (20) to enjoin a violation of § 1 (18). P. 287.
5. An interested carrier is not authorized by the Act to initiate proceedings before the Commission to determine whether the use of leased tracks by another carrier would be in the public interest, but it may intervene before the Commission if application for a certificate is made, or, no such application having been made, it may sue under § 1 (20) to enjoin construction or operation contrary to § 1 (18). P. 287.
6. The remedy provided by § 1 (20) is inconsistent with a proceeding before the Commission to attain the same end; and suits under that paragraph may not be tried before three judges; whereas those under the Urgent Deficiencies Act (28 U. S. C. 47) to set aside orders of the Commission cannot be tried in any other court. P. 288.
7. In suits under § 1 (20), appeals must be taken to the Circuit Court of Appeals; whereas appeals from District Courts of three judges must be taken to this Court. The statutes cannot be construed to give the Commission, a carrier, or other party seeking to enforce § 1 (18) a choice of remedies; i. e., between a proceeding before the Commission to invalidate the applicable tariff and a suit under § 1 (20). The latter is exclusive. P. 288.
8. There is no evidence in this case that inclusion of the government line within the trunk line's tariff without additional charges unduly impaired the line-haul revenue. P. 289.
9. Findings by the Commission in another proceeding in which it rejected an application by another corporation, formed by the

lessees, for a certificate of public convenience and necessity, have no bearing on the validity of the tariff involved in this case. P. 289.

10. In a suit by a railroad to set aside an order of the Interstate Commerce Commission striking out a tariff, a counterclaim by an intervening carrier seeking to enjoin the complainant's operation of part of the line covered by the tariff, upon the ground that it is an extension violative of § 1 (18), is not related to the cause of action alleged in the complaint, is not pleadable under Equity Rule 30, and is not within the jurisdiction of a court of three judges under 28 U. S. C. 47. P. 289.

12 F. Supp. 938, reversed.

APPEAL from a decree of the District Court of three judges in a suit brought by receivers of the Seaboard Air Line Railway to annul an order of the Interstate Commerce Commission striking out a tariff. The final decree overruled the Government's motion to dismiss, sustained the order, and granted affirmative injunctive relief against the plaintiff in accordance with a counterclaim set up by a competing carrier.

Messrs. Charles T. Abeles and *W. R. C. Cocke* for appellants.

Assistant Attorney General Dickinson, with whom *Solicitor General Reed* and *Messrs. Elmer Collins, Wendell Berge, E. M. Reidy,* and *Daniel W. Knowlton* were on the brief, for the United States and Interstate Commerce Commission, appellees.

Mr. T. M. Cunningham, with whom *Mr. A. R. Lawton, Jr.,* was on the brief, for H. D. Pollard, Receiver of Central of Georgia Ry. Co., appellee.

MR. JUSTICE BUTLER delivered the opinion of the Court.

In proceedings initiated on complaint of the receiver of the Central of Georgia Railway Company, the Interstate Commerce Commission ordered to be "stricken from

the files" a tariff filed by the receivers of the Seaboard Air Line Railway Company. The tariff extended Fort Benning Junction switching limits to include receiving and delivery tracks at Fort Benning military post. It was stricken on the ground that it extended to a station and covered transportation not on the line of the Seaboard in violation of § 6 (1) of the Interstate Commerce Act.[1] 206 I. C. C. 362. To annul that order the Seaboard brought this suit. The United States answered that the order is not reviewable and prayed dismissal of the complaint. The commission appeared and by its answer supported the order. The Central intervened; its answer contained, in what purports to be a counterclaim under Equity Rule 30, allegations appropriate for a complaint in a suit under § 1 (20) of the Act to prevent a violation of § 1 (18).[2] The Seaboard moved to

[1] § 6 (1) "Every common carrier . . . shall file with the commission . . . schedules showing all . . . charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad . . . when a through route and joint rate have been established. . . . The schedules . . . shall plainly state the places between which property . . . will be carried . . . and . . . state separately all terminal charges . . . and all other charges which the commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such . . . charges, or the value of the service rendered . . ." [49 U. S. C. 6 (1)]

§ 6 (7) "No carrier . . . shall engage or participate in the transportation of . . . property . . . unless the . . . charges . . . have been filed . . . nor shall any carrier . . . collect . . . different compensation for such transportation . . . or for any service in connection therewith, between the points named in such tariffs than the . . . charges which are specified in the tariff filed and in effect at the time . . ." [49 U. S. C. 6 (7)]

[2] 1 (18) "No carrier by railroad . . . shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of

strike out the counterclaim on the grounds, among others, that it is not related to the cause of action alleged in the complaint, is not pleadable under Rule 30, and is not within the jurisdiction of a court of three judges under 28 U. S. C., § 47.

The case was tried by a court of three, a circuit judge and two district judges. After hearing the evidence, the court in an opinion from which the circuit judge dissented held the order valid on the grounds that the tariff aided the Seaboard to violate § 1 (18) of the Act and that it unduly impaired the Seaboard's line haul revenue in violation of § 4 (1) of the Emergency Railroad Transportation Act, 1933, 48 Stat. 212. 12 F. Supp. 938. It entered a final decree denying the motion of the United States to dismiss and the motion of the Seaboard to strike out the counterclaim, declared the order valid and, in accordance with the prayer of the counterclaim, enjoined the Seaboard from extending its line from the junction to the receiving and delivery tracks at Fort Benning and from operating the line between these points without obtaining from the commission a certificate of public convenience and necessity, and from using the tariff and carrying out a contract for the use of the

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such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad . . ." [49 U. S. C. 1 (18)]

§ 1 (20) " . . . Any construction, [or] operation . . . contrary to the provisions of . . . paragraph (18) . . . may be enjoined by any court of competent jurisdiction at the suit of the United States, the commission, any commission or regulating body of the State or States affected, or any party in interest . . ." [49 U. S. C. 1 (20)]

§ 1 (22) "The authority of the commission, conferred by paragraphs (18) to (21) . . . shall not extend to the construction . . . of spur, industrial, team, switching or side tracks, located or to be located wholly within one State . . ." [49 U. S. C. 1 (22)]

tracks between the junction and the fort as devices to avoid the need of such a certificate.

The questions for decision are:

Is the Seaboard's suit to set aside the commission's order within the jurisdiction of the lower court? If so, may its decree upholding the order be sustained?

Is the Central's counterclaim against the Seaboard within the jurisdiction of the district court of three judges under 28 U. S. C., § 47?

Fort Benning is a United States military post in Georgia; the reservation includes 98,000 acres and has a population of more than 7,500. A railroad 6.8 miles long, built and owned by the United States, connects receiving and delivery tracks at the post, Fort Benning, with a station, Fort Benning Junction, at the intersection of the lines of the Seaboard and the Central. For more than eight years prior to October 16, 1932, the line between the junction and Fort Benning was operated by the Central under a license granted by the Secretary of War. The Central made Fort Benning a station on its system. For transportation between the junction and that station the Central collected arbitraries fixed by it in addition to the tariff charges applicable between the junction and points of origin or destination. Most of the freight handled was inbound. The Seaboard ceased to use its connection at the junction and interchanged traffic to and from Fort Benning with the Central at Columbia, about four miles from the junction.

In October, 1932, the Secretary of War revoked the Central's license and arranged to have the railroad operated by contractors, Page and Harris. He leased to them the line in question, and they agreed to transport all freight to and from the junction. They undertook to organize a corporation and to have it apply to the commission for a certificate of public convenience and necessity to acquire and operate the line as a common carrier

and then, by agreements with other carriers, to put in effect through routes and joint rates to and from Fort Benning as low as those to and from the junction and, out of its share of the rates so established, to take its pay for transportation performed by it.

Page and Harris organized the Fort Benning Railroad Company and caused it to apply for a certificate. The Seaboard gave assurances that it would join the new company in establishing through rates and divisions. The Central intervened in opposition. The application was granted by a division of the commission. 193 I. C. C. 223. But, on reargument before the entire commission, the certificate was rescinded and the application denied. 193 I. C. C. 517. The applicant never operated the line.

Shortly after the failure of the contractors' company to establish itself as a common carrier, the Seaboard filed the tariff in question, to become effective December 4, 1933. Under date of June 7, 1934, it made a contract with Page and Harris, stipulated to have been in force since the effective date of the tariff, whereby the latter agreed to act as its agents for transportation of freight between the junction and the receiving and delivery tracks named in the tariff. It agreed to pay them $12.50 for each loaded or partly loaded car handled in either direction or one-half of the gross revenue when the amount earned by the car was less than $25.

Paragraph (8) of the contract provides that when the Seaboard so desires, but subject to approval by the Secretary, it shall have the right, upon payment of reasonable compensation to Page and Harris, to perform switching service with its own engines and crews over the leased tracks. By paragraph (14) of the contract Page and Harris reserve the right, subject to the Secretary's approval, to render like service for the Central or any other common carrier. The Secretary approved

paragraph (8) subject to the reservation in paragraph (14) and to the condition that Page and Harris should ever hold themselves out as willing and ready to contract on similar terms with the Central or any other common carrier railroad.

The Central's complaint initiating the proceedings which resulted in the challenged order assailed the tariff on the grounds that it and the contract with Page and Harris constitute a device to avoid the commission's refusal to grant the Fort Benning Railroad Company a certificate of convenience and necessity; that by it the Seaboard seeks to extend its line to Fort Benning without obtaining a certificate and that it does not comply with § 6 (1) because it is obscure and ambiguous and fails to state the charges to be absorbed by the Seaboard or the compensation to be paid to Page and Harris. The complaint prayed cancelation of the tariff and cease and desist orders against the Seaboard and Page and Harris. It is obvious from the allegations and prayer of the complaint, as well as from its contentions before the commission, that the Central sought to have the commission prohibit the use by the Seaboard or its agents of the line between the junction and the fort because in violation of § 1 (18).

The commission's report states: The Seaboard employs Page and Harris as its agents and pays them for performance of transportation over the leased line and that service is common carrier service within the jurisdiction of the commission. The Central has not filed a similar tariff and does not perform or bear the cost of service corresponding to that covered by the Seaboard's tariff. Before the Seaboard could lawfully operate the line from the junction to the fort, it would have to obtain a certificate of convenience and necessity. But the commission did not decide whether, on that ground, it had jurisdiction to order the Seaboard or Page and Harris to

cease and desist or to suspend or set aside the tariff. It said (206 I. C. C. at p. 367): "Our finding of unlawfulness of the tariff . . . is not predicated on the fact that the Seaboard has violated section 1 (18), but rather on the fact that it has published rates to and from Fort Benning, a station not on its line and which cannot be reached by it or any other common carrier, and consequently it cannot pay out of its line-haul rates for a service which it is not legally obligated to perform and which it cannot perform except through the employment of the contractors with the Government." It added that approval by the Secretary of War of the contract between the Seaboard and Page and Harris "granted no rights to the Seaboard to operate over the track in question. Manifestly the War Department could take no action on a subject matter which the Congress has placed under our exclusive jurisdiction." The commission did not find that the tariff imposed any unreasonable burden upon the revenues of the Seaboard or connecting carriers or that the services covered by it would be performed for less than reasonable compensation or that its use would result in any disadvantage to shippers, carriers or the public.

1. The United States and the Interstate Commerce Commission contend that the commission's order is not reviewable under the statute.[3] They do not suggest that the order is a negative one or that the commission did not make an utterance which in form purported to be an order. But they say that it is not directed to any party; it requires no one to do or to refrain from doing any act; it could not be enforced, obeyed or disobeyed; it did not speak to the future or contemplate any future effect because, on and after the date it was made, it had no

[3] See 28 U. S. C. §§ 41 (28), 43, 44, 45, 45a, 47, 47a, 345. Cf. § 380.

significance "except as a record of a certain completed act performed by the Commission."

But overemphasis upon the mere form of the order may not be permitted to obscure its purpose and effect. By it the commission meant to put an end to the tariff in question and the service of the Seaboard according to its terms. The tariff was a rule binding the Seaboard to furnish transportation to and from the fort for charges under other tariffs applicable to and from the junction. The order would eliminate that rule and substitute for it terms of the tariffs applicable prior to its effective date. In effect the order grants the relief sought by the Central's complaint; it confines the Seaboard's service within the junction switching limits, denies leave to that carrier to furnish, and prevents it from furnishing, transportation to and from Fort Benning. Interpreted according to its purpose, the order is in substance and effect an affirmative one and therefore reviewable under the statute. *Chicago Junction Case,* 264 U. S. 258, 263. *Intermountain Rate Cases,* 234 U. S. 476, 490. *United States* v. *New River Co.,* 265 U. S. 533, 539–541. *Alton R. Co.* v. *United States,* 287 U. S. 229, 237. It is clear that the district court of three judges had jurisdiction to entertain the Seaboard's suit.

2. As to the validity of the order. The commission held the tariff violated § 6 solely because it covered service and published rates to and from a station, Fort Benning, found not to be on the line of the Seaboard. It may be assumed that, unless the record conclusively shows that the leased tracks constitute a part of the Seaboard's line within the meaning of § 6, the tariff was not authorized and the commission's order should be sustained. In substance, the facts found are: The United States leased the line to Page and Harris. With the approval of the Secretary, the lessees were employed by the

Seaboard as its agents to transport freight over the leased tracks, and the Seaboard was given the right to perform the transportation with its own engines and crews. Page and Harris reserved the right to render for the Central and other carriers service like that furnished by them as agent of the Seaboard, and were required by the Secretary to contract with such carriers on terms similar to those made with the Seaboard. The commission rightly held that in respect of the traffic covered by the tariff Page and Harris as the Seaboard's agents were common carriers and they and the service performed by them were subject to its jurisdiction.

Whether the leased tracks be, within the meaning of § 1 (18), an extension or addition, or, within the meaning of § 1 (22), spur, industrial, team, switching or side tracks, it is clear that the transportation over them by or for the Seaboard is required to be covered by a tariff filed in accordance with the Act. § 6 (7). The action of the Secretary was not inconsistent with proper exertion of the commission's authority to grant or withhold a certificate of public convenience and necessity for the use of the leased tracks by or for the Seaboard as required by § 1 (18) or to bring suit under § 1 (20) to enforce that paragraph. It follows that, § 1 (18) aside, the leased tracks covered by the tariff constitute a part of, and extend to or include a station on, the line of the Seaboard within the meaning of § 6. Indeed, there is nothing in the commission's report or in the briefs of appellees that tends to give support to the view that, if § 1 (18) had not been enacted, the tariff would not be valid.

As to the bearing of § 1 (18) on the validity of the tariff. The United States and the commission argue that the Seaboard cannot, by the arrangement for the use of the leased tracks, place Fort Benning on its line, because thereby the Seaboard extends its line and § 1 (18) prohibits an extension without the commission's approval;

that the tariff offers a service that cannot legally be performed because the extension, not having been approved, is forbidden by that paragraph. And they say that, since the carrier is required to furnish whatever service is covered by its tariffs, the inclusion of that within the Seaboard's extended switching limits would compel the carrier to perform an act prohibited by § 1 (18), and this the commission may not permit. The purpose of §§ 1 (18) to 1 (22) of the Act was to empower the commission in proceedings instituted by a carrier proposing to engage in transportation over or by means of an additional or extended line authoritatively to decide whether it would be in the public interest. Unless the project is one covered by § 1 (18), the commission is not authorized by the Act to consider whether it is in the public interest and, for lack of jurisdiction to determine that question, it must deny the application. Upon presentation by the carrier of application for a certificate, the commission, for the purpose of determining whether it is authorized by the Act to consider the merits, may pass incidentally upon the question whether the project is one covered by § 1 (18). But the decision of that question is for the court in either a suit to set aside an order granting a certificate or in a suit under § 1 (20) to enjoin a violation of § 1 (18). The function of the court is to construe that paragraph; that of the commission is to determine whether the project, if it is one covered by the paragraph, is in the public interest. The Central was not authorized by the Act to initiate a proceeding before the commission to determine whether the Seaboard's use of the leased tracks was or would be in the public interest. If application for a certificate had been made, the Central could have appeared in opposition. The Seaboard not having made application, the Central's sole remedy was a suit under § 1 (20). That paragraph provides the only method for enforcing § 1 (18). It de-

clares that any construction or operation contrary to § 1 (18) may be enjoined at the suit of the United States, the commission, the regulating body of the State affected or any party in interest. *Texas & Pacific Ry.* v. *Gulf, C. & S. F. Ry.*, 270 U. S. 266, 271–274. *Piedmont & Northern Ry.* v. *United States,* 280 U. S. 469, 476 *et seq. Chesapeake & Ohio Ry.* v. *United States,* 283 U. S. 35, 42. *Western Pacific California R. Co.* v. *Southern Pacific Co.,* 284 U. S. 47. *St. Louis S. W. Ry.* v. *Missouri Pacific R. Co.,* 289 U. S. 76, 81, 82. *Transit Commission* v. *United States,* 289 U. S. 121. *United States* v. *Idaho,* 298 U. S. 105, 109.

The contention of the United States and the commission comes to this: Fort Benning is not a station on the Seaboard's line because by use of the tariff and the leased tracks the carrier violates § 1 (18). Since the tariff extends to a station not on the carrier's line, it violates § 6. Therefore the commission rightly ordered the tariff to be stricken from its files. Plainly that begs the question. It takes for granted a violation of § 1 (18), a fact not established and one which the commission had no jurisdiction to determine. The contention is fallacious and must be rejected.

Plainly, the Central mistook its remedy. By its complaint against the tariff it sought an order of the commission equivalent to a decree of court in a suit under § 1 (20) enjoining the Seaboard from extending its service because contrary to § 1 (18). The order, as construed and supported by appellees, is the practical equivalent of such a decree. The governing statutory provisions do not permit substitution of the commission's order for a decree of court. The remedy provided by § 1 (20) is clearly inconsistent with a proceeding before the commission to attain the same end. Suits under that paragraph may not be tried before three judges. Those under the Urgent Deficiencies Act (28 U. S. C., § 47) to set aside orders

of the commission cannot be tried in any other court. In suits under § 1 (20), appeals must be taken to the Circuit Court of Appeals. Appeals from district courts of three judges must be taken to this court. The statutes cannot be construed to give the commission, a carrier or other party seeking to enforce § 1 (18) a choice of remedies; i. e., between a proceeding before the commission to invalidate the applicable tariff and a suit under § 1 (20). The latter is exclusive.

The gravamen of the Central's complaint is not that the Seaboard is engaging in transportation like that furnished by the Central before the Secretary revoked its license. But it is that the Seaboard does it without additional charges. There is nothing in the findings of the commission to suggest that the tariff unduly burdens the Seaboard's revenue or that it is unreasonable or unjustly discriminatory. Its findings on the Fort Benning Railroad Company's application although put in evidence are not findings in the proceeding in which was made the order in question and have no bearing on the validity of the tariff under consideration. The lower court erred in sustaining the commission's order on the ground that the "tariff unduly impairs the line haul revenue." The commission did not so find. The order cannot be sustained.

3. The counterclaim was not properly before the court and could not be entertained as an incident to or part of the suit to set aside the commission's order respecting the tariff.

The Seaboard's bill merely assails the commission's order. The issue between the original parties is confined to its validity. The suit is a statutory one triable only in a specially constituted court. The counterclaim is based on a violation of § 1 (18); the facts alleged are not sufficient to constitute a cause of action within the jurisdiction of that court. *Pittsburgh & West Virginia Ry.*

v. *United States,* 281 U. S. 479, 488. Moreover, the counterclaim does not arise out of the transaction that is the subject of the suit and is not germane or related to it. Equity Rule 30 cannot reasonably be construed to authorize intervening defendants, in a suit to set aside an order of the commission, to set up counterclaims not arising out of or related to the subject matter of the suit. That would permit complications likely to burden and impede and would be contrary to the purpose and intent of the rule. *Chandler & Price Co.* v. *Brandtjen & Kluge, Inc.,* 296 U. S. 53, 59. The counterclaim, not being within the jurisdiction of the specially constituted court, should have been dismissed for want of jurisdiction. *Pittsburgh & West Virginia Ry.* v. *United States, ubi supra.*

Complainants were entitled to the judgment and decree of the specially constituted court declaring that the commission's order striking the tariff from its files is illegal and void and setting aside and annulling the same.

Reversed.

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

MR. JUSTICE CARDOZO is of the opinion that the decree should be modified by striking the counterclaim of the intervening defendant, and as so modified, affirmed.

INGELS, DIRECTOR OF THE MOTOR VEHICLE DEPARTMENT, ET AL. *v.* MORF ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

No. 456. Argued February 5, 1937.—Decided March 1, 1937.

1. To justify the exaction by a State of a money payment burdening interstate commerce, it must affirmatively appear that it is de-

manded as reimbursement for the expense of providing facilities, or of enforcing regulations of the commerce which are within its constitutional power. This may appear from the statute itself, or from the use of the money collected, to defray such expense. P. 294.

2. The California "Caravan Act," Stats., 1935, c. 402, defines "caravaning" as the transportation "from without the State, of any motor vehicle operated on its own wheels or in tow of another vehicle for the purpose of selling or offering the same for sale . . . to any purchaser" located within or without the State; it prohibits caravaning without attaching to each vehicle a special permit, for which a fee of $15.00 is exacted. The permit is valid only for a specified trip or trips and for a period of 90 days. The Act directs that the fees collected be paid into the general fund in the state treasury, and declares that they are "intended to reimburse the state treasury for the added expense which the State may incur in the administration and enforcement of this Act, and the added expense of policing the highways over which such caravaning may be conducted, so as to provide for the safety of traffic on such highways where caravaning is being conducted." *Held:*

(1) From a consideration of the Act, in connection with other California enactments, it appears that the collections are used, not to meet the cost of highway construction or maintenance, but to reimburse the state treasury for the added expense of administering the Caravan Act and policing the caravaning traffic. P. 295.

(2) The burden of showing that, for this purpose, the exaction is excessive rested upon the person attacking it. P. 296.

(3) Finding of the trial court that the fee is excessive was sustained by the evidence in this case. *Id.*

(4) The licensing provisions therefore impose an unconstitutional burden on interstate commerce. *Morf* v. *Bingaman,* 298 U. S. 407, distinguished. Pp. 294, 297.

14 F. Supp. 922, affirmed.

APPEAL from a decree of the District Court of three judges, enjoining the enforcement of provisions of the California Caravan Act.

Messrs. Frank Richards and *Amos M. Mathews,* with whom *Mr. U. S. Webb,* Attorney General of California, and *Mr. James S. Howie* were on the brief, for appellants.

Messrs. Ralph K. Pierson and *Byron J. Walters,* with whom *Mr. Samuel P. Block* was on the brief, for appellees.

By leave of Court, *Mr. Frank P. Doherty* filed a brief on behalf of Asher & Ponder, a co-partnership, as *amicus curiae,* urging affirmance of the decree below.

MR. JUSTICE STONE delivered the opinion of the Court.

This suit was brought by appellee in the District Court for Southern California, three judges sitting, to restrain appellants, state officers, from enforcing the provisions of the "Caravan" Act, Cal. Stat. 1935, c. 402, as a forbidden burden on interstate commerce, and as an infringement of the due process and equal protection clauses of the Fourteenth Amendment. From a decree granting the relief prayed, the case comes here on appeal under §§ 238 (3), 266, Judicial Code.

The challenged statute defines "caravaning" as the transportation, "from without the state, of any motor vehicle operated on its own wheels or in tow of another vehicle for the purpose of selling or offering the same for sale . . . to any purchaser" located within or without the state. Sections 2 and 3 prohibit caravaning without attaching to each vehicle so transported a special permit issued by the State Motor Vehicle Department, for which a fee of $15 is exacted. A permit is valid only for the trip or trips specified in it, and for a period of ninety days (§ 4). Section 6 directs that the fees collected be paid into the general fund in the state treasury, and declares that they are "intended to reimburse the State treasury for the added expense which the State may incur in the administration and enforcement of this Act, and the added expense of policing the highways over which such caravaning may be conducted, so as to provide for

the safety of traffic on such highways where caravaning is being conducted."

Appellee, a resident of Los Angeles, California, carries on his business there as a dealer in automobiles. He purchases used automobiles in other states and transports them from the place of purchase to points on the California boundary line, thence over state highways to Los Angeles, and sometimes to other places, where he offers them for sale. He conducts from 20 to 25% of the total movement in such traffic. Some of his vehicles are coupled together in twos, and move in caravans or fleets, sometimes aggregating more than 30 cars. He gave testimony, which appellants sharply challenge, that from 30 to 40% move singly and not in company with any other vehicle. A permit is required for each car, whether it moves alone or as part of a fleet. The district court found that such movement of vehicles in caravans of more than four create special traffic difficulties, but that the movement of four or less "constitutes no police problem"; that there is considerable like traffic carried on wholly within the state, for which the fee of $15 is not exacted and for which no similar or other fee is required; and that the demanded fee for each car moving in the interstate traffic is excessive and bears no reasonable relation to the increased cost of policing. It concluded, as the appellee contends here, that the statute denies to appellee due process and equal protection, and places a forbidden burden on, and discriminates against, interstate commerce.

We find it necessary to consider only the contention that the licensing provisions burden interstate commerce. We do not discuss appellants' suggestion that, contrary to the finding below, there is no evidence of comparable traffic moving intrastate, and hence no discrimination against interstate commerce by the failure of the Act to

exact a fee of those engaged in intrastate commerce. It is not denied that the permit fee, imposed upon those engaged in interstate commerce, burdens this commerce, but appellants urge that it is a permissible charge for the use of the state highways and for the cost of policing the traffic, including the cost of administering the Act.

In *Morf* v. *Bingaman,* 298 U. S. 407, recently before this Court, the Caravaning Act of New Mexico, containing some features similar to the present act, was likewise assailed as burdening interstate commerce by the imposition of a fee, of $7.50 for each vehicle moving by its own power, and $5.00 for each vehicle towed by another when moving in caravan. The statute made the privilege of using the highway conditional upon payment of the fee. The fees collected were devoted in part to highway purposes. We held that the fees were a charge for the use of the highways, not shown by the taxpayer to be unreasonable, which the state might lawfully demand. Compare *Hendrick* v. *Maryland,* 235 U. S. 610, 624; *Interstate Busses Corp.* v. *Blodgett,* 276 U. S. 245, 249, 250.

To justify the exaction by a state of a money payment burdening interstate commerce, it must affirmatively appear that it is demanded as reimbursement for the expense of providing facilities, or of enforcing regulations of the commerce which are within its constitutional power. *Sprout* v. *South Bend,* 277 U. S. 163, 169, 170; *Interstate Transit, Inc.* v. *Lindsey,* 283 U. S. 183, 186; *Postal Telegraph-Cable Co.* v. *Richmond,* 249 U. S. 252, 259; *Clyde Mallory Lines* v. *Alabama,* 296 U. S. 261, 267. This may appear from the statute itself, *Morf* v. *Bingaman, supra; Clark* v. *Poor,* 274 U. S. 554, 557, or from the use of the money collected, to defray such expense. *Hicklin* v. *Coney,* 290 U. S. 169, 173; see *Kane* v. *New Jersey,* 242 U. S. 160, 168, 169; *Aero Mayflower Transit Co.,* v. *Georgia Public Service Comm'n,* 295 U. S. 285,

289; compare *Interstate Busses Corp.* v. *Blodgett, supra,* 249.

Here appellant does not show that the fees collected are used to meet the cost of the construction or maintenance of its highways. Section 6 of the challenged act, which directs that the permit fees be paid into the general fund of the state treasury, is to be contrasted with other California statutes relating to motor vehicles, which exact license fees and taxes and direct that they be paid, at least in part, into special funds devoted to highway purposes. Motor Fuel License Act, § 13, Cal. Stat. 1923, c. 267, as amended, Cal. Stat. 1935, c. 264; Vehicle Code, §§ 776, 781, Cal. Stat. 1935, c. 27; Cal. Stat. 1935, c. 362, §§ 9 (a), 9 (d). See *Interstate Transit, Inc.* v. *Lindsey, supra,* 188-190. Appellants point to no statute appropriating any part of the general fund of the state treasury for highway purposes, and the Street and Highways Code, § 183, Cal. Stat. 1935, c. 29, provides: "With the exception of money authorized by law to be deposited in the state highway general fund, all money available for the acquisition of real property or interest therein for state highways or for construction, maintenance or improvement of state highways, or highways in state parks, shall be deposited in the state highway fund."

Hence we must look to the statute itself to ascertain the purposes for which the permit fees are collected. On this point it is explicit. It declares (§ 6) that they are intended to reimburse the state treasury for the added expense of administering the Caravan Act and policing the caravaning traffic. This negatives any inference of the purpose of the collection which might otherwise be drawn from the statute, and from its provision that the permit is prerequisite to the use of the highways. Compare *Morf* v. *Bingaman, supra.* It is true that this declaration is not an appropriation of the moneys collected

and it does not foreclose the use of the fund for highway maintenance, should the state elect to do so. But until such appropriation is made the statute itself states the legislative purpose, and precludes state officials from asserting that the fees are collected for any other.

The burden rests on appellee to show that the fee is excessive for the declared purpose. *Hendrick* v. *Maryland, supra,* 624; *Interstate Busses Corp.* v. *Blodgett, supra,* 250; *Morf* v. *Bingaman, supra,* 410. But the trial court has found that it is excessive and the finding is amply supported by evidence. In 1934, 9,663 cars were caravaned, and in the first eleven months of 1935, 14,000. This supports the inference of the trial court that 15,000 cars are brought into the state, annually, for sale under the conditions defined in the Act. There was testimony that the expense involved in issuing caravaning permits is "about $5.00 per car," although it appeared that the permit fee for local pleasure cars, numbering 1,960,000 was $3.00 per year of which only 35% ($1.05) is devoted to administrative expenses.

The Caravan Act became effective September 15, 1935. A permit granted under it is confined to a limited movement from the state boundary to the immediate point of destination. The undisputed evidence shows that prior to the passage of the measure two new district inspectors were appointed solely on account of caravaning, and fourteen new highway patrolmen were "assigned," partially because of caravaning and its effect on traffic. The chief of the California highway patrol, in summarizing his testimony, said that he had put on "approximately six additional men over the whole state because there were caravans on the road, and I anticipate putting on more men." They receive a monthly salary of $170, which may eventually be increased to $225. The district court found that the evidence indi-

cated that a total of ten men at a salary of $200 a month, and at an aggregate cost of $24,000 a year, would be adequate to police the traffic, whereas the permit fees from 15,000 cars would yield an annual return of $225,000.

We cannot say that the evidence does not support the conclusion of the trial court that the cost of policing would be amply met by a license fee of one-third of the amount so charged. The administrative expense of issuing the permits appears not to have been included, but the testimony that that expense was about $5.00 per car does not bridge the arithmetical gap, and does not impeach the court's conclusion that the permit fee bears no reasonable relation to the total cost of regulation, to defray which it is collected. It rightly held that the licensing provisions of the statute impose an unconstitutional burden on interstate commerce.

On this record we are not required to consider whether the provisions of § 2 which make it unlawful "to operate three or more vehicles or groups of vehicles in a caravan unless a space of at least one hundred fifty feet shall at all times be maintained between each vehicle or group of vehicles being so caravaned" may be enforced if applied, independently of the licensing provisions, in a statute non-discriminatory in its operation. *Affirmed.*

SWAYNE & HOYT, LTD. ET AL. *v.* UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

No. 494. Argued February 11, 12, 1937.—Decided March 1, 1937.

1. Acting under the Shipping Act and an Executive Order purporting to transfer the functions of the Shipping Board to the Secretary of Commerce, the Secretary, after hearings, found that rates filed by a certain group of carriers were unduly prejudicial to shippers and other carriers and ordered their cancellation. *Held* that the

exercise of power, if initially unauthorized, was validated retroactively by Acts of Congress cited. *Isbrandtsen-Moller Co.* v. *United States, ante,* p. 139. P. 300.

2. In determining the validity of retroactive legislation, a distinction is drawn between bare attempts to create liability for transactions fully consummated and curative statutes designed to remedy, without injustice, mistakes and defects in administration of government. P. 302.
3. The want of impairment of any substantial equity, the preservation of the right to an administrative hearing and judicial review, and the fact that the proceedings were conducted by the Secretary in the name of the United States, deprive the validating statute of the elements of novelty and surprise which may condemn retroactive legislation. P. 302.
4. Tariffs allowing reduced rates to shippers who agree to ship exclusively, and for a specified period, by vessels of the carriers offering such rates, are discriminatory, and are unlawful under § 16 of the Shipping Act if the discrimination is undue or unreasonable. P. 303.
5. The Shipping Act, like the Interstate Commerce Act, sets up an administrative agency, whose determinations of fact, on the basis of which orders are made, will not be set aside in the courts if there is evidence to support them. Whether a discrimination in rates or services of a carrier is undue or unreasonable is peculiarly a question committed to the judgment of the administrative body. P. 303.
6. The evidence before the Secretary of Commerce in this case was enough to support his conclusions that the contract rate system here involved was not needed to assure stability of service and that it tended to give the participating carriers a monopoly by excluding competition of new lines. P. 305.
7. Though the evidence may support a different inference, this Court may not substitute its judgment for that of the Secretary. P. 307.

18 F. Supp. 25, affirmed.

APPEAL from a decree of the District Court of three judges dismissing the bill in a suit brought by intercoastal marine carriers to set aside an order of the Secretary of Commerce requiring the cancellation of certain rates.

Mr. Elisha Hanson, with whom *Messrs. Eliot C. Lovett* and *Frank Lyon* were on the brief, for appellants.

Assistant Solicitor General Bell, with whom *Solicitor General Reed* and *Messrs. Hugh B. Cox, Wendell Berge,* and *R. H. Hallett* were on the brief, for the United States.

MR. JUSTICE STONE delivered the opinion of the Court.

Appellants are steamship corporations engaged in the transportation of freight through the Panama Canal between United States ports on the Gulf of Mexico and on the Pacific Coast. They constitute the Gulf Intercoastal Conference, which operates under an agreement, approved March 28, 1934, by the United States Shipping Board Bureau of the Department of Commerce, as provided by § 15 of the Shipping Act of 1916, 39 Stat. 733, 46 U. S. C. § 814. On May 25, 1933, the Conference, in conformity to the Intercoastal Shipping Act of 1932, § 2, 47 Stat. 1425, 46 U. S. C. § 844, filed with the United States Shipping Board Bureau a new tariff, effective June 2, 1933, publishing certain rates for the transportation of freight, westbound from coast to coast.

The tariff, continuing the contract system in use by the Conference, provided for "contract rates" for specified commodities, to be enjoyed by shippers who agree with the Conference, by written contract, to make all their shipments of those commodities by vessel of the Conference members for a specified period. The tariff rates on the same commodities for shippers not entering into contracts were $2.00 per ton higher than the contract rates. In 1934, the Secretary of Commerce ordered an investigation by the Shipping Board Bureau of the lawfulness of the contract rate system (see § 22 of the Shipping Act, 39 Stat. 736, 46 U. S. C. § 821, and § 3 of the Intercoastal Shipping Act of 1933, 47 Stat. 1426, 46 U. S. C. § 845). The ensuing report condemned the discrimination, and on July 3, 1935, the Secretary ordered the appellants to cease charging the higher rates to shippers who had not entered into contracts.

In September of that year appellants filed new rate schedules, effective October 3, 1935, which continued the contract rate system. Thereupon the Secretary vacated his order of July 3rd and made an order suspending the schedules and directing a second hearing concerning the lawfulness of the contract rate system. On this hearing new evidence was introduced, and relevant portions of the evidence adduced on the previous hearing were spread upon the record. In a report reviewing this record, the Secretary found that the "real purpose of the suspended rates . . . is to prevent shippers from using the lines of other carriers and to discourage all others from attempting to engage in intercoastal transportation from and to the Gulf." He accordingly found the rates unduly prejudicial and ordered their cancellation.

The present suit was brought in the District Court for the District of Columbia, three judges sitting, to set aside the order of the Secretary as without his statutory authority and because not supported by substantial evidence. From the decree of the district court sustaining the Secretary's order, 18 F. Supp. 25, the case comes here on appeal under § 31 of the Shipping Act, 39 Stat. 738, 46 U. S. C. § 830, and the Act of October 22, 1913, 38 Stat. 220, 28 U. S. C., § 47. Appellants here, as in the court below, have assigned as error that the Secretary was without authority to make the order under review because the Executive Order of June 10, 1933, No. 6166, § 12, which abolished the United States Shipping Board and transferred its functions to the Department of Commerce, was without constitutional and legislative authority, and because the findings and order of the Secretary were without support in the evidence.

First. Since the appeal was taken, the contention that the transfer to the Secretary, by Executive Order (No. 6166, § 12), of powers conferred by the Shipping Act on the United States Shipping Board, was unauthorized by the terms of Title 4 of the Legislative Appropriation Act

of June 30, 1932, 47 Stat. 413, as amended, 47 Stat. 1517, has been put at rest by the decision of this Court in *Isbrandtsen-Moller Co.* v. *United States, ante,* p. 139. There we held that the failure of Congress, if any, to express its will in the earlier act had been remedied by various later acts mentioning the Executive Order, and making appropriations to the Department of Commerce for payment of the expenses of carrying out the provisions of the Shipping Act,[1] and by § 204 (a) of the Merchant Marine Act of June 29, 1936, 49 Stat. 1985, which referred to functions of the former Shipping Board as "now vested in the Department of Commerce pursuant to § 12 of the President's Executive Order No. 6166," and transferred them to the newly-constituted United States Maritime Commission.

To dispose of further contentions also urged here, that Congress was without constitutional power to delegate to the President authority to determine whether the transfer should be effected, and that he did not exercise it in a constitutional manner, the Court found it enough that the order of the Secretary, which the Maritime Commission had continued in effect, had "determined no rights and prescribed no duties" of the carrier. The rate order here is of a different sort and we face the question previously reserved. It is unnecessary now to pass on the efficacy of the transfer by Executive Order, for we are of opinion that as Congress itself had power to abolish the Shipping Board and to require its functions to be performed by the Secretary, it had power to recognize and validate his performance of those functions even though their attempted transfer by Executive Order was ineffectual.

It is well settled that Congress may, by enactment not otherwise inappropriate, "ratify . . . acts which it

[1] Act of April 7, 1934, 48 Stat. 529, 566; Act of March 22, 1935, 49 Stat. 67, 99; Act of May 15, 1936, 49 Stat. 1309, 1345.

might have authorized," see *Mattingly* v. *District of Columbia,* 97 U. S. 687, 690, and give the force of law to official action unauthorized when taken. *Wilson* v. *Shaw,* 204 U. S. 24, 32; *United States* v. *Heinszen & Co.,* 206 U. S. 370, 382; *Hamilton* v. *Dillin,* 21 Wall. 73, 96; *Tiaco* v. *Forbes,* 228 U. S. 549, 556; *Rafferty* v. *Smith, Bell & Co.,* 257 U. S. 226, 232; *Charlotte Harbor & Northern Ry.* v. *Welles,* 260 U. S. 8, 11; *Hodges* v. *Snyder,* 261 U. S. 600, 603. And we think that Congress, irrespective of any doctrine of ratification, has, by the enactment of the statutes mentioned, in effect confirmed and approved the exercise by the Secretary of powers originally conferred on the Shipping Board.

The mere fact that the validation is retroactive in its operation is not enough, in the circumstances of this case, to render it ineffective. In *Graham & Foster* v. *Goodcell,* 282 U. S. 409, 429, this Court recognized that a distinction must be taken "between a bare attempt of the legislature retroactively to create liabilities for transactions . . . fully consummated in the past . . . and the case of a curative statute aptly designed to remedy mistakes and defects in the administration of government where the remedy can be applied without injustice." And see *Hecht* v. *Malley,* 265 U. S. 144, 164. Here the retroactive application of the curative act impairs no substantial right or equity of appellants; their rights to an administrative hearing and determination, and to a judicial review, have been as fully preserved as if the act had been adopted at the date of the Executive Order. The proceedings were conducted by the Secretary in the name of the United States, cf. *United States* v. *Heinszen & Co., supra,* at 385, by virtue of the 1932 Act and the Executive Order. The consequences of the validating statute are free of the elements of novelty and surprise which have led to condemnation, as unreasonable and arbitrary, of other retroactive legislation. See

Milliken v. *United States,* 283 U. S. 15, 21; *United States* v. *Hudson,* 299 U. S. 498. We conclude that the Secretary's exercise of the powers conferred on the Shipping Board has been sanctioned by Congress.

Second. Section 16 of the Shipping Act declares that "it shall be unlawful for a common carrier by water," subject to the Act, "to make or give any undue or unreasonable preference or advantage to any particular person, locality or description of traffic in any respect whatsoever or to subject any particular person, locality or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." [2] The differential between appellants' rates on commodities transported under contract and the rates on the same commodities for non-contract shippers was prima facie discriminatory since the two rates were charged for identical services and facilities, and the narrow issue presented to the Secretary for decision was whether, in the conditions affecting the traffic involved, the discrimination was undue or unreasonable.

As pointed out by this Court in *United States Navigation Co.* v. *Cunard S. S. Co.,* 284 U. S. 474, the provisions of the Shipping Act which confer upon the Shipping Board authority over rates and practices of carriers by water, and prescribe the mode of its exercise, closely parallel those of the Interstate Commerce Act establishing the corresponding relations of the Interstate Commerce Commission to carriers by rail. Both have set up an administrative agency to whose informed judg-

[2] See also Shipping Act, § 15, 39 Stat. 733, 46 U. S. C. § 814 (the Shipping Board may cancel or modify any agreement between a carrier and another carrier or person subject to the Act, which it finds to be unjustly discriminatory); § 17, 39 Stat. 734, 46 U. S. C. § 816 (the Board may order discontinuance of discriminatory rates charged by carriers in foreign commerce); § 18, 39 Stat. 735, 46 U. S. C. § 817 (whenever the Board finds that any classification is unjust or unreasonable, it may order a just and reasonable one enforced).

ment and discretion Congress has committed the determination of questions of fact, on the basis of which it is authorized to make administrative orders.

Such determinations will not be set aside by courts if there is evidence to support them. Even though, upon a consideration of all the evidence, a court might reach a different conclusion, it is not authorized to substitute its own for the administrative judgment. See *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 481; *Pennsylvania Co.* v. *United States,* 236 U. S. 351; cf. *United States Navigation Co.* v. *Cunard S. S. Co., supra,* 484. Whether a discrimination in rates or services of a carrier is undue or unreasonable has always been regarded as peculiarly a question committed to the judgment of the administrative body, based upon an appreciation of all the facts and circumstances affecting the traffic. *Manufacturers Ry. Co.* v. *United States, supra; Pennsylvania Co.* v. *United States, supra,* 361; *Seaboard Air Line Ry. Co.* v. *United States,* 254 U. S. 57, 62; *Pennsylvania R. Co.* v. *International Coal Co.,* 230 U. S. 184, 196; *Nashville, C. & St. L. Ry.* v. *Tennessee,* 262 U. S. 318, 322.

In determining whether the present discrimination was undue or unreasonable the Secretary was called upon to ascertain whether its effect was to exclude other carriers from the traffic, and if so, whether, as appellants urge, it operated to secure stability of rates with consequent stability of service, and, so far as either effect was found to ensue, to weigh the disadvantages of the former against the advantages of the latter. This was clearly recognized in the report upon which the present order is based. It states that the danger of cut-throat competition was lessened by § 3 of the Intercoastal Shipping Act of 1933, and that the contract system tends to create a monopoly. In view of the assurance of reasonable rate stability afforded by the Act of 1933, the Secretary concluded that this was the real purpose of the contract rate.

Before the enactment of the Shipping Act in 1916, there was no Congressional regulation of rates and practices of water carriers. By § 16 of the Act, the carriers were required to file only their maximum rates, which left them free to indulge in rate wars. Under §§ 2 and 3 of the Intercoastal Shipping Act of 1933, they are required to file schedules specifying their rates, which are subject to change only on thirty days' notice, and to examination by the Board as to their lawfulness, with power in it to suspend the rate pending investigation. We cannot say that cut-rates for "tramp" and "distressed" tonnage, which, according to appellants' witnesses, are the principal menace to rate stability, would not be substantially deterred by these requirements. The chairman of the Conference admitted that the 1933 statute "has to a certain extent eliminated the condition necessitating the contract rate system." In addition may be mentioned the testimony of shippers who favored the contract rate system, but admitted that they had had no difficulty with the stability of the service in their shipments from Atlantic ports, where the conferences have not adopted a contract system. We think there was evidence from which the Secretary could reasonably conclude that there was little need for a contract rate system to assure stability of service.

On the other hand, there was substantial evidence from which the Secretary could infer that the contract rate system would tend to give to the Conference carriers a monopoly by excluding competition from new lines. The secretary of the Conference testified that approximately 64% of the west-bound port to port tonnage moved under the contract rate. Representatives of lines not members of the Conference stated that the tonnage left was not enough to make the operation of a new line profitable, and that the contract system precluded the employment of their idle steamers in the Gulf trade. The

Conference chairman admitted that it would "not be easy" for a new line to enter the Gulf service because it "is now adequately tonnaged," and that the contract system restricted the amount of available tonnage. He suggested that a competing line might be able to get tonnage if it offered as much as a 10% rate reduction, but admitted that it probably could not operate successfully at such a rate.

It also appeared, contrary to the assertion of appellants, that competing lines were not free to enter the Conference. By the provisions of the Conference agreement, it is prerequisite to admission that the applicant shall be engaged in the general cargo trade from the Gulf to the Pacific. There was testimony that the Conference had denied admission to a line because it did not have an established service in the Gulf, although at the time when it applied for membership it had idle vessels and "offices and facilities" for conducting the business. It is an admissible inference from the evidence that a new line, to secure admission to the Conference, must either be able successfully to compete with the Conference lines at the start, notwithstanding the restriction of the contract rate, or must subject itself to a loss before it can qualify for admission.

There was thus evidence before the Secretary which tended to show that the contract rate system, by reason of the conditions prevailing in the traffic, had established a practical monopoly of cargoes moving from the Gulf ports to ports on the Pacific coast, from which competing carriers were excluded by the provisions of the Conference agreement, except on terms which were practically prohibitive, and that, since the adoption of the Intercoastal Shipping Act of 1933, stability of service, which appellants urge as justification for the system, could be secured without a contract rate. As the Secretary has in-

terpreted the evidence, the operation of the contract system, in the circumstances of this case, does not differ substantially from that of "deferred rebates" outlawed in both foreign and coastwise shipping by § 14 of the Shipping Act, 39 Stat. 733, 46 U. S. C. § 812.[3]

Even though, as appellants seem to argue, the evidence may lend itself to support a different inference, we are without authority to substitute our judgment for that of the Secretary that the discrimination was unreasonable.

Affirmed.

MR. JUSTICE SUTHERLAND dissents.

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[3] Section 14 of the Shipping Act defines the term "deferred rebate" as "a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement."

The report of the House Committee on Merchant Marine & Fisheries, H. R. Doc. 805, 63rd Cong., 2d Sess. (1914), recommended (p. 307) the prohibition of deferred rebates, adopted in § 14 of the Shipping Act, because it operated to tie shippers to a group of lines for successive periods, and because the system "is unnecessary to secure excellence and regularity of service, a considerable number of conferences being operated today without this feature." See, e. g., pp. 103–105, 200. The Committee recognized that the exclusive contract system does not necessarily tie up the shipper as completely as "deferred rebates," since it does not place him in "continual dependence" on the carrier by forcing his exclusive patronage for one contract period under threats of forfeit of differentials accumulated during a previous contract period. Accordingly the Committee did not condemn the contract system completely. Cf. W. T. Rawleigh Co. *v.* Stoomvaart, 1 U. S. S. B. 285. The policy of the statute may properly be applied where, as in the circumstances of this case, the contract system must be taken as actually operating to effect a monopoly. Cf. Eden Mining Co. *v.* Bluefields Fruit & S. S. Co., 1 U. S. S. B. 41.

NEW YORK EX REL. COHN *v.* GRAVES ET AL.

APPEAL FROM THE SUPREME COURT OF NEW YORK.

No. 404. Argued February 3, 1937.—Decided March 1, 1937.

1. A State may tax her citizen upon the income he receives by way of rents from lands situate in another State and by way of interest on bonds secured by mortgage on lands situate in another State. Pp. 312, 316.
2. The receipt of income by a resident is a taxable event. P. 312.
3. Domicil itself affords a basis for such taxation. P. 313.
4. Enjoyment of the privileges of residence in the State and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government. *Id.*
5. Neither the privilege nor the burden is affected by the character of the source from which the income is derived. For that reason income is not necessarily clothed with the tax immunity enjoyed by its source. *Id.*
6. A tax on the income from land is not a tax on the land (*Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, distinguished), and taxation of both, by the same or different States, is not double taxation. P. 314.
7. In reviewing the judgment of a state court, this Court will not pass upon any federal question not shown by the record to have been raised in the state court or considered there, although it be one arising under the same clause in the Constitution with respect to which other questions are properly presented. P. 317.

271 N. Y. 353; 3 N. E. (2d) 508, affirmed.

APPEAL from a judgment which reversed a judgment favorable to the present appellant, in a proceeding to review a determination of the State Tax Commission of New York and thus secure a refund of money alleged to have been unlawfully exacted as state income taxes.

Mr. Maurice Cohn, with whom *Messrs. David Cohn, Daniel J. Kenefick, Randolph E. Paul,* and *Watson Washburn* were on the brief, for appellant.

No State may tax lands lying in another State. *Hoyt* v. *Commissioners,* 23 N. Y. 224, 226; *Senior* v. *Braden,*

295 U. S. 422; *Safe Deposit & Trust Co.* v. *Virginia,* 280 U. S. 83; *Frick* v. *Pennsylvania,* 268 U. S. 473; *Farmers' Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204; *Baldwin* v. *Missouri,* 281 U. S. 586.

A tax upon the rents from real estate is in substance and effect a tax upon the real estate. *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429, 580, 581; 158 *id.* 601, 630; *Northwestern Mutual Life Ins. Co.* v. *Wisconsin,* 275 U. S. 136, 140; *National Life Ins. Co.* v. *United States,* 277 U. S. 508, 521; *Opinion of the Justices,* 84 N. H. 559, 573, 574; *Opinion of the Justices,* 220 Mass. 613, 624. See also *Harrison* v. *Commissioner of Corporations,* 272 Mass. 422; *Hart* v. *Tax Commissioner,* 240 Mass. 37; *Pierson* v. *Lynch,* 237 App. Div. 765, aff'd, 263 N. Y. 533.

The general rule has always been, in the language of Coke: "But if a man seised of lands in fee by his deed granteth to another the profit of those lands, and to have and to hold to him and his heirs, and maketh livery *secundum forman chartae,* the whole land itselfe doth passe; for what is the land but the profits thereof; . . ." Co. Lit. 4b. See also *Knowlton* v. *Moore,* 178 U. S. 41, 81; *McCoach* v. *Minehill & S. H. R. Co.,* 228 U. S. 295, 306; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107; Alexander Hamilton, Hamilton's Works, Putnam's ed., vol. 3, p. 34; Joseph H. Choate (*Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. at p. 540); *Metcalf* v. *Mitchell,* 269 U. S. 514, 522; *Gillespie* v. *Oklahoma,* 257 U. S. 501; *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393.

For the State of domicile to tax the income from property, intangible as well as tangible, which is physically located in or has acquired a business situs in another State, would violate the due process clause of the Fourteenth Amendment. See *Wheeling Steel Corp* v. *Fox,* 298 U. S. 193, and cases *supra.*

Lawrence v. *State Tax Comm'n,* 286 U. S. 276, is not in harmony with the recent decisions of this Court and

particularly *Senior* v. *Braden, supra,* and *Wheeling Steel Corp.* v. *Fox, supra.* It should be limited to its facts.

Multiple state taxation contravenes due process. Tax chaos will result if the other States follow the overreaching example of New York.

Inheritance and property taxes are both dependent upon jurisdiction of the property. See *Frick* v. *Pennsylvania,* 268 U. S. 473; *First National Bank* v. *Maine,* 284 U. S. 312; *City Bank Farmers Trust Co.* v. *Schnader,* 293 U. S. 112. In recent years, and particularly since 1930, this Court in unmistakable terms has repeatedly declared against double and multiple state taxation.

The New York statute, passed May 16, 1935, in so far as it attempts to levy a retroactive tax on income received prior to 1934, was arbitrary and unconstitutional.

Distinguishing: *Lawrence* v. *State Tax Comm'n,* 286 U. S. 276; *Maguire* v. *Trefry,* 253 U. S. 12; *Cook* v. *Tait,* 265 U. S. 47; *Central Union Trust Co.* v. *Wendell,* 199 App. Div. 131; *Van Rensselaer* v. *Dennison,* 8 Barb. 23; and *Kirtland* v. *Hotchkiss,* 100 U. S. 491.

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

By leave of Court, *Messrs. Edgar M. Leventritt, Wm. R. Green, Jr., J. Mark Jacobson,* and *Frank Alland* filed a brief on behalf of the J. M. Joseph Trust, as *amicus curiae,* urging reversal of the judgment below.

Mr. Justice Stone delivered the opinion of the Court.

This case presents the question whether a state may constitutionally tax a resident upon income received from rents of land located without the state and from interest on bonds physically without the state and secured by mortgages upon lands similarly situated.

Section 351 of Article 16 of the New York Tax Law (N. Y. Laws 1919, c. 627), imposes a tax upon the "entire net income" of residents of the state. By § 359 gross income is defined as including interest and rent. The same section, as amended by N. Y. Laws 1935, c. 933, enumerates among the items of taxable income "rent (including rent derived from real property situated outside the state) . . . it being intended to include all the foregoing items without regard to the source thereof, location of the property involved, or any other factor except only a case where the inclusion thereof would be violative of constitutional restrictions."

Appellant, a resident of New York, brought the present *certiorari* proceeding in the courts of New York to review a determination of the State Tax Commission, appellees, denying her application for a refund of state income taxes assessed and paid for the years 1931 and 1932, so far as the taxes were attributable to rents received by appellant from New Jersey land, and interest paid on bonds secured by mortgaged real estate in New Jersey, where the bonds and mortgages were physically located. A ground for recovery of the tax assigned by appellant's petition was that the tax was in substance and effect a tax on real estate and tangible property located without the state, in violation of the Fourteenth Amendment of the Constitution of the United States. Judgment for appellant (see 246 App. Div. 335; 286 N. Y. S. 485), was reversed by the New York Court of Appeals, 271 N. Y. 353; 3 N. E. (2d) 508. The case comes here on appeal under § 237 (a) of the Judicial Code.

The stipulation of facts on which the case was tried in the state court does not indicate that appellant's income has been taxed by New Jersey, and it does not define the precise nature of her interest in the properties producing the income. It sets out that appellant's husband died testate, his will duly probated in New

Jersey "devising and bequeathing to said taxpayer the entire net income from his estate for and during her widowhood," and that the taxed income included "rents from testator's real estate" and "interest from testator's real estate mortgages," all located in New Jersey. The terms of the will and the status of the estate during the tax years do not otherwise appear. There is nothing to show that the income-producing properties were in those years held upon an active trust, or that appellant did not receive the income as life tenant of the legal interest. See *Paletz* v. *Camden Safe Deposit & Trust Co.,* 109 N. J. Eq. 344; 157 Atl. 456; cf. *Passman* v. *Guarantee Trust & Safe Deposit Co.,* 57 N. J. Eq. 273; 41 Atl. 953; *Westfield Trust Co.* v. *Beekman,* 97 N. J. Eq. 140; 128 Atl. 791. Any uncertainty arising from the ambiguity of the stipulation, if it has any present significance, is put at rest by the concession of appellant in brief, and in open court on the argument, that she is the owner of a life estate or interest in the properties, and that she received, as a part of her income in the tax years, the rents and interest which have been collected by the executors acting, not in their capacity as executors, but as her agents for an annual compensation.

In any case we may assume, for present purposes, that New York may not levy a property tax upon appellant's interest, whether it be legal or equitable, see *Senior* v. *Braden,* 295 U. S. 422; *Safe Deposit & Trust Co.* v. *Virginia,* 280 U. S. 83. We accordingly limit our review to the question considered and decided by the state court, whether there is anything in the Fourteenth Amendment which precludes the State of New York from taxing the income merely because it is derived from sources, which, to the extent indicated, are located outside the State.

Income from rents. That the receipt of income by a resident of the territory of a taxing sovereignty is a

taxable event is universally recognized. Domicil itself affords a basis for such taxation. Enjoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government. "Taxes are what we pay for civilized society . . . " See *Compañia General de Tabacos* v. *Collector,* 275 U. S. 87, 100. A tax measured by the net income of residents is an equitable method of distributing the burdens of government among those who are privileged to enjoy its benefits. The tax, which is apportioned to the ability of the taxpayer to pay it, is founded upon the protection afforded by the state to the recipient of the income in his person, in his right to receive the income and in his enjoyment of it when received. These are rights and privileges which attach to domicil within the state. To them and to the equitable distribution of the tax burden, the economic advantage realized by the receipt of income and represented by the power to control it, bears a direct relationship. See *Lawrence* v. *State Tax Comm'n,* 286 U. S. 276; *Maguire* v. *Trefry,* 253 U. S. 12, 14; *Virginia* v. *Imperial Coal Sales Co.,* 293 U. S. 15, 19; compare *Shaffer* v. *Carter,* 252 U. S. 37, 50.

Neither the privilege nor the burden is affected by the character of the source from which the income is derived. For that reason income is not necessarily clothed with the tax immunity enjoyed by its source. A state may tax its residents upon net income from a business whose physical assets, located wholly without the state, are beyond its taxing power, *Lawrence* v. *State Tax Comm'n, supra;* see *Schaffer* v. *Carter, supra,* at 50. It may tax net income from bonds held in trust and administered in another state, *Maguire* v. *Trefry, supra,* although the taxpayer's equitable interest may not be subjected to the tax, *Safe Deposit & Trust Co.* v. *Virginia, supra.* It may tax net income from operations in interstate commerce,

although a tax on the commerce is forbidden, *United States Glue Co.* v. *Oak Creek,* 247 U. S. 321; *Shaffer* v. *Carter, supra.* Congress may lay a tax on net income derived from the business of exporting merchandise in foreign commerce, although a tax upon articles exported is prohibited by constitutional provision (Art. I, § 9, Cl. 5). *Peck & Co.* v. *Lowe,* 247 U. S. 165; *Barclay & Co.* v. *Edwards,* 267 U. S. 442, 447.

Neither analysis of the two types of taxes, nor consideration of the bases upon which the power to impose, them rests, supports the contention that a tax on income is a tax on the land which produces it. The incidence of a tax on income differs from that of a tax on property. Neither tax is dependent upon the possession by the taxpayer of the subject of the other. His income may be taxed, although he owns no property, and his property may be taxed although it produces no income. The two taxes are measured by different standards, the one by the amount of income received over a period of time, the other by the value of the property at a particular date. Income is taxed but once; the same property may be taxed recurrently. The tax on each is predicated upon different governmental benefits; the protection offered to the property in one state does not extend to the receipt and enjoyment of income from it in another.

It would be pressing the protection which the due process clause throws around the taxpayer too far to say that because a state is prohibited from taxing land which it neither protects nor controls, it is likewise prohibited from taxing the receipt and command of income from the land by its resident, who is subject to its control and enjoys the benefits of its laws. The imposition of these different taxes, by the same or different states, upon these distinct and separable taxable interests, is not subject to the objection of double taxation, which has been successfully urged in those cases where two or more states have

laid the same tax upon the same property interest in intangibles or upon its transfer at death. *Safe Deposit & Trust Co.* v. *Virginia, supra; Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204; *Baldwin* v. *Missouri,* 281 U. S. 586; *Beidler* v. *South Carolina Tax Comm'n,* 282 U. S. 1; *First National Bank* v. *Maine,* 284 U. S. 312. These considerations lead to the conclusion that income derived from real estate may be taxed to the recipient at the place of his domicil, irrespective of the location of the land, and that the state court rightly upheld the tax.

Nothing which was said or decided in *Pollock* v. *Farmers Loan & Trust Co.,* 157 U. S. 429, calls for a different conclusion. There the question for decision was whether a federal tax on income derived from rents of land is a direct tax requiring apportionment under Art. I, § 2, Cl. 3 of the Constitution. In holding that the tax was "direct," the Court did not rest its decision upon the ground that the tax was a tax on the land, or that it was subject to every limitation which the Constitution imposes on property taxes. It determined only that for purposes of apportionment there were similarities in the operation of the two kinds of tax which made it appropriate to classify both as direct, and within the constitutional command. See *Pollock* v. *Farmers Loan & Trust Co., supra,* pp. 580, 581; *Brushaber* v. *Union Pacific R. Co.,* 240 U. S. 1, 16. And in *Union Transit Refrigerator Co.* v. *Kentucky,* 199 U. S. 194, 204, decided ten years after the *Pollock* case, the present question was thought not to be foreclosed.

It is by a parity of reasoning that the immunity of income-producing instrumentalities of one government, state or national, from taxation by the other, has been extended to the income. It was thought that the tax, whether on the instrumentality or on the income produced by it, would equally burden the operations of government. See *Collector* v. *Day,* 11 Wall. 113, 124; *Pollock*

v. *Farmers Loan & Trust Co., supra,* 583; *Gillespie* v. *Oklahoma,* 257 U. S. 501. But as we have seen, it does not follow that a tax on land and a tax on income derived from it are identical in their incidence or rest upon the same basis of taxing power, which are controlling factors in determining whether either tax infringes due process.

In *Senior* v. *Braden, supra,* on which appellant relies, no question of the taxation of income was involved. By concession of counsel, on which the Court rested its opinion, if the interest taxed was "land or an interest in land situate within or without the state," the tax was invalid, and the Court held that the interest represented by the certificates subjected to the tax was an equitable interest in the land. Here the subject of the tax is the receipt of income by a resident of the taxing state, and is within its taxing power, even though derived from property beyond its reach.

Income from bonds secured by New Jersey mortgages. What has been said of the power to tax income from land without the state is decisive of the objection to the taxation of the income from interest on bonds because they are secured by mortgages on land without the state, compare *Kirtland* v. *Hotchkiss,* 100 U. S. 491. Appellant also argues that the interest from the bonds is immune from taxation by New York because they have acquired a business situs in New Jersey within the doctrine of *New Orleans* v. *Stempel,* 175 U. S. 309; *Metropolitan Life Ins. Co.* v. *New Orleans,* 205 U. S. 395; *Wheeling Steel Corp.* v. *Fox,* 298 U. S. 193. This contention, if pertinent to the present case, is not supported by the record. The stipulation of facts discloses only that the bonds and mortgages were located in New Jersey. See *Baldwin* v. *Missouri, supra; Blodgett* v. *Silberman,* 277 U. S. 1, 14, 15. The burden rested on the taxpayer to present further facts which would establish a "business situs." *Beidler* v. *South Carolina Tax Comm'n,* 282 U. S. 1, 8.

Retroactive application of the tax. Appellant insists that in upholding the tax upon her income for 1931 and 1932 the state court infringed due process by giving retroactive effect to the 1935 amendment of § 359 of the New York Tax Law, which specifically declared that rents, embraced in taxable income by the section before amendment, should include rent from real property without the state. In support of this contention appellant points to the decision in *People ex rel. Pierson* v. *Lynch,* 266 N. Y. 431; 195 N. E. 141, affirming 237 App. Div. 763; 263 N. Y. S. 259, that rents from land outside the state were not taxed by that section before its amendment, and to the dismissal by this Court of the writ of *certiorari* to review the judgment for want of a properly presented federal question. 293 U. S. 52.

It is unnecessary for us to determine whether, or to what extent, the state court, in sustaining the tax in this case, rested its decision on the amendment of 1935, or whether it regarded it as anything more than a clarifying act pointing out the meaning properly attributable to the section before amendment. The record does not disclose that appellant raised in the state court the objection, which she presses here, to the retroactive application of the statute. In reviewing the judgment of a state court, this Court will not pass upon any federal question not shown by the record to have been raised in the state court or considered there, whether it be one arising under a different or the same clause in the Constitution with respect to which other questions are properly presented. *Bolln* v. *Nebraska,* 176 U. S. 83; *New York* v. *Kleinert,* 268 U. S. 646; *Saltonstall* v. *Saltonstall,* 276 U. S. 260.

Affirmed.

MR. JUSTICE BUTLER, dissenting.

The tax is on income. I am of opinion that the rents received by appellant for the use of real estate in New Jersey may not be included in her taxable income. By

our decisions it is established that a tax on income received for the use of land is in legal effect a tax upon the land itself. *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 580–581; 158 U. S. 601, 627–628, 637. *Thomas* v. *Gay*, 169 U. S. 264, 274. *Knowlton* v. *Moore*, 178 U. S. 41, 80–82. *McCoach* v. *Minehill & S. H. R. Co.*, 228 U. S. 295, 306. *Stratton's Independence* v. *Howbert*, 231 U. S. 399, 414. *Brushaber* v. *Union Pacific R. Co.*, 240 U. S. 1, 16. *Eisner* v. *Macomber*, 252 U. S. 189, 205. *Evans* v. *Gore*, 253 U. S. 245, 260. *Gillespie* v. *Oklahoma*, 257 U. S. 501, 505. *Lake Superior Iron Mines* v. *Lord*, 271 U. S. 577, 581–582. *Senior* v. *Braden*, 295 U. S. 422, 427, 429, 431–432.

New Jersey, in addition to tax on the land measured by its value, may lay a tax upon the income received by the owner for its use. *Lake Superior Iron Mines* v. *Lord*, *ubi supra*.

Appellant's right to own, or to collect rents in New Jersey for the use of, lands in that State was not given and is not protected by New York law. Neither of these rights is enjoyed in New York or has any relation to appellant's privilege of residence in, or to the protection of, that State. Ability of taxpayers to pay may be taken into account for apportionment of the tax burdens that it is authorized to impose. But the financial means of those to be taxed cannot be made to generate for the State power to tax lands, or rents paid for use of lands, beyond its borders. I would exclude the item.

MR. JUSTICE MCREYNOLDS concurs in this opinion.

PHELPS *v.* BOARD OF EDUCATION OF WEST NEW YORK ET AL.*

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF NEW JERSEY.

No. 454. Argued February 4, 5, 1937.—Decided March 1, 1937.

1. Where it is claimed that a contractual right was created by a state statute and impaired by a later one, this Court will give much weight to the construction put upon the earlier statute by the state court, though not bound by it. P. 322.
2. The provisions of c. 243, New Jersey Laws, 1909, forbidding removal of public school teachers who have served three years, or reduction of their salaries, except for causes specified and after notice and hearing, did not create contracts with individual teachers but was merely a limitation upon the authority of the boards of education with respect to the tenure and salaries of teachers. P. 323.
3. The stipulated facts of this case do not show contracts between the boards of education and teachers for service of the teachers beyond the current year. P. 323.
4. No arbitrary discrimination, violative of the equal protection clause of the Fourteenth Amendment, is attributable to a method of reducing the salaries of school teachers by dividing the salaries into several groups in order of amounts, and applying reduction percentages, ascending from the lowest group to the highest, although it result in some instances that a teacher receiving the lowest salary in his group will have his salary reduced to a figure lower than the reduced compensation of one receiving the highest compensation in the next lower group. P. 323.

116 N. J. L. 412, 185 Atl. 8; 116 N. J. L. 416, 184 Atl. 737, affirmed.

APPEALS from the affirmance by the court below of judgments of the Supreme Court of New Jersey (115 N. J. L. 310; 180 Atl. 220), which had affirmed, on certiorari, the action of the State Board of Education in a

* Together with No. 455, *Askam et al.* v. *Board of Education of West New York et al.* Appeal from the Court of Errors and Appeals of New Jersey.

controversy over reductions in the pay of principals, teachers and clerks, employed in the public schools.

Mr. Robert H. McCarter, with whom *Mr. Ward J. Herbert* was on the brief, for appellants.

Mr. Saul Nemser for appellees.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The people of New Jersey have ordained by their constitution that the legislature "shall provide for the maintenance and support of a thorough and efficient system of free public schools" . . .[1] In fulfillment of this command a comprehensive school law was adopted in 1903 by which boards of education were set up for cities, towns, and school districts throughout the state.[2] Section 106 empowered these boards to make rules and regulations governing engagement and employment of teachers and principals, terms and tenure of such employment, promotion, and dismissal, salaries and their time and mode of payment, and to change and repeal such rules and regulations from time to time.[3] This general school law was amended by the act of April 21, 1909,[4] § 1 of which provides:

"The service of all teachers, principals, supervising principals of the public schools in any school district of this State shall be during good behavior and efficiency, after the expiration of a period of employment of three consecutive years in that district, unless a shorter period is fixed by the employing board; . . . No principal or

[1] Art. IV, § VII, ¶ 6, 1 N. J. Comp. St. p. lxxv.

[2] Act of Oct. 19, 1903; Laws of N. J. 1904, 5; 4 N. J. Comp. St. 4724.

[3] 4 N. J. Comp. St. 4762.

[4] Chap. 243 N. J. Laws 1909, Pamph. L. p. 398, 4 N. J. Comp St. 4763, 4764.

teacher shall be dismissed or subjected to reduction of salary in said school district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause, and after a written charge of the cause or causes shall have been preferred against him or her, . . . and after the charge shall have been examined into and found true in fact by said Board of Education, upon reasonable notice to the person charged, who may be represented by counsel at the hearing. . . ."

An Act of February 4, 1933,[5] premising that existing economic conditions require that boards of education be enabled to fix and determine the amount of salary to be paid to persons holding positions in the respective school districts, authorizes each board to fix and determine salaries to be paid officers and employes for the period July 1, 1933, to July 1, 1934, "notwithstanding any such person be under tenure"; prohibits increase of salaries within the period named; forbids discrimination between individuals in the same class of service in the fixing of salaries or compensation; and sets a minimum beyond which boards may not go in the reduction of salaries. June 23, 1933, the board adopted a resolution reducing salaries for the school year July 1, 1933, to July 1, 1934, by a percentage of the existing salaries graded upward in steps as the salaries increased in amount, except with respect to clerks, the compensation of each of whom was reduced to a named amount.

Appellants, who were principals, teachers, and clerks employed by the appellee, petitioned the Department of Public Instruction, in accordance with the school law, praying that the action of the board be set aside. The Commissioner of Education dismissed the petition and, upon appeal from his action, the State Board of Education affirmed the decision. The appellants applied for certiorari from the Supreme Court, assigning among other

[5] Chap. 12, N. J. Laws 1933, Pamph. L. p. 24.

reasons that the decision violated Art. I, § 10, and §1 of the Fourteenth Amendment, of the Federal Constitution. The writs[6] issued and, after hearing, the court affirmed the action of the administrative tribunal.[7] The Court of Errors and Appeals affirmed the judgment upon the opinion of the Supreme Court.[8]

The position of the appellants is that by virtue of the Act of 1909 three years of service under contract confer upon an employe of a school district a contractual status indefinite in duration which the legislature is powerless to alter or to authorize the board of education to alter. The Supreme Court holds that the Act of 1909 "established a legislative status for teachers, but we fail to see that it established a contractual one that the legislature may not modify. . . . The status of tenure teachers, while in one sense perhaps contractual, is in essence dependent on a statute, like that of the incumbent of a statutory office, which the legislature at will may abolish, or whose emoluments it may change."

This court is not bound by the decision of a state court as to the existence and terms of a contract, the obligation of which is asserted to be impaired, but where a statute is claimed to create a contractual right we give weight to the construction of the statute by the courts of the state.[9] Here those courts have concurred in holding that the act of 1909 did not amount to a legislative contract

[6] Two writs were issued. The only difference between the two cases, which were heard as one, is that in the *Phelps* case the employe refused to accept the reduced salary. In the case of *Askam et al.*, the employes took the reduced salary under protest.

[7] 115 N. J. Law 310; 180 Atl. 220.

[8] 116 N. J. Law 412, 185 Atl. 8; 116 N. J. Law 416, 184 Atl. 737.

[9] *Freeport Water Co.* v. *Freeport,* 180 U. S. 587, 595; *Tampa Water Works Co.* v. *Tampa,* 199 U. S. 241, 243; *Milwaukee Electric R. & L. Co.* v. *Railroad Comm'n,* 238 U. S. 174, 184; *Seton Hall College* v. *South Orange,* 242 U. S. 100, 103; *Coombes* v. *Getz,* 285 U. S. 434, 441.

with the teachers of the state and did not become a term of the contracts entered into with employes by boards of education. Unless these views are palpably erroneous we should accept them.

It appears from a stipulation of facts submitted in lieu of evidence that after a teacher has served in a school district under yearly contracts for three years it has not been customary to enter into further formal contracts with such teacher. From time to time, however, promotions were granted and salary raised for the ensuing year by action of the board. In the case of many of the appellants there have been several such increases in salary.

Although after the expiration of the first three years of service the employe continued in his then position and at his then compensation unless and until promoted or given an increase in salary for a succeeding year, we find nothing in the record to indicate that the board was bound by contract with the teacher for more than the current year. The employe assumed no binding obligation to remain in service beyond that term. Although the act of 1909 prohibited the board, a creature of the state, from reducing the teacher's salary or discharging him without cause, we agree with the courts below that this was but a regulation of the conduct of the board and not a term of a continuing contract of indefinite duration with the individual teacher.

The resolution of June 23, 1933, grouped the existing salaries paid by the board into six classes the lowest of which comprised salaries between Twelve hundred dollars and Nineteen hundred and ninety-nine dollars; and the highest included salaries ranging between Four thousand dollars and Fifty-six hundred dollars. The reduction in the lowest class for the coming year was ten per cent; that in the highest class fifteen per cent. Salaries in the intermediate classes were reduced eleven,

twelve, thirteen, and fourteen per cent. It resulted that in some instances a teacher receiving the lowest salary in a given bracket would have his compensation reduced to a figure lower than the reduced compensation of one receiving the highest salary in the next lower bracket. From this circumstance it is argued that the board's action arbitrarily discriminated between the employes and so denied them the equal protection of the laws guaranteed by the Fourteenth Amendment.

We think it was reasonable and proper that the teachers employed by the board should be divided into classes for the application of the percentage reduction. All in a given class were treated alike. Incidental individual inequality resulting in some instances from the operation of the plan does not condemn it as an unreasonable or arbitrary method of dealing with the problem of general salary reductions or deny the equality guaranteed by the Fourteenth Amendment.

Judgments affirmed.

HOLYOKE WATER POWER CO. *v.* AMERICAN WRITING PAPER CO.

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

No. 180. Argued December 11, 1936.—Decided March 1, 1937.

Leases of water-power rights to be enjoyed in perpetuity provided that the grantee should pay as rent "a quantity of gold which shall be equal in amount to" a stated number of "dollars of the gold coin of the United States of the standard of weight and fineness of the year 1894, or the equivalent of this commodity in United States currency." In 1894, and continuously thereafter till January 31, 1934, the statutory gold content of the dollar was twenty-five and eight-tenths grains of gold, nine-tenths fine. Since January 31, 1934, by force of the Gold Reserve Act of that year and the order of the President thereunder, the gold content of the dollar has been fixed to consist of fifteen and five twenty-firsts

grains of gold, nine-tenths fine. The Joint Resolution of June 5, 1933, had declared that every obligation payable in money of the United States, whether theretofore or thereafter incurred, should be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment was legal tender for public or private debts, irrespective of any provision contained therein whereby the obligee was given a right to require payment in gold or in a particular kind of coin or currency, or in an amount in money of the United States measured thereby. *Held:*

1. The lessee's obligation under the contract was for the payment of money, and not for the delivery of gold as upon sale of a commodity. P. 335.

2. A contract for the payment of gold as the equivalent of money, and *a fortiori* a contract for the payment of money measurable in gold, is within the letter of the Joint Resolution of June 5, 1933, and equally within its spirit, *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240. P. 337.

An obligation to make delivery upon a *bona fide* sale is not fairly to be classified as an obligation "payable in money," within the meaning of the Joint Resolution, or so it may be assumed for the purpose of this case. But the evil aimed at by the Resolution does include transactions whereby gold, coined or uncoined, is to be delivered in satisfaction of a debt expressed in terms of dollars, payment, not sale, being then the end to be achieved, and transactions whereby a debt is to be discharged, not in bullion, but in dollars, if the number of the dollars is to be increased or diminished in proportion to the diminution or the increase of the gold basis of the currency.

83 F. (2d) 398, affirmed.

CERTIORARI, 299 U. S. 526, to review a judgment of the Circuit Court of Appeals affirming an order of the District Court made in a proceeding for reorganization of the Paper Company under § 77B of the Bankruptcy Act. The order fixed the amounts due from that company to a Water Power Company, the present petitioner, under several leases. 11 F. Supp. 518. See 9 *id.* 451.

Mr. Bentley Wirt Warren, with whom *Messrs. Nathan P. Avery, James M. Healy,* and *Donald C. Starr* were on the brief, for petitioner.

The question for determination is the measure of the debtor's liability, on three certain dates after the devaluation of the dollar, under an obligation in the alternative, to pay either a specified quantity of gold as a commodity or its equivalent in currency, at the option of the debtor.

The provision for payment in gold was impossible of performance according to its terms, and no provision for its discharge other than according to its terms was provided by law (more particularly, by the Joint Resolution of June 5, 1933).

The purpose of the parties in drawing the rental provisions in the form in dispute was to provide against the effect of an appreciation or depreciation of the currency by adopting gold bullion as a medium of payment, or, at the option of the lessee, as a measure of an indeterminate amount of currency according to the ratio of equivalence between gold bullion and currency on the various rental dates. According to the ordinary meaning of "equivalence," with respect to this relation, and as evident from various legislative enactments and executive acts, the currency equivalent of gold bullion on July 1 and October 1, 1934, and on January 1, 1935, according to the intent of the remaining alternative provision, was one dollar for each $15\frac{5}{21}$ grains of gold nine-tenths fine, or $35 an ounce.

The debtor's duty to perform this contractual provision according to its terms has not been modified by law (more particularly, by the said Joint Resolution), for the following reasons:

1. The provision of the Joint Resolution for the discharge of certain contracts "dollar for dollar" applies only to obligations to pay sums certain in money. This is apparent from the terms of the Resolution itself, whether read by themselves or in connection with relevant external evidence of their meaning.

The historic fact that gold has from time to time been the metallic base of the money of the United States has not the effect of constituting uncoined gold bullion "money." The terms of the express power given to Congress to "coin money" indicate the necessity of coinage to give to bullion the quality of legal tender attributed by the law, aside from its bullion value (see *Norman* v. *Baltimore & Ohio R. Co.,* 294 U. S. 240, 304).

The terms of the provision for the discharge of certain money obligations "dollar for dollar" themselves necessarily restrict the operation of the Resolution to obligations payable in dollars.

Nor is the question affected by the inclusion in the rental provision of the words "fifteen hundred ($1500) dollars of the gold coin of the United States." It was plainly the function of this phrase simply to render the magnitude of the quantity of gold being stipulated for more readily comprehensible to the contracting parties. If the parties had foregone the ready means of visual comprehension afforded by the reference to gold coins, and had calculated in the beginning (as must eventually have been done before payment in any case) the number of ounces or grains of gold being contracted for, and had written the stipulation in terms for "80.625 ounces of gold .9 fine, or 72.5625 ounces of gold 1000 fine," the substance of the undertaking would have been in no respect different. *Holyoke Water Power Co.* v. *American Writing Paper Co.,* 9 F. Supp. 451, 453; *Emery Bird Thayer Dry Goods Co.* v. *Williams,* 15 F. Supp. 938, 941.

2. Even if the terms of the Resolution be equivocal in this respect, they are to be construed as not referring to contracts payable in money measured by gold as a commodity, because interference by Congress with such contracts would be subject to grave doubts as to its constitutionality. Contracts employing a commodity as a

standard of value are not within the field of the currency power of Congress; although, even if they be within that field, they do not exist to such extent as to obstruct the monetary policy of Congress.

3. The obligation of the particular contracts in question may not be impaired, as decreed by the Circuit Court of Appeals, for the additional reason that they provide for payment for the supply of the power of artificially impounded water which your petitioner is contractually bound to furnish, in fixed amounts, in perpetuity. Payment of the currency equivalent according to the intent of the undertakings will not constitute an unjust burden upon the debtor, and so will not create a dislocation of the domestic economy to any degree whatever. By the same token, the tendency of the result which it was the design of the Congress, in enacting the Joint Resolution, to produce, must be, if the decree be affirmed, inevitably to require the Water Power Company to perform that which is economically impossible.

For these reasons, interference with the performance of these indentures would deprive your petitioner of property and would bear no reasonable relation to any legitimate exercise of power by the Congress and would constitute violation of the Fifth and Tenth Amendments to the Constitution.

If the currency equivalent for which the petitioner contends may not be recovered, it is submitted that in no event should that equivalent be determined according to the decree of the Circuit Court of Appeals, but that the decree be modified so as not to preclude recovery by the petitioner according to the actual value of the water power furnished during the rental periods in question, and to be furnished in the future.

Mr. Charles P. Curtis, Jr., with whom *Messrs. John L. Hall, Claude R. Branch,* and *Russell L. Davenport* were on the brief, for respondent.

The rental provisions in these indentures are not really commodity contracts. They do not require the obligor to deliver a commodity. They are gold value contracts, because they provide for payment either in gold or in the equivalent of gold in currency at the option of the obligor. Since the performance of either alternative is a full performance of the contract, the contract may be fully satisfied by the payment of money without the delivery of a single ounce of any commodity at any time. If this were a commodity contract, the money payment would be damages for the breach of a contract to deliver the gold, not, as it is, the performance of the contract in accordance with its very terms. Plainly it imposes no obligation upon the obligor to deliver gold as a commodity or otherwise. The obligation is to deliver the value of gold, either by the delivery of the gold itself or of its equivalent in money. Simply calling the measure of the equivalent money a commodity does not make the contract a commodity contract.

We have, therefor, not a gold contract, but a gold value contract.

The recent gold legislation of 1933–1934, which must be taken as a legislative unit, and of which the Joint Resolution of 1933 was only one part, did two things: (1) It eliminated the alternative of gold by making it impossible to pay in gold; and (2) it rendered the remaining alternative of money dischargeable dollar for dollar. For that was an obligation to pay an amount of money measured by gold, and expressly covered by the Joint Resolution. Congress banned gold as well as gold coins, and took action to put all gold value contracts on a uniform basis of parity.

The Joint Resolution declares to be against public policy any obligation purporting "to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount of money of the United

States measured thereby." This language embraces the present contract, since it expressly calls for gold or an amount of currency measured thereby. Under the terms of the Resolution, therefore, this contract is dischargeable dollar for dollar in currency.

The petitioner contends that the Joint Resolution was not intended to apply to the present contract because the formula prescribed for the discharge of contracts—i. e., by payment "dollar for dollar"—is not adapted to a contract which refers to dollars only for the purpose of fixing a quantity of gold which, in turn, is to be taken as the measure of payment in currency. The petitioner argues that the reference to dollars in this indenture was merely incidental and fortuitous; that the parties could have achieved the same result by providing for a certain number of ounces of gold with no mention of dollars whatever; and that a formula discharging the contract "dollar for dollar" does not apply where the contract contained no reference at all to dollars.

This argument is based on a practical inconvenience which does not exist in this case. For here there is an express reference to a fixed amount of dollars and here there is no difficulty whatever in applying the formula for discharge "dollar for dollar." Moreover, the petitioner's argument, if accepted, would confine the Resolution to contracts calling for a particular kind of coin or currency, or their equivalent, and would read out of the Resolution entirely the provision which prohibits contracts requiring "payment in gold . . . or in an amount in money . . . measured thereby." This provision must mean that the Resolution was intended to apply, not only to contracts which provide for the payment of currency in the equivalent of gold coin, but also to contracts, like the present, providing for payment of currency in the equivalent of gold.

What we have here is an express gold value clause. It is what the gold clause in *Norman* v. *Baltimore & Ohio R. Co.* was construed to be. What was there implied by the parties and construed by the Court is here expressed by the parties. The decision in that case is decisive here.

The monetary power of Congress extends over money contracts measured in terms of gold as well as over contracts for gold coin. Whether it would extend to contracts attempting to make other commodities the measure of money is beside the point. Gold has been used as money and as the measure of money too long to relieve it of the public burden of regulation by Congress.

Nor is the Joint Resolution as applied to these rental clauses invalid because there may be so few of them that they alone might not reasonably be regarded as an obstacle to the effective exercise of congressional power. That is not the point. The point is whether they are to be made an exception to an exercise of that power which expressly includes them. There is no reasonable ground for singling them out as an exception. To single them out would strike at the very reason for giving the power to Congress, which was uniformity. Moreover, if they and such as they were exempted, the exception would soon become the rule, as the only way men would have to fix promised money values in terms of gold.

But, even if the Joint Resolution cannot be applied to these rental clauses, whether as inapplicable or as invalid if so applied—even if there had been no Joint Resolution, yet the equivalent in money which these indentures call for is at the rate of $20.67 per ounce of gold. This result is reached quite independently of the Resolution. The usual doctrines of the law of contracts, applied to the situation created by the impossibility of paying in gold, require it.

The measure of the equivalent of the gold in money is what the gold would have been worth to the petitioner if it had been paid. That is what the petitioner contracted for with the word "equivalent." It cannot mean more than that without belying its own name.

An examination of the relevant Treasury Regulations shows that, if the gold had been paid, the petitioner could have got for it $20.67 per ounce, not $35 per ounce or any other sum.

The reduction of the gold content of the dollar by the Gold Reserve Act of 1933, and the Presidential Proclamation made no difference to that result. Devaluation made the gold worth no more to the petitioner. It could have got no more dollars for such gold after the devaluation than before.

This is the same result we reach by applying the Joint Resolution, and it is just the result we should expect from the fact that the Gold Reserve Act, the Presidential Proclamation, the Treasury Regulations, and the Joint Resolution are all of them parts of one whole, all directed to the same end.

Perry v. *United States* held that this was so for gold coin, and there is no reason to give more for gold bullion than for gold coin. The determination of the equivalent in that case is decisive of its determination here at $20.67 per ounce.

The petitioner has shown no loss to it here, any more than Perry in that case showed any loss to him there. We have only the certainty that the respondent is being asked to pay 69 cents a dollar more than it has been paying—a gratuitous loss to it and a windfall to the petitioner.

Solicitor General Reed, with whom *Attorney General Cummings* and *Messrs. Paul A. Freund, Herman Oliphant, Clarence V. Opper, Bernard Bernstein,* and

Charles W. Boand were on the brief, for the United States, as *amicus curiae,* by special leave of Court.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The controversy is one as to the number of dollars in present currency that will discharge a covenant for rent in leases antedating the reduction of the gold content of the dollar, the covenant being phrased in the manner hereinafter stated.

At various times between 1881 and 1897 thirteen leases were executed by the Holyoke Water Company, the petitioner, to the American Writing Paper Company, Inc., the respondent, for the enjoyment in perpetuity of water-power rights and privileges in consideration of an annual rental. With variations immaterial for present purposes, the provision for rental is the same in all the leases. By concession the following form has been accepted as typical: the grantee shall yield and pay unto the grantor as rent "a quantity of gold which shall be equal in amount to fifteen hundred ($1500) dollars of the gold coin of the United States of the standard of weight and fineness of the year 1894, or the equivalent of this commodity in United States currency." In 1894 and continuously thereafter till January 31, 1934, the statutory gold content of the dollar was twenty five and eight tenths grains of gold, nine tenths fine. Since January 31, 1934, by force of the Gold Reserve Act of that year (48 Stat. 337) and the order of the President thereunder, the gold content of the dollar has been fixed to consist of fifteen and five twenty-firsts grains of gold, nine tenths fine. Before that reduction a Joint Resolution of the Congress, dated June 5, 1933 (48 Stat. 112), had declared that every obligation payable in money of the United States, whether theretofore or thereafter incurred, should be discharged upon payment, dollar for

dollar, in any coin or currency which at the time of payment was legal tender for public or private debts, irrespective of any provision contained therein whereby the obligee was given a right to require payment in gold or in a particular kind of coin or currency, or in an amount in money of the United States measured thereby. The precise terms of the Resolution and its recitals will be considered more at length hereafter.

In June, 1934, the dollar having been then devalued, the lessee corporation became insolvent or unable to pay its debts as they matured. Taking advantage of § 77B of the Bankruptcy Act, it filed a petition for reorganization which the Court of Bankruptcy approved. The lessor (petitioner here) intervened in that proceeding and prayed that the amount due to it for rent under the several water-power leases be inquired into and determined. On behalf of the lessee the contention was that by force of the Joint Resolution the debt was dischargeable, dollar for dollar, in the then prevailing currency. On behalf of the lessor the contention was that the market price of fine gold at the time of the default and later was $35 an ounce, or $31.50 for an ounce nine tenths fine, and that payment should be made upon that basis for as many ounces of such gold as were contained in the stipulated dollars at the execution of the leases. In pressing that contention, the lessor did not deny that the law declines to give effect to contracts whereby debts are made payable in gold coin, or in currency varying in amount with the gold basis of the dollar. *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240. What was argued was rather this, that the covenant here in question was not for the payment of a debt, but for the sale of a commodity, or if viewed as a covenant for payment, that the standard was the commodity value of the bullion, not the value of the coin as money, the difference being thought to be sufficient to change the applicable rule.

The District Court held in favor of the lessee, and computed the indebtedness accordingly. 11 F. Supp. 518; see 9 F. Supp. 451. The Court of Appeals for the First Circuit affirmed. 83 F. (2d) 398. Because of the importance of the question we granted certiorari.

1. The obligation was one for the payment of money, and not for the delivery of gold as upon the sale of a commodity.

The lessor was a water power company, engaged in that business and not in any other. There is no pretense that it was stipulating for gold to be used in art or industry. What it wished was currency, or bullion susceptible of being converted into currency, the lessee to make the choice. The alternative forms of payment shed light upon each other. They will be considered in succession.

By the first term of the alternative, there may be payment of the rent in the form of "a quantity of gold which shall be equal in amount to $1500 of the gold coin of the United States of the standard of weight and fineness of the year 1894." In this form there is no call for a stated number of ounces of fine gold, as if a goldsmith were providing for the uses of his business. The call is for gold that shall be as heavy and as fine as a stated number of gold dollars, with the result that delivery in such dollars is a payment in strict accordance with the letter of the contract. We must consider the situation of the parties, their business needs and expectations, in gauging their intention. When these are kept in view, the gold is seen to be a standard with which to stabilize the value of the dollar; the dollar not a yardstick with which to measure the quantity of the gold. To read the leases otherwise is to permit the realities of the transaction, its substance and essential purpose, to be obscured by forms and phrases. Long ago it was said by a distinguished member of this court, commenting upon a different statute, but one analogous in purpose: "If the contract

is for the delivery of a chattel or a specific commodity or substance, the law does not apply. If it is *bona fide* for so many carats of diamonds or so many ounces of gold as bullion, the specific contract must be performed [assuming, of course, that contracts for the delivery of bullion are not prohibited by law]. But if terms which naturally import such a contract are used by way of evasion, and money only is intended, the law reaches the case." Per Bradley, J., in *Legal Tender Cases,* 12 Wall. 457, 566. Here what was intended was to assure the payment of a money debt in dollars of a value as constant as that of gold. *Norman* v. *Baltimore & Ohio R. Co., supra,* p. 302; cf. *Feist* v. *Société Intercommunale Belge D'Electricité,* L. R. [1934] A. C. 161, 172, 173. The fact is of little moment that currency is characterized as a commodity in the verbiage of the covenant as long as it is currency. Cf. *Lipke* v. *Lederer,* 259 U. S. 557, 561, 562. Weasel words will not avail to defeat the triumph of intention when once the words are read in the setting of the whole transaction. So read, the end to be achieved is shown forth unmistakably as a payment, not a sale.

This conclusion would be necessary though the first of the alternative forms of payment stood alone in the indentures. The necessity becomes even plainer when the first is considered in conjunction with the second. The lessee at its option may pay the equivalent of the gold "in United States currency." The presence of this alternative gives a quietus to the argument that the lessor was desirous of the gold as a commodity and was bargaining therefor. If there had been any such desire, the choice as to the forms of payment would never have been left to the lessee, as by implication of law it was, for a debtor, if methods of performance are alternative, may choose whichever one he pleases. 3 Williston, Contracts, § 1407; Restatement, Contracts, vol. 1, p. 493. In point of fact, there were statutes in existence

at the time of the default in payment that made delivery of gold impossible. *Norman* v. *Baltimore & Ohio R. Co., supra,* pp. 295, 296; *Nortz* v. *United States,* 294 U. S. 317, 327, 328; *Perry* v. *United States,* 294 U. S. 330, 355. The lessee would perforce have had to avail itself of the second term of the alternative, if it had been able to pay at all. But if both modes of payment had been preserved, the second equally with the first would have been effective to discharge the obligation. Payment in currency, quite as much as payment in coin or in bullion, was not only performance under the law, but performance under the contract, provided only that the value of the currency was equal, when paid, to the value of the gold. Whether that proviso has been abrogated is next to be considered.

2. A contract for the payment of gold as the equivalent of money, and *a fortiori* a contract for the payment of money measurable in gold, is within the letter of the Joint Resolution of June 5, 1933, and equally within its spirit.

The Resolution, for convenience of reference, is printed in the margin.* Its history has been traced in *Norman*

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* "JOINT RESOLUTION.

"To assure uniform value to the coins and currencies of the United States.

"Whereas the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restriction; and

"Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts. Now, therefore, be it

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That (a) every pro-

v. *Baltimore & Ohio R. Co., supra.* There is no need to repeat what has been already done so thoroughly. The Resolution touches gold as well as coin or currency whenever transactions in either are within the evil to

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vision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

"(b) As used in this resolution, the term 'Obligation' means an obligation (including every obligation of and to the United States excepting currency) payable in money of the United States; and the term 'coin or currency' means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations.

"Sec. 2. The last sentence of paragraph (1) of subsection (b) of section 43 of the Act entitled 'An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes,' approved May 12, 1933, is amended to read as follows:

"'All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues, except that gold coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight.'

"Approved, June 5, 1933, 4:40 p. m."

be remedied. We learn from the preamble that "provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts." Accordingly, all such provisions are declared to be against public policy, and every obligation, heretofore or hereafter incurred, though it contain such provisions, shall be payable, dollar for dollar, in legal tender at the time of payment. Transactions for the sale or delivery of gold for industrial purposes are not within the evil to be remedied, and so are not within the statute. Cf. Executive Order of April 5, 1933, and August 28, 1933; Orders of the Secretary of the Treasury, December 28, 1933 and January 15, 1934; Emergency Banking Act of March 9, 1933, 48 Stat. 1, 2, § 3. An obligation to make delivery upon a *bona fide* sale is not fairly to be classified as an obligation "payable in money" (Joint Resolution, subdivision (b)), or so we now assume. But very definitely, the evil does include transactions whereby gold, coined or uncoined, is to be delivered in satisfaction of a debt expressed in terms of dollars, payment, not sale, being then the end to be achieved. As definitely, indeed more obviously, the evil includes transactions whereby a debt is to be discharged, not in bullion, but in dollars, if the number of the dollars is to be increased or diminished in proportion to the diminution or the increase of the gold basis of the currency. Both forms of obligation are illustrations of the very mischief that Congress sought to hit.

3. The argument is made that in the case now before us the currency called for by the contract is stated too

indefinitely to be translated, dollar for dollar, as required by the Resolution, into the legal tender of the hour. But the difficulty is quite imaginary. Things that are equal to the same thing are equal to each other. There is application for the maxim here. If the currency to be paid by the lessee is to be the equivalent of gold, and if the gold is to be the equivalent of a stated number of gold dollars of a particular weight and fineness, then the covenant to pay the currency is tantamount to a covenant to pay the dollars, and dollars of the stated standard. This is the obligation that respondent took upon itself when it became a party to these leases. It is, however, the very obligation that has been outlawed by the statute as a menace to the maintenance of our monetary system. *Norman* v. *Baltimore & Ohio R. Co.*, *supra*, pp. 306, 311. "Dollar for dollar," the obligation for the payment of money conforming to the standard of the covenant is to be discharged with money of the standard established by the law.

4. The argument is made that covenants of this particular form are so rare and exceptional that the protection of the monetary system does not require their suppression, and that arbitrary suppression is inconsistent with the Fifth Amendment. How exceptional or rare they are, we have no means of ascertaining. For anything proved in the record or subject to judicial notice they may be illustrations, even if verbal variants, of a type common in the petitioner's business and indeed in many others. But the power of the Congress is not dependent upon the results of such a census. A particular covenant, if viewed in isolation, may have a slight, perhaps a trivial, influence upon the effectiveness and symmetry of a new monetary policy. The aggregate of many covenants, each contributing its mite, may bring the system to destruction. Rivulets in combination make up a stream of tendency that may attain engulfing power.

No principle of constitutional law, no dictate of fair dealing, lays a duty upon the Congress to single out for special treatment an individual or a few among the members of a common mass. Cf. *Purity Extract Co.* v. *Lynch,* 226 U. S. 192, 201. One cannot even say with reason that the effects of this particular covenant are to be classified as negligible. The lessee as the recipient of principal or income must accept payment from its debtors in the depreciated currency. It is injured, at least appreciably, if it is required to pay its creditors in dollars of a different standard. *Norman* v. *Baltimore & Ohio R. Co., supra,* p. 315. Receipts and disbursements are no longer on a common basis.

5. In last analysis, the case for the petitioner amounts to little more than this, that the effect of the Resolution in its application to these leases is to make the value of the dollars fluctuate with variations in the weight and fineness of the monetary standard, and thus defeat the expectation of the parties that the standard would be constant and the value relatively stable. Such, indeed, *is* the effect, and the covenant of the parties is to that exent abortive. But the disappointment of expectations and even the frustration of contracts may be a lawful exercise of power when expectation and contract are in conflict with the public welfare. "Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity." *Norman* v. *Baltimore & Ohio R. Co., supra,* pp. 307, 308. To that congenital infirmity this covenant succumbs.

The decree of the Circuit Court of Appeals is accordingly

Affirmed.

MR. JUSTICE VAN DEVANTER, MR. JUSTICE MCREYNOLDS, MR. JUSTICE SUTHERLAND, and MR. JUSTICE BUTLER dissent.

VAN BEECK, ADMINISTRATOR, *v.* SABINE TOWING CO., INC., ET AL.

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

No. 460. Argued February 5, 8, 1937.—Decided March 1, 1937.

1. The cause of action provided by the Merchant Marine Act, 46 U. S. C. 688, in connection with the Employers' Liability Act, 45 U. S. C. 51, on behalf of survivors or dependents of a seaman who has suffered death by reason of his employer's negligence, is not to be confused with any cause of action that may have accrued to the seaman himself between the time of his injury and the time of his death, but is a new cause of action, enforcible by his personal representative for the beneficiary in which the recovery is limited to the pecuniary loss sustained by the beneficiary, through the death, as contrasted with the personal loss and suffering sustained by the decedent before his death. Pp. 344, 346.
2. A suit brought under the Merchant Marine Act, 46 U. S. C. 688, and the Employers' Liability Act, 45 U. S. C. 51, by the administrator of a deceased mariner to compensate decedent's mother for loss caused to her by his instantaneous death through his employer's negligence, does not abate at her death but may be continued by the administrator of his estate (or by the administrator *de bonis non* if she was the administrator) for the recovery of her pecuniary loss up to the moment of her death, the damages, when collected, to be paid to her estate. *Chicago, B. & Q. R. Co.* v. *Wells-Dickey Trust Co.*, 275 U. S. 161, distinguished. P. 347.
3. This case is not affected by statutes which regulate the continuance of a proceeding in a court of the United States by the substitution of the executor or administrator of a party dying while the suit is pending. 28 U. S. C. 778. P. 350.

85 F. (2d) 478, reversed.

CERTIORARI, 299 U. S. 535, to review the affirmance of a judgment dismissing an action by the administrator of a deceased seaman to recover for the loss sustained by the decedent's mother on account of his death.

Mr. H. C. Hughes, with whom *Mr. M. G. Adams* was on the brief, for petitioner.

Mr. M. A. Grace for respondents.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The Merchant Marine Act of 1920 (June 5, 1920, c. 250, § 33, 41 Stat. 1007; 46 U. S. C. § 688) gives a cause of action for damages to the personal representative of a seaman who has suffered death in the course of his employment by reason of his employer's negligence. The question is whether the liability abates where the beneficiary of the cause of action, in this case the mother of the seaman, dies during the pendency of a suit in her behalf.

The steam tow-boat, Edgar F. Coney, sank on January 28, 1930, with the loss of all on board. The respondent, Sabine Towing Company, Inc., the owner of the boat, filed a libel in a United States District Court in Texas for the limitation of liability. In that proceeding claims for damages were filed by the personal representatives of several members of the crew. Among such claims was one for the pecuniary damage suffered through the death of the second mate of the vessel, Edward C. Van Beeck. He died unmarried, leaving a mother and several brothers. There being neither wife nor child nor father, the mother was the sole beneficiary of the statutory cause of action. This results from the provisions of the Employers' Liability Act (45 U. S. C. § 51), governing injuries to railway employees, which is made applicable by the Merchant Marine Act in case of injuries to seamen. Cf. *Cortes* v. *Baltimore Insular Line,* 287 U. S. 367, 376. The mother was appointed administratrix of her son's estate, and acting as such administratrix filed her claim for damages.

She died in July 1931, and thereupon the petitioner, a brother of the dead seaman, succeeded to her office by appointment duly made, and was substituted as claimant in the pending suit. In that suit a Commissioner reported that the mother had suffered loss up to the time of her death in the sum of $700, and that there should be an award of that amount for the use of her estate. The District Court dismissed the claim on the ground that at her death the liability abated, and the Court of Appeals for the Fifth Circuit affirmed the dismissal. 85 F. (2d) 478. To settle the meaning of an important act of Congress, we granted certiorari.

The statutory cause of action to recover damages for death ushered in a new policy and broke with old traditions. Its meaning is likely to be misread if shreds of the discarded policy are treated as still clinging to it and narrowing its scope. The case of *Higgins* v. *Butcher,* Noy 18; Yelv. 89, which arose in the King's Bench in 1606, is the starting point of the rule, long accepted in our law, though at times with mutterings of disapproval,[1] that in an action of tort damages are not recoverable by any one for the death of a human being.[2] The rule is often viewed as a derivative of the formula *"actio personalis moritur cum persona,"* a maxim which "is one of some antiquity," though "its origin is obscure and post-classical." [3] Even in classical times, however, the Roman law enforced the principle that "no action of an essen-

[1] Tiffany, Death by Wrongful Act, §§ 3, 6–11; Pollock, Torts, 13th ed., pp. 62–65.

[2] *Baker* v. *Bolton,* 1 Camp. 493; *Insurance Co.* v. *Brame,* 95 U. S. 754, 756; *Lindgren* v. *United States,* 281 U. S. 38, 47; *Cortes* v. *Baltimore Insular Line,* 287 U. S. 367, 371; Pollock, Torts, *supra;* Tiffany, *supra.*

[3] Bowen and Fry, L. J. J., *Finlay* v. *Chirney,* (1888) 20 Q. B. D. 494, 502; Pollock, *supra;* Goudy, Two Ancient Brocards, in Essays in Legal History, ed. by Vinogradoff, p. 215; Radin, Anglo-American Legal History, p. 413.

tially penal character could be commenced after the death of the person responsible for the injury." [4] Vengeance, though permissible during life, was not to "reach beyond the grave." [5] There was also an accepted doctrine that no money value could be put on the life of a freeman.[6] The post-classical maxim, taken up by Coke and his successors,[7] gave a new currency to these teachings of the Digest, and, it seems, a new extension.[8] But the denial of a cause of action for wrongs producing death has been ascribed to other sources also. The explanation has been found at times in the common law notion that trespass as a civil wrong is drowned in a felony.[9] As to the adequacy of this explanation grave doubt has been expressed.[10] None the less, the rule as to felony merger seems to have coalesced, even if in a confused way, with the rule as to abatement,[11] and the effect of the two in combination was to fasten upon the law a doctrine which it took a series of statutes to dislodge.

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[4] Fifoot, English Law and Its Background, pp. 167, 168. Cf. Buckland, A Text-Book of Roman Law, 2nd ed., p. 685; Buckland & McNair, Roman Law and Common Law, p. 288; Allen, Law in the Making, 2nd ed., pp. 196–198.

[5] Fifoot, *supra;* Goudy, *supra,* p. 218.

[6] Fifoot, *supra;* Goudy, *supra,* p. 218, citing Dig. IX, 3, 3; IX, 3, 1, § 5: *"Liberum corpus nullam recipit aestimationem."*

[7] *Pinchon's Case,* 9 Rep. 86 b; Goudy, *supra,* p. 226; Allen, *supra.*

[8] Holdsworth, A History of English Law, Vol. 3, pp. 333, 334; Vol. 2, p. 363.

[9] *Admiralty Commissioners* v. *S. S. Amerika,* [1917] A. C. 38, 43, 47, 60.

[10] Holdsworth, *supra,* Vol. 3, Appendix VIII; also Vol. 3, pp. 332–336. Cf. Pollock, *supra; Osborn* v. *Gillett,* L. R. 8 Ex. 88, 96, 97; *Carey* v. *Berkshire R. Co.,* 1 Cush. 475, 477, 478; *Shields* v. *Yonge,* 15 Ga. 349, 353; *Hyatt* v. *Adams,* 16 Mich. 180, 187, 188; *Grosso* v. *D. L. & W. R. Co.,* 50 N. J. L. 317, 320; 13 Atl. 233.

[11] *Higgins* v. *Butcher, supra; Admiralty Commissioners* v. *S. S. Amerika, supra;* Tiffany, *supra;* Holdsworth, *supra,* Vol. 3, pp. 332–336.

The adoption of Lord Campbell's Act in 1846 (9 & 10 Vict. c. 93), giving an action to the executor for the use of wife, husband, parent or child, marks the dawn of a new era. In this country, statutes substantially the same in tenor followed in quick succession in one state after another, till today there is not a state of the Union in which a remedy is lacking.[12] Congress joined in the procession, first with the Employers' Liability Act for railway employees (45 U. S. C. §§ 51, 59), next with the Merchant Marine Act of 1920 for seamen and their survivors (46 U. S. C. § 688), and again with an act of the same year (March 30, 1920, c. 111, §§ 1, 2, 41 Stat. 537; 46 U. S. C. §§ 761, 762), not limited to seamen, which states the legal consequences of death upon the high seas.

As already pointed out, the personal representative of a seaman laying claim to damages under the Merchant Marine Act is to have the benefit of "all statutes of the United States conferring or regulating the right of action for death in the case of railway employees." 46 U. S. C. § 688. The statutes thus referred to as a standard display a double aspect. One of these is visible in the Employers' Liability Act as it stood when first enacted in 1908. Under the law as then in force (April 22, 1908, c. 149, § 1, 35 Stat. 65; 45 U. S. C. § 51) the personal representative does not step into the shoes of the employee, recovering the damages that would have been his if he had lived. On the contrary, by § 1 of the statute a new cause of action is created for the benefit of survivors or dependents of designated classes, the recovery being limited to the losses sustained by them as contrasted with any losses sustained by the decedent.[13]

[12] Tiffany, *supra*, pp. xviii to xliii; cf. 44 Harv. L. Rev. 980.

[13] *Michigan Central R. Co.* v. *Vreeland*, 227 U. S. 59, 68; *Gulf, Colorado & Santa Fe Ry. Co.* v. *McGinnis*, 228 U. S. 173, 175; *North Carolina R. Co.* v. *Zachary*, 232 U. S. 248, 256–257; *Chesapeake & Ohio Ry. Co.* v. *Kelly*, 241 U. S. 485, 489.

However, with the adoption of an amendment in 1910 (April 5, 1910, c. 143, § 2, 36 Stat. 291; 45 U. S. C. § 59) a new aspect of the statute emerges into view. Section 2 as then enacted continues any cause of action belonging to the decedent, without abrogating or diminishing the then existing cause of action for the use of his survivors.[14] "Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries and is confined to their pecuniary loss through his death." [15] It is loss of this last order, and no other, that is the subject of the present suit. So far as the record shows, the seaman died at once upon the sinking of the vessel. In any event there is no claim that his injuries were not immediately fatal.[16] To what extent the present problem would be altered, if intermediate loss and suffering had been made the basis of a recovery, we have no occasion to consider. Our decision must be limited to the necessities of the case before us.

Viewing the cause of action as one to compensate a mother for the pecuniary loss caused to her by the negligent killing of her son, we think the mother's death does not abate the suit, but that the administrator may continue it, for the recovery of her loss up to the moment of her death, though not for anything thereafter,[17] the damages when collected to be paid to her estate. Such is the rule in many of the state courts in which like statutes are in force. It is the rule in New York, in Pennsylvania, in New Jersey, in Oklahoma, in Georgia, in

[14] *St. Louis, I. M. & S. Ry. Co.* v. *Craft*, 237 U. S. 648, 657; *Great Northern Ry. Co.* v. *Capital Trust Co.*, 242 U. S. 144, 147.

[15] *St. Louis, I. M. & S. Ry. Co.* v. *Craft, supra*, p. 658.

[16] Cf. *Great Northern Ry. Co.* v. *Capital Trust Co., supra.*

[17] *Cooper* v. *Shore Electric Co.*, 63 N. J. L. 558; 44 Atl. 633; *Sider* v. *General Electric Co.*, 238 N. Y. 64; 143 N. E. 792.

Kentucky, in North Carolina, and under statutes somewhat different in Connecticut and Massachusetts.[18] It is also the rule in the lower federal courts, applying the statute of Illinois as well as the Act of Congress in respect of death upon the high seas.[19] These cases take the ground that "the damages awarded for the negligent act are such as result to the property rights of the person or persons for whose benefit the cause of action was created." [20] Indeed, even at common law, since statutes adopted in the reign of Edward III (4 Edw. III, c. 7; 25 Edw. III, stat. 5, c. 5), which were extended beyond their letter by an equitable construction, an administrator might recover where the wrong was an injury to property and not an injury to the person.[21] The general rule was said to be that "executors and administrators are the representatives of the temporal property, that is, the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate." [22] When we re-

[18] *Meekin* v. *Brooklyn Heights R. Co.*, 164 N. Y. 145; 58 N. E. 50; *Sider* v. *General Electric Co., supra; Fitzgerald* v. *Edison Electric Illuminating Co.*, 207 Pa. 118, 122; 56 Atl. 350; *Cooper* v. *Shore Electric Co., supra; Shawnee* v. *Cheek*, 41 Okla. 227, 252; 137 Pac. 724; *Frazier* v. *Georgia R. R. & Banking Co.*, 101 Ga. 77, 78; 28 S. E. 662 (semble); *Kentucky Utilities Co.* v. *McCarty's Admr.*, 169 Ky. 38, 46; 183 S. W. 237; *Neill* v. *Wilson*, 146 N. C. 242; 59 S. E. 674; *Waldo* v. *Goodsell*, 33 Conn. 432; *Johnston* v. *Bay State St. Ry. Co.*, 222 Mass. 583, 584; 111 N. E. 91; *De Marco* v. *Pease*, 253 Mass. 499, 508; 149 N. E. 208.

[19] *Union Steamboat Co.* v. *Chaffin's Admrs.*, 204 Fed. 412, 417; *The City of Rome*, 48 F. (2d) 333, 341, 342.

[20] *Meekin* v. *Brooklyn Heights R. Co., supra*, p. 153.

[21] Williams, Executors and Administrators, 7th Am. ed., Vol. 2, pp. 4, 5; *Chamberlain* v. *Williamson*, 2 M. & S. 408, 412; *Leggott* v. *Great Northern Ry. Co.*, (1876) 1 Q. B. D. 599, 606; *Pulling* v. *Great Eastern Ry. Co.*, (1882) 9 Q. B. D. 110.

[22] *Chamberlain* v. *Williamson, supra*, p. 415; *Whitford* v. *Panama R. Co.*, 23 N. Y. 465, 476.

member that under the death statutes an independent cause of action is created in favor of the beneficiaries for their pecuniary damages, the conclusion is not difficult that the cause of action once accrued is not divested or extinguished by the death of one or more of the beneficiaries thereafter, but survives, like a cause of action for injury to a property right or interest, to the extent that the estate of the deceased beneficiary is proved to be impaired. To that extent, if no farther, a new property right or interest, or one analogous thereto, has been brought into being through legislative action. True, there are decisions under the death statutes of some states that teach a different doctrine, refusing to permit a recovery by the administrator after the beneficiary has died,[23] though the ruling has been made at times with scant discussion of the problem. Indeed, the problem now before us was not always presented to the attention of the court, for at times the death of the beneficiary followed hard upon the death of the person negligently killed or the claim was not urged that there had been damage in the interval. We think the cases favoring survival within the limits already indicated are supported by preponderant authority and also by the better reason.

[23] *Schmidt* v. *Menasha Woodenware Co.*, 99 Wis. 300; 74 N. W. 797; *Gilkeson* v. *Missouri Pacific Ry. Co.*, 222 Mo. 173; 121 S. W. 138; *Railroad* v. *Bean*, 94 Tenn. 388; 29 S. W. 370; *Harvey* v. *Baltimore & Ohio R. Co.*, 70 Md. 319; 17 Atl. 88; *Doyle* v. *Railroad Co.*, 81 Ohio St. 184; 90 N. E. 165; *Huberwald* v. *Orleans R. Co.*, 50 La. Ann. 477; 23 So. 474; *Taylor* v. *Western Pacific R. Co.*, 45 Cal. 323; *Wabash R. Co.* v. *Gretzinger*, 182 Ind. 155; 104 N. E. 69 (semble). Cf. *Sanders' Admx.* v. *Louisville & N. R. Co.*, 111 Fed. 708, 709; *McHugh* v. *Grand Trunk Ry. Co.*, [1901] 2 Ont. L. Rep. 600.

At times state decisions have drawn a distinction between the death of a beneficiary before and during suit. See, e. g., *Frazier* v. *Georgia R. R. & Banking Co., supra.* The validity of that distinction is irrelevant to the case at hand. Cf. however, *Chicago, B. & Q. R. Co.* v. *Wells-Dickey Trust Co.*, 275 U. S. 161, 163; *Reading Co.* v. *Koons*, 271 U. S. 58.

Nothing at war with that conclusion will be found in our opinion in *Chicago, Burlington & Quincy R. Co.* v. *Wells-Dickey Trust Co.*, 275 U. S. 161, on which the court below leant heavily in deciding as it did. The suit was under the Employers' Liability Act which gives a cause of action (a) to the widow or children; (b) to the parents if no widow or children survive; or (c) to dependent next of kin, if there be no surviving widow, child or parent. A mother survived the employee, but died before an administrator was appointed. The holding was that the beneficial interest did not shift upon her death to members of class (c). "The failure to bring the action in the mother's lifetime did not result in creating a new cause of action after her death for the benefit of the sister." 275 U. S. at p. 164.[24] The question was not raised whether the damages, if any, suffered by the mother between the son's death and her own would have been recoverable, if proved. Nor is the case at hand affected by statutes, invoked by the respondent, which regulate the continuance of a proceeding in a court of the United States by the substitution of the executor or administrator of a party dying while the suit is pending. 28 U. S. C. § 778. The present claimant is not the administrator of the deceased beneficiary, but an administrator *de bonis non* who has succeeded to the office of the original administrator.[25] The order substituting him as a party was made without objection, and he continued in the suit thereafter as if he had filed a claim anew.

Death statutes have their roots in dissatisfaction with the archaisms of the law which have been traced to their origin in the course of this opinion. It would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be

[24] Cf. *Wilcox* v. *Bierd*, 330 Ill. 571; *Rogers* v. *Fort Worth & D. C. Ry. Co.*, 91 S. W. (2d) 458 (Tex. Civ. App.).

[25] Cf. *Thompson* v. *United States*, 103 U. S. 480, 483.

remedied.[26] There are times when uncertain words are to be wrought into consistency and unity with a legislative policy which is itself a source of law, a new generative impulse transmitted to the legal system. "The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed." [27] Its intimation is clear enough in the statutes now before us that their effects shall not be stifled, without the warrant of clear necessity, by the perpetuation of a policy which now has had its day.[28]

The decree should be reversed and the cause remanded for further proceedings in accord with this opinion.

Reversed.

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[26] Cf. *The Arizona* v. *Anelich,* 298 U. S. 110, 123; *Beadle* v. *Spencer,* 298 U. S. 124, 128.

[27] Per Holmes, Circuit Justice, in *Johnson* v. *United States,* 163 Fed. 30, 32. Cf. *Gooch* v. *Oregon Short Line R. Co.,* 258 U. S. 22, 24; *South & Central American Commercial Co.* v. *Panama R. Co.,* 237 N. Y., 287, 291; 142 N. E. 666.

[28] *The Arizona* v. *Anelich, supra; Cortes* v. *Baltimore Insular Line, supra; Warner* v. *Goltra,* 293 U. S. 155.

BRUSH *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 451. Argued February 4, 1937.—Decided March 15, 1937.

1. The water system of the City of New York was created and is conducted in the exercise of the City's governmental functions, and the salary of the Chief Engineer of the City's Bureau of Water Supply is immune from federal taxation. Pp. 360, 366.

   The Chief Engineer holds his office by statutory authority with a fixed annual salary. He exercises supervision over the engineering details connected with the supplying of water for public purposes and for consumption by the inhabitants of the City; supervises the protection of the water supply from pollution; and generally exercises control over the operation of the water system, its personnel, expenditure of money, and other matters relating thereto. The opinion sketches the history of the system, developed under legislative authority, and indicates its vital importance from both public and private standpoints.
2. This activity may be deemed an essential governmental function of the State. P. 362.
3. The rule that forbids the United States to tax the governmental instrumentalities of the States, and *vice versa*, is necessarily implied in the Constitution as essential to the preservation of our form of government; its application is a question of national scope to be resolved by principles of general application. P. 364.
4. Local rulings attempting to separate governmental from corporate activities in determining whether municipalities are suable for the torts of their agents, should be applied with caution as a test in determining what municipal activities are subject to federal taxation. P. 363.
5. The conclusion that the acquisition and distribution of a supply of water for the needs of New York City involve the exercise of essential governmental functions is fortified by a consideration of the public uses to which the water is put, and the dependency of the health and comfort of the inhabitants upon an adequate supply of pure water. P. 370.

6. The fact that in former times the business of furnishing water to urban communities, including New York, was left largely or entirely to private enterprise is not a reason for holding that the function, when performed by the City, is not governmental. P. 371.
7. Governmental functions are not to be regarded as non-existent because they were held in abeyance and have but recently been called into use. P. 371.
8. The fact that the City makes a charge for water service to private consumers does not stamp the function of supplying water as a private one. P. 372.
9. *South Carolina* v. *United States,* 199 U. S. 437, 461, 462, and *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 172, distinguished. *Dicta* in an opinion by way of illustration do not control in subsequent cases in which the precise point is presented for decision. P. 373.

85 F. (2d) 32, reversed.

CERTIORARI, 299 U. S. 536, to review a judgment affirming an order of the Board of Tax Appeals, which sustained a deficiency income tax assessment on the salary of the petitioner in this case.

Messrs. Boykin C. Wright and *Paul Windels* for petitioner.

The question presented: The supplying of water to Greater New York for use by the City itself and its inhabitants being a usual governmental function and an undertaking which cannot be efficiently or safely left to private enterprise, and having been conducted by the Government for over a century, should not the salary of a municipal employee serving as engineer to the Department of Water Supply be exempt from federal income taxes? The petitioner contends the court below adopted an erroneous criterion for immunity, in that the court laid down the test that the activity in question must be "necessary to its [the municipality's] existence as a government."

The test to be applied is whether supplying water is a "usual governmental function." *Helvering* v. *Powers,*

293 U. S. 214; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107; *United States* v. *California,* 297 U. S. 175, 185.

The supply of pure water, in adequate amounts, to urban centers of population has been consistently regarded as a sovereign or governmental function from an early date. *New Orleans* v. *Morris,* 105 U. S. 600; *New Orleans Water Works* v. *Rivers,* 115 U. S. 674, 681–682; *Columbus* v. *Mercantile Trust Co.,* 218 U. S. 645, 658. Distinguishing: *South Carolina* v. *United States,* 199 U. S. 437; *Ohio* v. *Helvering,* 292 U. S. 360, 369. See *Ashton* v. *Cameron County Water District,* 298 U. S. 513; *Rochester* v. *Rush,* 80 N. Y. 302; *Leonard* v. *Brooklyn,* 71 N. Y. 498; *Massena* v. *St. Lawrence Co.,* 126 Misc. 524.

The necessity of public operation of waterworks is so widely recognized that such operation has become usual, with private operation rare in practice and confined to the smaller cities.

In defining "usual governmental function," the courts should not confine their attention to the situation prevailing when the Union was formed. *Hoskins* v. *Commissioner,* 84 F. (2d) 627.

The analogy of the tort cases is impertinent and misleading. Exemption from liability in tort might have led to widespread individual suffering and other deplorable consequences. The courts might well have decided that to leave uncompensated all persons injured through the negligent operation of waterworks would produce more widespread social evils than would flow from holding cities liable to persons injured.

Radically different considerations assume control when the discussion shifts to the matter of tax exemption of waterworks' employees from federal taxes. To deny exemption hinders the performance of what this Court regarded as the highest of police duties (*Columbus* v. *Mercantile Trust Co.,* 218 U. S. 645) by either leaving employees dissatisfied with reduced salaries or cities bur-

dened with the duty of increasing those salaries to levels adequate to leave a fair and just net salary after paying taxes.

That the traditional dichotomy of the tort cases is not universally valid has been acknowledged by this Court itself. *Trenton* v. *New Jersey,* 262 U. S. 182.

The petitioner's contentions do not lead to a withdrawal of any field from federal taxation. The field we are concerned with has never previously been invaded by the Federal Government. Cf. *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 519.

That revenues are derived from the municipal waterworks is of no consequence. *Commissioner* v. *Ten Eyck,* 76 F. (2d) 515, 519; *New York ex rel. Rogers* v. *Graves,* 299 U. S. 401; *United States* v. *Coghlan,* 261 Fed. 425, 426.

The taxation of the petitioner's salary impedes and burdens the municipality in performing governmental functions. *Collector* v. *Day,* 11 Wall. 113; *New York ex rel. Rogers* v. *Graves,* 299 U. S. 401; *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 524; *Miller* v. *McCaughn,* 27 F. (2d) 128.

We discern far-reaching consequences if the decision below is allowed to stand. For, if the Federal Government can tax the petitioner's salary, it will presently assert the right to tax the bonds issued for aqueduct and reservoir construction and, having succeeded so far, will impose an income tax on the revenues of operation. In order to enjoy the protection which an adequate supply of pure water gives against fires and against disease, the citizens of New York will be compelled to pay tribute to the Federal Government.

If the Government's contentions are upheld, the various States in which the Tennessee Valley Authority carries on its operations might well seek to tax its revenues and its real estate, on the ground that to do so

would not impede any activity essential to the existence of the Federal Government as a government.

By leave of Court, *Mr. Julius Henry Cohen* made an argument, and *Messrs. John J. Bennett, Jr.,* Attorney General, and *Henry Epstein,* Solicitor General, filed a brief, on behalf of the State of New York as *amicus curiae.*

The Department of Water Supply, Gas and Electricity of the City of New York represents and performs a normal and necessary governmental function, meeting the standards laid down by this Court.

The Federal taxation of New York City's water supply will constitute a direct burden on the State of New York.

If the water supply function is immune, the salaries of the city's officers and employees engaged therein are likewise immune.

Mr. J. P. Jackson, with whom *Solicitor General Reed, Assistant Attorney General Jackson,* and *Messrs. Sewall Key* and *Berryman Green* were on the brief, for respondent.

Since the rule is aimed at the protection of the operations of government, the immunity does not extend "to anything lying outside or beyond governmental functions and their exertions." *Fox Film Corp.* v. *Doyal,* 286 U. S. 123, 128; *Board of Trustees* v. *United States,* 289 U. S. 48. It is entirely clear that the operation by a municipality of a public utility such as a waterworks system is not a governmental function.

A municipal corporation acts in a dual capacity. In the one character it is a governmental subdivision of the State, and exercises, by delegation, a part of the sovereignty of the State. In the other character it is a mere legal entity or juristic person and stands for the community in administration of local affairs. *Vilas* v. *Manila,* 220 U. S. 345, 356; *Winona* v. *Botzet,* 169 Fed. 321, 332; *Galveston* v. *Rowan,* 20 F. (2d) 501, 502.

It is well settled that in the maintenance of a water supply system, the municipality acts in a corporate or proprietary and not in a governmental capacity. McQuillin, Municipal Corporations, (2d ed.), §§ 1962, 2852; Borchard, Government Liability in Tort, 34 Yale L. J., pp. 1, 252, 254. We have found no authority to the contrary. [Citing many state cases.] This is the settled rule in New York, the highest court of that State holding that the very function here involved—the operation of the New York City water system—is a private and not a governmental function, and holding, moreover, in applying the doctrine of *respondeat superior,* that an employee of the City, engaged in such proprietary activity, is not an officer or employee of the State of New York, but an agent of the City performing services for the local advantage and benefit of the City and not for the State at large. [Citing New York cases.]

That the rule of immunity has no place in this proceeding, see *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 172; *South Carolina* v. *United States,* 199 U. S. 437, 461, 462; *Helvering* v. *Powers,* 293 U. S. 214; *Blair* v. *Byers,* 35 F. (2d) 326; *Denman* v. *Commissioner,* 73 F. (2d) 193.

The fundamental reason for denying federal authority to tax is found in the necessary protection of the independence of the respective governments within their respective spheres under our Constitution. *Helvering* v. *Powers, supra; Collector* v. *Day,* 11 Wall. 113, 125, 127; *Ambrosini* v. *United States,* 187 U. S. 1, 7. These reasons outline the limits of the rule of immunity. *Board of Trustees* v. *United States,* 289 U. S. 48; *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, 575, 576. The principle of immunity has inherent limitations. *Helvering* v. *Powers, supra; Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 522–524; *Willcuts* v. *Bunn,* 282 U. S. 216, 225, 226; *Fox Film Corp.* v. *Doyal,* 286 U. S. 123, 128.

The successful working of our dual governmental system requires that the principle of immunity be applied so as to interfere as little as possible with the important functions of federal taxation, and, therefore, the rule is to be applied restrictively. *Willcuts* v. *Bunn,* 282 U. S. 216; 225; *Educational Films Corp.* v. *Ward,* 282 U. S. 379, 391.

The necessary independence of the States requires that the rule be applied only to those functions "strictly" or "essentially" governmental in character. *South Carolina* v. *United States, supra,* p. 461; *Flint* v. *Stone Tracy Co., supra,* pp. 157, 172. Just what those functions are that are strictly and essentially governmental and necessary to preserve the separate independence of the States is difficult to state in terms of general application. See *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 523. Apparently they include only the operations of the legislative, executive, and judicial branches of state government in the making and enforcing of laws. See *Flint* v. *Stone Tracy Co., supra,* pp. 157, 172; *Liggett & Myers Tobacco Co.* v. *United States,* 13 F. Supp. 143, 145; aff'd on other grounds, 299 U. S. 383. It is clear that the operation by a municipality of a waterworks is not a strictly and essential governmental function, necessary to the preservation of independent state governments. In fact, the State has no interest, governmental or otherwise, in the activity in question. *Bailey* v. *Mayor,* 3 Hill (N. Y.) 531, 539.

The rule of immunity is further limited by the settled principle that the States may not withdraw sources of revenue from the federal taxing power by engaging in activities to which, by their nature, the federal taxing power would normally extend. *Helvering* v. *Powers, supra; South Carolina* v. *United States,* 199 U. S. 437; *Murray* v. *Wilson Distilling Co.,* 213 U. S. 151, 173; *United States* v. *California,* 297 U. S. 175, 184–185; *Ohio*

v. *Helvering,* 292 U. S. 360, 368, 369. See also *United States Bank* v. *Planters Bank,* 9 Wheat. 904, 907.

In the purveying of water for a price, the City is engaged in a profitable business enterprise. It is engaged in an activity which, at the time of the adoption of our Constitution, was carried on by private companies. In New York City at the present time water is furnished and sold by private companies in certain areas.

The duties of the taxpayer as Chief Engineer are no different from those of similar engineers employed by private concerns engaged in a similar enterprise. We see no reason for putting the sale of water in a different category from the sale of liquor (*South Carolina* v. *United States,* 199 U. S. 437; *Ohio* v. *Helvering,* 292 U. S. 360) or from the operation of a street railway (*Helvering* v. *Powers,* 293 U. S. 214). And, if a State may not, by entering into these activities, thus withdraw sources of federal revenue, *a fortiori* a municipal corporation may not.

By leave of Court, briefs of *amici curiae* were filed as follows: by *Mr. J. Joseph Lilly,* on behalf of Thaddeus Merriman et al.; by *Messrs. Paul Windels, Oscar S. Cox,* and *Paxton Blair,* on behalf of the City of New York; and by *Messrs. James H. Howard* and *Charles C. Cooper, Jr.,* on behalf of Frank E. Weymouth, General Manager and Chief Engineer of the Metropolitan Water District of Southern California, all urging reversal of the judgment below.

Mr. Justice Sutherland delivered the opinion of the Court.

The question brought here for determination is whether the salary of petitioner as Chief Engineer of the Bureau of Water Supply of the City of New York is a part of his taxable income for the purposes of the federal income-

tax law. The answer depends upon whether the water system of the city was created and is conducted in the exercise of the city's governmental functions. If so, its operations are immune from federal taxation and, as a necessary corollary, "fixed salaries and compensation paid to its officers and employees in their capacity as such are likewise immune." *New York ex rel. Rogers* v. *Graves*, 299 U. S. 401, 408.

Petitioner holds his office as Chief Engineer by statutory authority, with a fixed annual salary of $14,000. He exercises supervision over the engineering details connected with the supplying of water for public purposes and for consumption by the inhabitants of the city; supervises the protection of the water supply from pollution; and generally exercises control over the operation of the water system, its personnel, expenditure of money and other matters relating thereto.

In the early history of the city, water was furnished by private companies; but a century or more ago, the city itself began to take over the development and distribution. In 1831, the Board of Aldermen declared its dissatisfaction with the private control, and resolved that the powers then vested in private hands should be repealed by the legislature and vested exclusively in the corporation of the City of New York. This, in effect, was initiated in 1833 (L. 1833, c. 36); and, soon thereafter, the city constructed municipal water works, and, with slight exceptions, private control and operation ceased. The sources of water supply furnished by such companies as remain are approaching exhaustion, and the water furnished is of a quality inferior to that supplied by the municipality. From 1833 to the present time, additions to the water supply and system have been steadily made until the cost has mounted to more than $500,000,000; and it is estimated that additional expenditures of a quarter of a billion dollars will be necessary.

The cost of bringing water from the Catskills alone amounted to approximately $200,000,000. The municipal outstanding bonded indebtedness incurred for supplying the city with water amounts to an enormous sum. More than half the entire population of the state is found within the municipal boundaries. The action of the city from the beginning has been taken under legislative authority.

The Commissioner of Internal Revenue having assessed a deficiency tax against petitioner in respect of his salary, petitioner sought a redetermination at the hands of the Board of Tax Appeals. That board sustained the commissioner and decreed a deficiency against petitioner of $256.27 for the year 1931. Upon review, the court below affirmed the decree of the board. 85 F. (2d) 32. While the sum involved is small, we granted the writ of certiorari because of the obvious importance of the question involved.

The phrase "governmental functions," as it here is used, has been qualified by this court in a variety of ways. Thus, in *South Carolina* v. *United States,* 199 U. S. 437, 461, it was suggested that the exemption of state agencies and instrumentalities from federal taxation was limited to those which were of a *strictly* governmental character, and did not extend to those used by the state in carrying on an ordinary private business. In *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 172, the immunity from taxation was related to the *essential* governmental functions of the state. In *Helvering* v. *Powers,* 293 U. S. 214, 225, we said that the state "cannot withdraw sources of revenue from the federal taxing power by engaging in businesses which constitute a departure from *usual* governmental functions and to which, by reason of their nature, the federal taxing power would normally extend." And immunity is not established because the state has the power to engage

in the business for what the state conceives to be the public benefit. *Idem.* In *United States* v. *California,* 297 U. S. 175, 185, the suggested limit of the federal taxing power was in respect of activities in which the states have *traditionally* engaged.

In the present case, upon the one side, stress is put upon the adjective "essential," as used in the *Flint* v. *Stone Tracy* case, while, on the other side, it is contended that this qualifying adjective must be put aside in favor of what is thought to be the greater reach of the word "usual," as employed in the *Powers* case. But these differences in phraseology, and the others just referred to, must not be too literally contradistinguished. In neither of the cases cited, was the adjective used as an exclusive or rigid delimitation. For present purposes, however, we shall inquire whether the activity here in question constitutes an essential governmental function within the proper meaning of that term; and in that view decide the case.

There probably is no topic of the law in respect of which the decisions of the state courts are in greater conflict and confusion than that which deals with the differentiation between the governmental and corporate powers of municipal corporations. This condition of conflict and confusion is confined in the main to decisions relating to liability in tort for the negligence of officers and agents of the municipality. In that field, no definite rule can be extracted from the decisions.[1] It is true that

[1] This is brought out in a careful and detailed review by Professor Borchard in that portion of his general discussion of "Government Liability in Tort" dealing with municipal corporations, to be found in (1924–5) 34 Yale L. J. 129–143, 229–258, in the course of which he says (p. 129): "Disagreement among the courts as to many customary municipal acts and functions may almost be said to be more common than agreement and the elaboration of the varying justifications for their classification is even less satisfying to any demand for principle in the law. Indeed, so hopeless did the effort of the courts

in most of the state courts, including those in the State of New York, it is held that the operation of water works falls within the category of corporate activities; and the city's liability is affirmed in tort actions arising from negligence in such operation. But the rule in respect of such cases, as we pointed out in *Trenton* v. *New Jersey,* 262 U. S. 182, 192, has been "applied to escape difficulties, in order that injustice may not result from the recognition of technical defenses based upon the governmental character of such corporations"; and the rule is hopelessly indefinite, probably for that very reason.

This is not, however, an action for personal injuries sounding in tort, but a proceeding which seeks in effect to determine whether immunity from federal taxation, in respect of the activity in question, attaches in favor of a state-created municipality—an objective so different in character from that sought in a tort action as to suggest caution in applying as the guide to a decision of the former a local rule of law judicially adopted in order to avoid supposed injustices which would otherwise result in the latter. We have held, for example, that the sale of motorcycles to a municipal corporation for use in its police service is not subject to federal taxation, because the maintenance of such a service is a governmental function. *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, 579. And while it is true that the weight of authority in tort actions accords with that view, there are state decisions which affirm the liability of a municipality for personal injury resulting from the negligence of its police officials under the circumstances presented in the respective cases dealt with.[2] Nevertheless, our

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to make an appropriate classification of functions appear to the Supreme Court of South Carolina that they determined to abandon the distinction between governmental and corporate acts."

[2] See *Herron* v. *Pittsburgh,* 204 Pa. 509, 513; 54 Atl. 311; *Jones* v. *Sioux City,* 185 Iowa 1178, 1185; 170 N. W. 445; *Twist* v. *Rochester,*

decision in the *Indian Motocycle* case did not rest in the slightest degree upon a consideration of the state rule in respect of tort actions, but upon a broad consideration of the implied constitutional immunity arising from the dual character of our national and state governments.

The rule in respect of municipal liability in tort is a local matter; and whether it shall be strict or liberal or denied altogether is for the state which created the municipality alone to decide (*Detroit* v. *Osborne,* 135 U. S. 492, 497–498)—provided, of course, the Federal Constitution be not infringed. But a federal tax in respect of the activities of a state or a state agency is an imposition by one government upon the activities of another, and must accord with the implied federal requirement that state and local governmental functions be not burdened thereby. So long as our present dual form of government endures, the states, it must never be forgotten, "are as independent of the general government as that government within its sphere is independent of the States." *Collector* v. *Day,* 11 Wall. 113, 124. And, as it was said in *Texas* v. *White,* 7 Wall. 700, 725, and often has been repeated—"the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government." The unimpaired existence of both governments is equally essential. It is to that high end that this court has recognized the rule, which rests upon necessary implication, that neither may tax the governmental means and instrumentalities of the other. *Collector* v. *Day, supra,* p. 127. In the light of these considerations, it follows that the question here presented is not controlled by local law but is a question of national scope to be resolved in harmony with implied constitutional prin-

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55 N. Y. Supp. 850. Compare *Kunz* v. *Troy,* 104 N. Y. 344, 348; 10 N. E. 442, with *Altvater* v. *Mayor of Baltimore,* 31 Md. 462.

ciples of general application. Compare *Workman* v. *New York City,* 179 U. S. 552, 557. This indicated dissimilarity constitutes a distinction which is fundamental; and we put aside the state decisions in tort actions as inapposite. Compare *Atlantic Cleaners & Dyers* v. *United States,* 286 U. S. 427, 433 *et seq.*

We thus come to a situation, which the courts have frequently been called upon to meet, where the issue cannot be decided in accordance with an established formula, but where points along the line "are fixed by decisions that this or that concrete case falls on the nearer or farther side." *Hudson Water Co.* v. *McCarter,* 209 U. S. 349, 355. We are, of course, quite able to say that certain functions exercised by a city are clearly governmental—that is, lie upon the nearer side of the line—while others are just as clearly private or corporate in character, and lie upon the farther side. But between these two opposite classes, there is a zone of debatable ground within which the cases must be put upon one side or the other of the line by what this court has called the gradual process of historical and judicial "inclusion and exclusion." *Continental Bank* v. *Chicago, R. I. & P. Ry.,* 294 U. S. 648, 670, and cases cited.

We think, therefore, that it will be wise to confine, as strictly as possible, the present inquiry to the necessities of the immediate issue here involved, and not, by an attempt to formulate any general test, risk embarrassing the decision of cases in respect of municipal activities of a different kind which may arise in the future. Cf. *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365, 397; *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 523. In the case last named we had occasion to point out the difficulty, albeit the necessity, as cases arise within the doubtful zone, of drawing the line which separates those activities which have some relation to government but are subject to taxation from those which are immune. "Experience has shown,"

we said, "that there is no formula by which that line may be plotted with precision in advance. But recourse may be had to the reason upon which the rule rests, and which must be the guiding principle to control its operation. Its origin was due to the essential requirement of our constitutional system that the federal government must exercise its authority within the territorial limits of the states; and it rests on the conviction that each government, in order that it may administer its affairs within its own sphere, must be left free from undue interference by the other."

The public interest in the conservation and distribution of water for a great variety of purposes—ranging from ordinary agricultural, domestic and sanitary uses, to the preservation of health and of life itself—is obvious and well settled. For the modern city, such conservation and distribution of water in sufficient quantity and in a state of purity is as vital as air. And this vital necessity becomes more and more apparent and pressing as cities increase in population and density of population. It has found, so far, its culminating point in the vast and supreme needs of the City of New York.

One of the most striking illustrations of the public interest in the use of water and the governmental power to deal with it is shown in legislation and judicial pronouncement with respect to the arid-land states of the far west. In some of them, the state constitution asserts public ownership of all unappropriated nonnavigable waters. In Utah, while it was still a territory, a statute conferred the right upon individual land owners to condemn rights-of-way across the lands of others in order to convey water to the former for irrigation purposes, and declared that such condemnation was for a "public use." This court upheld the statute. *Clark* v. *Nash,* 198 U. S. 361. We said that what is a public use may depend upon

the facts surrounding the subject; pointed out the vital need of water for irrigation in the arid-land states, a need which did not exist in the states of the east and where, consequently, a different rule obtained; and held that the court must recognize the difference of climate and soil which rendered necessary differing laws in the two groups of states.

Many years ago, Congress, recognizing this difference, passed the Desert Land Act (c. 107, 19 Stat. 377), by which, among other things, the waters upon the public domain in the arid-land states and territories were dedicated to the use of the public for irrigation and other purposes. Following this act, if not before, all non-navigable waters then on and belonging to that part of the national domain became *publici juris,* subject to the plenary control of the arid-land states and territories with the right to determine to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain. *California Oregon Power Co.* v. *Beaver Cement Co.,* 295 U. S. 142, 155 *et seq.* And in *Kansas* v. *Colorado,* 206 U. S. 46, 94, this court entertained and decided a controversy between two states involving the right of private appropriators in Colorado to divert waters for the irrigation of lands in that state from a river naturally and customarily flowing into the State of Kansas. It was held (p. 99) that such a controversy rises "above a mere question of local private right and involves a matter of state interest, and must be considered from that standpoint." Cf. *Hudson Water Co.* v. *McCarter,* 209 U. S. 349, 355; *New Orleans Gas Co.* v. *Drainage Comm'n,* 197 U. S. 453, 460; *Houck* v. *Little River District,* 239 U. S. 254, 261.

In *New Orleans* v. *Morris,* 105 U. S. 600, 602, the city had conveyed its water works to a corporation formed for the purpose of maintaining and enlarging them.

The city received as consideration shares of stock, which a state statute declared should not be liable to seizure for the debts of the city. It was held the statute did not impair the obligation of any contract, since the shares represented the city's ownership in the water works which had, before the enactment of the statute, been exempted from seizure and sale. This ruling was put upon the ground that the water works were of such public utility and necessity that they were held in trust for the use of the citizens the same as public parks and public buildings.

While these cases do not decide, they plainly suggest, that municipal water works created and operated in order to supply the needs of a city and its inhabitants are public works and their operation essentially governmental in character. Other decisions of this court, however, more directly support that conclusion.

We recently have held that the bankruptcy statutes could not be extended to municipalities or other political subdivisions of a state. *Ashton* v. *Cameron County Water District,* 298 U. S. 513. The respondent there was a water-improvement district organized by law to furnish water for irrigation and domestic uses. We said (pp. 527–528) that respondent was a political subdivision of the state "created for the local exercise of her sovereign powers, . . . Its fiscal affairs are those of the State, not subject to control or interference by the National Government, unless the right so to do is definitely accorded by the Federal Constitution." In support of that holding, former decisions of this court with respect to the immunity of states and municipalities from federal taxation were relied upon as apposite. The question whether the district exercised governmental or merely corporate functions was distinctly in issue. The petition in bankruptcy alleged that the district was created with power to perform "the proprietary and/or corporate function of fur-

nishing water for irrigation and domestic uses . . ." The district judge held that the district was created for the local exercise of state sovereign powers; that it was exercising "a governmental function"; that its property was public property; that it was not carrying on private business, but public business. That court, having denied the petition for want of jurisdiction, the district submitted a motion for a new trial in which it assigned, among other things, that the court erred in holding that petitioner was created for the purpose of performing governmental functions, "for the reason that the Courts of Texas, as well as the other Courts in the Nation, have uniformly held that the furnishing of water for irrigation was purely a proprietary function . . ." Substantially the same thing was repeated in other assignments of error. In the petition for rehearing in this court, the district challenged our determination that respondent was a political subdivision of the state "created for the local exercise of her sovereign powers," and asserted to the contrary that the facts would demonstrate that "respondent is a corporation organized for essentially proprietary purposes." It is not open to dispute that the statements quoted from our opinion in the *Ashton* case were made after due consideration, and the case itself decided and the rehearing denied in the light of the issue thus definitely presented. Compare *Bingham* v. *United States,* 296 U. S. 211, 218–219.

"No higher police duty rests upon municipal authority," this court said in *Columbus* v. *Mercantile Trust Co.,* 218 U. S. 645, 658, "than that of furnishing an ample supply of pure and wholesome water for public and domestic uses. The preservation of the health of the community is best obtained by the discharge of this duty, to say nothing of the preservation of property from fire, so constant an attendant upon crowded conditions of municipal life."

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In *Dunbar* v. *New York City,* 251 U. S. 516, we sustained a charter provision giving a lien for water charges upon a building in which the water had been used, although the charges had been incurred by tenants and not by the owner, saying—"And as a supply of water is necessary it is only an ordinary and legal exertion of government to provide means for its compulsory compensation."

In *German Alliance Ins. Co.* v. *Home Water Co.,* 226 U. S. 220, the City of Spartanburg had entered into a contract with the respondent by which the latter was empowered to supply the city and its inhabitants with water suitable for fire, sanitary and domestic purposes. The petitioner had issued a policy of fire insurance upon certain property, which was destroyed by fire. It paid the amount of the loss, and took an assignment from the insured of all claims and demands against any person arising from or connected with the loss. It brought suit against the respondent on the ground that the fire could easily have been extinguished if respondent had complied with its contract. This court held that the action was not maintainable for reasons which appear in the opinion. The city, it was said, was under no *legal* obligation to furnish water; and it did not subject itself to a new or greater liability because it voluntarily undertook to do so (pp. 227-228). "It acted in a governmental capacity, and was no more responsible for failure in that respect than it would have been for failure to furnish adequate police protection."

We conclude that the acquisition and distribution of a supply of water for the needs of the modern city involve the exercise of essential governmental functions, and this conclusion is fortified by a consideration of the public uses to which the water is put. Without such a supply, public schools, public sewers so necessary to preserve health, fire departments, street sprinkling and cleaning, public buildings, parks, playgrounds, and public baths,

could not exist. And this is equivalent, in a very real sense, to saying that the city itself would then disappear. More than one-fourth of the water furnished by the city of New York, we are told by the record, is utilized for these public purposes. Certainly, the maintenance of public schools, a fire department, a system of sewers, parks and public buildings, to say nothing of other public facilities and uses, calls for the exercise of governmental functions. And so far as these are concerned, the water supply is a necessary auxiliary, and, therefore, partakes of their nature. *New York ex rel. Rogers* v. *Graves,* 299 U. S. 401, 406. Moreover, the health and comfort of the city's population of 7,000,000 souls, and in some degree their very existence, are dependent upon an adequate supply of pure and wholesome water. It may be, as it is suggested, that private corporations would be able and willing to undertake to provide a supply of water for all purposes; but if the State and City of New York be of opinion, as they evidently are, that the service should not be entrusted to private hands but should be rendered by the city itself as an appropriate means of discharging its duty to protect the health, safety and lives of its inhabitants, we do not doubt that it may do so in the exercise of its essential governmental functions.

We find nothing that detracts from this view in the fact that in former times the business of furnishing water to urban communities, including New York, in fact was left largely, or even entirely, to private enterprise. The tendency for many years has been in the opposite direction, until now in nearly all the larger cities of the country the duty has been assumed by the municipal authorities. Governmental functions are not to be regarded as non-existent because they are held in abeyance, or because they lie dormant, for a time. If they be by their nature governmental, they are none the less so because the use of them has had a recent beginning.

The principle finds illustration in our decision in *Shoemaker* v. *United States,* 147 U. S. 282, 297, where it was held that land taken by an exercise of the power of eminent domain for the establishment of Rock Creek Park in the District of Columbia was taken for a public use, and that the amount required to be paid was validly assessed upon lands in the district specially benefited thereby. At the beginning of the opinion in that case, this court said: "In the memory of men now living, a proposition to take private property, without the consent of its owner, for a public park, and to assess a proportionate part of the cost upon real estate benefited thereby, would have been regarded as a novel exercise of legislative power." It was pointed out that Central Park in New York was the first place provided for the inhabitants of any city or town in the United States as a pleasure ground for rest and exercise in the open air, but that in 1892, when the opinion was written, there was scarcely a city of any considerable size in the country that did not have, or had not projected, such parks.

Respondent contends that the municipality, in supplying water to its inhabitants, is engaged in selling water for profit; and seems to think that this, if true, stamps the operation as private and not governmental in character. We first pause to observe that the overhead due to the enormous cost of the system, and the fact that so large a proportion of the water is diverted for public use, rather plainly suggests that no real profit is likely to result. And to say that, because the city makes a charge for furnishing water to private consumers, it follows that the operation of the water works is corporate and not governmental, is to beg the question. What the city is engaged in doing in that respect is rather rendering a service than selling a commodity. If that service be governmental it does not become private because a charge is made for it, or a profit realized. A state, for example,

constructs and operates a highway. It may, if it choose, exact compensation for its use from those who travel over it (see *Bingaman* v. *Golden Eagle Lines,* 297 U. S. 626, 628); but this does not destroy the claim that the maintenance of the highway is a public and governmental function. The state or the city may exact a tuition charge for instruction in the public schools; but thereby the maintenance of the public schools does not cease to be a function of the government. The state exacts a fee for issuing a license or granting a permit; for recording a deed; for rendering a variety of services in the judicial department. Do these various services thereby lose their character as governmental functions? The federal Post-Office Department charges for its services; but no one would question the fact that its operation calls into exercise a governmental function.

The contention is made that our decisions in *South Carolina* v. *United States,* 199 U. S. 437, 461, 462, and *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 172, are to the effect that the supplying of water is not a governmental function; but in neither case was that question in issue, and what was said by the court was wholly unnecessary to the disposition of the cases and merely by way of illustration. Expressions of that kind may be respected, but do not control in a subsequent case when the precise point is presented for decision. *Osaka Shosen Kaisha Line* v. *United States, ante,* pp. 98, 103, and authorities cited. The precise point is presented here, has been fully considered, and is decided otherwise. Neither *Ohio* v. *Helvering,* 292 U. S. 360, nor *Helvering* v. *Powers,* 293 U. S. 214, relied upon by respondent, is in point. What has already been said distinguishes those cases from the one now under consideration.

We have not failed to give careful consideration to *Blair* v. *Byers,* 35 F. (2d) 326, and *Denman* v. *Commissioner,* 73 F. (2d) 193, both of which take a view con-

trary to that which we have expressed. To the extent of this conflict, those cases are disapproved. Both rely on *South Carolina* v. *United States* and *Flint* v. *Stone Tracy Co., supra,* which we have already distinguished.

Reversed.

MR. JUSTICE STONE and MR. JUSTICE CARDOZO, concurring in the result:

We concur in the result upon the ground that the petitioner has brought himself within the terms of the exemption prescribed by Treasury Regulation 74, Article 643, which for the purposes of this case may be accepted as valid, its validity not being challenged by counsel for the Government.

In the absence of such a challenge no opinion is expressed as to the need for revision of the doctrine of implied immunities declared in earlier decisions.

We leave that subject open.

MR. JUSTICE ROBERTS, dissenting:

I regret that I am unable to concur in the opinion of the court. I think that the judgment should be affirmed.

There is no occasion now to discuss the dual character of our form of government, and the consequent dual allegiance of a citizen of a state to his state and to the United States, to elaborate the thesis that the integrity of each government is to be maintained against invasions by the other, or to reiterate that the implied immunity of the one from taxation by the other springs from the necessity that neither shall, by the exercise of the power to tax, burden, hinder or destroy the operation or existence of the other. There is universal recognition of the truth of these tenets, and of their fundamental relation to the preservation of the constitutional framework of the nation. Our difficulties arise, not in their statement as guiding principles, but, as in this instance, in their application to specific cases.

The frank admissions of counsel at the bar concerning the confusion and apparent inconsistency in administrative rulings as to the taxability of compensation of municipal employees seems to call for an equally candid statement that our decisions in the same field have not furnished the executive a consistent rule of action. The need of equitable and uniform administration of tax laws, national and state, and the just demand of the citizen that the rules governing the enforcement of those laws shall be ascertainable require an attempt at rationalization and restatement.

It seems to me that the reciprocal rights and immunities of the national and a state government may be safeguarded by the observance of two limitations upon their respective powers of taxation. These are that the exactions of the one must not discriminate against the means and instrumentalities of the other and must not directly burden the operations of that other. To state these canons otherwise: an exaction by either government which hits the means or instrumentalities of the other infringes the principle of immunity if it discriminates against them and in favor of private citizens or if the burden of the tax be palpable and direct rather than hypothetic and remote. Tested by these criteria the imposition of the challenged tax in the instant case was lawful.

The petitioner is a citizen of New York. By virtue of that status he is also a citizen of the United States. He owes allegiance to each government. He derives income from the exercise of his profession. His obligation as a citizen is to contribute to the support of the governments under whose joint protection he lives and pursues his calling. His liability to fulfill that obligation to the national government by payment of income tax upon his salary would be unquestioned were it not for the character of his employer. If the water works of New York

City were operated by a private corporation under a public franchise and if the petitioner held a like position with the corporation, there could be no question that the imposition of a federal income tax, measured by his compensation, would be justified. If petitioner, instead of holding a so-called official position under the municipal government of New York City, were consulted from time to time with respect to its water problems his compensation would be subject to income tax. (*Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514.) He is put into an untaxable class upon the theory that as an official of the municipality, which in turn is an arm of the state, he is an "instrumentality" of the state, and to tax him upon his salary is to lay a burden upon the state government which, however trifling, is forbidden by the implied immunity of the state from burdens imposed by the United States. The petitioner seeks to show the reality of the supposed burden by the suggestion that if his salary and the compensation of others employed by the city is subject to federal income tax, the municipality will be compelled to pay higher salaries in order to obtain the services of such persons and the consequent aggregate increase in outlay will entail a heavy financial load. We know, however, that professional services are offered in the industrial and business field; and that while there is no hard and fast standard of compensation, and men bargain for their rewards, salaries do bear some relation to experience and ability. There is a market in which a professional man offers his services and municipalities are bidders in that market. We know further that those in private employment holding positions comparable to that of the petitioner pay a tax equal to that levied upon him. It is clear that any consideration of the petitioner's immunity from federal income tax would be altogether remote, impalpable and unascertainable in influencing

him to accept a position under the municipality rather than under a private employer.

In reason and logic it is difficult to differentiate the present case from that of a private citizen who furnishes goods, performs work or renders service to a state or a municipality under a contract or an officer or employe of a corporation which does the same. Income tax on the compensation paid or the profit realized is a necessary cost incident to the performance of the contract and as such must be taken into account in fixing the consideration demanded of the city government. In quite as real a sense, as in this case, the taxation of income of such persons and, as well, the taxation of the corporation itself, lays a burden upon the funds of the state or its agency. Nevertheless, the courts have repeatedly declared that the doctrine of immunity will not serve to exempt such persons or corporations from the exaction.

The importance of the case arises out of the fact that the claimed exemption may well extend to millions of persons (whose work nowise differs from that of their fellows in private enterprise) who are employed by municipal subdivisions and districts throughout the nation and that, on the other hand, the powers of the states to tax may be inhibited in the case of hundreds of thousands of similar employes of federal agencies of one sort or another. Such exemptions from taxation ought to be strictly limited. They are essentially unfair. They are unsound because federal or state business ought to bear its proportionate share of taxation in order that comparison may be made between the cost of conducting public and private business.

We are here concerned only with the question of the taxation of salaries or compensation received by those rendering to a municipality services of the same kind as are rendered to private employers and need not go be-

yond the precise issue here presented. We have no concern with the exaction of a sales tax by the federal government on sales to a state government or one of its subdivisions, or the reverse; we are not called upon to define the power to levy taxes upon real property owned by a state or by the national government. We have no occasion to discuss the power of either government to impose excise taxes upon transactions of the other or upon the evidence of such transactions. Nor are we called upon here to determine the validity of a nondiscriminatory tax upon the salary of a governmental officer whose duties and functions have no analogue in the conduct of a business or the pursuit of a profession, but are both peculiar to and essential to the operation of government. The sole question here is whether one performing work or rendering service of a type commonly done or rendered in ordinary commercial life for gain is exempt from the normal burden of a tax on that gain for the support of the national government because his compensation is paid by a state agency instead of a private employer. I think the imposition of a tax upon such gain where, as here, the tax falls equally upon all employed in like occupation, and where the supposed burden of the tax upon state government is indirect, remote, and imponderable, is not inconsistent with the principle of immunity inherent in the constitutional relation of state and nation.

MR. JUSTICE BRANDEIS joins in this opinion.

WEST COAST HOTEL CO. *v.* PARRISH ET AL.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 293. Argued December 16, 17, 1936.—Decided March 29, 1937.

1. Deprivation of liberty to contract is forbidden by the Constitution if without due process of law; but restraint or regulation of this liberty, if reasonable in relation to its subject and if adopted for the protection of the community against evils menacing the health, safety, morals and welfare of the people, is due process. P. 391.
2. In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression. P. 393.
3. The State has a special interest in protecting women against employment contracts which through poor working conditions, long hours or scant wages may leave them inadequately supported and undermine their health; because:

   (1) The health of women is peculiarly related to the vigor of the race;

   (2) Women are especially liable to be overreached and exploited by unscrupulous employers; and

   (3) This exploitation and denial of a living wage is not only detrimental to the health and well being of the women affected but casts a direct burden for their support upon the community. Pp. 394, 398, et seq.
4. Judicial notice is taken of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. P. 399.
5. A state law for the setting of minimum wages for women is not an arbitrary discrimination because it does not extend to men. P. 400.
6. A statute of the State of Washington (Laws, 1913, c. 174; Remington's Rev. Stats., 1932, § 7623 *et seq.*) providing for the establishment of minimum wages for women, *held* valid. *Adkins* v. *Children's Hospital,* 261 U. S. 525, is overruled; *Morehead* v. *New York ex rel. Tipaldo,* 298 U. S. 587, distinguished. P. 400.

185 Wash. 581; 55 P. (2d) 1083, affirmed.

This was an appeal from a judgment for money directed by the Supreme Court of Washington, reversing the trial court, in an action by a chambermaid against a hotel company to recover the difference between the amount of wages paid or tendered to her as per contract, and a larger amount computed on the minimum wage fixed by a state board or commission.

Mr. E. L. Skeel, with whom *Mr. John W. Roberts* was on the brief, for appellant.

The statute was passed in 1913, long before the decision of this Court in the *Adkins* case. It is in no sense an emergency measure.

It sets up but one standard, that is, the wage must be adequate for the maintenance of the adult woman worker. It does not require that the wage have any relation to the reasonable value of the worker's services. The *Adkins* case, 261 U. S. 525, and like cases decided subsequently, condemn such legislation. *Murphy* v. *Sardell,* 269 U. S. 530; *Donham* v. *West-Nelson Mfg. Co.,* 273 U. S. 657; *Morehead* v. *New York ex rel. Tipaldo,* 298 U. S. 587.

The court below based its decision on two points: (1) That the *Adkins* case was not binding since the Act there involved was an Act of Congress; and (2) that the legislature and the state court have conclusively determined that the Act is in the public interest.

The power of Congress within the District of Columbia is as broad as that of the State within its own territory.

In any event, the subsequent decisions of this Court dealing with state legislation are directly in point.

The state legislature and the state supreme court cannot deprive a person of his constitutional rights by merely stating that the enactment is made as an exercise of the police power for the correction of an existing evil. *Meyer*

v. *Nebraska,* 262 U. S. 399; *Minnesota* v. *Barber,* 136 U. S. 313, 319; *Buchanan* v. *Warley,* 245 U. S. 60, 74.

Messrs. C. B. Conner and *Sam M. Driver* filed a brief on behalf of appellees.

The issue is whether this legislative Act is a valid and reasonable exercise of the police power of the State. The Constitution does not prohibit States from regulating matters for the public welfare, but simply requires that regulations be reasonable and adapted to that end. *Nebbia* v. *New York,* 291 U. S. 592. The burden rests upon him who assails the Act to show an improper exercise of the legislative power. *Missouri Pacific Ry. Co.* v. *Norwood,* 283 U. S. 249; *Borden's Farm Products* v. *Baldwin,* 293 U. S. 194.

It is within the province of the legislature to determine what matters and conditions pertaining to the public welfare require attention, and the remedy. *Radice* v. *New York,* 264 U. S. 292. In passing the minimum wage law, the legislature had under consideration the needs of the people of the State—the general welfare of the people; and in construing that law the Supreme Court approved the findings of the legislature and determined that the Act passed was in the interest of the general welfare of the community. *Larsen* v. *Rice,* 100 Wash. 642.

This Court does not inquire into the wisdom of the Act, nor the economic conditions of the State which induced its passage; and unless the Act is entirely beyond the legislative power, it is not subject to constitutional objection. *Nebbia* v. *New York,* 291 U. S. 502; *Northern Securities Co.* v. *United States,* 193 U. S. 197; *Atkins* v. *Kansas,* 191 U. S. 297; *O'Gorman & Young* v. *Hartford Fire Ins. Co.,* 282 U. S. 251, 257, 258.

This law was passed by virtue of the reserved police power of the State of Washington, and having received

the approval of the highest court of the State is entitled to approval by this Court. The *Adkins* case construed an Act of Congress which had received the disapproval of the highest court of the District of Columbia; and we, of course, draw the conclusion that the Act of Congress, not having received the approval of that court, was not a reasonable and proper remedy for a condition existing in the District of Columbia. If the Act of Congress so construed had been upheld by the highest court of the District of Columbia, then this Court would accept that judgment in the absence of any facts to support a contrary conclusion. *Adkins* v. *Children's Hospital,* 261 U. S. 525; *Bunting* v. *Oregon,* 243 U. S. 426.

The presumption of constitutionality must prevail in the absence of any factual foundation in the record for declaring the Act unconstitutional. That is not inconsistent with other decisions of the Supreme Court of the United States. See *Bunting* v. *Oregon,* 243 U. S. 426; *O'Gorman & Young* v. *Hartford Fire Ins. Co.,* 282 U. S. 251.

Murphy v. *Sardell,* 269 U. S. 530; *Donham* v. *West-Nelson Mfg. Co.,* 273 U. S. 657, follow with approval the decisions of the supreme courts of Arizona and Arkansas. So, in New York, a law similar to this one failed to receive the approval of the highest court of that jurisdiction, and this Court approved, sustaining the court of New York (*Morehead* v. *New York ex rel. Tipaldo,* 298 U. S. 587); but in no case has a decision of the highest court of a State upon a local minimum wage regulation been reversed by the Supreme Court of the United States.

Mr. W. A. Toner, Assistant Attorney General of Washington, with whom *Mr. G. W. Hamilton,* Attorney General, and *Mr. George G. Hannan,* Assistant Attorney

General, were on the brief, by special leave of Court, on behalf of the State of Washington, as *amicus curiae*.

It seems very difficult to understand why minimum wages may not be fixed without violating due process, if prices can be fixed without violating due process. Both interfere with liberty to contract. The legislative fixing of a minimum wage is not really different in principle from the legislative determination of hours of service, which is clearly constitutional. *Miller* v. *Wilson*, 236 U. S. 373; *Muller* v. *Oregon*, 208 U. S. 412; *Bunting* v. *Oregon*, 243 U. S. 426.

It is the same liberty to contract that is invaded, and the same legislative policy that is involved. The aim of both types of legislation is to create an equality where none existed to prevent employers from making an unfair use of their superior bargaining power. Misuse of bargaining power leads to extortion, and surely a State should be able to legislate against extortion under its police power.

Whether there are adequate reasons for submitting certain types of contracts to the public control depends upon the economic policies of the States. *Nebbia* v. *New York*, 291 U. S. 502, 537.

To say that the fixing of a minimum wage by the State in any industry is *ipso facto* arbitrary or discriminatory is to beg the question. Courts are to decide concrete cases. In this case the issue is one arising out of an implied contract. A general principle may be deduced from particular lines of decision, but the categorical assertion that any attempt to fix a minimum wage in industry, due consideration being given to the type involved, is arbitrary and discriminatory, palpably invades the power of the States. Further, it is an assertion by the court of a power not found in the national Constitution nor given therein by inference.

It is submitted that it is impossible to regulate hours and working conditions without vesting in the commission some power with reference to the fixing of wages, otherwise the whole cost of any improvement in conditions or any restrictions as to hours of service might be borne by the employee.

The order in question contains regulations upon both hours and conditions, and wages. It does not appear whether or not the welfare commission based the wages on what was reasonable as between the employer and employee; and considering the law, it must be that the reasonable rate was also sufficient for the decent maintenance of the worker. Otherwise, the commission would have had to fix a higher minimum. Whether it did or did not have to fix a minimum higher than that sufficient for decent maintenance does not appear.

The laws applied in similar cases sustain regulations of similar import, the contract clause forming the sole legitimate basis of appellant's attack upon the constitutionality of the statute. *Holden* v. *Hardy,* 169 U. S. 366.

The State has various fields in which it has the absolute right to fix wages. It is an employer itself on a vast scale. It exercises supervision over many types of public service concerns, and limits the total amount of wages that may be charged to the public without question. *Acker* v. *United States,* 298 U. S. 426.

It is necessary for the public welfare that water and light, transportation, health, and sanitary services should be continued; and if wage disputes are to be permitted to interrupt the service, or to embarrass the public generally, it would hardly be open to question that the State would have power to take whatever measures are necessary to insure continuation of the services.

The same considerations apply in a large measure to hotels. The comfort and convenience of the traveling public require certain standards. Hotels are subject to

inspection by public officers. The women who work for the hotels come in direct contact with the guests, and the hotels comply with many standards of sanitation and cleanliness through the maids and housekeepers in their employ.

Inns and innkeepers had been regulated by the law long before the business of insurance was considered.

The statute of Washington is within the police power of the State when applied to fixing a minimum wage for women employees in a hotel.

The courts have recognized a wide latitude for the legislature to determine the necessity for protecting the peace, health, safety, morals and general welfare of the people. Where there is no reasonable ground for supposing that the legislature's determination is not supported by the facts, or that its judgment is one of speculation rather than from experience, its findings are not reviewable. *Powell* v. *Pennsylvania,* 127 U. S. 678; *Lawton* v. *Steele,* 152 U. S. 133; *Holden* v. *Hardy,* 169 U. S. 366; *Jacobson* v. *Massachusetts,* 197 U. S. 11; *Muller* v. *Oregon,* 208 U. S. 412; *McLean* v. *Arkansas,* 211 U. S. 539; *Tanner* v. *Little,* 240 U. S. 369; *Radice* v. *New York,* 264 U. S. 292; *Block* v. *Hirsch,* 256 U. S. 135; *O'Gorman & Young* v. *Hartford Fire Ins. Co.,* 282 U. S. 251; *Missouri Pacific R. Co.* v. *Norwood,* 283 U. S. 249; *Mountain Timber Co.* v. *Washington,* 243 U. S. 219; *Stephenson* v. *Binford,* 287 U. S. 251, 272; *Highland* v. *Russell Car Co.,* 279 U. S. 253, 258.

The health and welfare of women in the performance of physical labor are held so fundamentally to affect the public welfare and to be so much more of an object of public interest and concern, that legislation designed for their special protection has been sustained even when like legislation for men might not be. *Muller* v. *Oregon,* 208 U. S. 412; *Riley* v. *Massachusetts,* 232 U. S. 671; *Hawley* v. *Walker,* 232 U. S. 718; *Bosley* v. *McLaughlin,* 236 U. S. 385; *Radice* v. *New York,* 264 U. S. 292.

What standing has this appellant, in this case, to attack the statute as violating the contract rights of the woman?

Keeping in mind the fact that a hotel or an inn is a business impressed with a public interest; that the present controversy is a private dispute regarding the wages to be paid by a corporation innkeeper to a domestic; that the amount in controversy is only $216.19; that no showing is made that payment at the rate prescribed by the welfare committee is unfair or unreasonable, or that it imposes any hardship on the employer, or that its business will be made unprofitable; and that no express contract was shown for a rate of wages different from that prescribed in the rules of the welfare commission, we submit that there is no factual basis for a general attack upon the constitutionality of the statute.

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

This case presents the question of the constitutional validity of the minimum wage law of the State of Washington.

The Act, entitled "Minimum Wages for Women," authorizes the fixing of minimum wages for women and minors. Laws of 1913 (Washington) chap. 174; Remington's Rev. Stat. (1932), §§ 7623 *et seq.* It provides:

"SECTION 1. The welfare of the State of Washington demands that women and minors be protected from conditions of labor which have a pernicious effect on their health and morals. The State of Washington, therefore, exercising herein its police and sovereign power declares that inadequate wages and unsanitary conditions of labor exert such pernicious effect.

"SEC. 2. It shall be unlawful to employ women or minors in any industry or occupation within the State of Washington under conditions of labor detrimental to their health or morals; and it shall be unlawful to employ

women workers in any industry within the State of Washington at wages which are not adequate for their maintenance.

"SEC. 3. There is hereby created a commission to be known as the 'Industrial Welfare Commission' for the State of Washington, to establish such standards of wages and conditions of labor for women and minors employed within the State of Washington, as shall be held hereunder to be reasonable and not detrimental to health and morals, and which shall be sufficient for the decent maintenance of women."

Further provisions required the Commission to ascertain the wages and conditions of labor of women and minors within the State. Public hearings were to be held. If after investigation the Commission found that in any occupation, trade or industry the wages paid to women were "inadequate to supply them necessary cost of living and to maintain the workers in health," the Commission was empowered to call a conference of representatives of employers and employees together with disinterested persons representing the public. The conference was to recommend to the Commission, on its request, an estimate of a minimum wage adequate for the purpose above stated, and on the approval of such a recommendation it became the duty of the Commission to issue an obligatory order fixing minimum wages. Any such order might be reopened and the question reconsidered with the aid of the former conference or a new one. Special licenses were authorized for the employment of women who were "physically defective or crippled by age or otherwise," and also for apprentices, at less than the prescribed minimum wage.

By a later Act the Industrial Welfare Commission was abolished and its duties were assigned to the Industrial Welfare Committee consisting of the Director of Labor and Industries, the Supervisor of Industrial Insurance,

the Supervisor of Industrial Relations, the Industrial Statistician and the Supervisor of Women in Industry. Laws of 1921 (Washington) c. 7; Remington's Rev. Stat. (1932), §§ 10840, 10893.

The appellant conducts a hotel. The appellee Elsie Parrish was employed as a chambermaid and (with her husband) brought this suit to recover the difference between the wages paid her and the minimum wage fixed pursuant to the state law. The minimum wage was $14.50 per week of 48 hours. The appellant challenged the act as repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States. The Supreme Court of the State, reversing the trial court, sustained the statute and directed judgment for the plaintiffs. *Parrish* v. *West Coast Hotel Co.,* 185 Wash. 581; 55 P. (2d) 1083. The case is here on appeal.

The appellant relies upon the decision of this Court in *Adkins* v. *Children's Hospital,* 261 U. S. 525, which held invalid the District of Columbia Minimum Wage Act, which was attacked under the due process clause of the Fifth Amendment. On the argument at bar, counsel for the appellees attempted to distinguish the *Adkins* case upon the ground that the appellee was employed in a hotel and that the business of an innkeeper was affected with a public interest. That effort at distinction is obviously futile, as it appears that in one of the cases ruled by the *Adkins* opinion the employee was a woman employed as an elevator operator in a hotel. *Adkins* v. *Lyons,* 261 U. S. 525, at p. 542.

The recent case of *Morehead* v. *New York ex rel. Tipaldo,* 298 U. S. 587, came here on certiorari to the New York court, which had held the New York minimum wage act for women to be invalid. A minority of this Court thought that the New York statute was distinguishable in a material feature from that involved in the *Adkins* case, and that for that and other reasons the New

York statute should be sustained. But the Court of Appeals of New York had said that it found no material difference between the two statutes, and this Court held that the "meaning of the statute" as fixed by the decision of the state court "must be accepted here as if the meaning had been specifically expressed in the enactment." *Id.*, p. 609. That view led to the affirmance by this Court of the judgment in the *Morehead* case, as the Court considered that the only question before it was whether the *Adkins* case was distinguishable and that reconsideration of that decision had not been sought. Upon that point the Court said: "The petition for the writ sought review upon the ground that this case [Morehead] is distinguishable from that one [Adkins]. No application has been made for reconsideration of the constitutional question there decided. The validity of the principles upon which that decision rests is not challenged. This court confines itself to the ground upon which the writ was asked or granted . . . Here the review granted was no broader than that sought by the petitioner . . . He is not entitled and does not ask to be heard upon the question whether the *Adkins* case should be overruled. He maintains that it may be distinguished on the ground that the statutes are vitally dissimilar." *Id.*, pp. 604, 605.

We think that the question which was not deemed to be open in the *Morehead* case is open and is necessarily presented here. The Supreme Court of Washington has upheld the minimum wage statute of that State. It has decided that the statute is a reasonable exercise of the police power of the State. In reaching that conclusion the state court has invoked principles long established by this Court in the application of the Fourteenth Amendment. The state court has refused to regard the decision in the *Adkins* case as determinative and has pointed to our decisions both before and since that case as justifying its position. We are of the opinion that this ruling of

the state court demands on our part a reëxamination of the *Adkins* case. The importance of the question, in which many States having similar laws are concerned, the close division by which the decision in the *Adkins* case was reached, and the economic conditions which have supervened, and in the light of which the reasonableness of the exercise of the protective power of the State must be considered, make it not only appropriate, but we think imperative, that in deciding the present case the subject should receive fresh consideration.

The history of the litigation of this question may be briefly stated. The minimum wage statute of Washington was enacted over twenty-three years ago. Prior to the decision in the instant case it had twice been held valid by the Supreme Court of the State. *Larsen* v. *Rice,* 100 Wash. 642; 171 Pac. 1037; *Spokane Hotel Co.* v. *Younger,* 113 Wash. 359; 194 Pac. 595. The Washington statute is essentially the same as that enacted in Oregon in the same year. Laws of 1913 (Oregon) chap. 62. The validity of the latter act was sustained by the Supreme Court of Oregon in *Stettler* v. *O'Hara,* 69 Ore. 519; 139 Pac. 743, and *Simpson* v. *O'Hara,* 70 Ore. 261; 141 Pac. 158. These cases, after reargument, were affirmed here by an equally divided court, in 1917. 243 U. S. 629. The law of Oregon thus continued in effect. The District of Columbia Minimum Wage Law (40 Stat. 960) was enacted in 1918. The statute was sustained by the Supreme Court of the District in the *Adkins* case. Upon appeal the Court of Appeals of the District first affirmed that ruling but on rehearing reversed it and the case came before this Court in 1923. The judgment of the Court of Appeals holding the Act invalid was affirmed, but with Chief Justice Taft, Mr. Justice Holmes and Mr. Justice Sanford dissenting, and Mr. Justice Brandeis taking no part. The dissenting opinions took the ground that the decision was at variance with the

principles which this Court had frequently announced and applied. In 1925 and 1927, the similar minimum wage statutes of Arizona and Arkansas were held invalid upon the authority of the *Adkins* case. The Justices who had dissented in that case bowed to the ruling and Mr. Justice Brandeis dissented. *Murphy* v. *Sardell,* 269 U. S. 530; *Donham* v. *West-Nelson Co.,* 273 U. S. 657. The question did not come before us again until the last term in the *Morehead* case, as already noted. In that case, briefs supporting the New York statute were submitted by the States of Ohio, Connecticut, Illinois, Massachusetts, New Hampshire, New Jersey and Rhode Island. 298 U. S., p. 604, *note.* Throughout this entire period the Washington statute now under consideration has been in force.

The principle which must control our decision is not in doubt. The constitutional provision invoked is the due process clause of the Fourteenth Amendment governing the States, as the due process clause invoked in the *Adkins* case governed Congress. In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

This essential limitation of liberty in general governs freedom of contract in particular. More than twenty-five years ago we set forth the applicable principle in these words, after referring to the cases where the liberty guaranteed by the Fourteenth Amendment had been broadly described: [1]

"But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community." *Chicago, B. & Q. R. Co.* v. *McGuire,* 219 U. S. 549, 567.

This power under the Constitution to restrict freedom of contract has had many illustrations.[2] That it may be exercised in the public interest with respect to contracts

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[1] *Allgeyer* v. *Louisiana,* 165 U. S. 578; *Lochner* v. *New York,* 198 U. S. 45; *Adair* v. *United States,* 208 U. S. 161.

[2] *Munn* v. *Illinois,* 94 U. S. 113; *Railroad Commission Cases,* 116 U. S. 307; *Willcox* v. *Consolidated Gas Co.,* 212 U. S. 19; *Atkin* v. *Kansas,* 191 U. S. 207; *Mugler* v. *Kansas,* 123 U. S. 623; *Crowley* v. *Christensen,* 137 U. S. 86; *Gundling* v. *Chicago,* 177 U. S. 183; *Booth* v. *Illinois,* 184 U. S. 425; *Schmidinger* v. *Chicago,* 226 U. S. 578; *Armour & Co.* v. *North Dakota,* 240 U. S. 510; *National Fire Insurance Co.* v. *Wanberg,* 260 U. S. 71; *Radice* v. *New York,* 264 U. S. 292; *Yeiser* v. *Dysart,* 267 U. S. 540; *Liberty Warehouse Co.* v. *Burley Tobacco Growers' Assn.,* 276 U. S. 71, 97; *Highland* v. *Russell Car Co.,* 279 U. S. 253, 261; *O'Gorman & Young* v. *Hartford Insurance Co.,* 282 U. S. 249, 251; *Hardware Dealers Insurance Co.* v. *Glidden Co.,* 284 U. S. 151, 157; *Packer Corp.* v. *Utah,* 285 U. S. 95, 111; *Stephenson* v. *Binford,* 287 U. S. 251, 274; *Hartford Accident Co.* v. *Nelson Mfg. Co.,* 291 U. S. 352, 360; *Petersen Baking Co.* v. *Bryan,* 290 U. S. 570; *Nebbia* v. *New York,* 291 U. S. 502, 527–529.

between employer and employee is undeniable. Thus statutes have been sustained limiting employment in underground mines and smelters to eight hours a day (*Holden* v. *Hardy,* 169 U. S. 366); in requiring redemption in cash of store orders or other evidences of indebtedness issued in the payment of wages (*Knoxville Iron Co.* v. *Harbison,* 183 U. S. 13); in forbidding the payment of seamen's wages in advance (*Patterson* v. *Bark Eudora,* 190 U. S. 169); in making it unlawful to contract to pay miners employed at quantity rates upon the basis of screened coal instead of the weight of the coal as originally produced in the mine (*McLean* v. *Arkansas,* 211 U. S. 539); in prohibiting contracts limiting liability for injuries to employees (*Chicago, B. & Q. R. Co.* v. *McGuire, supra*); in limiting hours of work of employees in manufacturing establishments (*Bunting* v. *Oregon,* 243 U. S. 426); and in maintaining workmen's compensation laws (*New York Central R. Co.* v. *White,* 243 U. S. 188; *Mountain Timber Co.* v. *Washington,* 243 U. S. 219). In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression. *Chicago, B. & Q. R. Co.* v. *McGuire, supra,* p. 570.

The point that has been strongly stressed that adult employees should be deemed competent to make their own contracts was decisively met nearly forty years ago in *Holden* v. *Hardy, supra,* where we pointed out the inequality in the footing of the parties. We said (*Id.,* 397):

"The legislature has also recognized the fact, which the experience of legislators in many States has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that

their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employes, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority."

And we added that the fact "that both parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself." "The State still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the State must suffer."

It is manifest that this established principle is peculiarly applicable in relation to the employment of women in whose protection the State has a special interest. That phase of the subject received elaborate consideration in *Muller* v. *Oregon* (1908), 208 U. S. 412, where the constitutional authority of the State to limit the working hours of women was sustained. We emphasized the consideration that "woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence" and that her physical well being "becomes an object of public interest and care in order to preserve the strength and vigor of the race." We emphasized the need of protecting women against oppression despite her possession of contractual rights. We said that "though limitations upon personal and contractual rights may be removed by legislation, there is that in her

disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right." Hence she was "properly placed in a class by herself, and legislation designed for her protection may be sustained even when like legislation is not necessary for men and could not be sustained." We concluded that the limitations which the statute there in question "placed upon her contractual powers, upon her right to agree with her employer as to the time she shall labor" were "not imposed solely for her benefit, but also largely for the benefit of all." Again, in *Quong Wing* v. *Kirkendall,* 223 U. S. 59, 63, in referring to a differentiation with respect to the employment of women, we said that the Fourteenth Amendment did not interfere with state power by creating a "fictitious equality." We referred to recognized classifications on the basis of sex with regard to hours of work and in other matters, and we observed that the particular points at which that difference shall be enforced by legislation were largely in the power of the State. In later rulings this Court sustained the regulation of hours of work of women employees in *Riley* v. *Massachusetts,* 232 U. S. 671 (factories), *Miller* v. *Wilson,* 236 U. S. 373 (hotels), and *Bosley* v. *McLaughlin,* 236 U. S. 385 (hospitals).

This array of precedents and the principles they applied were thought by the dissenting Justices in the *Adkins* case to demand that the minimum wage statute be sustained. The validity of the distinction made by the Court between a minimum wage and a maximum of hours in limiting liberty of contract was especially challenged. 261 U. S., p. 564. That challenge persists and is without any satisfactory answer. As Chief Justice Taft observed: "In absolute freedom of contract the one term is as important as the other, for both enter equally into the consideration given and received, a restriction as to

the one is not greater in essence than the other and is of the same kind. One is the multiplier and the other the multiplicand." And Mr. Justice Holmes, while recognizing that "the distinctions of the law are distinctions of degree," could "perceive no difference in the kind or degree of interference with liberty, the only matter with which we have any concern, between the one case and the other. The bargain is equally affected whichever half you regulate." *Id.*, p. 569.

One of the points which was pressed by the Court in supporting its ruling in the *Adkins* case was that the standard set up by the District of Columbia Act did not take appropriate account of the value of the services rendered. In the *Morehead* case, the minority thought that the New York statute had met that point in its definition of a "fair wage" and that it accordingly presented a distinguishable feature which the Court could recognize within the limits which the *Morehead* petition for certiorari was deemed to present. The Court, however, did not take that view and the New York Act was held to be essentially the same as that for the District of Columbia. The statute now before us is like the latter, but we are unable to conclude that in its minimum wage requirement the State has passed beyond the boundary of its broad protective power.

The minimum wage to be paid under the Washington statute is fixed after full consideration by representatives of employers, employees and the public. It may be assumed that the minimum wage is fixed in consideration of the services that are performed in the particular occupations under normal conditions. Provision is made for special licenses at less wages in the case of women who are incapable of full service. The statement of Mr. Justice Holmes in the *Adkins* case is pertinent: "This statute does not compel anybody to pay anything. It simply forbids employment at rates below those fixed as

the minimum requirement of health and right living. It is safe to assume that women will not be employed at even the lowest wages allowed unless they earn them, or unless the employer's business can sustain the burden. In short the law in its character and operation is like hundreds of so-called police laws that have been upheld." 261 U. S., p. 570. And Chief Justice Taft forcibly pointed out the consideration which is basic in a statute of this character: "Legislatures which adopt a requirement of maximum hours or minimum wages may be presumed to believe that when sweating employers are prevented from paying unduly low wages by positive law they will continue their business, abating that part of their profits, which were wrung from the necessities of their employees, and will concede the better terms required by the law; and that while in individual cases hardship may result, the restriction will enure to the benefit of the general class of employees in whose interest the law is passed and so to that of the community at large." *Id.*, p. 563.

We think that the views thus expressed are sound and that the decision in the *Adkins* case was a departure from the true application of the principles governing the regulation by the State of the relation of employer and employed. Those principles have been reënforced by our subsequent decisions. Thus in *Radice* v. *New York,* 264 U. S. 292, we sustained the New York statute which restricted the employment of women in restaurants at night. In *O'Gorman & Young* v. *Hartford Fire Insurance Co.,* 282 U. S. 251, which upheld an act regulating the commissions of insurance agents, we pointed to the presumption of the constitutionality of a statute dealing with a subject within the scope of the police power and to the absence of any factual foundation of record for deciding that the limits of power had been transcended. In *Nebbia* v. *New York,* 291 U. S. 502, dealing

with the New York statute providing for minimum prices for milk, the general subject of the regulation of the use of private property and of the making of private contracts received an exhaustive examination and we again declared that if such laws "have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied"; that "with the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal"; that "times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power." *Id.*, pp. 537, 538.

With full recognition of the earnestness and vigor which characterize the prevailing opinion in the *Adkins* case, we find it impossible to reconcile that ruling with these well-considered declarations. What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? And if the protection of women is a legitimate end of the exercise of state power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end? The legislature of the State was clearly entitled to consider the situation of women in employment, the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances. The legislature was entitled to adopt measures to reduce the evils of the "sweating sys-

tem," the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living, thus making their very helplessness the occasion of a most injurious competition. The legislature had the right to consider that its minimum wage requirements would be an important aid in carrying out its policy of protection. The adoption of similar requirements by many States evidences a deepseated conviction both as to the presence of the evil and as to the means adapted to check it. Legislative response to that conviction cannot be regarded as arbitrary or capricious, and that is all we have to decide. Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment.

There is an additional and compelling consideration which recent economic experience has brought into a strong light. The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenceless against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met. We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. It is unnecessary to cite official statistics to establish what is of common knowledge through the length and breadth of the land. While in the instant case no factual brief has been presented, there is no reason to doubt that the State of Washington has encountered the same social problem that is present elsewhere. The community is not bound to provide what is in effect a subsidy for unconscionable employers. The

community may direct its law-making power to correct the abuse which springs from their selfish disregard of the public interest. The argument that the legislation in question constitutes an arbitrary discrimination, because it does not extend to men, is unavailing. This Court has frequently held that the legislative authority, acting within its proper field, is not bound to extend its regulation to all cases which it might possibly reach. The legislature "is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest." If "the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied." There is no "doctrinaire requirement" that the legislation should be couched in all embracing terms. *Carroll* v. *Greenwich Insurance Co.*, 199 U. S. 401, 411; *Patsone* v. *Pennsylvania*, 232 U. S. 138, 144; *Keokee Coke Co.* v. *Taylor*, 234 U. S. 224, 227; *Sproles* v. *Binford*, 286 U. S. 374, 396; *Semler* v. *Oregon Board*, 294 U. S. 608, 610, 611. This familiar principle has repeatedly been applied to legislation which singles out women, and particular classes of women, in the exercise of the State's protective power. *Miller* v. *Wilson*, *supra*, p. 384; *Bosley* v. *McLaughlin*, *supra*, pp. 394, 395; *Radice* v. *New York*, *supra*, pp. 295–298. Their relative need in the presence of the evil, no less than the existence of the evil itself, is a matter for the legislative judgment.

Our conclusion is that the case of *Adkins* v. *Children's Hospital*, *supra*, should be, and it is, overruled. The judgment of the Supreme Court of the State of Washington is

Affirmed.

MR. JUSTICE SUTHERLAND, dissenting:

MR. JUSTICE VAN DEVANTER, MR. JUSTICE MCREYNOLDS, MR. JUSTICE BUTLER and I think the judgment of the court below should be reversed.

The principles and authorities relied upon to sustain the judgment, were considered in *Adkins* v. *Children's Hospital,* 261 U. S. 525, and *Morehead* v. *New York ex rel. Tipaldo,* 298 U. S. 587; and their lack of application to cases like the one in hand was pointed out. A sufficient answer to all that is now said will be found in the opinions of the court in those cases. Nevertheless, in the circumstances, it seems well to restate our reasons and conclusions.

Under our form of government, where the written Constitution, by its own terms, is the supreme law, some agency, of necessity, must have the power to say the final word as to the validity of a statute assailed as unconstitutional. The Constitution makes it clear that the power has been intrusted to this court when the question arises in a controversy within its jurisdiction; and so long as the power remains there, its exercise cannot be avoided without betrayal of the trust.

It has been pointed out many times, as in the *Adkins* case, that this judicial duty is one of gravity and delicacy; and that rational doubts must be resolved in favor of the constitutionality of the statute. But whose doubts, and by whom resolved? Undoubtedly it is the duty of a member of the court, in the process of reaching a right conclusion, to give due weight to the opposing views of his associates; but in the end, the question which he must answer is not whether such views seem sound to those who entertain them, but whether they convince him that the statute is constitutional or engender in his mind a rational doubt upon that issue. The oath which he takes as a judge is not a composite oath, but an individual one. And in passing upon the validity of a statute, he discharges a duty imposed upon *him,* which cannot be consummated justly by an automatic acceptance of the views of others which have neither convinced, nor created a reasonable doubt in, his mind. If upon a question so

important he thus surrender his deliberate judgment, he stands forsworn. He cannot subordinate his convictions to that extent and keep faith with his oath or retain his judicial and moral independence.

The suggestion that the only check upon the exercise of the judicial power, when properly invoked, to declare a constitutional right superior to an unconstitutional statute is the judge's own faculty of self-restraint, is both ill considered and mischievous. Self-restraint belongs in the domain of will and not of judgment. The check upon the judge is that imposed by his oath of office, by the Constitution and by his own conscientious and informed convictions; and since he has the duty to make up his own mind and adjudge accordingly, it is hard to see how there could be any other restraint. This court acts as a unit. It cannot act in any other way; and the majority (whether a bare majority or a majority of all but one of its members), therefore, establishes the controlling rule as the decision of the court, binding, so long as it remains unchanged, equally upon those who disagree and upon those who subscribe to it. Otherwise, orderly administration of justice would cease. But it is the right of those in the minority to disagree, and sometimes, in matters of grave importance, their imperative duty to voice their disagreement at such length as the occasion demands—always, of course, in terms which, however forceful, do not offend the proprieties or impugn the good faith of those who think otherwise.

It is urged that the question involved should now receive fresh consideration, among other reasons, because of "the economic conditions which have supervened"; but the meaning of the Constitution does not change with the ebb and flow of economic events. We frequently are told in more general words that the Constitution must be construed in the light of the present. If by that it is meant that the Constitution is made up of

living words that apply to every new condition which they include, the statement is quite true. But to say, if that be intended, that the words of the Constitution mean today what they did not mean when written—that is, that they do not apply to a situation now to which they would have applied then—is to rob that instrument of the essential element which continues it in force as the people have made it until they, and not their official agents, have made it otherwise.

The words of Judge Campbell in *Twitchell* v. *Blodgett,* 13 Mich. 127, 139–140, apply with peculiar force. "But it may easily happen," he said, "that specific provisions may, in unforeseen emergencies, turn out to have been inexpedient. This does not make these provisions any less binding. Constitutions can not be changed by events alone. They remain binding as the acts of the people in their sovereign capacity, as the framers of Government, until they are amended or abrogated by the action prescribed by the authority which created them. It is not competent for any department of the Government to change a constitution, or declare it changed, simply because it appears ill adapted to a new state of things.

". . . Restrictions have, it is true, been found more likely than grants to be unsuited to unforeseen circumstances . . . But, where evils arise from the application of such regulations, their force cannot be denied or evaded; and the remedy consists in repeal or amendment, and not in false construction." The principle is reflected in many decisions of this court. See *South Carolina* v. *United States,* 199 U. S. 437, 448–449; *Lake County* v. *Rollins,* 130 U. S. 662, 670; *Knowlton* v. *Moore,* 178 U. S. 41, 95; *Rhode Island* v. *Massachusetts,* 12 Pet. 657, 723; *Craig* v. *Missouri,* 4 Pet. 410, 431–432; *Ex parte Bain,* 121 U. S. 1, 12; *Maxwell* v. *Dow,* 176 U. S. 581, 602; *Jarrolt* v. *Moberly,* 103 U. S. 580, 586.

The judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation. To miss the point of difference between the two is to miss all that the phrase "supreme law of the land" stands for and to convert what was intended as inescapable and enduring mandates into mere moral reflections.

If the Constitution, intelligently and reasonably construed in the light of these principles, stands in the way of desirable legislation, the blame must rest upon that instrument, and not upon the court for enforcing it according to its terms. The remedy in that situation—and the only true remedy—is to amend the Constitution. Judge Cooley, in the first volume of his Constitutional Limitations (8th ed.), p. 124, very clearly pointed out that much of the benefit expected from written constitutions would be lost if their provisions were to be bent to circumstances or modified by public opinion. He pointed out that the common law, unlike a constitution, was subject to modification by public sentiment and action which the courts might recognize; but that "a court or legislature which should allow a change in public sentiment to influence it in giving to a written constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty; and if its course could become a precedent, these instruments would be of little avail. . . . What a court is to do, therefore, is *to declare the law as written,* leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it."

The *Adkins* case dealt with an act of Congress which had passed the scrutiny both of the legislative and executive branches of the government. We recognized that

thereby these departments had affirmed the validity of the statute, and properly declared that their determination must be given great weight, but we then concluded, after thorough consideration, that their view could not be sustained. We think it not inappropriate now to add a word on that subject before coming to the question immediately under review.

The people by their Constitution created three separate, distinct, independent and coequal departments of government. The governmental structure rests, and was intended to rest, not upon any one or upon any two, but upon all three of these fundamental pillars. It seems unnecessary to repeat, what so often has been said, that the powers of these departments are different and are to be exercised independently. The differences clearly and definitely appear in the Constitution. Each of the departments is an agent of its creator; and one department is not and cannot be the agent of another. Each is answerable to its creator for what it does, and not to another agent. The view, therefore, of the Executive and of Congress that an act is constitutional is persuasive in a high degree; but it is not controlling.

Coming, then, to a consideration of the Washington statute, it first is to be observed that it is in every substantial respect identical with the statute involved in the *Adkins* case. Such vices as existed in the latter are present in the former. And if the *Adkins* case was properly decided, as we who join in this opinion think it was, it necessarily follows that the Washington statute is invalid.

In support of minimum-wage legislation it has been urged, on the one hand, that great benefits will result in favor of underpaid labor, and, on the other hand, that the danger of such legislation is that the minimum will tend to become the maximum and thus bring down the

earnings of the more efficient toward the level of the less-efficient employees. But with these speculations we have nothing to do. We are concerned only with the question of constitutionality.

That the clause of the Fourteenth Amendment which forbids a state to deprive any person of life, liberty or property without due process of law includes freedom of contract is so well settled as to be no longer open to question. Nor reasonably can it be disputed that contracts of employment of labor are included in the rule. *Adair* v. *United States,* 208 U. S. 161, 174–175; *Coppage* v. *Kansas,* 236 U. S. 1, 10, 14. In the first of these cases, Mr. Justice Harlan, speaking for the court, said, "The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell. . . . In all such particulars the employer and employé have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."

In the *Adkins* case we referred to this language, and said that while there was no such thing as absolute freedom of contract, but that it was subject to a great variety of restraints, nevertheless, freedom of contract was the general rule and restraint the exception; and that the power to abridge that freedom could only be justified by the existence of exceptional circumstances. This statement of the rule has been many times affirmed; and we do not understand that it is questioned by the present decision.

We further pointed out four distinct classes of cases in which this court from time to time had upheld statutory interferences with the liberty of contract. They were, in brief, (1) statutes fixing rates and charges to be

exacted by businesses impressed with a public interest; (2) statutes relating to contracts for the performance of public work; (3) statutes prescribing the character, methods and time for payment of wages; and (4) statutes fixing hours of labor. It is the last class that has been most relied upon as affording support for minimum-wage legislation; and much of the opinion in the *Adkins* case (261 U. S. 547–553) is devoted to pointing out the essential distinction between fixing hours of labor and fixing wages. What is there said need not be repeated. It is enough for present purposes to say that statutes of the former class deal with an incident of the employment, having no necessary effect upon wages. The parties are left free to contract about wages, and thereby equalize such additional burdens as may be imposed upon the employer as a result of the restrictions as to hours by an adjustment in respect of the amount of wages. This court, wherever the question is adverted to, has been careful to disclaim any purpose to uphold such legislation as fixing wages, and has recognized an essential difference between the two. *E. g., Bunting* v. *Oregon,* 243 U. S. 426; *Wilson* v. *New,* 243 U. S. 332, 345–346, 353–354; and see Freund, Police Power, § 318.

We then pointed out that minimum-wage legislation such as that here involved does not deal with any business charged with a public interest, or with public work, or with a temporary emergency, or with the character, methods or periods of wage payments, or with hours of labor, or with the protection of persons under legal disability, or with the prevention of fraud. It is, simply and exclusively, a law fixing wages for adult women who are legally as capable of contracting for themselves as men, and cannot be sustained unless upon principles apart from those involved in cases already decided by the court.

Two cases were involved in the *Adkins* decision. In one of them it appeared that a woman 21 years of age,

who brought the suit, was employed as an elevator operator at a fixed salary. Her services were satisfactory, and she was anxious to retain her position, and her employer, while willing to retain her, was obliged to dispense with her services on account of the penalties prescribed by the act. The wages received by her were the best she was able to obtain for any work she was capable of performing; and the enforcement of the order deprived her, as she alleged, not only of that employment, but left her unable to secure any position at which she could make a living with as good physical and moral surroundings and as good wages as she was receiving and was willing to take. The Washington statute, of course, admits of the same situation and result, and, for aught that appears to the contrary, the situation in the present case may have been the same as that just described. Certainly, to the extent that the statute applies to such cases, it cannot be justified as a reasonable restraint upon the freedom of contract. On the contrary, it is essentially arbitrary.

Neither the statute involved in the *Adkins* case nor the Washington statute, so far as it is involved here, has the slightest relation to the capacity or earning power of the employee, to the number of hours which constitute the day's work, the character of the place where the work is to be done, or the circumstances or surroundings of the employment. The sole basis upon which the question of validity rests is the assumption that the employee is entitled to receive a sum of money sufficient to provide a living for her, keep her in health and preserve her morals. And, as we pointed out at some length in that case (pp. 555–557), the question thus presented for the determination of the board can not be solved by any general formula prescribed by a statutory bureau, since it is not a composite but an individual question to be answered for each individual, considered by herself.

What we said further in that case (pp. 557–559), is equally applicable here:

"The law takes account of the necessities of only one party to the contract. It ignores the necessities of the employer by compelling him to pay not less than a certain sum, not only whether the employee is capable of earning it, but irrespective of the ability of his business to sustain the burden, generously leaving him, of course, the privilege of abandoning his business as an alternative for going on at a loss. Within the limits of the minimum sum, he is precluded, under penalty of fine and imprisonment, from adjusting compensation to the differing merits of his employees. It compels him to pay at least the sum fixed in any event, because the employee needs it, but requires no service of equivalent value from the employee. It therefore undertakes to solve but one-half of the problem. The other half is the establishment of a corresponding standard of efficiency, and this forms no part of the policy of the legislation, although in practice the former half without the latter must lead to ultimate failure, in accordance with the inexorable law that no one can continue indefinitely to take out more than he puts in without ultimately exhausting the supply. The law is not confined to the great and powerful employers but embraces those whose bargaining power may be as weak as that of the employee. It takes no account of periods of stress and business depression, of crippling losses, which may leave the employer himself without adequate means of livelihood. To the extent that the sum fixed exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole.

"The feature of this statute which, perhaps more than any other, puts upon it the stamp of invalidity is that it

exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business, or the contract or the work the employee engages to do. The declared basis, as already pointed out, is not the value of the service rendered, but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health and morals. The ethical right of every worker, man or woman, to a living wage may be conceded. One of the declared and important purposes of trade organizations is to secure it. And with that principle and with every legitimate effort to realize it in fact, no one can quarrel; but the fallacy of the proposed method of attaining it is that it assumes that every employer is bound at all events to furnish it. The moral requirement implicit in every contract of employment, viz, that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is completely ignored. The necessities of the employee are alone considered and these arise outside of the employment, are the same when there is no employment, and as great in one occupation as in another. Certainly the employer by paying a fair equivalent for the service rendered, though not sufficient to support the employee, has neither caused nor contributed to her poverty. On the contrary, to the extent of what he pays he has relieved it. In principle, there can be no difference between the case of selling labor and the case of selling goods. If one goes to the butcher, the baker or grocer to buy food, he is morally entitled to obtain the worth of his money but he is not entitled to more. If what he gets is worth what he pays he is not justified in demanding more simply because he needs more; and the shopkeeper, having dealt fairly and honestly in that transaction, is not concerned in any peculiar sense with the question of his customer's necessities. Should a statute undertake to vest in a commission

power to determine the quantity of food necessary for individual support and require the shopkeeper, if he sell to the individual at all, to furnish that quantity at not more than a fixed maximum, it would undoubtedly fall before the constitutional test. The fallacy of any argument in support of the validity of such a statute would be quickly exposed. The argument in support of that now being considered is equally fallacious, though the weakness of it may not be so plain. A statute requiring an employer to pay in money, to pay at prescribed and regular intervals, to pay the value of the services rendered, even to pay with fair relation to the extent of the benefit obtained from the service, would be understandable. But a statute which prescribes payment without regard to any of these things and solely with relation to circumstances apart from the contract of employment, the business affected by it and the work done under it, is so clearly the product of a naked, arbitrary exercise of power that it cannot be allowed to stand under the Constitution of the United States."

Whether this would be equally or at all true in respect of the statutes of some of the states we are not called upon to say. They are not now before us; and it is enough that it applies in every particular to the Washington statute now under consideration.

The Washington statute, like the one for the District of Columbia, fixes minimum wages for adult women. Adult men and their employers are left free to bargain as they please; and it is a significant and an important fact that all state statutes to which our attention has been called are of like character. The common-law rules restricting the power of women to make contracts have, under our system, long since practically disappeared. Women today stand upon a legal and political equality with men. There is no longer any reason why they should be put in different classes in respect of their legal

right to make contracts; nor should they be denied, in effect, the right to compete with men for work paying lower wages which men may be willing to accept. And it is an arbitrary exercise of the legislative power to do so. In the *Tipaldo* case, 298 U. S. 587, 615, it appeared that the New York legislature had passed two minimum-wage measures—one dealing with women alone, the other with both men and women. The act which included men was vetoed by the governor. The other, applying to women alone, was approved. The "factual background" in respect of both measures was substantially the same. In pointing out the arbitrary discrimination which resulted (pp. 615–617) we said:

"These legislative declarations, in form of findings or recitals of fact, serve well to illustrate why any measure that deprives employers and adult women of freedom to agree upon wages, leaving employers and men employees free so to do, is necessarily arbitrary. Much, if not all, that in them is said in justification of the regulations that the Act imposes in respect of women's wages applies with equal force in support of the same regulation of men's wages. While men are left free to fix their wages by agreement with employers, it would be fanciful to suppose that the regulation of women's wages would be useful to prevent or lessen the evils listed in the first section of the Act. Men in need of work are as likely as women to accept the low wages offered by unscrupulous employers. Men in greater number than women support themselves and dependents and because of need will work for whatever wages they can get and that without regard to the value of the service and even though the pay is less than minima prescribed in accordance with this Act. It is plain that, under circumstances such as those portrayed in the 'Factual background' prescribing of minimum wages for women alone would unreasonably restrain them

in competition with men and tend arbitrarily to deprive them of employment and a fair chance to find work."

An appeal to the principle that the legislature is free to recognize degrees of harm and confine its restrictions accordingly, is but to beg the question, which is—since the contractual rights of men and women are the same, does the legislation here involved, by restricting only the rights of women to make contracts as to wages, create an arbitrary discrimination? We think it does. Difference of sex affords no reasonable ground for making a restriction applicable to the wage contracts of all working women from which like contracts of all working men are left free. Certainly a suggestion that the bargaining ability of the average woman is not equal to that of the average man would lack substance. The ability to make a fair bargain, as everyone knows, does not depend upon sex.

If, in the light of the facts, the state legislation, without reason or for reasons of mere expediency, excluded men from the provisions of the legislation, the power was exercised arbitrarily. On the other hand, if such legislation in respect of men was properly omitted on the ground that it would be unconstitutional, the same conclusion of unconstitutionality is inescapable in respect of similar legislative restraint in the case of women, 261 U. S. 553.

Finally, it may be said that a statute absolutely fixing wages in the various industries at definite sums and forbidding employers and employees from contracting for any other than those designated, would probably not be thought to be constitutional. It is hard to see why the power to fix minimum wages does not connote a like power in respect of maximum wages. And yet, if both powers be exercised in such a way that the minimum and the maximum so nearly approach each other as to

become substantially the same, the right to make any contract in respect of wages will have been completely abrogated.

A more complete discussion may be found in the *Adkins* and *Tipaldo* cases cited *supra.*

DUGAS *v.* AMERICAN SURETY CO.

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

No. 340. Argued January 13, 14, 1937.—Decided March 29, 1937.

In a proceeding brought in the District Court by a surety company under the Interpleader Act of May 8, 1926, to interplead the several claimants upon a qualifying bond, the amount of the bond was paid by the surety into the registry of the court, and two decrees were entered, the first discharging the surety from further liability on the bond and enjoining the several claimants from prosecuting any suit against the surety on account of any claim or right arising out of the bond; and a later, determining the rights of the several claimants in the deposited fund and directing its distribution among them on a *pro rata* basis. No appeal was taken from either decree. In an earlier proceeding in a state court, one of the claimants had obtained a judgment against the surety under the qualifying bond, from which judgment an appeal by the surety was pending, an appeal bond suspending execution having been filed. He objected to being brought into the interpleader, but agreed to the second decree in it and took his share of the distribution. *Held:*

1. The District Court in the interpleader suit had jurisdiction of both the subject matter and the parties. P. 425.

2. The decrees in the interpleader suit completely terminated the liability of the surety on the qualifying bond and fixed the full measure of the claimant's right under that bond. P. 425.

3. Rulings of the district court in the interpleader suit on the objection of the claimant to being brought into the suit, on the bearing and effect of the prior judgment and proceedings in the state court, and on the right of the surety to be discharged from further liability in respect of his claim, were all made in

the exercise of the court's jurisdiction, were subject to challenge and reëxamination only on appeal, and became conclusive on the claimant in the absence of an appeal. P. 425.

4. Though the payment was into the court's registry, and not directly to the claimants, it nevertheless was a lawful and effective payment under the Interpleader Act. P. 425.

5. As the judgment in the state court was based solely on the qualifying bond, the payment of the bond and discharge of the surety, as effected in the interpleader suit, operated, under recognized principles of law and equity, to extinguish the claimant's right under the judgment. P. 425.

6. In subsequently bringing suit in the state court on the appeal bond and attempting to realize on the prior judgment, the claimant contravened the fair intendment of the decrees in the interpleader suit. P. 426.

7. As the claimant's right under the state court judgment was extinguished, he was no more entitled to realize on the judgment by suing the surety on the appeal bond than by suing the principal. P. 428.

8. And as the surety on the appeal bond would be entitled to reimbursement from the principal were judgment to go against the former, the principal may be heard to complain. P. 428.

9. The District Court has jurisdiction to entertain a supplemental bill in aid of and to effectuate its prior decrees. P. 428.

10. Such a bill is ancillary and dependent, and the jurisdiction follows that of the original suit, regardless of the citizenship of the parties to the bill or the amount in controversy. P. 428.

11. The power of the District Court to enjoin the claimant from further prosecution of his suit in the state court on the appeal bond finds support in §§ 2 and 3 of the Interpleader Act, as well as in settled adjudications respecting the power of a federal court to protect its jurisdiction and decrees. P. 428.

82 F. (2d) 953, affirmed.

Statement by Mr. Justice Van Devanter.*

This case presents a controversy over the scope and effect of the decrees of a federal district court in a suit brought by a surety company under the Interpleader

*Opinion begins on p. 423, *infra*.

Act of May 8, 1926,[1] and over the propriety of subsequent proceedings in the same court upon a supplemental bill brought in aid of and to effectuate that decree.

It will be helpful to state the facts with some detail.

February 12, 1930, the Lumbermen's Reciprocal Association, a Texas insurance corporation, by way of qualifying itself to engage in writing workmen's compensation and other insurance in Louisiana, executed a bond, in the sum of $20,000.00, conditioned for the payment of claims lawfully arising against it by reason of insurance so written. The bond was given conformably to a Louisiana statute,[2] and was executed by the American Surety Company, a New York corporation, as surety. Later in 1930, and after writing a substantial volume of insurance in Louisiana, the Lumbermen's Reciprocal Association became embarrassed and was placed in the hands of a receiver by a court in Texas.

April 14, 1931, in a suit brought in a Louisiana court, Etienne Dugas, who had a claim against the Lumbermen's Reciprocal Association arising out of workmen's compensation insurance written by it in Louisiana, recovered against the American Surety Company, as surety on the qualifying bond, a judgment for the payment of $20.00 per week for not more than 300 weeks commencing May 15, 1930, subject to modification as to future payments if his disability was relieved or reduced, and for $250.00 for medical bills, together with costs.

The American Surety Company appealed to the Court of Appeal from that judgment, and, for the purpose of suspending execution pending the appeal, it executed a

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[1] Ch. 273, 44 Stat., Pt. 2, 416. Repealed and new act substituted January 20, 1936, c. 13, 49 Stat. 1096, but with saving clause respecting any act done or any right, accruing or accrued, in any suit or proceeding had or commenced under the earlier act prior to its repeal.

[2] Act 172, La. Laws, 1908, p. 232.

bond conditioned that it should diligently prosecute its appeal and satisfy whatever judgment might be rendered against it if cast in the appeal. The appeal bond was given conformably to a law of the State,[3] was in the sum of $10,000.00 and was executed by the New York Casualty Company as surety. The appeal was perfected and the record duly filed in the Court of Appeal, but nothing further was done therein for reasons which soon will appear.

Many other claims arising out of insurance written in Louisiana by the Lumbermen's Reciprocal Association were asserted under the qualifying bond. In the aggregate these claims were far in excess of the amount of the bond.

June 6, 1931, desiring to avail itself of the provisions of the Interpleader Act of May 8, 1926, the American Surety Company, with the court's leave, paid into the registry of the federal district court at New Orleans, Louisiana, the sum of $20,000.00, being the full amount of the qualifying bond, and thereupon filed in that court a duly verified bill of interpleader in which it set forth the several matters here recited, including the proceedings, judgment and appeal in Dugas' suit on the qualifying bond; stated the names and places of residence of the several claimants under that bond, so far as they were known to it; and further alleged—

"This Court has jurisdiction because this is a bill of interpleader in equity brought by a surety company against bona fide adverse claimants against its bond of February 12, 1930, two or more of whom are citizens of different states, and one or more of said adverse claimants resides or reside within the territorial jurisdiction of this Court. . . ."

"Plaintiff disclaims any interest in the amount of its said bond except to pay same to the persons lawfully entitled thereto. . . ."

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[3] La. Code Prac., arts. 575, 579.

"By reason of the conflicting claims against the said bond, and the fact that claims already known to plaintiff greatly exceed the amount of the said bond, plaintiff is in grave danger of being greatly harassed and damaged, and cannot safely make payments to any claimant without the aid of this Court."

"Plaintiff, with the permission of this Court first obtained, has paid into the Registry of this Court the said sum of $20,000.00, the amount of said bond, to abide the judgment of this Court."

The bill prayed that Dugas and the other claimants be cited to interplead and settle among themselves their claims to the amount of the bond deposited in the court's registry; that each of them be temporarily and permanently enjoined from instituting or prosecuting in any state court or in any other federal court any suit on account of any right or claim growing out of the qualifying bond; that the plaintiff be released from all further liability on the qualifying bond; and that any other or further relief deemed proper in the premises be granted.

All claimants under the qualifying bond, including Dugas, were called into the suit as defendants.

June 24, 1931, the court after a hearing granted an interlocutory injunction conforming to the prayer in the bill.

Dugas resisted the bill by an exception of no cause of action, a plea of estoppel and an answer. In the plea and answer he specifically relied on the judgment of April 14, 1931, in the state court and the appeal therefrom, together with the appeal bond, as showing that he should not be brought into the interpleader suit.

September 19, 1932, after a full hearing, the court rendered a decree as follows:

1. Declaring the American Surety Company had complied with all of its obligations under the qualifying bond by depositing the full amount of the bond in the

court's registry at the time of bringing the suit; and further declaring that company, by reason of such compliance, to be released and discharged from any and all further liability on account of such bond;

2. Enjoining each of the defendants from instituting or prosecuting in any state court, or in any other federal court, any suit against the American Surety Company on account of any right or claim growing out of such bond; and

3. Appointing a special master and charging him with the duty of hearing the claimants and reporting upon the manner in which the fund deposited in the registry, less specified fees and costs, should be distributed among the claimants.

No appeal was taken then or thereafter from that decree; and it remained in full force and effect.

In due course hearings were had and evidence was produced before the special master, after which he submitted a report containing his findings of fact, conclusions of law and recommendations for a distribution of the fund, less fees and costs, among the several claimants upon a pro rata basis. The report also contained a statement showing what he found to be the true and full amount of each claim, the total being in excess of $60,000.00, and a further statement showing the amount which, on a pro rata distribution would be payable on each claim. As to Dugas' claim the master reported the true and full amount as $4,160.68 [4] and the pro rata share of the fund payable on the claim as $1,141.29.

Shortly after the special master's report was submitted the several claimants, including Dugas, entered into and

[4] The master found Dugas' disability was materially relieved at the time the hearing began (October 26, 1932) and recommended that his claim be allowed at $20.00 per week for the 127 weeks preceding the hearing, at $8.00 per week for 173 weeks, discounted at 8%, and at $250.00 for medical bills and $97.40 for costs and expert testimony, making a total of $4,160.68.

filed in the suit a written stipulation declaring that they acquiesced in the report, waived the time allowed for filing exceptions, and requested the court to confirm the report and make it the court's decree.

April 20, 1933, the court, with the special master's report and the stipulation before it, rendered a decree confirming the report and directing that the balance of the fund in the registry be distributed among the several claimants in accordance with the master's recommendations. No appeal was taken from this decree.

The fund was distributed and paid out accordingly and was thereby exhausted. Dugas accepted the pro rata share accorded to him in the master's report and the confirming decree.

March 7, 1934, Dugas brought a suit in the Louisiana court before mentioned against the New York Casualty Company, the surety on the appeal bond given in his earlier suit on the qualifying bond. In this new suit he asserted that the American Surety Company, defendant in the earlier suit and principal in the appeal bond, had not diligently prosecuted its appeal, but, on the contrary, had brought the interpleader suit in the federal court and had obtained therein an injunction which in effect prohibited him from securing a determination of the appeal; and that it had thereby abandoned the appeal and violated the condition of the appeal bond.

While the new suit was based on an asserted breach of the appeal bond by the principal, it was brought against the surety alone. The relief prayed was a judgment in Dugas' favor for $3,019.39, being the difference between the amount of his workmen's compensation claim as ascertained in the interpleader suit and the sum allowed and paid to him in that suit as his pro rata share of the fund arising from the deposit in court of the full amount of the qualifying bond. By an amended petition

the amount for which judgment was prayed was reduced to $2,999.00 to forestall a removal to the federal court.

To the new suit the New York Casualty Company interposed the exception of prematurity, among others. The court sustained that exception, without ruling on the others, and dismissed the suit. Dugas appealed to the Supreme Court of the State, which, on January 7, 1935, reversed the judgment of dismissal and remanded the suit for further proceedings.[5]

January 29, 1935, the American Surety Company, with the leave of the federal court, filed in the interpleader suit a supplemental bill in which it set forth the matters and proceedings occurring after the decree of September 19, 1932, in that suit; alleged that the judgment of April 14, 1931, against the American Surety Company and in favor of Dugas in his earlier suit in the state court was based entirely on the qualifying bond of February 12, 1930, given by the Lumbermen's Reciprocal Association as principal and the American Surety Company as surety; that by the decree of September 19, 1932, in the interpleader suit, to which Dugas was a party, the American Surety Company was declared to have complied with all of its obligations under the qualifying bond and was released and discharged from any and all further liability on account thereof; that by that decree Dugas was enjoined from instituting or prosecuting in any other court any suit against the American Surety Company on account of any right or claim growing out of such bond; that Dugas' suit in the state court against the New York Casualty Company was brought on the appeal bond given by the American Surety Company as principal and the New York Casualty Company as surety on the appeal taken by the American Surety Company from the judg-

[5] *Dugas* v. *New York Casualty Co.*, 181 La. 322; 159 So. 572.

ment of April 14, 1931, on the qualifying bond; that if Dugas should collect any sum from the New York Casualty Company in his suit against it as surety on the appeal bond, the American Surety Company, as principal on that bond, would be bound to reimburse such surety; and that in these circumstances Dugas' suit against the New York Casualty Company was essentially an effort to enforce the judgment of April 14, 1931, which was based solely on the qualifying bond, and therefore was an attempt indirectly to subject the American Surety Company to further liability on account of that bond contrary to the decree of September 19, 1932. Accordingly, and in aid of the decrees in the interpleader suit, the supplemental bill contained prayers for an injunction restraining Dugas from further prosecuting his suit against the New York Casualty Company and for general relief.

To the supplemental bill Dugas filed pleas challenging the jurisdiction of the court, its power to enjoin proceedings in the state court, and the sufficiency of the case stated. The pleas were overruled and Dugas answered. Upon the final hearing the court found the facts to be as alleged in the supplemental bill and held that Dugas' suit against the New York Casualty Company as surety on the appeal bond was essentially an effort to enforce against the American Surety Company the judgment which he had obtained against it as surety on the qualifying bond, and therefore was in contravention of the spirit, if not the letter, of the decrees in the interpleader suit; and on that basis the court gave a supplemental decree specifically enjoining Dugas from further prosecuting his suit in the state court against the New York Casualty Company. Dugas appealed and the Circuit Court of Appeals affirmed the decree, one judge dissenting. 82 F. (2d) 953. The case is here on certiorari.

Mr. Ignatius Uzzo, with whom *Mr. M. C. Scharff* was on the brief, for petitioner.

Mr. Harry McCall, with whom *Messrs. Victor Leovy, Henry H. Chaffe,* and *Jas. Hy. Bruns* were on the brief, for respondent.

MR. JUSTICE VAN DEVANTER, after making the foregoing statement, delivered the opinion of the Court.

1. The amount or penalty of the qualifying bond was $20,000.00. The surety's obligation was not to Dugas alone, but to the other claimants as well; and this obligation was not to pay all claims regardless of their aggregate, but to pay $20,000.00, or so much thereof as should be needed, and no more. Because the claims exceeded $20,000.00, the surety paid that sum into the registry of the federal court, there to abide the court's decree, and at the same time brought in that court its interpleader suit against all claimants, including Dugas, to the end that its liability on the bond might be terminated, and that the rights of the several claimants in the amount of the bond so paid into court might be judicially determined and the fund distributed accordingly.

2. The Interpleader Act of 1926, under which that suit was brought, makes provision for the filing in a federal district court of a bill of interpleader by a surety company which has executed a bond in the sum of $500.00 or more, under which two or more claimants, citizens of different States, assert adverse rights to the penalty; authorizes the payment of the amount of the bond into the registry of the court, there to await such disposal as the court may direct; and further provides in the latter part of § 2 and in § 3:

"SEC. 2. . . . Notwithstanding any provision of the Judicial Code to the contrary, said court shall have power

to issue its process for all such claimants and to issue an order of injunction against each of them, enjoining them from instituting or prosecuting any suit or proceeding in any State court or in any other Federal court . . . on such bond . . . until the further order of the court; which process and order of injunction shall be returnable at such time as the said court or a judge thereof shall determine and shall be addressed to and served by the United States marshals for the respective districts wherein said claimants reside or may be found."

"SEC. 3. Said court shall hear and determine the cause and shall discharge the complainant from further liability; and shall make the injunction permanent and enter all such other orders and decrees as may be suitable and proper, and issue all such customary writs as may be necessary or convenient to carry out and enforce the same."

By plea and answer Dugas objected to being brought into the interpleader suit and grounded the objection upon the judgment, appeal and appeal bond in his earlier suit in the state court; but the objection was overruled, and the cause proceeded to the rendition of two related decrees.

In one decree, given September 19, 1932, the complainant surety, by reason of its payment of the amount of the qualifying bond into the court's registry, was discharged from any and all further liability on account of that bond, and the several claimants, including Dugas, were enjoined from instituting or prosecuting against the complainant surety, so discharged, any suit on account of any claim or right growing out of such bond. In the other decree, given April 20, 1933, the court determined the rights of the several claimants, including Dugas, in the fund paid into the registry, and directed its distribution among them on a pro rata basis—this decree being in exact accord with a stipulated request by all claimants including Dugas.

Taken together, the two decrees not only completely terminated the liability of the complainant surety on the qualifying bond, but also fixed the full measure of Dugas' right or claim under the bond, and in necessary effect determined that the judgment, appeal and appeal bond in his earlier suit in the state court did not put his claim beyond the reach of the interpleader suit, or require that it be dealt with differently from other claims.

Plainly the court had jurisdiction of both the subject matter and the parties. No appeal was taken from either decree. Therefore Dugas was bound by both decrees. Had he exercised his right to appeal he could have obtained a review of the rulings on his objection to being brought into the suit, on the bearing and effect of the prior judgment and proceedings in the state court, and on the right of the complainant surety to be discharged from further liability in respect of his claim. But these rulings were all made in the exercise of the court's jurisdiction, were subject to challenge and reëxamination only on appeal, and became conclusive on him in the absence of an appeal.

3. In the interpleader suit there was an actual, complete and judicially sanctioned payment of the qualifying bond by the surety, and it was on this basis that the surety was discharged from all further liability. While the payment was into the court's registry, and not directly to the claimants, it nevertheless was a lawful and effective payment under the Interpleader Act. In effect the first decree converted the claims under the bond into claims against the fund paid into the registry; and the second decree, made after a hearing in which all claimants were heard, directed and brought about a distribution of the fund among them according to their ascertained rights.

As Dugas' judgment in the state court was based solely on the qualifying bond, the payment of the bond and discharge of the surety, as effected in the interpleader suit,

operated, under recognized principles of law and equity, to extinguish his right under the judgment. He relied on the judgment in his several pleadings and the decrees fixed the measure of his claim conformably to the judgment. Even the costs awarded to him by the judgment were included in the computation. Thus it is plain that the interpleader suit and the decrees therein dealt with his claim as it was embodied in and evidenced by the judgment.

4. Whether, in subsequently bringing suit in the state court on the appeal bond, Dugas contravened the fair intendment of the decrees in the interpleader suit is the principal question arising on the supplemental bill. Both courts below answered the question in the affirmative.

The appeal bond was in the nature of a security for the satisfaction of the judgment in Dugas' suit on the qualifying bond; and in attempting to enforce this security he obviously was seeking to realize on the judgment. If his right under the judgment was extinguished he was not entitled to resort to the security; for the relation of one to the other was such that the extinguishment of his right under the judgment terminated his right in the security.[6]

It already has been shown in this opinion that his right under the judgment was extinguished by the proceedings and decrees in the interpleader suit.

With this understanding of the operation and effect of the decrees in that suit, it becomes plain that Dugas' action in bringing suit on the appeal bond and thereby attempting to realize on the prior judgment, notwithstanding the extinguishment of his rights under it, was in contravention of those decrees.

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[6] *Cage's Executors* v. *Cassidy*, 23 How. 109, 116; *Carpenter* v. *Longan*, 16 Wall. 271, 275; *Dodge* v. *Freedman's S. & T. Co.*, 93 U. S. 379, 382; *United States* v. *Chouteau*, 102 U. S. 603, 610–611. And see *Illinois Surety Co.* v. *Peeler*, 240 U. S. 214, 225.

His counsel contends otherwise, and seeks to support the contention by pointing out that the injunction did not directly forbid Dugas from suing on the appeal bond, but only from instituting or prosecuting any suit against the complainant surety on account of a right or claim growing out of the qualifying bond. But the injunction, being only one part of the decrees, is not the exclusive criterion of what was determined and effected by them. Its purpose was to forestall anticipated departures, not to limit other provisions or restrict their operation and effect.

By the other provisions it was adjudged that the complainant surety had complied with all of its obligations under the bond by paying the amount of the bond into the court's registry; that, by reason of this compliance, it was discharged from any and all further liability on account of the bond; and that the several claimants under the bond, all of whom had been brought in and heard, were entitled to designated portions of the fund so paid into the registry. Under this last provision each claimant was paid his portion, the fund being thereby exhausted. It also was adjudged that the fact that Dugas' claim was embodied in and evidenced by a judgment did not make it other than a claim under the bond or take it without the reach of the interpleader suit. He acquiesced in that and other rulings; and the amount of his claim and his proportionate share of the fund were fixed conformably to the judgment. He acquiesced also in this, and accepted the share so allotted to him. In this way the other provisions in the decrees accomplished as they were intended to do, the extinguishment of his right under the judgment; and they did this independently of the injunction.

Of the decisions under state interpleader statutes which are cited as if making for a different conclusion, it is enough to say, first, that in none was the statute substantially identical with the federal act of 1926; and, secondly,

that in such as involved questions approximately like those presented to the district court in the original suit there were locally appropriate applications for the exercise of appellate authority before the rulings became conclusive, which was not the case here.

Some reliance is placed on the fact that the suit on the appeal bond was against the surety thereon alone. But this does not make for a different result. As Dugas' right under the judgment was extinguished he was no more entitled to realize on the judgment by suing the surety on the appeal bond than by suing the principal. Besides, the surety, if cast in the suit and compelled to pay, would be entitled to reimbursement by the principal. The latter, therefore, may be heard to complain in the circumstances shown here.

5. The jurisdiction to entertain the supplemental bill is free from doubt. Such a bill may be brought in a federal court in aid of and to effectuate its prior decree to the end either that the decree may be carried fully into execution or that it may be given fuller effect, but subject to the qualification that the relief be not of a different kind or on a different principle.[7] Such a bill is ancillary and dependent, and therefore the jurisdiction follows that of the original suit, regardless of the citizenship of the parties to the bill or the amount in controversy.[8]

6. The power of the court to enjoin Dugas from further prosecuting his suit in the state court on the appeal bond has full support in §§ 2 and 3 of the Interpleader Act of 1926 before quoted, as also in settled adjudications

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[7] Story's Equity Pleading, 9th ed., § 338; *Root* v. *Woolworth*, 150 U. S. 401, 410–412; *Local Loan Co.* v. *Hunt*, 292 U. S. 234, 239.

[8] *Root* v. *Woolworth, supra*, p. 413; *Local Loan Co.* v. *Hunt, supra.*

respecting the power of a federal court to protect its jurisdiction and decrees.[9]

Decree affirmed.

The CHIEF JUSTICE and MR. JUSTICE CARDOZO are of opinion that the decree should be reversed for the reasons stated by Sibley, J., in the court below.

MR. JUSTICE STONE did not participate in the consideration or decision of this case.

MATOS *v.* ALONSO HERMANOS ET AL.

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

No. 227. Argued March 2, 1937.—Decided March 29, 1937.

Upon review of a judgment of the Supreme Court of Puerto Rico, in a case controlled by the construction and application of local laws of redhibition and prescription, the Circuit Court of Appeals should follow the decision unless there be a sense of clear error committed. P. 432.

81 F. (2d) 930, reversed.

CERTIORARI, 299 U. S. 527, to review a judgment reversing a judgment of the Supreme Court of Puerto Rico, which had reversed a judgment of the trial court and directed dismissal of the complaint, in an action by a purchaser of cattle to have the sale annulled and to recover the purchase money.

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[9] *French* v. *Hay*, 22 Wall. 250; *Root* v. *Woolworth*, *supra*, p. 411; *Julian* v. *Central Trust Co.*, 193 U. S. 93, 112; *Madisonville Traction Co.* v. *Saint Bernard Mining Co.*, 196 U. S. 239, 245; *Looney* v. *Eastern Texas R. Co.*, 247 U. S. 214, 221; *Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175, 183.

Mr. Nelson Gammans argued the cause, and *Messrs. Gabriel I. Lewis, Oscar B. Frazer,* and *Heriberto Torres Sola* filed a brief, for petitioner.

Mr. Francis H. Dexter for respondent.

Mr. Justice McReynolds delivered the opinion of the Court.

Two sections of the Revised Civil Code of Puerto Rico follow:

"1397. Animals and cattle suffering from contagious diseases shall not be the object of a contract of sale. Any contract made with regard to the same shall be void. A contract of sale of cattle and animals shall also be void, when the use or service for which they are acquired being stated, they are found to be useless therefor."

"1399. The redhibitory action, based on the vices or defects of animals, must be instituted within forty days, counted from their delivery to the vendee, unless, by reason of the customs in each locality, longer or shorter periods are established. This action in the sale of animals may only be enforced with regard to the vices and defects of the same, determined by law or by local customs."

Several sections of the Island's Penal Code interdict sale or possession of animals suffering from a contagious disease.

A complaint filed by respondents, Alonso Hermanos, et al., in the District Court of San Juan, December 12, 1929, alleged that they purchased March 1, 1929, from petitioner, Jose Matos, a herd of cattle—122 head—for the lump sum of $18,000.00; although apparently in good condition the cattle were suffering from tuberculosis, a contagious disease; prior to December 6th forty-three had died, twenty-nine were condemned and destroyed by the Health Department. They further declared readiness to

return all surviving cattle and prayed that the sale be declared null and void, in accordance with § 1397 of the Civil Code, also for judgment for the purchase price.

A demurrer invoking the limitation of forty days upon redhibitory actions, prescribed by Code § 1399, was overruled. An answer followed. This admitted execution of the contract, receipt of the consideration, death and condemnation of the cattle as alleged. But it affirmed that tuberculosis was contracted after the sale through improper care; also renewed the claim of prescription.

The trial court found the facts shown by the evidence; concluded the questioned contract was illegal and void, that the action was not subject to the prescription of forty days; and ordered return of the entire purchase price.

Upon appeal the Supreme Court of Puerto Rico ruled the sale contract was not void but voidable at the purchaser's election; its legal effect and the remedy for violation were within the Code provisions relating to redhibitory contracts; the limitation of forty days applied; "that Section 1397 does not exclude the transaction made in this case from the field of warranties." Also, the contract for the purchase of the herd was "individual" or "distributive"—not unitary; as to the dead cows the right to recover the purchase price was prescribed; as to those which survived no right of recovery ever existed. It accordingly reversed the judgment of the District Court and directed dismissal of the complaint.

The Circuit Court of Appeals held the contract of sale illegal—non-existent—as to cows which had died or were condemned; as to them the action was not redhibitory; the prescription of forty days had no application; and it reversed the questioned judgment. With respect to the surviving cows it adopted the interpretation of § 1397 approved by the Supreme Court. It said: "To sum-

marize: In the trial court the plaintiffs put their claim on the herd basis; they endeavored to rescind the entire transaction and get back the full consideration which had been paid; and they were held entitled to do so. On appeal the Supreme Court held that the sale could not be given this unitary character, but must be considered with respect to the individual animals,—and that view stands. In its decision that, as to the tuberculous cattle, a contract was entered into and the plaintiffs' rights were of redhibitory character and subject to the limitation of section 1399, the Supreme Court fell into error."

Accordingly the judgment of the Supreme Court was reversed and the cause remanded to the District Court with instructions to permit an amendment to the complaint. A dissenting opinion approved the Supreme Court's construction of the Code, also its judgment.

The matter is here by certiorari. Manifestly the solution of the controversy must turn upon the meaning and effect of the above quoted sections of the Civil Code—local law of Puerto Rico.

Considering the argument here, the divergent views below, the authorities cited, and "recognizing the deference due to the understanding of local courts upon matters of purely local concern," it becomes impossible for us to entertain "a sense of clear error committed" by the Supreme Court. Following the view so often approved, we think the Circuit Court of Appeals should have accepted and affirmed the ruling there announced after much consideration. *Nadal* v. *May,* 233 U. S. 447, 454; *De Villanueva* v. *Villanueva,* 239 U. S. 293, 299; *Diaz* v. *Gonzalez,* 261 U. S. 102, 105.

The judgment of the Circuit Court of Appeals must be reversed; the judgment of the Supreme Court is affirmed.

Reversed.

GENERAL BAKING CO. *v.* HARR, SECRETARY OF BANKING OF PENNSYLVANIA, ET AL.

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

No. 559. Argued March 5, 1937.—Decided March 29, 1937.

Diverse citizenship and the requisite jurisdictional amount being present, a District Court has jurisdiction of a suit by a depositor to fasten a trust on funds in an insolvent state bank, notwithstanding that the bank has been taken over by a state official for liquidation pursuant to the state law. *Commonwealth Trust Co.* v. *Bradford*, 297 U. S. 613. P. 434.

85 F. (2d) 932, 934, reversed.

CERTIORARI, 299 U. S. 539, to review a judgment which reversed a judgment of the District Court and directed dismissal of the suit for the want of jurisdiction. See 9 F. Supp. 210, 214.

Mr. George E. Beechwood, with whom *Messrs. James S. Benn, Jr., Mark E. Lefever, J. Harry LaBrum,* and *William J. Conlen* were on the brief, for petitioner.

Mr. Joseph S. Clark, Jr., with whom *Mr. Charles J. Margiotti,* Attorney General of Pennsylvania, was on the brief, for respondents.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Acting under Pennsylvania statutes, October 5, 1931, William D. Gordon, Secretary of Banking, (respondent Harr is his successor) closed the Franklin Trust Company, a banking institution in Philadelphia, and took control of its business and assets.

Thereafter in the United States District Court, Eastern District of Pennsylvania, petitioner, a New York corpora-

tion, presented a bill against Gordon, setting up an agreement by which it undertook to keep on deposit with the Trust Company a sum specified, and the latter undertook either directly or through correspondent banks to accept deposits of cash, checks, etc., and to forward the proceeds therefrom to petitioner in New York. Also that when closed the Trust Company had in its assets $49,590.17 received under this agreement, and its correspondent banks had on hand deposits likewise acquired amounting to $32,403.26.

The bill prayed for a decree declaring petitioner owner of the $32,403.26 and that a trust existed in its favor in respect of the $49,590.17 deposit; also for general relief. The answer suggested some qualifications of the alleged agreement and denied that there was no adequate remedy at law. Otherwise, the allegations of the bill were generally admitted.

The District Court took jurisdiction of the controversy; held petitioner was not owner of the $32,403.26; also that no ground existed for impressing a trust upon assets because of the $49,590.17 deposit; and dismissed the bill.

The Circuit Court of Appeals concluded the District Court had no jurisdiction and should have dismissed the bill without adjudicating other questions. It accordingly approved the dismissal but directed that the cause be referred to the state court for proper procedure there.

Although entered in September, 1936, the opinion below does not refer to *Commonwealth Trust Co.* v. *Bradford,* 297 U. S. 613, decided here March 30, 1936. Nothing indicates that this opinion was brought to the Court's attention. The doctrine there approved, we think, is decisive of the issue concerning jurisdiction now presented.

It was error for the Circuit Court of Appeals to hold that the District Court was without jurisdiction of the controversy. It should have passed on issues properly presented upon the appeal.

The questioned decree must be reversed and the matter remanded to the Circuit Court of Appeals for further proceedings.

Reversed.

STROEHMANN ET AL. *v.* MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

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

No. 599. Argued March 11, 1937.—Decided March 29, 1937.

Where, from the language of a policy of life insurance, it is doubtful whether provisions for disability benefits were excepted from the "incontestable" clause, the doubt will be resolved in favor of the insured. Pp. 439–440.

86 F. (2d) 47, reversed.

District Court affirmed.

CERTIORARI, *post*, p. 646, to review a decree reversing a decree dismissing the bill. The suit was by the insurance company to cancel the disability benefits provisions of a policy upon the ground of fraud, alleged to have been practiced by the insured in obtaining the insurance. The District Court at first refused to dismiss the bill, 6 F. Supp. 953, but later ruled the other way when the motion was renewed after the bill had been amended.

Mr. George H. Hafer, with whom *Messrs. George Ross Hull* and *Carl B. Shelley* were on the brief, for petitioners.

Mr. Wm. Marshall Bullitt, with whom *Messrs. Frederick L. Allen* and *Reese H. Harris* were on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

By a policy dated June 30, 1930, respondent Insurance Company, a New York corporation, agreed to pay the

named beneficiary $40,000.00 upon death of Carl F. Stroehmann, the insured. Or to pay $80,000.00 if his death results from accidental bodily injury, "all upon the conditions set forth in Section 1." "And if the Insured is totally and presumably permanently disabled before age 60, will pay to the Insured $400.00 monthly during such disability, increasing after five and ten years continuous disability, besides waiving premium payments, all upon the conditions set forth in Section 3."

The policy is a long and complicated document. It incorporates the application and the Medical Examiner's report.

Section 1 (two printed pages) relates to the "Double Indemnity" obligation. It defines the injury to which the insurance applies, specifies the necessary proof, optional modes of settlement, etc.

Section 3—"Benefits in Event of Total and Permanent Disability before Age 60," is in the margin.[1] It defines

[1] "Section 3.—Benefits in Event of Total and Permanent Disability before Age 60.

"Total Disability.—Disability shall be considered total when there is any impairment of mind or body which continuously renders it impossible for the Insured to follow a gainful occupation.

"Permanent Disability.—Total disability shall, during its continuance, be presumed to be permanent;

"(a) If such disability is the result of conditions which render it reasonably certain that such disability will continue during the remaining lifetime of the Insured; or,

"(b) If such disability has existed continuously for ninety days.

"When Benefits become Effective.—If, before attaining the age of sixty years and while no premium on this Policy is in default, the Insured shall furnish to the Company due proof that he is totally and permanently disabled, as defined above, the Company will grant the following benefits during the remaining lifetime of the Insured so long as such disability continues.

"Benefits. (a) Increasing Income.—The Company will pay a monthly income to the Insured of the amount stated on the first page hereof ($10 per $1,000 face amount of Policy), beginning

total and permanent disability; states when benefits will become effective; what they shall be; when premiums will be waived. Also specifies what will be considered permanent disability, when proofs may be demanded, etc.

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upon receipt of due proof of such disability and increasing after sixty consecutive monthly payments have been made to one and one-half times such amount and after sixty further consecutive monthly payments have been made to twice such amount at which it shall remain while total and permanent disability continues.

"(b) Waiver of Premium.—The Company will also, after receipt of such due proof, waive payment of each premium as it thereafter becomes due during such disability.

"Specified Disabilities.—The entire and irrecoverable loss of the sight of both eyes, or of the use of both hands or both feet or one hand and one foot, will be considered total and permanent disability.

"General Provisions.—The Company may, before making any income payment or waiving any premium, require due proof of the continuance of total and permanent disability, but such proof shall not be required oftener than once a year after such disability has continued for two years. If such proof is not furnished on demand or if it shall appear to the Company that the Insured is no longer totally and permanently disabled, no further income payments will be made or premiums waived.

"Neither the dividends nor the amount payable in any settlement hereof shall be decreased because of Disability Benefits granted.

"If the Insured shall at any time so recover that the payment of Disability Benefits terminates and later shall furnish due proof that he has again become totally and permanently disabled, Disability Benefits shall be the same in amount and subject to the same conditions as if no prior disability had existed.

"If the disability of the Insured shall be the result of insanity, income payments shall be payable to the beneficiary, if any, instead of to the Insured.

"Any disability income payment which may become payable and which is unpaid at the death of the Insured shall be paid to the beneficiary.

"Disability Benefits shall not be granted if disability is the result of self-inflicted injury.

"The provision for Disability Benefits shall automatically terminate if the Insured shall at any time, voluntarily or involuntarily,

And provides: "Disability Benefits shall not be granted if disability is the result of self-inflicted injury. The provision for Disability Benefits shall automatically terminate if the Insured shall at any time, voluntarily or involuntarily engage in military or naval service in time of war outside of the continental limits of the United States of America and the Dominion of Canada." Other provisions relate to termination of such benefits, reduction of premiums thereafter, etc.

Neither § 1 nor § 3 contains anything relative to fraud in obtaining the policy or the effect of false statements in the application.

Section 14—"Miscellaneous Provisions" (two pages) contains the following paragraph: "Incontestability.—Except for non-payment of premiums and except for the restrictions and provisions applying to the Double Indemnity and Disability Benefits as provided in Sections 1 and 3 respectively, this Policy shall be incontestable after one year from its date of issue unless the Insured dies in such year, in which event it shall be incontestable after two years from its date of issue."

In October, 1932, respondent filed a bill (afterwards amended) against Stroehmann, the insured, and the beneficiary in the United States District Court, Middle District, Pennsylvania. It alleged that the policy had been obtained upon false and fraudulent misrepresentations and concealments material to the risk. It asked

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engage in military or naval service in time of war outside of the continental limits of the United States of America and the Dominion of Canada.

"If requested in writing by the Insured, the Company will terminate the provision for Disability benefits by endorsement on this Policy.

"If the Insured attains the age of sixty years or if the provision for Disability Benefits terminates, the premiums payable after such age or such termination shall be reduced by the premium for such benefits."

that the Disability Benefits provisions be cancelled, also for an injunction against suit at law upon them.

Relying upon the Incontestability clause the petitioner moved that the bill be dismissed. The trial court sustained the motion, holding that as more than a year had elapsed since the policy took effect the limitation was applicable and controlling. The Circuit Court of Appeals thought otherwise and reversed the challenged decree.

The matter is here by certiorari limited to the question of the application and effect of the Incontestability clause.

No reason appears to doubt the power of the insurer to except from the ordinary Incontestability clause all policy provisions relating to Disability Benefits. Ch. 28, Laws N. Y. (1923); *Steinberg* v. *N. Y. Life Ins. Co.*, 263 N. Y. 45; 188 N. E. 152. But the petitioner maintains that the words used in the policy before us are inadequate definitely to disclose a purpose so to do. And we think the point is well taken.

In *Mutual Life Insurance Co.* v. *Hurni Packing Co.*, 263 U. S. 167, 174, this Court said: "The rule is settled that in case of ambiguity that construction of the policy will be adopted which is most favorable to the insured. The language employed is that of the company and it is consistent with both reason and justice that any fair doubt as to the meaning of its own words should be resolved against it." See *Royal Insurance Co.* v. *Martin*, 192 U. S. 149, 162, 165; *Bergholm* v. *Peoria Life Ins. Co.*, 284 U. S. 489, 492.

Examination of the words relied upon to show an exception to the Incontestability clause of the policy discloses ample cause for doubt concerning their meaning. The arguments of counsel have emphasized the uncertainty. The District Court and the Circuit Court of Appeals reached different conclusions, and elsewhere there is diversity of opinion.

The District Court accepted the view approved in *Ness* v. *Mutual Life Ins. Co.* (Fourth Circuit), 70 F. (2d) 59, and *Mutual Life Ins. Co.* v. *Markowitz,* (Ninth Cir-Cuit), 78 F. (2d) 396, which presented for interpretation language identical with that now before us. The Circuit Court of Appeals followed its earlier opinion in *N. Y. Life Ins. Co.* v. *Gatti,* (Oct. 6, 1936), where the company employed different language. Certain life companies undertake to make exceptions to the Incontestability clause by words more precise than those now under consideration, and opinions in cases arising upon their policies must be appraised accordingly.

Without difficulty respondent could have expressed in plain words the exception for which it now contends. It has failed, we think, so to do. And applying the settled rule, the insured is entitled to the benefit of the resulting doubt.

The decree of the Circuit Court of Appeals must be reversed. The decree of the District Court is affirmed.

Reversed.

WRIGHT *v.* VINTON BRANCH OF THE MOUNTAIN TRUST BANK OF ROANOKE ET AL.

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

No. 530. Argued March 3, 4, 1937.—Decided March 29, 1937.

1. A motion to dismiss a petition under § 75 (s), as amended, of the Bankruptcy Act upon the ground that, as applied to the owner of a farm loan secured by deed of trust, provisions of that subsection are unconstitutional, *held* not premature where the farmer debtor had taken all affirmative action required of him under the section to initiate proceedings leading to a stay of foreclosure. P. 456.

Louisville Joint Stock Bank v. *Radford,* 295 U. S. 555, did not

question the power of Congress to offer to distressed farmers means of rehabilitation under the bankruptcy clause.

2. When the validity of an Act of 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. P. 461.
3. Section 75 (s) of the Bankruptcy Act, as amended, (the new Frazier-Lemke Act) is construed with committee reports and is found adequately to preserve the following substantive rights of a farm mortgagee, which this Court held in *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555, were not protected before the amendment, *viz.,* (a) The right to retain the lien until the indebtedness thereby secured is paid; (b) the right to realize upon the security by a judicial sale; (c) the right to protect the mortgagee's interest in the property by bidding at such sale whenever held. P. 458.
4. In the *Radford* case, *supra,* it was not held that deprivation of any one of the five rights of a mortgagee enumerated in the opinion (pp. 594, 595) would render the original Frazier-Lemke Act invalid, but that the effect of the statute in its entirety was to deprive the mortgagee of his property without due process of law. P. 457.
5. While the new Act affords the farmer debtor, ordinarily, a three year stay of foreclosure, the stay is not an absolute one; the court may terminate it earlier and order a sale. P. 460.
6. Construed in the light of committee reports, and the exposition of the bill made in both Houses by its authors and those in charge of the bill and accepted by the Congress without dissent, the amended Act gives the court broad power to curtail the stay of foreclosure, for the protection of mortgagees. The property of which the debtor retains possession is at all times in the custody and under the supervision and control of the court. If the debtor defaults at any time in his obligation to pay a reasonable rental for the part of the property of which he retains possession, or fails at any time to comply with orders of the court issued under its power to require interim payments on principal, or other orders issued in the course of the court's supervision and control of his possession, or if after a reasonable time it becomes evident to the court that there is no reasonable hope that the debtor can rehabilitate himself financially within the three year period, or if

within that period the court finds that the emergency that gave rise to the legislation has ceased to exist,—the court may terminate the stay and order a sale. P. 461.

7. The amended Act is not unconstitutional as applied to a mortgagee because possession of the property during the stay of foreclosure is in the debtor subject to the obligations imposed by the Act and under the supervision and control of the court, rather than in a receiver or trustee. P. 465.

8. The clause of the amended Act, § 75 (s), par. 2, providing that the first payment of rental by the debtor in possession shall be within one year of the date of the stay order, is construed, in view of the additional requirement that the payments shall be semi-annual, not as meaning that the debtor may not be required by the court to pay any rent before the close of the first year, but as forbidding the court to postpone the payment beyond one year. So construed, the clause is not unreasonable or arbitrary. P. 467.

9. The requirement of the amended Act that the rents paid into court by the debtor in possession during stay of foreclosure shall be applied first on taxes and upkeep, is consistent with the constitutional rights of the mortgagee. P. 468.

10. The objection that the amended Act unconstitutionally restricts a lienor's remedy under the state law by delays interposed to the enforcement of his rights, is to be tested not by what might be permitted to a State under the contract clause of the Constitution, but by whether, as an exercise of the bankruptcy power, for the rehabilitation of the farmer mortgagor, the Act so far modifies the lienor's rights, remedial or substantive, as to deny the due process of law guaranteed by the Fifth Amendment. P. 468.

85 F. (2d) 973, reversed.

CERTIORARI, 299 U. S. 537, to review a judgment affirming a judgment of the Bankruptcy Court, 12 F. Supp. 297, which, on the motion of a secured creditor, dismissed a petition filed by a farmer under § 75, subsection (s), as amended, of the Bankruptcy Act.

Messrs. S. S. Lambeth, Jr., Elmer McClain, and *William Lemke* for petitioner.

The history and development of bankruptcy legislation in the United States have been exhaustively considered in a number of recent cases in this Court. *Continental Illinois National Bank & Trust Co.* v. *Chicago, R. I. & P. Ry. Co.,* 294 U. S. 648; *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555; *Ashton* v. *Cameron County,* 298 U. S. 513.

The new Frazier-Lemke Act is based on constitutional power to enact laws on the subject of bankruptcies, and is a reasonable exercise of that power. While the new Act has for its object the conservation and preservation of agriculture, as did the original Act, yet the methods and means employed are essentially different.

When this Court held the original Act unconstitutional in *Louisville Joint Stock Land Bank* v. *Radford, supra,* the present Act was introduced in both the Senate and the House. It was referred to the Judiciary Committees, which referred it to subcommittees for study and consideration with the purpose of complying with the Court's decision. The bill with the changes and amendments made by the subcommittees was then brought up before the Committees of the Whole of both the Senate and the House, and further amendments were made. Thereafter it was debated on the floors of the Senate and the House and passed without a dissenting vote in either House.

There is nothing novel in the new Act. It simply applies well established principles of bankruptcy law to agriculture. This may appear novel, but there is no provision of the Act which the bankruptcy courts have not already passed upon.

The courts have allowed going concerns to remain in possession, and to continue in business under trustees, and without trustees. They have permitted possession and the payment of indebtedness of such concerns on the instalment plan, with or without interest. *In re Reiman,* Fed. Cas. No. 11,673; *Sparhawk* v. *Yerkes,* 142 U. S. 114;

In re Swofford Co., 180 Fed. 549; *Burlingham* v. *Crouse,* 228 U. S. 459.

The courts have scaled down indebtedness to less than the value of the property, through composition, and they have given extension of time in which payments were to be made; and this, at times, against the wishes of the minority. What can be done to a minority can be done to a majority or to all of them, secured or unsecured creditors, and still be constitutional. Courts have sold encumbered property free of lien, and unincumbered property for cash or on time. Cf. *In re Merkus,* 289 Fed. 732; *Traer* v. *Clews,* 115 U. S. 528; *In re Waterloo Organ Co.,* 118 Fed. 904; *Matter of Theiberg,* 47 Am. B. R. 257; *Matter of Franklin Brewing Co.,* 41 Am. B. R. 51; *Matter of Tube Co.,* 25 Am. B. R. 651; *Shinn* v. *Kemp & Herbert,* 73 Wash. 254; *Van Huffel* v. *Harkelrode,* 284 U. S. 225.

Section 75 (s) has been held constitutional in many cases, State and Federal.

Acts of Congress held to be unconstitutional as originally enacted, have on several occasions been held constitutional when reënacted in altered form with the design of meeting the Court's objections. Cf. *Hill* v. *Wallace,* 259 U. S. 44; *Chicago Board of Trade* v. *Olson,* 262 U. S. 1; *Employers' Liability Cases,* 207 U. S. 463; *Second Employers' Liability Cases,* 223 U. S. 1.

The duty of the Court is to square a new statute with the Constitution. *United States* v. *Butler,* 297 U. S. 1. Former decisions on the validity of older statutes are not *stare decisis. Hertz* v. *Woodman,* 218 U. S. 205, 212; *DiSanto* v. *Pennsylvania,* 273 U. S. 3, dis. op.

The new subsection (s) provides that any farmer-debtor, who fails under subsections a–r of § 75 to effect a composition with his creditors, may amend his petition or answer asking to be adjudged a bankrupt. All the debtor's property wherever located is then to be appraised

at its fair and reasonable market value. His unencumbered exemptions are set aside to him.

The debtor is allowed to retain possession of any part or all of the remainder of his property for a period of three years under supervision and control of the court. The debtor is required to pay a reasonable rental into court for the part of the property he retains. This rental is to be applied first to pay taxes and upkeep of the property, and the remainder distributed among creditors, secured and unsecured, and applied on their claims as their interests may appear. The court is given power to sell unexempt and perishable personal property if deemed necessary to protect the interests of creditors. The court may, if it sees fit, require payments on principal with a view to the debtor's ability to pay.

After three years have elapsed, or sooner if he desires, the debtor may pay into court the amount of the appraisal of the property of which he has retained possession, and the court will turn over to him full title to and possession of that property, free and clear of encumbrances. This procedure is subject to two provisos: 1. On the request of any creditor, secured or unsecured, or of the debtor, the court may order a reappraisal of the property and require the debtor to pay that price. 2. On the demand of any secured creditor the court must order the property on which the creditor has a lien sold at public auction. If the debtor fails to comply with the provisions of the Act, or any court order made thereunder, a trustee may be appointed and the property sold as in other bankruptcy cases.

It is an Act on the subject of bankruptcies. See *In re Klein* (reported in note to *Nelson* v. *Carland,* 1 How. 265); *In re Reiman,* Fed. Cas. No. 11,673; *Hanover Nat. Bank* v. *Moyses,* 186 U. S. 181; *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555; *In re Chicago,*

R. I. & P. Ry. Co., 72 F. (2d) 443; *Continental Illinois Bank* v. *Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648.

It does not take property without due process.

In *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, holding the first § 75 (s) void, the Court listed five rights of a secured creditor which were said to have been impaired. It did not hold the original Act unconstitutional because of the infringement of all of these rights. The Court held the Act unconstitutional because it was in violation of the due process clause of the Fifth Amendment. In fact, in *Continental Illinois Bank* v. *Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648, this Court, in holding § 77 of the Bankruptcy Act constitutional, must have found that all of these so-called rights enumerated in the Radford case were qualified and subject to the Federal Constitution. We say this because § 77 of the Bankruptcy Act, providing for reorganization of railroad corporations, is much more drastic and arbitrary as far as the creditor's rights are concerned than subsection (s) of § 75.

It was held in the *Radford* case, *supra*, that the taking of these five so-called rights as a group had the effect of substantially impairing the mortgagee's security. It is clear from a reading of the new Act that rights numbered (1), (2) and (4) are fully and completely preserved.

Rights numbered (3) and (5), "The right to determine when such sale shall be held, subject only to the discretion of the court," and "The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt," are not substantive, but remedial, rights and as such are subject to control under the bankruptcy power. They are only relative or remedial rights which

may be, and have been, suspended or taken away without violating the due process clause of the Fifth Amendment. Cf. *Continental Illinois Bank* v. *Chicago, R. I. & P. Ry. Co.,* 294 U. S. 648, holding the original § 77 of the Bankruptcy Act constitutional. Cf. *Campbell* v. *Allegany Corp.,* 75 F. (2d) 947, cert. den., 296 U. S. 581, holding § 77B of the Bankruptcy Act constitutional.

In no case does § 75 (s) treat creditors' rights more arbitrarily than either § 77 or § 77B. In most situations it does not go nearly so far.

The amendment is a reasonable adaptation of bankruptcy proceedings to farmers' conditions.

In bankruptcy proceedings, the court should be influenced by the consideration that a man can ordinarily do better with his own property and realize more therefrom than can be obtained in the course of judicial proceedings, with compulsory sales and expenses of administration. *In re Arrington Co.,* 113 Fed. 498; *Dallas Joint Stock Land Bank* v. *Davis,* 83 F. (2d) 322.

The amendment is reasonable and the necessity for it is shown by statistics.

Declaration of the existence of an emergency by a legislative body cannot be regarded as a subterfuge or as lacking in adequate basis. *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398; *Block* v. *Hirsh,* 256 U. S. 135.

Recent improvements in farm conditions show that suspension of sale of farm property will benefit both creditor and debtor.

While the value of farm lands has increased, the agricultural debt structure has remained practically the same, except as reduced by foreclosures. The increase in the value of farm lands has in fact stimulated foreclosures. There is little money available for farm loans. The truth is that the farmer who really needs help cannot get it. As a result, hundreds and thousands of farm foreclosures

and evictions are taking place in practically every part of this Nation.

The purpose of the Bankruptcy Act was two-fold: First, to provide for an equitable distribution of the bankrupt's estate among his creditors; second, to rehabilitate the bankrupt and to give him a fresh start in life free from the burden of his debts.

The Court has stressed the fact that the Bankruptcy Act is founded on sound public policy. *Stellwagen* v. *Clum,* 254 U. S. 605; *In re Klein,* 1 How. 279; *Continental Illinois Bank* v. *Chicago, R. I. & P. Ry. Co.,* 294 U. S. 648; *Canada Southern R. Co.* v. *Gebhard,* 109 U. S. 527, 536.

It is within the power of the Court to transfer the creditor's lien to the proceeds of a sale of the property, and to allow the bankrupt to repurchase the property. *Van Huffel* v. *Harkelrode,* 284 U. S. 225; *Traer* v. *Clews,* 115 U. S. 528; *Sparhawk* v. *Yerkes,* 142 U. S. 1.

Congress may, under the bankruptcy power, stay judicial proceedings for three years. Cf. §§ 77, 77B; *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398.

The experience with bankruptcy administration shows that, even in normal times and under normal conditions, distribution takes not much less than 3 years. In times of emergency and economic distress it takes longer, because the problem of liquidation is more difficult and slow, due to lack of buyers of bankrupt estates.

In the famous rent cases, tenants were allowed to remain in possession over the objection of landlords, provided reasonable rent was paid. Cf. *Levy Leasing Co.* v. *Siegal,* 258 U. S. 242; *Marcus Brown Holding Co.* v. *Feldman,* 256 U. S. 170; *Block* v. *Hirsh,* 256 U. S. 135.

The moratorium is a proper exercise of federal police power within the respective fields of sovereignty

enumerated in Art. I, § 8, of the Constitution. Congress may exercise full police power to the same extent that a state legislature may exercise police power within the fields of sovereignty not granted to the federal government. Cf. *Hamilton* v. *Kentucky Distilleries,* 251 U. S. 146, 156; *Champion* v. *Ames,* 188 U. S. 321, 357; *McCray* v. *United States,* 195 U. S. 27, 59; *Hipolite Egg Co.* v. *United States,* 220 U. S. 45, 57, 58; *Hoke* v. *United States,* 227 U. S. 308; *Caminetti* v. *United States,* 242 U.S. 470, 492; *Seven Cases* v. *United States,* 239 U. S. 510, 514, 515; *United States* v. *Doremus,* 249 U. S. 86, 93, 94.

The Fifth Amendment imposes in this respect no greater limitation upon the national power than does the Fourteenth Amendment upon state power. *In re Kemmler,* 136 U. S. 436, 438; *Carroll* v. *Greenwich Insurance Co.,* 199 U. S. 401, 410; *Brooks* v. *United States,* 267 U. S. 432, 436; *Block* v. *Hirsh,* 256 U. S. 135, 155.

The sovereignty of the United States under Art. I, § 8, cl. 4, to "establish uniform laws on the subject of bankruptcies," is as untrammeled as any of the other sixteen cognate sovereignties granted in the same section.

The moratorium in subsection (s) under the power of Congress to legislate upon "the subject of bankruptcies" is a proper exercise of the federal police power. It is as valid as the power of a State to enact a moratorium during the existence of the same emergency under its police power.

The Act does not deny full faith and credit to state laws and judicial decrees.

The Act is a uniform law on the subject of bankruptcies.

Even if clause (6) of the Act were held unconstitutional, it can be severed from the rest of the Act.

Mr. John Strickler, pro hac vice, by special leave of Court, and *Mr. T. X. Parsons,* with whom *Messrs. S. V. Kemp* and *John F. Reinhardt* were on the brief, for respondents.

It should be especially observed that under the Virginia law no proceedings in court are necessary to enforce a deed of trust. Upon notification by the holder of the debt that there has been a default, the trustee proceeds to sell the property, and pending sale may rent the property for the future protection of the creditor. The sale by the trustee is absolute and final, and the sale will not be enjoined in Virginia so long as the trustee acts within the powers given him by the trust instrument or by state law. It is, therefore, evident that the positions of the secured creditors in this case and in the *Radford* case are similar, with the exception that in this case under the Virginia law the rights of the creditors are more absolute in form and the exercise of those rights is not subject to the discretion of the court. See *In re Sherman,* 12 F. Supp. 297.

Under the operation of this Act some time will be occupied, perhaps several months, in attempting to secure the relief provided for in the sections preceding subsection (s), in regard to a composition or extension of the debtor's obligation with the consent of the creditors; then, when a petition is filed praying for the relief outlined in subsection (s), a further period of months will be consumed in having the property appraised and putting the debtor in the position he must occupy before the stay is granted. There is a four months' period, which would prolong the delay, wherein he is given time to object to the appraisement. Then, should the official and judicial procedure be stayed for a period of three years, no rent will be paid for one year, since the payment of rent is not a condition precedent to the operation of the Act. If we compare

the position of the creditor under the Virginia law prior to the passage of this Act with his position thereafter, we find that not only is the application of the security to the payment of the debt deferred for three or more years, but the rents and profits are diverted from him for one year or more, and even then the rental is paid on taxes and upkeep of the property in derogation of his rights.

Practically, therefore, the creditor suffers a loss that may be, as in this case, very substantial. Cf. *W. B. Worthen Co.* v. *Kavanaugh,* 295 U. S. 250.

In bankruptcy proceedings, generally, the law governing the validity of liens and property interests is the law of the locality in which the property is located. See *Cox* v. *Wallace,* 219 Fed. 126.

Congress has no power under the Bankruptcy clause to modify or impair the interests of mortgagees. *Continental Illinois Bank* v. *Chicago, R. I. & P. Ry.,* 294 U. S. 648.

The creditor, by the operation of this Act, has suffered a change of position to his detriment; and the estate of the debtor has been enlarged thereby. While the property is in the possession of the debtor under the supervision and control of the court, the net amounts received by the creditor through rental will be less than what he would receive with the trustee in possession; and in addition to that, sale is delayed.

Subsection (s) is so arbitrary and unreasonable in its operation on the vested rights of creditors as to violate the due process clause of the Fifth Amendment.

In this case, the debtor estimates the value of his assets at $2,882.50. The same schedule shows debts of $6,559.50, a large part of which is owed to these respondents. The record further shows that this debtor first petitioned for relief under the original Frazier-Lemke Act, since invalidated, by filing a petition March 29, 1935. His

petition asked that proceedings for foreclosure by appellees be stayed, which, as shown by the record, was done. The order of reference was entered March 30, 1935, but it was not until September 27, 1935, that a proposal was made to the creditors. The original Act having been invalidated and a new law passed in August, 1935, on October 8th this debtor petitioned for further relief, and on October 12, 1935, the matter was again referred to the conciliation commissioner. On January 8, 1936, the District Court ordered the case to be dismissed on the grounds that subsection (s) was unconstitutional, and thence it has come here on writ of certiorari.

Should the constitutionality of this legislation be upheld, a further order will have to be entered staying foreclosure proceedings for a period of three years, and this will be done in spite of the fact that the bankruptcy schedule shows no possible hope of solvency and contains no possible basis for a financial rehabilitation, which is claimed as the great objective of this Act. Furthermore, there will be more than another year before any rental will be paid, at which time additional taxes will be due, and a strong probability of diverting the income for making repairs as provided for in the Act. The operation of this legislation will postpone any payment to the secured creditor almost indefinitely, whereas under the law of Virginia the trustee has an immediate right of possession, and the beneficiary has an absolute and immediate right to demand sale of the property for payment of the debt.

If the rule laid down in *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, and in the *Radford* case, 295 U. S. 555, is correctly understood, it clearly asserts that, while the mortgagee is debarred from actual possession, he should have in rents the equivalent in value of possession during the extended period; also his interest should be carefully safeguarded.

The Bankruptcy Court may sell encumbered property free of liens, but as was observed in the *Radford* case, *supra,* such sales are held when it is to the interest of other creditors, and it is a settled principle that sale of encumbered property will not be ordered by the court if the amount of the liens exceeds the value of the property.

The contention based upon §§ 77 and 77B of the Bankruptcy Act and *Continental Illinois Bank* v. *Chicago, R. I. & P. Ry.,* 294 U. S. 648, was disposed of by this Court in the *Radford* case. Large numbers of creditors must be dealt with as a class. These sections operate for the best interest of the creditors, and upon consent of a two-thirds majority in number and amount. The rights of secured creditors, may thus be modified or somewhat restricted. But subsection (s) of § 75 works against the consent of the secured creditor and the restriction of his rights is against his will.

In a railroad reorganization the court is concerned with a public utility, the bonds of which have been purchased by the public with full knowledge of the nature of its business and the need for uninterrupted operation in the public interest.

The bankruptcy power of Congress is limited by the Fifth Amendment. *Radford* case, *supra.* Congress has no police power except as incidental to the exercise of some power delegated in the Constitution. *Hamilton* v. *Kentucky Distilleries,* 251 U. S. 246..

The Frazier-Lemke Act is not an exercise of police power nor incidental to the bankruptcy powers of Congress. *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, distinguished.

Mr. Justice Brandeis delivered the opinion of the Court.

The question for decision is whether § 75, subsection (s), of the Bankruptcy Act, as amended by the new

Frazier-Lemke Act, August 28, 1935, c. 792, 49 Stat. 943–945, is constitutional. In this case, the federal court for western Virginia (see *In re Sherman,* 12 F. Supp. 297) and the Circuit Court of Appeals for the Fourth Circuit (85 F. (2d) 973) held it invalid. Like decisions have been rendered in other circuits. *Lafayette Life Insurance Co.* v. *Lowmon,* 79 F. (2d) 887 (Seventh Circuit); *United States National Bank of Omaha* v. *Pamp,* 83 F. (2d) 493 (Eighth Circuit). In the Fifth Circuit the legislation was sustained. *Dallas Joint Stock Land Bank* v. *Davis,* 83 F. (2d) 322. Because of this conflict and the importance of the question, we granted certiorari.[1]

Wright, a Virginia farmer, gave in 1929 a mortgage deed of trust of his farm to secure a debt now held by the Vinton Branch of the Mountain Trust Bank. In March, 1935, he filed a petition under § 75 of the Bankruptcy Act as amended June 28, 1934, c. 869, 48 Stat. 1289.

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[1] See also *Steverson* v. *Clark,* 86 F. (2d) 330, and *Knotts* v. *First Carolinas Joint Stock Land Bank, id.,* 551 (Fourth Circuit), applying the decision in the instant case; *McWilliams* v. *Blackard, id.,* 328, and *Phoenix Joint Stock Land Bank* v. *Ledwidge, id.,* 355 (Eighth Circuit), applying the decision in *United States National Bank of Omaha* v. *Pamp, supra;* and *Schauer* v. *Producers Wool & Mohair Co., id.,* 576 (Fifth Circuit), applying the decision in *Dallas Joint Stock Land Bank* v. *Davis, supra.* The cases in the district courts are also conflicting. The legislation was sustained in *In re Slaughter,* 12 F. Supp. 206 (N. D. Tex.); *In re Reichert,* 13 *id.,* 1 (W. D. Ky.); *In re Cole, id.,* 283 (S. D. Ohio); *In re Bennett, id.,* 353 (W. D. Mo.); and *In re Chilton,* 16 *id.* 14 (D. Colo.). Compare *In re Paul,* 13 *id.* 645 (S. D. Iowa); *In re Slaughter, id.,* 893 (N. D. Tex.). It was held invalid in *In re Young,* 12 F. Supp. 30 (S. D. Ill.); *In re Lindsay, id.,* 625 (N. D. Iowa); *In re Weise, id.,* 871 (W. D. N. Y.); *In re Davis,* 13 *id.* 221 (E. D. N. Y.); *In re Diller, id.,* 249 (S. D. Cal.); *In re Tschoepe, id.,* 371 (S. D. Tex.); *In re Schoenleber, id.,* 375 (D. Neb.); *In re Wogstad,* 14 *id.* 72 (D. Wyo.); and *In re Maynard,* 15 *id.* 809 (D. Idaho). Compare *In re Shonkwiler,* 17 F. Supp. 697, 699 (E. D. Ill.).

When the proceedings were begun, the debt secured by the deed of trust had matured and was in default, and the trustee, at the request of the beneficiary, had advertised the property for sale pursuant to the terms of the deed of trust and the provisions of the Virginia Code. The debtor's petition prayed, among other things, "that all proceedings against him by way of pending and advertised foreclosures of his farming lands, or by other methods contrary to the provisions" of the Act be stayed. The petition, "appearing to be in proper form and to have been filed in good faith," was referred to the Conciliation Commissioner as required by § 75. On July 27, 1935, the debtor made a proposal for composition; but it was not accepted by the mortgage creditor. On October 8, 1935, Wright filed an amended petition under subsection (s) of § 75 as amended by the new Frazier-Lemke Act; and asked to be adjudged a bankrupt and to have all the benefits of the provisions of said subsection (s) as so amended and approved August 28, 1935.

An order was entered adjudging Wright a bankrupt and again referring the matter to the Conciliation Commissioner. Thereafter, the Vinton Branch of the Mountain Trust Bank moved in the District Court that the proceedings before the Commissioner be terminated and "that this case be dismissed upon the ground that Subsection (s) of said Act is unconstitutional in that it deprives said creditor of its property without due process of law and that the debtor is not entitled to pursue the remedies and privileges granted therein." On January 8, 1936, that motion was granted; all proceedings on the bankrupt's petition were terminated; and his petition was dismissed. It is that order, affirmed by the Court of Appeals, which is here for review. Both of the lower courts held that, since the applicable rights of a mortgagee in Kentucky and of the beneficiary under a mortgage deed of trust in

Virginia are substantially the same, our decision in *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555, required that subsection (s) be held unconstitutional.

First. The mortgagee claims that the legislation is void on its face. It challenges the power of Congress to confer upon courts authority to grant to a mortgagor, under any circumstances, any of the relief provided for in subsection (s) of the new Frazier-Lemke Act. There has been no order granting a stay under Paragraph 2 of subsection (s). But the motion is not premature; for the fact that no stay order has been entered does not imply that an actual constitutional controversy is not presented. The petitioner asserts a right to pursue proceedings provided by a federal statute, and that right has been denied him on grounds of the alleged invalidity of the statute. Before the motion to dismiss was made, the district court had entered its order adjudging petitioner a bankrupt, and referring the matter to the conciliation commissioner for further proceedings under § 75 (s). The entry of the order of reference initiated proceedings designed to move, through the appointment of appraisers, the appraisal, and the referee's order recognizing the debtor's right to possession, to the grant of the stay by the court. Under the Act no further affirmative action by petitioner precedent to his obtaining the stay was necessary. The mortgagee was not obliged to delay his challenge to the validity of the stay and its essential incidents until these officials had complied with the mandatory provisions of the Act. But while we must decide whether the challenged subsection is constitutional, we refrain from deciding questions suggested which may arise later in the course of its administration.

Second. The decision in the *Radford* case did not question the power of Congress to offer to distressed farmers the aid of a means of rehabilitation under the bankruptcy clause. The original Frazier-Lemke Act was there held invalid solely on the ground that the bankruptcy power of

Congress, like its other great powers, is subject to the Fifth Amendment; and that, as applied to mortgages given before its enactment, the statute violated that Amendment, since it effected a substantial impairment of the mortgagee's security. The opinion enumerates five important substantive rights in specific property which had been taken. It was not held that the deprivation of any one of these rights would have rendered the Act invalid, but that the effect of the statute in its entirety was to deprive the mortgagee of his property without due process of law. The rights enumerated were (pp. 594–595):

"1. The right to retain the lien until the indebtedness thereby secured is paid.

"2. The right to realize upon the security by a judicial public sale.

"3. The right to determine when such sale shall be held, subject only to the discretion of the court.

"4. The right to protect its interest in the property by bidding at such sale whenever held, and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of the proceeds of a fair competitive sale or by taking the property itself.

"5. The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt."

In drafting the new Frazier-Lemke Act, its framers sought to preserve to the mortgagee all of these rights so far as essential to the enjoyment of his security. The measure received careful consideration before the committees of the House and the Senate. Amendments were made there with a view to ensuring the constitutionality of the legislation recommended. The Congress concluded, after full discussion, that the bill, as enacted, was free from the objectionable features which had been held fatal to the original Act.

Third. It is not denied that the new Act adequately preserves three of the five above enumerated rights of a mortgagee. "The right to retain the lien until the indebtedness thereby secured is paid" is specifically covered by the provisions in Paragraph 1, that the debtor's possession, "under the supervision and control of the court," shall be "subject to all existing mortgages, liens, pledges, or encumbrances," and that:

"All such existing mortgages, liens, pledges, or encumbrances shall remain in full force and effect, and the property covered by such mortgages, liens, pledges, or encumbrances shall be subject to the payment of the claims of the secured creditors, as their interests may appear." [2]

"The right to realize upon the security by a judicial public sale" is covered by the provision in Paragraph 3 that at the termination of the stay:

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[2] Amendments to the bill subsequent to its introduction plainly demonstrate careful intention to leave the lien wholly unimpaired. As introduced, the measure provided for retention of the lien 'up to the actual value of such property, as fixed by the appraisals provided for in this section,' S. 3002, § 6, p. 6 (Compare Act of June 28, 1934, c. 869, Subsec. (s), (2), 48 Stat. 1290); and there was no provision for a public sale at the request of the secured creditor. As reported out of the Senate Committee on the Judiciary, and as subsequently enacted, the measure provided for retention of the lien unqualified by reference to the appraisal value of the property. See S. 3002, as reported, § 6, p. 6; Sen. Rep. No. 985, 74th Cong., 1st Sess., p. 3. As reported by the committee, the bill provided for a public sale in the discretion of the court, upon request of the secured creditor, and limited the lienholder's bid at such sale to 'the appraised value or the original principal, whichever is the higher.' S. 3002, *supra*, § 6, p. 9; Sen. Rep. No. 985, *supra*, pp. 4, 6. Since the latter qualification was thought to raise some constitutional doubt, it was eliminated during the Senate's consideration of the measure. See statements of Senators Ashurst and Borah, of the Committee on the Judiciary, and of Senator Frazier, 79 Cong. Rec. 13413, 13633, 13634, 13641. The House Committee on the Judiciary reported the bill with this change. H. R. Rep. No. 1808, 74th Cong., 1st Sess., pp. 1, 4, 6.

". . . upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction." [3]

The new Act does not in terms provide for "The right to protect its [the mortgagee's] interest in the property by bidding at such sale whenever held . . ." But the committee reports and the explanations given in Congress make it plain that the mortgagee was intended to have this right.[4] We accept this view of the statute.

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[3] As introduced, S. 3002 contained the provision of the Act by which the mortgagor might purchase at the appraised value, subject to the mortgagee's right to require a re-appraisal; but it did not provide that the mortgagee might, in lieu of a re-appraisal, have a public sale. The bill as reported by the Senate Committee on the Judiciary inserted after the provision for appraisal a clause providing, "That upon request in writing by any secured creditor or creditors, the court, in its discretion, if it deems it for the best interests of the secured creditors and debtor, may order the property upon which such secured creditors have a lien, to be sold at public auction; . . ." S. 3002, as reported, § 6, p. 9; see Sen. Rep. No. 985, 74th Cong., 1st Sess., p. 4. "To remove a question as to the constitutionality of the bill," this provision was altered in the course of the bill's passage through the House to deprive the court of discretion in the matter and to give the secured creditor an unqualified right to a public sale as the alternative to a transfer of the property to the debtor at the re-appraised value. See remarks of Representative Sumners, of the House Committee on the Judiciary, 79 Cong. Rec. 14332–33.

[4] As reported by the Senate Committee on the Judiciary, S. 3002, § 6, p. 9, recognized a right in the mortgagee to bid at the sale not in excess "of the appraised value or the original principal, whichever is the higher." See Sen. Rep. No. 985, 74th Cong., 1st Sess., pp. 4, 6. In striking out this qualification for the express purpose of avoiding a constitutional doubt, Senators responsible for the measure plainly showed that they had no intention of raising a further constitutional controversy by questioning the mortgagee's unqualified right to bid. See statements of Senators Ashurst, Borah, and Frazier, 79 Cong. Rec. 13413, 13633, 13634, 13641–42. H. R. Rep. No. 1808, 74th Cong., 1st Sess., pp. 1, 5–6, unequivocally declared that under the Act

Fourth. The claim that sub-section (s) is unconstitutional rests mainly upon the contention that the Act denies to a mortgagee the "right to determine when such sale shall be held, subject only to the discretion of the court." The assertion is that the new Act in effect gives to the mortgagor the absolute right to a three-year stay; and that a three-year moratorium cannot be justified. The three-year stay is specified in the following provisions:

"When the conditions set forth in this section [§ 75] have been complied with, the court shall stay all judicial or official proceedings in any court, or under the direction of any official, against the debtor or any of his property, for a period of three years." (Par. 2.)

"At the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property of which he retains possession, including the amount of encumbrances on his exemptions, up to the amount of the appraisal, less the amount paid on principal." (Par. 3.)[5]

Whether, in view of the emergency, an absolute stay of three years would have been justified under the bankruptcy power, we have no occasion to decide. There are

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the secured creditors have the right to bid at the sale; and this was made clear on the floor of the House by Representative Sumners, of the Committee on the Judiciary. See 79 Cong. Rec. 14333.

The beneficiary under a mortgage deed of trust in Virginia is permitted to bid in the property at the sale. See, *e. g., Ashworth* v. *Tramwell,* 102 Va. 852, 858, 47 S. E. 1011; *Title Insurance Co.* v. *Industrial Bank,* 156 Va. 322, 327, 157 S. E. 710; *Everette* v. *Woodward,* 162 Va. 419, 174 S. E. 864. Compare *Easton* v. *German-American Bank,* 127 U. S. 532, 538.

[5] This clause is qualified by alternative provisos, one for payment at a reappraised value, the other for a public sale to be held upon the mortgagee's request at the time when the stay expires, whether by lapse of time or by the mortgagor's payment into court of the appraised or reappraised value. See Note 3, *supra.*

other provisions in the statute affecting the mortgagor's right to possession. Their phraseology is lacking in clarity. But we are of opinion that, while the Act affords the debtor, ordinarily, a three-year period of rehabilitation, the stay provided for is not an absolute one; and that the court may terminate the stay and order a sale earlier. If we were in doubt as to the intention of Congress, we should still be led to that construction by a well settled rule: "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.

The mortgagor's right to retain possession during the stay is specifically limited by paragraph 3, which provides:

"If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this Act."

Thus, for example, the debtor's tenure under the stay is subject to the requirement that he pay "a reasonable rental semiannually for that part of the property of which he retains possession." Under the last-quoted provision of Paragraph 3, if the debtor defaults in this obligation "at any time," the court may thereupon order the property sold. Likewise, the property while in the debtor's possesssion is kept, according to Paragraph 2, at all times "in the custody and under the supervision and control of the court"; and, also under Paragraph 2:

"The court, in its discretion, if it deems it necessary to protect the creditors from loss by the estate, and/or to

conserve the security, . . . may, in addition to the rental, require payments on the principal due and owing by the debtor to the secured or unsecured creditors, as their interests may appear, in accordance with the provisions of this Act, and may require such payments to be made quarterly, semiannually, or annually, not inconsistent with the protection of the rights of the creditors and the debtor's ability to pay, with a view to his financial rehabilitation."

Paragraph 3 authorizes the court to have the property sold if "at any time" the debtor should fail to comply with orders of the court issued under its power to require interim payments on principal, or otherwise in the course of its "supervision and control" of his possession. Paragraph 3 also provides that "if . . . the debtor at any time . . . is unable to refinance himself within three years," the court may close the proceedings by selling the property. This clause must be interpreted as meaning that the court may terminate the stay if after a reasonable time it becomes evident that there is no reasonable hope that the debtor can rehabilitate himself within the three-year period.[6] Finally, the intention of Congress to make the

[6] This construction is in harmony with the requirement of good faith in the initiation of proceedings under § 75. Relief under § 75 (s) may be obtained only by one who has made a bona fide attempt, and has failed, to effect a composition under § 75, (a)-(r). The offer of composition must be in good faith, [§ 75, (c), (i), 47 Stat. 1471, 1472], and if the debtor is beyond all reasonable hope of financial rehabilitation, and the proceedings under § 75 cannot be expected to have any effect beyond postponing inevitable liquidation, the proceedings will be halted at the outset. The practical administration of § 75 in the lower courts already affords ample evidence of the substantial protection afforded the creditor by this requirement of good faith in the initiation of proceedings under subsections (a)-(r). See *In re Borgelt,* 79 F. (2d) 929; *Dallas Joint Stock Land Bank* v. *Davis,* 83 *id.* 322, 323; *Stevenson* v. *Clark,* 86 *id.* 330;

stay terminable by the court within the three years is shown also by Paragraph 6, which declares the act an emergency measure, and provides that:

"if in the judgment of the court such emergency ceases to exist in its locality, then the court, in its discretion, may shorten the stay of proceedings herein provided for and proceed to liquidate the estate." [7]

Since the language of the Act is not free from doubt in the particulars mentioned, we are justified in seeking enlightenment from reports of Congressional committees and explanations given on the floor of the Senate and House by those in charge of the measure.[8] When the leg-

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Knotts v. *First Carolinas Joint Stock Land Bank, id.* 551; *In re Reichert,* 13 F. Supp. 1, 4, 5; *In re Paul, id.,* 645, 647; *In re Buxton's Estate,* 14 *id.* 616; *In re Vater, id.,* 631; *In re Schaeffer, id.,* 807; *In re Duvall, id.,* 799; *In re Byrd,* 15 *id.* 453; *In re Wylie,* 16 *id.* 193, 194; *In re Price, id.,* 836, 837. Compare *In re Chilton,* 16 F. Supp. 14, 17; *In re Davis, id.,* 960. It must be assumed that the situation of the present debtor was not beyond all reasonable hope of rehabilitation, else he could not have qualified to file his petition at the outset. Compare *Tennessee Publishing Co.* v. *American National Bank,* 299 U. S. 18, 22.

[7] This provision is not inconsistent with the constitutional requirement that laws established by Congress on the subject of bankruptcies shall be uniform throughout the United States. Art. 1, § 8, cl. 4. The problem dealt with may present significant variations in different parts of the country. By Paragraph 6 the Bankruptcy Act adjusts its operation to these variations, as under other provisions it has adjusted its operation to the differing laws of the several States affecting dower, exemptions, and other property rights. Compare *Hanover National Bank* v. *Moyses,* 186 U. S. 181, 189; *Stellwagen* v. *Clum,* 245 U. S. 605, 613. The authority granted by Paragraph 6 does not exceed limits of authority familiarly exercised by courts. See *Standard Oil Co.* v. *United States,* 221 U. S. 1, 69; compare *Chastleton Corp.* v. *Sinclair,* 264 U. S. 543.

[8] Where the meaning of legislation is doubtful or obscure, resort may be had in its interpretation to reports of Congressional committees which have considered the measure, (*McLean* v. *United*

islative history of the bill is thus surveyed, it becomes clear that to construe the Act otherwise than as giving the courts broad power to curtail the stay for the protection of the mortgagee would be inconsistent not only with provisions of the Act, but with the committee reports and with the exposition of the bill made in both Houses by its authors and those in charge of the bill and accepted by the Congress without dissent.[9] We construe it as giving the courts such power.

States, 226 U. S. 374, 380; *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, 435); to exposition of the bill on the floor of Congress by those in charge of or sponsoring the legislation, (*Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443, 475; *Richbourg Motor Co.* v. *United States,* 281 U. S. 528, 536); to comparison of successive drafts or amendments of the measure, (*United States* v. *Pfitsch,* 256 U. S. 547, 551; *United States* v. *Great Northern Ry. Co.,* 287 U. S. 144, 155); and to the debates in general in order to show common agreement on purpose as distinguished from interpretation of particular phraseology, (*Federal Trade Comm'n* v. *Raladam Co.,* 283 U. S. 643, 650; *Humphrey's Executor* v. *United States,* 295 U. S. 602, 625).

[9] Emphasis upon the deliberate intention to meet the constitutional objections raised in *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555, dominated the consideration of the bill in all stages. See *e. g.,* Sen. Rep. No. 985, 74th Cong., 1st Sess., pp. 1, 3; H. R. Rep. No. 1808, *id.,* pp. 1, 3; statements of Senator McCarran, 79 Cong. Rec. 11971; Senator Ashurst, *ibid.;* Senator Borah, *id.,* 13411, 13632, 13642; Representative Lemke, *id.,* 14331, 14332; and Representative Sumners, *id.,* 14333. There was no dissent on constitutional grounds apart from the doubts which were disposed of as described in notes 2, 3, and 4, *supra.* Comparing the present measure with the former § 75 (s), Sen. Rep. No. 985, 74th Cong., 1st Sess., p. 5, pointed out that "the amended subsection (s) shortens the time of the stay of proceedings from 5 to 3 years, and . . . gives the court power to shorten that stay. It gives the court complete jurisdiction and custody of the property, with authority to fix the rental annually, and to sell perishable property and personal property that is not necessary for the debtor's farming operations. It will also be noticed that the court can require payments over and above the rental value. In other words, in the amended subsection (s),

Fifth. It is urged that subsection (s) is unconstitutional because there is taken from the mortgagee "the right to control meanwhile the property during the period of default, subject only to the discretion of the court,

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the property is virtually in the complete custody and control of the court, for all purposes of liquidation. . . ." Likewise, it was said in H. R. Rep. No. 1808, 74th Cong., 1st Sess., p. 5, that "The new subsection (s) shortens the time of the stay of proceedings from 5 to 3 years, and in addition gives the court power to shorten that period. . . . Under the new subsection (s) the property of the bankrupt is in the complete custody and control of the court, for all the purposes of liquidation." And at p. 6: "The Supreme Court intimated that in the original subsection, the district court did not have sufficient discretion. In this subsection, the district court is given complete control and discretion."

Discussion of the bill in the Senate is reported in 79 Cong. Rec. 11970–71, 13348–49, 13411–13, 13632–45.

In the Senate discussion there occurred the following (79 Cong. Rec. 13633):

"Mr. BORAH. The court is given power in the bill to make sale of the property whenever the court deems it in the interest of all parties to do so.

"Mr. HASTINGS. During the 3 years?

"Mr. BORAH. Yes. In the case of perishable property, or property which is not bringing in any income, or anything of that kind, the court has power to make sale of it.

. . . . . .

"Mr. FRAZIER. The bill gives the court authority to sell the property, if it deems it advisable, at any time. The court may sell any part of it or all of it at any time before or during or after the 3 years."

Discussion of the bill in the House is reported in 79 Cong. Rec. 13831, 14331–34. Presenting the bill, as reported from committee, Representative Lloyd explained: "We have in no way reduced the security of the mortgagee. We have left his security intact, but we have made it possible for the bankruptcy court to retain jurisdiction for a period not to exceed 3 years." 79 Cong. Rec. 13831.

There also occurred in the House the following (79 Cong. Rec. 14332):

"Mr. FORD of California. Is it not designed to give to the farmer a breathing spell so that he may orient himself in such a way as to

and to have the rents and profits collected by a receiver for the satisfaction of the debt."

(a) The argument is that possession by the mortgagor during the stay is necessarily less favorable to the mortgagee than possession by a receiver or trustee would be. This is not true. The mortgagor is in default, but it is not therefore to be assumed that he is a wrongdoer, or incompetent to conduct farming operations. The legislation is designed to aid victims of the general economic depression. The mortgagor is familiar with the property, and presumably vitally interested in preserving ownership thereof and ready to exert himself to the uttermost to that end. It is not unreasonable to assume that, under these circumstances, the interests of all concerned will be better served by leaving him in possession than by installing a disinterested receiver or trustee. For the mortgagor holds possession charged with obligations imposed for the benefit of the mortgagee as fully as if the property were in the possession of a receiver or trustee, and there is probably a saving of expense. In order to protect the creditor's interests, the possession is at all times subject to the supervision and control of the court; and, if the debtor, "at any time," fails to comply with orders of the

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get out of his present difficulties without in the least jeopardizing the lien of his creditors?

"Mr. LEMKE. Absolutely, and the district judge has complete control all the time of the farmer's property.

. . . . .

"Mr. ANDRESEN. All it does is to give a 3-year extension for the time of the redemption if the court so directs.

"Mr. LEMKE. Under the supervision and control of the court."

Despite some apparent similarity of language, the remarks quoted from the discussion in the Senate do not seem to have been addressed to the second proviso of paragraph 3 as it then stood, but to have been intended more generally, expressing the plan embodied in the last sentence of paragraph 3. See S. 3002, as reported from committee, § 6, p. 9.

court issued in the exercise of its supervisory power to protect the mortgagee against waste or other abuse of his possession by the mortgagor, the court may order the property sold. The farmer's proceeding in bankruptcy for rehabilitation, resembles that of a corporation for reorganization. As to the latter it is expressly provided that the debtor may, to some extent, be left in possession, U. S. Code, Title 11, § 207 (c); and it is common practice to appoint as receivers one of the officials of the corporation.

(b) It is complained that the mortgagor is not required to pay the first instalment of rent until the end of one year. The phraseology of the applicable provision is not clear. Paragraph 2 provides:

"During such three years the debtor shall be permitted to retain possession of all or any part of his property, in the custody and under the supervision and control of the court, provided he pays a reasonable rental semiannually for that part of the property of which he retains possession. The first payment of such rental shall be made within one year of the date of the order staying proceedings, the amount and kind of such rental to be the usual customary rental in the community where the property is located, based upon the rental value, net income, and earning capacity of the property."

The clause providing that "the first payment of such rental shall be made within one year" is obviously capable of either of two constructions. One, that the mortgagor may not be required by the court to pay before the close of the year. The other, that the court may not postpone the payment beyond one year. In view of the requirement of semi-annual rental, the latter seems to us more reasonable. We intimate no opinion as to the validity of this provision under the first construction. As here construed, the clause cannot be deemed arbitrary or unreasonable.

(c) The disposition of the rental required to be made is said to involve denial of the mortgagee's rights. Paragraph 2 provides:

"Such rental shall be paid into court, to be used, first, for payment of taxes and upkeep of the property, and the remainder to be distributed among the secured and unsecured creditors, and applied on their claims, as their interests may appear."

It is suggested that payment of taxes and keeping the property in repair takes the income from the mortgagee, and that the mortgagor alone may be benefited thereby; that if the mortgagor exercises the option to purchase the property at its appraised value, he will secure the property free of tax liens which otherwise might have accrued against it. But it must be assumed that the mortgagor will not get the property for less than its actual value. The Act provides that upon the creditor's request the property must be reappraised, or sold at public auction; and the mortgagee may by bidding at such sale fully protect his interest. Non-payment of taxes may imperil the title. Payments for upkeep are essential to the preservation of the property. These payments prescribed by the Act are in accordance with the common practice in foreclosure proceedings where the property is in the hands of receivers.[10]

Sixth. In support of the contention that the legislation is unconstitutional, it is pointed out that the delay in the enforcement of the mortgage under § 75 of the Bankruptcy Act as amended by sub-section (s) may exceed the term of three years; that months may be consumed in

[10] See *Shepherd* v. *Pepper*, 133 U. S. 626, 652; *Thompson* v. *Phenix Insurance Co.*, 136 U. S. 287, 293; *Cake* v. *Mohun*, 164 U. S. 311, 316; 1 Clark, Law and Practice of Receivers (2d ed. 1929) § 670; High, Law of Receivers (4th ed. 1910) § 643; 1 Wiltsie, Mortgage Foreclosure (4th ed. 1927) § 616. Compare *Atlantic Trust Co.* v. *Chapman*, 208 U. S. 360, 371.

the effort to obtain a composition or extension of the debtor's obligations with the consent of the creditors; that when a petition is filed praying for the relief outlined in subsection (s) a further period of months may be consumed in having the property appraised and putting the debtor in the position which he must occupy before the stay is granted; that "four months from the date that the referee approves the appraisal" is given within which "either party may file objections, exceptions, and take appeals" from the appraisal; and that upon a sale of the property under Paragraph 3:

"The debtor shall have ninety days to redeem any property sold at such sale, by paying the amount for which any such property was sold, together with 5 per centum per annum interest, into court . . ."

It is pointed out, also, that the mortgage here in question is in the form of a deed of trust.[11] It is claimed that the rights to enforce payment by sale of the mortgage property, conferred by the law of Virginia upon the creditor under such a deed, are more peremptory than those under the law of Kentucky discussed in the *Radford* case.[12] And it is urged that the limitations here placed upon the enforcement of the mortgage are not merely a modification of the remedy recognized as permissible. Compare *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 434.

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[11] See *Franklin Plant Farm* v. *Nash,* 118 Va. 98, 111, 86 S. E. 836, 840; *Dillard* v. *Serpell,* 138 Va. 694, 697, 123 S. E. 343; 3 Jones, Law of Mortgages (8th ed. rev. 1928) §§ 1742, 2276.

[12] See Code of Va., 1918 (Michie 1924) § 5167, as amended, Acts, 1926, c. 324, subsecs. (1)–(6), (13); *In re Sherman,* 12 F. Supp. 297, 298–299; compare *Hogan* v. *Duke,* 20 Gratt. 244, 256, 259; *Muller's Administrator* v. *Stone,* 84 Va. 834, 837, 6 S. E. 223; *Hudson* v. *Barham,* 101 Va. 63, 67, 68, 43 S. E. 189. See also *Ashworth* v. *Tramwell,* 102 Va. 852, 858, 47 S. E. 1011; *Peterson* v. *Haynes,* 145 Va. 653, 661, 134 S. E. 675; *Neff's Administrator* v. *Newman,* 150 Va. 203, 210, 142 S. E. 389.

But the question here involved is not one of state action under the police power alleged to violate the contract clause. The power here exerted by Congress is the broad power "To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." The question which the objections raise is not whether the Act does more than modify remedial rights. It is whether the legislation modifies the secured creditor's rights, remedial or substantive, to such an extent as to deny the due process of law guaranteed by the Fifth Amendment. A court of bankruptcy may affect the interests of lien holders in many ways. To carry out the purposes of the Bankruptcy Act, it may direct that all liens upon property forming part of a bankrupt's estate be marshalled; or that the property be sold free of encumbrances and the rights of all lien holders be transferred to the proceeds of the sale. *Van Huffel* v. *Harkelrode,* 284 U. S. 225, 227. Despite the peremptory terms of a pledge, it may enjoin sale of the collateral, if it finds that the sale would hinder or delay preparation or consummation of a plan of reorganization. *Continental Illinois National Bank & Trust Co.* v. *Chicago, R. I. & P. Ry. Co.,* 294 U. S. 648, 680–681. It may enjoin like action by a mortgagee which would defeat the purpose of subsection (s) to effect rehabilitation of the farmer mortgagor. For the reasons stated, we are of opinion that the provisions of subsection (s) make no unreasonable modification of the mortgagee's rights; and hence are valid.

Reversed.

Counsel for Parties.

ATCHISON, TOPEKA & SANTA FE RAILWAY CO. *v.* SCARLETT.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 505. Argued March 3, 1937.—Decided March 29, 1937.

1. A regulation prescribed by the Interstate Commerce Commission in pursuance of constitutional statutory authority, has the same force as though prescribed in terms by the statute. P. 474.
2. In an action under the Federal Safety Appliance Act against a railroad company to recover damages for personal injuries resulting from an alleged violation of the Act, the judgment of the trial court and jury cannot be substituted for that of the Interstate Commerce Commission on the question as to what constitutes compliance with its regulations. P. 474.
3. The Federal Safety Appliance Act provides that cars requiring "secure" ladders shall be so equipped. An order of the Interstate Commerce Commission, issued pursuant to the Act, requires such ladders to have a minimum clearance of treads of "two, preferably two and one-half inches." *Held:*

   (1) A side ladder of a freight car complied with the Act, though between it and the side of the car was a diagonal brace rod, which the ladder cleared by two and three-quarter inches. P. 474.

   (2) The brace rod was not a part of the ladder. P. 474.

   (3) Long-continued use of brace rods of the type here involved, in the same relation to the ladder, without change of its order by the Interstate Commerce Commission, is persuasive that the Act and the order were not violated. P. 474.

   (4) The right of recovery, if any, in this case must be governed not by the Safety Appliance Act but by the common law rule of negligence. P. 475.

7 Cal. (2d) 181; 60 P. (2d) 462, reversed.

CERTIORARI, 299 U. S. 537, to review a judgment affirming a judgment against the railroad company in an action under the Federal Safety Appliance Act.

Messrs. H. K. Lockwood and *Robert Brennan,* with whom *Mr. Charles H. Woods* was on the brief, for petitioner.

Mr. Louis E. Goodman, with whom *Mr. Herman A. Bachrack* was on the brief, for respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is an action under the Federal Safety Appliance Act (Act of April 14, 1910, c. 160, §§ 2 and 3, 36 Stat. 298*), brought by Scarlett against the railway company to recover damages for a personal injury resulting from an alleged violation of the act. It also was generally alleged that the injury was due to the negligence of the railway company. Scarlett was employed as a brakeman. While descending from a box car by means of a ladder attached to the side of the car, his foot slipped on a round brace rod, also attached to the side of the car immediately behind the ladder, and he fell to the ground, thereby sustaining the injury for which damages were sought.

The ladder itself was not defective. In its structure it complied with the regulations of the Interstate Commerce Commission made in pursuance of the act. "United States Safety-appliance Standards"—order of March 13, 1911. It is unnecessary to set forth these regulations. The only one important here prescribes—"Minimum clearance of treads, [shall be] two (2), preferably two-

*Section 2, so far as pertinent, provides that ". . . all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders: . . ."

Section 3 requires the Interstate Commerce Commission, within a time fixed, to designate the number, dimensions, location and manner of application of the appliances provided for in the foregoing section. And these designations were to "remain as the standards of equipment to be used on all cars subject to the provisions of this Act, unless changed by an order of said Interstate Commerce Commission . . ."

and-one-half (2½), inches." The round brace rods with which the car was equipped extended outward from the wall of the car a distance of more than an inch. These brace rods operated to strengthen the walls of the car. That was their only purpose; and there is no doubt as to their necessity for that purpose. The brace rod in question ran down the side of the car at an angle of about 45°. The ladder overlay the brace rod, and cleared its outermost surface by more than the prescribed 2½ inches.

Scarlett's contention is that the brace rod is a part of the ladder, and by reason of its slant and rounded shape made the descent of the ladder insecure. At the trial, he abandoned his claim based upon negligence, and put his case wholly on the ground that the round diagonal brace rod and the ladder combined to constitute an unsafe appliance within the meaning of the act, and that, in consequence, the liability of the railway company was absolute. The case was submitted to the jury by the trial court upon that theory, and a verdict and judgment against the company resulted. That judgment the court below affirmed on appeal. 7 Cal. (2d) 181; 60 P. (2d) 462.

The record shows that brace rods, generally flat in shape, are in practically universal use on box cars. The company here formerly used a flat rod; but finding that such a rod frequently buckled, sometimes immediately under the ladder, it was abandoned and the stronger and less elastic round type was adopted in its place. This was in 1924; and the proof shows that for many years cars so equipped have been in general and constant operation on its lines. The general foreman of the company, having charge of all the car repairs at one of the principal shops, and who inspected a thousand cars each month, testified that he had never heard of an accident attributable or claimed to be attributable to the round brace rod, except

in the present case. The record shows nothing to the contrary.

In the light of the long-continued use of brace rods of the type here in question in the same relation to the ladder as is the case here, we may fairly presume that the Interstate Commerce Commission in the performance of its duties was aware of the situation, and knowingly permitted its rule in respect of the ladder clearance to remain without change. Compare *Pennell* v. *Philadelphia & Reading Ry.*, 231 U. S. 675, 680. The regulation having been made by the commission in pursuance of constitutional statutory authority, it has the same force as though prescribed in terms by the statute. And the railway company having strictly complied with the regulation has discharged its full duty so far as the ladder requirement of the Safety Appliance Act is concerned. The judgment of the trial court and jury cannot be substituted for that of the commission. See *Kansas City So. Ry.* v. *United States,* 231 U. S. 423, 456–457; *Napier* v. *Atlantic Coast Line,* 272 U. S. 605, 611–612; *Mahutga* v. *Minneapolis, St. P. & S. S. M. Ry. Co.,* 182 Minn. 362, 366; 234 N. W. 474; *Auschwitz* v. *Wabash Ry. Co.,* 346 Ill. 190, 204; 178 N. E. 403; *Ford* v. *New York, N. H. & H. R. Co.,* 54 F. (2d) 342, 343.

In *Illinois Central R. Co.* v. *Williams,* 242 U. S. 462, 466, we held that § 2 of the act requiring secure ladders, etc., was operative pending action by the Interstate Commerce Commission under § 3. In the interim, we said, § 2 had the effect of prescribing an absolute and imperative duty, of making the ladders and other appliances "secure"; but that § 3 contemplated that these appliances "shall ultimately conform to a standard to be prescribed by the Interstate Commerce Commission, that is, that they shall be standardized . . ."

We do not see how it reasonably can be said that the brace rod constitutes a part of the ladder. In itself, it

was a contrivance separate and distinct from the ladder, designed and used for a purpose entirely apart from the use of that appliance. The right of recovery, if any, must, therefore, rest upon the effect of the near proximity of the ladder to the rod, neither being in itself defective. The law to be applied to that situation is the common-law rule of negligence, and not the inflexible rule of the Safety Appliance Act; and the questions to be answered are whether the two appliances were maintained in such relation to one another as to constitute negligence on the part of the company and, if so, whether Scarlett assumed the risk. *Ford* v. *New York, N. H. & H. R. Co., supra; Chicago, R. I. & P. Ry. Co.* v. *Benson,* 352 Ill. 195, 199; 185 N. E. 244; *Slater* v. *Chicago, St. P., M. & O. Ry. Co.,* 146 Minn. 390, 392–393; 178 N. W. 813. In that view, Scarlett in abandoning his claim under the common-law rule of negligence abandoned the only possible ground of recovery.

Judgment reversed, and cause remanded for further proceedings not inconsistent with this opinion.

AMERICAN PROPELLER & MANUFACTURING CO. *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 605. Argued March 12, 1937.—Decided March 29, 1937.

1. In a suit in the Court of Claims, a recovery by the United States on a counterclaim, which is clearly unjust and inequitable to the claimant, should not be allowed unless under plain compulsion of law. P. 478.
2. Interest upon the Government's counterclaim for taxes, under the circumstances of this case, should not have been allowed. P. 478.

. In 1924, the Government was indebted to a claimant in the sum of $119,413.04, against which there was at the same time a just counterclaim of $82,701.29. The inequity of allowing the Govern-

ment interest for 12 years thereafter, so as to bring the claimant in debt to the Government in the sum of over $21,000, is so gross as to be shocking.

3. The opinion of the Court of Claims may be referred to in order to clarify the meaning of a finding which otherwise would be in doubt. P. 479.

4. It is unnecessary to remand a case to the Court of Claims for the purpose of clarifying a finding as to whether there was compliance with § 250 (e) of the Revenue Act of 1918, making "notice and demand by the collector" prerequisite to the allowance of interest on unpaid taxes, where the finding, the pleadings, and the opinion of the court, taken together, clearly show that the section was not complied with. P. 480.

5. Nor ought the case to be remanded on the mere chance that the Government may be able to furnish evidence which it failed to furnish in a decade of litigation, and especially in respect of a claim which at the bar the Government frankly conceded to be inequitable. P. 480.

83 Ct. Cls. 100; 14 F. Supp. 168, reversed.

CERTIORARI, *post*, p. 648, to review a judgment against the claimant in a suit against the United States upon certain contracts, wherein the Government asserted a counterclaim for taxes.

Messrs. J. Kemp Bartlett and *Edgar Allan Poe*, with whom *Messrs. Paul F. Myers* and *John R. Yates* were on the brief, for petitioner.

Mr. J. Louis Monarch, with whom *Solicitor General Reed*, *Assistant Attorney General Morris*, and *Mr. Sewall Key* were on the brief, for the United States.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is a proceeding brought in the Court of Claims by petitioner to recover a balance of $144,238.03 alleged to be due from the government under certain designated contracts. The government filed a general traverse, and

a counterclaim for a deficiency income and excess-profits tax assessment in the sum of $191,403.77. The taxes were for the year 1918, and were assessed on the 14th day of June, 1924. The court below found that the government was indebted to petitioner upon the contracts in the sum of $119,413.04. Upon the counterclaim the court found that the tax liability of petitioner was $82,701.29. Upon this latter sum, it allowed interest, at the rate of 6% per annum from the date of assessment, in the sum of $58,607.64, bringing the total allowance upon the counterclaim to the sum of $141,308.93. Judgment was given against petitioner for the difference between that sum and the sum due under the contracts, namely $21,895.89. The opinion of the court will be found in 14 F. Supp. 168; and a supplemental opinion in the form of a memorandum was filed on October 5, 1936. [17 F. Supp. 215.] We granted certiorari, limited to the question of the allowance of interest to the government upon its counterclaim.

In the argument here, both parties proceed upon the theory that interest was allowed under the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1083, § 250 (e).[1] The government contended below that under that section it was entitled to interest at the rate of 1 per centum per month instead of 6 per centum per annum. It abandons that

[1] Sec. 250. (e) If any tax remains unpaid after the date when it is due, and for ten days after notice and demand by the collector, then, except in the case of estates of insane, deceased, or insolvent persons, there shall be added as part of the tax the sum of 5 per centum on the amount due but unpaid, plus interest at the rate of 1 per centum per month upon such amount from the time it became due: *Provided,* That as to any such amount which is the subject of a bona fide claim for abatement such sum of 5 per centum shall not be added and the interest from the time the amount was due until the claim is decided shall be at the rate of ½ of 1 per centum per month. . . .

contention here, but insists that it is entitled to at least the interest allowed by the court below.

It will be seen that under the findings, the government was indebted in 1924 to petitioner in the sum of $119,413.04, against which there was at the same time a just counterclaim of $82,701.29; so that if the account had been adjusted at that time instead of 12 years later, the government would have been obliged to pay petitioner the difference between these two sums, or $36,711.75. The inequity of allowing the government interest for 12 years under these circumstances, so as to bring the petitioner in debt to the government in the sum of over $21,000, is so gross as to be shocking.

We have said (*United States* v. *The Thekla,* 266 U. S. 328, 339–340, 341)—"When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter. The absence of legal liability in a case where but for its sovereignty it would be liable does not destroy the justice of the claim against it . . . the reasons are strong for not obstructing the application of natural justice against the government by technical formulas when justice can be done without endangering any public interest." If the principle thus stated is not strictly applicable, it at least suggests that the court should not affirm what is clearly an unjust and inequitable result unless under plain compulsion of law.

Section 250 (e), *supra,* provides for the allowance of interest where the tax remains unpaid after the date when it is due and "for ten days after notice and demand by the collector." The court below found that on June 14, 1924, the commissioner made the assessment "and duly notified plaintiff with regard thereto." It made no other finding in respect of that matter. The government contends that the finding which was made means that

the commissioner set in motion the normal administrative machinery which resulted in a notice demanding payment, and relies upon the presumption of official regularity as being sufficient to make this finding the equivalent of a finding of notice and demand by the collector. *Pacific States Co.* v. *White*, 296 U. S. 176, 186.

But we are dealing here not with a presumption, but with a specific finding; and that finding should be examined in the light of the pleadings. *Luckenbach S. S. Co.* v. *United States*, 272 U. S. 533, 539. The amended counterclaim of the government, filed in 1927, among other things, alleges that "the Commissioner of Internal Revenue made an additional assessment" of which the plaintiff [petitioner] was duly notified. The collector is not mentioned and no demand is alleged. Considering the finding in connection with the allegation, the former fairly may be construed as comprehending all that was done in attempted compliance with the condition imposed by § 250 (e) as a prerequisite to the allowance of interest. But this is not all that appears.

In the memorandum supplementing the original opinion, the court below said: "The record fails to show that any demand was made and we can not presume that it was. On the contrary, in view of the fact that plaintiff at the time was claiming that the defendant was indebted to it in a sum larger than the amount of the tax, it is more probable that no such demand was made." While it is true that this court is not at liberty to refer to the opinion for the purpose of eking out, controlling or modifying the scope of the findings,[2] the rule is not absolute and does not preclude reference to the opinion for all purposes whatsoever. It is well established that in case

[2] *Stone* v. *United States*, 164 U. S. 380, 383; *United States* v. *Wells*, 283 U. S. 102, 120; *Crocker* v. *United States*, 240 U. S. 74, 78; *United States* v. *Esnault-Pelterie*, 299 U. S. 201, 206.

of ambiguity, extrinsic aid may be sought in order to settle the meaning of a statute or a contract. We see no reason why the principle of that rule does not permit reference to the opinion of the court in order to clarify the meaning of a finding otherwise in doubt. The government suggests that in such case the proper course is to remand the case to the Court of Claims in order that that court may supplement and clarify the finding and, if necessary, take additional evidence to that end. Of course, that sometimes has been done; but where, as here, the finding, the pleadings and the opinion of the court, taken together, clearly show that § 250 (e) in the particular under consideration was not complied with, it is unnecessary to follow that procedure.

This proceeding was originally brought in 1922. The deficiency assessment was made while the case was pending. The counterclaim of the government was first filed in 1926, and an amended counterclaim in 1927. Under these circumstances we see no reason for remanding the case upon the mere chance that the government may be able to furnish evidence which it has failed to furnish during more than a decade of litigation, and especially in respect of a claim which at the bar the government frankly conceded to be inequitable.

The judgment should be reversed with directions to enter judgment for petitioner, without an allowance of interest upon the counterclaim, in accordance with the foregoing opinion.

Reversed.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* TEX-PENN OIL CO.*

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

No. 207. Argued December 14, 1936. Reargued February 1, 2, 1937.—Decided March 29, 1937.

1. Findings of circumstantial facts by the Board of Tax Appeals must be taken as established if supported by substantial evidence. P. 490.
2. An "ultimate finding" by the Board of Tax Appeals, which is really a conclusion of law, or a determination of mixed law and fact, based on the Board's findings of primary, evidentiary or circumstantial facts, is subject to judicial review, and, on such review, the court may substitute its judgment for that of the Board. P. 491.
3. In pursuance of a plan of reorganization, the assets of an oil company, and undivided interests in oil leases owned by individuals, were conveyed to a new company, which delivered part of its shares and a sum of cash to the old company (later dissolved) and paid cash to the individuals. The Board of Tax Appeals, after finding the evidential facts, made an "ultimate finding" that the consideration moving to the old company from the new one included the cash delivered to the former as well as the shares, and upon that ground refused to apply the non-recognition of gains provision (Rev. Act, 1918, § 202 (b); Treas. Reg. 45, Art. 1567), and allowed deficiency assessments. *Held:*

   (1) The validity of the "ultimate finding" is to be tested by what in fact was done rather than by the mere form of words used in the writings employed. P. 493.

   (2) The Board's findings of what was actually done show that the money advanced to the old company was no part of the consideration for its assets but was part of the consideration for the individually owned lease interests, and was so advanced, by direction of the individuals, to pay the old company's debts,

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* Together with No. 208, *Helvering, Commissioner,* v. *Benedum;* and No. 209, *Helvering, Commissioner,* v. *Parriott.* Certiorari to the Circuit Court of Appeals for the Third Circuit.

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in order that its assets might be conveyed free and clear, as required by the plan, and was so applied except a portion which was returned to the individuals *pro rata*. P. 491.

4. Another "ultimate finding" of the Board, that the cash received by three of the individuals from the new company was consideration for both their stock in the old company and their interests in the leases, is clearly negatived by the circumstantial facts found by the Board, showing that this stock was assigned to the other two individuals before the assignment of the lease interests was made. The fact that the assignment of stock was to be returned if payment for the assignors' lease interests was not made before a certain date, did not make the two sales a single or indivisible transaction. P. 495.
5. A construction of Rev. Act, 1918, § 202 (b), and T. R. 45, Art. 1567, contrary to previous construction and decision, never mentioned or considered in the proceedings under review, but advanced by the Commissioner of Internal Revenue for the first time in this Court after certiorari had been granted, will not be considered here. P. 497.
6. Taxpayers are entitled to know the basis of law and fact on which the Commissioner seeks to sustain deficiency assessments. P. 498.
7. Where shares of stock exchanged by a corporation for the assets of another corporation were highly speculative and were subject to a restrictive agreement preventing their sale and did not have a fair market value, capable of being ascertained with reasonable certainty, when they were acquired by the taxpayers, *held* that their ownership did not lay the basis for a computation of gain at the time they were received, or for a tax as of that date under Rev. Act, 1918, § 202 (b); T. R. 45, Art. 1563. P. 499.

83 F. (2d) 518, affirmed.

CERTIORARI, 299 U. S. 529, 530, to review a judgment overruling an order of the Board of Tax Appeals, 28 B. T. A. 917, redetermining deficiency tax assessments.

Mr. Thurman Arnold, with whom *Solicitor General Reed, Assistant Attorney General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *A. F. Prescott* were on the brief, for petitioner.

Mr. John W. Davis, with whom *Messrs. Montgomery B. Angell, Weston Vernon, Jr., J. C. Adams, Harry Fried-*

man, John S. Weller, John O. Wicks, and *David D. Johnson* were on the brief, for respondents.

MR. JUSTICE BUTLER delivered the opinion of the Court.

In each of these cases there is involved an item claimed by petitioner to be taxable income of respondent for 1919. In 1925 the commissioner gave notice of deficiencies. These claims were based on a transaction in 1919 which included transfer by Tex-Penn Oil Company of all its assets to Transcontinental Oil Company, the issue and delivery by the latter of 1,007,834 shares to Benedum and Parriott, the stockholders of Tex-Penn, and the dissolution of that company. The commissioner claims that the consideration for the transfer included not only the stock but also $350,000 in cash paid by Transcontinental to Tex-Penn. Respondents petitioned the Board of Tax Appeals for redeterminations. The cases were consolidated for hearing; the board made findings of circumstantial facts on the basis of which it concluded in an "ultimate finding" that the consideration for the transfer by Tex-Penn to Transcontinental included cash, and that therefore the transaction was not one in which, under Revenue Act of 1918, § 202 (b), 40 Stat. 1060, "no gain or loss shall be deemed to occur." It redetermined deficiencies of $2,871,085, $1,925,466, and $908,470, respectively. 28 B. T. A. 917. Respondents petitioned the Circuit Court of Appeals for review. It reversed the orders with directions that the board enter judgments of no deficiencies. 83 F. (2d) 518.

1. The first ultimate finding is (p. 950): "The consideration received by Tex-Penn on or about August 1, 1919, in exchange for its assets consisted of $350,000 in cash and 1,007,834 shares of Transcontinental stock of no par value."

The first question for decision is whether that conclusion is supported by evidence. If well grounded, the transaction is not within the non-recognition of gain pro-

vision of § 202 (b). That section declares that "when in connection with the reorganization, merger or consolidation of a corporation a person receives in place of stock or securities owned by him new stock or securities of no greater aggregate par or face value, no gain or loss shall be deemed to occur from the exchange, and the new stock or securities received shall be treated as taking the place of the stock, securities, or property exchanged."

Treasury Regulations 45, Art. 1567,[1] contains an interpretation of that provision: "In general where two (or more) corporations unite their properties by . . . the sale of its property by B to A and the dissolution of B . . . no taxable income is received from the transaction . . . provided the sole consideration received by B and its stockholders . . . is stock . . . of A . . ."

The pertinent substance of the circumstantial facts found follows:

In 1917 and early 1918, respondents Benedum and Parriott and three others, Kirkland, Lantz and Wrather, acquired 31 Texas oil and gas leases called the "Duke-Knoles" group. The leases reserved to lessors a one-eighth royalty. The interests of the five in what the findings refer to as the remaining seven-eighths interest were Benedum six-sixteenths, Parriott and Kirkland three-sixteenths each, Lantz and Wrather two-sixteenths each.

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[1] "In general, where two (or more) corporations unite their properties, by either (a) the dissolution of corporation B and the sale of its assets to corporation A, or (b) the sale of its property by B to A and the dissolution of B, or (c) the sale of the stock of B to A and the dissolution of B, or (d) the merger of B into A, or (e) the consolidation of the corporations, no taxable income is received from the transaction by A or B or the stockholders of either, provided the sole consideration received by B and its stockholders in (a), (b), (c), and (d) is stock or securities of A, and by A and B and their stockholders in (e) is stock or securities of the consolidated corporation, in any case of no greater aggregate par or face value than the old stock and securities surrendered. . . ."

In October, 1918, they caused Tex-Penn to be incorporated. Its authorized capital stock was $2,000,000, divided into 80,000 shares of $25 each. It issued 4,000 shares for par to the five lease owners ratably according to their interests; they transferred a fourth interest in the leases to the company. It agreed to develop the properties at its own expense; they agreed that one-half of their shares of the proceeds might be used to make up deficits in the company's operating expenses.

They authorized Parriott to receive their shares of the proceeds, to carry out the agreement with the company, and to invest the remaining half of the proceeds in the company's stock. Accounts of transactions between the company and him, as agent, were kept under the name of "Parriott Attorney." Pursuant to the agreement, he from time to time purchased at par stock of the company amounting to 9,120 shares; it used the money in developing the leased properties.

Benedum and Parriott were also interested as owners in the Riverside Eastern Oil Company, the Riverside Western Oil Company, and the Pittsburgh-Texas Oil & Gas Company. In early 1919, they decided to cause to be organized the Transcontinental Oil Company to acquire and operate the properties of these companies and of Tex-Penn together with the individually owned interests in the leases. Benedum's four associates, by writing dated June 2, 1919, gave him authority to sell the assets of Tex-Penn and all individual interests in the leases for $12,000,000 and agreed to accept their pro rata share of the net proceeds of the sale for their holdings in Tex-Penn and their individual interests in the leases.

To arrange for money with which to carry out the project, Benedum negotiated with bankers. Under the first plan, the bankers were to pay Transcontinental $23,000,000 for a part of its stock, and that amount was to be used to pay the $12,000,000, and $2,500,000 in equal parts to Riverside Eastern and Riverside Western to

retire preferred stock. The balance, $8,500,000, was to be retained by Transcontinental for working capital. By a later arrangement the amount to be paid by the bankers was reduced to $20,000,000 and that to be received by the five individuals to $9,000,000. Benedum's associates declined to accept less than their proportionate share of $12,000,000 as originally planned. In order that the undertaking should not fail, Benedum agreed to diminish by $3,000,000 the amount he was to have and so bore the entire reduction. On that basis, distribution of the $9,000,000 would be $1,500,000 each to Benedum, Lantz and Wrather and $2,250,000 each to Parriott and Kirkland.

Transcontinental was organized and authorized to issue 2,000,000 no-par-value shares, of which the bankers agreed to buy 500,000 at $40 per share. They exercised an option to buy 225,000 additional shares at $1.00 per share. Tex-Penn's assets were to pass to Transcontinental free and clear of all liabilities. July 12, Kirkland, Lantz and Wrather assigned and delivered their Tex-Penn shares to Benedum and Parriott for $30.[2]

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[2] The terms of the transfers were evidenced by two letters to Parriott accompanying delivery of the assignments. Words within brackets were in the first letter but not in the second; words in italics were in the second letter but not in the first.

"In connection with the assignment we have executed today, transferring to . . . Transcontinental . . . all of our right, title and interest in the oil and gas leases. . . . we are assigning and hand you herewith our shares of stock . . . Tex-Penn . . . *which we hereby agree to sell to you and M. L. Benedum jointly for a consideration of $5.00 payable to each of us.* If for any reason the proposed organization of . . . Transcontinental . . . should not go through, this stock is to be returned to us.

"We understand that you and Mr. Benedum are transferring to . . . Transcontinental . . . a considerable amount of property that you and he own . . . including your interests in the Tex-Penn leases, and that you and he are to be paid for all these properties

July 15, the stock was transferred on the Tex-Penn stock book. July 22, new directors were elected to take the places of the assignors who, as stated in the minutes, had ceased to be stockholders.

July 14, the individual owners and Tex-Penn executed an assignment to Transcontinental of all their interest in the leases and gave it to Parriott in escrow for delivery upon payment of $5,250,000 to Kirkland, Lantz and Wrather, or to Parriott for their account. They stipulated that if payment was not made by August 1, the assignment and stock would be returned to them. And, in order that Tex-Penn assets might be free from liability, they authorized Parriott to deduct from their shares seven-sixteenths of not exceeding $500,000 to pay debts and obligations of the company. Benedum and Parriott were to bear nine-sixteenths. The auditor of Tex-Penn reported that approximately $350,000 would be required.

July 24, Benedum and Parriott made a contract with J. M. Holliday, acting for the bankers and Transcontinental, in which they agreed to transfer to Transcontinental their interests in the leases for $3,400,000 in cash, to cause Tex-Penn to transfer to Transcontinental all its assets "for and in consideration of . . . $350,000 in cash and . . . 1,007,834 shares of the capital stock of . . . Transcontinental," and to cause Kirkland, Lantz and Wrather to transfer to Transcontinental their seven-sixteenths of the five-eighths interest in the leases for $5,250,000 in cash.

The same day, Holliday addressed an offer to Tex-Penn to purchase all its assets "for . . . $350,000 in cash

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partly in cash and partly in stock of . . . Transcontinental. . . . Our entire interests in the stock of the Tex-Penn Company and in the leases covered by the assignment above referred to are paid for in full by the [$5,250,000 that is to be paid us in this transaction.] *considerations agreed upon between us.*"

and . . . 1,007,834 shares" of Transcontinental. By resolution of its directors, Tex-Penn accepted the offer, referring to the consideration as "$350,000 cash and . . . 1,007,834 shares" of Transcontinental. It was further resolved that, after the transfer of its property, the collection of debts due, and payment of those owed by, Tex-Penn, it would be dissolved and its assets distributed to its stockholders "and that to facilitate this, the . . . officers . . . direct Mr. Holliday that . . . $350,000 . . . shall be paid to the treasury of this company, and that the . . . shares . . . be issued and delivered to" Benedum and Parriott jointly.

July 30, Tex-Penn conveyed its assets to Transcontinental. Holliday directed the latter to deliver to Benedum and Parriott jointly certificates for 1,007,834 shares, to deliver $5,250,000 to Parriott Attorney, $3,400,000 to Benedum and Parriott and $350,000 to Tex-Penn. The next day, these directions were carried out by Transcontinental.

There was available for use by Tex-Penn in payment of its expenses $286,891.29, derived from one-half of the proceeds from the individually owned five-eighths interest in the leases. It also had receivables and oil and the $350,000 with which to discharge its liabilities. The $350,000 was deducted by Transcontinental from the amount to be paid Benedum and Parriott for their interest in the leases. But that deduction was in fact borne not by them alone but ratably by the five owners. Payment of Tex-Penn's liabilities did not require use of all the $350,000. There remained $55,255.24. And that sum was distributed to the five individuals according to their interests in the leases.

Details are reflected in the accounts of "Parriott Attorney." Kirkland was given credit for $2,250,000 and Lantz and Wrather for $1,500,000 each as purchase prices of their shares of the five-eighths interest in the leases.

Each of the five, according to his interest in the leases, was charged with his share of the $350,000 with the explanation that "this amount was to be apportioned against the sale price received by all the individual interests." [3]

In respect of the transfer of the Tex-Penn stock by Kirkland, Lantz and Wrather to Benedum and Parriott, the latter were charged $15 each and correspondingly each of the former was credited with $10. At the end of the year, Parriott furnished annual statements to Kirkland, Lantz and Wrather, showing the sale prices of their interests in the leases reduced by their contributions to the $350,000. The sales price of the stock sold by them was shown at $30.

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[3] This corrected an entry of August 1 which charged Tex-Penn with the $350,000 and credited $140,000 to Benedum and $210,000 to Parriott with the explanation that the $350,000 had been taken out of their share of the purchase price of the Duke-Knoles properties. The correcting entry (December 31, 1919) is as follows:

W. E. Wrather	$43,750.00
J. B. Lantz	43,750.00
J. L. Kirkland	65,625.00
F. B. Parriott	65,625.00
M. L. Benedum	131,250.00
Tex-Penn Oil Co.	$350,000.00

To correct . . . entry . . . distributing amount paid by [sic] Tex-Penn by Transcontinental . . . and deducted from M. L. B. (Benedum) and F. B. P. (Parriott) cash proceeds of sale of Duke-Knoles property to Transcontinental . . . as this amount was to be apportioned against the sale price received by all the individual interests reducing such sale price of 5/8 int. per agreement to following:

W. E. Wrather	$1,456,250.00
J. B. Lantz	1,456,250.00
J. L. Kirkland	2,184,375.00
F. B. Parriott	2,184,375.00
M. L. Benedum	1,368,750.00
Total	$8,650,000.00

On partial distributions by Parriott before final settlement, Kirkland, Lantz and Wrather gave receipts similar in form. That of Kirkland recited that the payment was on account of the purchase price of his interest "in and to . . . the leases . . . and to the stock of the Tex-Penn. . . . The balance . . . is to be retained until the final adjustment of the taxes and the affairs of . . . Tex-Penn . . . at the conclusion of which the said balance is to be paid to me, less my proportionate share of said expenses." Kirkland and Lantz died before the hearing. Wrather testified that he attached no great importance to the form of the receipt; that he knew there had been in form separate transfers of the lease interests and the Tex-Penn stock but that he and his associates considered only the ultimate objective.

Benedum and Parriott in their 1919 income tax returns reported their own profits from the sale of their lease interests upon the basis of the total price of $8,650,000. Tex-Penn's return stated that it had sold its assets for $350,000 cash and shares of stock. It also stated that the cost of the assets sold was $2,359,205.69, from which it deducted $350,000, leaving $2,009,205.69, and that amount was designated "value of stock." Neither the $350,000 nor the stated "value of stock" received was included in gross income. A schedule attached to the return stated that the cash consideration was accounted for in the return, and that the "no par value stock" received was not taxable income under § 202 (b) and T. D. 2924.

The foregoing includes the substance of all the findings of circumstantial facts material to the question under consideration. They must be taken as established if supported by substantial evidence. *Helvering* v. *Rankin,* 295 U. S. 123, 131. *Old Mission Cement Co.* v. *Helvering,* 293 U. S. 289, 294. *Burnet* v. *Leininger,* 285 U. S. 136, 138–139. *Phillips* v. *Commissioner,* 283 U. S.

589, 600. *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716. There is no suggestion that they are not amply sustained. In addition to and presumably upon the basis of these findings, the board made its "ultimate finding." And upon that determination it ruled that the transaction was not within the non-recognition provisions of § 202 (b). The ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact. It is to be distinguished from the findings of primary, evidentiary or circumstantial facts. It is subject to judicial review and, on such review, the court may substitute its judgment for that of the board. *Helvering* v. *Rankin, ubi supra.*

Treating the transaction as a part of reorganization, merger or consolidation, the board concluded that cash constituted a part of the consideration. The opinion refers to writings above mentioned and emphasizes their provisions that state or indicate that the consideration was or did include cash and stock. The documents cited are the agreement for the transfer of Tex-Penn's assets to Transcontinental, the offer to Tex-Penn, the resolution of its directors accepting the offer and directing payment of the $350,000 to its treasury. Holliday's letter directing Transcontinental so to pay, Transcontinental's check for that amount to Tex-Penn and the latter's tax return.

But the board's findings of what was actually done show that, pursuant to direction of the individuals selling lease interests, Transcontinental advanced to Tex-Penn $350,000 and deducted that amount from the price of the lease interests. The findings also show that, for the part of that amount remaining after payment of its debts, Tex-Penn accounted to the individuals.

As indirectly showing that the $350,000 constituted part of the consideration for transfer of Tex-Penn assets, the opinion cites the entry in the "Parriott Attorney" accounts showing that the effect of the payment of that

sum to Tex-Penn was to reduce the sale price of the interest in the leases from $9,000,000 to $8,650,000, the entries distributing that amount to the five individuals, and the tax returns of Benedum, Parriott and Tex-Penn.

Petitioner does not bring forward these entries or the tax returns of Benedum and Parriott to support the board's ultimate finding now under consideration. Manifestly, the entries referred to in the board's opinion are opposed to its conclusion. As will more fully appear, upon an examination of them later to be made, the findings of details make it plain that the $350,000 was a part of the consideration paid for the individually owned lease interests and leave no ground for any other inference.

The board's opinion shows that both parties relied on art. 1567 as a correct interpretation of the statute. The board held (p. 959) that it "requires, as a condition of nonrecognition of gain, that the sole consideration be stock or securities . . . The written agreements herein indicate clearly that there was a cash consideration to Tex-Penn of $350,000. We are not convinced by the oral evidence that that was not a fact. Accordingly, we hold that the petitioners have not brought themselves within section 202 (b) . . . and article 1567 . . . so as to escape recognition of gain."

The opinion of the Circuit Court of Appeals, after discussion of primary or evidentiary facts found by the board, states, 83 F. (2d) at p. 522: "A consideration of all the documentary evidence drives us to the conclusion that the $350,000 was not consideration passing from Transcontinental to Tex-Penn, but was money furnished by the lessees as individuals to pay the debts of Tex-Penn so that the transaction might be made according to agreement . . . In form the documents upon which the Board of Tax Appeals relied stated that the $350,000 was corporate consideration passing from Transcontinental, but in fact, it was not, and the rule is well settled that in determining tax liability, taxing authorities must

look through form to fact and substance. It has been a long time since these transactions took place and most of the parties who were interested in them are dead, but every living person who was in any way connected with them testified without contradiction that the $350,000 was paid by the five lessees and not by Transcontinental."

The validity of the ultimate finding above quoted is to be tested by what in fact was done rather than by the mere form of words used in the writings employed. *United States* v. *Phellis*, 257 U. S. 156, 168. *Curran* v. *Commissioner*, 49 F. (2d) 129, 131. The board's findings of circumstantial facts definitely show the substance of the transaction as actually consummated. Summarily stated, the details of controlling significance are these:

The bankers bought from Transcontinental 725,000 shares of its stock for $20,225,000. Transcontinental paid and issued its stock:

	Cash	*Shares*
Riverside Eastern.....	$1,250,000	41,666
Riverside Western.....	1,250,000	41,667
Pittsburg-Texas.....	.....	158,833
Benedum and Parriott....	3,400,000	1,007,834
Parriott, Attorney.....	5,250,000	.....
Tex-Penn	350,000	.....
	$11,500,000	1,250,000

Included in the total was $9,000,000 to pay for the individually owned five-eighths interest in the leases and $2,500,000 to retire preferred stock of Riverside Eastern and Riverside Western, and $5,250,000 to pay for seven-sixteenths of the five-eighths interest: $2,250,000 to Kirkland and $1,500,000 each to Lantz and Wrather. The remaining $3,750,000 was to pay Benedum and Parriott for their nine-sixteenths: $1,500,000 to Benedum for his six-sixteenths and $2,250,000 to Parriott for his three-sixteenths.

The $350,000 received by Tex-Penn from Transcontinental was to be used to the extent needed to pay Tex-

Penn's debts in order that its assets should be free and clear of liabilities. But no part of that amount was borne by Transcontinental. Upon authorization of Benedum and Parriott, it deducted that amount from the $3,750,000 payable by it to them. And, by arrangement among themselves, the five individuals were chargeable with the $350,000 according to their interests in the leases:

Benedum	$131,250
Parriott	65,625
Kirkland	65,625
Lantz	43,750
Wrather	43,750
	$350,000

The amount so advanced exceeded what was required to pay Tex-Penn's debts by $55,255.24. And to the five individuals that amount was accounted for:

Benedum	$20,720.73
Parriott	10,360.35
Kirkland	10,360.35
Lantz	6,906.90
Wrather	6,906.90
	$55,255.23

The statement below shows in column (1) the amounts that, but for the advance of $350,000 to Tex-Penn, each of the individuals would have received directly from Transcontinental in cash for his interest in the leases; it shows in column (2) the amount that was received by each after deducting his share of the amount actually used to discharge liabilities of Tex-Penn.

	(1)	(2)
Benedum	$1,500,000	$1,389,470.73
Parriott	2,250,000	2,194,735.35
Kirkland	2,250,000	2,194,735.35
Lantz	1,500,000	1,463,156.90
Wrather	1,500,000	1,463,156.90
	$9,000,000	$8,705,255.23

The board's findings of evidentiary details not only fail to support, but definitely negative, its conclusion that the consideration received by Tex-Penn in exchange for its assets included $350,000 in cash.

Essential to the project was the transfer to Transcontinental of Tex-Penn assets free from claims, and equally indispensable was the transfer of the individually owned lease interests. Tex-Penn needed money to satisfy demands of its creditors. Should it be unable to free its property from liability, the entire enterprise might fail. In that event, the individuals would lose the sale of their lease interests. And so, they decided to provide the cash needed by Tex-Penn to clear its assets and for that purpose they caused Transcontinental to advance Tex-Penn the $350,000 and deduct it from $9,000,000, the price it was to pay them for their lease interests. The excess, $55,255.24, was ratably distributed as shown above. No part of the $350,000 was included in or had any relation to the consideration for the transfer of the Tex-Penn assets. In legal effect, the details found by the board to have been carried out are not to be distinguished from a direct advance by the five individuals to Tex-Penn of the money required to pay its debts. Unquestionably, such an advance would not constitute consideration received by Tex-Penn. As against the board's findings showing what was actually done in consummation of the transaction, no weight as evidence can be given to mere recitals, directions, engagements and admissions of respondents contained in the documents relied on by the board. It should have held that the Transcontinental stock was the sole consideration for the transfer of the Tex-Penn assets. The Circuit Court of Appeals rightly held that the ruling to the contrary was erroneous.

2. The board's second ultimate finding is (p. 950). "The cash received by Wrather, Lantz and Kirkland from Transcontinental was consideration for both their

stock in Tex-Penn and their interests in the Duke-Knoles leases." The board (p. 959) deemed that conclusion an additional ground for its ruling that the transaction is not within the non-recognition provisions of § 202 (b). In support of that view the commissioner maintains that "the nominal sale of stock, the transfer of the assets of Tex-Penn, and the sale of the individual interests in the leases, constituted a single indivisible transaction."

But the circumstantial facts clearly negative this ultimate finding. Kirkland, Lantz and Wrather sold their Tex-Penn stock to Benedum and Parriott and their lease interests to Transcontinental. The stock was sold and delivered before the assignment of the lease interests was made. The transfer on the company's stock book was effected, and their connection as stockholders and directors was terminated, while the lease interests were being held until paid for by Transcontinental. The stipulation that, if payment for their lease interests was not made by August 1, the assignment of their shares of stock would be returned, did not make the two sales a single or indivisible transaction. Assuming that Kirkland, Lantz and Wrather would not have sold their Tex-Penn stock without also selling their lease interests, that fact would not convert the two sales into one. The purpose of the stipulation is plain. If Transcontinental did not pay for and take the lease interests and Tex-Penn continued to operate the properties, they would again become stockholders and have a voice in the operation.

On the point under consideration, the commissioner's position before the board is not in harmony with his contention here. There he made four computations: two were of Tex-Penn taxes, the other two were respectively those of the other respondents. In all his calculations, he attributed to the consideration for Tex-Penn assets the 1,007,834 shares of Transcontinental and to the

Benedum and Parriott lease interests their shares of the cash, $9,000,000, less the amount thereof used to pay Tex-Penn debts. All these shares went to Benedum and Parriott who owned all the Tex-Penn stock. The deficiencies claimed by the commissioner and the amounts determined by the board rest upon the fact that Benedum and Parriott as the only stockholders of Tex-Penn became the owners of the 1,007,834 Transcontinental shares. And, as shown by the board's findings, the balance of the cash without more went to Kirkland, Lantz and Wrather for their lease interests.

It is immaterial whether $30 was sufficient fully to compensate them for their Tex-Penn stock. The findings show the transfer was valid. Invalidating disparity between worth and consideration is not disclosed, and may not be assumed. Indeed, the commissioner's brief states that Tex-Penn was organized to develop the leases which were the personal property of its five stockholders; it "was not expected to operate at a profit . . . and actually it could not operate at a profit . . . It was useful chiefly in connection with the five-eighths royalties in the Duke-Knoles field held individually by its stockholders." And respondents call attention to findings disclosing operating results that point in the same direction.

We find nothing in the circumstantial facts found or in the evidence to support the board's conclusion that Kirkland, Lantz and Wrather received from Transcontinental any cash for their stock in Tex-Penn. It cannot be sustained.

3. The commissioner seeks reversal upon the grounds that the transaction was not a tax-exempt reorganization because Tex-Penn sought to realize a profit rather than merely to change the form of its ownership and that § 202 (b) does not exempt from taxation exchanges of property for stock. Specifically he argues that, assuming that the Transcontinental stock was the sole

property exchanged for Tex-Penn assets, the transaction was not within the non-recognition of gains provision. Concededly, this contention is contrary to the interpretation put upon § 202 (b) by art. 1567 which was promulgated September 26, 1919 by the commissioner with the approval of the Secretary of the Treasury and has since been followed.[4] The parties presented their respective claims to the board and to the lower court on the theory that, if neither Tex-Penn nor its stockholders as such received any cash from Transcontinental, the transaction would be within § 202 (b). The commissioner's notices of deficiency do not suggest the construction for which he now contends. He sought no ruling upon the question from the board or the lower court and is therefore not entitled to have it decided here. *Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378, 380. The taxpayers were entitled to know the basis of law and fact on which the commissioner sought to sustain the deficiencies. His failure earlier to present the question leaves this court without the assistance of decision below.[5] His petitions for these writs did not present the question to this court. We are not called on to consider the construction of § 202 (b) now proposed.[6]

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[4] Cf. *Brewster* v. *Gage*, 280 U. S. 327, 336. *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 378. *Federal Land Bank* v. *Warner*, 292 U. S. 53, 55.

[5] Cf. *Virginian Ry.* v. *United States*, 272 U. S. 658, 675. *Lawrence* v. *St. Louis-San Francisco Ry.*, 274 U. S. 588, 596. *Hammond* v. *Schappi Bus Line*, 275 U. S. 164, 171–172. *Baltimore & Ohio R. Co.* v. *United States*, 279 U. S. 781, 787. *Beaumont, S. L. & W. Ry.* v. *United States*, 282 U. S. 74, 86. *Public Service Comm'n* v. *Wisconsin Telephone Co.*, 289 U. S. 67, 69–70.

[6] *Alice State Bank* v. *Houston Pasture Co.*, 247 U. S. 240, 242. *Webster Co.* v. *Splitdorf Co.*, 264 U. S. 463, 464. *Steele* v. *Drummond*, 275 U. S. 199, 203. *Gunning* v. *Cooley*, 291 U. S. 90, 98. *Johnson* v. *Manhattan Ry. Co.*, 289 U. S. 479, 494. *Zellerbach Paper Co.* v. *Helvering*, 293 U. S. 172, 182. *Helvering* v. *Taylor*, 293 U. S.

4. As the sole consideration to Tex-Penn was Transcontinental shares and as Kirkland, Lantz and Wrather received from Transcontinental no cash for their Tex-Penn stock, the transaction is within the non-recognition of gains provisions. The judgments must therefore be affirmed.

5. The court is also of opinion that the judgments must be affirmed upon the ground that in the peculiar circumstances of this case, the shares of Transcontinental stock, regard being had to their highly speculative quality and to the terms of a restrictive agreement making a sale thereof impossible, did not have a fair market value, capable of being ascertained with reasonable certainty, when they were acquired by the taxpayers.

In the absence of such value, the ownership of the shares did not lay the basis for the computation of a gain at the time they were received, or for a tax as of that date under the applicable statute. § 202 (b). Treasury Regulations 45, Art. 1563.

Affirmed.

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

MR. JUSTICE CARDOZO concurs on the ground last stated in the opinion.

507, 511. *Clark* v. *Williard,* 294 U. S. 211, 216. *Morehead* v. *N. Y. ex rel. Tipaldo,* 298 U. S. 587, 605.

UNITED STATES *v.* MADIGAN.

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

No. 562. Argued March 10, 1937.—Decided March 29, 1937.

1. The provisions of § 305 of the World War Veterans' Act, as amended, whereby a policy which has lapsed while the insured was suffering from a compensable disability for which compensation was not collected may be revived and matured, *pro tanto*, if the insured has become permanently disabled, by applying the uncollected compensation as premiums, do not extend to an earlier policy which was converted into the one that lapsed. P. 502.
2. In the congressional legislation dealing with the subject, Veterans' insurance changed from one form to another is termed "converted." P. 503.
3. Neither the words nor the legislative history of § 305 of the Act suggest that the phrase "canceled or reduced insurance" was intended to include insurance elsewhere described in the Act as "converted," at least where the conversion was not accompanied by a reduction of the policy. P. 505.
4. The holder of a converted policy is not "entitled" to total disability benefits under the original policy, within the meaning of § 307 of the Act, as amended in 1930, where the total disability did not occur until after the conversion. P. 506.
5. Section 307 does not, either by its terms or by reasonable implication, extend the privileges of § 305 to converted insurance. Its legislative history does not disclose any purpose to amend, or to depart from the policy of § 305. P. 506.
6. A construction of a new section added to an existing statute, as by implication modifying a settled construction of an earlier section, is not favored. P. 506.

85 F. (2d) 609, reversed.

CERTIORARI, 299 U. S. 538, to review a judgment affirming a recovery of total disability benefits in a suit on a contract of war risk term insurance.

Mr. Wilbur C. Pickett, with whom *Solicitor General Reed* and *Messrs. Julius C. Martin, Fendall Marbury,* and

W. Marvin Smith were on the brief, for the United States.

Mr. Jordan R. Bentley argued the cause and *Mr. David Spaulding* filed a brief for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

Respondent brought this suit in the District Court for Southern California to recover total permanent disability benefits under a contract of war risk term insurance. While in the military service of the United States in the World War, he acquired a term policy of war risk insurance. On November 1, 1919, availing himself of the benefits of § 404 of the War Risk Insurance Act of October 6, 1917, c. 105, 40 Stat. 398, 410, he converted his term insurance into a twenty-payment life policy of United States Government insurance. He paid premiums on this policy until January 31, 1920, when it was allowed to lapse for non-payment of premiums. On the date of the conversion of his first policy, he was suffering from a "compensable disability," and, after the lapse of the second, on June 6, 1925, he was rated by the Veterans' Bureau as totally and permanently disabled. At that time he was entitled to disability compensation from the Government in the sum of $312.25.

On the trial in the district court a jury was waived and the case was heard on an agreed statement of facts. The court gave judgment for the respondent for permanent disability benefits under his first policy, with respect to so much of the insurance as the $312.25 of disability compensation, remaining uncollected at the time of total permanent disability, would have purchased if applied to the payment of premiums due upon the original policy between the date of its conversion and the date of total disability. The Court of Appeals for the Ninth Circuit affirmed, 85 F. (2d) 609, holding that respondent was en-

titled, under §§ 305, 307 of the World War Veterans' Act, to revive the original term insurance and to recover under it the permanent disability benefits awarded by the trial court. We granted certiorari because of the importance of the decision of the Court of Appeals, which conflicts with the consistent rulings of the Administrator of Veterans' Affairs, and affects, adversely to the Government, a large number of pending insurance claims.

Section 305 of the World War Veterans' Act of June 7, 1924, c. 320, 43 Stat. 624, 626, as amended July 2, 1926, c. 723, 44 Stat. 790, 799, 38 U. S. C. § 516, applies to lapsed, cancelled or reduced insurance policies. It provides:

"Where any person has heretofore allowed his insurance to lapse, or has canceled or reduced all or any part of such insurance, while suffering from a compensable disability for which compensation was not collected and dies or has died, or becomes or has become permanently and totally disabled and at the time of such death or permanent total disability was or is entitled to compensation remaining uncollected, then and in that event so much of his insurance as said uncollected compensation, . . . would purchase if applied as premiums when due, shall not be considered as lapsed, canceled or reduced; and the United States Veterans' Bureau is hereby authorized and directed to pay to said soldier, or his beneficiaries, as the case may be, the amount of said insurance . . ."

Section 307, as amended July 3, 1930, 46 Stat. 991, 1001, 38 U. S. C. § 518, relates to all insurance policies "heretofore or hereafter issued, reinstated or converted." It declares that all such policies shall be incontestable and provides:

"That the insured under such contract or policy may, without prejudicing his rights, elect to make claim to the bureau or to bring suit under section 19 of this Act on

any prior contract or policy, and if found entitled thereto, shall, upon surrender of any subsequent contract or policy, be entitled to payments under the prior contract or policy . . ."

Respondent elected to claim under his original policy, presumably because the rate of premiums for the term insurance was lower than for the twenty-payment life policy, and the $312.25 of disability compensation would purchase a larger amount of the former type than of the latter. The Government admits that the respondent is entitled, under § 305, to revive the twenty-payment life policy which has lapsed, but contends that he is not entitled to revive the earlier term insurance which he had converted, because § 305 omits any reference to converted insurance, such as appears in § 307.

All war risk policies were required to be for term insurance by § 404 of the War Risk Insurance Act, but that section permitted conversion of the insurance into other forms, after termination of the war. When Congress desired to legislate about one form of insurance thus changed into another, it explicitly used the descriptive term "converted." [1] The omission of any reference to converted insurance in § 305 indicates that the privilege of reviving a lapsed, cancelled or reduced policy, was not intended to extend to an earlier policy converted into another, whose lapse is the condition of the revival. Such must be taken to be the meaning if it is consistent with the purposes of the section, disclosed by its legislative history and with the provisions of other sections.

[1] See World War Veterans' Act, 1924, § 307, as amended July 3, 1930, 46 Stat. 991, 1001, 38 U. S. C. § 518. Compare World War Veterans' Act, 1924, § 310, 45 Stat. 970, 38 U. S. C. § 512 a; § 311, 45 Stat. 970, 38 U. S. C. § 512 b; § 302, 43 Stat. 625, 38 U. S. C. § 513; § 308, 44 Stat. 790, 800, 38 U. S. C. § 516 a, for legislation applying the term "converted" to the subsequent, United States Government life insurance.

The legislative history supports the government's argument that from the beginning the aim of the legislation later embodied in § 305 was to permit the veteran to revive his policy when he had allowed it to lapse, for want of funds, at a time when there was money due him from the government for a compensable disability. The supposition was that he would have paid the premiums on the lapsed policy if he had then received the sum due from the government—a supposition which is inadmissible if, at that time, he had converted low premium term insurance into any of the other forms of insurance commanding a higher premium, as permitted by § 404.

In its original form, § 305 appeared as a part of § 408 of the War Risk Insurance Act, added by the Act of August 9, 1921, § 27, c. 57, 42 Stat. 147, 156–157. The bill which became § 408, as originally reported by the House Committee, provided for the reinstatement by disabled veterans of their lapsed and cancelled policies. In recommending this legislation the Committee of the House having it in charge pointed out that most such lapses and cancellations occurred at a time when disability compensation was due to the veteran, and were probably occasioned by lack of funds.[2] The bill was amended on the floor of the House [3] so as to include the provisions later elaborated into § 305. They permitted the revival of a lapsed policy in favor of the beneficiaries of a deceased veteran, if, at the time of the lapse, he had been entitled to money from the Government for a com-

[2] Report of House Committee, No. 104, 67th Cong., 1st Sess., p. 10, states: "It would appear to be equitable and fair when it is remembered that as a matter of fact, in most of the instances, the reason the disabled soldier failed to keep up his insurance was that he was short of funds and it took the Government some time to investigate and grant his compensation, and that because of this financial stringency he allowed his insurance to lapse."

[3] 61 Cong. Rec. 2422.

pensable disability.[4] The proviso, upon which revival was conditioned, that at the time of the lapse compensation be due from the Government to the veteran, made more explicit the purpose indicated in the Committee Report.[5]

As then adopted, the revival provision applied only to lapsed policies, but as amended by the Act of July 2, 1926, it was extended to include "cancelled or reduced" insurance. This amendment was adopted for the purpose of avoiding a ruling of the Comptroller General that the phrase "lapsed insurance" did not embrace cancelled or reduced insurance, even though the cancellation or reduction occurred at a time when compensation was owing to the veteran. See Report of House Committee, No. 1217, 69th Cong., 1st Sess., pp. 7–8; Hearings before Senate Finance Committee, 69th Cong., 1st Sess., on H. R. 12175, pp. 50–51. Neither the words nor the legislative history of § 305 suggest that the phrase "canceled or reduced insurance" was intended to include insurance elsewhere described in the Act as "converted," at least unless the conversion was accompanied by a reduction of the policy. The like administrative construction which has consistently been given to the section by the Veterans' Bureau [6] is of persuasive force. *Norwegian*

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[4] Section 408 was amended by the Act of March 4, 1923, c. 291, 42 Stat. 1521, 1525–1526, to provide that a lapsed policy could be revived by one who became permanently and totally disabled.

[5] See 34 Opinions, U. S. Attorneys General, 369, 371.

[6] See communication of Administrator of Veterans' Affairs to the Solicitor General, December 5, 1936: ". . . it has been the consistent practice of the Veterans' Administration and its predecessors to administer Section 305, World War Veterans' Act, 1924, and the preceding provisions of Section 408, War Risk Insurance Act, on the theory that they contained no provisions, express or implied, for revival of insurance under a yearly renewable term contract after it had been converted to a policy of United States Government life insurance. . . ."

Products Co. v. *United States,* 288 U. S. 294, 315; *Brown* v. *United States,* 113 U. S. 568, 571.

The other sections of the Act are consistent with this construction of § 305. Section 307 permits the insured, if totally disabled, to make claim under his converted policy and entitles him to the benefits of that policy "if found entitled thereto." See *United States* v. *Arzner,* 287 U. S. 470, 473. But it is plain that respondent is not "entitled" to total disability benefits under the original policy, within the meaning of § 307, because the total disability did not occur until after its conversion. Section 307 does not, either by its terms or by reasonable implication, extend the privileges of § 305 to converted insurance. The legislative history of § 307 does not disclose any purpose to amend § 305, or to depart from its policy, and in any case the modification by implication of the settled construction of an earlier and different section is not favored. *United States* v. *Munday,* 222 U. S. 175, 182; *Ibanez* v. *Hongkong Banking Corp.,* 246 U. S. 621, 626. The right of respondent to revive his insurance is limited to the lapsed twenty-payment life policy.

Reversed.

SONZINSKY *v.* UNITED STATES.

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

No. 614. Argued March 12, 1937.—Decided March 29, 1937.

1. That part of the National Firearms Act which provides that every dealer in firearms shall register and shall pay an annual tax of $200 or be subject to fine and imprisonment, is a valid exercise of the taxing power of Congress. Pp. 511 et seq.

The term "firearm" is defined by § 1 of the Act as meaning a shotgun or rifle having a barrel less than eighteen inches in length, or any other weapon, except a pistol or revolver, from which a shot is discharged by an explosive, if capable of being concealed on the person, or a machine gun, and includes a muffler or silencer for any firearm.

2. Congress may select the subjects of taxation, choosing some and omitting others. It may impose excise taxes on the doing of business. P. 512.
3. The tax upon dealers, *supra,* is not in the category of penalties imposed for the enforcement of regulations beyond the scope of congressional power. P. 513.
4. A tax may have regulatory effects and may burden, restrict or suppress the thing taxed, and still be within the taxing power. P. 513.
5. Courts may not inquire into the motives of Congress in exercising its powers; they will not undertake, by collateral inquiry as to the measure of the regulatory effect of a tax, to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Federal Constitution. P. 513.
6. The Court declines to consider petitioner's contentions not supported by assignment of error. P. 514.

86 F. (2d) 486, affirmed.

CERTIORARI, *post,* p. 648, to review a judgment affirming a conviction under the National Firearms Act.

Mr. Harold J. Bandy, with whom *Mr. John M. Karns* was on the brief, for petitioner.

Congress is not empowered to tax for those purposes which are within the exclusive province of the States. *United States* v. *Butler,* 297 U. S. 1, 64; *Gibbons* v. *Ogden,* 9 Wheat. 1, 199.

Beneficent aims can never serve in lieu of constitutional power. *Carter* v. *Carter Coal Co.,* 298 U. S. 38.

An exaction, called a tax, which is in fact and effect a penalty, is not a tax. While the lawmaker is entirely free to ignore the ordinary meaning of words and make definitions of his own, that device may not be employed so as to change the nature of acts or things to which the words are applied. *Carter* v. *Carter Coal Co., supra; Bailey* v. *Drexel Furniture Co.,* 259 U. S. 20; *United States* v. *LaFranca,* 282 U. S. 568, 572; *United States* v. *Constantine,* 296 U. S. 287, 293; *United States* v. *Butler, supra.*

The Constitution made no grant of authority to Congress to legislate substantively for the general welfare, and no such authority exists, save as the general welfare may be promoted by the exercise of the powers which are granted. Cases *supra.*

The power of taxation which is expressly granted may 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. Cases *supra.*

If the Constitution, in its grant of powers, is to be so construed as to carry into full effect the power granted, it is equally imperative that, where a prohibition or limitation is placed upon the power of Congress, that prohibition or limitation should be enforced in its spirit and to its entirety. *Fairbanks* v. *United States,* 181 U. S. 312.

A mere reading of the National Firearms Act discloses that it was enacted for the purpose of regulating or suppressing traffic in the firearms described in the Act; that it was not enacted for the purpose of collecting any taxes; that it was passed as a police measure, as an aid to local law enforcement, and not as a revenue law. While it is true that, where the law merely imposes the tax without disclosing the indirect purpose of its imposition, the courts might hesitate to declare the law unconstitutional, on the other hand, if the real purpose of the law is disclosed on its face to be a purpose that invades the police powers reserved to the individual States, the courts should not hesitate to declare the Act an unconstitutional usurpation by the Federal Government of powers reserved to the States by the Tenth Amendment. Cooley, Const. L., pp. 56–60; *Citizens Savings & Loan Assn.* v. *Topeka,* 20 Wall. 655; *Powell* v. *Pennsylvania,* 127 U. S. 678.

Under the American constitutional system, the police power, being an attribute of sovereignty inherent in the original States, and not delegated by the Federal Constitution to the United States, remains with the individual States. *New Orleans Gas Light Co.* v. *Louisiana Light Co.,* 115 U. S. 650; *Plumley* v. *Massachusetts,* 155 U. S. 461; *United States* v. *L. C. Knight Co.,* 156 U. S. 1; *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540.

Whatever may be the motive or pretext of a statute, or in whatever language it may be framed, its real purpose and the question of its validity must be determined by its natural and reasonable effect to be ascertained from its practical operation. *Henderson* v. *New York,* 92 U. S. 259; *Morgan's Co.* v. *Board of Health,* 118 U. S. 455; *Collins* v. *New Hampshire,* 171 U. S. 30; *Mugler* v. *Kansas,* 123 U. S. 623; *Fairbanks* v. *United States,* 181 U. S. 283; *Postal Telegraph Co.* v. *Adams,* 155 U. S. 688.

It is apparent from reading the National Firearms Act that Congress had no intention of framing a law that would procure any revenue for the Government. In the instant case, the effect of the application of the law to petitioner is to require him to pay a dealer's annual tax of $200.00 and to pay a transfer tax of an additional $200.00 for the privilege of handling and selling a commodity of the value of only $10.00. The Act further subjects petitioner to the payment of a fine and to imprisonment of not to exceed five years if he should fail to pay the penalties required of him. These facts demonstrate, without the possibility of contradiction, that the purpose was not not to tax a business, but to prohibit it. It is inconceivable that anyone would anticipate that a dealer within the definition of § 2 of the Act could possibly pay the penalty required by the Act. The amount of a levy that a statute makes upon business frequently forms the basis of jurisdictional action and determines the validity

of legislation. The courts have found no insuperable difficulty in determining the difference between a tax and a penalty. *Bailey* v. *Drexel Furniture Co.,* 259 U. S. 20; *Atlantic & Pacific Telegraph Co.* v. *Philadelphia,* 190 U. S. 160; *Smyth* v. *Ames,* 169 U. S. 466; *Linder* v. *United States,* 268 U. S. 5.

The classification made by the Act is arbitrary and unreasonable. It discriminates against one dealer in favor of another, without stating any justification for so doing. *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540; *Oliver* v. *Washington Mills,* 11 Allen 265.

It is the duty of a reviewing court to review the testimony and reverse the conviction if there is no evidence whatever to support it. *Miles* v. *United States,* 103 U. S. 304; *Degnan* v. *United States,* 271 Fed. 291; *Applebaum* v. *United States,* 274 Fed. 43.

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

The authority of Congress to enact this statute is found in Art. I, § 8, cl. 1 of the Constitution.

It is no objection that the size of the tax tends to burden and discourage the conduct of the occupation of petitioner. Cf. *Magnano Co.* v. *Hamilton,* 292 U. S. 40. Nor is it material that Congress may have anticipated and even intended such an effect. Where a tax is laid on a proper subject and discloses a revenue purpose, it is of no consequence that social, or moral, or economic factors may have been considered by Congress in enacting the measure. *McCray* v. *United States,* 195 U. S. 27; *United States* v. *Doremus,* 249 U. S. 86; *Nigro* v. *United States,* 276 U. S. 332; *Hampton & Co.* v. *United States,* 276 U. S. 394. The cases relied upon by petitioner are distinguishable. They involve penalties for failure to comply with

federal regulations deemed to be beyond the power of Congress.

Petitioner's contention that the statute involves an unreasonable classification is merely an attack on the selection by Congress of the objects of taxation, and is untenable. His further insistence that the evidence does not support the judgment of conviction presses a contention not within the limits of the order granting the writ of certiorari.

MR. JUSTICE STONE delivered the opinion of the Court.

The question for decision is whether § 2 of the National Firearms Act of June 26, 1934, c. 757, 48 Stat. 1236, 26 U. S. C., §§ 1132–1132 q, which imposes a $200 annual license tax on dealers in firearms, is a constitutional exercise of the legislative power of Congress.

Petitioner was convicted by the District Court for Eastern Illinois on two counts of an indictment, the first charging him with violation of § 2, by dealing in firearms without payment of the tax. On appeal the Court of Appeals set aside the conviction on the second count and affirmed on the first. 86 F. (2d) 486. On petition of the accused we granted certiorari, limited to the question of the constitutional validity of the statute in its application under the first count in the indictment.

Section 2 of the National Firearms Act requires every dealer in firearms to register with the Collector of Internal Revenue in the district where he carries on business, and to pay a special excise tax of $200 a year. Importers or manufacturers are taxed $500 a year. Section 3 imposes a tax of $200 on each transfer of a firearm, payable by the transferor, and § 4 prescribes regulations for the identification of purchasers. The term "firearm" is defined by § 1 as meaning a shotgun or a rifle having a barrel less than eighteen inches in length, or any other weapon, ex-

cept a pistol or revolver, from which a shot is discharged by an explosive, if capable of being concealed on the person, or a machine gun, and includes a muffler or silencer for any firearm. As the conviction for non-payment of the tax exacted by § 2 has alone been sustained, it is unnecessary to inquire whether the different tax levied by § 3 and the regulations pertaining to it are valid. Section 16 declares that the provisions of the Act are separable. Each tax is on a different activity and is collectible independently of the other. Full effect may be given to the license tax standing alone, even though all other provisions are invalid. *Weller* v. *New York,* 268 U. S. 319; *Field* v. *Clark,* 143 U. S. 649, 697; cf. *Champlin Refining Co.* v. *Commission,* 286 U. S. 210, 234.

In the exercise of its constitutional power to lay taxes, Congress may select the subjects of taxation, choosing some and omitting others. See *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 158; *Nicol* v. *Ames,* 173 U. S. 509, 516; *Bromley* v. *McCaughn,* 280 U. S. 124. Its power extends to the imposition of excise taxes upon the doing of business. See *License Tax Cases,* 5 Wall. 462; *Spreckles Sugar Refining Co.* v. *McClain,* 192 U. S. 397, 412; *United States* v. *Doremus,* 249 U. S. 86, 94. Petitioner does not deny that Congress may tax his business as a dealer in firearms. He insists that the present levy is not a true tax, but a penalty imposed for the purpose of suppressing traffic in a certain noxious type of firearms, the local regulation of which is reserved to the states because not granted to the national government. To establish its penal and prohibitive character, he relies on the amounts of the tax imposed by § 2 on dealers, manufacturers and importers, and of the tax imposed by § 3 on each transfer of a "firearm," payable by the transferor. The cumulative effect on the distribution of a limited class of firearms, of relatively small value, by the successive imposition of different taxes, one on the

business of the importer or manufacturer, another on that of the dealer, and a third on the transfer to a buyer, is said to be prohibitive in effect and to disclose unmistakably the legislative purpose to regulate rather than to tax.

The case is not one where the statute contains regulatory provisions related to a purported tax in such a way as has enabled this Court to say in other cases that the latter is a penalty resorted to as a means of enforcing the regulations. See *Child Labor Tax Case,* 259 U. S. 20, 35; *Hill* v. *Wallace,* 259 U. S. 44; *Carter* v. *Carter Coal Co.,* 298 U. S. 238. Nor is the subject of the tax described or treated as criminal by the taxing statute. Compare *United States* v. *Constantine,* 296 U. S. 287. Here § 2 contains no regulation other than the mere registration provisions, which are obviously supportable as in aid of a revenue purpose. On its face it is only a taxing measure, and we are asked to say that the tax, by virtue of its deterrent effect on the activities taxed, operates as a regulation which is beyond the congressional power.

Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed. But a tax is not any the less a tax because it has a regulatory effect, *United States* v. *Doremus, supra,* 93, 94; *Nigro* v. *United States,* 276 U. S. 332, 353, 354; *License Tax Cases, supra;* see *Child Labor Tax Case, supra,* 38; and it has long been established that an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed. *Veazie Bank* v. *Fenno,* 8 Wall. 533, 548; *McCray* v. *United States,* 195 U. S. 27, 60–61; cf. *Alaska Fish Co.* v. *Smith,* 255 U. S. 44, 48.

Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon

it is beyond the competency of courts. *Veazie Bank* v. *Fenno, supra; McCray* v. *United States, supra,* 56–59; *United States* v. *Doremus, supra,* 93–94; see *Magnano Co.* v. *Hamilton,* 292 U. S. 40, 44, 45; cf. *Arizona* v. *California,* 283 U. S. 423, 455; *Smith* v. *Kansas City Title Co.,* 255 U. S. 180, 210; *Weber* v. *Freed,* 239 U. S. 325, 329–330; *Fletcher* v. *Peck,* 6 Cranch 87, 130. They will not undertake, by collateral inquiry as to the measure of the regulatory effect of a tax, to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Federal Constitution. *McCray* v. *United States, supra;* cf. *Magnano Co.* v. *Hamilton, supra,* 45.

Here the annual tax of $200 is productive of some revenue.[1] We are not free to speculate as to the motives which moved Congress to impose it, or as to the extent to which it may operate to restrict the activities taxed. As it is not attended by an offensive regulation, and since it operates as a tax, it is within the national taxing power. *Alston* v. *United States,* 274 U. S. 289, 294; *Nigro* v. *United States, supra,* 352, 353; *Hampton & Co.* v. *United States,* 276 U. S. 394, 411, 413.

We do not discuss petitioner's contentions which he failed to assign as error below.

Affirmed.

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[1] The $200 tax was paid by 27 dealers in 1934, and by 22 dealers in 1935. Annual Report of the Commissioner of Internal Revenue, Fiscal Year Ended June 30, 1935, pp. 129–131; *id.,* Fiscal Year ended June 30, 1936, pp. 139–141.

Syllabus.

VIRGINIAN RAILWAY CO. *v.* SYSTEM FEDERATION NO. 40, RAILWAY EMPLOYEES DEPARTMENT OF THE AMERICAN FEDERATION OF LABOR, ET AL.

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

No. 324. Argued February 8, 9, 1937.—Decided March 29, 1937.

1. Concurrent findings of fact, by district court and circuit court of appeals, are conclusive when not plainly erroneous. Pp. 542–545.
2. The amended Railway Labor Act seeks to avoid interruptions of interstate commerce resulting from disputes concerning pay, rules, or working conditions on the railroads, by the promotion of collective bargaining between the carrier and the authorized representative of its employees, and by mediation and arbitration when such bargaining does not result in agreement. To facilitate agreement, it gives to employees the right to organize and bargain collectively through a representative of their own selection, doing away with company interference and "company unions." Section 2, Ninth, makes it the duty of the National Mediation Board, when any dispute arises among a carrier's employees "as to who are the representatives of such employees," to investigate the dispute and to certify the name of the organization authorized to represent the employees; and it commands that "Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act." *Held:*

   (1) That the duty to "treat" with the representative so certified is mandatory. P. 547.

   (2) The statute does not undertake to compel agreement and does not preclude the employer from entering into individual contracts directly with individual employees, but it requires the employer to "treat with" the authorized representative of the employees, that is, to meet and confer with their representative, to listen to their complaints, and to make reasonable effort to compose differences. P. 548.

   (3) The duty is to treat with the authorized representative exclusively. P. 548.

   (4) This duty is enforceable by injunction. P. 549.

3. A court of equity may refuse to act when it cannot give effective relief; but whether a decree should be refused as useless is a matter of judgment addressed to the special circumstances of each case. P. 550.
4. In determining whether the duty of a carrier to treat with the authorized representative of its employees is enforceable by mandatory injunction, weight is attached to the judgment of Congress that conference between carriers and employees is a powerful aid to industrial peace; and it will not be assumed that such negotiation will not result in agreement or lead to successful mediation or arbitration. P. 551.
5. The peaceable settlement of labor controversies that may seriously impair the ability of an interstate carrier to perform its service to the public, is a matter of public concern. P. 552.
6. Courts of equity go much farther in furtherance of the public interest than when only private interests are involved. P. 552.
7. The fact that, by the Railway Labor Act, Congress has indicated its purpose to make negotiation between carrier and employees obligatory in case of industrial controversy, is in itself a declaration of public interest and policy. P. 552.
8. The power of Congress over interstate commerce extends to such regulations of the relations of rail carriers to their employees as are reasonably calculated to prevent the interruption of interstate commerce by strikes and their attendant disorders. P. 553.
9. It was for Congress to choose the means by which its objective of securing the uninterrupted service of interstate railroads was to be secured, and its judgment, expressed in the Railway Labor Act and confirmed by the history of industrial disputes and of railroad labor relations, is not open to review here. P. 553.
10. The activities of "back shop" employees engaged on heavy repairs on locomotives and cars withdrawn from service for long periods, are *held* to bear such relation to the interstate activities of the carrier as to be regarded as part of them—(*Employers' Liability Cases,* 207 U. S. 463, distinguished)—all subject to the power of Congress over interstate commerce. P. 554.
11. Although the carrier in this case might have turned over its back shop repair work to independent contractors, its determination to make its own repairs, and the nature of the work done, brought its relations with the back shop employees within the purview of the Railway Labor Act. P. 557.
12. The provisions of the Railway Labor Act prohibiting company unions and imposing on the railway the duty of "treating with"

the authorized representative of its employees for the purpose of negotiating a labor dispute, do not infringe the rights of the carrier under the due process clause of the Fifth Amendment. P. 557.

13. In this regard, the Railway could complain only of infringement of its own constitutional immunity, not that of the employees. P. 558.

14. Under § 2, Fourth, of the Railway Labor Act, at an election participated in by a majority of the employees entitled to vote, the vote of a majority of the participants determines the choice of representative. P. 559.

15. A certificate of the National Mediation Board, certifying, in conformity with the Railway Labor Act, that as the result of an election a specified union has been designated to represent a craft of employees, and showing on its face the total number of votes cast in favor of each candidate, is not void because it fails to state the total number of eligible voters in the craft, but is *prima facie* sufficient, and the omitted fact is open to inquiry by the court asked to enforce the command of the statute, § 2, Ninth. P. 561.

16. Section 9 of the Act of March 23, 1932, c. 90, 47 Stat. 70, which provides that "every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in . . . findings of fact made and filed by the court," is not inconsistent with the mandatory injunction in this case. P. 562.

17. Specific provisions of a later Act cannot be rendered nugatory by more general provisions of an earlier Act. P. 563.

84 F. (2d) 641, affirmed. D. C., 11 F. Supp. 621.

CERTIORARI, 299 U. S. 529, to review the affirmance of a decree rendered by the District Court against the Railway Company in a suit by the Federation. The decree commanded the Company to treat with the Federation as the duly accredited representative of the Company's shop craft employees, in respect of pay, working conditions, etc., and restrained the Company from interfering with, influencing, or coercing such employees in their free choice of their representatives, etc.

Mr. James Piper opened, and *Mr. H. T. Hall* concluded, the argument for petitioner. *Messrs. W. H. T. Loyall* and *John C. Donnally* were also on the petitioner's brief from which the following summary is taken.

Section 2, Ninth, of the Act was not meant to impose a legally enforceable obligation to negotiate. In requiring the Railway to "exert every reasonable effort to make and maintain agreements," etc., the decree uses the very words of § 2, First, of the Railway Labor Act of 1926, which was continued by the 1934 amendments without change. The court below held "treat with" in § 2, Ninth, to mean "negotiate with," and presumably this portion of the decree was upheld as a definition of the negotiations the Railway was required to undertake. But in *Malone* v. *Gardner,* 62 F. (2d) 15, 18–20, the same court held § 2, First, of the Act to be a general admonition or declaration of duty imposing no enforceable obligation, citing *Texas & N. O. R. Co.* v. *Railway Clerks,* 281 U. S. 548, and *Pennsylvania Railroad System* v. *Pennsylvania R. Co.,* 267 U. S. 203. The two decisions of the court below are irreconcilable. It rests the authority to award such a mandatory injunction, not upon any change in § 2, First, but solely upon the addition to the Act of the provision in § 2, Ninth, requiring carriers to "treat with" representatives certified, etc. In other words, it holds, in effect, that an admittedly unenforceable duty "to exert every reasonable effort to make and maintain agreements" has been transformed into a legally enforceable one by the mere addition to the statute of this requirement to "treat with" representatives. It seems to have felt that a direction to negotiate for specified purposes (§ 2, First), legally unenforceable, was made legally enforceable by the addition to the statute of (what it construed to be) a direction to "negotiate" for any of the purposes of the Act (§ 2, Ninth).

Congress did not intend to make any such change in the law, and did not use "treat with" in the sense of "nego-

tiate with," but in its very usual sense of "act towards" or "regard." The duty is to treat with the certified representative "as the representative of the craft or class." If Congress had used "treat with" in the sense of "negotiate with" it would not have included this quoted phrase.

The essential characteristic of the Railway Labor Act of 1926 was that it provided a voluntary scheme for the adjustment of the relations between carriers and their employees. *Texas & N. O. R. Co.* v. *Railway Clerks,* 281 U. S. 548, 569. The purpose of Congress in adding § 2, Ninth, is apparent from the report of the Committee of the House accompanying H. R. 9861, the bill which enacted the 1934 amendments to the Railway Labor Act. Section 2, Ninth, was to provide machinery for determining the representative of employees in cases of disputes between them on that subject.

The requirement that the carrier shall "treat" means only that, after such a dispute and a certification by the Board, if the carrier desires to deal with a representative of the craft or class involved, it must treat with the person or organization found by the Board to be the authorized representative, as the authorized representative, and not with someone else. It does not mean that as a consequence of a dispute and certification (but not otherwise) the carrier is under a legally enforceable obligation to negotiate with a representative of its employees. To so hold is not only to ignore the "voluntary scheme" of the Act which the Chief Justice in the *Texas & N. O. R. Co.* case said was its "essence," but to impute to Congress the unlikely intention of creating a duty on the part of the carrier to negotiate with a representative of its employees enforceable when, but only when, its employees have had a dispute as to who that representative shall be.

Even if Congress used the phrase "treat with" in the sense of "negotiate with," it is obvious that it did not intend thereby to create a legally enforceable obligation to negotiate.

A duty to negotiate is an imperfect obligation beyond the power of courts of equity to enforce. *Texas & N. O. R. Co.* v. *Railway Clerks,* 281 U. S. 548, 568.

Negotiation depends upon the feelings, desires and mental attitude of those negotiating, and these are completely beyond judicial control. In order to negotiate in good faith, one must have the desire and the will to negotiate, and this implies the existence of a desire to make an agreement upon the best terms possible, and to make counter proposals if necessary, and do everything else that constitutes bargaining. It is easy to imagine demands, made upon a carrier by its employees, so unreasonable that the carrier could not for an instant consider acceding thereto to any extent whatsoever. May the carrier, nevertheless, negotiate without any good faith intention of acceding to such demands to any extent? The answer must be in the negative—one cannot be said, for example, to negotiate for the purchase of a house if he have a settled determination never to buy a house on any terms. See Story, J., in *Tobey* v. *Bristol,* Fed. Cas. No. 14,065, at p. 1321; Pomeroy's Eq. Juris., 4th ed., § 2180.

If § 2, Ninth, of the Railway Labor Act, requires the Railway to negotiate with the Federation, it is unconstitutional in that it deprives the Railway of its liberty and property in violation of the due process clause. The mandatory injunction directing the Railway to negotiate with the representative certified by the Mediation Board and exert every reasonable effort to make and maintain agreements and to settle disputes, is a violation of the due process clause of the Fifth Amendment.

This Court has long held that the freedom of employers and employees to deal with each other on equal and voluntary terms, is protected by the due process clause of the Fifth and Fourteenth Amendments. *Lochner* v. *New York,* 198 U. S. 45, 53; *Adair* v. *United States,* 208 U. S. 161, 173; *Hitchman Coal Co.* v. *Mitchell,* 245 U. S.

229, 250; *Morehead* v. *Tipaldo,* 298 U. S. 587. The liberty to refrain from entering into contracts is a part of liberty of contract; legislation which compels the making of agreements is a violation of fundamental rights and is void. *Coppage* v. *Kansas,* 236 U. S. 1, 20. Liberty of contract as a right is, of course, not absolute, but qualified. *Nebbia* v. *New York,* 291 U. S. 502, 523. But "Legislative abridgment of that freedom can only be justified by the existence of exceptional circumstances. Freedom of contract is the general rule and restraint the exception." *Morehead* v. *Tipaldo, supra.*

There are here no "exceptional circumstances," no imminent "disaster," (*Wilson* v. *New,* 243 U. S. 332, 342), no unusual "danger" (*Holden* v. *Hardy,* 169 U. S. 366, 393), no "desperate" situation (*Nebbia* v. *New York,* 291 U. S. 502, 515), no element of "deception" (*Hall* v. *Geiger-Jones Co.,* 242 U. S. 539, 551). The Railway Labor Act is permanent legislation. Its validity has been sustained only as a "voluntary scheme" involving no invasion of contract relationships. *Texas & N. O. R. Co.* v. *Railway Clerks, supra.* See also *Pennsylvania R. Co.* v. *U. S. Railroad Labor Board,* 261 U. S. 72; *Pennsylvania Railroad System* v. *Pennsylvania R. Co.,* 267 U. S. 203.

As now construed by the Court below, the Act has now lost that voluntary character, which this Court declared to be its "essence" and has become a system of compulsion against the employer; yet no similar compulsion is imposed upon the employees.

Negotiation with respect to the terms of the contract is a part of the contractual process; and since the employer cannot be compelled to take the ultimate step (*Coppage* v. *Kansas, supra*), it is plain that he cannot be compelled to take the initial steps. As viewed by the Fifth Amendment, the contractual process is a single one; all of its elements enjoy the same protection. *Adair* v.

United States, 208 U. S. 161, 173, in Cooley on Torts; 3 Willoughby, Const., 2d ed., 1802; *Allgeyer* v. *Louisiana,* 165 U. S. 578, 589.

The doctrine that liberty of contract includes liberty to refuse to have business relations to any extent has been exemplified in the cases upholding the right of every man to deal with, or refuse to deal with, any man, or class of men, as he sees fit, whatever his motive or whatever the resulting injury, without being held in any way accountable (*Federal Trade Comm'n* v. *Raymond Brothers-Clark Co.,* 263 U. S. 565; *United States* v. *Colgate & Co.,* 250 U. S. 300; *Grenada Lumber Co.* v. *Mississippi,* 217 U. S. 433; *Great A. & P. Tea Co.* v. *Cream of Wheat Co.,* 227 Fed. 46), and in the decisions against schemes of compulsory arbitration (*Wolff Packing Co.* v. *Industrial Court,* 267 U. S. 552, 569; *Dorchy* v. *Kansas,* 264 U. S. 286).

Further, in construing the Transportation Act, 1920, this Court has twice strongly intimated that legislation establishing compulsory negotiation would violate the Fifth Amendment. *Pennsylvania R. Co.* v. *Railroad Labor Board,* 261 U. S. 72, 84, 85; *Pennsylvania Railroad System* v. *Pennsylvania R. Co.,* 267 U. S. 203, 217. See *Sherman* v. *Abeles,* 265 N. Y. 383; *Holcombe* v. *Creamer,* 231 Mass. 99, 109.

The abridgment of liberty of contract here attempted is arbitrary and unreasonable,—beyond the limits of effective federal statutory control,—beyond the powers of a court of equity. The direction to "treat with," if it means "negotiate with," is utterly futile. The direction to negotiate is also futile since the ultimate result of any conference is admittedly without the scope of control.

The injunction restraining the Railway from contracting with anyone except the Federation is a violation of the due process clause of the Fifth Amendment. The carrier is deprived of the right to bargain or contract with

those of its employees who do not desire such representation; and this is so whether the carrier desires to contract directly with an individual in the minority or indirectly through an organization by which the minority desires to be represented. If the Act empowers the majority to speak for the minority, it in effect delegates to the majority the right to prevent the carrier from making a contract with the minority which the minority may be willing to make. A somewhat similar delegation to the majority of power to bind the minority was recently condemned by this Court in *Carter* v. *Carter Coal Co.,* 298 U. S. 238.

The Act is unconstitutional in its entirety in that it attempts to regulate labor relations between carriers and employees engaged solely in activities intrastate in character which do not directly affect interstate commerce.

The back-shop employees are engaged solely in intrastate activities, as was found by both of the lower courts. Their work is not so related to the interstate activities of the Railway as to admit of federal regulation of the employer-employee relationship. *First Employers' Liability Cases,* 207 U. S. 463, 498; *New York, N. H. & H. R. Co.* v. *Bezue,* 284 U. S. 415. See also *Industrial Accident Comm'n* v. *Davis,* 259 U. S. 182; *Minneapolis & St. Louis R. Co.* v. *Winters,* 242 U. S. 353.

Furthermore, the work of the back-shop employees at the railway's shop is manufacture, which is not commerce. *Crescent Cotton Oil Co.* v. *Mississippi,* 257 U. S. 129; *Carter* v. *Carter Coal Co.,* 298 U. S. 238.

The proposition that back-shop employees are subject to federal regulation because in the event of a strike by such workers the interstate activities of the Railway may be interfered with is untenable. According to that test or standard, all activities, no matter how local, would be held to directly burden or affect interstate commerce inasmuch as any interruption of them by strikes to some extent would affect the stream of interstate commerce.

The back-shop work is just as local as similar work done by outside concerns, which clearly could not be subjected to federal regulation on the ground of possible strike disturbance. *Carter* case, *supra.*

The strike test is also untenable because, as is manifest from the testimony, the Railway could permanently close its shop tomorrow without occasioning any interruption to its interstate service. All the work done in the shop could be handled by outside shops and the material made at the shop could be purchased in the market. Distinguishing: *United States* v. *Railway Employees' Department,* 283 Fed. 479; *id.,* 290 Fed. 978.

As an attempted regulation of intrastate activities, the Act is inseparable; it cannot be aided by construction. *United States* v. *Reese,* 92 U. S. 214; *Trade-Mark Cases,* 100 U. S. 82; *James* v. *Bowman,* 190 U. S. 127; *Illinois Central R. Co.* v. *McKendree,* 203 U. S. 514; *Employers' Liability Cases, supra; Crowell* v. *Benson,* 285 U. S. 22, 76–77 (dissenting opinion).

Nor does the separability provision save the Act or any part of it. *Hill* v. *Wallace,* 259 U. S. 44, 70; *Railroad Retirement Board* v. *Alton R. Co.,* 295 U. S. 330, 361.

The certification of the Mediation Board is a nullity (a) because it fails to show that a majority of any craft or class of employees voted in favor of the Federation, or even that such a majority participated in the election, and (b) because it is impossible to tell from it what the result of the election would have been without the votes of the back-shop employees.

The injunction is contrary to the Norris-LaGuardia Act.

Mr. Frank L. Mulholland, with whom *Messrs. S. M. Brandt* and *Willard H. McEwen* were on the brief, for respondents.

The historical development of the Railway Labor Act, as amended in 1934, indicates the intent to impose an

enforceable legal obligation upon carriers to treat with the true representative of any craft or class of their employees certified as such by the National Mediation Board. The Act was amended to remedy an existing evil. Carriers were avoiding any treating with the true representatives of employees, through the subterfuge of fomenting and keeping in existence a representation dispute between a company union and the standard labor organization which the employees desired. In so far as the evidence presented to the congressional committee demonstrated, no carrier was then refusing to treat with the true representatives of employees save under the cloak of a claimed representation dispute. Thus if it be true that Congress did not include in the Act any compulsory provisions requiring carriers to "treat" where no such dispute existed, no conclusion can be drawn from that fact as to its intention with regard to the enforceability of such an obligation in situations where a dispute did exist.

Statutes must be construed in relation to the evils which they were designed to cure. *Warner* v. *Goltra,* 293 U. S. 155.

But the Act does impose compulsory obligations upon carriers to "treat" in some measure with the representatives of their employees whether a representation dispute exists or not. Petitioner's argument in this connection rests solely on the provisions of paragraphs First and Second of § 2 of the Act. These are copied substantially from the Railway Labor Act of 1926, which in turn took them from § 301 of the Transportation Act of 1920. As a part of the 1920 Act this language did not impose an enforceable obligation. As adopted into the Railway Labor Act of 1926, it was also held unenforceable in the case of *Malone* v. *Gardner,* 62 F. (2d) 15. The petitioner asserts that this language as used in the Act of 1934 provides an unenforceable obligation under the familiar

"copied statute" rule of interpretation. That language which creates an unenforceable obligation when a part of a generally unenforceable statute retains its character when it becomes a part of an enforceable Act is not an inevitable conclusion. But, regardless of the enforceability of the provisions of § 2, First and Second, there are other provisions of this amended statute which do create enforceable obligations upon all carriers to treat or confer with the representatives of their employees under certain circumstances.

Section 2, Ninth, requires carriers to "treat" with the representatives of their employees "for the purposes of this Act," which must refer to the settlement of disputes between carriers and employees. Two types of disputes are contemplated, those involving the making or changing of agreements concerning rules, rates of pay, or working conditions, and those involving local grievances or disputes concerning the interpretation or application of agreements already made.

The system set up by the statute for all carriers regardless of whether a representation dispute exists or not, contemplates a measure of compulsion in the matter of treating with representatives of employees in the settlement of both types of differences.

The provisions of § 6 of the Act relating to conferences between the parties are certainly enforceable. To this extent unquestionably Congress has imposed a legal obligation upon all carriers to "treat" with employee representatives.

The other type of case, *i. e.*, arising out of grievances or out of the interpretation or application of agreements, is to be handled in a different manner. The parties, however, are again commanded to confer with regard to the matter. If conferences fail, then the dispute may be referred to the National Railroad Adjustment Board for determination.

Either method of procedure as outlined by the statute results ultimately in the parties coming under definite legal obligations. Decisions of the National Railroad Adjustment Board may be enforced by definitely outlined procedure. Acts of the National Mediation Board are not thus enforceable, but a taking of jurisdiction by that Board places the parties under a certain legal duty to maintain the *status quo* until its functions have been performed.

Where the ultimate end of the statutory process is the undoubted creation of enforceable obligations, general statements of duty are given color by the proceedings to which they are related. Accordingly, there is specifically imposed upon all carriers an obligation to confer or treat with employee representatives "for the purposes of this Act," *i. e.,* the adjustment of disputes between them.

The obligation to "treat" imposed by § 2, Ninth, is sufficiently definite to be capable of enforcement by injunction.

Courts are frequently called upon to pass upon the good faith of a party and to estimate his state of mind by his acts. That bad faith may be successfully concealed has never been accepted as a valid reason why courts should be barred from inquiring into the facts and from seeking to enforce the law. The difficulty, if any, is one of proof and not of equity jurisdiction.

It must be kept in mind that the carrier was not only ordered to treat with the Federation as the representative of the employees in question, but as a necessary corollary was also ordered not to treat with any other person or organization claiming to be such representative. Not only is the negative phase of this decree definitely enforceable, but it also assists in the enforcement of the positive phase. This assistance grows out of the economic relations of the parties. In dealing with nu-

merous employees scattered over the many miles of territory through which a railroad system extends, it has been considered necessary by carriers that they negotiate general agreements defining the rights of whole classes or crafts of employees as units. If the carrier is prevented from treating with regard to the negotiation of such agreements with other parties, its own economic self-interest dictates that it treat for that purpose with the certified representative of the employees, and in good faith.

Section 2, Ninth, of the Railway Labor Act, as above interpreted, does not violate the Fifth Amendment. *Duncan* v. *Missouri,* 152 U. S. 377; *Wagner* v. *Leser,* 239 U. S. 207; *Chicago, R. I. & P. R. Co.* v. *United States,* 284 U. S. 79.

If the statute has a "reasonable relation to a proper use" (*Liberty Warehouse Co.* v. *Burley Tobacco Assn.,* 276 U. S. 71); is "reasonably necessary to effect any of the great purposes for which the National Government was created" (*Highland* v. *Russell Car Co.,* 279 U. S. 253); and is not "inappropriate" to remedy "the evil aimed at" (*Packer Corp.* v. *Utah,* 285 U. S. 104), the statute must be held valid whether contracts or contract rights are affected or not.

Congress, in the exercise of its legislative discretion, deemed it necessary to the successful functioning of its plan to define the nature of the employees' groups through which the contemplated bargaining was to be carried on. In selecting the "craft or class of employees" as such group, Congress was making no arbitrary determination. It was merely recognizing bargaining groups which were already in existence and functioning as such on virtually all of the Nation's carriers.

It is further apparent that the craft or class, like any other group of individuals, can act collectively only

through representatives selected by it. The next step logically, therefore, was for Congress to establish the means by which such representatives should be chosen. It was not only logical, but necessary, in order to perfect the existing system, that Congress establish a method of choosing the necessary representatives.

The Act does not require a carrier to enter into any contract, but merely that it shall negotiate with regard to the matter. The claimed right of freedom to abstain from negotiations is one whose existence or non-existence can have no legal or practical effect upon the rights of the petitioner. The purpose of the Fifth Amendment was to provide a protection for valuable individual rights. Until valuable rights are infringed, protection of the Amendment cannot be invoked.

The claim that the carrier must be free to treat with any representatives of any group of employees it chooses means that the carrier, not the Congress, should have the power to determine the nature of the collective bargaining group of employees, and should be able to deal with groups smaller in size than the craft or class, *i. e.*, disgruntled or favored minorities within the craft or class. As a practical matter, this asserted right is one of mere academic value to the petitioner, except as it may be used for the purpose of avoiding or breaking down the regulatory scheme exemplified by the Railway Labor Act, a result which would certainly follow its successful assertion.

By virtue of the practice long recognized in the railroad industry, labor agreements so negotiated by an accredited representative selected by the majority of the class or craft, have been made applicable to all the employees constituting the class or craft. Any departure from this arrangement in the nature of another agreement applicable only to the individuals constituting a

minority group would inevitably become subversive of the agreement made by the representative of the majority group.

The labor agreements covering rates of pay, rules and working conditions, with which the Railway Labor Act is concerned, are to be distinguished from the individual contracts of employment with each employee. They are the general rules and regulations promulgated by the employer for the government of all employees of a particular class; but instead of the employer arbitrarily issuing such rules without consulting the employees, they are formulated in joint conferences and adopted by mutual agreement.

From a simple railroad operating standpoint, it would be quite impracticable for two groups, majority and minority of the same class or craft of employees, jointly constituting one operating or service organization, to function efficiently under two divergent sets of labor rules.

Still other complications would arise. More than one agreement applying to the same class or craft of employees would make it necessary at the outset to identify the very individuals to whom the terms of each agreement applied. Thus the individuals constituting the majority group and those constituting the minority group would have to be listed for payroll and other accounting needs. The accounting complications arising in themselves would be expensive. The majority and minority employees would become known, with the result, considering the controversial nature of the situation as a whole, that all kinds of disturbances growing out of proselyting and favoritism would ensue to impair the morale of the labor forces.

Under what conditions is the employee to work who elects neither the standards of the majority nor the

minority group? May he make still another agreement? If so, where is the process to end? Such is the situation which the Railway Labor Act and prior railway labor legislation sought to correct.

Collective bargaining has been recognized by this Court as legitimate and salutary. Its fostering and protection of the Nation's carriers as a means of settling disputes between them and their employees has been recognized as a legitimate congressional function. *Texas & N. O. R. Co.* v. *Railway Clerks,* 281 U. S. 548.

The petitioner is a common carrier, a public utility, the operator of a business peculiarly charged with the public interest. Its business may, therefore, be regulated to a greater extent than is the case with other industries without infringing upon the constitutional guarantee of freedom of contract. *Wilson* v. *New,* 243 U. S. 332.

In many respects, the private rights of carriers to enter into contracts have been subjected to unique restrictions conforming to the importance of the services which they perform for the public and the liability of the public to harm if that service is not constantly and justly rendered, all without violation of the Fifth Amendment. That the public is vitally concerned in labor disputes involving carriers and employees is obvious. The Railway Labor Act is designed to safeguard this public interest.

Distinguishing: *Carter* v. *Carter Coal Co.,* 298 U. S. 238. The decision in the *Carter* case is not binding upon the Court in this one because of the vast and fundamental differences between the statutes involved, both as to subject matter and as to their legal consequences.

The Railway Labor Act is a valid exercise of the interstate commerce power.

The consideration of whether a person or thing is directly engaged in or being used in interstate commerce affords at best a sort of rule of thumb method of deter-

mining whether he or it comes within the scope of federal regulatory power. If so engaged or used, federal authority may doubtless be applied. If not, the opposite conclusion does not follow. The authority of Congress is not governed by the employment of people or things in interstate commerce, but by the effects upon that commerce of the acts or practices sought to be regulated. Indeed, the authority of Congress has been held to extend to at least two classes of cases where purely intrastate matters are or may be involved. First, the Federal Government may exercise its power to prevent direct injury or interruption to the flow of interstate commerce whatever may be the source of that injury or interruption. Second, where the operations of a carrier are such that its interstate and intrastate activities are so inextricably commingled that they cannot be separated for the purposes of regulation, the power of Congress has been held to extend to both.

As for interruptions to interstate commerce, the disastrous results of strikes on interstate railroads is a matter of common knowledge.

If the Government of the United States has the power to prevent such interruptions to commerce by injunction after the interruption has begun, it has equal power to eliminate the source of the interruption before it occurs.

Reasoning from past experiences, the Congress concluded that the interruptions which it sought to prevent might arise as easily from disputes involving shop employees as from any other class. Nice distinctions between employees engaged in interstate commerce and those not so engaged, or between back-shop employees and others, were not attempted, for the reason that no such distinctions have ever been apparent in the results of the disputes involving these various groups. Whatever the group, the ultimate result of a serious dispute between a carrier and its employees has been the same—

interruption to interstate commerce, direct and disastrous. Accordingly, Congress sought to apply the procedure set up in the statute to all classes of carriers' employees defined as such by the rulings of the Interstate Commerce Commission. In so doing, Congress was applying no novel constitutional theory, but was treading a path well marked by the decisions of this Court. *Southern Ry. Co.* v. *United States,* 222 U. S. 20; *Texas & Pacific R. Co.* v. *Rigsby,* 241 U. S. 33; *Second Employers' Liability Cases,* 223 U. S. 1; *Baltimore & Ohio R. Co.* v. *Interstate Commerce Comm'n,* 221 U. S. 612; *Wilson* v. *New,* 243 U. S. 332; *New England Divisions Case,* 261 U. S. 184; *Dayton-Goose Creek Ry.* v. *United States,* 263 U. S. 456.

The difficulty experienced by the courts in determining whether a single employee is engaged in interstate commerce at a single moment of time (in applying the Second Federal Employers' Liability Act) is attested by the vast number of cases on the point. The decisions, both state and federal, are hopelessly contradictory, and many situations have been presented to this Court for final adjudication. The confusion which would follow any attempt to separate employees for the purpose of regulation of labor relations with their employing carriers would be so great as to render any such plan unworkable. Here we would have involved not a single employee, nor a single moment of time, as in a personal injury case, but numbers of employees and long courses of relationships between them and their employer extending over many years. Consider two groups of employees of the same carrier performing similar tasks, *e. g.,* those performed by machinists, the one group making running repairs, the other working in the back shop, the one therefore working in interstate commerce, the other not. Both groups belong to the same craft, usually both belong to the same labor organization. Their common interests are virtually

identical. Labor unrest may easily spread from one to the other. No practical distinction is maintained between them in the operation of a railroad. Neither group is static. A given employee may be in one category today and the other tomorrow, or in any one day he may perform tasks appertaining to both. All this is strikingly illustrated by the situation now existing on the Virginian Railroad.

That this carrier has attempted no such division in practice as it says exists between back-shop employees and others, in regulating its own business affairs, is the best evidence that such a division is entirely impracticable.

In *Schechter Poultry Corp.* v. *United States, supra,* and *Carter* v. *Carter Coal Co., supra,* this Court was careful to distinguish between the production of such goods as would ultimately be transported in interstate commerce, the handling of those goods after commerce had ceased, and the commercial process itself. Labor disputes in businesses whose function is production or distribution, though they might be effective to prevent the goods in question from entering interstate commerce, and by inference though they might so clog the machinery of distribution as to ultimately dam up the commercial stream, were considered by the Court as affecting interstate commerce only indirectly. Those cases establish no rule of law exempting the field of labor relations as such from the scope of federal regulation. They merely define commerce and point out those acts which may be said to directly affect it. The doctrine expressed in *Texas & N. O. R. Co.* v. *Railway Clerks* has not been disturbed or modified by these later decisions.

The certification of the National Mediation Board is valid.

The Norris-LaGuardia Act is not applicable.

Solicitor General Reed, with whom *Attorney General Cummings* and *Messrs. Charles E. Wyzanski, Jr., Wendell*

Berge, Leo F. Tierney, and *Robert L. Stern* were on the brief, on behalf of the United States, as *amicus curiae,* by special leave of Court.

The Railway Labor Act may constitutionally be applied to cover persons employed in the back shops of a carrier even though such persons are not themselves engaged in interstate commerce. This Court has already upheld the validity of the Act as applied to clerks, whose work is obviously intrastate in nature. *Texas & N. O. R. Co.* v. *Railway Clerks,* 281 U. S. 548. The purpose of the Act was to prevent strikes which threatened the service of the necessary agencies of interstate transportation. Labor disputes between carriers and their shop employees would both endanger the safety of interstate transportation and directly obstruct its movement. Moreover, a dispute between a carrier and its back-shop employees would necessarily be communicated to employees engaged in interstate commerce, inasmuch as the mechanical department of a carrier, which includes both back-shop employees and those engaged in making running repairs, is operated and organized as a unit. The principle of the *Employers' Liability Cases,* 207 U. S. 463, does not apply here. Although interstate commerce might not be affected at all by the rule of liability applicable to shopmen's injuries, it would be directly obstructed if shopmen ceased to work and if railroad equipment was not repaired.

It is doubtful whether there are any railroad employees whose work is not essential to the effective functioning of the transportation system or as to whom it might not be said that labor disputes between them and their employers would interfere with interstate commerce. But if it be assumed that there is a small proportion of employees as to whom the Act could not constitutionally be applied, it is clear that Congress would have intended the Act to stand as to the remainder.

Petitioner does not challenge the enforceability or legality of subdivisions Third and Fourth of § 2, which together form one of the alternative statutory bases for the negative part of the decree, but claims that the affirmative duty imposed upon carriers to treat with the representatives of their employees is not enforceable. A review of the history and context of these sections, however, shows that Congress intended the obligations imposed by paragraphs First, Second, and Ninth of § 2, to be both mandatory and enforceable.

Enforcement of paragraphs First, Second, and Ninth of § 2 is in fact essential to the success of the statutory plan for amicable settlement of disputes through conferences between representatives of the parties. The purpose and effect of these provisions is to require carriers and their employees to use the machinery established by the Act for the attainment of industrial peace; it does not change the basic principles of the Act, which recognize that peace can be achieved only through conferences and voluntary agreements.

There is no inherent difficulty in the way of equitable enforcement of the statutory requirement that carriers confer with the representatives of their employees. The statute does not attempt to compel agreement, and the decree only requires the carrier to meet representatives of employees in conference.

The negative requirement in the decree that petitioner refrain from entering into collective labor agreements except with respondent may be regarded as one way in which a court of equity enforces the affirmative statutory obligation. Or it may rest upon the negative statutory obligations included in § 2, Second and Ninth. These paragraphs and complementary parts of the statute not only express an affirmative duty to treat with duly designated representatives of employees but also imply a negative duty not to treat with any one else as to rates

of pay, rules, or working conditions. Thus the negative part of the decree may be in execution of these paragraphs. Or it may be in execution of paragraphs Third and Fourth, which are unquestionably enforceable. *Texas & N. O. R. Co.* v. *Railway Clerks,* 281 U. S. 548.

The affirmative obligation does not deprive petitioner of liberty or property in violation of the Fifth Amendment; the obligation is merely to confer, not necessarily to contract. Moreover, if such a requirement were deemed to interfere with petitioner's property or contract rights, it would be reasonable as a necessary and important part of the machinery for the prevention of railway labor disputes. Every portion of the statutory plan ultimately depends for its success on the willingness of carriers to confer with the representatives of their employees.

The negative obligation does not in fact deprive carriers of liberty of contract, inasmuch as the practice of carriers is not to contract with individual employees or with minorities. It would be extremely impracticable for a carrier to have minority groups of employees working under different rules than the majority. The privilege of contracting with more than one representative of a single class of employees is purely theoretical.

In any event, the prohibition against contracts with minority groups is reasonable and necessary if railway labor disputes are to be prevented. The effectiveness of the machinery of the Act is posited upon agreement between representatives of employers and employees, and cannot be achieved by conflicting conferences between a carrier and numerous representatives of individual employees or minority groups working at cross purposes. Any attempt by a carrier to maintain two or more contracts applying to persons doing the same work, with standards necessarily discriminating against one group or another, would result in discord and dissatisfaction and make labor disputes inevitable.

The Railway Labor Act does not involve any delegation of legislative power. The doctrine of *Carter* v. *Carter Coal Co.*, 298 U. S. 238, is inapplicable.

Petitioner's claim that the injunction below violates §§ 4 (e), 6, 7 (a), and 9 of the Norris-LaGuardia Anti-Injunction Act is obviously unsupported by the language of the sections to which petitioner refers. Moreover, if there were an inconsistency, the Railway Labor Act, which was enacted after the Norris-LaGuardia Act and which deals with the specific problem at bar, would prevail.

MR. JUSTICE STONE delivered the opinion of the Court.

This case presents questions as to the constitutional validity of certain provisions of the Railway Labor Act of May 20, 1926, c. 347, 44 Stat. 577, as amended by the Act of June 21, 1934, c. 691, 48 Stat. 1185, 45 U. S. C. §§ 151–163, and as to the nature and extent of the relief which courts are authorized by the Act to give.

Respondents are System Federation No. 40, which will be referred to as the Federation, a labor organization affiliated with the American Federation of Labor and representing shop craft employees of petitioner railway, and certain individuals who are officers and members of the System Federation. They brought the present suit in equity in the District Court for Eastern Virginia, to compel petitioner, an interstate rail carrier, to recognize and treat with respondent Federation, as the duly accredited representative of the mechanical department employees of petitioner, and to restrain petitioner from in any way interfering with, influencing or coercing its shop craft employees in their free choice of representatives, for the purpose of contracting with petitioner with respect to rules, rates of pay and working conditions, and for the purpose of considering and settling disputes between petitioner and such employees.

The history of this controversy goes back to 1922, when, following the failure of a strike by petitioner's shop employees affiliated with the American Federation of Labor, other employees organized a local union known as the "Mechanical Department Association of the Virginian Railway." The Association thereupon entered into an agreement with petitioner, providing for rates of pay and working conditions, and for the settlement of disputes with respect to them, but no substantial grievances were ever presented to petitioner by the Association. It maintained its organization and held biennial elections of officers, but the notices of election were sent out by petitioner and all Association expenses were paid by petitioner.

In 1927 the American Federation of Labor formed a local organization, which, in 1934, demanded recognition by petitioner of its authority to represent the shop craft employees, and invoked the aid of the National Mediation Board, constituted under the Railway Labor Act as amended, to establish its authority. The Board, pursuant to agreement between the petitioner, the Federation, and the Association, and in conformity to the statute, held an election by petitioner's shop craft employees, to choose representatives for the purpose of collective bargaining with petitioner. As the result of the election, the Board certified that the Federation was the duly accredited representative of petitioner's employees in the six shop crafts.

Upon this and other evidence, not now necessary to be detailed, the trial court found that the Federation was the duly authorized representative of the mechanical department employees of petitioner, except the carmen and coach cleaners; that the petitioner, in violation of § 2 of the Railway Labor Act, had failed to treat with the Federation as the duly accredited representative of petitioner's employees; that petitioner had sought to influence its employees against any affiliation with labor organizations other than an association maintained by petitioner, and to

prevent its employees from exercising their right to choose their own representative; that for that purpose, following the certification by the National Mediation Board, of the Federation, as the duly authorized representative of petitioner's mechanical department employees, petitioner had organized the Independent Shop Craft Association of its shop craft employees, and had sought to induce its employees to join the independent association, and to put it forward as the authorized representative of petitioner's employees. [1]

Upon the basis of these findings the trial court gave its decree applicable to petitioner's mechanical department employees except the carmen and coach cleaners. It directed petitioner to "treat with" the Federation and to "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, . . ." It restrained petitioner from "entering into any contract, undertaking or agreement of whatsoever kind concerning rules, rates of pay or working conditions affecting its Mechanical Department employees, . . . except . . . with

[1] The court found that after the certification by the Mediation Board "the defendant, by and through its officers, agents and servants, undertook by means of the circulation of a petition or petitions addressed to the National Mediation Board to have the certification of the National Mediation Board aforesaid altered, changed or revoked so as to deprive its Mechanical Department employes of the right to representation by said System Federation No. 40, Railway Employes Department of the American Federation of Labor, so designated as aforesaid, and thereafter did cause to be organized the Independent Shop Crafts Association by individual Mechanical Department employes by circulating or causing to be circulated applications for membership in said Independent Shop Crafts Association notwithstanding the certification as aforesaid by the National Mediation Board of said System Federation No. 40, Railway Employes Department of the American Federation of Labor, as the authorized representative of its Mechanical Department employes, . . ."

the Federation," and from "interfering with, influencing or coercing" its employees with respect to their free choice of representatives "for the purpose of making and maintaining contracts" with petitioner "relating to rules, rates of pay, and working conditions or for the purpose of considering and deciding disputes between the Mechanical Department employees" and petitioner. The decree further restrained the petitioner from organizing or fostering any union of its mechanical department employees for the purpose of interfering with the Federation as the accredited representative of such employees. 11 F. Supp. 621.

On appeal the Court of Appeals for the Fourth Circuit approved and adopted the findings of the district court and affirmed its decree. 84 F. (2d) 641. This Court granted certiorari to review the cause as one of public importance.

Petitioner here, as below, makes two main contentions: First, with respect to the relief granted, it maintains that § 2, Ninth, of the Railway Labor Act, which provides that a carrier shall treat with those certified by the Mediation Board to be the representatives of a craft or class, imposes no legally enforcible obligation upon the carrier to negotiate with the representative so certified, and that in any case the statute imposes no obligation to treat or negotiate which can be appropriately enforced by a court of equity. Second, that § 2, Ninth, in so far as it attempts to regulate labor relations between petitioner and its "back shop" employees, is not a regulation of interstate commerce authorized by the commerce clause because, as it asserts, they are engaged solely in intrastate activities; and that so far as it imposes on the carrier any obligation to negotiate with a labor union authorized to represent its employees, and restrains it from making agreements with any other labor organization, it is a denial of due process guaranteed by the Fifth Amendment. Other minor objections to the decree, so far as relevant to

our decision, will be referred to later in the course of this opinion.

The concurrent findings of fact of the two courts below are not shown to be plainly erroneous or unsupported by evidence. We accordingly accept them as the conclusive basis for decision, *Texas & N. O. R. Co.* v. *Brotherhood of Railway & S. S. Clerks,* 281 U. S. 548, 558; *Pick Mfg. Co.* v. *General Motors Corp.,* 299 U. S. 3, 4, and address ourselves to the questions of law raised on the record.

First. The Obligation Imposed by the Statute. By Title III of the Transportation Act of February 28, 1920, c. 91, 41 Stat. 456, 469, Congress set up the Railroad Labor Board as a means for the peaceful settlement, by agreement or by arbitration, of labor controversies between interstate carriers and their employees. It sought "to encourage settlement without strikes, first by conference between the parties; failing that, by reference to adjustment boards of the parties' own choosing, and if this is ineffective, by a full hearing before a National Board . . ." *Pennsylvania R. Co.* v. *Railroad Labor Board,* 261 U. S. 72, 79. The decisions of the Board were supported by no legal sanctions. The disputants were not "in any way to be forced into compliance with the statute or with the judgments pronounced by the Labor Board, except through the effect of adverse public opinion." *Pennsylvania Federation* v. *Pennsylvania R. Co.,* 267 U. S. 203, 216.

In 1926 Congress, aware of the impotence of the Board, and of the fact that its authority was generally not recognized or respected by the railroads or their employees, made a fresh start toward the peaceful settlement of labor disputes affecting railroads, by the repeal of the 1920 Act and the adoption of the Railway Labor Act. Report, Senate Committee on Interstate Commerce, No. 222, 69th Cong., 1st Sess. *Texas & N. O. R. Co.* v. *Brotherhood of Railway & S. S. Clerks, supra,* 563. By the new measure Congress continued its policy of encouraging the amicable adjustment of labor disputes by their voluntary submis-

sion to arbitration before an impartial board, but it supported that policy by the imposition of legal obligations. It provided means for enforcing the award obtained by arbitration between the parties to labor disputes. § 9. In certain circumstances it prohibited any change in conditions, by the parties to an unadjusted labor dispute, for a period of thirty days, except by agreement. § 10. It recognized their right to designate representatives for the purposes of the Act "without interference, influence or coercion exercised by either party over the self-organization or designation of representatives by the other." § 2, Third. Under the last-mentioned provision this Court held, in the *Railway Clerks* case, *supra,* that employees were free to organize and to make choice of their representatives without the "coercive interference" and "pressure" of a company union organized and maintained by the employer; and that the statute protected the freedom of choice of representatives, which was an essential of the statutory scheme, with a legal sanction which it was the duty of courts to enforce by appropriate decree.

The prohibition against such interference was continued and made more explicit by the amendment of 1934.[2] Petitioner does not challenge that part of the

[2] Section 2 of the Act, as amended in 1934, declares that its purposes, among others, are "(2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization" and "(3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act." The section was also amended to provide that "neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives," § 2, Third, and that "it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization . . . or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization." § 2, Fourth.

decree which enjoins any interference by it with the free choice of representatives by its employees, and the fostering, in the circumstances of this case, of the company union. That contention is not open to it in view of our decision in the *Railway Clerks* case, *supra,* and of the unambiguous language of § 2, Third, and Fourth, of the Act, as amended.

But petitioner insists that the statute affords no legal sanction for so much of the decree as directs petitioner to "treat with" respondent Federation "and exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes whether arising out of the application of such agreements or otherwise." It points out that the requirement for reasonable effort to reach an agreement is couched in the very words of § 2, First, which were taken from § 301 of the Transportation Act, and which were held to be without legal sanction in that Act. *Pennsylvania Federation* v. *Pennsylvania R. Co., supra,* 215. It is argued that they cannot now be given greater force as reënacted in the Railway Labor Act of 1926, and continued in the 1934 amendment. But these words no longer stand alone and unaided by mandatory provision of the statute as they did when first enacted. The amendment of the Railway Labor Act added new provisions in § 2, Ninth, which makes it the duty of the Mediation Board, when any dispute arises among the carrier's employees, "as to who are the representatives of such employees," to investigate the dispute and to certify, as was done in this case, the name of the organization authorized to represent the employees. It commands that "Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act."

It is, we think, not open to doubt that Congress intended that this requirement be mandatory upon the railroad employer, and that its command, in a proper case, be enforced by the courts. The policy of the Transportation Act of encouraging voluntary adjustment of labor disputes, made manifest by those provisions of the Act which clearly contemplated the moral force of public opinion as affording its ultimate sanction, was, as we have seen, abandoned by the enactment of the Railway Labor Act. Neither the purposes of the later Act, as amended, nor its provisions when read, as they must be, in the light of our decision in the *Railway Clerks* case, *supra,* lend support to the contention that its enactments, which are mandatory in form and capable of enforcement by judicial process, were intended to be without legal sanction.[3]

Experience had shown, before the amendment of 1934, that when there was no dispute as to the organizations authorized to represent the employees, and when there was willingness of the employer to meet such representative for a discussion of their grievances, amicable adjustment of differences had generally followed and strikes had been avoided.[4] On the other hand, a prolific source of dispute had been the maintenance by the railroads of company unions and the denial by railway management

[3] The 1934 amendment imposed various other obligations upon the carrier, to which criminal penalties were attached [§ 2, Tenth]—*e. g.,* prohibitions against helping unions, by contributions of funds, or assistance in the collection of dues, § 2, Fourth; against requiring employees to promise to join or not to join a labor union, § 2, Fifth; against changing rates of pay, etc., without specifying a conference upon thirty days' notice, § 2, Seventh; and see the requirement that the carrier post notices that all disputes will be determined in accordance with the Act, § 2, Eighth.

[4] In the first two years after the enactment of the Railway Labor Act of 1926, 363 cases concerning rates of pay, rules or working conditions were submitted to the United States Board of Mediation, and

of the authority of representatives chosen by their employees. Report of House Committee on Interstate and Foreign Commerce, No. 1944, 73rd Cong., 2d Sess., pp. 1–2.[5] Section 2, Ninth, of the amended Act, was specifically aimed at this practice. It provided a means for ascertaining who are the authorized representatives of the employees through intervention and certification by the Mediation Board, and commanded the carrier to treat with the representative so certified. That the command was limited in its application to the case of intervention

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about 25% of these were withdrawn by the parties. Yet, during the same period, more than 600 direct and voluntary settlements were negotiated. See United States Board of Mediation, First Annual Report, For the Fiscal Year Ended June 30, 1927, pp. 10–11; Second Annual Report, For the Fiscal Year Ended June 30, 1928, pp. 11, 58–59. Compare National Mediation Board, Second Annual Report, For the Fiscal Year Ended June 30, 1936, at p. 1: "For every dispute submitted to . . . these Boards, there were many others considered and settled in conferences between representatives of carriers and of the employees as required by section 2, second, of the Act."

See also testimony of William M. Leiserson, Chairman of the National Mediation Board until February 1, 1937, at Hearing by National Labor Relations Board in the case of Jones & Laughlin Steel Corporation, 301 U. S. 1: "If we have a threat of a strike now [on the railroads] it might be on a big fundamental question, like wages and hours, and we usually find we can settle those by arbitration or otherwise. . . . But if the issues involved were discrimination or discharge of men because they had joined the organization, or the question would be the right of the organization to represent them, we could not have settled those strikes." See Governmental Protection of Labor's Right to Organize, National Labor Relations Board, Division of Economic Research, Bull. No. 1, August, 1936, pp. 17–18.

[5] See also statement by Representative Crosser, in charge of the bill on the floor, in Hearings, House Committee on Rules, 73d Cong., 2d Sess., on H. R. 9861, pp. 10–11, 13: "The purpose of the bill is . . . [*inter alia*] to outlaw the attempt that has been made in numerous instances by employers who control alleged labor unions, and thereby, to use a slang phrase, to 'gum up the works', . . . We have had 8

and certification by the Mediation Board indicates not that its words are precatory, but only that Congress hit at the evil "where experience shows it to be most felt." *Keokee Coke Co.* v. *Taylor,* 234 U. S. 224, 227.

Petitioner argues that the phrase "treat with" must be taken as meaning "regard" or "act towards," so that compliance with its mandate requires the employer to meet the authorized representative of the employees only if and when he shall elect to negotiate with them. This suggestion disregards the words of the section, and ignores the plain purpose made manifest throughout the numerous provisions of the Act. Its major objective is the avoidance of industrial strife, by conference between the authorized representatives of employer and employee. The command to the employer to "treat with" the authorized representative of the employees adds nothing to the 1926 Act, unless it requires some affirmative act on the part of the employer. Compare the *Railway Clerks* case, *supra.* As we cannot assume that its addition to the statute was purposeless, we must take its meaning to be that which the words suggest, which alone would add something to the statute as

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years of operation of this act, and we have prevented any strikes. But strikes have been threatened because of the defects which have been found in this bill."

Under the 1926 Act disputes over the designation of employee representatives could be dealt with by the old United States Mediation Board only by agreement of the parties. The carriers agreed to an election conducted by the Board but nine times in six years, see testimony of William M. Leiserson, Chairman of the National Mediation Board until February 1, 1937, at Hearing by National Labor Relations Board in the case of Jones & Laughlin Steel Corp., 301 U. S. 1; Governmental Protection of Labor's Right to Organize, National Labor Relations Board, Division of Economic Research, Bull. No. 1, August, 1936, p. 50. The 1934 amendment was followed by a large increase in the number of representation disputes submitted to the National Mediation Board. See *infra,* Note 7.

it was before amendment, and which alone would tend to effect the purpose of the legislation. The statute does not undertake to compel agreement between the employer and employees, but it does command those preliminary steps without which no agreement can be reached. It at least requires the employer to meet and confer with the authorized representative of its employees, to listen to their complaints, to make reasonable effort to compose differences—in short, to enter into a negotiation for the settlement of labor disputes such as is contemplated by § 2, First.

Petitioner's insistence that the statute does not warrant so much of the decree as forbids it to enter into contracts of employment with its individual employees is based upon a misconstruction of the decree. Both the statute and the decree are aimed at securing settlement of labor disputes by inducing collective bargaining with the true representative of the employees and by preventing such bargaining with any who do not represent them. The obligation imposed on the employer by § 2, Ninth, to treat with the true representative of the employees as designated by the Mediation Board, when read in the light of the declared purposes of the Act, and of the provisions of § 2, Third and Fourth, giving to the employees the right to organize and bargain collectively through the representative of their own selection, is exclusive. It imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other. We think, as the Government concedes in its brief,[6] that

[6] (Note 35a.) "The Government interprets the negative obligations imposed by the statute and decree as having the following effect:

"When the majority of a craft or class has (either by secret ballot or otherwise) selected a representative, the carrier cannot make with anyone other than the representative a collective contract (i. e., a contract which sets rates of pay, rules, or working conditions),

the injunction against petitioner's entering into any contract concerning rules, rates of pay and working conditions, except with respondent, is designed only to prevent collective bargaining with anyone purporting to represent employees, other than respondent, who has been ascertained to be their true representative. When read in its context it must be taken to prohibit the negotiation of labor contracts, generally applicable to employees in the mechanical department, with any representative other than respondent, but not as precluding such individual contracts as petitioner may elect to make directly with individual employees. The decree, thus construed, conforms, in both its affirmative and negative aspects, to the requirements of § 2.

Propriety of Relief in Equity. Petitioner contends that if the statute is interpreted as requiring the employer to negotiate with the representative of his employees, its obligation is not the appropriate subject of a decree in equity; that negotiation depends on desires and mental attitudes which are beyond judicial control, and that since equity cannot compel the parties to agree, it will not

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whether the contract covers the class as a whole or a part thereof. Neither the statute nor the decree prevents the carrier from refusing to make a collective contract and hiring individuals on whatever terms the carrier may by unilateral action determine. In hirings of that sort the individual does not deal in a representative capacity with the carrier and the hiring does not set general rates of pay, rules, or working conditions. Of course, as a matter of voluntary action, not as a result of the statute or the decree, the carrier may contract with the duly designated representative to hire individuals only on the terms of a collective understanding between the carrier and the representative; but any such agreement would be entirely voluntary on the carrier's part and would in no sense be compelled.

"If the majority of a craft or class has not selected a representative, the carrier is free to make with anyone it pleases and for any group it pleases contracts establishing rates of pay, rules, or working conditions."

compel them to take the preliminary steps which may result in agreement.

There is no want of capacity in the court to direct complete performance of the entire obligation: both the negative duties not to maintain a company union and not to negotiate with any representative of the employees other than respondent and the affirmative duty to treat with respondent. Full performance of both is commanded by the decree in terms which leave in no uncertainty the requisites of performance. In compelling compliance with either duty it does far less than has been done in compelling the discharge of a contractual or statutory obligation calling for a construction or engineering enterprise, *New Orleans, M. & T. Ry. Co.* v. *Mississippi,* 112 U. S. 12; *Wheeling Traction Co.* v. *Board of Commissioners,* 248 Fed. 205; see *Gas Securities Co.* v. *Antero & Lost Park Reservoir Co.,* 259 Fed. 423, 433; *Board of Commissioners* v. *A. V. Wills & Sons,* 236 Fed. 362, 380; *Jones* v. *Parker,* 163 Mass. 564; 40 N. E. 1044, or in granting specific performance of a contract for the joint use of a railroad bridge and terminals, *Joy* v. *St. Louis,* 138 U. S. 1; *Union Pacific Ry. Co.* v. *Chicago, R. I. & P. Ry. Co.,* 163 U. S. 564; cf. *Prospect Park & Coney Island R. Co.* v. *Coney Island & Brooklyn R. Co.,* 144 N. Y. 152; 39 N. E. 17. Whether an obligation has been discharged, and whether action taken or omitted is in good faith or reasonable, are everyday subjects of inquiry by courts in framing and enforcing their decrees.

It is true that a court of equity may refuse to give any relief when it is apparent that that which it can give will not be effective or of benefit to the plaintiff. Equity will not decree the execution of a partnership agreement since it cannot compel the parties to remain partners, see *Hyer* v. *Richmond Traction Co.,* 168 U. S. 471, 482, or compel one to enter into performance of a contract of personal service which it cannot adequately control, *Marble Com-*

pany v. *Ripley,* 10 Wall. 339, 358; *Karrick* v. *Hannaman,* 168 U. S. 328, 336; *Tobey* v. *Bristol,* Fed. Cas. No. 14,065; *Weeks* v. *Pratt,* 43 F. (2d) 53, 57; Railway Labor Act, § 2, Tenth. But the extent to which equity will go to give relief where there is no adequate remedy at law is not a matter of fixed rule. It rests rather in the sound discretion of the court. *Willard* v. *Tayloe,* 8 Wall. 557, 565; *Joy* v. *St. Louis, supra,* 47; *Morrison* v. *Work,* 266 U. S. 481, 490; *Curran* v. *Holyoke Water Power Co.,* 116 Mass. 90, 92. Whether the decree will prove so useless as to lead a court to refuse to give it, is a matter of judgment to be exercised with reference to the special circumstances of each case rather than to general rules which at most are but guides to the exercise of discretion. It is a familiar rule that a court may exercise its equity powers, or equivalent mandamus powers, *United States ex rel. Greathouse* v. *Dern,* 289 U. S. 352, 359, to compel courts, boards, or officers to act in a matter with respect to which they may have jurisdiction or authority, although the court will not assume to control or guide the exercise of their authority. *Interstate Commerce Comm'n* v. *Humboldt S. S. Co.,* 224 U. S. 474; *Louisville Cement Co.* v. *Interstate Commerce Comm'n,* 246 U. S. 638; see *Work* v. *United States ex rel. Rives,* 267 U. S. 175, 184; *Wilbur* v. *United States ex rel. Kadrie,* 281 U. S. 206, 218.

In considering the propriety of the equitable relief granted here, we cannot ignore the judgment of Congress, deliberately expressed in legislation, that where the obstruction of the company union is removed, the meeting of employers and employees at the conference table is a powerful aid to industrial peace. Moreover, the resources of the Railway Labor Act are not exhausted if negotiation fails in the first instance to result in agreement. If disputes concerning changes in rates of pay, rules or working conditions, are "not adjusted by the parties in conference," either party may invoke the mediation services of the

Mediation Board, § 5, First, or the parties may agree to seek the benefits of the arbitration provision of § 7. With the coercive influence of the company union ended, and in view of the interest of both parties in avoiding a strike, we cannot assume that negotiation, as required by the decree, will not result in agreement, or lead to successful mediation or arbitration, or that the attempt to secure one or another through the relief which the district court gave is not worth the effort.

More is involved than the settlement of a private controversy without appreciable consequences to the public. The peaceable settlement of labor controversies, especially where they may seriously impair the ability of an interstate rail carrier to perform its service to the public, is a matter of public concern. That is testified to by the history of the legislation now before us, the reports of committees of Congress having the proposed legislation in charge, and by our common knowledge. Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved. *Pennsylvania* v. *Williams,* 294 U. S. 176, 185; *Central Kentucky Gas Co.* v. *Railroad Commission,* 290 U. S. 264, 270–273; *Harrisonville* v. *W. S. Dickey Clay Co.,* 289 U. S. 334, 338; *Beasley* v. *Texas & Pacific Ry. Co.,* 191 U. S. 492, 497; *Joy* v. *St. Louis, supra,* 47; *Texas & Pacific Ry. Co.* v. *Marshall,* 136 U. S. 393, 405–406; *Conger* v. *New York, W. S. & B. R. Co.,* 120 N. Y. 29, 32, 33; 23 N. E. 983. The fact that Congress has indicated its purpose to make negotiation obligatory is in itself a declaration of public interest and policy which should be persuasive in inducing courts to give relief. It is for similar reasons that courts, which traditionally have refused to compel performance of a contract to submit to arbitration, *Tobey* v. *Bristol, supra,* enforce statutes commanding performance of arbitration agreements. *Red Cross*

Line v. *Atlantic Fruit Co.*, 264 U. S. 109, 119, 121; *Marine Transit Corp.* v. *Dreyfus*, 284 U. S. 263, 278.

The decree is authorized by the statute and was granted in an appropriate exercise of the equity powers of the court.

Second. Constitutionality of § 2 of the Railway Labor Act. (A) Validity Under the Commerce Clause. The power of Congress over interstate commerce extends to such regulations of the relations of rail carriers to their employees as are reasonably calculated to prevent the interruption of interstate commerce by strikes and their attendant disorders. *Wilson* v. *New*, 243 U. S. 332, 347–348. The Railway Labor Act, § 2, declares that its purposes, among others, are "To avoid any interruption to commerce or to the operation of any carrier engaged therein," and "to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions." The provisions of the Act and its history, to which reference has been made, establish that such are its purposes, and that the latter is in aid of the former. What has been said indicates clearly that its provisions are aimed at the settlement of industrial disputes by the promotion of collective bargaining between employers and the authorized representative of their employees, and by mediation and arbitration when such bargaining does not result in agreement. It was for Congress to make the choice of the means by which its objective of securing the uninterrupted service of interstate railroads was to be secured, and its judgment, supported as it is by our long experience with industrial disputes, and the history of railroad labor relations, to which we have referred, is not open to review here.[7] The means chosen are appro-

[7] There was evidence available to Congress that the labor policy embodied in the Railway Labor Act had been successful in curbing strikes. In the eight years subsequent to the passage of the 1926 Act, there were only two small railroad strikes. Since the 1934

priate to the end sought and hence are within the congressional power. See *Railway Clerks* case, *supra,* 570; *Railroad Retirement Board* v. *Alton R. Co.,* 295 U. S. 330, 369.

But petitioner insists that the Act as applied to its "back shop" employees is not within the commerce power since their duties have no direct relationship to interstate transportation. Of the 824 employees in the six shop crafts eligible to vote for a choice of representatives, 322 work in petitioner's "back shops" at Princeton, West Virginia. They are there engaged in making classified repairs, which consist of heavy repairs

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amendment, there has been but one. See National Mediation Board, First Annual Report, For the Fiscal Year Ended June 30, 1935, p. 8; Second Annual Report, For the Fiscal Year Ended June 30, 1936, p. 1.

In the water transportation and motor transportation fields, there were frequent strikes. A table submitted by the United States [see Respondent's Brief, Associated Press *v.* National Labor Relations Board, No. 365, October Term 1936, p. 57], and derived from United States Department of Labor, Bureau of Labor Statistics, Bulletins No. R 339 (1936), p. 4; No. R. 389 (1936), p. 4; Monthly Labor Review (May–September, 1936), Monthly "Analysis of Strikes," shows the following:

	Man-days of idleness due to labor strikes—			
	1933	1934	1935	(1936 Jan.–May)
Water Transportation	32, 752	1, 068, 867	749, 534	119, 820
Motor Transportation	155, 565	859, 657	202, 393	46, 054
Railroads	0	0	56	0

Yet there were many disputes between rail carriers and their employees. Apart from the more trivial grievances and differences of opinion in the interpretation of agreements, 876 disputes, principally over changes in rates of pay, rules or working conditions, were referred to the United States Board of Mediation between 1926 and 1934. The following table, derived from its Eighth Annual Report, For the Fiscal Year Ended June 30, 1934, pp. 4–5, indicates the suc-

on locomotives and cars withdrawn from service for that purpose for long periods (an average of 105 days for locomotives and 109 days for cars). The repair work is

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cess of the mediation and arbitration machinery set up by the Railway Labor Act.

Manner of Disposition	*Fiscal Year Ending June 30,* —								
	1927	1928	1929	1930	1931	1932	1933	1934	Total
Mediation Agreements	57	84	46	25	24	45	23	17	321
Withdrawn by Parties	24	45	43	20	21	69	20	26	268
Arbitration Agreements	27	14	10	4	2	4	3	9	73
Closed Account:									
Refusal to Arbitrate	0	0	9	3	1	47	39	50	149
Retired or closed, other causes	3	2	21	10	5	5	10	9	65

But statistics show that many more labor disputes were settled by direct negotiation, *supra*, footnote 4, and Congress might reasonably have feared that the action of certain railroads in negotiating only with unions dominated by them would prevent such settlements and lead to strikes. See *supra*, footnote 5. That there were many disputes, apparent and latent, for which the 1926 Act had not provided adequate machinery, is shown by the large number of representation disputes (more than 230) referred to the National Mediation Board in the first two years of its existence, see First Annual Report, For the Fiscal Year Ended June 30, 1935, p. 9; Second Annual Report, For the Fiscal Year Ended June 30, 1936, pp. 5, 7.

It is the belief of the National Mediation Board that peace in the railroad industry is largely due to the 3,485 collective agreements covering rates of pay, rules and working conditions, which were filed by June 30, 1936 [see National Mediation Board, Second Annual Report, For the Fiscal Year Ended June 30, 1936, p. 26]. In its First Annual Report, For the Fiscal Year Ended June 30, 1935, it concluded (p. 36): "The absence of strikes in the railroad industry, particularly during the last two years when wide-spread strikes, the usual accompaniment of business recovery, prevailed throughout the country, is to be explained primarily not by the mediation machinery of the Railway Labor Act, but by the existence of these collective labor contracts. For, while they are in existence, these contracts provide orderly, legal processes of settling all disputes as a substitute for strikes and industrial warfare."

upon the equipment used by petitioner in its transportation service, 97% of which is interstate. At times a continuous stream of engines and cars passes through the "back shops" for such repairs. When not engaged in repair work, the back shop employees perform "store order work," the manufacture of material such as rivets and repair parts, to be placed in railroad stores for use at the Princeton shop and other points on the line.

The activities in which these employees are engaged have such a relation to the other confessedly interstate activities of the petitioner that they are to be regarded as a part of them. All taken together fall within the power of Congress over interstate commerce. *Baltimore & Ohio R. Co.* v. *Interstate Commerce Comm'n,* 221 U. S. 612, 619; cf. *Pedersen* v. *Delaware, L. & W. R. Co.,* 229 U. S. 146, 151. Both courts below have found that interruption by strikes of the back shop employees, if more than temporary, would seriously cripple petitioner's interstate transportation. The relation of the back shop to transportation is such that a strike of petitioner's employees there, quite apart from the likelihood of its spreading to the operating department, would subject petitioner to the danger, substantial, though possibly indefinable in its extent, of interruption of the transportation service. The cause is not remote from the effect. The relation between them is not tenuous. The effect on commerce cannot be regarded as negligible. See *United States* v. *Railway Employees' Department of the American Federation of Labor,* 290 Fed. 978, 981, holding participation of back shop employees in the nation-wide railroad shopmen's strike of 1922 to constitute an interference with interstate commerce. As the regulation here in question is shown to be an appropriate means of avoiding that danger, it is within the power of Congress.

It is no answer, as petitioner suggests, that it could close its back shops and turn over the repair work to independent contractors. Whether the railroad should do its repair work in its own shops, or in those of another, is a question of railroad management. It is petitioner's determination to make its own repairs which has brought its relations with shop employees within the purview of the Railway Labor Act. It is the nature of the work done and its relation to interstate transportation which afford adequate basis for the exercise of the regulatory power of Congress.

The *Employers' Liability Cases,* 207 U. S. 463, 498, which mentioned railroad repair shops as a subject beyond the power to regulate commerce, are not controlling here. Whatever else may be said of that pronouncement, it is obvious that the commerce power is as much dependent upon the type of regulation as its subject matter. It is enough for present purposes that experience has shown that the failure to settle, by peaceful means, the grievances of railroad employees with respect to rates of pay, rules or working conditions, is far more likely to hinder interstate commerce than the failure to compensate workers who have suffered injury in the course of their employment.

(*B*) *Validity of § 2 of the Railway Labor Act Under the Fifth Amendment.* The provisions of the Railway Labor Act applied in this case, as construed by the court below, and as we construe them, do not require petitioner to enter into any agreement with its employees, and they do not prohibit its entering into such contract of employment as it chooses, with its individual employees. They prohibit only such use of the company union as, despite the objections repeated here, was enjoined in the *Railway Clerks* case, *supra,* and they impose on petitioner only the affirmative duty of "treating with" the authorized representatives of its employees for the purpose of negotiating a labor dispute.

Even though Congress, in the choice of means to effect a permissible regulation of commerce, must conform to due process, *Railroad Retirement Board* v. *Alton R. Co., supra,* 347; *Chicago, R. I. & P. Ry. Co.* v. *United States,* 284 U. S. 80, 97; see *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555, 589, it is evident that where, as here, the means chosen are appropriate to the permissible end, there is little scope for the operation of the due process clause. The railroad can complain only of the infringement of its own constitutional immunity, not that of its employees. *Erie R. Co.* v. *Williams,* 233 U. S. 685, 697; *Jeffrey Mfg. Co.* v. *Blagg,* 235 U. S. 571, 576; *Rail & River Coal Co.* v. *Yaple,* 236 U. S. 338, 349; cf. *Hawkins* v. *Bleakly,* 243 U. S. 210, 214. And the Fifth Amendment, like the Fourteenth, see *West Coast Hotel Co.* v. *Parrish,* decided this day, *ante,* p. 379, is not a guarantee of untrammeled freedom of action and of contract. In the exercise of its power to regulate commerce, Congress can subject both to restraints not shown to be unreasonable. Such are the restraints of the safety appliance act, *Johnson* v. *Southern Pacific Co.,* 196 U. S. 1; of the act imposing a wage scale on rail carriers, *Wilson* v. *New, supra;* of the Railroad Employers' Liability Act, *Second Employers' Liability Cases,* 223 U. S. 1; of the act fixing maximum hours of service for railroad employees whose duties control or affect the movement of trains, *Baltimore & Ohio R. Co.* v. *Interstate Commerce Comm'n, supra;* of the act prohibiting the prepayment of seamen's wages, *Patterson* v. *Bark Eudora,* 190 U. S. 169.

Each of the limited duties imposed upon petitioner by the statute and the decree do not differ in their purpose and nature from those imposed under the earlier statute and enforced in the *Railway Clerks* case, *supra.* The quality of the action compelled, is reasonableness, and therefore the lawfulness of the compulsion, must be

judged in the light of the conditions which have occasioned the exercise of governmental power. If the compulsory settlement of some differences, by arbitration, may be within the limits of due process, see *Hardware Dealers Mutual Fire Ins. Co.* v. *Glidden Co.*, 284 U. S. 151, it seems plain that the command of the statute to negotiate for the settlement of labor disputes, given in the appropriate exercise of the commerce power, cannot be said to be so arbitrary or unreasonable as to infringe due process.

Adair v. *United States*, 208 U. S. 161, and *Coppage* v. *Kansas*, 236 U. S. 1, have no present application. The provisions of the Railway Labor Act invoked here neither compel the employer to enter into any agreement, nor preclude it from entering into any contract with individual employees. They do not "interfere with the normal exercise of the right of the carrier to select its employees or to discharge them." See the *Railway Clerks* case, *supra*, 571.

There remains to be considered petitioner's contentions that the certificate of the National Mediation Board is invalid and that the injunction granted is prohibited by the provisions of the Norris-LaGuardia Act, of March 23, 1932, c. 90, 47 Stat. 70; 29 U. S. C. §§ 101–115.

Validity of the Certificate of the National Mediation Board. In each craft of petitioner's mechanical department a majority of those voting cast ballots for the Federation. In the case of the blacksmiths the Federation failed to receive a majority of the ballots of those eligible to vote, although a majority of the craft participated in the election. In the case of the carmen and coach cleaners, a majority of the employees eligible to vote did not participate in the election. There has been no appeal from the ruling of the district court that the designation of the Federation as the representative of the carmen and coach cleaners was invalid. Petitioner as-

sails the certification of the Federation as the representative of the blacksmiths because less than a majority of that craft, although a majority of those voting, voted for the Federation.

Section 2, Fourth, of the Railway Labor Act provides: "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act." Petitioner construes this section as requiring that a representative be selected by the votes of a majority of eligible voters. It is to be noted that the words of the section confer the right of determination upon a majority of those eligible to vote, but is silent as to the manner in which that right shall be exercised. Election laws providing for approval of a proposal by a specified majority of an electorate have been generally construed as requiring only the consent of the specified majority of those participating in the election. *Carroll County* v. *Smith,* 111 U. S. 556; *Douglass* v. *Pike County,* 101 U. S. 677; *Louisville & Nashivlle R. Co.* v. *County Court of Davidson County,* 1 Sneed (Tenn.) 637; *Montgomery County Fiscal Court* v. *Trimble,* 104 Ky. 629; 47 S. W. 773. Those who do not participate "are presumed to assent to the expressed will of the majority of those voting." *Cass County* v. *Johnston,* 95 U. S. 360, 369, and see *Carroll County* v. *Smith, supra.*

We see no reason for supposing that § 2, Fourth, was intended to adopt a different rule. If, in addition to participation by a majority of a craft, a vote of the majority of those eligible is necessary for a choice, an indifferent minority could prevent the resolution of a contest, and thwart the purpose of the Act, which is dependent for its operation upon the selection of representatives. There is the added danger that the absence of eligible voters may be due less to their indifference than to coercion by the employer. The opinion of the trial court discloses that the

Mediation Board scheduled an election to be determined by a majority of the eligible voters, but that the Federation's subsequent protest that the Railway was influencing the men not to vote caused the Board to hold a new election to be decided by the ballots of a majority of those voting.

It is significant of the congressional intent that the language of § 2, Fourth, was taken from a rule announced by the United States Railroad Labor Board, acting under the labor provisions of the Transportation Act of 1920, Decision No. 119, *International Association of Machinists* v. *Atchison, T. & S. F. Ry.*, 2 Dec. U. S. Railroad Labor Board, 87, 96, par. 15. Prior to the adoption of the Railway Labor Act, this rule was interpreted by the Board, in Decision No. 1971, *Brotherhood of Railway & S. S. Clerks* v. *Southern Pacific Lines*, 4 Dec. U. S. Railroad Labor Board 625, where it appeared that a majority of the craft participated in the election. The Board ruled, p. 639, that a majority of the votes cast was sufficient to designate a representative. A like interpretation of § 2, Fourth, was sustained in *Association of Clerical Employees* v. *Brotherhood of Railway & S. S. Clerks*, 85 F. (2d) 152.

The petitioner also challenges the validity of the certificate of the National Mediation Board in this case because it fails to state the number of eligible voters in each craft or class. The certificate states that respondent "has been duly designated and authorized to represent the mechanical department employees" of petitioner. It also shows on its face the total number of votes cast in each craft in favor of each candidate, but omits to state the total number of eligible voters in each craft. Petitioner insists that this is a fatal defect in the certificate, upon the basis of those cases which hold that where a finding of fact of an administrative officer or tribunal is prerequisite to the making of a rule or order, the finding must be explicitly

set out. See *Panama Refining Co.* v. *Ryan,* 293 U. S. 388; *United States* v. *Chicago, M., St. P. & P. R. Co.,* 294 U. S. 499; *Atchison, T. & S. F. Ry. Co.* v. *United States,* 295 U. S. 193.

The practice contended for is undoubtedly desirable, but it is not required by the present statute or by the authorities upon which petitioner relies. The National Mediation Board makes no order. The command which the decree of the court enforces is that of the statute, not of the Board. Its certificate that the Federation is the authorized representative of the employees is the ultimate finding of fact prerequisite to enforcement by the courts of the command of the statute. There is no contention that this finding is conclusive in the absence of a finding of the basic facts on which it rests—that is to say, the number of eligible voters, the number participating in the election and the choice of the majority of those who participate. Whether the certification, if made as to those facts, is conclusive, it is unnecessary now to determine. But we think it plain that if the Board omits to certify any of them, the omitted fact is open to inquiry by the court asked to enforce the command of the statute. See *Dismuke* v. *United States,* 297 U. S. 167, 171–173. Such inquiry was made by the trial court, which found the number of eligible voters and thus established the correctness of the Board's ultimate conclusion. The certificate, which conformed to the statutory requirement, was *prima facie* sufficient, and was not shown to be invalid for want of the requisite supporting facts.

Validity of the Injunction Under the Norris-LaGuardia Act. Petitioner assails the decree for its failure to conform to the requirements of § 9 of the Norris-LaGuardia Act, which provides: "every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act

or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in . . . findings of fact made and filed by the court." The evident purpose of this section, as its history and context show, was not to preclude mandatory injunctions, but to forbid blanket injunctions against labor unions, which are usually prohibitory in form, and to confine the injunction to the particular acts complained of and found by the court. We deem it unnecessary to comment on other similar objections, except to say that they are based on strained and unnatural constructions of the words of the Norris-LaGuardia Act, and conflict with its declared purpose, § 2, that the employee "shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

It suffices to say that the Norris-LaGuardia Act can affect the present decree only so far as its provisions are found not to conflict with those of § 2, Ninth, of the Railway Labor Act, authorizing the relief which has been granted. Such provisions cannot be rendered nugatory by the earlier and more general provisions of the Norris-LaGuardia Act. See the *Railway Clerks* case, *supra,* 571; cf. *Callahan* v. *United States,* 285 U. S. 515, 518; *Walla Walla* v. *Walla Walla Water Co.,* 172 U. S. 1, 22; *International Alliance* v. *Rex Theatre Corp.,* 73 F. (2d) 92, 93.

Affirmed.

UNITED STATES *v.* NORRIS.

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

No. 600. Argued March 11, 1937.—Decided March 29, 1937.

1. A Resolution of the Senate, reciting that the Senate desired facts to aid it in enacting remedial legislation and in deciding contests involving senatorial elections, authorized a committee to investigate the campaign expenditures of the various candidates for the United States Senate, the names of the persons subscribing, the amount contributed, the method of expenditure, and all facts in relation thereto, with power to call witnesses. A person who had attempted to file in a primary election of candidates for the office of United States Senator, but whose application had been rejected by the State Supreme Court as too late, was called before the committee, and being sworn testified that he had received no financial support, or assurance of it, for his campaign. *Held:*

   (1) That the inquiry was within the competency of Congress and the committee. P. 573.

   (2) That within the meaning of the perjury statute (Criminal Code, § 125) it was a case in which a law of the United States (2 U. S. C. 191) authorized the oath to be administered. *Id.*

   (3) That the testimony was material to the inquiry. *Id.*

2. A witness who commits wilful perjury in violation of § 125 of the federal Criminal Code cannot purge himself of the offence by appearing at a later stage of the inquiry and recanting the false testimony. P. 573.

86 F. (2d) 379, reversed.

CERTIORARI, *post*, p. 647, to review a judgment reversing a conviction for perjury in an inquiry by a committee of the Senate.

Mr. Charles E. Wyzanski, Jr., with whom *Solicitor General Reed, Assistant Attorney General McMahon,* and *Mr. William W. Barron* were on the brief, for the United States.

The perjury statute does not create an exception or immunity for a witness who recants false testimony

which he has deliberately given, and which he has allowed to stand until other witnesses have exposed his falsehoods. Moreover, it would be against sound public policy to read such an exception into the statute. An insistence upon the truth at every stage of a lawful inquiry is necessary not merely to protect whatever substantive interests may be at stake, but also to insure expeditious procedure in the tribunal conducting the inquiry. There is no likelihood that the grant of an immunity such as is claimed on behalf of the respondent will lead a witness who has deliberately lied to tell the truth later. Indeed such grant is more likely to tempt a knave to tell a falsehood in the first place and wait to see if he is detected.

On the doctrine of avoidance of perjury by subsequent recantation there is no decision or dictum in this Court. The English law does not recognize this doctrine in cases where the original false statement was deliberate and unequivocal. *Regina* v. *Holl,* 45 L. T. Rep. 69 (Q. B. D., 1881); *Regina* v. *Philpotts,* 5 Cox Cr. Cas. 363 (1851). The prevailing view in the American state courts does not supply the doctrine unless the original falsehood was due to ambiguity, inadvertence, or accidental error. And no case here or abroad regards perjury as undone where not only the original falsehood was clear and deliberate, but also where the retraction did not come until after the witness had left the stand and other witnesses had exposed him. *Masaichi Ono* v. *Carr,* 56 F. (2d) 772.

Mr. William E. Shuman for respondent.

Perjury under the Criminal Code is merely a statutory adoption of the common law offense.

When Congress adopts a common law offense, the common law interpretation attends it.

The whole of the evidence of a witness is to be taken together and if the testimony be ultimately true, there is no perjury. *King* v. *Jones,* 1 Peakes Rep. 37.

A corrected misstatement forms no part of the evidence after the correction is made. It is no longer the assertion of a fact.

Even if the testimony of the witness was intentionally false, yet if he correct it while the matter is still pending, he is not guilty of perjury. The law encourages the correction. *People* v. *Gillette,* 126 App. Div. 665; *People* v. *Brill,* 165 N. Y. S. 65; *Brannan* v. *State,* 94 Fla. 565; *Henry* v. *Hamilton,* 7 Blackf. (Ind.) 506 (Nov. Term, 1845); *Commonwealth* v. *Irvine,* 14 Pa. Dist. & Co. Rep. 275; *King* v. *Carr,* 1 Siderfin's Rep. 418; *King* v. *Jones,* 1 Peakes Rep. 37; Bishop, Crim. L., 9th ed., § 1044a.

If a witness dare not correct either inadvertent or intentional misstatements without running the risk of punishment, the administration of justice will be greatly hindered.

A committee of Congress can have no general powers to probe the affairs of the citizen. *Sinclair* v. *United States,* 279 U. S. 263; *Kilbourn* v. *Thompson,* 103 U. S. 168; *McGrain* v. *Daugherty,* 273 U. S. 135.

Every incident referred to in the evidence pertained to the primary election to be held in Nebraska in 1930. It is settled that Congress has no power to legislate for the purpose of regulating primary elections. *Newberry* v. *United States,* 256 U. S. 231.

The record shows that the application of respondent was not filed with the Secretary of State of Nebraska within the time required by law, and that the Supreme Court of the State ordered that his name be omitted from the list of candidates on the primary election ballot. At most it was an abortive effort of respondent to become a candidate. There could, therefore, never be a contest involving the right to a seat in the United States Senate because, more than two months prior to the time that respondent was called as a witness before this sub-committee, the Nebraska court had ordered his name omitted

from the ballot; and the primary election, without the name of respondent upon the ballot, had been held forty days before respondent gave the testimony complained of in the indictment.

The power to take testimony to aid the Senate in determining a contest involving the right to a seat in the United States Senate applies not to a remotely anticipated contest, and particularly in a case where the inquiry pertains solely to one who was not even permitted to be a candidate before the primary election, but applies to a contest then existing. *Kilbourn* v. *Thompson,* 103 U. S. 168.

The Senate Resolution only authorized the Committee to investigate "the campaign expenditures of the various candidates for the United States Senate." The respondent never became a candidate for the United States Senate. At most he transmitted his request that he be permitted to become a candidate, and on July 18, 1930, the Supreme Court of Nebraska denied the request.

Not only was the respondent not a candidate, but the evidence discloses no incident that could in any way be said to be a part of any campaign.

The evidence does not contain a word to indicate that either Senator George W. Norris or W. M. Stebbins, who were the only candidates for nomination at this primary election, had anything whatsoever to do with the events shown in the record, or with the funds paid to respondent. The indictment was therefore based upon inquiries that in no wise pertained to a candidate and were therefore wholly immaterial.

Furthermore, there was no campaign nor any part of a campaign by respondent. So far as respondent was concerned, any candidacy by him, or any campaign, were non-existing things. To convict one of perjury the evidence "must be strong and clear." *Phair* v. *United States,* 60 F. (2d) 953. Not having any campaign, the

respondent's answer to the questions were legally truthful and he therefore cannot be held for perjury. *United States* v. *Slutzki,* 79 F. (2d) 504.

To make out a case of perjury, "the Government must show the false testimony was relevant to a material issue in a controversy." *Morris* v. *United States,* 261 Fed. 175; *United States* v. *Rhodes,* 218 Fed. 518.

But the evidence of the Government in the trial of this case indicated nothing relevant or material to any question in which the United States Senate could properly be interested.

To constitute perjury it is essential that the oath be taken in a "case in which a law of the United States authorizes an oath to be administered." The charge of crime must have clear legislative basis.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The record in this case presents an important question of federal criminal law which has not been settled by our decisions. Does retraction neutralize false testimony previously given and exculpate the witness of perjury? [1]

April 10, 1930, the United States Senate, by resolution, empowered the Vice-President to appoint a special committee to investigate campaign expenditures of candidates for the Senate, the committee to sit at such times and places as it should deem proper, to require attendance of witnesses and production of books and papers, and to act by any subcommittee. Failure to obey process of the committee or refusal to answer questions pertinent to the investigation was to be punished according to law. The

[1] Compare *Loubriel* v. *United States,* 9 F. (2d) 807, 808; *Ex parte Chin Chan On,* 32 F. (2d) 828; *Ex parte Keizo Shibata,* 35 F. (2d) 636; *Johnsen* v. *United States,* 41 F. (2d) 44, 46; *Masaichi Ono* v. *Carr,* 56 F. (2d) 772; *Seymour* v. *United States,* 77 F. (2d) 577, 582.

resolution recited that the Senate desired facts to aid it in enacting remedial legislation and in deciding contests involving senatorial elections.[2] The committee so appointed authorized Senator Nye, the Chairman, to act as a subcommittee and to name a subcommittee of one or more members. Such a subcommittee, consisting of Senators Nye and Dale, met September 22, 1930, at Lincoln, Nebraska. The Nebraska primary election had been held on August 12, 1930; the general election at which the names of senatorial candidates were to appear on the ballots was to be held the following November. Senator George W. Norris of McCook, Nebraska, had filed for the Republican primaries on January 1, 1930, and W. M. Stebbins had, on November 12, 1929, filed his acceptance of Republican nominating petitions in his behalf. The respondent had attempted to file for the same primaries on July 5, 1930, but the Supreme Court of the State had ruled on July 18th that his application was not filed within the time prescribed by law and had ordered the Secretary of State to omit his name from the list of candidates for United States Senator to be certified to county clerks and election commissioners.[3] In the light of these facts the subcommittee summoned the respondent to testify on September 22, 1930. He was called and sworn to tell the truth and the whole truth. He narrated something of his personal history and said his original intention was to run for State Railway Commissioner, but he did not file for that office because he thought about filing for United States Senator. He gave the following testimony:

"Q. Now what assurance did you have of financial support and backing?

A. None whatever.

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[2] Senate Resolution No. 215, 71st Cong., 2d Sess., 72 Cong. Rec 6841–6842.

[3] *State ex rel. Smith* v. *Marsh,* 120 Neb. 287, 289; 232 N. W. 99.

Q. In your campaign?

A. None whatever.

. . . . .

Q. Did you get any assurance from anybody that they would help you—Republican, Democrat, independents, or anybody say they would help to finance your campaign?

A. No, sir.

. . . . .

Q. Did you receive any money from anybody in the campaign?

A. I did not."

After the conclusion of his testimony the subcommittee adjourned until the following day, when several witnesses were examined, amongst whom was one Johnson. The respondent was present and heard Johnson testify. After consulting his counsel he asked and was granted permission to return to the stand. He then admitted the receipt from Johnson of $50 to be used for his filing fee and a $500 government bond, and stated that he had cashed the bond through his brother at North Platte.

June 23, 1931, the grand jury for the District of Nebraska indicted the respondent for perjury under § 125 of the Criminal Code.[4] On his trial the government proved the facts as above outlined and called Johnson as a witness who testified that, pursuant to a plan devised by himself and others, he had approached the respondent on June 30th and requested him not to file as a candidate

[4] "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than $2,000 and imprisoned not more than five years." R. S. § 5392; 18 U. S. C. § 231.

for Railway Commissioner but to file for United States Senator telling him that if he were willing to do this the Republican Party would support him and $50 would at once be paid him for his filing fee and $500, the estimated amount of his campaign expenses, would also be paid to him. He swore that, on July 2nd, he gave the respondent $50 and, on the next day, handed him a $500 bond.

The respondent took the witness stand and admitted that he "knew at the time of testifying [before the Senate Committee] that he had received $500 and $50 and what he was saying was not true."

In charging the jury the judge stated that the respondent could not be convicted if he testified carelessly, negligently or hastily but the jury must find that his testimony was intentionally untrue and that he did not believe it true when he gave it. And, respecting the retraction of his former testimony, the judge stated that the jury might consider the retraction along with the other evidence "on the question of whether or not considering what the defendant testified on the day prior and his act of testifying again the following day and what he said in his testimony, the defendant wilfully, that is, intentionally testified falsely in his testimony on the day before in the matters charged against him."

The respondent requested the following instructions:

"The Jury are instructed that even if you find that the defendant in this case made false answers to the questions which were put to him at the hearing before the Senate Committee in question, and if you also find that while this hearing was yet continuing and while the matter was yet pending before the Senate Committee, the defendant corrected any erroneous or false statements that were made, if any, then you will find the defendant not guilty."

"The Jury are instructed that if you find the defendant, in the latter portion of his examination before the Senate

Committee, corrected statements that may have been incorrect or even intentionally false, made prior to the correction of the defendant, then you will find the defendant not guilty."

These were refused and an exception granted. The jury rendered a verdict of guilty, sentence was imposed, and the respondent appealed to the Circuit Court of Appeals, which reversed the judgment,[5] holding that the trial court erred in refusing to submit to the jury the question whether the respondent had fully and fairly retracted and corrected his original false statements. In the course of its opinion the court stated the following would have been a proper charge, and failure to give a charge of such tenor was reversible error:

"The jury are charged that the law encourages the correction of erroneous and even intentionally false statements made by a witness upon a trial or hearing, and so, if you shall find and believe from the evidence that defendant made false answers to the questions or any of them which were put to him at the hearing before the Senate Subcommittee (which questions are set out in the indictment and which questions the court has already in this charge called specifically to your attention), yet that defendant, while the hearing was continuing and unfinished again took the witness stand and then and there fully corrected all erroneous or false statements, if any, which had theretofore been made by him in answer to said questions, you should find the defendant not guilty."

The respondent insists that reversal of his conviction was right because (1) Congress exceeded its power in adopting Resolution No. 215, since it cannot legislate for the purpose of regulating primary elections; (2) perjury can only be committed if an oath be taken in a case wherein a law of the United States authorizes an oath

[5] 86 F. (2d) 379.

to be administered, and the committee hearing was not such a case; (3) the false testimony concerned an immaterial matter, and (4) the whole of a witness's evidence must be taken together and, if his testimony be ultimately true, his indictment for perjury cannot be predicated thereon.

Little need be said with respect to the first three propositions. That it is within the constitutional province of Congress to institute investigations and to compel evidence with a view to possible exercise of its legislative function [6] or possible discharge of its duty to determine the validity of the election of its members [7] is settled. R. S. § 101,[8] is a law of the United States authorizing any member of either house of Congress to administer oaths to witnesses in any matter pending in either house of Congress or any committee thereof. The materiality of the respondent's false answers is clear in view of the scope of the inquiry. The resolution authorized the committee "to investigate the campaign expenditures of the various candidates for the United States Senate, the names of the persons . . . subscribing, the amount contributed, the method of expenditure, and all facts in relation thereto . . ."

We come to the substantial question which moved us to grant the writ of certiorari. We hold the District Judge was right in refusing to charge as requested by the respondent, and the judgment should not have been reversed on account of his failure so to do. The respondent admitted he gave intentionally false testimony on September 22d. His recantation on the following day cannot alter this fact. He would have us hold that so long as the cause or proceeding in which false testimony is given is not closed, there remains a *locus poenitentiae* of which

[6] *McGrain* v. *Daugherty,* 273 U. S. 135.

[7] *Barry* v. *United States,* 279 U. S. 597.

[8] U. S. C. Tit. 2, § 191.

he was entitled to and did avail himself. The implications and results of such a doctrine prove its unsoundness. Perjury is an obstruction of justice; its perpetration well may affect the dearest concerns of the parties before a tribunal. Deliberate material falsification under oath constitutes the crime of perjury, and the crime is complete when a witness's statement has once been made. It is argued that to allow retraction of perjured testimony promotes the discovery of the truth and, if made before the proceeding is concluded, can do no harm to the parties. The argument overlooks the tendency of such a view to encourage false swearing in the belief that if the falsity be not discovered before the end of the hearing it will have its intended effect, but, if discovered, the witness may purge himself of crime by resuming his role as witness and substituting the truth for his previous falsehood. It ignores the fact that the oath administered to the witness calls on him freely to disclose the truth in the first instance and not to put the court and the parties to the disadvantage, hindrance, and delay of ultimately extracting the truth by cross examination, by extraneous investigation or other collateral means.

Notwithstanding the fact that the testimony originally given and allowed then to stand as his final statement on the subject of inquiry falls clearly within the definition of § 125 of the Criminal Code the respondent insists that the authorities, English and American, demonstrate that his retraction before the conclusion of the proceedings in which he testified absolve him and preclude a conviction. Perjury has been a common law crime since at least the seventeenth century. Quite generally the conception embodied in the common law definition of perjury has been embodied in statutes. This is true of § 125. But it cannot be said that there is any respectable body of authority under the common law or statute in England or in the United States to support the respondent's position. On

the contrary, the cases in which the courts have dealt directly and specifically with the question here for decision are surprisingly few. The respondent plants himself upon *Roy* v. *Carr,* 1 Siderfin 418, 82 Eng. Rep. 1191, a case decided in 1669, which he claims established the doctrine for which he contends and has been followed both in England and in this country. A critical examination of the case arouses grave doubt that it held, or was intended to hold, that a retraction of a witness's false testimony negatives the commission of perjury; and in later cases the English courts have so intimated and have said that if it stood for such a proposition it probably would not be followed.[9] Several later English decisions squint in the opposite direction, and some of them come near to refute the respondent's argument with respect to the English law.[10]

Decisions of state courts of last resort in this country do not make a much better case for the argument. One state supreme court seems to have held directly in accordance with the contention in an appeal from a conviction of perjury.[11] One lower court case is in accord.[12] In one state court of last resort wherein the question arose in a slander suit, where the defendant was alleged to have improperly charged a witness with having committed perjury in another proceding, the court answered it favorably to respondent's claim.[13] The Appellate Division of the Supreme Court of New York has definitely held with the respondent upon the point, in a case where the witness corrected his false testimony immediately and told the truth

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[9] *Edwards* v. *M'Leay,* 2 Vesey & D. 256, 258, 35 Eng. Rep. 316; *Reg.* v. *Holl,* 45 Law Times Rep. 69.

[10] *Rex* v. *Thorogood,* 8 Mod. 179, 88 Eng. Rep. 131; *Allen* v. *Westley,* Hetley 97, 124 Eng. Rep. 372; *Reg.* v. *Philpotts,* 5 Cox's Crim. Cas. 363; *Reg.* v. *Holl,* 45 Law Times Rep. 69.

[11] *Brannen* v. *State,* 94 Fla. 656, 114 So. 429.

[12] *Commonwealth* v. *Irvine,* 14 Pa. D. & C. Rep. 275.

[13] *Henry* v. *Hamilton,* 7 Blackf. (Ind.) 506.

although, in that case, the conviction was reversed on several grounds any one of which would have been adequate for reversal.[14] The Court of Appeals of New York has not spoken on the subject, and in a later case a lower court has refused to follow the decision mentioned where the contradictory statement was not part of the same examination at which the false statement was made.[15]

While we should accord respectful consideration to decisions of the English and American courts supporting the respondent's view, the research of counsel and our own examination disclose that there is no substantial body of authority favoring it. As will appear by scrutiny of the cases cited in Note 1, the lower federal courts have not dealt with the question often, and while their expressions may not be entirely consonant, it may be said that they preponderate against the respondent's contention. We are free, therefore, to give such meaning and effect to § 125 of the Criminal Code as in justice we think ought to be attributed to it. The plain words of the statute and the public policy which called for its enactment alike demand we should hold that the telling of a deliberate lie by a witness completes the crime defined by the law. This is not to say that the correction of an innocent mistake, or the elaboration of an incomplete answer, may not demonstrate that there was no wilful intent to swear falsely. We have here no such case.

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

Reversed.

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[14] *People* v. *Gillette,* 126 App. Div. 665; 111 N. Y. S. 133.

[15] *People* v. *Markan,* 123 Misc. 689; 206 N. Y. S. 197.

Syllabus.

HENNEFORD ET AL. *v.* SILAS MASON CO., INC. ET AL.

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

No. 418. Argued December 14, 15, 1936. Reargued March 1, 2, 1937.—Decided March 29, 1937.

1. When goods imported in interstate commerce have become part of the common mass of property within the State of destination, that State may subject them to a property tax, or to a tax upon their use. P. 582.

   The privilege of use is only one of the privileges that make up property or ownership. A State is at liberty to tax them all collectively or tax them separately, and calling a tax on the use alone an excise does not affect its validity under the commerce clause.

2. A Washington statute provides that after May 1, 1935, every retail sale of tangible personal property made in that State (with some enumerated exceptions) shall be subject to a tax of 2% of the selling price; it also lays a tax or excise, called "compensation tax," on the privilege of using within the State any article of tangible personal property, purchased at retail after April 30, 1935, at the rate of 2% of the purchase price, including in such price the cost of transportation from the place where the article was purchased; but the compensation tax is not to apply to the use of any article the sale or use of which has already been subjected to a tax equal to or in excess of 2% whether such prior tax was under the laws of Washington or those of some other State; and, if the rate of such other tax is less than 2%, the Washington use tax rate is to be measured by the difference. In practical effect the use tax helps retail sellers in Washington to compete upon terms of equality with retail dealers in other States who are exempt from a sales tax or any corresponding burden, and tends to avoid a drain upon the revenues of the State through the placing of orders in other States to escape the taxes on local sales. *Held,* as applied to machinery and other things purchased in other States but which had had continuous use in Washington long after the time when delivery there was over:

   (1) That the use tax is not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end. P. 582.

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(2) The tax upon the use after the property is at rest is not so measured or conditioned as to hamper the transactions of interstate commerce or discriminate against them. P. 583.

(3) Reading the statute as not taxing the use of articles manufactured by the users, or received as legacies or acquired in any other way except purchase at retail, does not make the tax on use in fact a tax on the foreign sales. P. 587.

3. Motives leading to its adoption can seldom, if ever, invalidate a tax which, apart from motives, would be recognized as lawful. P. 586.
4. A legislature has a wide range of choice in classifying and limiting the subjects of taxation. The choice is as broad where the tax is laid upon one or a few of the attributes of ownership as when laid upon them all. P. 587.

15 F. Supp. 958, reversed.

APPEAL from a decree of the District Court, of three judges, holding unconstitutional a tax on the use of chattels bought in other States and brought into the State of Washington and used there. The suit was by the taxpayer to enjoin the Tax Commission of Washington from collecting the tax.

Mr. R. G. Sharpe, Assistant Attorney General of Washington, with whom *Mr. G. W. Hamilton,* Attorney General, was on the brief, for appellants.

Mr. B. H. Kizer, with whom *Mr. W. G. Graves* was on the brief, for appellees.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

A statute of Washington taxing the use of chattels in that state is assailed in this suit as a violation of the commerce clause (Constitution of the United States, Article I, § 8) in so far as the tax is applicable to chattels purchased in another state and used in Washington thereafter.

Plaintiffs (appellees in this court) are engaged either as contractors or as subcontractors in the construction of the Grand Coulee Dam on the Columbia River. In the performance of that work they have brought into the state of Washington machinery, materials and supplies, such as locomotives, cars, conveyors, pumps, and trestle steel, which were bought at retail in other states. The cost of all the articles with transportation expenses added was $921,189.34. Defendants, the Tax Commission of Washington (appellants in this court) gave notice that plaintiffs had become subject through the use of this property to a tax of $18,423.78, two per cent of the cost, and made demand for payment. A District Court of three judges, organized in accordance with § 266 of the Judicial Code (28 U. S. C. § 380), adjudged the statute void upon its face, and granted an interlocutory injunction, one judge dissenting. 15 F. Supp. 958. The case is here upon appeal. 28 U. S. C. § 380.

Chapter 180 of the Laws of Washington for the year 1935, consisting of twenty titles, lays a multitude of excise taxes on occupations and activities. Only two of these taxes are important for the purposes of the case at hand, the "tax on retail sales," imposed by Title III, and the "compensating tax," imposed by Title IV on the privilege of use. Title III provides that after May 1, 1935, every retail sale in Washington, with a few enumerated exceptions,[1] shall be subject to a tax of 2% of

[1] "Sec. 19. The tax hereby levied shall not apply to the following sales:

"(a) Casual and isolated sales by a person who is not engaged in the business of selling tangible personal property at retail;

"(b) Sales made by persons in the course of business activities with respect to which tax liability is specifically imposed under title V of this act, when the gross proceeds from such sales must be included in the measure of the tax imposed under said title V;

"(c) The distribution and news stand sale of newspapers;

the selling price. Title IV, with the heading "compensating tax," provides (§§ 31, 35) that there shall be collected from every person in the state "a tax or excise for the privilege of using within this state any article of tangible personal property purchased subsequent to April 30, 1935," at the rate of 2% of the purchase price, including in such price the cost of transportation from the place where the article was purchased. If those provisions stood alone, they would mean that retail buyers within the state would have to pay a double tax, 2% upon the sale and 2% upon the use. Relief from such a burden is provided in another section (§ 32) which qualifies the use tax by allowing four exceptions. Only two of these exceptions (b and c) call for mention at this time.[2] Subdivision (b) provides that the use tax shall not be laid unless the property has been bought at retail. Subdivision (c) provides that the tax shall not

"(d) Sales which the State of Washington is prohibited from taxing under the constitution of this state or the constitution or laws of the United States;

"(e) Sales of motor vehicle fuel taxable under chapter 58 of the Laws of 1933, section 5 (being Rem. Rev. Stat., section 8327–5);

"(f) Sales made on relief vouchers issued by the department of public welfare or by any county or city or other welfare agency;

"(g) Sales of fresh sweet milk, raw unprocessed fruits and vegetables, butter, eggs, cheese, canned milk and unsweetened bread in loaf form (including rolls and buns), sold for consumption off the premises."

[2] For greater certainty exceptions (a) and (d) are stated in this note:

"The provisions of this title shall not apply:

"(a) In respect to the use of any article of tangible personal property brought into the State of Washington by a non-resident thereof for his or her use or enjoyment while within the state;

"(d) In respect to the use of tangible personal property purchased during any calendar month, the total purchase price of which is less than twenty ($20.00) dollars."

apply to the "use of any article of tangible personal property the sale or use of which has already been subjected to a tax equal to or in excess of that imposed by this title whether under the laws of this state or of some other state of the United States." If the rate of such other tax is less than 2%, the exemption is not to be complete (§ 33), but in such circumstances the rate is to be measured by the difference.

The plan embodied in these provisions is neither hidden nor uncertain. A use tax is never payable where the user has acquired property by retail purchase in the state of Washington, except in the rare instances in which retail purchases in Washington are not subjected to a sales tax. On the other hand, a use tax is always payable where the user has acquired property by retail purchase in or from another state, unless he has paid a sales or use tax elsewhere before bringing it to Washington. The tax presupposes everywhere a retail purchase by the user before the time of use. If he has manufactured the chattel for himself, or has received it from the manufacturer as a legacy or gift, he is exempt from the use tax, whether title was acquired in Washington or elsewhere. The practical effect of a system thus conditioned is readily perceived. One of its effects must be that retail sellers in Washington will be helped to compete upon terms of equality with retail dealers in other states who are exempt from a sales tax or any corresponding burden. Another effect, or at least another tendency, must be to avoid the likelihood of a drain upon the revenues of the state, buyers being no longer tempted to place their orders in other states in the effort to escape payment of the tax on local sales. Do these consequences which must have been foreseen, necessitate a holding that the tax upon the use is either a tax upon the operations of interstate commerce or a discrimination against such commerce obstructing or burdening it unlawfully?

1. The tax is not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end.

Things acquired or transported in interstate commerce may be subjected to a property tax, non-discriminatory in its operation, when they have become part of the common mass of property within the state of destination. *Wiloil Corp.* v. *Pennsylvania,* 294 U. S. 169, 175; *Cudahy Packing Co.* v. *Minnesota,* 246 U. S. 450, 453; *Brown-Forman Co.* v. *Kentucky,* 217 U. S. 563, 575; *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500, 519; *Woodruff* v. *Parham,* 8 Wall. 123, 137. This is so, indeed, though they are still in the original packages. *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506; *American Steel & Wire Co.* v. *Speed, supra; Woodruff* v. *Parham, supra.* For like reasons they may be subjected, when once they are at rest, to a non-discriminatory tax upon use or enjoyment. *Nashville, C. & St. L. Ry. Co.* v. *Wallace,* 288 U. S. 249, 267; *Edelman* v. *Boeing Air Transport, Inc.,* 289 U. S. 249, 252; *Monamotor Oil Co.* v. *Johnson,* 292 U. S. 86, 93. The privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership. *Nashville, C. & St. L. Ry. Co.* v. *Wallace, supra; Bromley* v. *McCaughn,* 280 U. S. 124, 136–138; *Burnet* v. *Wells,* 289 U. S. 670, 678. A state is at liberty, if it pleases, to tax them all collectively, or to separate the faggots and lay the charge distributively. *Ibid.* Calling the tax an excise when it is laid solely upon the use (*Vancouver Oil Co.* v. *Henneford,* 183 Wash. 317; 49 P. (2d) 14) does not make the power to impose it less, for anything the commerce clause has to say of its validity, than calling it a property tax and laying it on ownership. "A nondiscriminatory tax upon local sales . . . has never been regarded as imposing a direct burden upon interstate commerce and has no greater or different effect upon that commerce than a general property tax to which all those enjoying the protection of the

State may be subjected." *Eastern Air Transport, Inc.* v. *South Carolina Tax Comm'n,* 285 U. S. 147, 153. A tax upon the privilege of use or storage when the chattel used or stored has ceased to be in transit is now an impost so common that its validity has been withdrawn from the arena of debate. *Nashville, C. & St. L. Ry. Co.* v. *Wallace, supra; Edelman* v. *Boeing Air Transport, Inc., supra; Monamotor Oil Co.* v. *Johnson, supra.* Cf. *Vancouver Oil Co.* v. *Henneford, supra.*

The case before us does not call for approval or disapproval of the definition of use or enjoyment in the rules of the Commission. Those rules inform us that "property is put to use by the first act after delivery is completed within the state by which the article purchased is actually used or is made available for use with intent actually to use the same within the state. The term 'made available for use' means and includes the exercise of any right or power over tangible personal property preparatory to actual use within the state, such as keeping, storing, withdrawing from storage, moving, installing or performing any act by which dominion or control over the property is assumed by the purchaser." A tax upon a use so closely connected with delivery as to be in substance a part thereof might be subject to the same objections that would be applicable to a tax upon the sale itself. If the rules are too drastic in that respect or others, the defect is unimportant in relation to this case. Here the machinery and other chattels subjected to the tax have had continuous use in Washington long after the time when delivery was over. The plaintiffs are not the champions of any rights except their own.

2. The tax upon the use after the property is at rest is not so measured or conditioned as to hamper the transactions of interstate commerce or discriminate against them.

Equality is the theme that runs through all the sections of the statute. There shall be a tax upon the use, but sub-

ject to an offset if another use or sales tax has been paid for the same thing. This is true where the offsetting tax became payable to Washington by reason of purchase or use within the state. It is true in exactly the same measure where the offsetting tax has been paid to another state by reason of use or purchase there. No one who uses property in Washington after buying it at retail is to be exempt from a tax upon the privilege of enjoyment except to the extent that he has paid a use or sales tax somewhere. Every one who has paid a use or sales tax anywhere, or, more accurately, in any state, is to that extent to be exempt from the payment of another tax in Washington.

When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed. Equality exists when the chattel subjected to the use tax is bought in another state and then carried into Washington. It exists when the imported chattel is shipped from the state of origin under an order received directly from the state of destination. In each situation the burden borne by the owner is balanced by an equal burden where the sale is strictly local. "There is no demand in . . . [the] Constitution that the State shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the State's constitutional power." *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472, 480. If the sales tax were abolished, the buyer in Washington would pay at once upon the use. He would have no longer an offsetting credit. While the sales tax is in force, he pays upon the sale, and pays at the same rate. For the owner who uses after buying from afar the effect is all one whether his competitor is taxable under one title or another. This common sense conclusion has ample precedent behind it. Alabama laid a tax on

the sale of spirituous liquors, the products of sister states. Comparing the tax with others applicable to domestic products, the court upheld the statute. The methods of collection were different, but the taxes were complementary and were intended to effect equality. *Hinson* v. *Lott,* 8 Wall. 148. Louisiana laid a tax in lieu of local taxes on rolling stock operated within the state, but belonging to corporations domiciled elsewhere. The court compared the tax with the local taxes upon residents, and found discrimination lacking. *General American Tank Car Corp.* v. *Day,* 270 U. S. 367, 372, 373. South Carolina laid a tax on the storage of gasoline brought from other states and held for use in local business. The statute was interpreted by the state court as covering "all gasoline stored for use and consumption upon which a like tax has not been paid under other statutes." Upon comparison of all the statutes, the impost was upheld. The taxpayers had "failed to show that whatever distinction there existed in form, there was any substantial discrimination in fact." *Gregg Dyeing Co.* v. *Query, supra.*

Baldwin v. *G. A. F. Seelig, Inc.,* 294 U. S. 511, is invoked by appellees as decisive of the controversy, but the case is far apart from this one. There a statute of New York had made provision for a minimum price to be paid by dealers in milk to producers in that state. Cf. *Nebbia* v. *New York,* 291 U. S. 502; *Hegeman Farms Corp.* v. *Baldwin,* 293 U. S. 163. The same statute provided that when milk from another state had been brought into New York, the dealer should be prohibited from selling it at any price unless in buying the milk from the out-of-state producer he had paid the price that would be necessary if he had bought within the state. New York was attempting to project its legislation within the borders of another state by regulating the price to be paid in that state for milk acquired there. She said in effect to farmers in Vermont: your milk cannot be sold by dealers to whom you ship it in

New York unless you sell it to them in Vermont at a price determined here. What Washington is saying to sellers beyond her borders is something very different. In substance what she says is this: You may ship your goods in such amounts and at such prices as you please, but the goods when used in Washington after the transit is completed, will share an equal burden with goods that have been purchased here.

We are told that a tax upon the use, even though not unlawful by force of its effects alone, is vitiated by the motives that led to its adoption. These motives cause it to be stigmatized as equivalent to a protective tariff. But motives alone will seldom, if ever, invalidate a tax that apart from its motives would be recognized as lawful. *Magnano Co.* v. *Hamilton,* 292 U. S. 40, 44; *Fox* v. *Standard Oil Co.,* 294 U. S. 87, 100, 101. Least of all will they be permitted to accomplish that result when equality and not preference is the end to be achieved. Catch words and labels, such as the words "protective tariff," are subject to the dangers that lurk in metaphors and symbols, and must be watched with circumspection lest they put us off our guard. A tariff, whether protective or for revenue, burdens the very act of importation, and if laid by a state upon its commerce with another is equally unlawful whether protection or revenue is the motive back of it. But a tax upon use, or, what is equivalent for present purposes, a tax upon property after importation is over, is not a clog upon the process of importation at all, any more than a tax upon the income or profits of a business. The contention would be futile that Washington in laying an ownership tax would be doing a wrong to non-residents in allowing a credit for a sales tax already borne by the owner as a result of the same ownership. To contend this would be to deny that a state may develop its scheme of taxation in such a way as to rid its exactions of unnecessary oppression. In the statute in dispute such a scheme has

been developed with sedulous regard for every interest affected. Yet a word of caution should be added here to avoid the chance of misconception. We have not meant to imply by anything said in this opinion that allowance of a credit for other taxes paid to Washington made it mandatory that there should be a like allowance for taxes paid to other states. A state, for many purposes, is to be reckoned as a self-contained unit, which may frame its own system of burdens and exemptions without heeding systems elsewhere. If there are limits to that power, there is no need to mark them now. It will be time enough to mark them when a taxpayer paying in the state of origin is compelled to pay again in the state of destination. This statute by its framework avoids that possibility. The offsetting allowance has been conceded, whether the concession was necessary or not, and thus the system has been divested of any semblance of inequality or prejudice. A taxing act is not invalid because its exemptions are more generous than the state would have been free to make them by exerting the full measure of her power.

Finally, there is argument that the tax now in question, though in form upon the use, was in fact upon the foreign sale, and not upon the use at all, the form being a subterfuge. The supposed basis for that argument is a reading of the statute whereby the use shall not be taxable if the chattel was manufactured by the user or received as a legacy or acquired in any way except through the medium of purchase, and a retail one at that. But the fact that the legislature has chosen to lay a tax upon the use of chattels that have been bought does not make the tax upon the use a tax upon the sale. One could argue with as much reason that there would be a tax upon the sale if a property tax were limited to chattels so acquired. A legislature has a wide range of choice in classifying and limiting the subjects of taxation. *Bell's Gap R. Co.* v.

Pennsylvania, 134 U. S. 232, 237; *Ohio Oil Co.* v. *Conway,* 281 U. S. 146, 159. The choice is as broad where the tax is laid upon one or a few of the attributes of ownership as when laid upon them all. *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 158, 159. True, collections might be larger if the use were not dependent upon a prior purchase by the user. On the other hand, economy in administration or a fairer distribution of social benefits and burdens may have been promoted when the lines were drawn as they were. Such questions of fiscal policy will not be answered by a court. The legislature might make the tax base as broad or as narrow as it pleased.

The interlocutory injunction was erroneously granted, and the decree must be

Reversed.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER dissent.

MARTIN *v.* NATIONAL SURETY CO. ET AL.

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

No. 500. Argued March 2, 3, 1937.—Decided March 29, 1937.

1. A payment by the Government of money due on a construction contract, made to one who collected it under a power of attorney and letter from the contractor intended to operate as an assignment (contrary to R. S., § 3477), is to be regarded as payment to the contractor through his representative. P. 594.
2. The provisions of R. S., § 3477; 31 U. S. C. 203, declaring all assignments of any claim upon the United States "absolutely null and void" unless made after the allowance of such claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof, are provisions for the protection of the Government, and not for the regulation of the equities of claimants growing out of irregular assignments, when collection is complete and the Government's liability ended. P. 594.

3. Moneys due by the Government as deferred payments under a building contract were paid over by the Government to the contractor, although the contractor had failed to perform the obligation imposed on him by the Materialmen's Act, 40 U. S. C. 270, and by his bond, to pay persons who supplied labor and materials in the progress of the work. The contractor, in obtaining his bond, had promised the surety in writing that he would not assign any such payments to any third person and had, on the contrary, undertaken to assign them to the surety to the end that, in the event of any breach or default in the government contract, such money might be credited upon any loss or damage sustained by the surety under the bond. *Held* that an equitable lien arose from the assignment in favor of the surety to have the moneys received by the contractor from the Government applied to the satisfaction of the claims of laborers and materialmen, and that this equity was superior to the claim of one who, with notice, had lent money to the contractor and, under power of attorney from the contractor, had collected the deferred payments from the Government and applied them to his loan. P. 595.
4. Failure to pay materialmen, as required by 40 U. S. C. 270, and by the contractor's bond, is a default in the performance of the construction contract, since the statute commands that the bond, conditioned on such payments, shall be executed by the contractor before the commencement of the work, and the terms of the bond are read into the contract. P. 597.

85 F. (2d) 135, affirmed.

CERTIORARI, 299 U. S. 536, to review the affirmance of a final decree of the District Court in a suit by the surety on a bond securing a public building contract. At the prayer of the surety, money paid the contractor by the Government was impounded and applied to the claims of materialmen and laborers. The petitioner in this case, who had lent money to the contractor, had, by the contractor's authority, received the payment from the Government and applied it to his debt.

Mr. Richard S. Bull, with whom *Mr. Harold R. Small* was on the brief, for petitioner.

Mr. J. H. Cunningham, Jr., with whom *Mr. William L. Igoe* was on the brief, for respondents.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

A controversy is here as to the interests of rival claimants in moneys paid by the Government pursuant to a building contract, the one claim being founded on an assignment to a surety, which is held for the benefit of materialmen and laborers, the other on a power of attorney, later than the assignment, which was given to a creditor as security for a loan.

On February 12, 1932, a contract was made between the Government of the United States and Tobin, a builder, for the construction of a Post Office at Carlinville, Illinois. The statute called for a bond with a good and sufficient surety conditioned to the effect that the contractor would promptly make payment to all persons supplying the principal with labor and materials in the prosecution of the work. 40 U. S. C. § 270; *American Surety Co.* v. *Westinghouse Electric Co.*, 296 U. S. 133, 135. Such a bond was given in the sum of $25,000 by the National Surety Company, acting through Guy S. Martin, its agent. Martin, who is the petitioner in this court, had been ordered by one of the officers of the company not to execute the bond, and in signing it disobeyed the order. The fact of disobedience was unknown to the obligee, and by concession the bond is binding according to its terms. In a written application the contractor stated to the surety that he had not assigned and would not assign to third persons his payments on the contract or any part thereof. In further consideration of the execution of the bond he did by the same instrument assign the payments to the surety in the event of any breach or default in the contract, the proceeds to be credited upon any loss or damage.* There

* The assignment reads as follows: "That in further consideration of the execution of said bond, the undersigned hereby assigns, transfers and conveys to the Company all the deferred payments and re-

was also a covenant of indemnity, and a covenant that in the event of the filing of any liens there would be a deposit with the surety sufficient to secure them.

Martin's agency was canceled after the writing of the bond in breach of his instructions. With full knowledge of the application and of the duties there assumed, he loaned moneys to the contractor from time to time under an agreement for the division of the profits of the enterprise. By December, 1932, when the building was near completion, the total of these loans was in excess of $10,000, exclusive of any interest. The work had been done to the satisfaction of the Government, but bills for labor and materials were largely in default. The surety became alarmed. In the latter part of December an officer of the company gave notice to the contractor that the company would insist upon the execution of a power of attorney for the collection of any payments then owing from the Government or falling due thereafter. Tobin took the document away with him, promising to show it to his lawyer. Instead he showed it to Martin, for whose benefit he signed another power of attorney as well as a letter, addressed to the Treasury Department, directing that all checks for Tobin should thereafter go to Martin. These documents were intended to have the effect of an assignment which would be security to Martin for the amount of his advances. Both documents were forwarded to the Treasury as soon as they were signed. The surety did not know of them till five or six weeks later. At last, on Feb-

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tained percentages, and any and all moneys and properties that may be due and payable to the undersigned at the time of any breach or default in said contract, or that thereafter may become due and payable to the undersigned on account of said contract, or on account of extra work or materials supplied in connection therewith, hereby agreeing that such money, and the proceeds of such payments and properties shall be the sole property of the Company and to be by it credited upon any loss, cost, damage, charge and expense sustained or incurred by it under said bond."

ruary 4, 1933, Tobin, pressed again to carry out his agreement, admitted that the power of attorney had been turned over to Martin, but promised to try to get it back. Even then there was denial that it was on file in the Treasury. But the promise, even if sincere, was no longer susceptible of fulfilment. On the very day it was made, Martin had gone to Washington, had visited the Treasury, and had received from the Government a warrant for $10,448.10, the progress or deferred payments then due upon the contract. This sum he collected on February 6, and applied upon his loans. At that time the building was substantially completed, though there was still owing from the Government $5,700, made up of a retained percentage plus a small additional amount to cover unfinished work.

The surety ascertained the truth a day or two thereafter. On February 9, 1933, it brought suit in a District Court in Missouri to protect the interests of the materialmen and laborers, joining Tobin and Martin as defendants as well as certain officers of the Government. It prayed *inter alia* that the moneys received by Martin be impounded, and that the fund, when deposited in court, be disbursed in payment of the bills for material and labor, and in exoneration of the bond. At the beginning of the suit, Tobin was already insolvent. The surety became insolvent later, and renounced in favor of the materialmen and laborers all its rights and interests in the fund in litigation. Martin, yielding to the compulsion of interlocutory decrees, paid into the registry of the court what he had collected from the Government. After notice to materialmen and laborers to file their claims against the fund, the court made a final decree disposing of the controversy. Martin's claim was dismissed on the ground that he was a partner with the contractor, and could gain nothing by his assignment except in subordination to the creditors. The claims of materialmen and laborers (here-

inafter, for convenience, referred to as materialmen) were considered and adjudicated, and distribution was decreed.

The case went to the Court of Appeals for the Eighth Circuit upon an appeal by Martin. The decree was there affirmed. 85 F. (2d) 135. Without disputing the finding that Martin was to share with Tobin in the profits of the enterprise, the Court of Appeals did not pass upon the question whether the relation was one of partnership. It placed its ruling upon the broad ground that, apart from any assignment or any statute, the proceeds of a building contract are chargeable in favor of materialmen with an equitable lien, which attaches upon collection, even if not before, and which cannot be overridden at the will of the contractor by payment to his other creditors, though the payment be made in fulfilment of a promise. For this it cited *Belknap Hardware & Mfg. Co.* v. *Ohio River Contract Co.*, 271 Fed. 144, and *United States Fidelity & Guaranty Co.* v. *Sweeney*, 80 F. (2d) 235, 238, conceding the existence of other cases contra. *Third National Bank* v. *Detroit Fidelity & Surety Co.*, 65 F. (2d) 548; *Kane* v. *First National Bank of El Paso*, 56 F. (2d) 534; *Fidelity & Deposit Co.* v. *Union State Bank*, 21 F. (2d) 102. The opinion dwells upon the confusion in which the subject is enveloped. We granted certiorari.

Our decision will be kept within the necessities of the specific controversy here. Even so, the grounds chosen, though narrower than those assigned below, may be expected to be helpful as a guide in other cases. The proceeds of the contract, when collected by Martin under his power of attorney, were received by him with knowledge of the agreement between the contractor and the surety whereby such proceeds became a fund to be devoted in the first instance to the payment of materialmen and others similarly situated. In our view of the law,

the equities in favor of materialmen growing out of that agreement were impressed upon the fund in the possession of the court.

An Act of Congress tells us that all transfers and assignments "of any claim upon the United States . . . and all powers of attorney, orders, or other authorities for receiving payment of any such claim . . . shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof." R. S. § 3477; 31 U. S. C. § 203. By force of that pronouncement the Government was at liberty to hold the money back till demanded by the contractor personally, disregarding any assignment or power of attorney for its payment to another. But the Government did not choose to shape its course accordingly. It turned over the money to Martin as Tobin's representative, thus discharging its indebtedness as effectively as if payment had been made directly to the principal. *McKnight* v. *United States,* 98 U. S. 179. The case is to be viewed as if Tobin had received the warrant, had put the proceeds in his bank, and had paid them afterwards to Martin. Will Martin be allowed to keep them in the face of his knowledge of the earlier assignment to the surety and of the promise that no assignment would be made to anyone else?

The provisions of the statute making void an assignment or power of attorney by a Government contractor are for the protection of the Government. *Hobbs* v. *McLean,* 117 U. S. 567, 576; *McGowan* v. *Parish,* 237 U. S. 285, 294, 295. In the absence of such a rule, the Government would be in danger of becoming embroiled in conflicting claims, with delay and embarrassment and the chance of multiple liability. *Hobbs* v. *McLean,*

supra. But as applied to the fund in controversy, that peril is now past. The fund is in court to be distributed to rival claimants, with the Government discharged irrespective of the outcome. The very fact that an assignment is permitted even as between the contractor and the Government itself when the warrant is outstanding, if the transfer be executed with prescribed formalities, is significant that the Government is not concerned to regulate the equities of claimants growing out of irregular assignments when collection is complete and liability is ended. The purpose of the statute "was not to dictate to the contractor what he should do with the money received on his contract after the contract had been performed." *Hobbs* v. *McLean, supra.* A transfer of a warrant has need to be accompanied by safeguards lest the assignor may avoid it afterwards for forgery or fraud. A transfer of the fund after payment is perfected is of no concern to any one except the parties to the transaction, and this quite irrespective of the time of the assignment or the manner of its making.

If the Government has any interest in the outcome of this controversy it is in sustaining the assignment to the surety rather than destroying it. The contractor undertook that materialmen would receive their money promptly while the work was going on. In failing to pay them, he violated a duty to them, but a duty also to the Government, for the default was a breach of the condition of the bond. If the assignment to the surety creates a lien upon the fund, the contractor will be compelled to fulfill the duty thus assumed. A different question would be present if the surety were seeking to keep the money for itself. Cf. *American Surety Co.* v. *Westinghouse Electric Co., supra; Jenkins* v. *National Surety Co.,* 277 U. S. 258, 266. There is no such effort here. On the contrary, the surety, claiming nothing for

itself, is devoting the full proceeds of the assignment to the satisfaction of the liabilities covered by the bond. Has the assignment been so obliterated through the condemnation of the statute that when used by the surety in aid of such a purpose it does not generate an equity worthy of recognition?

The advocates of literalism find color of support in a line of decisions made in very different circumstances from these, but tending none the less to a strict construction of the statute. *National Bank of Commerce* v. *Downie,* 218 U. S. 345; *Nutt* v. *Knut,* 200 U. S. 12; *Spofford* v. *Kirk,* 97 U. S. 484; *United States* v. *Gillis,* 95 U. S. 407. We do not pause to inquire with reference to all the cases whether the necessities of the judgment were as broad as the words of the opinion. Thus, in *National Bank of Commerce* v. *Downie, supra,* to give a single illustration, where the controversy was between the trustee in bankruptcy of the contractor and prior assignees, the claims against the Government which were the subject of the assignment had never been allowed, much less collected, though the decision cannot be said to have been put on that ground. Another line of cases exhibit an opposing tendency. *Lay* v. *Lay,* 248 U. S. 24; *Portuguese-American Bank* v. *Welles,* 242 U. S. 7, 11, 12; *McGowan* v. *Parish, supra; Freedman's Saving & T. Co.* v. *Shepherd,* 127 U. S. 494, 506; *Hobbs* v. *McLean, supra; Bailey* v. *United States,* 109 U. S. 432, 439; *Goodman* v. *Niblack,* 102 U. S. 556, 559; *McKnight* v. *United States, supra; Erwin* v. *United States,* 97 U. S. 392. Cf. *York* v. *Conde,* 147 N. Y. 486; 42 N. E. 193, dismissed 168 U. S. 642. These cases teach us that the statute must be interpreted in the light of its purpose to give protection to the Government. After payments have been collected and are in the hands of the contractor or subsequent payees with notice, assignments may be heeded, at all events in equity, if they will not frustrate the ends to which the

prohibition was directed. See *Lay v. Lay, supra,* aff'g 118 Miss. 549; 79 So. 291. To the extent that the two lines of cases are in conflict, the second must be held to be supported by the better reason. Many an analogy from fields uncovered by the statute reinforces that conclusion. An assignment ineffective at law may none the less amount to the creation of an equitable lien when the subject matter of the assignment has been reduced to possession and is in the hands of the assignor or of persons claiming under him with notice. *Western Union Telegraph Co.* v. *Shepard,* 169 N. Y. 170; 62 N. E. 154; *Walker* v. *Brown,* 165 U. S. 654; *Fourth Street Bank* v. *Yardley,* 165 U. S. 634; *Ketchum* v. *St. Louis,* 101 U. S. 306. All this is familiar law. No reason is discoverable in the policy of the statute why the analogy should be rejected in its application to the case at hand. Far from defeating or prejudicing the interests of the Government, the recognition of the equities growing out of the relation between the contractor and the surety will tend, as already has been suggested, to make those interests prevail. Cf. *Equitable Surety Co.* v. *McMillan,* 234 U. S. 448, 456. It would be a strange construction of the statute that would make it necessary for the Government to declare the equities illusory when they serve its own good.

In what has been written we have assumed that the failure to pay materialmen was a default of such a nature as to impose a duty on the contractor to turn over the payments to the surety upon appropriate demand. There is argument to the contrary. According to that argument the moneys were to be assigned in the event of default in the performance of the contract between the contractor and the Government, and not upon the failure to pay persons other than the Government who had claims against the contractor for materials or labor. But the statute directs that a bond for the prompt payment of

materialmen and laborers shall be executed by the contractor before the commencement of the work. Not only that, but the contract with the Government, which was drawn in the standard form, is a confirmation and adoption of the statutory duty. The terms of the bond are read into the contract, and there is default under the contract when there is default under the bond.

We conclude that Martin's interest in the fund was correctly held to be subordinate to the interests of other claimants. Without denying the possibility of arriving at the same conclusion through other avenues of approach, we follow the pathway that has been marked in this opinion.

The decree should be

Affirmed.

BROWN *v.* O'KEEFE, RECEIVER.

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

No. 575. Argued March 8, 1937.—Decided March 29, 1937.

1. Shares of national bank stock, scheduled by their registered owner in his voluntary petition in bankruptcy, were disclaimed by the trustee as burdensome assets, by direction of the court. *Held* that notwithstanding the adjudication of bankruptcy, their ownership remained in the bankrupt, continuously, or by relation, from the date of filing the petition. P. 602.
2. The statutory liability of a shareholder in a national bank in course of voluntary liquidation (12 U. S. C. 181, 182), is enforcible by a creditor or creditors suing for themselves and for others similarly situated. P. 603.
3. An assessment by the Comptroller is not a condition precedent, in cases of voluntary liquidation, to proceedings by creditors. P. 604.
4. Creditors of a national bank which is in course of voluntary liquidation and known to be insolvent, may enforce the statutory liability of a bankrupt shareholder by filing their claims in the court of bankruptcy. That court has authority to liquidate, or to

direct the liquidation of, such claims, when, as in this case, their amount is susceptible of prompt ascertainment. P. 604.

5. The liability of the shareholder of a national bank to creditors, though statutory, is a liability upon quasi or implied contract, in kind provable and dischargeable in bankruptcy. P. 606.

85 F. (2d) 885, reversed.

CERTIORARI, 299 U. S. 539, to review the affirmance of a judgment against a shareholder of a national bank in a suit by the Receiver of the bank based on a Comptroller assessment. The shareholder interposed a discharge in bankruptcy.

Mr. Wm. Elmer Brown, Jr., pro se.

Mr. George P. Barse, with whom *Messrs. Wm. B. Hunter, Ernest Russell,* and *James Louis Robertson* were on the brief, for respondent.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

In a suit for the enforcement of the personal liability imposed by the statute then in force upon shareholders in national banks, petitioner, the defendant in the suit, disclaimed liability, first, upon the ground that before the assessment of the shareholders his ownership of the shares was divested by the filing of a bankruptcy petition and the appointment of a trustee thereunder, and, second, upon the ground that if ownership continued, liability was extinguished by virtue of a discharge in bankruptcy. Whether the defense should have prevailed is now to be determined.

Petitioner was adjudicated a bankrupt on April 21, 1933, and on July 31, 1933, was granted a discharge. At the filing of the bankruptcy petition he was the owner of ten shares of stock of the Union National Bank of Atlantic City, New Jersey. Since September 30, 1931, the Union bank had been in course of voluntary liquidation (under

R. S. §§ 5220 and 5221; 12 U. S. C. §§ 181, 182), the Atlantic City National Bank being the liquidating agent. The terms of liquidation are defined by an agreement. Union sold to Atlantic all its assets of every kind for $1,686,977.63, which the buyer was to pay through an assumption of the seller's liabilities. The seller covenanted that the assets had a value equal to the price, and bound itself to pay the deficiency, if any should ensue. To this there was to be an exception in the case of the banking house and fixtures, which were to be taken at a valuation of $353,000, irrespective of the outcome. The amount of the seller's liability was to be fixed at the expiration of two years (i. e. on September 30, 1933), at which time all notes then uncollected were to be reckoned as losses. Before that time arrived, the liquidating bank met with troubles of its own. In January 1933, it was declared to be insolvent by the Comptroller of the Currency, and a receiver was appointed to wind up its affairs. In December, 1933, Union also was declared insolvent, and the receiver then appointed is the respondent in this court. Valuing the uncollected assets, the Comptroller found it necessary to enforce the personal liability laid upon the shareholders (R. S. § 5151; 12 U. S. C. § 63; 38 Stat. 273; 12 U. S. C., § 64), and by an order made and filed on January 8, 1934, assessed them to the amount of the par value of the shares. The receiver has sued the petitioner as one of the shareholders of Union to recover that assessment.

In defense of the suit petitioner asserts, as we have seen, that the ownership of the stock was divested by the bankruptcy, and also that liability was barred, if ownership remained. To estimate correctly the worth of these defenses we must have some other facts before us. The record shows that on October 27, 1933, by order of a referee, the trustee in bankruptcy was "authorized and di-

rected to abandon all title to and to disclaim all the interest of the bankrupt in" the ten shares of Union National Bank, now the subject of this suit. There is no suggestion that in the interval between adjudication and disclaimer, the trustee had done anything betokening acceptance. The record also shows, in the form of an affidavit accepted by the court, that the bankrupt in his list of liabilities included the liability to assessment on his shares of Union stock, and that in his schedule of creditors he included Union and Atlantic as well as the receiver for Atlantic, then in charge of its affairs. The same affidavit tells us that promptly upon the transfer of the assets in September, 1931, the liabilities assumed by Atlantic were paid to the last dollar; that at the time of the defendant's bankruptcy Union had no debts or liabilities except the debt or liability to the liquidating agent; and that even before the bankruptcy the fact had been definitely ascertained that the liquidation of the Union assets would result in a deficiency which would require an assessment of the stockholders up to the maximum amount of the par value of the shares.[1] The estimate was not impracticable, for about a year and seven months had passed since liqui-

[1] "At the time that I was adjudicated a bankrupt as aforesaid it had been determined and from then until now it has been definitely determined and known that said Union National Bank was insolvent. Said Union National Bank was throughout all of that time and ever since September 30, 1931, had been closed to business. Also at said time it had been determined and throughout said period it was definitely known that the assets of said Union National Bank were insufficient in value to liquidate at a sum equal to the value placed upon them by said agreement of September 30, 1931.

"Also at the time that I was adjudicated a bankrupt as aforesaid it had been determined and from then until now it has been definitely determined and known that an assessment and requisition upon the shareholders of said Union National Bank to the total par value of the amount of stock outstanding would be necessary to pay the debts and claims of said bank." Extracts from petitioner's affidavit.

dation had begun, and only about five months were left before it would be deemed to be complete.

Upon these facts, established by the pleadings and supporting affidavits, the receiver moved for judgment. The District Court held the defenses insufficient, and gave judgment against the defendant for the amount of the assessment. 16 F. Supp. 494. There was an appeal to the Court of Appeals for the Third Circuit where the judgment was affirmed. 85 F. (2d) 885. An important question of bankruptcy law being involved, a writ of certiorari issued from this court.

We dismiss with a few words the petitioner's contention that at the moment of the bankruptcy he lost the title to the shares, and became relieved thereby of the liabilities attendant upon ownership, though his name was left continuously on the stock book of the bank. Cf. *Richmond* v. *Irons,* 121 U. S. 27, 58; *Matteson* v. *Dent,* 176 U. S. 521. Whatever title or inchoate interest may have passed to the trustee was extinguished by relation as of the filing of the petition when the trustee informed the court that the shares were burdensome assets, and was directed by the court to abandon and disclaim them. *American File Co.* v. *Garrett,* 110 U. S. 288, 295; *Sparhawk* v. *Yerkes,* 142 U. S. 1, 13; *Sessions* v. *Romadka,* 145 U. S. 29, 39; *Dushane* v. *Beall,* 161 U. S. 513; *First National Bank* v. *Lasater,* 196 U. S. 115. In such case "the title stands as if no assignment had been made." *Sessions* v. *Romadka, supra,* p. 52. Cf. *Mills Novelty Co.* v. *Monarch Tool & Mfg. Co.,* 49 F. (2d) 28, 31; *In re Frazin,* 183 Fed. 28, 32; *Kirstein Holding Co.* v. *Bangor Veritas, Inc.,* 131 Me. 421, 424; 163 Atl. 655. A precise analogy is found in the law of gifts and legacies. Acceptance is presumed, but rejection leaves the title by relation as if the gift had not been made. See *Albany Hospital* v. *Albany Guardian Society,* 214 N. Y. 435, 441, 442; 108 N. E. 812, collecting many cases. For the purposes of the case at hand the result will

be the same whether title is conceived of as remaining in the bankrupt or as afterwards reverting. *Albany Hospital* v. *Albany Guardian Society, supra,* pp. 443, 445. In either view it is his after disclaimer by the trustee, wherever it may have been while acceptance was uncertain. *American File Co.* v. *Garrett, supra.*

The petitioner being held to be the owner of the shares, we pass to the closer question whether the effect of the discharge in bankruptcy was to extinguish the personal liability that was attached to his ownership as a statutory incident.

Liabilities are not discharged in bankruptcy unless claims thereon exist in favor of claimants whose identity is determinable at the date of the petition. *Zavelo* v. *Reeves,* 227 U. S. 625, 631; *Everett* v. *Judson,* 228 U. S. 474, 479. If the Union bank at that date had been a going concern, the possibility that it might later become insolvent or resort to liquidation, would not have furnished an occasion for stripping the shares of their statutory incidents by the device of a discharge in bankruptcy. In such a situation there would be no claim to be proved and no one capable of proving it. But at the date of this petition, the Union bank was not a going concern with the liability of shareholders a latent possibility. It was in course of liquidation by a voluntary liquidator. Not only was it in liquidation, but according to the evidence it was already known to be insolvent. Liquidation coupled with insolvency is the critical event which is capable of transforming a potential liability into one presently enforcible, as soon as a qualified claimant appears upon the scene. The method of winding up determines who the spokesman for the claim shall be. If a bank is in course of liquidation by the Comptroller of the Currency, the personal liability of stockholders is enforcible upon the direction of the Comptroller, at the suit of a receiver. Act of June 30, 1876, c. 156, § 1, 19 Stat. 63; 12 U. S. C. § 191. Cf. 12

U. S. C. §§ 63, 64. If the bank is in course of liquidation by a voluntary liquidator, the liability is enforcible by a creditor or creditors, suing for themselves and for others similarly situated. Act of June 30, 1876, c. 156, § 2, 19 Stat. 63; 12 U. S. C. § 65. Cf. 12 U. S. C. § 181. We have no occasion to inquire whether in the absence of an assessment by the Comptroller of the Currency the statutory liability may be enforced by a receiver through the medium of a claim in bankruptcy. Cf. *Erickson* v. *Richardson,* 86 F. (2d) 963. That question is not here. An assessment by the Comptroller, even if a necessary preliminary to a suit by a receiver when a bank is in the course of involuntary liquidation, is not a condition precedent, in cases of voluntary liquidation, to proceedings in behalf of creditors. No adequate reason occurs to us, and none, we think, is stated in the arguments of counsel, why a court of bankruptcy is then incompetent to liquidate the amount of the indebtedness effectively and speedily, and give relief accordingly. Cf. *Cunningham* v. *Commissioner of Banks,* 249 Mass. 401, 426; 144 N. E. 447; *United States* v. *Illinois Surety Co.,* 226 Fed. 653, 662–663.

In saying this we are not unmindful that a comprehensive suit in equity is commonly the proper remedy against shareholders where insolvency becomes manifest in voluntary liquidation. 12 U. S. C. § 65. The remedy does not exclude the presentation of a proof of claim in bankruptcy, the amount to be liquidated under the direction of the court by bill in equity or otherwise. *Cunningham* v. *Commissioner of Banks, supra; United States* v. *Illinois Surety Co., supra; King* v. *Pomeroy,* 121 Fed. 287; *Irons* v. *Manufacturer's Nat. Bank,* 17 Fed. 308, 314; 27 Fed. 591. Cf. *Hightower* v. *American Nat. Bank,* 263 U. S. 351; *Wyman* v. *Wallace,* 201 U. S. 230. By the mandate of the statute (Bankruptcy Act § 63b; 11 U. S. C. § 103b): "Unliquidated claims against the

bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against the estate." The result is to invest the court with a discretionary power that can be fitted to the needs of varying situations. *Maynard* v. *Elliott,* 283 U. S. 273. Cf. *Foust* v. *Munson S. S. Lines,* 299 U. S. 77, 83. A holding that a creditor is disabled from making proof in bankruptcy till a suit in equity against the shareholders has been brought to a decree would have unfortunate results. Today it is the bankrupt who is asserting the provable quality of such a claim in order to preserve for himself the benefit of a discharge. Tomorrow it may be a creditor who unless he is given that opportunity may lose his dividend from the assets and find his suit in equity illusory. In that predicament the malleable processes of courts of bankruptcy give assurance of a remedy that can be moulded and adapted to the needs of the occasion. *Cunningham* v. *Commissioner of Banks, supra.*

Liquidation being possible, the claim is not defeated though there was uncertainty as to its amount at the filing of the petition. *Maynard* v. *Elliott, supra.* Yet even the amount was certain, if we are to credit the defendant's statement. By this it appears that long before the bankruptcy the necessity for an assessment to the amount of the par value of the shares had become obvious to the liquidating agent and indeed to all concerned. The facts are far removed from those in *Miller* v. *Irving Trust Co.,* 296 U. S. 256, where the claim had its origin in the covenants of a lease. For historical causes such covenants are *sui generis* (*Manhattan Properties* v. *Irving Trust Co.,* 291 U. S. 320; *Gardiner* v. *Butler & Co.,* 245 U. S. 603), but the analogy is still imperfect if that distinction be ignored. There the only cause of action belonging to the claimant was for a deficiency that was

dependent upon unpredictable events.[2] Here the progress of the liquidation had already brought about a deficiency too great to be corrected by any unexpected windfall. This at least is the situation as the petitioner describes it. What infusion of contingency will vitiate a claim is at best a question of degree (*Maynard* v. *Elliott, supra,* p. 278), though there is a leaning toward allowance in aid of the purpose of the statute to relieve the honest debtor. *Williams* v. *U. S. Fidelity & G. Co.,* 236 U. S. 549, 554–555; *Central Trust Co. v. Chicago Auditorium Assn.,* 240 U. S. 581, 591. To all this we add that the uncertainty, if there was any, as to the exact amount of the assessment was to be dispelled at the farthest by September 30, 1933, less than six months later, for obligations then unpaid were to be classified as losses. Cf. Bankruptcy Act, § 57n; 11 U. S. C. § 93n. Upon the facts of this case the impediments to a prompt ascertainment of the liability of shareholders were unsubstantial, if not imaginary.

Other objections are made to the operation of the discharge, but they need not detain us long.

There is argument that a claim against a stockholder is not provable in bankruptcy for the reason that it is founded on a statutory liability not subject to discharge. Bankruptcy Act § 63; 11 U. S. C. § 103. True indeed it is that the liability is created by a statute, and not solely by agreement. *McClaine* v. *Rankin,* 197 U. S. 154, 159, 161; *Christopher* v. *Norvell,* 201 U. S. 216, 225, 226. No disclaimer by the stockholder would be effective to avoid it. Even so, the liability, created though it is by statute, is quasi-contractual in its origin and basis. *Chisholm* v. *Gilmer,* 299 U. S. 99, 102; *Shriver* v. *Woodbine Bank,* 285

[2] "Under the clause in question, it was, at the time the petition in bankruptcy was filed, uncertain, a mere matter of speculation, whether any liability ever would arise under it." *Miller* v. *Irving Trust Co.,* 296 U. S. 256, 258.

U. S. 467, 477; *Coffin Brothers & Co.* v. *Bennett,* 277 U. S. 29, 31; *Bernheimer* v. *Converse,* 206 U. S. 516, 529; *Christopher* v. *Norvell, supra; McClaine* v. *Rankin, supra,* p. 159; *McDonald* v. *Thompson,* 184 U. S. 71, 74. Cf. *Erickson* v. *Richardson, supra.* It is an incident affixed by law to the contract of membership between shareholder and bank. *Ibid.* A liability upon quasi-contract is one upon an "implied contract," and so provable in bankruptcy (Bankruptcy Act § 63 (4); 11 U. S. C. § 103 (4); *Crawford* v. *Burke,* 195 U. S. 176; *Tindle* v. *Birkett,* 205 U. S. 183; *Davis* v. *Aetna Acceptance Co.,* 293 U. S. 328, 331), if the other conditions of allowance are found to be fulfilled.

Finally argument is possible that the discharge is ineffective against the creditors of the bank for the reason that only a single creditor of Union was listed in the schedules. This, however, is unimportant if the creditor so listed (the liquidating agent) was in fact the only creditor, as the petitioner insists it was. Cf. *Longfield* v. *Minnesota Savings Bank,* 95 Minn. 54; 103 N. W. 706. If in fact there were other creditors whose names have been omitted, the burden rests on the respondent to make proof of such omission. *Hill* v. *Smith,* 260 U. S. 592, 595. The conclusion may well follow, if the omission shall be proved, that as to any creditors not listed the discharge is without effect.

Whether the petitioner will be able to make good the allegations of his answer, amplified and explained by the supporting affidavits, is not to be predicted now. Enough for present purposes that there are issues to be tried.

The decree should be reversed and the cause remanded for further proceedings in accord with this opinion.

Reversed.

HIGHLAND FARMS DAIRY, INC., ET AL. *v.* AGNEW ET AL.

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

No. 573. Argued March 8, 9, 1937.—Decided March 29, 1937.

1. The Virginia Milk and Cream Act created a Commission with power to establish market areas, and to determine, after hearings, the need for regulation of milk and cream prices within each area and, if satisfied of the need, to fix prices accordingly. *Held* that the objection of unconstitutional delegation of legislative power has no basis under the Federal Constitution, and has been decided adversely as to the state Constitution by the highest court of the State. P. 611.
2. How power shall be distributed by a State among its governmental organs is commonly, if not always, a question for the State itself. P. 612.
3. The federal guaranty to the States of a republican form of government, Const., Art. IV, § 4, is not involved in this case, and, in any event, is an obligation of Congress, not of the Courts. *Id.*
4. A judgment by the highest court of a State as to the meaning and effect of its own constitution is decisive and controlling. P. 613.
5. The validity of a provision in the above mentioned statute for the cancellation of the prices established for a market if cancellation is requested by a majority of the producers and distributors in the area affected, need not be considered, because no exercise of the power of cancellation has been threatened. P. 613.
6. A holding of invalidity as to this provision for cancellation would not affect the rest of the statute because of the saving clause. P. 614.
7. The price-fixing and licensing provisions of the Virginia Milk and Cream Act do not apply to transactions in interstate commerce, notwithstanding the broad definition of a "distributor." This view is confirmed by the administrative practice under it and by its declaration that operations in interstate commerce shall not be deemed to be affected. P. 614.
8. This statute is not invalid for failing to prescribe the standards to be applied by the Commission in granting licenses or refusing them. P. 616.

The obvious purpose of the license is to provide the Commission and the members of the local boards with a record of the distributors and producers subject to the Act, as an aid to supervision and enforcement. It is not to be inferred that any one was intended to be excluded because of favor or caprice. An order refusing to issue a license, or suspending or revoking one, may be reviewed on appeal to the Supreme Court of Appeals.

9. One who is required to take out a license will not be heard to complain, in advance of application, that there is danger of refusal. P. 616.

16 F. Supp. 575, affirmed.

APPEAL from a judgment of the District Court, of three judges, denying a permanent injunction and dismissing the bill in a suit to restrain enforcement of the Virginia Milk and Cream Act.

Messrs. Philip Rosenfeld and *Lawrence Koenigsberger,* with whom *Messrs. Morris Simon* and *Eugene Young* were on the brief, for appellants.

Mr. Edwin H. Gibson, Assistant Attorney General of Virgina, and *Mr. John S. Barbour,* with whom *Mr. Abram P. Staples,* Attorney General, was on the brief, for appellees.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

A statute of Virginia, known as the "Milk and Cream Act," is assailed by the appellants as invalid both under the Constitution of Virginia and under that of the United States.

The act is chapter 357 of the Laws of 1934. It recites the existence of demoralizing trade practices in the dairy industry, threatening to interrupt the supply of pure and wholesome milk for the inhabitants of the Commonwealth and producing an economic emergency so acute and destructive as to call for corrective measures. It establishes

a Milk Commission with power to create within the state natural market areas, and to fix the minimum and maximum prices to be charged for milk and cream therein. It authorizes the Commission to exact a license from distributors subject to the act, and provides that in the absence of such a license sales shall be unlawful within the market areas. It imposes taxes or fees for the support of the Commission and of local milk boards which are to be created to coöperate with the Commission in making the plan effective. It warns (§ 14) that none of its provisions "shall apply or be construed to apply to foreign or interstate commerce, except in so far as the same may be effective pursuant to the United States Constitution and to the laws of the United States enacted pursuant thereto." Finally it provides (§ 16) that "if any section, clause, or sentence or paragraph shall be declared unconstitutional for any reason, the remainder of the act shall not be affected thereby." A fuller summary of the statute is given in the opinion of the court below (16 F. Supp. 575), to which reference is made. Other provisions will be noted in this opinion later.

The suit is for an injunction to restrain the members of the Commission from enforcing the statute or the regulations made thereunder. One of the two plaintiffs (Highland Farms Dairy, Incorporated), which will be spoken of as "Highland," has a creamery for the pasteurizing and treatment of milk at Washington in the District of Columbia. For that purpose it buys milk from farmers in Virginia and Maryland. Its entire output of bottled milk it sells to the other plaintiff, Luther W. High, who has retail stores in Virginia and elsewhere for the sale of ice cream, milk and other dairy products. A regulation adopted by the Commission on March 27, 1936, set up a market area, described as the Arlington-Alexandria Milk Market, within which High is engaged in business. Mini-

mum prices prescribed for that area are in excess of the prices at which Highland had been selling to High and at which High had sold to the consumers. Each went on selling at the old prices. Neither made application for a license. In June, 1936, the Commission gave notice to High that it would proceed against him for an injunction if he refused compliance with its orders. No proceedings against Highland were begun or even threatened, the Commission taking the position that Highland was not subject to the prohibitions of the statute, its sales and purchases in Virginia being transactions in interstate commerce. In spite of this disclaimer, Highland joined with High in suing to enjoin the enforcement of the Act. A District Court of three judges, organized in accordance with § 266 of the Judicial Code (28 U. S. C. § 380), gave judgment for the defendants, with a comprehensive opinion to which little can be added. 16 F. Supp. 575. The case is here upon appeal. 28 U. S. C. § 380.

The power of a state to fix a minimum price for milk in order to save producers, and with them the consuming public, from price cutting so destructive as to endanger the supply, was affirmed by this court in *Nebbia* v. *New York,* 291 U. S. 502, and in other cases afterwards. *Hegeman Farms Corp.* v. *Baldwin,* 293 U. S. 163; *Borden's Farm Products Co.* v. *Ten Eyck,* 297 U. S. 251. Appellants are not asking us to undo what was there done. They take the ground, however, that the statute of Virginia is open to objections that were inapplicable to the statute of New York. The present grounds of criticism will be considered one by one.

1. The statute is not invalid as an unlawful delegation of legislative power.

The General Assembly of the Commonwealth in setting up the Milk Commission did not charge it with a duty to prescribe a scale of prices in every portion of the state.

The Commission was to establish market areas, and with reference to each area was to determine, after a public hearing, whether there was need within such area that prices should be regulated. If it was satisfied of the need, it was to fix a scale accordingly. The argument for the appellants is that in this there was a grant of discretionary power overpassing the limits of lawful delegation.

The Constitution of the United States in the circumtances here exhibited has no voice upon the subject. The statute challenged as invalid is one adopted by a state. This removes objections that might be worthy of consideration if we were dealing with an act of Congress. How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself. Nothing in the distribution here attempted supplies the basis for an exception. The statute is not a denial of a republican form of government. Constitution, Art. IV, § 4. Even if it were, the enforcement of that guarantee, according to the settled doctrine, is for Congress, not the courts. *Pacific States Telephone Co.* v. *Oregon,* 223 U. S. 118; *Davis* v. *Hildebrant,* 241 U. S. 565; *Ohio ex rel. Bryant* v. *Akron Park District,* 281 U. S. 74, 79, 80. Cases such as *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, and *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, cited by appellants, are quite beside the point. What was in controversy there was the distribution of power between President and Congress, or between Congress and administrative officers or commissions, a controversy affecting the structure of the national government as established by the provisions of the national constitution.

So far as the objection to delegation is founded on the Constitution of Virginia, it is answered by a decision of the highest court of the state. In *Reynolds* v. *Milk Commission,* 163 Va. 957; 179 S. E. 507, the Supreme Court of Appeals passed upon the validity of the statute now in

question. The Commission sued distributors to enjoin them from selling milk at a price lower than the prescribed minimum, and the injunction was granted against the defendants' objection that the statute was invalid. Upon appeal to the Supreme Court of Appeals the judgment was affirmed. To escape the force of that decision the argument is made that the question of unlawful delegation was not considered or decided. But the contrary is plainly indicated both in the opinion of the court and in that of its dissenting members. The prevailing opinion summarizes the arguments against the act, and among them is this (163 Va. at p. 976), that there is "the delegation to the Commission of the power to enact legislation which is both prohibitory and penal in character and which will be operative only in such areas as the Commission may define." The dissenting opinion says (p. 980): "The Commission may order milk to be sold at one price in Staunton, at another in Harrisonburg and may leave Woodstock to shift for itself." These statements are too clear to leave room for misconstruction. A judgment by the highest court of a state as to the meaning and effect of its own constitution is decisive and controlling everywhere.

2. The statute is not invalid in its present application by reason of a provision for the cancellation of the prices established for a market, if cancellation is requested by a majority of the producers and distributors in the area affected.[1]

The argument is made that the effect of that provision is to vest in unofficial agencies, capriciously selected, a power of repeal to be exercised at pleasure. The case

[1] The provision (§ 3 (i)) reads as follows: "The commission shall withdraw the exercise of its powers from any market upon written application of a majority of the producers (measured by volume) of milk produced and a majority of the distributors (measured by volume of milk distributed) in said market acting jointly."

of *Eubank* v. *Richmond,* 226 U. S. 137, is cited for the proposition that this cannot be done consistently with the Fourteenth Amendment of the Federal Constitution. Delegation to official agencies is one thing, there being nothing in the concept of due process to require that a particular agency shall have a monopoly of power; delegation to private interests or unofficial groups with arbitrary capacity to make their will prevail as law may be something very different. Cf., however, *Cusack Co.* v. *Chicago,* 242 U. S. 526, 531. Such is the appellants' argument when its implications are developed.

Without acceptance or rejection of the distinction in its application to this statute, we think it is enough to say that the power of cancellation has not been exercised or even threatened. The controversy in that regard is abstract and conjectural. *Abrams* v. *Van Schaick,* 293 U. S. 188. Moreover, if a provision so subordinate were at any time to fail, the saving clause in § 16 would cause the residue to stand.

3. The statute does not lay a burden on interstate commerce.

Argument to the contrary is built upon the definition of the word "distributor" contained in § 1. We learn from that section that distributors include "persons wherever located or operating, whether within or without the Commonwealth of Virginia, who purchase, market, or handle milk for resale as fluid milk in the Commonwealth of Virginia." This definition, we are told, takes in the plaintiff Highland, who buys milk and sells it in interstate commerce, and does so with the expectation that upon arrival in Virginia the milk will be resold. But Highland is not subject to the provisions of the act, and so the Milk Commission has ruled. No matter what the definition of a distributor may be, sales are not affected by any restriction as to price unless made

within the boundaries of a designated market area. The sections quoted in the margin point fairly to that conclusion.[2] Highland in Washington may sell to High in Virginia, and High may buy from Highland, at any price they please. Not till the milk is resold in Virginia within a market area will the price minimum apply, and then only to the price to be charged on the resale. Cf. *Wiloil Corp.* v. *Pennsylvania,* 294 U. S. 169, 175; *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506; *Baldwin* v. *G. A. F. Seelig, Inc.,* 294 U. S. 511. If there could be any doubt about this as a matter of construction, the doubt would be dispelled by the administrative practice and by the warning of the statute, expressed in § 14, that operations in interstate commerce shall not be deemed to be affected. So

[2] Sec. 3, subd. j: "The commission, after public hearing and investigation, may fix the prices to be paid producers and/or associations of producers by distributors in any market or markets, may fix the minimum and maximum wholesale and retail prices to be charged for milk in any market, and may also fix different prices for different grades of milk. In determining the reasonableness of prices to be paid or charged in any market or markets for any grade, quantity, or class of milk, the commission shall be guided by the cost of production and distribution, including compliance with all sanitary regulations in force in such market or markets, necessary operation, processing, storage and delivery charges, the prices of other foods, and the welfare of the general public."

Sec. 3, subd. k: "The commission may require all distributors in any market designated by the commission to be licensed by the commission for the purpose of carrying out the provisions of this act. The commission may decline to grant a license, or may suspend or revoke a license already granted upon due notice and after a hearing. The commission may classify licenses, and may issue licenses to distributors to process or store or sell milk to a particular city or village or to a particular market or markets within the Commonwealth."

Sec. 1, par. II: " 'Market' means any city, town or village of the Commonwealth, or two or more cities and/or towns and/or villages and surrounding territory designated by the commission as a natural marketing area."

also as to the requirement of a license expressed in § 4.[3] High needs a license to the extent that he sells at retail to consumers in Virginia. Highland does not need one, and the Commission is not asking it to apply for one, because its business as now conducted with persons in Virginia is interstate exclusively. Clumsy draftsmanship may have spread a fog about the section when viewed in isolation or taken from its setting. The fog scatters when we recall the provisions of § 14 and the administrative practice. Appellants' fears are visionary.

4. The statute is not invalid for failing to prescribe the standards to be applied by the Commission in granting licenses or refusing them.

The obvious purpose of the license is to provide the Commission and the members of the local boards with a record of the distributors and producers subject to the act. Supervision and enforcement are thus likely to be easier. No inference is permissible that any one was intended to be excluded because of favor or caprice. *Lieberman* v. *Van De Carr,* 199 U. S. 552. Indeed the statute makes provision (§ 6) that an order refusing to issue a license, or suspending or revoking one, may be reviewed on appeal to the Supreme Court of Appeals. There is sedulous protection against oppression or abuse of power. One who is required to take out a license will not be heard to complain, in advance of application, that there is danger of

[3] The section reads as follows: "No distributor in a market in which the provisions of this act are in effect shall buy milk from producers, or others, for sale within the Commonwealth, or sell or distribute milk within the Commonwealth, unless such distributor is duly licensed under the provisions of this act. It shall be unlawful for a distributor to buy milk from or sell milk to a distributor who is not licensed as required by this act. It shall be unlawful for any distributor to deal in, or handle milk if such distributor has reason to believe it has previously been dealt in, or handled, in violation of the terms and provisions of this act."

refusal. *Lehon* v. *Atlanta,* 242 U. S. 53, 56; *Smith* v. *Cahoon,* 283 U. S. 553, 562. He should apply and see what happens.

Other arguments against the act are implicit in the arguments already summarized and answered. Expansion of the answer will serve no useful purpose.

The decree is

Affirmed.

MR. JUSTICE VAN DEVANTER, MR. JUSTICE MCREYNOLDS, MR. JUSTICE SUTHERLAND and MR. JUSTICE BUTLER do not assent to so much of the opinion as attributes to the State a power to fix minimum and maximum prices to be charged in the sale of milk, their views on this question being reflected by what was said on their behalf by MR. JUSTICE MCREYNOLDS in *Nebbia* v. *New York,* 291 U. S. 502, 539–559. In other respects they concur in the opinion.

DISTRICT OF COLUMBIA *v.* CLAWANS.

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

No. 103. Argued November 18, 1936. Reargued March 1, 1937.—Decided April 5, 1937.

1. The offense of engaging, without a license, in the business of a dealer in second-hand personal property, defined by the Code of the District of Columbia, punishable by a fine of not more than $300 or imprisonment of not more than 90 days, is to be classed as a petty offense which, consistently with Art. III, § 2, cl. 3, of the Constitution, may be tried without a jury. P. 624.
2. In determining whether an offense is a petty offense that constitutionally may be tried without a jury, the severity of the penalty inflictable, as well as the moral quality of the act and its relation to common law crimes, should be considered. P. 625.

3. Engaging in the business of selling second-hand property without a license was not indictable at common law. Today it is at most but an infringement of local police regulations, and its moral quality is relatively inoffensive. P. 625.
4. In England and in the American States, at the time of the adoption of the Constitution, confinement for a period of 90 days or more was not an unusual punishment for petty offenses, tried without a jury. P. 626.
5. The question whether an offense is triable without a jury is unaffected by the fact that the offender is not entitled to an appeal as of right; it must be assumed that, in a proper case, authority in the appellate court to allow an appeal will be exercised. P. 627.
6. Assuming that, with change of the common attitude towards severity of punishment, a petty offense which, at the time of the adoption of the Constitution, would have been triable without a jury may come within the provision of the Constitution requiring jury trial, the existence of such change must be determined by objective standards such as may be seen in the laws and practices of the community taken as a gauge of its social and ethical judgments. P. 627.

   The Act of Congress applicable to this case, and statutes in force in the States and in England, together with numerous state court decisions, are examined and are persuasive that there has been no such change in the generally accepted standards of punishment as would overcome the presumption that a summary punishment of 90 days' imprisonment, permissible when the Constitution was adopted, is permissible now.
7. Common experience teaches that testimony delivered against a defendant in a criminal case by private police or detectives, acting in the course of their private employment, is open to the suspicion of bias, especially when uncorroborated; and the cross-examination of such witnesses, bearing directly on substantial issues, should not be summarily curtailed. P. 630.
8. While the extent of cross-examination rests in the sound discretion of the trial judge, in this case discretion was abused, and the error prejudicial. P. 632.

   Throughout the trial, rulings of the judge prevented cross-examination in appropriate fields and excluded questions bearing on the credibility of witnesses for the prosecution and on the commission by the accused of the acts charged.

66 App. D. C. 11; 84 F. (2d) 265, affirmed.

CERTIORARI, 299 U. S. 524, to review a judgment reversing a conviction in the Police Court of the District of Columbia. The opinion disapproves of the reason given by the court below but affirms the reversal upon another ground which that court deemed unsubstantial.

Mr. Raymond Sparks, with whom *Messrs. Elwood Seal* and *Vernon E. West* were on the brief, for petitioner.

The Constitution does not require the trial of petty offenses by jury. The character of such offenses is determined by reference to the procedure at common law. *Schick* v. *United States,* 195 U. S. 65; *Colts* v. *District of Columbia,* 282 U. S. 63, 73; *Callan* v. *Wilson,* 127 U. S. 540; *State* v. *Buchanan,* 5 H. & J. (Md.) 317, 360; *United States* v. *Marshall,* 17 D. C. 34; *Palmer* v. *Lenovitz,* 34 App. D. C. 303, 305; *Patton* v. *United States,* 281 U. S. 276, 312; *Ex parte Grossman,* 267 U. S. 87, 108.

At common law, prior to the adoption of the Constitution, there were many offenses, both in England and America, in the trial of which no jury was allowed. These included not only offenses punishable by fines, but others in which corporal punishment or imprisonment might be imposed. [Giving numerous instances.] *People ex rel. Cosgriff* v. *Craig,* 195 N. Y. 190; *Johnson* v. *Barclay,* 1 Harrison 1, 6; *United States* v. *Morland,* 258 U. S. 433, 445; *Ex parte Wilson,* 114 U. S. 417, 427.

The decisions of state courts, where similar constitutional restrictions are provided, support the position that an offense such as is here involved may be tried by summary procedure. Citing the following cases in addition to cases cited in the opinion: *Lancaster* v. *State,* 90 Md. 211; *State* v. *Loden,* 117 Md. 373; *State* v. *Ruhe,* 24 Nev. 251; *Duffy* v. *People,* 6 Hill's Rep. 75; *Cooley* v. *Wilder,* 234 App. Div. 256; *People* v. *Stein,* 80 App. Div. 357;

State v. *Rodgers,* 91 N. J. L. 212; *Katz* v. *Eldridge,* 97 N. J. L. 123.

The license law is in the nature of a municipal ordinance and Congress has properly treated a violation of the law as a petty offense. *District of Columbia* v. *Colts,* 282 U. S. 63, 72; *State* v. *Rodgers,* 91 N. J. L. 212, 214.

The absence of an absolute right of appeal does not affect the right of trial by jury.

The opinion of the lower court is inconsistent with the decisions of this Court. *Dimick* v. *Schiedt,* 293 U. S. 475, 487; *Continental Bank* v. *Chicago, R. I. & P. Ry.,* 294 U. S. 648, 669.

Mr. Seth W. Richardson, with whom *Mr. Allen Caruthers* and *Miss Lillian Clawans* were on the brief, for respondent.

This Court may consider all contentions of respondent duly presented below, even though the petition for certiorari is based on a single proposition, as such additional contentions are for the purpose of sustaining the judgment of the Court of Appeals. Jud. Code, §§ 240, 269.

Defendant was entitled to a jury trial.

The numerous statutes cited by petitioner show that a special Act was necessary to authorize administration of summary punishment even at common law. License violations do not appear to have been dealt with by the common law.

Ever since the decision of this Court in *Schick* v. *United States,* 195 U. S. 65, it has been plain that either the nature of an offense or the prescribed punishment might determine the right to a trial by a jury. It is thus reasonable to conclude that, even with respect to an offense denominated as petty under the common law, and which was subject to summary punishment at common law, if, in more modern times, the punishment shall have been increased from a petty degree to a substantial de-

gree, the rule of summary punishment at common law would no longer apply. The offense would, because of the severity of the punishment, be entitled to a classification as a criminal offense, and therefore come within the constitutional provision granting the right to a jury trial.

In 1871, a licensing Act was passed by the District Assembly, which fixed the penalty for violation at a fine of not less than $5.00 or more than $50.00, without imprisonment. A jury trial was permitted. *Lasley* v. *District,* 14 App. D. C. 407. In 1902, the offense was made punishable by not to exceed $500.00 fine and thirty days in jail, in default of payment. At this period, the defendant was entitled to appeal, and secure a jury trial in the Supreme Court of the District. Dist. of Col. Rev. Stats., §§ 1073–7, 773. It was not until 1925, that right of appeal was withdrawn, and right of trial by jury was likewise limited to cases involving punishment in excess of 90 days' imprisonment and $300.00 fine.

We think it fair to say that the various state decisions seem quite irreconcilable, and not unnaturally so, since jury provisions in the various state constitutions differ widely. But these cases do, generally, establish the following conclusions: (a) That summary punishment at common law usually depended on a specific statute; (b) That the punishments usually viewed as "trivial" are not comparable in severity with the punishment here involved; (c) That severity of sentence is a controlling feature in determining right to a jury trial; (d) That in license cases in the state courts, jury trials are commonly afforded.

In *Callan* v. *Wilson,* 127 U. S. 540, the court did not concede that there was a class of "petty" or minor offenses not usually embraced in criminal statutes, which, if committed in this District, may under the authority of Congress be tried by the court and without a jury. It merely

assumed this for the purposes of decision. The only issue involved was the right of a defendant to waive a jury in a criminal prosecution.

No policy of convenience should be permitted to destroy the safeguards of liberty under the Constitution. Such a policy has frequently been commented upon and discouraged by this Court. See *Dimick* v. *Schiedt,* 293 U. S. 486; 4 Blackstone, c. 27, p. 350.

The record is not sufficient to sustain a judgment that the defendant was "engaged in the business of dealer in second-hand personal property."

Defendant's rights on cross-examination of the prosecuting witnesses were prejudicially curtailed.

The defendant was not given a fair trial.

The fact that a right of an appeal is not an absolute one is a potent reason why one charged with a criminal offense under a law which does not allow this right, should have a jury pass upon the fact of guilt or innocence as provided by the Constitution. See *Dimick* v. *Schiedt,* 293 U. S., p. 486, and authorities cited.

The opinion of the lower court is in accord with the decisions of this Court and the best considered cases in the highest courts of the States, as well as numerous decisions in the Circuit Courts of Appeals. *Frank* v. *United States,* 192 Fed. 864; *Callan* v. *Wilson,* 127 U. S. 540; *Schick* v. *United States,* 195 U. S. 65.

There is not a decision of this Court or of any federal court defining clearly what is or what is not a "petty offense."

The petitioner cites several cases, to-wit, *Patton* v. *United States,* 281 U. S. 276; *Callan* v. *Wilson,* 127 U. S. 540; *Dimick* v. *Schiedt,* 293 U. S. 486; and *West* v. *Gammon,* 98 Fed. 426, to the effect that the guarantee of a trial by jury has always been construed to mean a trial in the mode and according to the settled rules of the common law, including all the essential elements recog-

nized in this country and England, when the Constitution was adopted. This means nothing more than that the word jury, when used in the Constitution, means a jury of 12 men and that any less number is not within the meaning of the Constitution. The logical result of petitioner's argument is that Congress could provide a trial without a jury in any case where, before the adoption of the Constitution, such a case had been tried either under an Act of Parliament or in the Colonies summarily without a jury, regardless of the nature of the offense or the punishment.

MR. JUSTICE STONE delivered the opinion of the Court.

Respondent was convicted in the District of Columbia police court of engaging, without a license, in the business of a dealer in second-hand personal property, to-wit, the unused portions of railway excursion tickets, in violation of § 7, par. 39, of the Act of Congress, approved July 1, 1902, 32 Stat. 622, c. 1352, as amended by the Act of July 1, 1932, 47 Stat. 550, c. 356. On arraignment she demanded a jury trial, which was denied, and on conviction she was sentenced to pay a fine of $300 or to be confined in jail for sixty days. The case was brought to the Court of Appeals for the District of Columbia by writ of error to review the denial of the respondent's request for a jury, and other rulings of the trial court which, it was claimed, had deprived her of a fair trial. The Court of Appeals reversed the judgment, holding that a jury trial was guaranteed to petitioner by the Constitution, but that the trial had been fair in other respects. 66 App. D. C. 11; 84 F. (2d) 265. We granted certiorari.

The statute under which petitioner was convicted provides that the offense may be prosecuted in the District of Columbia police court and is punishable by a fine of not more than $300 or imprisonment for not more than ninety days. The Code of the District of Columbia

(1929) Tit. 18, § 165, provides that prosecutions in the police court shall be on information and that the trial shall be by jury in all cases "in which, according to the Constitution of the United States, the accused would be entitled to a jury trial," and that, "In all cases where the accused would not by force of the Constitution of the United States be entitled to a trial by jury, the trial shall be by the court without a jury, unless in . . . cases wherein the fine or penalty may be more than $300, or imprisonment as punishment for the offense may be more than ninety days, the accused shall demand a trial by jury, in which case the trial shall be by jury." Article III, § 2, Clause 3, of the Constitution, provides that "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury. . . ." The Sixth Amendment declares that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . ."

It is settled by the decisions of this Court, which need not now be discussed in detail, that the right of trial by jury, thus secured, does not extend to every criminal proceeding. At the time of the adoption of the Constitution there were numerous offenses, commonly described as "petty," which were tried summarily without a jury, by justices of the peace in England, and by police magistrates or corresponding judicial officers in the Colonies, and punished by commitment to jail, a workhouse, or a house of correction.[1] We think, as the Court of Appeals held and

[1] 4 Blackstone, Commentaries, 280–281; McNamara's Paley on Summary Convictions (4th ed. 1856), 10–12; Dillon, Municipal Corporations, § 433 (5th ed. 1911, § 750). A comprehensive collection of the statutes, English and American, will be found in Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harv. L. Rev. 917, 922–965, 983–1019.

respondent concedes, that, apart from the prescribed penalty, the offense of which petitioner was convicted is, by its nature, of this class, and that were it not for the severity of the punishment, the offender could not, under our decisions, claim a trial by jury as of right. *Schick* v. *United States,* 195 U. S. 65; and see *Callan* v. *Wilson,* 127 U. S. 540, 552, 555; *Natal* v. *Louisiana,* 139 U. S. 621, 624; *District of Columbia* v. *Colts,* 282 U. S. 63, 72, 73.

Engaging in the business of selling second-hand property without a license was not indictable at common law. Today it is at most but an infringement of local police regulations, and its moral quality is relatively inoffensive. But this Court has refused to foreclose consideration of the severity of the penalty as an element to be considered in determining whether a statutory offense, in other respects trivial and not a crime at common law, must be deemed so serious as to be comparable with common law crimes, and thus to entitle the accused to the benefit of a jury trial prescribed by the Constitution. See *Schick* v. *United States, supra,* 67–68.

We are thus brought to the question whether the penalty, which may be imposed for the present offense, of ninety days in a common jail, is sufficient to bring it within the class of major offenses, for the trial of which a jury may be demanded. The court below thought, as we do, that the question is not free from doubt, but concluded, in view of the fact that the statute allows no appeal as of right from the conviction for the offense, and in view of its own estimate of the severity of the penalty, that three months' imprisonment is a punishment sufficiently rigorous to place respondent's delinquency in the category of major offenses.

If we look to the standard which prevailed at the time of the adoption of the Constitution, we find that confinement for a period of ninety days or more was not an un-

usual punishment for petty offenses, tried without a jury. Laying aside those for which the punishment was of a type no longer commonly employed, such as whipping, confinement in stocks and the like, and others, punished by commitment for an indefinite period, we know that there were petty offenses, triable summarily under English statutes, which carried possible sentences of imprisonment for periods from three to twelve months.[2] At least sixteen statutes, passed prior to the time of the American Revolution by the Colonies, or shortly after by the newly-created States, authorized the summary punishment of petty offenses by imprisonment for three months or more.[3] And at least eight others were punishable by imprisonment for six months.[4]

In the face of this history, we find it impossible to say that a ninety day penalty for a petty offense, meted out

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[2] Three months: 5 Anne, c. 14, IV; 1 Geo. I, c. 48, II. Six months: 17 Geo. II, c. 5, IX. One year: 5 Eliz., c. 4, XXI; 5 Eliz., c. 15, II; 7 Jac. I, c. 4, VII; 8 Geo. I, c. 2, XXXVI; 15 Geo. II, c. 33, VI.

[3] Georgia: 18 Colonial Records (Candler) 588 (1764). Maryland: Laws 1768 (Kilty) c. 29, § 16. Massachusetts: Province Laws 1764–1765, c. 30, §§ 2, 5, 4 Acts and Resolves of Mass. Province 763. New Hampshire: Laws 1696 [8 Wm. III] c. 1, § 1. New Jersey: Paterson's Laws of New Jersey, at 410, § 3 (Act of June 10, 1799). New York: 3 Colonial Laws 318 (1743); 3 *id.* 855 (1751); 4 *id.* 304 (1758); 4 *id.* 349 (1759); 4 *id.* 748 (1763); 4 *id.* 925 (1766). North Carolina: Laws 1778, c. 2, 24 State Records 158. Pennsylvania: 7 Statutes at Large of Pennsylvania from 1682 to 1801, c. 534, § 12 (1766); 8 *id.*, c. 623, § 2 (1771). Virginia: 29 Geo. II, c. 4, § 4 (1756); Laws 1787, c. 48, § 13. See also Connecticut, 1786 Stat. 36 (four months).

[4] Maryland: Laws 1715 (Kilty) c. 44, § 34. Massachusetts: Province Laws 1752–1753, c. 16, § 1, 3 Acts and Resolves of Mass. Province 645. New Hampshire: 3 Laws of New Hampshire (Metcalf) 72 (1754); 4 *id.* 75 (1777). New Jersey: 27 & 28 Geo. II, c. 261, § 11, Acts of Province of New Jersey (Allinson) 198, 201 (1754). New York: 3 Colonial Laws 1096 (1755); Laws 1785, c. 40, § 3; Laws 1785, c. 47, § 2.

upon a trial without a jury, does not conform to standards which prevailed when the Constitution was adopted, or was not then contemplated as appropriate notwithstanding the constitutional guarantee of a jury trial. This conclusion is unaffected by the fact that respondent is not entitled to an appeal as of right. Code of the District of Columbia (1929) Tit. 18, § 28. The safeguards of an appeal are different in nature and purpose from those of a jury trial. At common law there was no review of criminal cases as of right. Due process does not comprehend the right of appeal, *McKane* v. *Durston,* 153 U. S. 684, 687. The early statutes providing for summary trial often did not allow it. And in any case it cannot be assumed that the authority to allow an appeal, given to the justices of the Court of Appeals by the District laws, will not be exercised in a proper case.

We are aware that those standards of action and of policy which find expression in the common and statute law may vary from generation to generation. Such change has led to the abandonment of the lash and the stocks, and we may assume, for present purposes, that commonly accepted views of the severity of punishment by imprisonment may become so modified that a penalty once thought to be mild may come to be regarded as so harsh as to call for the jury trial, which the Constitution prescribes, in some cases which were triable without a jury when the Constitution was adopted. See *Schick* v. *United States, supra,* 67, 68; compare *Weems* v. *United States,* 217 U. S. 349, 373; *District of Columbia* v. *Colts, supra,* 74; *Powell* v. *Alabama,* 287 U. S. 45, 71–73; *United States* v. *Wood,* 299 U. S. 123, 141 *et seq.* But we may doubt whether summary trial with punishment of more than six months' imprisonment, prescribed by some pre-Revolutionary statutes,[5] is admissible without concluding

[5] See footnote 2, *supra.*

that a penalty of ninety days is too much. Doubts must be resolved, not subjectively by recourse of the judge to his own sympathy and emotions, but by objective standards such as may be observed in the laws and practices of the community taken as a gauge of its social and ethical judgments.

Congress itself, by measuring the punishment in this case in conformity to the commonly accepted standard when the Constitution was adopted, and declaring that it should be applied today unless found to transgress constitutional limitations, has expressed its deliberate judgment that the punishment is not too great to be summarily administered. A number of states have continued in force statutes providing for trial, without a jury, of violations of municipal ordinances, and sundry petty statutory offenses, punishable by commitment for three months or more.[6] Convictions under such legislation have been up-

[6] (A) Statutes embracing violations of municipal ordinances generally. E. g.: Ariz. Rev. Code (Struckmeyer, 1928) §§ 382, 442, (three months); Neb. Comp. Stat. (1929) §§ 18–201, 18–205 (three months); New Mex. Stat. (Courtright, 1929) §§ 90–402 (66), 90–901, 90–910, 79–322, (three months); Nev. Comp. Laws (Hillyer, 1929) §§ 1128 (1), 1167, (six months); Wyo. Rev. Stat. (Courtright, 1931) §§ 22–402, 22–409, (three months).

(B) Statutes commanding summary trial for specified offenses. E. g.: N. J. Comp. Laws (1924 Supp.), §§ 135–63 (3), 135–76 (operating motor vehicle under influence of liquor; six months; see *Klinges* v. *Court of Common Pleas,* 130 Atl. 601); N. J. Comp. Laws (1930 Supp.) § 160–222, 3 (disorderly persons act; three months penalty, see N. J. Laws 1898, p. 954, increased to one year by laws 1910, p. 37); Pa. Stat. Ann. (Purdon, 1931), § 18–2033 (vagrancy; six months); § 18–2832 (frequenting of public places by thieves, for unlawful purpose; three months).

The most extensive elimination of the jury prevails in New York. The three-judge Court of Special Sessions, sitting without a jury, has jurisdiction to try all misdemeanors [i. e., offenses punishable with one year's imprisonment, N. Y. Penal Law (1909), § 1937] com-

held many times in the state courts, despite objections to the denial of a jury trial.[7] In England many acts of Parliament now in force, authorizing ninety day punishments, call for summary trials.[8]

This record of statute and judicial decision is persuasive that there has been no such change in the generally accepted standards of punishment as would overcome the presumption that a summary punishment of ninety days' imprisonment, permissible when the Constitution was adopted, is permissible now. Respondent points to no

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mitted in New York City. Inferior Criminal Courts Act of the City of New York, N. Y. Laws 1910, c. 659, § 31 (1), (4). A city magistrate sitting alone may try certain misdemeanors, including violations of N. Y. Penal Law (1909), § 1566, proscribing the sale of street railroad transfer tickets, Inferior Criminal Courts Act, § 43 (d), added by Laws 1915, c. 531. Other legislation, state-wide in application, provides for summary trial and conviction of persons guilty of disorderly conduct (six months), N. Y. Penal Law (1923), §§ 723, 724; of persons frequenting a public place for purposes of crime (100 days), N. Y. Code Crim. Proc., § 898–a; of "vagrants" (one year in jail; three years in correctional institution), N. Y. Code Crim. Proc., §§ 891, 891–a.

[7] In *Wilmarth* v. *King,* 74 N. H. 512; 69 Atl. 889 (1908), the court approved a statute authorizing six months' imprisonment as not exceeding in magnitude the pre-Revolutionary punishments. In the following cases convictions under statutes authorizing commitment for three months or more were upheld and the right to jury trial held properly denied. *Bray* v. *State,* 140 Ala. 172; 37 So. 250 (1903); *State* v. *Parker,* 87 Fla. 181;100 So. 260 (1924); *State* v. *Glenn,* 54 Md. 572 (1880); *State* v. *Broms,* 139 Minn. 402; 166 N. W. 771 (1918); *State* v. *Anderson,* 165 Minn. 150; 206 N. W. 51 (1925); *Bell* v. *State,* 104 Neb. 203; 176 N. W. 544 (1920); *State* v. *Kacin,* 123 Neb. 64; 241 N. W. 785 (1932); *People ex rel. St. Clair* v. *Davis,* 143 App. Div. 579; 127 N. Y. S. 1072 (1911); *People* v. *Harding,* 115 Misc. 298; 189 N. Y. S. 657 (1921); *Byers* v. *Commonwealth,* 42 Pa. St. 89 (1862).

[8] Thirty-seven offenses are listed in Stone's Justices' Manual (66th ed. 1934), Appendix of Table of Punishments for Offences Cognizable

contrary evidence. We cannot say that this penalty, when attached to the offense of selling second-hand goods without a license, gives it the character of a common law crime or of a major offense, or that it so offends the public sense of propriety and fairness as to bring it within the sweep of a constitutional protection which it did not previously enjoy.

Although we conclude that respondent's demand for a jury trial was rightly denied, there must be a new trial because of the prejudicial restriction, by the trial judge, of cross-examination by respondent. The testimony of five prosecution witnesses was the sole evidence of the acts of respondent relied on to establish the doing of business without a license. These acts were the sale by her, on each of three occasions, to one or another of the witnesses, of the unused portion of a round trip railway passenger ticket from New York to Washington. Three of the five, a man and his wife and another, were employed by the Railroad Inspection Company as investigators. The other two were company police of the Baltimore & Ohio Railroad. All were private police or detectives, apparently acting in the course of their private employment. Common experience teaches us that the testimony of such witnesses, especially when uncorroborated, is open to the

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Under the Summary Jurisdiction, pp. 1904–1945. E. g. Frauds by Workmen Act, 1777, 17 Geo. III, c. 56, § 1; Merchandise Marks Act, 1887, 50 & 51 Vict., c. 28, § 2; Agricultural Marketing Act, 1933, 23 & 24 Geo. V, c. 31, § 6 (5).

Several of the statutes specify larger penalties, but by § 17 of the Summary Judicature Act, 1879, 42–43 Vict., c. 49, except in cases of assault, sentences exceeding three months cannot be administered unless the accused has been offered the choice of trial by jury.

suspicion of bias, see *Gassenheimer* v. *United States,* 26 App. D. C. 432, 446; *Moller* v. *Moller,* 115 N. Y. 466, 468; 22 N. E. 169; *People* v. *Loris,* 131 App. Div. 127, 130; 115 N. Y. S. 236; *Sopwith* v. *Sopwith,* 4. Sw. & Tr. 243, 246–7; Wigmore, Evidence (2d ed. 1923) §§ 949, 969, 2062, and that their cross-examination should not be curtailed summarily, see *State* v. *Diedtman,* 58 Mont. 13, 24; 190 Pac. 117, especially when it has a direct bearing on the substantial issues of the case.

The defense was a suggested mistaken identity of respondent and an alibi, that at the times mentioned she was confined to her bed by illness, at her home in Newark, New Jersey. A number of questions on cross-examination by respondent were aimed at showing mistaken identity and at testing credibility. She asked one witness whether respondent had been pointed out to him. She asked another whether he had any trouble in "knowing" the respondent at the trial, and whether he had seen her before the date of the alleged sale of tickets to which he testified. All these questions were excluded, as were others which were proper, since they might have established contradiction in the testimony of the witnesses for the prosecution.

Other questions, which were relevant to the issue and obviously proper tests of credibility, were excluded. The woman witness had testified that one of the sales took place in the presence of her husband, and of the two railroad police witnesses. On cross-examination she could not remember whether anyone beside her husband was present. Yet respondent was not permitted to ask the husband whether the railroad police witnesses were

known to him or to ask one of the latter whether he knew the husband and wife before the date of the alleged sale. The court instructed one of the police officers not to answer the question whether the husband had come to Washington by prearrangement. Like questions addressed to the husband and his wife were excluded. The respondent was similarly prevented from making inquiries as to corroborative detail, such as the time of day when the witnesses arrived in Washington on the dates of the alleged sales, and the place of residence of a witness, see *Alford* v. *United States,* 282 U. S. 687. In the circumstances of the case, these questions may have had an important bearing on the accuracy and truthfulness of the testimony of the prosecuting witnesses. We do not stop to give other examples of the summary curtailment of all inquiry as to matters which are the appropriate subject of cross-examination.

The extent of cross-examination rests in the sound discretion of the trial judge. Reasonable restriction of undue cross-examination, and the more rigorous exclusion of questions irrelevant to the substantial issues of the case, and of slight bearing on the bias and credibility of the witnesses, are not reversible errors. But the prevention, throughout the trial of a criminal case, of all inquiry in fields where cross-examination is appropriate, and particularly in circumstances where the excluded questions have a bearing on credibility and on the commission by the accused of the acts relied upon for conviction, passes the proper limits of discretion and is prejudicial error. See *Alford* v. *United States, supra.*

The judgment of the Court of Appeals will be affirmed, that of the police court reversed, and the case will be

remanded with instructions for a new trial without a jury.

Affirmed.

Separate opinion of MR. JUSTICE McREYNOLDS and MR. JUSTICE BUTLER.

MR. JUSTICE BUTLER and I approve the conclusion of the Court of Appeals concerning respondent's right to trial by jury; also we accept the supporting opinion announced there as entirely adequate.

The Sixth Amendment—In all criminal prosecutions, the accused shall enjoy the right to a speedy, and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Seventh Amendment—In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

We cannot agree that when a citizen is put on trial for an offense punishable by 90 days in jail or a fine of $300.00, the prosecution is not criminal within the Sixth Amendment. In a suit at common law to recover above $20.00, a jury trial is assured. And to us, it seems improbable that while providing for this protection in such a trifling matter the framers of the Constitution intended

that it might be denied where imprisonment for a considerable time or liability for fifteen times $20.00 confronts the accused.

In view of the opinion just announced, it seems permissible to inquire what will become of the other solemn declarations of the Amendment. Constitutional guarantees ought not to be subordinated to convenience, nor denied upon questionable precedents or uncertain reasoning. See *Boyd* v. *United States,* 116 U. S. 616, 635; *In re Debs,* 158 U. S. 564, 594.

We concur in the conclusion of the Court concerning unfairness of the trial and the necessity for a new one.

This cause shows the grave danger to liberty when the accused must submit to the uncertain judgment of a single magistrate.

DECISIONS PER CURIAM, ETC., FROM FEBRUARY 1, THROUGH APRIL 11, 1937.*

No. 648. First Bank Stock Corp. *v.* Minnesota. Appeal from the Supreme Court of Minnesota. Jurisdictional statement distributed January 23, 1937. Decided February 1, 1937. *Per Curiam:* The appeal herein is dismissed upon the authority of *Rio Grande Ry.* v. *Stringham,* 239 U. S. 44, 47. Mr. Justice Butler took no part in the consideration or decision of this case. *Messrs. John Junell, Clark R. Fletcher,* and *Leland W. Scott* for appellant. *Messrs. William S. Ervin* and *Matthias N. Orfield* for appellee. Reported below: 198 Minn. 619; 270 N. W. 574.

No. 35. Smith *v.* Hall et al.; and

No. 36. Same *v.* James Manufacturing Co. et al. Certiorari to the Circuit Court of Appeals for the Second Circuit. February 1, 1937. These cases are restored to the docket and assigned for reargument.

No. 103. District of Columbia *v.* Clawans. Certiorari to the United States Court of Appeals for the District of Columbia. February 1, 1937. This case is restored to the docket and assigned for reargument.

No. 418. Henneford et al. *v.* Silas Mason Co., Inc. et al. Appeal from the District Court of the United States for the Eastern District of Washington. Febru-

* For decisions on applications for certiorari, see *post,* pp. 646; 653; for rehearing, *post,* p. 685.

ary 1, 1937. This case is restored to the docket and assigned for reargument.

No. 436. SCHWARTZ ET AL. *v.* IRVING TRUST CO., TRUSTEE, ET AL. Certiorari to the Circuit Court of Appeals for the Second Circuit. February 1, 1937. It is ordered that the third and fourth sentences of the opinion delivered in this cause on January 4, 1937, be amended to read as follows: "Their leases were rejected in a bankruptcy proceeding pending when the reorganization section was adopted. All of the leases contained indemnity covenants similar to that considered in No. 354." The petition for rehearing is denied. [Reported as amended, 299 U. S. 457.]

No. —, original. TEXAS *v.* NEW YORK ET AL. February 1, 1937. Returns to rule to show cause presented.

No. 2, original. VERMONT *v.* NEW HAMPSHIRE. February 15, 1937. On consideration of the report of November 16, 1936, of Samuel S. Gannett, the Commissioner appointed herein by decree of this Court of January 8, 1934 (290 U. S. 579), to locate and mark on the ground the boundary between the State of Vermont and the State of New Hampshire, at the points designated in said decree, and the supplemental report of Samuel S. Gannett, Commissioner, of January 14, 1937, prepared and filed pursuant to order of this Court of December 21, 1936; and the State of Vermont and the State of New Hampshire having stipulated by counsel that they have no exceptions and no objections to the said report and the supplemental report, and they having applied to this Court to terminate the time within which exceptions

or objections to said report and supplemental report may be filed;

It is now adjudged, ordered, and decreed as follows:

1. The time within which exceptions or objections to said report and supplemental report may be filed is hereby terminated;

2. The said reports are in all respects confirmed;

3. The boundary line marked and located on the ground as set forth by said reports and on the accompanying maps is established and declared to be the true boundary between the States of Vermont and New Hampshire, as determined by the decree of this Court of January 8, 1934;

4. As it appears that the Commissioner has completed his work, conformably to the decree of this Court of January 8, 1934, and the order of this Court of December 21, 1936, he is hereby discharged;

5. The Clerk of this Court is directed to transmit to the Chief Magistrates of the States of Vermont and New Hampshire copies of this decree, duly authenticated under the seal of this Court together with copies of the said reports of the Commissioner and of the accompanying maps;

6. The costs in this cause shall be borne and paid in equal parts by the States of Vermont and New Hampshire.

No. 622. NEW YORK LIFE INSURANCE CO. ET AL. *v.* ALEXANDER, EXECUTOR, ET AL. Appeal from the Supreme Court of Mississippi. Motion to dismiss distributed February 13, 1937. Decided March 1, 1937. *Per Curiam:* The motion of the appellees to dismiss the appeal is granted, and the appeal is dismissed for the reason that the judgment sought here to be reviewed is based upon a nonfederal ground adequate to support it. *Enterprise Irriga-*

tion Dist. v. *Canal Co.*, 243 U. S. 157, 163, 164; *Fox Film Corp.* v. *Muller*, 296 U. S. 207, 210, 211; *Lansing Drop Forge Co.* v. *American State Savings Bank*, 297 U. S. 697. See *New York Life Insurance Co.* v. *Blaylock*, 144 Miss. 541. *Messrs. William H. Watkins, P. H. Eager, Jr.*, and *Louis H. Cooke* for appellants. *Mr. W. E. Morse* for appellees. Reported below: 177 Miss. 172; 169 So. 882.

No. 692. BUNGER *v.* GREEN RIVER. Appeal from the Supreme Court of Wyoming. Motion to dismiss distributed February 20, 1937. Decided March 1, 1937. *Per Curiam:* The motion of the appellee to dismiss the appeal is granted, and the appeal is dismissed for the want of a substantial federal question. (1) *Gundling* v. *Chicago*, 177 U. S. 183, 188; *Western Turf Assn.* v. *Greenberg*, 204 U. S. 359, 363; *Williams* v. *Arkansas*, 217 U. S. 79. (2) *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 81; *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157, 160; *Bryant* v. *Zimmerman*, 278 U. S. 63, 73. (3) *Asbell* v. *Kansas*, 209 U. S. 251, 254, 255; *Savage* v. *Jones*, 225 U. S. 501, 525; *Hartford Indemnity Co.* v. *Illinois*, 298 U. S. 155, 158. *Mr. John W. Davis* for appellant. *Mr. T. S. Taliaferro, Jr.*, for appellee. Reported below: 50 Wyo. 52; 58 P. (2d) 456.

No. 693. VAUGHAN ET AL. *v.* NEW YORK. Appeal from the Court of Claims of New York. Motion to dismiss distributed February 20, 1937. Decided March 1, 1937. *Per Curiam:* The motion of the appellee to dismiss the appeal is granted, and the appeal is dismissed for the want of a substantial federal question. *Hatch* v. *Reardon*, 204 U. S. 152, 159, 160. *Messrs. William F. Unger* and *Samuel P. Gilman* for appellants. *Mr. Henry*

Epstein for appellee. Reported below: 272 N. Y. 102; 5 N. E. (2d) 53.

No. 698. PETER H. MARKMANN FUNERAL HOME, INC. *v.* RYAN. Appeal from the Supreme Court of Pennsylvania. Motion to dismiss distributed February 20, 1937. Decided March 1, 1937. *Per Curiam:* The motion of the appellee to dimiss the appeal is granted, and the appeal is dismissed for the want of a substantial federal question. *Crescent Oil Co.* v. *Mississippi,* 257 U. S. 129, 137; *Hanover Ins. Co.* v. *Harding,* 272 U. S. 494, 507; *Hemphill* v. *Orloff,* 277 U. S. 537, 548. *Mr. B. D. Oliensis* for appellant. *Mr. Henry A. Craig* for appellee. Reported below: 323 Pa. 139; 185 Atl. 851.

No. 584. CITY BUS CO. *v.* MISSISSIPPI. Appeal from the Supreme Court of Mississippi. Motion to dismiss distributed January 9, 1937. Adjudged to be dismissed for failure to comply with Rule 12 January 18, 1937. Motion to reinstate appeal filed February 4, 1937. Motion granted March 1, 1937. Decided March 1, 1937. *Per Curiam:* The motion to reinstate the appeal is granted. The appeal is dismissed (1) for the want of a substantial federal question, *Carley & Hamilton* v. *Snook,* 281 U. S. 66, 73–74; (2) insofar as a question is sought to be raised under the Fourteenth Amendment, for the want of a properly presented federal question. *McCorquodale* v. *Texas,* 211 U. S. 432, 437; *Forbes* v. *State Council of Virginia,* 216 U. S. 396, 399; *Rooker* v. *Fidelity Trust Co.,* 261 U. S. 114, 117; *Gelkom Realty Corp.* v. *Young Women's Hebrew Assn.,* 296 U. S. 537. *Messrs. Marcellus Green, Garner W. Green,* and *B. E. Eaton* for appellant. *Messrs. Greek L. Rice* and *W. W. Pierce* for appellee. Reported below: 176 Miss. 597; 169 So. 774.

No. 266. ICKES, SECRETARY OF THE INTERIOR, *v.* FOX ET AL.;

No. 267. SAME *v.* PARKS ET AL.; and

No. 268. SAME *v.* OTTMULLER. March 1, 1937. It is ordered by this Court that the opinion of this Court in these cases be, and it hereby is, amended as follows:

That the word "so" in line 6 from the bottom of page 1 be transposed to follow the word "suits" in the same line; and that there be inserted between the words "affect" and "the" in line 6 from the bottom of page 1, the words "the extent or measure of the rights of the respective respondents or" so that the sentence will read: "The allegations of the three second-amended bills of complaint differ in some particulars; but whether these differences will affect the extent or measure of the rights of the respective respondents or the final disposition of the suits so as to require unlike decrees, we do not determine."

The petition for rehearing is denied.

[Reported as amended, *ante,* p. 82.]

No. 105. MURPHY *v.* MURPHY ET AL. March 1, 1937. The motion for an order requiring the clerk of the Supreme Court of California to certify the record is denied.

No. 690. DUGAN ET AL. *v.* BRIDGES, GOVERNOR, ET AL. March 1, 1937. In this case probable jurisdiction is noted. The motion to substitute Walter H. White and William A. Jackson, members of the State Liquor Commission, as appellees herein in place of William M. Marcotte, Jr., and Bernard B. Chase, respectively, is granted. Further consideration of said motion, insofar as it requests the substitution of Francis P. Murphy, Governor of the State of New Hampshire, for H. Styles Bridges, is postponed to the hearing of the case on the merits. Reported below: 16 F. Supp. 694.

No. 532. UNITED STATES *v.* BELMONT ET AL. March 1, 1937. Motion to intervene submitted by *Mr. Samson Selig* for John R. Crews, temporary receiver of the assets in New York of Petrograd Metal Works, in support of the motion, and by *Solicitor General Reed* for the United States in opposition thereto, and the motion denied. Reported below: 85 F. (2d) 542.

No. 741. BLACKMAN ET AL. *v.* STONE ET AL. Appeal from the District Court of the United States for the Southern District of Illinois. Jurisdictional statement distributed February 27, 1937. Decided March 8, 1937. *Per Curiam:* The decree entered by the District Court composed of three judges under 28 U. S. C. 380 is vacated upon the ground that the cause, so far as relief by injunction is sought, has become moot (*Mills* v. *Green,* 159 U. S. 651, 653; *Jones* v. *Montague,* 194 U. S. 147, 151, 152; *Richardson* v. *McChesney,* 218 U. S. 487, 492; *Mahan* v. *Hume,* 287 U. S. 575), but without prejudice to action by the District Court in relation to any matter which may remain in the cause. *Mr. Carol King* for appellants. *Mr. Otto Kerner* for appellees. Reported below: 17 F. Supp. 102.

No. 491. HOLTON *v.* KANSAS STATE BANK ET AL. Appeal from the Supreme Court of Kansas. Argued March 2, 1937. Decided March 8, 1937. *Per Curiam:* The appeal herein is dismissed for the want of jurisdiction. *Pawhuska* v. *Pawhuska Oil Co.,* 250 U. S. 394; *Trenton* v. *New Jersey,* 262 U. S. 182. *Mr. Albert M. Cole,* with whom *Mr. William B. Bostian* was on the brief, for appellant. *Messrs. E. R. Sloan, Eldon R. Sloan, Braden C. Johnston,* and *Otis S. Allen* were on the brief for appellees. Reported below: 144 Kan. 352; 59 P. (2d) 41.

No. —, original. Ex parte Filer & Stowell Co. et al. March 8, 1937. The motion for leave to file petition for writ of certiorari herein is denied.

No. —, original. Texas *v.* New York et al. March 8, 1937. Argued on the motion for leave to file bill of complaint and the returns to the rule to show cause, by *Messrs. William McCraw* and *Llewellyn B. Duke* for the State of Texas, complainant; *Mr. James J. Ronan* for the Commonwealth of Massachusetts, defendant; and *Mr. H. E. Carter* for the State of Florida, defendant. Motion for leave to file bill of complaint denied without prejudice.

No. 742. Illinois ex rel. DeBardas *v.* Toman, Sheriff of Cook County. Appeal from the Supreme Court of Illinois. Motion to dismiss distributed March 6, 1937. Decided March 15, 1937. *Per Curiam:* The motion for leave to file the statement as to jurisdiction is granted. The motion of the appellee to dismiss the appeal is granted, and the appeal is dismissed for the want of jurisdiction. Section 237 (a), Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for a writ of certiorari, as required by § 237 (c), Judicial Code, as amended (43 Stat. 936, 938), certiorari is denied. *Mr. Wm. Scott Stewart* for appellant. *Mr. Otto Kerner* for appellee. Reported below: 364 Ill. 516; 4 N. E. (2d) 859.

No. 758. Singer *v.* Illinois ex rel. Rusch. Appeal from the Supreme Court of Illinois. Jurisdictional statement distributed March 6, 1937. Decided March 15,

1937. *Per Curiam:* The appeal herein is dismissed for the reason that the judgment of the Supreme Court of the State of Illinois, sought here to be reviewed, is based upon a non-federal ground adequate to support it. *Callan* v. *Bransford,* 139 U. S. 197; *John* v. *Paullin,* 231 U. S. 583, 585. *Mr. Nat S. Ruvell* for appellant. No appearance for appellee. Reported below: 364 Ill. 480; 4 N. E. (2d) 823.

No. —, original. TEXAS *v.* FLORIDA ET AL. March 15, 1937. The motion for leave to file the bill of complaint herein is granted and process is ordered to issue returnable May 17, 1937. *Mr. William McCraw,* Attorney General of Texas, and *Mr. Llewellyn B. Duke* for plaintiff, in support of the motion.

No. 285. UNITED STATES EX REL. GIRARD TRUST CO., TRUSTEE, *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. March 15, 1937. The motion for leave to file and the petition for rehearing are granted. The order entered on December 7, 1936 (299 U. S. 603) denying the petition for certiorari is vacated and the petition for writ of certiorari to the United States Court of Appeals for the District of Columbia is granted. Reported below: 66 App. D. C. 64; 85 F. (2d) 230.

No. 202 (October Term, 1935). STONE ET AL. *v.* WHITE, FORMER COLLECTOR. March 15, 1937. The motion for leave to file and the petition for rehearing are granted. The orders heretofore entered on October 14, 1935 (296 U. S. 596), and December 7, 1936 (299 U. S. 622), denying the petition for certiorari and petition for rehearing herein are vacated and the petition for

writ of certiorari to the Circuit Court of Appeals for the First Circuit is granted. Reported below: 78 F. (2d) 136.

No. 818. WHITMORE *v.* SALT LAKE CITY ET AL. Appeal from the Supreme Court of Utah. Motion to dismiss distributed March 20, 1937. Decided March 29, 1937. *Per Curiam:* The motion of the appellees to dismiss the appeal is granted and the appeal is dismissed for the want of jurisdiction. *Godchaux Co.* v. *Estopinal,* 251 U. S. 179; *Herndon* v. *Georgia,* 295 U. S. 441, 443; *Johnson* v. *Washington,* 296 U. S. 535. Treating the papers whereon the appeal was allowed as a petition for a writ of certiorari, as required by § 237 (c), Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 938), certiorari is denied. *Mr. Albert R. Barnes* for appellant. *Mr. Walter G. Moyle* for appellees. Reported below: 89 Utah 387; 57 P. (2d) 726.

No. 724. CARMICHAEL ET AL. *v.* SOUTHERN COAL & COKE CO.; and

No. 797. SAME *v.* GULF STATES PAPER CORP. March 29, 1937. The motion to postpone the hearing of these cases is denied. The motions for modification of the injunctions are granted. The orders to be settled on notice. Reported below: 17 F. Supp. 225.

No. 724. CARMICHAEL ET AL. *v.* SOUTHERN COAL & COKE CO.; and

No. 797. SAME *v.* GULF STATES PAPER CORP. March 30, 1937. Orders entered modifying the injunctions in these cases. Reported below: 17 F. Supp. 225.

No. —, original. EX PARTE ALBERT E. PEIRCE. April 5, 1937. The motion for leave to file petition for writ of certiorari is denied.

No. —, original. EX PARTE WILLIAM PAUL OWENS. April 5, 1937. The motion for leave to file petition for writ of habeas corpus is denied.

No. 12, original. TEXAS *v.* NEW MEXICO ET AL. April 5, 1937. The Special Master having submitted an *ad interim* report under date of March 26, 1937, and it appearing therefrom that a stipulation has been entered into by the Attorney General and Assistant Attorney General of the State of Texas, the Assistant Attorney General of the State of New Mexico, and counsel for the Middle Rio Grande Conservancy District, that stipulation being as follows:

"Subject to the approval of the Supreme Court of the United States or of the Special Master, New Mexico, the Middle Rio Grande Conservancy District and the State of Texas, in conformity with S. B. 234 of the Legislature of the State of New Mexico, stipulate that any further proceedings in Original Cause No. 12, October Term, 1936, be held in abeyance until the first day of October, 1937, without prejudice to the rights of any party."; and the Special Master having recommended the approval of the stipulation: It is ordered (1) that the above stipulation, filed with the report of the Special Master, be, and the same is hereby, approved, and the Attorneys for the State of Texas are directed to transmit a copy of this order to the Governor of the State of New Mexico; (2) that Charles Warren, the Special Master herein, be, and he is hereby, authorized to postpone hearings in this

cause, at his discretion, until such date after October 1, 1937, and prior to January 15, 1938, as he shall determine.

No. 35. SMITH *v.* HALL ET AL.; and

No. 36. SAME *v.* JAMES MANUFACTURING CO. ET AL. April 5, 1937. S. Harold Smith, Executor of the Estate of Samuel B. Smith, substituted as the party petitioner on motion of *Mr. Dean S. Edmonds* for the petitioner. Reported below: 83 F. (2d) 217, 221.

No. 567. DAVIS *v.* BOSTON & MAINE RAILROAD ET AL. April 6, 1937. Motion for leave to file petition for rehearing submitted by *Mr. Edward F. McClennen* for the petitioner, and the motion denied. Reported below: 89 F. (2d) 368. See 299 U. S. 614.

DECISIONS GRANTING CERTIORARI FROM FEBRUARY 1, THROUGH APRIL 11, 1937.

No. 599. STROEHMANN ET AL. *v.* MUTUAL LIFE INSURANCE CO. February 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted, limited to the question of the application and effect of the incontestability clause in policy No. 4,361,192. *Messrs. George H. Hafer, George Ross Hull,* and *Carl B. Shelby* for petitioners. *Messrs. Reese H. Harris* and *Frederick L. Allen* for respondent. Reported below: 86 F. (2d) 47.

No. 627. MUMM *v.* JACOB E. DECKER & SONS. February 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. Ralph F. Merchant* and *Frank W. Dahn* for pe-

titioner. *Messrs. Maurice M. Moore, Harold Olsen, Oscar W. Giese,* and *R. F. Clough* for respondent. Reported below: 86 F. (2d) 77.

No. 600. UNITED STATES *v.* NORRIS. February 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Solicitor General Reed* for the United States. *Mr. Wm. E. Shuman* for respondent. Reported below: 86 F. (2d) 379.

No. 588. OPPENHEIMER *v.* HARRIMAN NATIONAL BANK & TRUST CO. ET AL.; and

No. 670. HARRIMAN NATIONAL BANK & TRUST CO. ET AL. *v.* OPPENHEIMER. February 8, 1937. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Edward S. Greenbaum* for Oppenheimer. *Messrs. Martin Conboy, George P. Barse,* and *John F. Anderson* for Harriman National Bank & Trust Co. Reported below: 85 F. (2d) 582; 86 F. (2d) 1008.

No. 602. WELCH, FORMER COLLECTOR OF INTERNAL REVENUE, *v.* OBISPO OIL CO. February 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Reed* for petitioner. *Mr. Joseph D. Peeler* for respondent. Reported below: 85 F. (2d) 860.

No. 604. RAY *v.* UNITED STATES. February 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Reynolds Robertson* for petitioner. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Messrs. William W.*

Barron and *W. Marvin Smith* for the United States. Reported below: 86 F. (2d) 942.

No. 605. AMERICAN PROPELLER & MANUFACTURING Co. *v.* UNITED STATES. February 15, 1937. Petition for writ of certiorari to the Court of Claims granted, limited to the question of the allowance of interest to the Government upon its claim. *Messrs. J. Kemp Bartlett, Edgar Allan Poe, Paul F. Myers,* and *John R. Yates* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Mr. Sewall Key* for the United States. Reported below: 83 Ct. Cls. 100; 14 F. Supp. 168.

No. 614. SONZINSKY *v.* UNITED STATES. February 15, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted, limited to the question of the constitutional validity of the statute in its application under the first count of the indictment. *Mr. Harold J. Bandy* for petitioner. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Mr. Wm. W. Barron* for the United States. Reported below: 86 F. (2d) 486.

No. 638. STEELMAN, TRUSTEE IN BANKRUPTCY, *v.* ALL CONTINENT CORP. February 15, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. It is ordered that the temporary injunction issued on January 18, 1937, shall continue in force until the hearing and determination of the cause by this Court. *Mr. Wm. Elmer Brown, Jr.,* for petitioner. *Mr. Benjamin Reass* for respondent. Reported below: 86 F. (2d) 913.

No. 659. CINCINNATI SOAP CO. *v.* UNITED STATES. February 15, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Alfred Bettman* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Mr. Sewall Key* for the United States.

No. 667. ANNISTON MANUFACTURING CO. *v.* DAVIS, COLLECTOR OF INTERNAL REVENUE. February 15, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. W. A. Sutherland* and *Joseph B. Brennan* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Fred E. Youngman* for respondent. By leave of Court, *Mr. Wm. B. McIlvaine* and *Mr. George T. Buckingham* filed briefs as *amici curiae,* urging issuance of the writ. 87 F. (2d) 773.

No. 687. HASKINS BROS. & CO. *v.* O'MALLEY, COLLECTOR OF INTERNAL REVENUE. February 15, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. William Stanley* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Mr. Sewall Key* for respondent.

No. 688. SHULMAN ET AL. *v.* WILSON-SHERIDAN HOTEL CO. ET AL. March 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Meyer Abrams* and *Max Shulman* for petitioners. *Messrs. Isaac E. Ferguson* and *C. S. Bentley Pike* for respondents. Reported below: 86 F. (2d) 898.

No. 716. GREAT LAKES TRANSIT CORP. *v.* INTERSTATE STEAMSHIP CO. ET AL. March 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted, limited to the second question presented by the petition for writ of certiorari. *Mr. Lawrence E. Coffey* for petitioner. *Messrs. Ray M. Stanley, Ellis H. Gidley, Frederick L. Leckie,* and *Thomas H. Garry* for respondents. Reported below: 86 F. (2d) 740.

No. 621. FIRST NATIONAL BANK & TRUST CO., TRUSTEE, *v.* BEACH. March 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Arthur B. Weiss* for petitioner. *Mr. Sydney P. Simons* for respondent. Reported below: 86 F. (2d) 88.

No. 285. UNITED STATES EX REL. GIRARD TRUST CO., TRUSTEE, *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. See *ante,* p. 643.

No. 202 (October Term, 1935). STONE ET AL. *v.* WHITE, FORMER COLLECTOR. See *ante,* p. 643.

No. 703. OLD COLONY TRUST CO., TRUSTEE, *v.* COMMISSIONER OF INTERNAL REVENUE. March 15, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. Harold S. Davis* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Fred E. Youngman* for respondent. Reported below: 87 F. (2d) 131.

No. 721. LIPSON *v.* SOCONY VACUUM CORP.; and

No. 722. SAME *v.* STANDARD OIL CO. March 15, 1937. Petition for writs of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Messrs. Edward O. Proctor* and *Edward C. Park* for petitioner. *Mr. George R. Stobbs* for respondents. Reported below: 87 F. (2d) 265.

No. 743. A. A. LEWIS & CO. ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. March 29, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Franz W. Castle, Emmett J. McCarthy, Howard R. Brintlinger,* and *Robert F. Carey* for petitioners. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Ellis N. Slack* for respondent. Reported below: 87 F. (2d) 1000.

No. 753. AETNA INSURANCE CO. *v.* KENNEDY;

No. 754. SPRINGFIELD FIRE & MARINE INSURANCE CO. *v.* SAME; and

No. 755. LIVERPOOL & LONDON & GLOBE INSURANCE CO., LTD. *v.* SAME. March 29, 1937. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Horace Michener Schell* and *Robert T. McCracken* for petitioners. *Mr. Harry Shapiro* for respondent. Reported below: 87 F. (2d) 683.

No. 765. MANTLE LAMP CO. *v.* ALUMINUM PRODUCTS CO. March 29, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. George I. Haight, W. H. F. Millar,* and *M. K. Hobbs* for petitioner. *Mr. Wm. Nevarre Cromwell* for respondent. Reported below: 86 F. (2d) 509.

No. 837. CHAS. C. STEWARD MACHINE CO. *v.* DAVIS, COLLECTOR OF INTERNAL REVENUE. March 29, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. Wm. Logan Martin, Walter Bouldin, Niel P. Sterne,* and *Borden Burr* for petitioner. *Solicitor General Reed* for respondent. Reported below: 89 F. (2d) 207.

No. 660. LINDSEY ET AL. *v.* WASHINGTON. April 5, 1937. The petition for writ of certiorari to the Supreme Court of Washington is granted, limited to the question as to whether Chapter 114 of the Laws of Washington of 1935, as here applied, is invalid as an *ex post facto* law within the meaning of Art. I, § 10, of the Constitution. *Messrs. Elbert B. Lindsey* and *E. R. Lindsey, pro se. Mr. A. O. Colburn* for respondent. Reported below: 187 Wash. 364; 61 P. (2d) 293.

No. 750. MCEACHERN, ADMINISTRATOR, *v.* ROSE, FORMER COLLECTOR OF INTERNAL REVENUE. April 5, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. W. A. Sutherland* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Harry Marselli* for respondent. Reported below: 86 F. (2d) 231.

No. 803. ANDERSON, RECEIVER, *v.* ATHERTON, ADMINISTRATOR, ET AL. April 5, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Messrs. Eugene P. Locke, E. B. Stroud, Maurice E. Purnell, Arthur Peter,* and *John G. Heyburn* for petitioner. *Messrs. Newton D. Baker, Howard F.*

Burns, Wm. W. Crawford, John C. Doolan, Allen P. Dodd, Churchill Humphrey, Graddy Cary, David R. Castleman, Charles G. Middleton, and *Huston Quin* for respondents. Reported below: 86 F. (2d) 518.

No. 824. THOMAS, COLLECTOR OF INTERNAL REVENUE, *v.* PERKINS ET AL. April 5, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Solicitor General Reed* for petitioner. *Mr. Harry C. Weeks* for respondents. Reported below: 86 F. (2d) 954.

DECISIONS DENYING CERTIORARI FROM FEBRUARY 1, THROUGH APRIL 11, 1937.

No. 566. SUREN *v.* OCEANIC STEAMSHIP CO. February 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. James F. Brennan* for petitioner. *Mr. Herman Phleger* and *Maurice E. Harrison* for respondent. Reported below: 85 F. (2d) 324.

No. 574. FERRERO *v.* COMMISSIONER OF IMMIGRATION. February 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Carol King* and *Isaac Shorr* for petitioner. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Messrs. Wm. W. Barron* and *W. Marvin Smith* for respondent. Reported below: 86 F. (2d) 1021.

No. 576. BARLOW-MOORE TOBACCO CO. *v.* UNITED STATES. February 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit

denied. *Messrs. Charles I. Dawson* and *A. Shelby Winstead* for petitioner. *Solicitor General Reed, Assistant Attorney General Jackson,* and *Messrs. Sewall Key* and *A. F. Prescott* for the United States.

No. 579. PRENTISS, RECEIVER, *v.* CHANDLER. February 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Rollin L. McNitt* for petitioner. *Mr. T. B. Cosgrove* for respondent. Reported below: 85 F. (2d) 733.

No. 580. PRENTISS, RECEIVER, *v.* TIMES-MIRROR CO. February 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Rollin L. McNitt* for petitioner. *Mr. T. B. Cosgrove* for respondent. Reported below: 85 F. (2d) 733.

No. 590. UNITED STATES *v.* THE BESSEMER ET AL. February 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Solicitor General Reed* for the United States. *Mr. Otto Wolff, Jr.,* for respondents. Reported below: 85 F. (2d) 427.

No. 568. HILLS DRY GOODS CO., INC. *v.* KLICKA ET AL. February 1, 1937. Petition for writ of certiorari to the Supreme Court of Wisconsin denied. *Mr. William Benjamin Collins* for petitioner. *Messrs. Charles F. Millmann* and *Mortimer Levitan* for respondents. Reported below: 222 Wis. 439; 267 N. W. 905.

No. 577. HINMAN ET AL. *v.* PACIFIC AIR TRANSPORT. February 1, 1937. Petition for writ of certiorari to the

Circuit Court of Appeals for the Ninth Circuit denied. *Mr. G. W. Nix* for petitioners. *Messrs. Allen W. Ashburn* and *Gurney E. Newlin* for respondent. Reported below: 84 F. (2d) 755.

No. 578. HINMAN ET AL. *v.* UNITED AIR LINES TRANSPORT CORP. February 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. G. W. Nix* for petitioners. *Messrs. Allen W. Ashburn* and *Gurney E. Newlin* for respondent. Reported below: 84 F. (2d) 755.

No. 583. COOPMAN ET AL. *v.* CITIZENS STATE BANK ET AL. February 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Robert L. Clinton* for petitioners. No appearance for respondents. Reported below: 85 F. (2d) 799.

No. 589. NORTH ET AL. *v.* HIGBEE COMPANY ET AL. February 1, 1937. Petition for writ of certiorari to the Supreme Court of Ohio denied. *Messrs. Luther Day, H. H. McKeehan,* and *Donald Kling* for petitioners. *Messrs. Walter T. Kinder* and *Gardner Abbott* for respondents. Reported below: 131 Oh. St. 507; 3 N. E. (2d) 391.

No. 596. PALMER *v.* PARAMOUNT PICTURES, INC.; and

No. 597. BOEHM *v.* SAME. February 1, 1937. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Louis Boehm* and *Archibald Palmer* for petitioners. *Mr. Thomas D. Thacher* for respondent. Reported below: 85 F. (2d) 588, 592.

No. 598. ZIRN *v.* PARAMOUNT PICTURES, INC. February 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Samuel Zirn, pro se.* *Mr. Thomas D. Thacher* for respondent. Reported below: 85 F. (2d) 593.

No. 607. SCHNECKENBURGER *v.* MORAN, JUDGE. February 1, 1937. Petition for writ of certiorari to the Supreme Court of the Commonwealth of the Philippines denied. *Mr. Pedro Guevara* for petitioner. *Mr. Eugene M. Caffey* for respondent.

No. 610. ILLINOIS EX REL. RAPPAPORT *v.* TOMAN, SHERIFF. February 1, 1937. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Edward M. Keating* for petitioner. *Mr. Otto Kerner* for respondent. Reported below: 364 Ill. 238; 4 N. E. (2d) 106.

No. 611. BIRNAMWOOD OIL CO. *v.* BARNSDALL REFINERIES, INC. February 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Francis E. McGovern* for petitioner. *Messrs. M. D. Kirk* and *Perry J. Stearns* for respondent. Reported below: 81 F. (2d) 569.

No. 612. METAL TONE MFG. CO., INC. ET AL. *v.* VOICES, INC. February 1, 1937. Petition for writ of certiorari to the Court of Errors and Appeals of New Jersey denied. *Messrs. Samuel Milberg* and *Samuel B. Ohlbaum* for petitioners. *Mr. Joseph Joffe* for respondent. Reported below: 120 N. J. Eq. 618; 187 Atl. 370.

No. 613. GENERAL MOTORS JAVA HANDEL MAATSCHAPPIJ *v.* ERIE R. Co. February 1, 1937. Petition for writ of certiorari to the Supreme Court of New York denied. *Messrs. D. Roger Englar, George S. Brengle,* and *Arthur W. Clement* for petitioner. *Messrs. Theodore Kiendl* and *Harold W. Bissell* for respondent. Reported below: 248 App. Div. 582; 288 N. Y. S. 1108.

No. 617. CACEY ET AL. *v.* VIRGINIAN RY. Co. February 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. A. F. Kingdon* and *Joseph M. Sanders* for petitioners. *Messrs. W. H. T. Loyall* and *John R. Pendleton* for respondent. Reported below: 85 F. (2d) 976.

No. 618. DAVIS *v.* UNITED STATES. February 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Clifford E. Hay* and *Lee W. Branch* for petitioner. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Mr. Mahlon D. Kiefer* for the United States. Reported below: 86 F. (2d) 45.

No. 619. KABATT *v.* BOARD OF EDUCATION OF ELMIRA. February 1, 1937. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Anthony Kabatt* for petitioner. *Mr. Halsey Sayles* for respondent. Reported below: 271 N. Y. 629; 3 N. E. (2d) 456.

No. 629. HOWES BROTHERS CO. *v.* MASSACHUSETTS UNEMPLOYMENT COMPENSATION COMM'N ET AL. February 1, 1937. Petition for writ of certiorari to the

Supreme Judicial Court, Suffolk County, Massachusetts, denied. *Messrs. Edward F. McClennen* and *Jacob J. Kaplan* for petitioner. *Messrs. Paul A. Dever* and *James J. Ronan* for respondents. Reported below: 5 N. E. (2d) 720.

No. 581. CANFIELD, EXECUTRIX, *v.* SCRIPPS, TRUSTEE, ET AL. February 1, 1937. Petition for writ of certiorari to the District Court of Appeal, 2d Appellate District, of California, denied. The CHIEF JUSTICE took no part in the consideration or decision of this application. *Messrs. W. G. McAdoo, Wm. H. Neblett,* and *R. Dean Warner* for petitioner. No appearance for respondents. Reported below: 15 Cal. App. (2d) 642; 59 P. (2d) 1040.

No 671. LAMBERT *v.* CENTRAL BANK OF OAKLAND. February 8, 1937. 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. Henry C. McPike* for petitioner. No appearance for respondent. Reported below: 85 F. (2d) 954.

No. 680. GRUBBS *v.* SMITH ET AL. February 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Millard D. Grubbs, pro se.* No appearance for respondents. Reported below: 86 F. (2d) 275.

No. 681. FOWLER *v.* WASHINGTON. February 8, 1937. Petition for writ of certiorari to the Supreme Court of Washington, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. George Fowler, pro se.* No

appearance for respondent. Reported below: 187 Wash. 450; 60 P. (2d) 83.

No. 564. HAMERSLEY *v.* UNITED STATES. February 8, 1937. Petition for writ of certiorari to the Court of Claims denied. *Mr. Ralph Royall* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Mr. Sewall Key* for the United States. Reported below: 83 Ct. Cls. 687; 16 F. Supp. 768.

No. 591. MARTINSON *v.* STATE INDUSTRIAL ACCIDENT COMM'N. February 8, 1937. Petition for writ of certiorari to the Supreme Court of Oregon denied. *Messrs. John P. Hannon* and *Wm. P. Lord* for petitioner. No appearance for respondent. Reported below: 154 Ore. 423; 60 P. (2d) 972.

No. 592. CARY *v.* UNITED STATES; and

No. 593. WILLIAMS *v.* SAME. February 8, 1937. Petition for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Emmett E. Doherty* for petitioners. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Messrs. Wm. W. Barron* and *W. Marvin Smith* for the United States. Reported below: 86 F. (2d) 461.

No 616. BROTHERHOOD OF RAILROAD SHOP CRAFTS ET AL. *v.* LOWDEN ET AL., TRUSTEES. February 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. E. H. Hatcher* for petitioners. *Solicitor General Reed* and *Messrs. Charles E. Wyzanski, Jr., Wendell Berge, Leo F. Tierney,* and *Robert L. Stern* for respondents. Reported below: 86 F. (2d) 458.

No. 620. MERCHANTS REFRIGERATING CO. *v.* NEW YORK CENTRAL R. CO. February 8, 1937. Petition for writ of certiorari to the Supreme Court of New York denied. *Messrs. John J. Hickey* and *Walter W. Ahrens* for petitioner. *Messrs. Clive C. Handy* and *Kenneth O. Mott-Smith* for respondent. Reported below: 247 App. Div. 877; 288 N. Y. S. 761.

No. 623. PREECE *v.* UNITED STATES. February 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. C. L. Dawson* and *Warren E. Miller* for petitioner. *Solicitor General Reed* and *Messrs. Julius C. Martin, Wilbur C. Pickett, Fendall Marbury,* and *W. Marvin Smith* for the United States. Reported below: 85 F. (2d) 952.

No. 626. EQUITABLE LIFE ASSURANCE SOCIETY *v.* NICKOLOPULOS. February 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Clement K. Corbin* for petitioner. *Mr. Ralph E. Lum* for respondent. Reported below: 86 F. (2d) 12.

No. 634. KNOTTS *v.* FIRST CAROLINAS JOINT STOCK LAND BANK. February 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Cole L. Blease* for petitioner. *Mr. J. E. Belser* for respondent. Reported below: 86 F. (2d) 551.

No. 650. NEW YORK EX REL. LEHMAN *v.* MOREHEAD, WARDEN. February 8, 1937. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr.*

Howard Hilton Spellman for petitioner. *Messrs. Wm. F. X. Geoghan* and *Henry J. Walsh* for respondent. Reported below: 272 N. Y. 531; 4 N. E. (2d) 434.

No. 606. HANSEN *v.* UNITED STATES. February 15, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Hector A. Brouillet* for petitioner. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Messrs. Wm. W. Barron* and *W. Marvin Smith* for the United States. Reported below: 87 F. (2d) 1006.

No. 624. SOURINO *v.* UNITED STATES. February 15, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Henry A. Alexander* for petitioner. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Mr. Wm. W. Barron* for the United States. Reported below: 86 F. (2d) 309.

Nos. 631 and 632. HENWOOD, TRUSTEE, *v.* GUARANTY TRUST CO., TRUSTEE. February 15, 1937. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Carleton S. Hadley* and *A. H. Kiskaddon* for petitioner. *Messrs. Guy A. Thompson, Edwin S. S. Sunderland,* and *Malcolm Fooshee* for respondent. Reported below: 86 F. (2d) 347.

No. 633. DYER ET AL. *v.* INDUSTRIAL COMMISSION ET AL. February 15, 1937. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. James H. Dyer* for petitioners. *Mr. M. J. Connelly* for respondents. Reported below: 364 Ill. 161; 4 N. E. (2d) 82.

No. 635. WAZAU *v.* EVANSTON. February 15, 1937. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Benjamin I. Salinger* for petitioner. *Mr. Lloyd D. Heth* for respondent. Reported below: 364 Ill. 198; 4 N. E. (2d) 78.

No. 636. DIVERSEY BUILDING CORP. *v.* WEBER ET AL. February 15, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Arthur Abraham* for petitioner. No appearance for respondents. Reported below: 86 F. (2d) 456.

No. 649. ALEOGRAPH COMPANY *v.* ELECTRICAL RESEARCH PRODUCTS, INC. ET AL. February 15, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. James B. Lewright* for petitioner. No appearance for respondents.

No. 654. MAYTAG COMPANY *v.* BROOKLYN EDISON CO., INC. February 15, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Thomas G. Haight, Wallace R. Lane,* and *Oscar W. Jeffery* for petitioner. *Messrs. William H. Davis* and *Dean S. Edmonds* for respondent. Reported below: 86 F. (2d) 625.

No. 657. NEV-CAL ELECTRIC SECURITIES CO. *v.* IMPERIAL IRRIGATION DISTRICT ET AL. February 15, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Robert B. Murphey, Henry W. Coil,* and *Ross T. Hickox* for petitioner. *Messrs. Harry W. Horton* and *A. L. Cowell* for respondents. Reported below: 85 F. (2d) 886.

No. 662. UNITED RAILWAYS & ELECTRIC CO. ET AL. *v.* CONSOLIDATED GAS, ELECTRIC LIGHT & POWER CO. February 15, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Edwin G. Baetjer, Charles McH. Howard,* and *Henry H. Waters* for petitioners. *Mr. Charles Markell* for respondent. Reported below: 85 F. (2d) 799.

No. 664. SALMON RIVER CANAL CO., LTD. *v.* UTAH CONSTRUCTION CO. February 15, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Oliver O. Haga* for petitioner. *Mr. Edwin Snow* for respondent. Reported below: 85 F. (2d) 769.

No. 672. OBEROESTERREICH *v.* GUDE ET AL. February 15, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Samuel R. Wachtell* for petitioner. *Messrs. A. Spotswood Campbell* and *Karl T. Frederick* for respondents. Reported below: 86 F. (2d) 621.

No. 674. WILSON *v.* SMITH; and

No. 675. SAME *v.* SMITH, ADMINISTRATRIX. February 15, 1937. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. James R. Morford* for petitioner. *Mr. Simone N. Gazan* for respondent in No. 674. No appearance for respondent in No. 675. Reported below: 86 F. (2d) 1023.

No. 682. STEINHAGEN RICE MILLING CO. *v.* SCOFIELD, COLLECTOR OF INTERNAL REVENUE;

No. 683. BEAUMONT RICE MILLS *v.* SAME;

No. 684. GULF COAST RICE MILLS ET AL. *v.* SAME;

No. 685. EL CAMPO RICE MILLING CO. *v.* SAME; and

No. 686. TYRRELL RICE MILLING CO. *v.* SAME. February 15, 1937. Petition for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Homer L. Bruce* and *John P. Bullington* for petitioners. *Solicitor General Reed, Assistant Attorney General Morris, Mr. Sewall Key,* and *Miss Helen R. Carloss* for respondent. Reported below: 87 F. (2d) 804.

No. 601. SHERIDAN FLOURING MILLS, INC. *v.* CASSIDY, COLLECTOR OF INTERNAL REVENUE. February 15, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. George T. Evans* for petitioner. *Solicitor General Reed, Assistant Attorney General Jackson,* and *Messrs. Sewall Key* and *A. F. Prescott* for respondent. Reported below: 87 F. (2d) 20.

No. 637. UNITED STATES *v.* WILSON ET AL. March 1, 1937. Petition for writ of certiorari to the Court of Claims denied. *Solicitor General Reed* for the United States. *Messrs. Alfred S. Weill* and *Hugh Satterlee* for respondents. Reported below: 81 Ct. Cls. 289, 83 *id.* 699; 10 F. Supp. 591.

Nos. 639 and 640. BURR *v.* UNITED STATES;

Nos. 641 and 642. GISNET *v.* SAME; and

Nos. 643 and 644. MINSKY *v.* SAME. March 1, 1937. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Lewis F. Jacobson* for petitioners. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key, William H. Boyd,* and *Earl C. Crouter* for the United States. Reported below: 86 F. (2d) 502; 87 *id.* 1005, 1012.

No. 651. SOUTHERN PACIFIC CO. ET AL. *v.* LAHEY ET AL. March 1, 1937. Petition for writ of certiorari to the District Court of Appeal, 3rd Appellate District, of California, denied. *Messrs. Wm. H. Devlin, Robert T. Devlin, Horace B. Wulff, A. I. Dipenbrock,* and *James R. Bell* for petitioners. *Mr. Clifford A. Russell* for respondents. Reported below: 16 Cal. App. (2d) 652; 61 P. (2d) 461.

No. 653. RUBEN CONDENSER CO. ET AL. *v.* COPELAND REFRIGERATION CORP. March 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Lawrence Bristol* and *Leon Robbin* for petitioners. *Mr. Merrell E. Clark* for respondent. Reported below: 85 F. (2d) 537.

No. 665. NEW YORK, CHICAGO & ST. LOUIS R. CO. *v.* MAHER. March 1, 1937. Petition for writ of certiorari to the Appellate Court, 1st District, of Illinois, denied. *Messrs. Harold A. Smith, Silas H. Strawn,* and *W. J. Stevenson* for petitioner. *Mr. Joseph D. Ryan* for respondent. Reported below: 286 Ill. App. 609; 3 N. E. (2d) 349.

No. 666. NATIONAL LOCK CO. *v.* THOMPSON ET AL. March 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Roy F. Hall* for petitioner. *Mr. Floyd E. Thompson* for respondents. Reported below: 86 F. (2d) 484.

No. 679. AMERICAN-WEST AFRICAN LINE, INC. *v.* NELSON. March 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. George Whitefield Betts, Jr.,* for peti-

tioner. *Mr. Harold S. Deming* for respondent. Reported below: 86 F. (2d) 730.

No. 645. HUBBARD *v.* UNITED STATES. March 1, 1937. Petition for writ of certiorari to the Court of Claims denied. *Mr. John L. McMaster* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Mr. Sewall Key* for the United States. Reported below: 84 Ct. Cls. 205; 17 F. Supp. 93.

No. 646. HUBBARD *v.* UNITED STATES. March 1, 1937. Petition for writ of certiorari to the Court of Claims denied. *Mr. John L. McMaster* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Mr. Sewall Key* for the United States. Reported below: 84 Ct. Cls. 213.

No. 661. STEVERSON *v.* CLARK ET AL. March 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Cole L. Blease* for petitioner. No appearance for respondents. Reported below: 86 F. (2d) 330.

No. 669. DECK *v.* COMMISSIONER OF IMMIGRATION AND NATURALIZATION. March 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Paul Jones* for petitioner. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Mr. William W. Barron* for respondent. Reported below: 86 F. (2d) 1020.

No. 673. KAUFMAN ET AL. *v.* UNITED SHIPYARDS, INC. March 1, 1937. Petition for writ of certiorari to the Cir-

cuit Court of Appeals for the Second Circuit denied. *Mr. Charles L. Sylvester* for petitioners. *Mr. Spier Whitaker* for respondent. Reported below: 86 F. (2d) 1015.

No. 677. EISELE & Co. *v.* BECTON, DICKINSON & Co. March 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Allen S. Hubbard* and *Charles C. Trabue* for petitioner. *Messrs. A. H. Roberts* and *Hans v. Briesen* for respondent. Reported below: 86 F. (2d) 267.

No. 689. REEVES MANUFACTURING Co. *v.* LOME Co. ET AL. March 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Randolph C. Richardson* and *Harry Frease* for petitioner. *Mr. John F. Oberlin* for respondents. Reported below: 86 F. (2d) 1010.

No. 695. LUSTER, EXECUTOR, *v.* MARTIN ET AL. March 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Silas H. Strawn* for petitioner. *Mr. Thomas C. McConnell* for respondents. Reported below: 85 F. (2d) 833.

No. 608. FIDELITY & DEPOSIT Co. ET AL. *v.* JONES ET AL. March 1, 1937. Petition for writ of certiorari to the Supreme Court of Arkansas denied. *Messrs. George B. Rose* and *Horace Chamberlin* for petitioners. *Messrs. Sam T. Poe, Tom Poe,* and *Walter G. Riddick* for respondents. Reported below: 192 Ark. 224; 96 S. W. (2d) 959.

No. —, original. Ex parte Filer & Stowell Co. et al. See *ante*, p. 642.

No. 761. Wells *v.* Wells. March 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit and motion for leave to proceed further *in forma pauperis* denied. *Ida Wells, pro se.* No appearance for respondent. Reported below: 86 F. (2d) 1022.

No. 615. Choctaw Nation *v.* United States et al. March 8, 1937. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Streeter B. Flynn, Robert M. Rainey,* and *W. F. Semple* for petitioner. *Solicitor General Reed* and *Messrs. George T. Stormont, Charles H. Small, Melven Cornish,* and *William H. Fuller* for respondents. Reported below: 83 Ct. Cls. 140.

No. 663. Ritter *v.* United States. March 8, 1937. Petition for writ of certiorari to the Court of Claims denied. *Mr. Carl T. Hoffman* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. M. Leo Looney, Jr.,* and *John J. Pringle, Jr.,* for the United States. Reported below: 84 Ct. Cls. 293.

No. 678. Hornung et al. *v.* Louisville Trust Co. et al. March 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Marcella Hornung, pro se. Mr. Bruce Fuller* for petitioners. No appearance for respondents. Reported below: 86 F. (2d) 1002.

No. 691. WILLIAMS, ADMINISTRATRIX, *v.* TERMINAL RAILROAD ASSN. March 8, 1937. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Mr. John V. Lee* for petitioner. No appearance for respondent. Reported below: 339 Mo. 594; 98 S. W. (2d) 651.

No. 696. WAINER ET AL. *v.* UNITED STATES. March 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Irwin S. Rubelle, A. M. Fitzgerald,* and *John E. Dougherty* for petitioners. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Messrs. William W. Barron* and *W. Marvin Smith* for the United States. Reported below: 87 F. (2d) 77.

No. 701. JOHN F. JELKE CO. *v.* SMIETANKA. March 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John E. Hughes* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key, Maurice J. Mahoney,* and *Charles A. Horsky* for respondent. Reported below: 86 F. (2d) 470.

No. 702. TROTT ET AL. *v.* CULLEN ET AL. March 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Carlton Hill* and *Geo. I. Haight* for petitioners. *Mr. Merrell E. Clark* for respondents. Reported below: 86 F. (2d) 141; 87 *id.* 200.

No. 711. GUILFOIL *v.* HAYES, EXECUTRIX. March 8, 1937. Petition for writ of certiorari to the Circuit Court

of Appeals for the Fourth Circuit denied. *Mr. James E. Heath* for petitioner. *Mr. William L. Parker* for respondent. Reported below: 86 F. (2d) 544.

No. 714. S. S. KRESGE CO. *v.* SEARS ET AL. March 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Richard W. Hale* and *Lawrence E. Green* for petitioner. *Messrs. Robert G. Dodge* and *Thomas M. Reynolds* for respondents. Reported below: 87 F. (2d) 135.

No. 725. NATIONAL RESERVE INSURANCE CO. *v.* MANZO. March 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Samuel A. Berger* for petitioner. *Mr. Alfred B. Nathan* for respondent. Reported below: 87 F. (2d) 1011.

No. 728. MOUNT CLEMENS SUGAR CO. *v.* GRAND TRUNK WESTERN R. CO. March 8, 1937. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Mr. Leo J. Carrigan* for petitioner. *Mr. H. V. Spike* for respondent. Reported below: 277 Mich. 366; 269 N. W. 208.

No. 718. BARBOUR ET AL. *v.* THOMAS, RECEIVER, ET AL.; and

No. 719. CONNOLLY, RECEIVER, *v.* SAME. March 8, 1937. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. James Turner, Frank E. Robson, Paul W. Voorhies, J. O. Murfin, Sidney T. Miller,* and *Sherwin A. Hill* for petitioners in No. 718. *Mr. William Henry Gallagher* for

petitioner in No. 719. *Messrs. Frank E. Wood* and *Robert S. Marx* for respondents. Reported below: 86 F. (2d) 510.

No. 655. REUBEN *v.* UNITED STATES;

No. 656. LAVEN *v.* SAME; and

No. 668. ROLLNICK *v.* SAME. March 8, 1937. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Irwin Geiger* for petitioner in No. 655. *Mr. Sidney G. Kusworm* for petitioner in No. 656. *Messrs. I. Harvey Levinson, Edward F. Colladay,* and *D. C. Colladay* for petitioner in No. 668. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Mr. William W. Barron* for the United States. Reported below: 86 F. (2d) 464.

No. 742. ILLINOIS EX REL. DEBARDAS *v.* TOMAN, SHERIFF. See *ante,* p. 642.

No. 770. ZIMMERN ET AL. *v.* UNITED STATES. March 15, 1937. 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. Lawrence Koenigsberger* for petitioners. No appearance for the United States. Reported below: 87 F. (2d) 179.

No. 772. NELSON *v.* CUMMINGS. March 15, 1937. Petition for writ of certiorari to the Supreme Court of New York and motion for leave to proceed further *in forma pauperis* denied. *Mr. John O. Nelson, pro se.* No appearance for respondent. Reported below: 272 N. Y. 507; 4 N. E. (2d) 421.

No. 676. ROGAN, COLLECTOR OF INTERNAL REVENUE, *v.* VENTURA CONSOLIDATED OIL FIELDS. March 15, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Solicitor General Reed* for petitioner. *Messrs. Herman Phleger* and *Maurice E. Harrison* for respondent. Reported below: 86 F. (2d) 149.

No. 697. FIDELITY & DEPOSIT CO. ET AL. *v.* BROCK. March 15, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Harlan Hobart Grooms* and *Eugene Ballard, Jr.,* for petitioners. No appearance for respondent. Reported below: 86 F. (2d) 345.

No. 704. HELLER BROTHERS CO. *v.* LIND, REGIONAL DIRECTOR, ET AL.;

No. 705. BROWN SHOE CO., INC. *v.* MADDEN ET AL.;

No. 706. BETHLEHEM SHIPBUILDING CORP., LTD. *v.* SAME;

No. 707. BEAVER MILLS *v.* SAME;

No. 708. PILGRIM ET AL. *v.* SAME;

No. 709. A. C. LAWRENCE LEATHER CO. *v.* SAME;

No. 710. CABOT MANUFACTURING CO. *v.* SAME; and

No. 744. HATFIELD WIRE & CABLE CO. *v.* HERRICK, REGIONAL DIRECTOR, ET AL. March 15, 1937. Petitions for writs of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Theodore B. Benson* and *Merritt Lane* for petitioners in Nos. 704 and 744. *Messrs. Frederick H. Wood, Richard H. Wilmer,* and *Douglas L. Hatch* for petitioners in Nos. 705, 706, 707, and 708. *Mr. Hugh H. Obear* for petitioners in Nos. 709 and 710. *Solicitor General Reed* and *Messrs. A. H. Feller, Charles A. Horsky,* and *Charles*

Fahy for respondents. Reported below: 66 App. D. C. 306; 86 F. (2d) 862.

No. 715. POLIAKOVA *v.* COMPAGNIE GENERALE TRANSATLANTIQUE. March 15, 1937. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Simone N. Gazan* for petitioner. *Mr. Harold S. Deming* for respondent. Reported below: 249 App. Div. 609; 291 N. Y. S. 798.

No. 723. NORD ET AL. *v.* GRIFFIN. March 15, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Leo J. Hassenauer* for petitioners. *Mr. Anan Raymond* for respondent. Reported below: 86 F. (2d) 481.

No. 727. NORMAN *v.* CONSOLIDATED EDISON CO., INC. ET AL. March 15, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Emanuel Redfield* for petitioner. *Solicitor General Reed, Assistant Attorney General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key, Arnold Raum, William L. Ranson,* and *Jacob H. Goetz* for respondents. Reported below: 89 F. (2d) 619.

No. 729. KEELER *v.* COMMISSIONER OF INTERNAL REVENUE. March 15, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Charles D. Hamel* and *John Enrietto* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key, S. Dee Hanson,* and *Charles A. Horsky* for respondent. Reported below: 86 F. (2d) 265.

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No. 730. PEAVY-BYRNES LUMBER CO. *v.* COMMISSIONER OF INTERNAL REVENUE. March 15, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Sidney L. Herold* and *John B. Files* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Maurice J. Mahoney* for respondent. Reported below: 86 F. (2d) 234.

No. 733. UNITED CHROMIUM, INC. *v.* GENERAL MOTORS CORP. ET AL. March 15, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Thomas G. Haight* and *Gustave R. Thompson* for petitioner. *Messrs. Drury W. Cooper, Merrell E. Clark,* and *Allan C. Bakewell* for respondents. Reported below: 85 F. (2d) 577.

No. 737. BROOKS *v.* SOUTHERN RAILWAY CO. March 15, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Winfield P. Jones* for petitioner. *Messrs. H. O'B. Cooper, Rembert Marshall, G. E. Maddox, Sidney S. Alderman,* and *S. R. Prince* for respondent. Reported below: 86 F. (2d) 920.

No. 746. PEREY MANUFACTURING CO., INC. ET AL. *v.* TULCHIN. March 15, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Maxwell James* for petitioners. *Mr. Hans v. Briesen* for respondent. Reported below: 87 F. (2d) 302.

No. 818. WHITMORE *v.* SALT LAKE CITY ET AL. See *ante,* p. 644.

No. 815. CARTEY, ADMINISTRATRIX, *v.* UNITED STATES. March 29, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit and motion for leave to proceed further *in forma pauperis* denied. *Mr. John J. McCreary* for petitioner. No appearance for the United States. Reported below: 86 F. (2d) 139.

No. 816. JENKINS, ADMINISTRATRIX, *v.* UNITED STATES. March 29, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit and motion for leave to proceed further *in forma pauperis* denied. *Mr. John J. McCreary* for petitioner. No appearance for the United States. Reported below: 86 F. (2d) 123.

No. 826. WYANT *v.* CALDWELL, RECEIVER. March 29, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit and motion for leave to proceed further *in forma pauperis* denied. *Mr. Claude Wyant, pro se.* No appearance for respondent. Reported below: 86 F. (2d) 357.

No. 720. ANDERSON ET AL. *v.* UNITED STATES. March 29, 1937. Petition for writ of certiorari to the Court of Claims denied. *Mr. R. C. Fulbright* for petitioners. *Solicitor General Reed, Assistant Attorney General Morris,* and *Mr. Sewall Key* for the United States. Reported below: 83 Ct. Cls. 561; 15 F. Supp. 216.

No. 726. NORTH GERMAN LLOYD *v.* ELTING, COLLECTOR OF CUSTOMS. March 29, 1937. Petition for writ of

certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Roger O'Donnell* for petitioner. *Solicitor General Reed* and *Messrs. William W. Scott, Paul A. Sweeney,* and *W. Marvin Smith* for respondent. Reported below: 86 F. (2d) 93.

No. 732. COMPAGNIE GENERALE TRANATLANTIQUE *v.* UNITED STATES. March 29, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Roger O'Donnell, Lambert O'Donnell,* and *William J. Peters* for petitioner. *Solicitor General Reed* and *Messrs. William W. Scott, Paul A. Sweeney,* and *W. Marvin Smith* for the United States. Reported below: 86 F. (2d) 996.

No. 736. FIRST NATIONAL BANK *v.* VIRGINIA OIL & REFINING CO. ET AL. March 29, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Robert Sansom* and *Theodore Mack* for petitioner. No appearance for respondents. Reported below: 86 F. (2d) 770.

No. 738. ST. PAUL FIRE & MARINE INSURANCE CO. *v.* NEW ORLEANS COAL & BISSO TOWBOAT CO. ET AL. March 29, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Edouard F. Henriques* for petitioner. *Messrs. Walker B. Spencer, Esmond Phelps, Charles E. Dunbar, Jr.,* and *Arthur A. Moreno* for respondents. Reported below: 86 F. (2d) 53.

No. 739. LOUISIANA NATIONAL BANK *v.* NEW ORLEANS COAL & BISSO TOWBOAT CO. ET AL. March 29, 1937.

Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. M. A. Grace* for petitioner. *Messrs. Walker B. Spencer, Esmond Phelps, Charles E. Dunbar, Jr.,* and *Arthur A. Moreno* for respondents. Reported below: 86 F. (2d) 53.

No. 740. BIEGLER *v.* UNITED STATES. March 29, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. William F. Waugh* and *J. J. Goshkin* for petitioner. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Messrs. William W. Barron* and *W. Marvin Smith* for the United States. Reported below: 86 F. (2d) 41.

No. 748. C. D. PARKER & Co., INC. *v.* GUTERMAN ET AL. March 29, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Charles B. Rugg* for petitioner. *Mr. Jacob J. Kaplan* for respondents. Reported below: 86 F. (2d) 546.

No. 749. AJAX PIPE LINE CO. *v.* SMITH, COLLECTOR OF REVENUE, ET AL. March 29, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. James S. Veasey, Lloyd G. Owen,* and *Charles F. Newman* for petitioner. *Mr. William L. Vandeventer* for respondents. Reported below: 87 F. (2d) 567.

No. 789. ERIE R. CO. *v.* MIZELL, RECEIVER. March 29, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Halsey Sayles* for petitioner. *Messrs. George P. Barse*

and *John F. Anderson* for respondent. Reported below: 86 F. (2d) 998.

No. 694. PEARSON, ADMINISTRATOR, *v.* UNITED STATES. March 29, 1937. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Russell L. Bradford* and *George H. Craven* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Mr. Sewall Key* for the United States. Reported below: 83 Ct. Cls. 624; 14 F. Supp. 1016; 17 F. Supp. 527.

No. 699. KLEIN *v.* UNITED STATES. March 29, 1937. Petition for writ of certiorari to the Court of Claims denied. *Mr. Hiram C. Todd* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Mr. Sewall Key for* the United States. Reported below: 83 Ct. Cls. 702.

No. 717. CENTRAL HANOVER BANK & TRUST CO., TRUSTEE, *v.* UNITED STATES. March 29, 1937. Petition for writ of certiorari to the Court of Claims denied. *Messrs. John E. Hughes* and *William Cogger* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Mr. Sewall Key* for the United States. Reported below: 83 Ct. Cls. 401; 14 F. Supp. 541.

No. 745. HATFIELD *v.* GUAY, U. S. MARSHAL, ET AL. March 29, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. John J. McDonald* for petitioner. *Mr. Daniel F. McCormack* for respondents. Reported below: 87 F. (2d) 358.

No. 751. CONTINENTAL PETROLEUM CO. *v.* UNITED STATES. March 29, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Floyd F. Toomey, Elmer J. Lundy, Thomas D. Lyons, T. P. Gore,* and *Frank Pace* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Harry Marselli* for the United States. Reported below: 87 F. (2d) 91.

No. 756. HARTFORD ACCIDENT & INDEMNITY CO. *v.* BAUGH. March 29, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Paul McMahon* for petitioner. No appearance for respondent. Reported below: 87 F. (2d) 240.

No. 759. FOOD MACHINERY CORP. *v.* SCHELL ET AL. March 29, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. O. K. Reaves* for petitioner. *Messrs. Seiforde M. Stellwagen, William J. Neale, John B. Singeltary, Alvan B. Rowe,* and *W. D. Bell* for respondents. Reported below: 87 F. (2d) 385.

No. 766. PICKER ET AL. *v.* IRVING TRUST CO., TRUSTEE. March 29, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Mortimer Hays* for petitioners. *Messrs. Wm. D. Whitney* and *R. L. Gilpatric* for respondent. Reported below: 86 F. (2d) 629.

No. 767. WACO DEVELOPMENT CO. *v.* RUPE ET AL. March 29, 1937. Petition for writ of certiorari to the

Circuit Court of Appeals for the Fifth Circuit denied. *Mr. James D. Williamson* for petitioner. No appearance for respondents. Reported below: 87 F. (2d) 395.

No. 768. WELCH, TRUSTEE, *v.* LARKIN ET AL. March 29, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Thomas M. Hoyne* for petitioner. *Mr. Duane R. Dills* for respondents. Reported below: 86 F. (2d) 442.

No. 785. MISSOURI-KANSAS-TEXAS R. CO. *v.* ROWE. March 29, 1937. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Mr. Joseph M. Bryson* for petitioner. *Mr. Wendell W. McCanles* for respondent. Reported below: 339 Mo. 1145; 100 S. W. (2d) 480.

No. 793. NEW YORK LIFE INSURANCE CO. *v.* KASSLY. March 29, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Rudolph J. Kramer* and *Louis H. Cooke* for petitioner. *Messrs. Louis Beasley* and *Edward C. Zulley* for respondent. Reported below: 87 F. (2d) 236.

No. 817. E. EDELMANN & CO. *v.* TRIPLE-A SPECIALTY CO. March 29, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Otto Raymond Barnett* for petitioner. *Messrs. George A. Chritton* and *Russell Wiles* for respondent. Reported below: 88 F. (2d) 852.

No. 802. BEELAND WHOLESALE CO. ET AL. *v.* DAVIS. March 29, 1937. The motion for injunction is denied.

Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Wm. Logan Martin* and *Lewis B. Randall* for petitioners. No appearance for respondent. Reported below: 88 F. (2d) 447.

No. 838. ALPHA PORTLAND CEMENT CO. *v.* DAVIS. March 29, 1937. The motion for injunction is denied. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Forney Johnston* and *Joseph F. Johnston* for petitioner. No appearance for respondent. Reported below: 88 F. (2d) 449.

No. —, original. EX PARTE ALBERT E. PEIRCE. See *ante*, p. 645.

No. 806. F. A. D. ANDREA, INC. *v.* RADIO CORPORATION. April 5, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. MR. JUSTICE ROBERTS took no part in the consideration or decision of this application. *Messrs. Samuel E. Darby, Jr.*, and *E. Ennalls Berl* for petitioner. *Messrs. Thomas G. Haight, Abel E. Blackmar, Jr.*, and *Manton Davis* for respondent. Reported below: 88 F. (2d) 474.

No. 752. MARATHON ELECTRIC MANUFACTURING CORP. *v.* CLARK, REGIONAL DIRECTOR, ET AL. April 5, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Claire B. Bird* for petitioner. *Solicitor General Reed* and *Mr. Charles Fahy* for respondents. Reported below: 88 F. (2d) 59.

No. 757. PRODUCERS WOOL & MOHAIR CO. ET AL. *v.* SCHAUER. April 5, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Will A. Morriss* for petitioners. No appearance for respondent. Reported below: 86 F. (2d) 576.

No. 760. SIMON ET AL. *v.* CHAMBLESS, TRUSTEE, ET AL. April 5, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Gustavus A. Rogers* for petitioners. No appearance for respondents. Reported below: 86 F. (2d) 569.

No. 762. MCDONNELL ET AL. *v.* DURNING, COLLECTOR OF CUSTOMS. April 5, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Delbert M. Tibbetts* for petitioners. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Mr. William W. Barron* for respondent. Reported below: 86 F. (2d) 91.

No. 763. WATERFORD IRRIGATION DISTRICT *v.* COVELL ET AL. April 5, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. A. L. Cowell* for petitioner. *Mr. Charles L. Childers* for respondents. Reported below: 86 F. (2d) 22.

No. 764. BOURJOIS, INC. *v.* MCGOWAN, COLLECTOR OF INTERNAL REVENUE. April 5, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Mark Eisner* and *Ferdinand Tannenbaum* for petitioner. *Solicitor General Reed,*

Assistant Attorney General Morris, and *Messrs. Sewall Key* and *Joseph M. Jones* for respondent. Reported below: 85 F. (2d) 510.

No. 771. STANDARD OIL CO. *v.* FITZGERALD, SECRETARY OF STATE. April 5, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Alex J. Groesbeck* for petitioner. *Mr. Howell Van Auken* for respondent. Reported below: 86 F. (2d) 799.

No. 778. BURNHAM *v.* COMMISSIONER OF INTERNAL REVENUE. April 5, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Arnold R. Baar* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Harry Marselli* for respondent. Reported below: 86 F. (2d) 776.

No. 780. JAMERSON *v.* ALLIANCE INSURANCE CO. ET AL. April 5, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Bruce A. Campbell* and *Patrick H. Cullen* for petitioner. *Messrs. George C. Willson, J. H. Cunningham, Jr., Harold G. Baker,* and *Ralph F. Lesemann* for respondents. Reported below: 87 F. (2d) 253.

No. 788. MURPHY *v.* SUN OIL CO. April 5, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Lamar G. Seeligson* for petitioner. *Messrs. W. N. Foster* and *B. D. Tarlton* for respondent. Reported below: 86 F. (2d) 895.

No. 796. UNITED STATES EX REL. MAINE POTATO GROWERS & SHIPPERS ASSN. ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. April 5, 1937. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Arthur L. Winn, Jr.,* and *Wilbur LaRoe, Jr.,* for petitioners. *Messrs. J. Stanley Payne, Daniel W. Knowlton, Joseph T. Sherier,* and *G. F. Snyder* for respondents. Reported below: 88 F. (2d) 780.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT FROM FEBRUARY 1, THROUGH APRIL 11, 1937.

No. 630. C. D. PARKER & Co., INC. *v.* GUTERMAN ET AL. On petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit. February 8, 1937. Dismissed on motion of *Mr. Charles B. Rugg* for petitioner. Reported below: 86 F. (2d) 546.

No. 381. KENNEDY *v.* BOSTON-CONTINENTAL NATIONAL BANK ET AL.; and

No. 382. WENDELL PHILLIPS Co. *v.* SAME. On writs of certiorari to the Circuit Court of Appeals for the First Circuit. March 29, 1937. Dismissed on motion of counsel for petitioners. *Messrs. Burton E. Eames, George B. Rowlings,* and *Charles A. Rome* for petitioner in No. 381. *Mr. Edmund K. Arnold* for petitioner in No. 382. *Mr. Robert E. Goodwin* for respondents. Reported below: 84 F. (2d) 592, 599.

No. 690. DUGAN ET AL. *v.* BRIDGES, GOVERNOR, ET AL. Appeal from the District Court of the United States for

the District of New Hampshire. March 29, 1937. Dismissed on motion of *Messrs. Jonathan Piper, M. J. Donnelly,* and *John E. O'Hara* for appellants. *Mr. Dudley Orr* for appellees. Reported below: 16 F. Supp. 694.

No. 747. MURPHY ET AL. *v.* TURMAN OIL CO. ET AL. On petition for writ of certiorari to the Court of Civil Appeals, 3d Supreme Judicial District, of Texas. April 5, 1937. Dismissed on motion of *Mr. J. N. Saye* for petitioners. *Messrs. Joseph H. Parsons, Ben H. Powell, Alvin J. Wirt, Conrad E. Cooper, William McCraw,* and *Harry S. Pollard* for respondents. Reported below: 97 S. W. (2d) 485.

PETITIONS FOR REHEARING GRANTED FROM FEBRUARY 1, THROUGH APRIL 11, 1937.

No. 285. UNITED STATES EX REL. GIRARD TRUST CO., TRUSTEE, *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. See *ante,* p. 643.

No. 202 (October Term, 1935). STONE ET AL. *v.* WHITE, FORMER COLLECTOR. See *ante,* p. 643.

PETITIONS FOR REHEARING DENIED FROM FEBRUARY 1, THROUGH APRIL 11, 1937.*

No. 436. SCHWARTZ ET AL. *v.* IRVING TRUST CO., TRUSTEE IN BANKRUPTCY, ET AL. February 1, 1937. 299 U. S. 456.

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* See Table of Cases Reported in this volume for earlier decisions in these cases, unless otherwise indicated.

No. 161. LIGGETT & MYERS TOBACCO CO. *v.* UNITED STATES;

No. 162. MASSACHUSETTS *v.* SAME; and

No. 163. LIGGETT & MYERS TOBACCO CO. EX REL. MASSACHUSETTS *v.* SAME. February 1, 1937. 299 U. S. 383.

No. 212. MARVEL *v.* ZERBST, WARDEN. February 1, 1937. 299 U. S. 518.

Nos. 480 and 481. AVERY *v.* COMMISSIONER OF INTERNAL REVENUE. February 1, 1937. 299 U. S. 604.

No. 540. SPERRY FLOUR CO. *v.* COASTWISE STEAMSHIP & BARGE CO. ET AL. February 1, 1937. 299 U. S. 612.

No. 545. RINDGE LAND & NAVIGATION CO. ET AL. *v.* SECURITY-FIRST NATIONAL BANK, TRUSTEE, ET AL. February 1, 1937. 299 U. S. 613.

No. 511. SANACORY *v.* NEW YORK. March 1, 1937. The motion for leave to file a second petition for rehearing is denied.

No. 266. ICKES, SECRETARY OF THE INTERIOR, *v.* FOX ET AL.;

No. 267. SAME *v.* PARKS ET AL.; and

No. 268. SAME *v.* OTTMULLER. March 1, 1937. *Ante,* p. 82.

No. 20. GREAT NORTHERN RY. CO. *v.* WASHINGTON. March 1, 1937. *Ante,* p. 154.

No. 217. MIDLAND REALTY CO. *v.* KANSAS CITY POWER & LIGHT CO. March 1, 1937. *Ante,* p. 109.

No. 325. MORLEY CONSTRUCTION CO. ET AL. *v.* MARYLAND CASUALTY CO. March 1, 1937. *Ante,* p. 185.

No. 329. UNITED STATES *v.* GILES. March 1, 1937. *Ante,* p. 41.

No. 572. CONTINENTAL MILLS, INC. *v.* UNITED STATES. March 1, 1937. 299 U. S. 614.

No. 619. KABATT *v.* BOARD OF EDUCATION OF ELMIRA. March 1, 1937.

No. 330. UNITED STATES *v.* AUTOMATIC WASHER CO. March 8, 1937.

No. 623. PREECE *v.* UNITED STATES. March 8, 1937.

No. 649. ALEOGRAPH CO. *v.* ELECTRICAL RESEARCH PRODUCTS, INC. ET AL. March 8, 1937.

No. 406. SUMI *v.* YOUNG. March 29, 1937. *Ante,* p. 251.

No. 446. AETNA LIFE INSURANCE CO. *v.* HAWORTH ET AL. March 29, 1937. *Ante,* p. 227.

No. 622. NEW YORK LIFE INSURANCE CO. ET AL. *v.* ALEXANDER, EXECUTOR. March 29, 1937.

No. 689. REEVES MANUFACTURING CO. *v.* LOME CO. ET AL. March 29, 1937.

No. 257. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* MIDLAND MUTUAL LIFE INSURANCE CO. April 5, 1937. *Ante*, p. 216.

No. 692. BUNGER *v.* GREEN RIVER. April 5, 1937.

No. 567. DAVIS *v.* BOSTON & MAINE RAILROAD ET AL. See *ante*, p. 646.

AMENDMENT OF BANKRUPTCY RULES.

ORDER.

The following is adopted as an addition to the existing General Orders in Bankruptcy, and shall be effective on and after April 5, 1937.*

LIII.

Bond of Designated Depository Under § 61.

1. The bond required of a banking institution designated as a depository shall be given with an authorized fidelity or bonding company as surety, or with approved individual sureties who are residents of that judicial district and two of whom are neither officers nor directors of the institution designated as a depository.

2. The condition of bonds hereafter given shall be substantially to the effect that the banking institution, so designated, shall well and truly account for and pay over all monies deposited with it as such depository, and shall pay out such monies only as provided by the bankruptcy law and applicable general orders and court rules, and shall abide by all orders of the bankruptcy court in respect of such monies, and shall otherwise faithfully perform all duties pertaining to it as such depository.

3. As one means of bringing before the bankruptcy court information respecting possible occasions for requiring a depository to give a new bond in an increased amount, or a new bond with different sureties, it shall

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*For statutory provision relating to the bond of a depository, see Act of July 1, 1898, c. 541, § 61, 30 Stat. 562, as amended August 23, 1935, c. 614, § 340, 49 Stat. 721 (Title 11, § 101, U. S. C.).

For statutory provision permitting deposit of bankruptcy funds in postal savings depository, see Act of March 3, 1933, c. 204, § 3, 47 Stat. 1482 (Title 11, § 101 (a), U. S. C.).

be the duty of each depository to file with the bankruptcy court during the month of January in each year a sworn statement in writing disclosing

(a) The amount of monies on deposit with it as such depository on the last business day of each month in the preceding calendar year;

(b) Whether any of the individual sureties on its bond has ceased to be a resident of that judicial district, or has died; and

(c) Whether the financial worth of any of its individual sureties has become materially impaired.

4. It shall be the duty of the bankruptcy court to require a depository to give a new bond whenever it appears that the prior bond is not sufficient in amount, in view of present and prospective deposits, or that a surety has died or ceased to be a resident of that judicial district, or whenever there is otherwise occasion to believe that the prior bond does not constitute adequate security.

5. It shall be the duty of the bankruptcy court to require each depository in its district to give a new bond within five years after the giving of its last prior bond.

6. A surety, or the personal representative of a deceased surety, on the bond of a depository may, by a petition setting forth the grounds therefor, request the bankruptcy court to require the depository to give a new bond and thereby to relieve such surety, or his estate, from responsibility and liability as respects any future default of the depository, and, if upon a hearing had after reasonable notice to the depository, to other sureties on the bond, and to the trustees or other representatives of bankrupt estates having deposits in such depository, it appears to the court that the petition can be granted without injury to any party in interest, the court shall require the depository to give a new bond.

7. A new bond given under any subdivision of this general order shall, from the time of its approval by the bankruptcy court, be regarded as taking the place of

the preceding bond as respects any subsequent default of the depository; and, upon approving the new bond, the court shall enter an order relieving the sureties on the prior bond, and the estate of any deceased surety, from responsibility and liability thereon as respects any default of the depository occurring thereafter.

8. If any depository, when required to give a new bond, fails to comply with that requirement within the time fixed therefor by this general order or by the bankruptcy court, it shall be the duty of that court to order such depository to pay over all monies on deposit with it as such depository, and to revoke its designation as a depository.

February 15, 1937.

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2. *Id.* Validity of administrative order as affected by motive of officer. *Isbrandtsen-Moller Co.* v. *U. S.*, 139.

3. *Id. Notice and Hearing,* when not prerequisite to issuance of administrative order. *Id.*

4. *Effect. Enforcement.* Force of regulation prescribed by Interstate Commerce Commission pursuant to constitutional statutory authority; determination of what constitutes compliance. *A., T. & S. F. Ry. Co.* v. *Scarlett*, 471.

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