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VOLUME 303

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1937

FROM JANUARY 18, 1938, TO AND INCLUDING APRIL 11, 1938

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS [1]

CHARLES EVANS HUGHES, Chief Justice.
JAMES CLARK McREYNOLDS, Associate Justice.
LOUIS D. BRANDEIS, Associate Justice.
PIERCE BUTLER, Associate Justice.
HARLAN FISKE STONE, Associate Justice.
OWEN J. ROBERTS, Associate Justice.
BENJAMIN N. CARDOZO, Associate Justice.[2]
HUGO L. BLACK, Associate Justice.
STANLEY REED, Associate Justice.[3]

RETIRED

WILLIS VAN DEVANTER, Associate Justice.
GEORGE SUTHERLAND, Associate Justice.[4]

HOMER S. CUMMINGS, Attorney General.
STANLEY REED, Solicitor General.[3]
ROBERT H. JACKSON, Solicitor General.[5]
CHARLES ELMORE CROPLEY, Clerk.
FRANK KEY GREEN, Marshal.

For references see following page.

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

[2] MR. JUSTICE CARDOZO was absent from the bench, on account of illness, during the period covered by this volume.

[3] MR. STANLEY REED, of Kentucky, was nominated to be Associate Justice by President Roosevelt on January 15, 1938; the nomination was confirmed by the Senate on January 25; the commission issued January 27; and he took the constitutional and judicial oaths and was seated on January 31.

[4] MR. JUSTICE SUTHERLAND, by letter to the President of January 5th, communicated his intention to retire on the 18th of that month, as authorized by Act of March 1, 1937, c. 21, 50 Stat. 24. See p. VI.

[5] MR. ROBERT H. JACKSON, of New York, was nominated to be Solicitor General by President Roosevelt on January 27, 1938; the nomination was confirmed by the Senate March 4; and he was commissioned and took the oath of office March 5.

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 D. Brandeis, Associate Justice.

For the Second Circuit, Harlan F. 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, Hugo L. Black, Associate Justice.

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

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

For the Eighth Circuit, Pierce Butler, Associate Justice.

For the Ninth Circuit, Stanley Reed, Associate Justice.

For the Tenth Circuit, Pierce Butler, Associate Justice.

February 7, 1938.

(For next previous allotment, November 8, 1937, see 302 U. S., p. IV.)

RETIREMENT OF MR. JUSTICE SUTHERLAND.

On January 7, 1938, it was ordered by the Court that the accompanying correspondence between members of the Court and Mr. Justice Sutherland be spread upon the minutes and that it also be printed in the reports of the Court.

SUPREME COURT OF THE UNITED STATES

WASHINGTON, D. C.

JANUARY 6, 1938.

My dear Justice SUTHERLAND:

Upon your retirement from regular active service on the bench, we wish to give you renewed assurance of our warm affection and of our high appreciation of the distinguished ability and unremitting devotion which have characterized your long participation in the work of the Court. Not only have you brought to our deliberations learning and dialectical skill, a wide knowledge of affairs enriched by varied and eminent public service, and a habit of thoroughness and precision, but you have matched tenacity of purpose with an unvarying kindliness and have mellowed our deliberations with unfailing humor. We keenly regret the loss of this companionship which will ever remain a delightful memory. We trust that in your retirement from the constant labor of active service you will find fresh vigor and the abiding satisfaction which comes from the consciousness of arduous duties performed with complete fidelity.

Faithfully yours,

CHARLES E. HUGHES.
J. C. MCREYNOLDS.
LOUIS D. BRANDEIS.
PIERCE BUTLER.
HARLAN F. STONE.
OWEN J. ROBERTS.
BENJAMIN N. CARDOZO.
HUGO L. BLACK.

MR. Justice SUTHERLAND.

RETIREMENT OF MR. JUSTICE SUTHERLAND.

SUPREME COURT OF THE UNITED STATES

WASHINGTON, D. C.

JANUARY 7, 1938.

My dear BRETHREN:

I have read your letter, and make my reply to it with mingled emotions of gratitude for the more than generous things you say, and sorrow that these amenities end the completeness of that close and affectionate comradeship which reaches back so many years. It is very hard for me to step out of this circle, where I have taken comfort for so long. I leave the Court with keen regret. I have loved the work in which we have been engaged together; and only a definite conviction that the time has come reconciles me to the unwelcome thought of laying it down. The memory of our association will remain; but this, although very dear, will not compensate me for the loss of the reality. May health and happiness attend you all throughout the coming years.

Very sincerely yours,

GEO. SUTHERLAND.

The CHIEF JUSTICE.
Mr. Justice MCREYNOLDS.
Mr. Justice BRANDEIS.
Mr. Justice BUTLER.
Mr. Justice STONE.
Mr. Justice ROBERTS.
Mr. Justice CARDOZO.
Mr. Justice BLACK.

TABLE OF CASES REPORTED

TABLE OF CASES

Cited in Opinions

TABLE OF STATUTES

Cited In Opinions

(A) Statutes of the United States

(B) STATUTES OF THE STATES AND TERRITORIES

(C) Treaties

(D) Foreign Statutes

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1937.

KAY *v.* UNITED STATES.

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

No. 61. Argued December 10, 13, 1937.—Decided January 31, 1938.

1. The Court declines to consider a point made by the Government, not raised below and not adequately based in the record, to the effect that a defendant whose plea of guilty was withdrawn on motion made after the ten days set by Rule II (4) of the Criminal Appeals Rules and who was tried and convicted, is precluded from attacking the indictment and the statute on which it was founded. P. 4.
2. The second mortgagee of property on which a loan is being sought of the Home Owners' Loan Corporation, who, in a consent to accept bonds of the Corporation in full settlement of his debt, knowingly and falsely, for the purpose of influencing the action of the Corporation, overstates the amount of his claim, is guilty of a violation of § 8 (a) of the Home Owners' Loan Act. P. 5.
3. Even if the other parts of the Act were unconstitutional, § 8 (a), aided by the separability clause, is valid as a protection of the Government against false and misleading representations while the Act is being administered. P. 6.

   When one undertakes to cheat the Government or to mislead those acting under its authority, by false statements, he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without constitutional sanction.

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4. Sec. 8 (a) of the Home Owners' Loan Act defines the crime sufficiently to comply with due process. P. 7.
5. Sec. 8 (e) of the Home Owners' Loan Act, originally and as amended in 1934, forbids and penalizes the charging of applicants for loans from the Home Owners' Loan Corporation for services rendered "for examination and perfection of title, appraisal, and like necessary services," except the "ordinary charges" or fees authorized and required by the Corporation. *Held* valid.

   (1) Sec. 8 (e) is separable from the other provisions of the statute. P. 8.

   (2) Without regard to the validity of the scheme of the Act, Congress was authorized to protect from exploitation through improper or excessive charges those who sought loans under it. *Id.*

   (3) Taken in connection with a resolution of the Corporation defining the ordinary charges that are "authorized or required," and providing for "any other necessary charge for like necessary services, as specifically approved by the Board of Directors," the section is sufficiently definite to satisfy due process. P. 8.

   (4) The phrase "like necessary services" means services cognate to those mentioned in the preceding clause, "for examination and perfection of title" and "appraisal." P. 9.

   (5) Congress did not exceed its power in delegating to the Corporation the authority to make such regulations. *Id.*
6. Under the Criminal Appeals Rules, the Circuit Court of Appeals has power, in the exercise of sound discretion, to approve a settlement and filing of a bill of exceptions which were too late in the District Court, and to pass upon the rulings there disclosed. P. 9.

89 F. (2d) 19, judgment vacated.

CERTIORARI, 301 U. S. 679, to review a judgment sustaining convictions and concurrent sentences on various counts charging violation of the Home Owners' Loan Act.

Messrs. Frank R. Serri and *W. S. Culbertson* for petitioner.

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

1 Opinion of the Court.

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

Petitioner was convicted of violations of § 8 (a) [1] and (e) [2] of the Home Owners' Loan Act of 1933. Act of

[1] Section 8 (a) of the Home Owners' Loan Act, 12 U. S. C. 1467 (a), is as follows:

"Sec. 8. (a) Whoever makes any statement, knowing it to be false, or whoever willfully overvalues any security, for the purpose of influencing in any way the action of the Home Owners' Loan Corporation or the Board or an association upon any application, advance, discount, purchase, or repurchase agreement, or loan, under this Act, or any extension thereof by renewal deferment, or action or otherwise, or the acceptance, release, or substitution of security therefor, shall be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both."

[2] Section 8 (e) of the Act, 12 U. S. C. 1467 (e), as originally enacted by the Act of June 13, 1933, c. 64, 48 Stat. 134, was as follows:

"(e) No person, partnership, association, or corporation shall make any charge in connection with a loan by the Corporation or an exchange of bonds or cash advance under this Act except ordinary charges authorized and required by the Corporation for services actually rendered for examination and perfecting of title, appraisal, and like necessary services. Any person, partnership, association, or corporation violating the provisions of this subsection shall, upon conviction thereof, be fined not more than $10,000, or imprisoned not more than five years, or both."

By the Act of April 27, 1934, c. 168, § 12, 48 Stat. 643, 647, § 8 (e) was amended so as to read:

"(e) No person, partnership, association, or corporation shall, directly or indirectly, solicit, contract for, charge or receive, or attempt to solicit, contract for, charge or receive any fee, charge, or other consideration from any person applying to the Corporation for a loan, whether bond or cash except ordinary fees authorized and required by the Corporation for services actually rendered for examination and perfection of title, appraisal, and like necessary services. Any person, partnership, association, or corporation violating the provisions of this subsection shall, upon conviction thereof, be fined not more than $10,000, or imprisoned not more than five years or both."

June 13, 1933, c. 64, 48 Stat. 128, 134, amended by Act of April 27, 1934, c. 168, 48 Stat. 643, 647. 12 U. S. C., § 1467 (a) and (e). The Circuit Court of Appeals sustained the conviction, 89 F. (2d) 19, and because of the importance of the questions presented certiorari was granted. 301 U. S. 679.

The conviction was upon eight counts of the indictment, viz., counts 5 and 15 under § 8 (a) and counts 8, 12, 14, 20, 24 and 25 under § 8 (e). To count 12 petitioner had pleaded guilty but later was permitted to withdraw that plea, pleaded not guilty, and went to trial. On count 8, imposition of sentence was suspended and petitioner was placed upon probation. On the remaining seven counts, petitioner was sentenced to a year and a day in prison, the sentences to run concurrently.

The Circuit Court of Appeals refused to consider errors arising on the bill of exceptions, as it had not been settled and filed within the time permitted by Rule IX of the Criminal Appeals Rules. The court accordingly limited its consideration to the sufficiency of the indictment, entertaining and deciding the questions of the constitutional validity of the Home Owners' Loan Act and of the provisions of § 8 (a) and (e) in particular.

The Government contends that the convictions should be sustained, irrespective of questions of the validity of any part of the statute, upon the ground that, the sentences being concurrent, the judgment should be affirmed if good under any one of the counts. In that view, the Government submits that petitioner consented to the judgment on count 12. The point is that petitioner was permitted to withdraw her plea of guilty to that count although eleven days had intervened, while Rule II (4) of the Criminal Appeals Rules requires such a motion to be made within ten days. The Government argues that the provision of the rule is mandatory and hence the judgment, as one upon consent, should be

affirmed without consideration of the merits. Petitioner answers that the Government by going to trial is now estopped to raise the question and further that a plea of guilty does not prevent the defendant from challenging the sufficiency of the indictment. (2 Bishop on Criminal Procedure, 2d ed., § 795.) The point does not appear to have been raised either in the District Court or in the Court of Appeals and it is based solely upon the dates of certain entries in the criminal docket without any supporting proof. We are not disposed to deal with a question of that importance presented in this manner.

First.—As to the counts under § 8 (a).[3]—Counts 5 and 15, under that provision, charge that petitioner, being the holder of a second mortgage upon certain premises, in executing the consent to accept bonds of the Home Owners' Loan Corporation in full settlement, and for the purpose of influencing the action of the Corporation, knowingly and falsely stated that her claims were respectively in the sums of $590 and $650, whereas in fact they were respectively only in the sums of $285 and $150.

Petitioner argues that there is no allegation that a loan to the owner was made or approved, or that any payment was made to petitioner; that the second mortgagee's consent is temporary and may be withdrawn; that it is not under oath and that there is no warranty of the truth of the information given. Petitioner argues further that any statement in the consent of a second mortgagee as to the balance due cannot endanger or directly influence any loan made by the Corporation; that the second mortgagee is not an applicant and that the practice in such cases negatives reliance on the consent, as the essential factors are the value of the property, as to which the Corporation makes its appraisal, and the earning capacity of the owner. None of these arguments is impressive. It does not lie with one knowingly making

[3] See Note 1.

false statements with intent to mislead the officials of the Corporation to say that the statements were not influential or the information not important. There can be no question that Congress was entitled to require that the information be given in good faith and not falsely with intent to mislead. Whether or not the Corporation would act favorably on the loan is not a matter which concerns one seeking to deceive by false information. The case is not one of an action for damages but of criminal liability and actual damage is not an ingredient of the offense.

Petitioner's main argument is that the whole scheme of the statute is invalid; that Congress had no constitutional authority to create the Home Owners' Loan Corporation,—to provide for the conduct of a business enterprise of that character. There is no occasion to consider this broad question as petitioner is not entitled to raise it. When one undertakes to cheat the Government or to mislead its officers, or those acting under its authority, by false statements, he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without constitutional sanction.

We recently dealt with a similar contention that the false claims statute, Criminal Code, § 35, did not apply to a conspiracy to cheat the United States by false representations in connection with operations under a statute which this Court found to be unconstitutional. We said that such a construction was inadmissible. "It might as well be said that one could embezzle moneys in the United States Treasury with impunity if it turns out that they were collected in the course of invalid transactions. . . . Congress was entitled to protect the Government against those who would swindle it regardless of questions of constitutional authority as to the operations that the Government is conducting. Such questions cannot be raised by those who make false claims

against the Government." *United States* v. *Kapp,* 302 U. S. 214, 217–218; *Madden* v. *United States,* 80 F. (2d) 672. While the instant case is not one of conspiracy to obtain money from the United States, but one of false statements designed to mislead those acting under authority of the Government, the principle involved is the same. Apart from any question of the validity of the other provisions of the Home Owners' Loan Act, Congress was entitled to secure protection against false and misleading representations while the Act was being administered, and the separability provision of the Act (§ 9) is clearly applicable. *Utah Power Co.* v. *Pfost,* 286 U. S. 165, 184.

There is the further argument that the provision of § 8 (a), separately considered, offends the due process clause as being vague and uncertain. We find no merit in that contention. The statute defining the crime is sufficiently explicit.

Second.—As to the counts under § 8 (e).[4]—The Government points out that count 14 is based on the statute as it was originally enacted in 1933. That count charges that petitioner on or about April 1, 1934, made a contract with an applicant for a loan for the payment to petitioner of a certain sum for services in connection with the loan and that the contract was not for "an ordinary charge or fee authorized and required by the Home Owners' Loan Corporation for services actually rendered for examination and perfection of title, appraisal, and like necessary services."

Counts 12, 20, 24 and 25, under the statute as amended, charge that petitioner in or about June, July and September, 1934, made similar contracts for the payment of unauthorized charges.

It appears that the Board of Directors in January, 1934, specifically provided that "the ordinary charges author-

[4] See Note 2.

ized and required" for services should consist of (1) an appraisal fee as approved by the Board, (2) a fee for a character report, (3) necessary recording and similar fees, (4) necessary charges for perfecting title in a sum not exceeding $75 in any case and larger necessary charges if approved by the Board, (5) necessary and usual fees for abstracts, examination of title, opinions, certificates of title or title insurance, (6) charges of attorneys or title companies for escrow services or closing loans, and (7) any other necessary charge for like necessary services as specifically approved by the Board.

Section 8 (e) is also separable from the other provisions of the statute. It is plainly designed to prevent the exploitation of applicants. It rests upon the same principle as that which underlies § 8 (a) as to false and misleading representations to the officials of the Corporation. Congress was entitled not only to prevent misapplication of the public funds and to protect the officials concerned from being misled, but also to protect those who sought loans from being imposed upon by extravagant or improper charges for services in connection with their applications. This would be in the interest "not only of themselves and their families but of the public." See *Yeiser* v. *Dysart*, 267 U. S. 540, 541; *Nebbia* v. *New York*, 291 U. S. 502, 535, 536. Authority to penalize such exploitation while the enterprise is being conducted cannot be regarded as dependent upon the validity of the general plan. That plan might or might not be assailed. If assailed, a long period might elapse before final decision. Meanwhile, the governmental operations go on, and public funds and public transactions require the protection which it was the aim of these penal provisions to secure, whatever might be the ultimate determination as to the validity of the enterprise. *United States* v. *Kapp*, *supra*.

As a separable provision, the validity of § 8 (e) is challenged as lacking the requisite definiteness under the

due process clause. Section 8 (e) as amended in 1934 omitted the words "in connection with a loan by the Corporation or an exchange of bonds or cash advance under this Act" which were in the original provision. But the context, in the amended section, sufficiently shows that the forbidden charges are those in connection with applications "for a loan, whether bond or cash." The resolution adopted by the Board of Directors sets forth the nature of the ordinary charges that "are authorized and required," and the power of Congress to provide for such action by the Board is not open to question. See *United States* v. *Grimaud,* 220 U. S. 506, 521; *United States* v. *Shreveport Grain Co.,* 287 U. S. 77, 85. The phrase "like necessary services" in the section describes services which are cognate to those mentioned in the preceding clause "for examination and perfection of title" and "appraisal." And the resolution of the Board, after stating the categories of authorized charges, provides for "any other necessary charge for like necessary services, as specifically approved by the Board of Directors." We think that the statute sets up an ascertainable standard and is "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." *United States ex rel. Handler* v. *Hill,* 90 F. (2d) 573, 574. Compare *Connally* v. *General Construction Co.,* 269 U. S. 385, 391; *Old Dearborn Co.* v. *Seagram-Distillers Corp.,* 299 U. S. 183, 196.

Third.—We have considered the objections to the indictment which were open in the absence of a bill of exceptions. The Circuit Court of Appeals rightly held that the bill of exceptions was not settled and filed in time under the rule. But its decision was rendered before our decision in *Ray* v. *United States,* 301 U. S. 158, construing Rule IV of the Criminal Appeals Rules. See, also, *Forte* v. *United States,* 302 U. S. 220. That rule gives to the Circuit Court of Appeals full supervision and control of the proceedings on appeal, "including the proceed-

ings relating to the preparation of the record on appeal." The appellate court, in the exercise of its sound discretion, has authority to provide for the correction of any miscarriage of justice in connection with any action of the trial judge relating to the settlement and filing of a bill of exceptions.

As the Circuit Court of Appeals may have proceeded in this case upon the assumption that it had no power to approve the settlement and filing of the bill of exceptions and to pass upon the rulings it disclosed, its judgment will be vacated and the cause will be remanded so that the appellate court may be free to exercise its discretion in that relation.

Judgment vacated.

MR. JUSTICE CARDOZO took no part in the consideration and decision of this case.

BRADY *v.* TERMINAL RAILROAD ASSOCIATION.

CERTIORARI TO THE SUPREME COURT OF MISSOURI.

No. 163. Argued January 4, 5, 1938.—Decided January 31, 1938.

The defendant carrier hauled a string of freight cars over its own line and left them on the receiving track of a connecting carrier, where they then stood temporarily whilst being inspected by an employee of the connecting carrier to determine whether they should be accepted by the latter for further transportation. Due to a defectively attached grab-iron, the employee fell from one of the cars and was injured. Both carriers were engaged in interstate commerce. *Held* that the defendant carrier was liable under the Federal Safety Appliance Act.

1. The defective car was "in use," within the meaning of the statute. P. 13.

2. The responsibility of the defendant carrier, which had brought the car, was not ended, since the other carrier had not accepted it nor assumed control. P. 13.

3. The duty of the defendant carrier under the Act extended to the person injured, although he was not its employee. P. 14.

4. A railroad employee is not denied the protection of the Act because his work is that of inspection for the purpose of discovering defects, including defects in the appliances prescribed. P. 14.

The duty imposed is absolute and the Act expressly excludes the defense of assumption of risk.

340 Mo. 841; 102 S. W. (2d) 903, reversed.

CERTIORARI, 302 U. S. 678, to review the reversal of a judgment recovered by the present petitioner in an action for personal injuries.

Mr. Mark D. Eagleton, with whom *Messrs. Merritt U. Hayden* and *Roberts P. Elam* were on the brief, for petitioner.

Mr. Walter N. Davis, with whom *Messrs. Thomas M. Pierce* and *Joseph L. Howell* were on the brief, for respondent.

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

The Supreme Court of Missouri reversed a judgment which petitioner had recovered under the Federal Safety Appliance Act, 340 Mo. 841; 102 S. W. (2d) 903, and rendered a final judgment in favor of respondent. See *State* v. *Ragland,* 339 Mo. 452, 456, 458; 97 S. W. (2d) 113. In view of the importance of the question in the administration of the federal statute, this Court granted certiorari.

Petitioner was employed by the Wabash Railway Company as a car inspector in its yard at Granite City, Illinois. He was injured in November, 1927, while inspecting a car which was one of a string of cars brought by the respondent, Terminal Railroad Association of St. Louis, from St. Louis to Granite City and placed upon a track of the Wabash known as a "receiving" or "inbound" track. The purpose of the inspection was to determine whether the cars were to be accepted by the Wabash.

Both the Wabash and the Terminal companies were carriers engaged in interstate commerce.

While making his inspection petitioner stood upon one of the side ladders of the car, and, in attempting to pull himself to the top of the car, petitioner took hold of a grabiron which, with the board to which it was attached, became loose, causing him to fall. The board was found to have "become rotten from end to end on the under side, and to some extent on the upper side around the bolts by which the grabiron was attached to it."

Petitioner first sued his employer, the Wabash, under the provisions of the Federal Safety Appliance Act, but a judgment in his favor was reversed upon the ground that the car had not yet been accepted by the Wabash Company which therefore had not hauled or used it, or permitted it to be hauled or used, within the prohibition of the statute. *Brady* v. *Wabash Ry. Co.*, 329 Mo. 1123; 49 S. W. (2d) 24. While that suit was pending, petitioner brought the present suit against respondent.

The federal statute, Act of April 14, 1910, c. 160, § 2, 36 Stat. 298, 45 U. S. C. 11, provides that

"it shall be unlawful for any common carrier subject to the provisions of this Act to haul, or permit to be hauled or used on its line any car subject to the provisions of this Act not equipped with appliances provided for in this Act, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; 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:"

The Act of 1910 supplemented the provisions of the Act of March 2, 1893, c. 196, 27 Stat. 532, 45 U. S. C. 7, which provided in § 8:

"Any employee of any common carrier engaged in interstate commerce by railroad who may be injured by any locomotive, car, or train in use contrary to the provision

of this chapter shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."

See, also, Federal Employers' Liability Act, 35 Stat. 65, c. 149, § 4, 45 U. S. C. 54.

The first question is whether the car can be said to have been in use by the respondent at the time in question. The statute gives no ground for holding that it was the intent of Congress that in a situation such as is here presented neither the Wabash nor the Terminal Association should be subject to the statutory duty. The "use, movement or hauling of the defective car," within the meaning of the statute, had not ended when petitioner sustained his injuries. *Chicago Great Western R. Co.* v. *Schendel,* 267 U. S. 287, 291, 292. The car had been brought into the yard at Granite City and placed on a receiving track temporarily pending the continuance of transportation. If not found to be defective, it would proceed to destination; if found defective, it would be subject to removal for repairs. It is not a case where a defective car has reached a place of repair. See *Baltimore & Ohio R. Co.* v. *Hooven,* 297 Fed. 919, 921, 923; *New York, C. & St. L. R. Co.* v. *Kelly,* 70 F. (2d) 548, 551. The car in this instance had not been withdrawn from use. *Johnson* v. *Southern Pacific Co.,* 196 U. S. 1, 21, 22; *Delk* v. *St. Louis & San Francisco R. Co.,* 220 U. S. 580, 584–586; *Great Northern Railway Co.* v. *Otos,* 239 U. S. 349, 351; *Chicago Great Western R. Co.* v. *Schendel, supra.* The car was still in use, though motionless. *Minneapolis, St. P. & S. S. M. Ry. Co.* v. *Goneau,* 269 U. S. 406. In view of that use, either the Terminal Association or the Wabash was subject to the obligation imposed by the statute.

The question then is whether the responsibility of the Terminal Association, which brought in the car, had ended. We think that question is answered by the un-

disputed fact that it was placed by the Terminal Association on the receiving track to await inspection and acceptance by the Wabash.

The Wabash had not accepted it. The jury, which found for petitioner, were instructed that as a condition of that verdict it was necessary for them to find that petitioner "was required to go upon said car for the purpose of inspecting the equipment thereon and of accepting or rejecting said car on behalf of his employer, the Wabash Railway Company." We cannot agree with the view, expressed in the opinion of the state court in reversing the judgment, that "granted that the cars were still (in the legal sense) in the possession of the Terminal," it might still be held that "the right of control" had passed to the Wabash. As the Wabash had not accepted the car, the Wabash had not assumed control and petitioner was examining the car in order to determine whether the Wabash should assume control.

As the car had not been withdrawn from use and was still in the possession of the Terminal Association, its statutory obligation continued and the question is whether that duty was owing to petitioner. The fact that petitioner was not an employee of the Terminal Association did not necessarily absolve it from duty to him. We have said that "the nature of the duty imposed by the statute and the benefits resulting from its performance" usually determine what persons are entitled to invoke its protection. It was in this view that we held that the power brakes required by the Safety Appliance Act were not only for the safety of railway employees and passengers on trains but also of travelers on the highways at railway crossings. *Fairport R. Co.* v. *Meredith,* 292 U. S. 589, 596, 597. In the instant case, petitioner in the course of his duty would have occasion to go upon the car and use the grabiron, and accordingly the benefit of the statute would extend to him, although

he was not employed by the carrier holding the car in use, unless he was outside the scope of the statute because of the special character of his work. His work was that of inspection to discover defects of the sort here found to exist as well as others.

This final question must be determined in the light of the nature of the obligation resting upon the carrier in relation to the use of a defective car. The statutory liability is not based upon the carrier's negligence. The duty imposed is an absolute one and the carrier is not excused by any showing of care however assiduous. *St. Louis, I. M. & S. Ry. Co.* v. *Taylor,* 210 U. S. 281, 295; *Chicago, B. & Q. Ry. Co.* v. *United States,* 220 U. S. 559, 570; *Louisville & Nashville R. Co.* v. *Layton,* 243 U. S. 617, 620, 621; *Great Northern Ry. Co.* v. *Otos, supra.* The breadth of the statutory requirements is shown by the fact that it embraces all locomotives, cars and similar vehicles used on any railway that is a highway of interstate commerce and is not confined exclusively to vehicles engaged in such commerce. *Southern Ry. Co.* v. *United States,* 222 U. S. 20. Laying down this comprehensive rule as a matter of public policy, Congress has made no exception of those employed in inspecting cars. The statute has been liberally construed "so as to give a right of recovery for every injury the proximate cause of which was a failure to comply with a requirement of the Act." *Swinson* v. *Chicago, St. P., M. & O. Ry. Co.,* 294 U. S. 529, 531. In *Davis* v. *Wolfe,* 263 U. S. 239, 243, reviewing the earlier cases, the Court held that one can recover "if the failure to comply with the requirements of the act is a proximate cause of the accident, resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection." Even where the required equipment is known to have become defective and the car is being hauled to the nearest avail-

able point for repairs, while the Act relieves the carrier in such a case from the prescribed penalties, the carrier still remains subject by the express terms of the statute to civil liability for injuries sustained by "any railroad employee" in the course of such a movement by reason of the defective equipment. Act of April 14, 1910, c. 160, § 4, 36 Stat. 299; 45 U. S. C. 13. See *New York, C. & St. L. R. Co.* v. *Kelly, supra.*

We think that these considerations require the conclusion that one is not to be denied the benefit of the Act because his work was that of inspection for the purpose of discovering defects. As we said in *Louisville & Nashville R. Co.* v. *Layton, supra,* the liability "springs from its being made unlawful to use cars not equipped as required,—not from the position the employee may be in or the work which he may be doing at the moment when he is injured," provided the defective equipment is the proximate cause of the injury.

The fact that petitioner was looking for defects of the sort which caused his injury does not prevent recovery as the statute expressly excludes the defense of assumption of risk. 45 U. S. C. 7, 54.

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

Reversed.

Mr. Justice Cardozo took no part in the consideration and decision of this case.

HENNEFORD ET AL. *v.* NORTHERN PACIFIC RAILWAY CO.

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

No. 243. Argued January 11, 1938.—Decided January 31, 1938.

Upon appeal from a decree of the District Court enjoining the enforcement of a state tax, the amount of which, as alleged in the bill, was less than $3,000, *held:*

1. That the District Court had no jurisdiction notwithstanding other allegations to the effect that failure to pay would entail much greater damage to the plaintiff by way of penalties, seizure and sale of property and damage to business. *Healy* v. *Ratta,* 292 U. S. 263, 268. P. 19.

2. A motion for leave to file an affidavit to supplement the record for the purpose of showing the amount of the tax for succeeding months must be denied. *Id.*

3. The case should be decided upon the record before this Court; the jurisdiction of the District Court should be tested by the case made by the bill; and that court should be directed to dismiss for want of jurisdiction. *Id.*

15 F. Supp. 302, reversed.

Mr. R. G. Sharpe, Assistant Attorney General, with whom *Mr. G. W. Hamilton,* Attorney General, of the State of Washington, was on the brief, for appellants.

Mr. M. L. Countryman, Jr., with whom *Mr. Lorenzo B. daPonte* was on the brief, for appellee.

By leave of Court, *Messrs. Robert Brennan, Leo E. Sievert,* and *Harry H. McElroy* filed a brief on behalf of the Atchison, Topeka & Santa Fe Ry. Co. et al., as *amici curiae,* in support of appellee.

PER CURIAM.

This suit was brought to restrain the enforcement against the Northern Pacific Railway Company of the "compensating tax" imposed by Title IV of Chapter 180

of the Laws of Washington of 1935. The Act levies a tax of 2% for the privilege of using within the State any article of tangible personal property purchased subsequent to April 30, 1935. Cf. *Henneford* v. *Silas Mason Co.*, 300 U. S. 577. The bill alleged that in the necessary maintenance, operation and repair of its railroad, the Company purchases materials, supplies, shop machinery and tools, a part of which are bought in other States and transported into the State of Washington, and that such purchases in other States in May and June, 1935, as shown by the list annexed to the complaint and made a part of it, amounted to $102,204.18, including the cost of transportation. The bill also alleged that the defendants (appellants here) composing the State Tax Commission of the State of Washington had demanded the tax of 2% of this sum and unless enjoined would assess penalties on the tax amounting to $2,044.08, and would cause summary process to be issued for the seizure and sale of the Company's property and that its business would thereby be interfered with to its irreparable damage in the sum of more than $100,000, and that the Company was without an adequate remedy at law. The validity of the tax was assailed under the commerce and due process clauses of the Federal Constitution. An interlocutory injunction was sought and the case was heard in the District Court by three judges. 28 U. S. C. 380. It was stipulated that the case be submitted for final determination on its merits and decree was entered permanently enjoining the enforcement of the tax. 15 F. Supp. 302. The case comes here on appeal.

By its order of October 11, 1937, this Court noted probable jurisdiction and directed the attention of counsel to the questions as to (1) the existence of the required jurisdictional amount and (2) the adequacy of the remedy at law. Appellants concede that in view of the terms of the statute prohibiting any action to recover the tax,

if paid, except as therein provided (Laws of Washington, 1935, c. 180, Title XVIII, § 199) there would be no remedy available at law in the federal court and hence that federal equity jurisdiction would not be ousted. *City Bank Co.* v. *Schnader,* 291 U. S. 24, 29. With respect to the jurisdictional amount, it appears on the face of the complaint that the tax, the enforcement of which is sought to be enjoined, amounted only to $2,044.08 and that the damages alleged would be incurred only by failure to make the required payment. It follows that the requisite jurisdictional amount is not involved. See *Healy* v. *Ratta,* 292 U. S. 263, 268, and cases there cited.

Appellee moves for leave to file an affidavit to supplement the record for the purpose of showing the amount of the tax for succeeding months. The motion is denied. The Court is of the opinion that the case should be decided upon the record before it and that the jurisdiction of the District Court should be tested by the case made by the bill of complaint. The judgment is reversed and the cause is remanded to the District Court with directions to dismiss the bill for want of jurisdiction.

Reversed.

MR. JUSTICE CARDOZO took no part in the consideration and decision of this case.

ATKINSON ET AL. *v.* STATE TAX COMMISSION OF OREGON ET AL.

APPEAL FROM THE SUPREME COURT OF OREGON.

No. 303. Argued January 13, 1938.—Decided January 31, 1938.

Oregon applied its personal income tax law to the net income derived by individuals from their work, within the boundaries of the State, in the construction of the Bonneville Dam on the Columbia River, a navigable stream, under a contract with the United States. The work was performed partly in the bed of the river and partly on other land purchased by the United States. *Held* valid.

1. The tax did not burden the operations of the Federal Government. P. 21.

2. Subject to the paramount authority of the Federal Government to have the work performed for purposes within the federal province, the State retained its title and territorial jurisdiction over the river bed. P. 22.

3. With like restriction, the State retained its territorial jurisdiction over the land purchased, notwithstanding a general law of Oregon consenting to purchase of land by the United States for the erection of "any needful buildings" and purporting to cede exclusive jurisdiction over the same; since the Federal Government need not accept such jurisdiction when tendered and in this instance the facts show that it intended otherwise. P. 23.

4. The tax involved no interference with the carrying out of the federal project. P. 25.

156 Ore. 461; 67 P. (2d) 161, affirmed.

APPEAL from a judgment of the Supreme Court of Oregon sustaining a tax.

Mr. Howard P. Arnest for appellants.

Mr. Carl E. Davidson, Assistant Attorney General, with whom *Mr. I. H. Van Winkel,* Attorney General, of Oregon, was on the brief, for appellees.

By leave of Court, *Attorney General Cummings, Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Arnold Raum* filed a brief on behalf of the United States, as *amicus curiae,* in support of appellees.

PER CURIAM.

This case presents the question of the validity of the personal income tax law of Oregon (Oregon Code 1930, c. XV, Title LXIX, §§ 69–1501 to 69–1538, as amended by Laws of 1933, c. 322 and 387 and by laws of 1933, Second Special Session, c. 31) as applied to the net income of the appellants derived from their work within the exterior limits of the State in the construction of the Bonneville Dam on the Columbia River under a contract with the United States. The contract was made in February, 1934, and the work was completed in that year. The tax was assailed upon the grounds (1) that it burdened the operations of the Federal Government and (2) that the area within which the work was done was within the exclusive jurisdiction of the United States. The Supreme Court of the State sustained the tax, 156 Ore. 461; 62 P. (2d) 13, 67 P. (2d) 161, and the contractors appeal.

With respect to the contention that the state law lays an unconstitutional burden upon the Federal Government, the case is controlled by our previous decisions. *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514; *General Construction Co.* v. *Fisher,* 295 U. S. 715; *James* v. *Dravo Contracting Co.,* 302 U. S. 134; *Silas Mason Co.* v. *Tax Commission,* 302 U. S. 186. In the two cases last mentioned the tax which was upheld was upon the gross income of the contractors. In *Metcalf & Eddy* v. *Mitchell, supra,* and *General Construction Co.* v. *Fisher, supra,* the tax was upon the net income.

As to territorial jurisdiction, it appears that the area within the boundaries of Oregon in which the work was

performed embraced (a) the bed of the Columbia River, where the main structural works are placed, and (b) Bradford island and a portion of the mainland.

The United States did not acquire title to the bed of the river. Upon this point the state court said (pp. 481–482):

"Section 60–1302, Oregon Code 1930 (Laws 1874, p. 10), grants to the governor of Oregon authority and power to convey to the United States title to land belonging to the state and covered by the waters of the United States, not exceeding ten acres in any one tract, as the site of a lighthouse, beacon or other aid to navigation, upon application made to him by a duly authorized agent of the United States, and further grants him authority 'to cede to the said United States jurisdiction over the same,' reserving, however, to the state the right to serve thereon civil or criminal process issuing under authority of the state. No application has been made to the governor of this state or to the legislature for conveyance of any part of the bed of either the north or south channel of the Columbia river within the project, or for cession to the federal government of jurisdiction over the same. . . .

"No authority has been called to our attention to the effect that the state of Oregon has in any way relinquished its sovereignty over the area occupied by the waters of Bradford slough and that part of the north channel of the Columbia river which is within the territorial limits of the state."

The case in this relation falls within the principle of our decision in *James* v. *Dravo Contracting Co., supra.* The question, we there said, was not one of the paramount authority of the Federal Government to have the work performed for purposes within the federal province. The title to the bed of the river was in the State. And, although subject to the dominant right of the Federal

Government, the servient title continued in the State which thus retained its territorial jurisdiction for purposes not inconsistent with the exercise by the Federal Government of its constitutional functions. See, also, *Silas Mason Co.* v. *Tax Commission, supra.*

The remaining question concerns the lands on Bradford island and the mainland which were purchased by the United States. Appellants rely upon the Oregon statute giving consent to the United States to purchase or otherwise acquire any land within the State "for the purpose of erecting thereon any needful public buildings" under authority of any act of Congress, and providing that the United States should have "the right of exclusive jurisdiction over the same," saving the authority of the State for the service of process. Oregon Code, 1930, § 60–1303.

In *Silas Mason Co.* v. *Tax Commission, supra,* we said that as a transfer of exclusive jurisdiction rests upon a grant by the State, it follows, in accordance with familiar principles applicable to grants, that the grant may be accepted or declined. Acceptance may be presumed in the absence of evidence of a contrary intent. But we found no constitutional principle "which compels acceptance by the United States of an exclusive jurisdiction contrary to its own conception of its interests." The mere fact that the Government needs title to property within the boundaries of a State "does not necessitate the assumption by the Government of the burdens incident to an exclusive jurisdiction."

In this instance, the state court took the view that the Federal Government had not accepted and did not intend to exercise exclusive legislative authority over the lands which had been purchased for this project. The court said:

"The mere fact that there may be on the statute books of the state a general law, such as § 60–1303, Oregon Code 1930, consenting to the purchase of land by the

United States and granting to the national government the right to exercise exclusive jurisdiction thereover, does not imply that over all lands purchased by the national government in the state after the enactment of such law the state is divested *ipso facto* of sovereignty, and exclusive control over the acquired area is assumed by the federal government. In the instant case there is nothing to indicate that the federal government desires to exercise exclusive legislative jurisdiction over the land purchased by it within the Bonneville project. It would be somewhat inconsistent to assume that since it does not have such jurisdiction over the major part of the structures which are now being built, the federal government is seeking to exercise exclusive jurisdiction over that part of the works located on lands title to which it has acquired.

"The record discloses that the government officials in charge of the construction work required the contractors to come under the provisions of the workmen's compensation law of the state in which the work was to be performed. At the time the contract with the plaintiffs was entered into at least two states had held that their workmen's compensation laws were not effective on territory over which the federal government had exclusive jurisdiction: *Willis* v. *Oscar Daniels Co.*, 200 Mich. 30 (166 N. W. 496); *Murray* v. *Joe Gerrick & Co.*, 172 Wash. 365 (20 P. (2d) 591). On February 5, 1934, the Supreme Court of the United States affirmed the latter case. See 291 U. S. 315.

"The contract between the plaintiffs and the federal government was dated February 6, 1934. In view of those decisions it is reasonable to assume that the officials in charge of construction of the Bonneville dam on behalf of the federal government understood that the land included in the project was not under the exclusive legislative jurisdiction of the United States. Otherwise they

would not have required contractors to provide state workmen's compensation."

The contract between the Government and appellants is not in evidence but the record discloses, as stated by the state court, that the Government did not seek to exclude the State from all legislative authority, an exclusion which would have followed from an acceptance of a grant of "exclusive jurisdiction" with the sole reservation of the right to serve process. The enforcement and administration of the Oregon compensation law (see Oregon Code 1930, §§ 49–1801 to 49–1845), with which the contractors were required to comply, were incompatible with the existence of exclusive legislative authority in the United States.[1] If, however, exclusive jurisdiction, although offered, was not accepted by the United States, there is no warrant for the conclusion that the State did not retain its territorial jurisdiction over the area in question so far as its exercise involved no interference with the carrying out of the federal project. And as we have decided that there is no such interference through the enforcement of a tax such as is here assailed, we find no ground for overruling the decision of the state court.

The judgment is

Affirmed.

MR. JUSTICE CARDOZO took no part in the consideration and decision of this case.

[1] The purchases of the lands, here involved, were made by the Government, and the contract with the appellants was made and performed, prior to the enactment of the Act of Congress of June 25, 1936, 49 Stat. 1938, and we express no opinion as to the effect of that Act in relation to lands as to which exclusive jurisdiction had previously been granted to and accepted by the United States.

UNITED STATES *v.* ESNAULT-PELTERIE.

CERTIORARI TO THE COURT OF CLAIMS.

No. 231. Argued January 7, 1938.—Decided January 31, 1938.

1. Review by this Court of a judgment of the Court of Claims against the United States in a suit for infringement of a patent, brought under the Act of June 25, 1910, as amended, is limited to questions of law. P. 28.
2. In a patent case in the Court of Claims under the Act of 1910 the questions of validity and infringement are questions of fact. P. 29.
3. The duty of the Court of Claims to find the ultimate facts, requires that it resolve conflicting inferences and draw the necessary factual conclusions from the evidence. *Id.*
4. The Court of Claims made elaborate circumstantial findings preceding its two ultimate findings that the patent sued on was valid and infringed by the United States. Its opinion disclosed that there was contradictory testimony by experts for the claimant and for the United States, but the evidence was not, and could not properly be, incorporated in the record before this Court. *Held* that while this Court could inquire whether the ultimate findings were necessarily overborne by the subordinate ones, thus showing that the judgment against the United States was not sustainable in point of law, it could not take up the patents set forth in the findings and, in the absence of the explanatory and construing testimony of the expert witnesses, attempt to pass upon the various questions involved, and upon such a necessarily limited consideration overrule the conclusions of fact reached by the Court of Claims upon the entire record. P. 30.

84 Ct. Cls. 625, affirmed.

CERTIORARI, 302 U. S. 668, to review a judgment against the United States on a claim of patent infringement. See s. c. 299 U. S. 201.

Mr. Drury W. Cooper, with whom *Solicitor General Reed, Assistant Attorney General Whitaker,* and *Messrs. Alexander Holtzoff* and *Lee A. Jackson* were on the brief, for the United States.

Messrs. George T. Bean and *Eugene V. Myers,* with whom *Messrs. R. Keith Kane* and *Edwin J. Brindle* were on the brief, for respondent.

PER CURIAM.

Respondent brought this suit to recover compensation for the use and manufacture by and for the United States of a device alleged to be covered by respondent's patent No. 1,115,795 for an invention for the control of the equilibrium of airplanes. On the first hearing, the Court of Claims made special findings of fact and decided as a conclusion of law that respondent's patent was valid and had been infringed by the United States and that respondent was entitled to compensation. Judgment was entered accordingly. 81 Ct. Cls. 785. On review by writ of certiorari, this Court held that validity and infringement were ultimate facts to be found by the Court of Claims and, as these facts had not been found, the judgment was vacated and the case was remanded to that court with instructions to find specifically whether respondent's patent was valid and, if so, whether it had been infringed. *United States* v. *Esnault-Pelterie,* 299 U. S. 201.

The parties then moved in the Court of Claims for additional findings and that court amended its special findings by adding the following findings of fact:

"XLVIII. Claims 2, 5, 6, 7, 8, and 9 of the Esnault-Pelterie patent in suit are valid.

"XLIX. The three alleged infringing airplanes of the defendant all possess the single vertical lever movable in every direction for controlling the lateral or longitudinal equilibrium of the airplane, connected to equivalent controlling surfaces having the same functional effects as those disclosed in the patent.

"Claims 2, 5, 6, 7, 8, and 9 of the Esnault-Pelterie patent in suit are infringed by defendant."

The court then entered an interlocutory judgment holding respondent entitled to compensation and directing that the court's previous findings, as amended, together with its opinion as theretofore announced, should stand. 84 Ct. Cls. 625. Certiorari was granted.

Without its consent, the United States may not be sued for infringement of a patent. *Crozier* v. *Krupp,* 224 U. S. 290. The Congress has determined the conditions upon which the United States consents to be sued. By the applicable statute Congress has permitted suit to be brought in the Court of Claims for reasonable compensation for the infringing use or manufacture. Act of June 25, 1910, 36 Stat. 251, as amended by Act of July 1, 1918, 40 Stat. 705. 35 U. S. C. 68. Review by this Court of the judgment in such a suit is thus subject to the rules which have been established for the review of the judgments of the Court of Claims. That review is limited to questions of law.

The Act of March 3, 1863, c. 92, 12 Stat. 765, providing for suits against the United States in the Court of Claims, authorized appeals to this Court under such regulations as this Court should direct. See, also, Act of March 3, 1887, c. 359, § 4, 24 Stat. 505, 506. 28 U. S. C. 761. The rules first adopted provided for the finding of the facts by the Court of Claims and directed that "The facts so found are to be the ultimate facts or propositions which the evidence shall establish, in the nature of a special verdict, and not the evidence on which the ultimate facts are founded." Rule 1, 3 Wall. VII. The present rule, under § 3 (b) of the Act of February 13, 1925, c. 229, 43 Stat. 936, governing review upon certiorari, is to the same effect. Rule 41, par. 3. This established practice was thus described in *Luckenbach S. S. Co.* v. *United States,* 272 U. S. 533, 538, 539:

"This Court uniformly has regarded the legislation and rules as confining the review to questions of law shown by

the record when made up as the rules direct. Bills of exception are not recognized in either the legislation or the rules; nor is there other provision for bringing the evidence into the record or including therein the various rulings involved in applying to the evidence presented the rules which mark the line between what properly may be considered and what must be rejected. As long ago as *Mahan* v. *United States,* 14 Wall. 109, 111, this Court said of the rules that they could not be examined 'without seeing that the purpose was to bring nothing here for review but questions of law, leaving the Court of Claims to exercise the functions of a jury in finding facts, equivalent to a special verdict and with like effect.' " [1]

In a patent case in the Court of Claims under the Act of 1910 the questions of validity and infringement are questions of fact. We have said that, for the purposes of our review in such a case, the findings of the Court of Claims "are to be treated like the verdict of a jury, and we are not at liberty to refer to the evidence, any more than to the opinion, for the purpose of eking out, controlling, or modifying their scope." *Brothers* v. *United States,* 250 U. S. 88, 93; *Stilz* v. *United States,* 269 U. S. 144, 147, 148; *United States* v. *Esnault-Pelterie, supra.* The requirement that the Court of Claims should find the ultimate facts which are controlling places upon that court the duty of resolving conflicting inferences and to draw from the evidence the necessary conclusions of fact. *United States* v. *Adams,* 6 Wall. 101, 112. Even though the finding determines a mixed question of law and fact, the finding is conclusive unless the court is able "to so separate the question as to see clearly what and where the mistake of law is." *Ross* v. *Day,* 232 U. S. 110, 117;

[1] See, also, *United States* v. *Smith,* 94 U. S. 214; *Stone* v. *United States,* 164 U. S. 380, 383; *Collier* v. *United States,* 173 U. S. 79; *Crocker* v. *United States,* 240 U. S. 74; *Niles Bement Pond Co.* v. *United States,* 281 U. S. 357, 360.

United States v. *Omaha Indians,* 253 U. S. 275, 281; *Stilz* v. *United States, supra; United States* v. *Swift & Co.,* 270 U. S. 124, 138.

In the instant case, as pointed out in our previous opinion, there are 47 findings of fact preceding the findings of the ultimate facts, as now made, and by reference there are included 28 exhibits on 266 pages. These references cover a number of patents claimed to be in analogous arts. From these, the Government seeks to establish that the device in question was not patentable over prior disclosures. But this is not a case where the Court of Claims has presented in its findings all the evidence upon which the ultimate facts are based so that it appears on the face of the findings that the judgment is necessarily wrong as matter of law. *United States* v. *Clark,* 96 U. S. 37, 40. Cf. *United States* v. *Berdan Fire-Arms Co.,* 156 U. S. 552, 573; *Stone* v. *United States,* 164 U. S. 380, 383. The opinion of the Court of Claims contains an elaborate review of the patents to which reference is made, and it discloses that there was "considerable contradictory testimony" by the various experts for the plaintiff and the defendant. That testimony is not here, and would not appropriately form part of the record brought to this Court, as it was the duty of the court below, and is not ours, to deal with the conflicts of statement or inferences to which it might give rise. We are not unmindful of the rule that where, with all the evidence before the court, it appears that no substantial dispute of fact is presented, and that the case may be determined by a mere comparison of structures and extrinsic evidence is not needed for purposes of explanation, or evaluation of prior art, or to resolve questions of the application of descriptions to subject-matter, the questions of invention and infringement may be determined as questions of law. *Heald* v. *Rice,* 104 U. S. 737, 749; *Singer Mfg. Co.* v. *Cramer,* 192 U. S. 265, 275; *Sanitary*

Refrigerator Co. v. *Winters,* 280 U. S. 30, 36. But we do not think that rule is applicable where we are unable to examine the testimony which was heard by the court below and we cannot say that it was of no importance or determine its value in the light of the disputes revealed. We should not be justified in taking up the patents set forth in the findings and, in the absence of the explanatory and construing testimony of the expert witnesses with respect to the pertinent fact situations, in attempting to pass upon the various questions, whether of a scientific nature or otherwise, that are involved and upon such a necessarily limited consideration in overruling the conclusions of fact reached by the Court of Claims upon the entire record. Cf. *Bischoff* v. *Wethered,* 9 Wall. 812, 815, 816; *Royer* v. *Schultz Belting Co.,* 135 U. S. 319, 325; *St. Paul Plow Works* v. *Starling,* 140 U. S. 184, 196, 197; *Coupe v. Royer,* 155 U. S. 565, 577–580.

We may, of course, inquire whether the subordinate or circumstantial findings made by the court below necessarily override its ultimate findings of fact and show that the judgment in point of law is not sustainable. But we have no such case here. Nor is the case like that of a review by a Circuit Court of Appeals of decisions of boards, such as the Board of Tax Appeals, where the evidence is before the appellate court and the question is whether there was substantial evidence before the Board to support the findings made. Cf. *Phillips* v. *Commissioner,* 283 U. S. 589, 600; *Helvering* v. *Rankin,* 295 U. S. 123, 131; *Helvering* v. *Tex-Penn Co.,* 300 U. S. 481, 491. We must take the findings of fact as made below. If, in the instant case, the subordinate findings had required a decree in favor of the Government the case would not have been remanded. *United States* v. *Esnault-Pelterie, supra,* p. 206; *Botany Mills* v. *United States,* 278 U. S. 282, 290; *United States* v. *Wells,* 283 U. S. 102, 120. And it cannot be said that the ultimate findings, now made, as

to validity and infringement are necessarily overborne by the subordinate findings.

The argument that the Government is precluded from obtaining the sort of review which is permissible in this Court, when there is a conflict between circuit courts of appeals as to validity and infringement of patents, and the questions are submitted upon the evidence taken in the District Court, is unavailing, for the result is due to the procedure which has been established by the Congress for the determination of claims against the United States.

The judgment is

Affirmed.

MR. JUSTICE BLACK is of the opinion that the findings do not show infringement of any valid patent; or that Appellee invented either a vertical lever or a universal joint or the combined use of a vertical lever and a universal joint to control air planes or machinery; he believes the findings show that such means of control were in general use long before Appellee—five years after his original application for a patent—filed an amendment asserting this claim. For these reasons he believes the judgment should be reversed.

MR. JUSTICE CARDOZO took no part in the consideration and decision of this case.

LONERGAN *v.* UNITED STATES.

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

No. 121. Argued January 10, 1938.—Decided January 31, 1938.

An appellant to the Circuit Court of Appeals has a right to rely upon the rules of that court, properly construed, which govern his assignments of error, and can not be prejudiced by additions to the requirements made by amendment of the rules between the appeal and the decision of the case. P. 35.

Rule 11 of the Circuit Court of Appeals for the Ninth Circuit, before its recent amendment, provided: "When the error alleged is to the admission or the rejection of evidence the assignment of errors shall quote the full substance of the evidence admitted or rejected." *Held* that it was satisfied by some, if not all, of 28 assignments which that court rejected in this case.

88 F. (2d) 591, reversed.

CERTIORARI, 302 U. S. 663, to review affirmance of a conviction in a criminal case.

Mr. Pierce Lonergan, pro se.

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

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

In the District Court, Western District of Washington, the petitioner was convicted of violating § 215 Criminal Code; 18 U. S. C. 338, by using the mails for fraudulent purposes. He appealed to the Circuit Court of Appeals, Ninth Circuit, and filed—August 14, 1936—forty assignments of error. The judgment of conviction was affirmed March 6, 1937, upon an opinion, 88 F. (2d) 591, which, among other things, states—

"Twenty-eight assignments (numbered 5, 9 to 25, inclusive, and 31 to 40, inclusive) are to the admission of and refusal to strike out evidence. The assignments do not indicate that any of this evidence was objected to in the trial court. They do not state what objections, if any, were made, nor the grounds thereof, nor the grounds, if any, on which appellant moved to strike out the evidence. Such assignments do not conform to our Rule 11 and will not be considered. Cody *v.* United States (C. C. A. 9), 73 F. (2d) 180, 184; Goldstein *v.* United States (C. C. A. 9), 73 F. (2d) 804, 806."

This ruling we think was error. Through wrongful interpretation and application of the rule petitioner was denied a proper hearing.

At the date of the appeal the pertinent portion of Rule 11 read as follows—"When the error alleged is to the admission or the rejection of evidence the assignment of errors shall quote the full substance of the evidence admitted or rejected."

Concerning this provision, the opinion in *Goldstein* v. *United States,* (1934) 73 F. (2d) 804, 806, declared—"The assignment of error must not only quote 'the full substance of the evidence admitted or rejected,' but it must also state the error asserted and intended to be urged. This requires that the objection and ruling of the court upon the objection and the exception to the ruling be incorporated in the assignment of error." Adhering to this interpretation, the court persistently refused to consider assignments deemed not in conformity therewith.

Between the appeal and announcement of the opinion under consideration, Rule 11 was amended so as to provide—"When the error alleged is to the admission or rejection of evidence the assignment of error shall quote *the ground urged at the trial for the objection and the exception taken and* the full substance of the evidence admitted or rejected."

Manifestly petitioner had the right to rely upon the rule, properly construed, as it stood at the time of his appeal—before the amendment. And if analysis of one of the rejected assignments discloses substantial compliance, the cause must go back for further consideration of the record.

Litigants may not be deprived of a hearing upon their points by wrongful construction of rules nor by their arbitrary application. An unwarranted construction has been given to the language of Rule 11; properly interpreted, it did not require petitioner to do all the things specified by the amendment.

The substance of Assignment No. XVI follows—

"The court erred in admitting in evidence, and denying defendant's motion to strike, to which exceptions were taken and allowed, plaintiff's Exhibit No. 75, being a letter on the letterhead of Battle, Hulbert, Helsell & Bettens, as follows:" [This letter—a long one—dated August 17, 1934, addressed to petitioner and signed Battle, Hulbert, Helsell & Bettens, by Joseph E. Gandy, is set out in full. It states, among other things, that certain "allegations and persuasions" made by the petitioner to one Atwood "were obviously fraudulently made" and that one "Atwood was defrauded by the misrepresentations," etc.]

"The testimony in support of its admission given by witnesses A. M. Atwood and Joseph Gandy, is substantially as follows." [Here follows a resume of the testimony given by these witnesses.]

"The reasons such Exhibit should not have been admitted, and that it should have been stricken, are as follows:

"1. It was hearsay evidence, contained conclusions of third parties, and happened subsequent to the termination of the alleged plan.

"2. It was a self serving statement of a third party making the statements therein contained.

"3. It was highly incompetent, irrelevant and immaterial, and in its nature highly prejudicial to the defendant. Its admission was not necessary to clarify 76-A and it was not related to 76-B."

We think this assignment adequately met the applicable requirements of Rule 11. Clearly, it quoted the full substance of the evidence admitted and was definite enough to enable both court and opposing counsel readily to perceive the point intended to be relied on. *Seaboard Air Line Ry. Co.* v. *Watson,* 287 U. S. 86, 91.

Other assignments also seem sufficiently definite and formal to demand consideration. We do not pass upon the merits of any assignment and decide only that some, if not all, of them were improperly rejected.

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

Reversed.

MR. JUSTICE CARDOZO took no part in the consideration and decision of this case.

MUNRO *v.* UNITED STATES.

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

No. 218. Argued January 6, 7, 1938.—Decided January 31, 1938.

1. A suit in the District Court to recover on a War Risk insurance policy, the procedure in which is the same as that provided in §§ 5 and 6 of the Tucker Act, was not brought in time to toll the statute of limitations where the complaint was not filed with the clerk of the court before the period of limitations expired. P. 39.

   To commence the suit in accordance with §§ 5 and 6 of the Tucker Act, it was not enough to serve a copy of the summons upon the District Attorney and mail another to the Attorney General.

2. Suits against the United States can be maintained only by permission, in the manner prescribed and subject to the restrictions imposed. The Conformity Act can not be relied upon to change any of these. P. 41.
3. A District Attorney has no power to waive conditions or limitations imposed by statute in respect of suits against the United States. *Id.*

89 F. (2d) 614, affirmed.

CERTIORARI, 302 U. S. 668, to review the reversal of a judgment against the United States in a suit on a War Risk Insurance claim.

Messrs. Alger A. Williams and *Charles H. Kendall,* with whom *Mr. George Clinton, Jr.,* was on the brief, for petitioner.

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

By leave of Court, *Messrs. Charles B. Rugg, H. Brian Holland,* and *Warren F. Farr* filed a brief on behalf of the Bates Manufacturing Co., as *amicus curiae,* in support of petitioner.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Certiorari was granted because of conflicting views in the lower courts.

Claiming to be permanently and totally disabled, petitioner instituted an action in the United States District Court, Western District of New York, to recover under a War Risk Insurance Policy. He was honorably discharged in 1919.

Before the cause came on for trial respondent moved for dismissal because the action was not brought within

the time prescribed by § 19, World War Veterans Act 1924, as amended by Act July 3, 1930, 46 Stat. 992, copied in the margin.[1] This motion was overruled. Whether properly so, is the matter for our consideration.

[1] Act of July 3, 1930, c. 849, 46 Stat. 992.

"Sec. 19. In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the bureau and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the Supreme Court of the District of Columbia or in the district court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies. The procedure in such suits shall be the same as that provided in sections 5 and 6 of the Act entitled 'An Act to provide for the bringing of suits against the Government of the United States,' approved March 3, 1887, and section 10 thereof so far as applicable. . . .

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

Tucker Act, March 3, 1887, c. 359, 24 Stat. 506.

Sec. 5; U. S. C., Title 28, § 762.

"*Petition in suit against United States.* The plaintiff in any suit brought under the provisions of section 41, paragraph 20, of this title shall file a petition, duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered

By concession it was necessary to bring suit not later than July 1, 1933.

March 16, 1933, a praecipe for issuance of summons was filed with the Clerk of the District Court; on the same day copy of the summons was served upon the United States Attorney in Buffalo and another mailed to the Attorney General at Washington; no copy of the complaint was served upon the United States Attorney until July 26, 1933; the original complaint was not filed with the Clerk until April 23, 1936.

February 15, 1934, the United States Attorney filed an answer without questioning the timeliness of the suit; a year later he moved to dismiss. The cause was heard in April, 1936; judgment went for the assured July 29, 1936.

In following the above described procedure petitioner's counsel acted upon information given by the Assistant United States Attorney, who declared that service of summons would suffice to give jurisdiction and toll the statute; that complaint might be served thereafter.

Two points are presented. Did procuring the summons, serving one copy on the United States Attorney and sending another to the Attorney General begin the

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and praying the court for a judgment or decree upon the facts and law."

Sec. 6; U. S. C., Title 28, § 763.

"*Service; appearance by district attorney.* The plaintiff shall cause a copy of his petition filed under section 762 of this title, to be served upon the district attorney of the United States in the district wherein suit is brought, and shall mail a copy of the same, by registered letter, to the Attorney General of the United States, and shall thereupon cause to be filed with the clerk of the court wherein suit is instituted an affidavit of such service and the mailing of such letter. It shall be the duty of the district attorney upon whom service of petition is made as aforesaid to appear and defend the interests of the Government in the suit, and within sixty days after the service of petition upon him, unless the time should be extended by order of the court made in the case to file a plea, answer, or demurrer on the part of the Government, . . ."

suit within the requirement of the statute? If not, do the circumstances establish waiver of the defense that suit was out of time.

Section 19, Act of 1924, permits an action on a War Risk policy to be brought in the United States District Court for the district in which the claimant resides. Also directs, "The procedure in such suits shall be the same as that provided in Sections 5 and 6" (§§ 762 and 763, Title 28, U. S. C.) of the Tucker Act of March 3, 1887, "and Section 10 thereof [§ 765, Title 28, U. S. C.] insofar as applicable." Sec. 5 of the Tucker Act provides that the plaintiff "shall file a petition" with the Clerk of the court, containing a succinct statement of the facts upon which the claim is based; Sec. 6 that he shall cause one copy of this to be served upon the District Attorney and mail another to the Attorney General. These requirements were not complied with prior to July 1, 1933.

The Circuit Court of Appeals held the suit was not brought in time to toll the statute, and with this conclusion we agree. The opinion there adequately refers to the sundry opinions which have considered the subject, discloses the claims of the parties and reasons for the judgment.

Affirmation here, upon authority of *United States* v. *Larkin,* 208 U. S. 333, of the District Court's judgment in *United States* v. *Mill Creek, etc.,* and two similar causes (Nos. 103, 104, 105, Oct. Term 1919), 251 U. S. 539, cannot properly be regarded as authority for a view contrary to the one we now approve. Those causes came up under a statute which permitted direct appeals from District Courts solely upon questions of jurisdiction. We determined only that the District Court had power to hear and rule upon the questions presented to it—among them whether the suits were brought in time. The merits of the controversy—whether in reality the suits were in time—we did not consider. Examination of the opin-

ion in Larkin's case and the statute then in force will make this clear enough.

Suits against the United States can be maintained only by permission, in the manner prescribed and subject to the restrictions imposed. *Reid* v. *United States,* 211 U. S. 529, 538. The Conformity Act cannot be relied upon to change any of these.

The District Attorney had no power to waive conditions or limitations imposed by statute in respect of suits against the United States. *Finn* v. *United States,* 123 U. S. 227, 233. Judgment against them is not permissible if first sought after expiration of the time allowed.

Affirmed.

MR. JUSTICE CARDOZO took no part in the consideration and decision of this case.

MYERS ET AL. *v.* BETHLEHEM SHIPBUILDING CORP.*

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

No. 181. Argued January 5, 1938.—Decided January 31, 1938.

1. The National Labor Relations Board, upon a charge made to it, issued a complaint against a corporation engaged, at the plant involved, in the building and sale of ships, boats and marine equipment. The complaint alleged that the corporation dominated and interfered, in a manner described, with a labor organization of its employees, and was thus engaged in unfair labor practices affecting commerce within the meaning of the National Labor Relations Act of July 5, 1935. The corporation was given notice of a hearing to be had upon the complaint. *Held:*

(1) That the District Court had no jurisdiction of a suit by the corporation to enjoin the Board from holding the hearing. P. 47.

*Together with No. 182, *Myers et al.* v. *MacKenzie et al.,* also on writ of certiorari to the Circuit Court of Appeals for the First Circuit.

The bill alleged that the business of the company at the plant affected, and the sale of its products, were not in interstate or foreign commerce; that the holding of the hearings would be futile and would irreparably damage the company, by expense and inconvenience, impairment of the good will and harmonious relations existing between it and its employees, and lowered efficiency of its operations.

(2) That the District Court had no jurisdiction of a suit by employees of the corporation who were officers of a labor organization at the plant, to enjoin the Board from holding the hearing,—the bill in this case alleging further that the employees are satisfied with their existing contracts of employment and desire to retain the existing plan of representation without change; that the holding of the proposed hearing will discredit the plan and destroy its usefulness to the employees; that they will be deprived of their right to negotiate by the method of their choice, the value of which has been proved by years of operation; that alteration of the plan will cause dissatisfaction among the employees; that operation of plant will be disrupted by labor disturbances; that employment will be interrupted; and that the damage to the employees will be irreparable. P. 53.

2. In the National Labor Relations Act, Congress provided for appropriate procedure before the Labor Board and an adequate opportunity, through review by the Circuit Court of Appeals, to secure judicial protection against possible illegal action by the Board; and the grant to the Board and the Circuit Court of Appeals of exclusive jurisdiction "to prevent any person from engaging in any unfair labor practice affecting commerce" is constitutional. P. 48.
3. The conclusion that the District Court is without jurisdiction to enjoin the holding of a hearing by the Labor Board, even though it be claimed that interstate or foreign commerce is not involved and that the holding of a hearing would cause irreparable injury, does not deny any rights guaranteed by the Federal Constitution. P. 50.
4. The rule requiring exhaustion of the administrative remedy can not be circumvented by a claim that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage. P. 51.
5. The general rule that the decree of a District Court granting or denying a preliminary injunction will not be disturbed on appeal,

has no application where there is an insuperable objection in point of jurisdiction to the maintenance of the suit and where it clearly appears that the decree was the result of an improvident exercise of judicial power. In such case, dismissal of the bill should be directed. P. 52.

88 F. (2d) 154; 89 *id.* 1000, reversed.

CERTIORARI, 302 U. S. 667, to review decrees affirming decrees of the District Court in two cases, 15 F. Supp. 915, heard together below. The decrees granted preliminary injunctions restraining the holding of a hearing by the National Labor Relations Board.

Mr. Robert B. Watts, with whom *Solicitor General Reed,* and *Messrs. Robert L. Stern, Charles Fahy,* and *Philip Levy* were on the brief, for petitioners.

Mr. Claude R. Branch, with whom *Messrs. Frederick H. Wood, John L. Hall,* and *E. Fontaine Broun* were on the brief, for respondent in No. 181.

Mr. B. A. Brickley, with whom *Messrs. Alexander G. Gould* and *Oliver R. Waite* were on the brief, for respondents in No. 182.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The question for decision is whether a federal district court has equity jurisdiction to enjoin the National Labor Relations Board from holding a hearing upon a complaint filed by it against an employer alleged to be engaged in unfair labor practices prohibited by National Labor Relations Act, July 5, 1935, c. 372, 49 Stat. 449. The Circuit Court of Appeals for the First Circuit held in these cases that the District Court possesses such jurisdiction; and granted preliminary injunctions. Every other Circuit Court of Appeals in which the question has arisen has

held the contrary.[1] Because of the importance of the questions presented, the conflict in the lower courts and alleged conflict with our own decisions, we granted these writs of certiorari.

The declared purpose of the National Labor Relations Act is to diminish the causes of labor disputes burdening and obstructing interstate and foreign commerce; and its provisions are applicable only to such commerce. In order to protect it the Act seeks to promote collective bargaining; confers upon employees engaged in such commerce the right to form, and join in, labor organizations; defines acts of an employer which shall be deemed unfair labor practice; and confers upon the Board certain limited powers with a view to preventing such practices. If a charge is made to the Board that a person "has engaged in or is engaging in any . . . unfair labor practice," and it appears that a proceeding in respect thereto should be instituted, a complaint stating the charge is to be filed, and a hearing is to be held thereon upon notice to the person complained of.

The Industrial Union of Marine and Shipbuilding Workers of America, Local No. 5, made to the Board a charge that the Bethlehem Shipbuilding Corporation, Ltd.,[2] was engaging in unfair labor practices at its plant in Quincy, Massachusetts, for the production, sale and

[1] *E. I. Dupont de Nemours & Co.* v *Boland,* 85 F. (2d) 12 (C. C. A. 2); *Newport News Shipbuilding & Dry Dock Co.* v. *Schauffler,* 91 F. (2d) 730 (C. C. A. 4); *Bradley Lumber Co.* v. *National Labor Relations Board,* 84 F. (2d) 97 (C. C. A. 5); *Clark* v. *Lindemann & Hoverson Co.,* 88 F. (2d) 59 (C. C. A. 7); *Pratt* v. *Oberman & Co.,* 89 F. (2d) 786 (C. C. A. 8); *Heller Bros. Co.* v. *Lind,* 66 App. D. C. 306; 86 F. (2d) 862; cf. *Bowen* v. *James Vernor Co.,* 89 F. (2d) 968 (C C. A. 6); *Carlisle Lumber Co.* v. *Hope,* 83 F. (2d) 92 (C. C. A. 9); *Lyons* v. *Eagle-Picher Lead Co.,* 90 F. (2d) 321 (C. C. A. 10).

[2] A Delaware corporation, with its principal place of business at Bethlehem, Pennsylvania.

distribution of boats, ships, and marine equipment. Upon that charge the Board filed, on April 13, 1936, a complaint which alleged, among other things, that the company dominates and interferes in the manner described "with a labor organization known as Plan of Representation of Employees in Plants of the Bethlehem Shipbuilding Corporation, Ltd."; that such action leads to strikes interfering with interstate commerce; and that "the aforesaid acts of respondent constitute unfair labor practices affecting commerce, within the meaning of Section 8, subdivisions (1) and (2) and Section 2, subdivisions (6) and (7) of said [National Labor Relations] Act."

The complaint alleged, specifically:

"The respondent in the course and conduct of its business causes and has continuously caused large quantities of the raw materials used in the production of its boats, ships and marine equipment to be purchased and transported in interstate commerce from and through states of the United States other than the State of Massachusetts to the Fore River Plant in the State of Massachusetts, and causes and has continuously caused the boats, ships and marine equipment produced by it to be sold and transported in interstate commerce from the Fore River Plant in the State of Massachusetts to, into and through states of the United States other than the State of Massachusetts, all of the aforesaid constituting a continuous flow of trade, traffic and commerce among the several states."

The Board duly notified the Corporation that a hearing on the complaint would be held on April 27, 1936, at Boston, Massachusetts, in accordance with Rules and Regulations of the Board, a copy of which was annexed to the notice; and that the Corporation "will have the right to appear, in person or otherwise, and give testimony."

On that day the Corporation filed, in the federal court for Massachusetts, the bill in equity, herein numbered 181, against A. Howard Myers, Acting Regional Director for the First Region, National Labor Relations Board, Edmund J. Blake, its Regional Attorney for the First Region, and Daniel M. Lyons, Trial Examiner, to enjoin them from holding "a hearing for the purpose of determining whether or not the plaintiff has engaged at its Fore River Plant in any so-called unfair labor practices under the National Labor Relations Act, and from having any proceedings or taking any action whatsoever, at any time or times, with respect thereto." There were prayers for a restraining order, an interlocutory injunction and a permanent injunction; and, also, a prayer that the court declare that the National Labor Relations Act and "defendants' actions and proposed actions thereunder" violate the Federal Constitution.

On May 4, 1936, another bill in equity, herein numbered 182, against the same defendants, seeking, on largely the same allegations of fact, substantially the same relief, was brought in the same court by Charles MacKenzie, James E. Manning and Thomas E. Barker, employees of the Bethlehem Corporation and officers of the so-called Plan of Representation at the Fore River Plant.[3]

Upon the filing of each bill, the District Court issued a restraining order and an order of notice to show cause why a preliminary injunction should not issue. In each case the defendants filed a motion to dismiss the bill of complaint and also a return to the order to show cause. The cases were heard together. In each, the District Court issued the preliminary injunction; and the decrees therefor are still in effect. They were affirmed by the Circuit Court of Appeals for the First Circuit on Febru-

[3] A substituted bill of complaint was filed May 7, 1936.

ary 12, 1937. 88 F. (2d) 154. Petitions for a rehearing, based upon the conflict with the decisions of other circuit courts of appeals were denied. And the court denied also motions for leave to file a second petition for rehearing, based upon the decisions of this Court in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, and other cases rendered April 12, 1937. 89 F. (2d) 1000. The District Court denied the motions to dismiss the bills. 15 F. Supp. 915. But the review by the Circuit Court of Appeals dealt only with the decrees for a preliminary injunction.

The two cases present, in the main, the same questions. In discussing them reference will be made, in the first instance, only to the suit brought by the Corporation.

We are of opinion that the District Court was without power to enjoin the Board from holding the hearings.

First. There is no claim by the Corporation that the statutory provisions and the rules of procedure prescribed for such hearings are illegal; or that the Corporation was not accorded ample opportunity to answer the complaint of the Board; or that opportunity to introduce evidence on the allegations made will be denied. The claim is that the provisions of the Act are not applicable to the Corporation's business at the Fore River Plant, because the operations conducted there are not carried on, and the products manufactured are not sold, in interstate or foreign commerce; that, therefore, the Corporation's relations with its employees at the plant cannot burden or interfere with such commerce; that hearings would, at best, be futile; and that the holding of them would result in irreparable damage to the Corporation, not only by reason of their direct cost and the loss of time of its officials and employees, but also because the hearings would cause serious impairment of the good will and harmonious relations existing between the Corporation

and its employees, and thus seriously impair the efficiency of its operations.[4]

Second. The District Court is without jurisdiction to enjoin hearings because the power "to prevent any person from engaging in any unfair practice affecting commerce," has been vested by Congress in the Board and the Circuit Court of Appeals, and Congress has declared: "This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise." [5] The grant of that exclusive power is constitutional, because the Act provided for appropriate procedure before the Board and in the review by the Circuit Court of Appeals an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board. No power to enforce an order is conferred upon the Board. To secure enforcement, the Board must apply to a Circuit Court of Appeals for its affirmance. And until the Board's order has been affirmed by the appropriate Circuit Court of Appeals, no penalty accrues for disobeying it. The independent right to apply to a Circuit Court of Appeals to have an order set aside

[4] It is alleged that in 1934 and 1935 the predecessor of the present National Labor Relations Board instituted somewhat similar action against the Corporation. Although the proceedings were eventually dismissed, the hearings consumed a total of some 2500 hours of working time of officials and employees and cost the Corporation more than $15,000, none of which could be recovered.

[5] Compare House Committee Report, H. R. Rep. 1147, 74th Cong., 1st Sess., p. 24: "any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may claim a review of such order in the appropriate circuit court of appeals, or in the Court of Appeals of the District of Columbia. It is intended here to give the party aggrieved a full, expeditious, and exclusive method of review in one proceeding after a final order is made. Until such final order is made the party is not injured, and cannot be heard to complain, as has been held in cases under the Federal Trade Commission Act."

is conferred upon any party aggrieved by the proceeding before the Board. The Board is even without power to enforce obedience to its subpoena to testify or to produce written evidence. To enforce obedience it must apply to a District Court; and to such an application appropriate defence may be made.[6]

As was said in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 46, 47, the procedural provisions,

"do not offend against the constitutional requirements governing the creation and action of administrative bodies. See Interstate Commerce Commission *v.* Louisville & Nashville R. Co., 227 U. S. 88, 91. The Act establishes standards to which the Board must conform. There must be complaint, notice and hearing. The Board must receive evidence and make findings. The findings as to the facts are to be conclusive, but only if supported by evidence. The order of the Board is subject to review by the designated court, and only when sustained by the court may the order be enforced. Upon that review all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority, are open to examination by the court. We construe the procedural provisions as affording adequate opportunity to secure judicial protection against arbitrary action in accordance with the well-settled rules applicable to administrative agencies set up by Congress to aid in the enforcement of valid legislation."

It is true that the Board has jurisdiction only if the complaint concerns interstate or foreign commerce. Unless the Board finds that it does, the complaint must be dismissed. And if it finds that interstate or foreign commerce

[6] See § 11 of the Act and Article II, §§ 20 and 21, of the Rules and Regulations issued April 27, 1936. Cf. *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U. S. 160; *E. I. Dupont de Nemours & Co.* v. *Boland*, 85 F. (2d) 12 (C C. A. 2).

is involved, but the Circuit Court of Appeals concludes that such finding was without adequate evidence to support it, or otherwise contrary to law, the Board's petition to enforce it will be dismissed, or the employer's petition to have it set aside will be granted.[7] Since the procedure before the Board is appropriate and the judicial review so provided is adequate, Congress had power to vest exclusive jurisdiction in the Board and the Circuit Court of Appeals. *Anniston Manufacturing Co.* v. *Davis,* 301 U. S. 337, 343–346.

Third. The Corporation contends that, since it denies that interstate or foreign commerce is involved and claims that a hearing would subject it to irreparable damage, rights guaranteed by the Federal Constitution will be denied unless it be held that the District Court has jurisdiction to enjoin the holding of a hearing by the Board.[8] So to hold would, as the Government insists, in effect substitute the District Court for the Board as the tribunal to hear and determine what Congress declared the Board exclusively should hear and determine in the first instance. The contention is at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the pre-

[7] Section 10 (f) of the Act provides: "Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive."

[8] In support of that contention the following cases were cited: *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287, 289; *Bluefield Co.* v. *Public Service Comm'n,* 262 U. S. 679, 683; *Phillips* v. *Commissioner,* 283 U. S. 589, 600; *Crowell* v. *Benson,* 285 U. S. 22, 60, 64; *State Corporation Comm'n* v. *Wichita Gas Co.,* 290 U. S. 561, 569; *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 51–52.

scribed administrative remedy has been exhausted.[9] That rule has been repeatedly acted on in cases where, as here, the contention is made that the administrative body lacked power over the subject matter.[10]

Obviously, the rule requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage.[11] Lawsuits also often prove to have been ground-

[9] The rule has been most frequently applied in equity where relief by injunction was sought. *Pittsburgh &c. Ry.* v. *Board of Public Works,* 172 U. S. 32, 44–45; *Prentis* v. *Atlantic Coast Line Co.,* 211 U. S. 210, 230; *Dalton Adding Machine Co.* v. *State Corporation Comm'n,* 236 U. S. 699, 701; *Gorham Mfg. Co.* v. *State Tax Comm'n,* 266 U. S. 265, 269–70; *Federal Trade Comm'n* v. *Claire Furnace Co.,* 274 U. S. 160, 174; *Lawrence* v. *St. Louis-San Francisco Ry. Co.,* 274 U. S. 588, 592–93; *Chicago, M., St. P. & P. R. Co.* v. *Risty,* 276 U. S. 567, 575; *St. Louis-San Francisco Ry. Co.* v. *Alabama Public Service Comm'n,* 279 U. S. 560, 563; *Porter* v. *Investors Syndicate,* 286 U. S. 461, 468, 471; *United States* v. *Illinois Central Ry. Co.,* 291 U. S. 457, 463–64; *Hegeman Farms Corp.* v. *Baldwin,* 293 U. S. 163, 172; cf. *Red "C" Oil Mfg. Co.* v. *Board of Agriculture,* 222 U. S. 380, 394; *Farncomb* v. *Denver,* 252 U. S. 7, 12; *Milheim* v. *Moffat Tunnel District,* 262 U. S. 710, 723; *McGregor* v. *Hogan,* 263 U. S. 234, 238; *White* v. *Johnson,* 282 U. S. 367, 374; *Petersen Baking Co.* v. *Bryan,* 290 U. S. 570, 575; *Pacific Tel. & Tel. Co.* v. *Seattle,* 291 U. S. 300, 304. But because the rule is one of judicial administration—not merely a rule governing the exercise of discretion—it is applicable to proceedings at law as well as suits in equity. Cf. *First National Bank* v. *Board of County Comm'rs,* 264 U. S. 450, 455; *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337, 343.

[10] *Dalton Adding Machine Co.* v. *State Corporation Comm'n,* 236 U. S. 699; *Federal Trade Comm'n* v. *Claire Furnace Co.,* 274 U. S. 160; *Lawrence* v. *St. Louis-San Francisco Ry. Co.,* 274 U. S. 588; *St. Louis-San Francisco Ry. Co.* v. *Alabama Public Service Comm'n,* 279 U. S. 560; cf. *Western & Atlantic R. Co.* v. *Georgia Public Service Comm'n,* 267 U. S. 493, 496, and cases cited in note 1, *supra.*

[11] Such contentions were specifically rejected in *Bradley Lumber Co.* v. *National Labor Relations Board,* 84 F. (2d) 97 (C. C. A. 5);

less; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact.

Fourth. The Circuit Court of Appeals should have reversed the decrees for a preliminary injunction. It is true that ordinarily the decree of a District Court granting or denying a preliminary injunction will not be disturbed on appeal. But that rule of practice has no application where, as here, there was an insuperable objection to the maintenance of the suit in point of jurisdiction and where it clearly appears that the decree was the result of an improvident exercise of judicial discretion.[12] Since the constitutionality of the Act has been determined by our decision in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, and

Clark v. *Lindemann & Hoverson Co.*, 88 F. (2d) 59 (C. C. A. 7); *Chamber of Commerce* v. *Federal Trade Comm'n*, 52 App. D. C. 40; 280 Fed. 45 (C. C. A. 8); *Heller Bros. Co.* v. *Lind*, 66 App. D. C. 306; 86 F. (2d) 862; and *Pittsburgh & W. Va. Ry. Co.* v. *Interstate Commerce Comm'n*, 280 Fed. 1014 (App. D. C.). Cf. *United States* v. *Los Angeles & S. L. R. Co.*, 273 U. S. 299, 314; *Lawrence* v. *St. Louis-San Francisco Ry. Co.*, 274 U. S. 588; *Dalton Adding Machine Co.* v. *State Corporation Comm'n*, 236 U. S. 699; *McChord* v. *Louisville & Nashville Ry. Co.*, 183 U. S. 483; *Richmond Hosiery Mills* v. *Camp*, 74 F. (2d) 200, 201 (C. C. A. 5).

The cases cited by the Corporation are not opposed. *Watson* v. *Sutherland*, 5 Wall. 74; *Pierce* v. *Society of Sisters*, 268 U. S. 510; *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1; *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U. S. 65, 82; *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, 248; *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 592, 593; *City Bank Farmers Trust Co.* v. *Schnader*, 291 U. S. 24; *Truax* v. *Raich*, 239 U. S. 33; *Terrace* v. *Thompson*, 263 U. S. 197, 215–16.

[12] *Meccano Ltd.* v. *John Wanamaker*, 253 U. S. 136, 141; *Lawrence* v. *St. Louis-San Francisco Ry. Co.*, 274 U. S. 588 (*semble*); cf. *Prendergast* v. *New York Telephone Co.*, 262 U. S. 43, 50–51; *National Fire Insurance Co.* v. *Thompson*, 281 U. S. 331, 338; *Alabama* v. *United States*, 279 U. S. 229, 231; *Rogers* v. *Hill*, 289 U. S. 582, 587.

the defect in the bill is incapable of remedy by amendment, its dismissal should be directed.[13]

Fifth. In No. 182, also, the Circuit Court of Appeals should have reversed the decree for a preliminary injunction and directed dismissal of the bill. The plaintiffs, officers of the so-called Plan of Representation of Employees, alleged, in addition to the facts already stated, that the employees are satisfied with their existing contracts of employment and desire to retain the existing Plan without change; that the holding of the proposed hearing will discredit the Plan and destroy its usefulness to the employees; that they will be deprived of their right to negotiate by the method of their choice, the value of which has been proved by years of operation; that alteration of the Plan will cause dissatisfaction among the employees; that operation of plant will be disrupted by labor disturbances; that employment will be interrupted; and that the damage to the employees will be irreparable. These additional allegations furnish no reason why the Board should be prevented from exercising the exclusive initial jurisdiction conferred upon it by Congress.

Decrees for preliminary injunction reversed with direction to dismiss the bills.

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

[13] *Smith* v. *Vulcan Iron Works,* 165 U. S. 518, 525; *Mast, Foos & Co.* v. *Stover Mfg. Co.,* 177 U. S. 485, 494; *Metropolitan Water Co.* v. *Kaw Valley Drainage Dist.,* 223 U. S. 519, 523; *United States Fidelity & Guaranty Co.* v. *Bray,* 225 U. S. 205, 214; *Denver* v. *New York Trust Co.,* 229 U. S. 123, 136; cf. *In re Tampa Suburban R. Co.,* 168 U. S. 583, 588; *Ex parte National Enameling & Stamping Co.,* 201 U. S. 156, 162; *Meccano Ltd.* v. *John Wanamaker,* 253 U. S. 136, 141.

NEWPORT NEWS SHIPBUILDING & DRY DOCK CO. *v.* SCHAUFFLER ET AL.

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

No. 305. Argued January 5, 1938.—Decided January 31, 1938.

1. *Bethlehem Shipbuilding Corp. v. Myers, ante,* p. 41, followed. P. 57.
2. In a suit in equity to enjoin the holding of a hearing upon a complaint issued by the National Labor Relations Board, allegations of the bill that interstate or foreign commerce is not involved are conclusions of law, and are not admitted by a motion to dismiss. P. 57.
3. The National Labor Relations Act does not vest in the Labor Board exclusive power to determine its own jurisdiction. It confers upon the Board exclusive initial power to make the investigation, but provides for judicial review by the Circuit Court of Appeals. P. 57.
4. There is no basis in the Act for the contention that the District Court may entertain a suit to prevent the Board from conducting a public investigation under § 10 if the employer claims that it is not engaged in interstate or foreign commerce. P. 58.
5. A cause in which equitable relief was sought to prevent injury which allegedly would result from the holding of a hearing by the Labor Board can not be disposed of as moot where, though the hearing has in the meantime been held, the trial examiner has not yet made his report to the Board, the Board has made no decision, and there is thus a possibility of further proceedings. P. 58.

91 F. (2d) 730, affirmed.

CERTIORARI, 302 U. S. 673, to review a decree affirming the dismissal of a bill which sought to restrain officials of the National Labor Relations Board from holding a hearing upon a complaint issued against the shipbuilding company.

Messrs. H. H. Rumble and *Fred H. Skinner* for petitioner.

Mr. Robert B. Watts, with whom *Solicitor General Reed,* and *Messrs. Robert L. Stern, A. H. Feller,* and *Charles Fahy* were on the brief, for respondents.

Mr. Justice Brandeis delivered the opinion of the Court.

The Newport News Shipbuilding and Dry Dock Company is a Virginia corporation engaged in the construction, overhaul and repair of ships at its plant in that State. In June, 1937, the Industrial Union of Marine and Shipbuilding Workers of America filed with the National Labor Relations Board the charge that the Company was "dominating and interfering with the employees' right of self organization by dominating, interfering with and lending financial support to a so-called labor organization" at said plant known as "Representation of Employees"; that the Company had discharged and refused to reinstate several employees at the plant "because they joined and assisted a labor organization of their own choosing and engaged in concerted activities with fellow employees for collective bargaining and other mutual aid and protection"; and that by so doing the Company was engaged in unfair labor practices within the meaning of § 8, subsections (1), (2) and (3) of the National Labor Relations Act. Thereupon, the Board, through its Regional Director for the 5th Region, Bennett F. Schauffler, filed a complaint against the Company and gave notice of a hearing pursuant to § 10 (b) of the Act.

The Company did not answer the complaint. Before the date assigned for the hearing, it brought, in the federal court for eastern Virginia, this suit, in which it sought to enjoin Schauffler, Jacob Blum, the Regional Attorney for the 5th Region, both citizens of Maryland, and the Trial Examiner designated or to be designated, from holding the hearing and taking further proceedings un-

der the Act. There were prayers for both an interlocutory and a final injunction and for a declaratory judgment that the Act as applied to the Company's business and its relations to its employees is unconstitutional. As the basis for this relief it alleged facts similar to those set forth in the bill of the Bethlehem Shipbuilding Corporation, Ltd., in No. 181, *ante*, p. 41. It alleged, specifically, that neither the Company's business nor its relations with its employees affected interstate or foreign commerce; that it had not engaged in any unfair labor practice; and that it would be irreparably damaged by the holding of the hearing of the Board and the taking of any action in connection therewith. Among the elements of irreparable injury alleged were that the Company would be held up to scorn as a violator of a law of the United States and so would incur for as long as the proceedings lasted the odium and ill will of the public and of its own employees; that its officials would be compelled to produce evidence of a confidential nature; and that the pendency and holding of the Board's proceedings, regardless of their outcome, would impede the Company in exercising its right to bargain freely with its employees.

The case was heard by the District Court upon the plaintiff's application for a temporary injunction and the defendants' motion that the bill be dismissed on the ground, among others, that the Company had failed to exhaust its administrative remedies and that granting the relief prayed would be an usurpation of the authority exclusively vested by the Act in the Court of Appeals. The court denied the temporary injunction and dismissed the bill on the ground that the Company had "a plain, adequate and exclusive remedy under the terms of the Act itself, that no irreparable damage is threatened, and that this [the District] Court has no jurisdiction of the controversy presented by the bill." That decree was af-

firmed by the Court of Appeals for the Fourth Circuit, which held that the Company "has an adequate remedy under the statute and may not apply for relief in equity until it has exhausted the administrative remedy there provided." 91 F. (2d) 730.

We granted certiorari because of conflict with *Bethlehem Shipbuilding Corp.* v. *Myers,* 89 F. (2d) 1000, in which the facts are substantially similar and the issues the same. That case is reversed by our opinion delivered this day in No. 181. For the reasons there stated, we affirm the decree herein, adding only the following.

First. The Company insists that since the case was heard on motion to dismiss the bill which alleges that the Company is not engaged in interstate or foreign commerce and its relations to its employees do not affect such commerce, these allegations must be accepted as true. The motion admits as facts allegations describing the manner in which the business is carried on, but not legal conclusions from those facts. The allegations that interstate or foreign commerce is not involved are conclusions of law.[1]

Second. The Company urges that, since the Board can have jurisdiction only over businesses engaged in interstate or foreign commerce, since the Company denies that it is so engaged, and the Federal Constitution does not permit vesting in an administrative body exclusive power to determine its own jurisdiction, the District Court must have power to pass upon that issue. The Act does not purport to leave the determination wholly to the Board. It confers upon the Board exclusive initial power to make the investigation, but provides for judicial review by the

[1] Compare *Pennie* v. *Reis,* 132 U. S. 464, 469–470; *Pierce Oil Corp.* v. *Hope,* 248 U. S. 498, 500; *Nortz* v. *United States,* 294 U. S. 317, 324–325; *Pacific States Box & Basket Co.* v. *White,* 296 U. S. 176, 184–185.

Circuit Court of Appeals.[2] As the only question here involved is the power of the Board to make the investigation, we have no occasion to consider the extent of the review provided.

It is suggested that while the Board has the right and duty to make, under § 5 of the Act, a preliminary informal inquiry before public action, for the purpose of informing itself whether a particular concern is subject to its authority, the District Court may entertain a suit to prevent the Board from conducting a public investigation under § 10 if the concern claims that it is not engaged in interstate or foreign commerce. The limitation suggested would, in large measure, defeat the purpose of the legislation. There is no basis in the Act for such a contention.

Third. The Circuit Court of Appeals having refused to grant an injunction staying the action by the Board pending the contemplated appeal, application for a stay was made to Mr. Justice Butler of this Court, after filing of the petition for a writ of certiorari. It has been called to our attention that, upon his denial of that application, the hearing was held before the trial examiner of the Board from August 30 to September 8, 1937, and has apparently been closed. To the extent that relief was sought to prevent the injury resulting from a hearing, the cause appears to be moot. But the cause cannot be disposed of as moot, as the trial examiner has not yet made his report to the Board; the Board has made no decision; and thus there is a possibility of further proceedings.

Decree affirmed.

Mr. Justice Cardozo took no part in the consideration or decision of this case.

[2] § 10 (a), (e), (f). See *National Labor Relations Board* v. *Jones & Laughlin Steel Co.*, 301 U. S. 1, 47; *Myers* v. *Bethlehem Shipbuilding Corp., ante*, p. 41.

ADAM *v.* SAENGER ET AL.

CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE NINTH SUPREME JUDICIAL DISTRICT OF TEXAS.

No. 197. Argued January 6, 1938.—Decided January 31, 1938.

1. Matter of fact or of law upon which the jurisdiction of a state court to render a judgment depended, but which was not litigated in that court, is matter for adjudication by the court of another State in an action on the judgment. P. 62.
2. Upon an appeal from the judgment of a state court in a suit upon a judgment of another State, this Court takes judicial notice of the law of the latter State to the same extent as such notice is taken by the court appealed from. P. 63.
3. According to Texas law the legal effect of a judgment of another State, on which suit is brought, is to be determined by the court, not the jury. But a suitor who asserts that the effect is different from that of a similar judgment of the courts of Texas is required to allege specifically and prove as a matter of fact the particular law or usage on which he relies to establish the difference; and, on demurrer, only the law or usage specifically alleged will be considered in determining whether the law of the other State differs from that of Texas. P. 63.
4. A, being sued by B, a resident of Texas, in a court of general jurisdiction in California, brought a cross-action in the same court against B with leave of court and by service in California of a cross-complaint upon B's attorney of record in the original action. A obtained judgment against B by default and sued upon it in Texas, pleading relevant California statutes and citations of decisions of California courts. The question, raised by general demurrer to A's complaint, was the legal effect in California of the service in the cross-action, and hence of the judgment founded upon it. *Held:*

   That this question, whether regarded as of fact or of law, is a federal question arising under the Full Faith and Credit Clause and R. S. § 905, 28 U. S. C. 687, and its decision by the Texas court is reviewable here. P. 64.
5. Under §§ 442, 1015 and 1011 of the California Code of Civil Procedure, and decisions of the California courts, as pleaded in this case, valid service of a cross-complaint may be made upon the attorney of the plaintiff in the original action. P. 65.

The cross-complaint was for conversion of chattels, filed, with the permission of the court, in an action for goods sold and delivered.

6. There is nothing in the Fourteenth Amendment to prevent a State from adopting a procedure by which a judgment *in personam* may be rendered in a cross-action against a plaintiff in its courts, upon service of process or of appropriate pleading upon his attorney of record. P. 67.

101 S. W. (2d) 1046, reversed.

CERTIORARI, 302 U. S. 668, to review the affirmance of a judgment dismissing a suit brought in Texas by the assignee of a judgment recovered, on cross-complaint, in California against a Texas corporation. The Texas suit was against the directors of the corporation, as trustees in dissolution, and against the stockholders, as transferees of corporate assets. The Supreme Court of Texas having refused a writ of error for want of jurisdiction, the writ of this Court ran to the Court of Civil Appeals.

Mr. M. G. Adams for petitioner.

Mr. Oliver J. Todd submitted on brief for respondents.

MR. JUSTICE STONE delivered the opinion of the Court.

The question for decision is whether the action, in this case, of the Texas state courts, in dismissing a suit founded upon a judgment of the superior court of California, denied to the judgment the faith and credit which the Constitution commands.

Petitioner, as assignee of a California judgment against the Beaumont Export & Import Company, a Texas corporation, brought the present suit in the Texas state district court against respondents, directors of the corporation acting as its trustees in dissolution, and against its stockholders as transferees of corporate assets, to collect the judgment. His petition sets out in detail the circumstances attending the rendition of the California judg-

ment and incorporates by reference a duly attested copy of the judgment roll.

It appears that the corporation brought suit in the Superior Court of California, a court of general jurisdiction, against Montes, petitioner's predecessor in interest, to recover a money judgment for goods sold and delivered. Thereupon Montes, following what is alleged to be the California practice, with leave of the court brought a cross-action against the corporation, by service of a cross-complaint upon the corporation's attorney of record in the pending suit, to recover for the conversion of chattels. Judgment in the cross-action, taken by default, was followed by dismissal of the corporation's suit and is the judgment which is the subject of the present suit. A motion to open the default and to be allowed to defend, made later on behalf of the corporation, was contested and was denied by the court, the issue being whether the cross-complaint was in fact served on the plaintiff's attorney.

The trial court sustained a general demurrer to the complaint and gave judgment dismissing the cause, which the Court of Appeals affirmed, 101 S. W. (2d) 1046. Petition to the Texas supreme court for a writ of error was denied for want of jurisdiction. We granted certiorari, cf. *Bain Peanut Co.* v. *Pinson,* 282 U. S. 499, the question being an important one of constitutional law. Our writ is properly directed to the Court of Civil Appeals, it being the highest court of the state in which a judgment could be had. *Bacon* v. *Texas,* 163 U. S. 207, 215; *Sullivan* v *Texas,* 207 U. S. 416; *San Antonio & A. P. Ry. Co.* v. *Wagner,* 241 U. S. 476; *American Railway Express Co.* v. *Levee,* 263 U. S. 19.

The Court of Civil Appeals rested its decision on a single ground, want of jurisdiction of the California court over the corporation in the cross-action in which the judgment was rendered. Construing the California statutes

and decisions which the complaint set out, it concluded that they did not authorize service of the complaint in the cross-action upon the plaintiff's attorney of record. It held further that in any case as the corporation was not present within the state no jurisdiction could be acquired over it by the substituted service, and the California judgment was consequently without due process and a nullity beyond the protection of the full faith and credit clause. To review these rulings we brought the case here. Cf. *Ward* v. *Love County,* 253 U. S. 17, 25; *Indiana ex rel. Anderson* v. *Brand, post,* p. 95.

By R. S. § 905, 28 U. S. C. 687, enacted under authority of the full faith and credit clause, Art. IV, § 1 of the Constitution, the duly attested record of the judgment of a state is entitled to such faith and credit in every court within the United States as it has by law or usage in the state from which it is taken. If it appears on its face to be a record of a court of general jurisdiction, such jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence, or by the record itself. *Hanley* v. *Donoghue,* 116 U. S. 1; *Knowles* v. *Gaslight & Coke Co.,* 19 Wall. 58; *Settlemier* v. *Sullivan,* 97 U. S. 444. But in a suit upon the judgment of another state the jurisdiction of the court which rendered it is open to judicial inquiry, *Chicago Life Insurance Co.* v. *Cherry,* 244 U. S. 25, and when the matter of fact or law on which jurisdiction depends was not litigated in the original suit it is a matter to be adjudicated in the suit founded upon the judgment. *Thompson* v. *Whitman,* 18 Wall. 457. Here the fact of the service of the complaint upon the attorney is alleged by the petitioner and admitted by the demurrer, but the court's conclusion that the California court was without jurisdiction, resting in part upon its construction of the California statute, presents an issue not litigated in the California suit which must be determined in the present one.

Congress has not prescribed the manner in which the legal effect of the judgment and the proceedings on which it is founded in the state where rendered are to be ascertained by the courts of another state. It has left that to the applicable procedure of the courts in which they are drawn in question. Where they are in issue this Court, in the exercise of its appellate jurisdiction to review cases coming to it from state courts, takes judicial notice of the law of the several states to the same extent that such notice is taken by the court from which the appeal is taken. "Whatever is matter of law in the court appealed from is matter of law here, and whatever was matter of fact in the court appealed from is matter of fact here." *Hanley* v. *Donoghue, supra,* 6.

According to Texas law the legal effect of the judgment of another state, on which suit is brought, is to be determined by the court, not the jury. But a suitor who asserts that the force and effect of the judgment is different from that of a similar judgment of the courts of the state is required to allege specifically and prove as matter of fact the particular laws or usage on which he relies to establish the difference, and on demurrer only the law or usage specifically alleged will be considered in determining whether the law of another state differs from that of Texas. *Porcheler* v. *Bronson,* 50 Tex. 555; *Gill* v. *Everman,* 94 Tex. 209; 59 S. W. 531; *National Bank of Commerce* v. *Kenney,* 98 Tex. 293; 83 S. W. 368.

In the present suit petitioner, in conformity to the state procedure, has set out in his complaint the California statutes and the citations of the decisions of California courts which he contends establish the law of that state that a cross-action in a pending suit may be begun by service of a cross-complaint upon the plaintiff's attorney. The question thus raised upon demurrer for decision by the court is the legal effect in California of the service, and hence of the judgment founded upon it.

Whether the question be regarded as one of fact or more precisely and accurately as a question of law to be determined as are other questions of law, although procedural exigencies require it to be presented by the pleading and proof, as are issues of fact, it is one arising under the Constitution and a statute of the United States which commands that such faith and credit shall be given by every court to the California proceedings "as they have by law or usage" of that state. And since the existence of the federal right turns on the meaning and effect of the California statute, the decision of the Texas court on that point, whether of law or of fact, is reviewable here. *Stanley* v. *Schwalby,* 162 U. S. 255, 274, 277–279; *Southern Pacific Co.* v. *Schuyler,* 227 U. S. 601, 611; *Creswill* v. *Knights of Pythias,* 225 U. S. 246, 261; *Ancient Egyptian Order* v. *Michaux,* 279 U. S. 737, 744–746; *Norris* v. *Alabama,* 294 U. S. 587, 590; see *Northern Pacific R. Co.* v. *North Dakota,* 236 U. S. 585, 593; cf. *Union Pacific R. Co.* v. *Public Service Comm'n,* 248 U. S. 67, 69; *Ward* v. *Love County, supra,* 22; *Truax* v. *Corrigan,* 257 U. S. 312, 324; *Davis* v. *Wechsler,* 263 U. S. 22, 24; *Patterson* v. *Alabama,* 294 U. S. 600, 602.

While this Court reëxamines such an issue with deference after its determination by a state court, it cannot, if the laws and Constitution of the United States are to be observed, accept as final the decision of the state tribunal as to matters alleged to give rise to the asserted federal right. This is especially the case where the decision is rested, not on local law or matters of fact of the usual type, which are peculiarly within the cognizance of the local courts, but upon the law of another state, as readily determined here as in a state court. *Huntington* v. *Attrill,* 146 U. S. 657, 684; *Yarborough* v. *Yarborough,* 168 S. C. 46; 166 S. E. 877; 290 U. S. 202.

In ruling that the service in the California suit was unauthorized, the Court of Civil Appeals said:

"The cross action was not an ancillary proceeding, but an independent suit in which a final judgment could be rendered without awaiting a decision in the original suit. Farrar *v.* Steensburg, 173 Cal. 94, 159 Pac. 707. It is well settled in this State that a cross action occupies the attitude of an independent suit and requires service of the cross action upon the cross defendant. Harris *v.* Schlinke, 95 Tex. 88. This being so, in the absence of a waiver of service, or an appearance by the cross defendant, personal service on the cross defendant must be had to confer jurisdiction upon the court to determine the matter and render judgment in the case."

But the question presented by the pleadings is the status of a cross-action under the California statutes, not under those of Texas. We think its status is adequately disclosed by the California statutes and decisions pleaded by petitioner, and is that for which he contends.

Section 442 of the California Code of Civil Procedure specifically provides that a defendant may secure affirmative relief upon "cross-complaint" which "must be served upon the parties affected thereby," and requires service of "summons upon the cross-complaint" only upon such parties as "have not appeared in the action." [1] Arguing that "action" means only "cross-action" and not the original action brought by the plaintiff, the Texas court con-

[1] "Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract, transaction, matter, happening or accident upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint. The cross-complaint must be served upon the parties affected thereby, and such parties may demur or answer thereto as to the original complaint. If any of the parties affected by the cross-complaint have not appeared in the action, a summons upon the cross-complaint must be issued and served upon them in the same manner as upon the commencement of an original action."

cluded that a plaintiff who has not appeared in the cross-action must be served with summons "as upon the commencement of an original action." But the word "action," even if susceptible of such meaning, cannot be so interpreted in the face of the pleaded California decisions which hold that a cross-complaint may be served on the attorney of one who is already a party to the original action. *Farrar* v. *Steenbergh,* 173 Cal. 94; 159 P. 707; *Wood* v. *Johnston,* 8 Cal. App. 258; 96 P. 508; *Ritter* v. *Braash,* 11 Cal. App. 258; 104 P. 592.

Section 1015 provides that in all cases where a party, whether resident or non-resident, has an attorney in an action, "the service of papers, when required, must be upon the attorney instead of the party, except service of subpoenas, of writs and other process issued in the suit, and of papers to bring him into contempt." [2] The Court of Civil Appeals construed this section as requiring "service of subpoenas, of writs, and other process issued in the suit" upon the party rather than the attorney, and as including the cross-complaint in the terms "writ" and "process." But assuming that a cross-complaint served without summons may be so characterized, it is clear that the section does not by its terms preclude valid service

[2] "When a plaintiff or a defendant, who has appeared, resides out of the State, and has no attorney in the action or proceeding, the service may be made on the clerk or on the justice where there is no clerk, for him. But in all cases where a party has an attorney in the action or proceeding, the service of papers, when required, must be upon the attorney instead of the party, except service of subpenas, of writs, and other process issued in the suit, and of papers to bring him into contempt. If the sole attorney for a party is removed or suspended from practice, then the party has no attorney within the meaning of this section. If his sole attorney has no known office in this State, notices and papers may be served by leaving a copy thereof with the clerk of the court or with the justice where there is no clerk, unless such attorney shall have filed in the cause an address of a place at which notices and papers may be served on him, in which event they may be served at such place."

of the cross-complaint upon the attorney for a party which, as we have seen, § 442 permits. Section 1015 directs service upon the attorney of all but the three types of papers excepted, but says nothing as to the effectiveness of service of those papers upon him. Section 1011, set out in the pleading though not referred to in the court's opinion, reads, "Notices and papers, when and how served. The Service may be personal, by delivery to the party or attorney on whom the service is required to be made. . . ."

The question whether § 1015 does forbid service of a cross-complaint on the attorney has been definitely answered in the negative by the Supreme Court of California, which, in *Farrar* v. *Steenbergh, supra,* 97, held, "Service of a cross-complaint upon a plantiff who appears by an attorney is not made by a summons to the plaintiff, but by delivery of a copy of the cross-complaint to the attorney." Upon this ground the California District Court of Appeals, in cases on which petitioner relies, has sustained judgments taken upon default in a cross-action begun by service of the cross-complaint on the plaintiff's attorney. *Ritter* v. *Braash, supra; Wood* v. *Johnston, supra.* Upon all the pleaded evidence of the California law, to the consideration of which we are restricted by the present state of the record, we think the only inference to be drawn is that the service in the California suit was authorized by California law.

There is nothing in the Fourteenth Amendment to prevent a state from adopting a procedure by which a judgment *in personam* may be rendered in a cross-action against a plaintiff in its courts, upon service of process or of appropriate pleading upon his attorney of record. The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes

for which justice to the defendant requires his presence. It is the price which the state may exact as the condition of opening its courts to the plaintiff. *Frank L. Young Co.* v. *McNeal-Edwards Co.*, 283 U. S. 398, 400; cf. *Chicago & N. W. Ry. Co.* v. *Lindell*, 281 U. S. 14, 17.

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

Reversed.

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

MR. JUSTICE BLACK concurs in the result.

COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., *v.* THE NAVEMAR ET AL.

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

No. 242. Argued January 7, 10, 1938.—Decided January 31, 1938.

1. A vessel of a friendly government in its possession and service is a public vessel, even though engaged in the carriage of merchandise for hire, and as such is immune from suit in the courts of admiralty of the United States. P. 74.
2. This immunity the friendly government may assert either through diplomatic channels or as a claimant in the courts of the United States. *Id.*

   If the claim is allowed by the executive branch of our government, it is then the duty of the courts to release the vessel upon appropriate suggestion by the Attorney General of the United States, or other officer acting under his direction.

   The foreign government is also entitled as of right upon a proper showing, to appear in a pending suit, there to assert its claim to the vessel, and to raise the jurisdictional question in its own name or that of its accredited and recognized representative.
3. The District Court took possession of a Spanish vessel on a libel by one claiming to be the owner, who alleged wrongful dispossession by members of the crew. The Spanish Ambassador, by a

verified suggestion, challenged the jurisdiction on the ground that the vessel, before the arrest, was a public vessel in possession of the Spanish Government and so immune from process. He also claimed that the Spanish Government was owner and entitled to possession by virtue of a Spanish decree of attachment. The Department of State had refused to act in the matter and had referred the Ambassador to the courts. At a hearing upon the suggestion and reply affidavits, the District Court found that no one had taken possession in behalf of the Spanish Government, although endorsements had been made by Spanish consuls in foreign ports, on the ship's roll and register stating that the ship had become the property of the Spanish State through an attachment. *Held:*

(1) That the Ambassador's application was properly entertained. P. 75.

(2) The Department of State having declined to act, the want of admiralty jurisdiction because of the alleged public status of the vessel and the right of the Spanish Government to demand possession of the vessel as owner if it so elected, were appropriate subjects for judicial inquiry upon proof of the matters alleged. *Id.*

(3) The suggestion, though sufficient as a statement of the contentions made, was not proof of its allegations. *Id.*

(4) The decree of attachment, being *in invitum,* did not dispossess the shipowner, a taking of actual possession by some act of physical dominion or control in behalf of the Spanish Government or some act of recognition by the ship's officers was needful. *Id.*

(5) The Ambassador should be permitted to intervene as claimant. P. 76.

90 F. (2d) 673, reversed.

CERTIORARI, 302 U. S. 669, to review the reversal of an order of the District Court refusing leave to the Ambassador of the Republic of Spain to appear as claimant of a ship in an admiralty case. The court below deemed the Ambassador's verified suggestion conclusive and ordered the libel dismissed.

Mr. T. Catesby Jones, with whom *Messrs. D. Roger Englar, Oscar R. Houston,* and *James W. Ryan* were on the brief, for petitioner.

Mr. Charles W. Hagen, with whom *Messrs. Anthony V. Lynch, Jr.,* and *Horace T. Atkins* were on the brief, for the Spanish Ambassador, respondent in this Court.

MR. JUSTICE STONE delivered the opinion of the Court.

In a suit in admiralty, brought in a district court by the alleged owner to recover possession of a Spanish merchant vessel, the Spanish Ambassador asked leave to intervene as claimant on the basis of an affidavit of the Spanish Acting Consul General suggesting that when the suit was brought the vessel was the property of the Republic of Spain, by virtue of a decree of attachment promulgated by the President of the Republic, appropriating the vessel to the public use, and that it was then in the possession of the Spanish Government. The principal question for decision is whether it was the duty of the court, upon presentation of the suggestion, to dismiss the libel for want of admiralty jurisdiction.

Petitioner, a Spanish corporation, brought the present suit in admiralty in the district court for eastern New York against the Spanish steamship "Navemar," five members of her crew, and all persons claiming an interest in her, to recover possession of the vessel. The libel alleged that petitioner was owner of the vessel, which was within the territorial jurisdiction of the court; and that while she was in petitioner's possession the individual respondents, acting as a committee of the crew, had wrongfully and forcibly seized, and had since retained possession of the vessel. After hearing evidence in support of the petition, the district court rendered its decree upon default, directing the marshal to place libelant in possession.

Thereupon the Spanish Ambassador filed a suggestion in the cause, challenging the jurisdiction of the court on the ground that the "Navemar" was a public vessel of the Republic of Spain, not subject to judicial process of the court, and asking that it direct delivery of the

vessel to the Spanish Acting Consul General in New York. The suggestion alleged that when the suit was brought the "Navemar" was the property of the Spanish Government by virtue of its decree of October 10, 1936, and was in the possession of the Republic of Spain. The district court issued its order to show cause why the default should not be opened and the Ambassador permitted to appear specially as claimant of the vessel. After a hearing the court denied the application but with leave to the Ambassador to make further application upon fuller presentation of the facts showing the ownership and possession of the vessel by the Spanish Government.

Meanwhile the Department of State had refused to act upon the Spanish Government's claim of possession and ownership of the "Navemar," had declined to honor the request of the Ambassador that representations be made in the pending suit by the Attorney General of the United States in behalf of the Spanish Government, and had advised the Ambassador that his Government was entitled "to appear directly before the court in a case of this character."

A second application by the Ambassador for leave to appear as a claimant upon a verified suggestion, stating additional circumstances relied upon to establish possession of the vessel by the Republic of Spain, was denied. 18 F. Supp. 153. On appeal the Court of Appeals for the Second Circuit, after restricting the appeal to the order of the district court on the second application, reversed that order and directed that the libel be dismissed. 90 F. (2d) 673. We granted certiorari, because the case is of public importance and because of alleged conflict of the decision below with our decision in *The Pesaro,* 255 U. S. 216, and with that of the Court of Appeals for the Fourth Circuit in *The Attualita,* 238 Fed. 909.

Respondent's suggestion on the second application presented two contentions: one, a challenge to the jurisdic-

tion on the ground that the "Navemar" was a public vessel, immune from arrest and process of the court; the other, that the Spanish Government was owner of the vessel and entitled to her possession by virtue of the decree of attachment.

In addition to the general allegations of ownership and possession of the vessel by the Spanish Government in the first application, the suggestion in the second set up the acquisition of possession in behalf of the Spanish Government by specific acts of its consular officers in Argentina and in New York. It alleged that on October 26, 1936, the Spanish Consul at Rosario, Argentina, had endorsed on the ship's roll a statement that "Through a cable dated 26 of the inst month from the Director General of the Merchant Marine this ship has become the property of the State through attachment according to the Decree of Oct. 10, 1936," and that on October 28 the Spanish Acting Consul General at Buenos Aires had made a similar endorsement on the ship's register. It was also alleged that on arrival in New York in November the Spanish Acting Consul General at that port, by direction of the Ambassador, had instructed the master of the "Navemar" "to await and abide further instructions . . . as regards any further use of the" vessel, and that on November 28 he had instructed the master to render a detailed account of the expenses of the "Navemar" and of minor repairs that she might require. There was no averment that the alleged seizure by the members of the crew was an act of or in behalf of the Spanish Government.

The district court allowed a full hearing upon the suggestion and upon reply affidavits submitted by libelant, in the course of which there was opportunity for the parties to present proof of all the relevant facts. Cf. *Ex parte New York,* 256 U. S. 503. The court found that no one had taken possession of the "Navemar" in behalf

of the Spanish Government. It pointed out that neither the ship's roll nor its register is a document of title or possession, the ship's roll being merely a record, in the case of Spanish vessels usually deposited with the Spanish consul while in port, showing arrivals and sailings of the vessel, the kind of cargo carried, the list of passengers, and the enrollment of the members of the crew, and the ship's register being only a record of the nationality of the vessel as determined by the place of her home port. It found that none of the consular officers mentioned had done any act purporting to take possession of the vessel; that none of them had informed the master that he wished to take possession or had any intention of doing so; that the vessel had proceeded under command of her master upon her voyage from Buenos Aires to New York, manned by officers and crew in the employ of petitioner; that upon arrival, the master, under direction of the ship's agent, had discharged cargo; and that before discharge the freight money was paid by the consignees to the agents of the time charterer in New York.

The district court, upon this and other evidence not necessary to detail, concluded that the "Navemar" was never in possession of the Spanish Government before her seizure by the members of the crew in the territorial waters of the United States, and that she was not a vessel in the public service of the Spanish Government.

The Court of Appeals, without reviewing the findings of the district court, or the evidence, adverted to the allegation of the first suggestion, substantially repeated on information and belief in the second, that the Spanish Consul at Rosario "pursuant to instructions from the Director General of the Spanish Merchant Marine, took possession of the . . . Navemar in the name of the Republic of Spain . . . whereby the . . . Navemar then and there became and at all times since has remained the property of the Government of the Republic of Spain."

Declaring that the court was bound to accept this allegation as conclusive, it held that the vessel must be taken to be a public vessel owned by and in the possession of the Spanish Government, and as such immune from suit in the courts of the United States.

This we think was a mistaken view of the force and effect of the suggestion. Admittedly a vessel of a friendly government in its possession and service is a public vessel, even though engaged in the carriage of merchandise for hire, and as such is immune from suit in the courts of admiralty of the United States. *Berizzi Bros. Co.* v. *The Pesaro,* 271 U. S. 562; cf. *The Exchange,* 7 Cranch 116. And in a case such as the present it is open to a friendly government to assert that such is the public status of the vessel and to claim her immunity from suit, either through diplomatic channels or, if it chooses, as a claimant in the courts of the United States.

If the claim is recognized and allowed by the executive branch of the government, it is then the duty of the courts to release the vessel upon appropriate suggestion by the Attorney General of the United States, or other officer acting under his direction. *The Cassius,* 2 Dall. 365; *The Exchange, supra; The Pizarro,* 19 Fed. Cas. No. 11,199; see *The Constitution,* L. R. 4 P. D. 39; cf. *Ex parte Muir,* 254 U. S. 522; *The Parlement Belge,* L. R. 4 P. D. 129. The foreign government is also entitled as of right upon a proper showing, to appear in a pending suit, there to assert its claim to the vessel, and to raise the jurisdictional question in its own name or that of its accredited and recognized representative. *The Sapphire,* 11 Wall. 164, 167; *The Anne,* 3 Wheat. 435, 445–446; *The Santissima Trinidad,* 7 Wheat. 283, 353; *Colombia* v. *Cauca Co.,* 190 U. S. 524; *Ex parte Transportes Maritimos,* 264 U. S. 105; *Berizzi Bros. Co.* v. *The Pesaro, supra.*

After refusal of the Secretary of State to act upon the present claim, the Ambassador adopted the latter course.

His application to be permitted to appear and present the claim was properly entertained by the district court. But it was not bound, as the Court of Appeals thought, to accept the allegations of the suggestion as conclusive. The Department of State having declined to act, the want of admiralty jurisdiction because of the alleged public status of the vessel and the right of the Spanish Government to demand possession of the vessel as owner if it so elected, were appropriate subjects for judicial inquiry upon proof of the matters alleged.

But the filed suggestion, though sufficient as a statement of the contentions made, was not proof of its allegations. This Court has explicitly declined to give such a suggestion the force of proof or the status of a like suggestion coming from the executive department of our government. *Ex parte Muir, supra; The Pesaro, supra. Berizzi Bros. Co.* v. *The Pesaro, supra,* did not hold otherwise for there it was stipulated that the vessel, when arrested, was owned, possessed and controlled by a foreign government and used by it in carrying merchandise for hire. The sole question was one of law, whether, upon the facts stipulated, the vessel was immune from suit.

The district court concluded, rightly we think, that the evidence at hand did not support the claim of the suggestion that the "Navemar" had been in the possession of the Spanish Government. The decree of attachment, without more, did not operate to change the possession which, before the decree, was admittedly in petitioner. To accomplish that result, since the decree was *in invitum,* actual possession by some act of physical dominion or control in behalf of the Spanish Government, was needful, *The Davis,* 10 Wall. 15, 21; *Long* v. *The Tampico,* 16 Fed. 491, 493, 494; *The Attualita, supra; The Carlo Poma,* 259 Fed. 369, 370, reversed on other grounds, 255 U. S. 219, or at least some recognition on the part of the ship's officers that they were controlling the vessel and crew in

behalf of their government.[1] Both were lacking, as was support for any contention that the vessel was in fact employed in public service. See *Long* v. *The Tampico, supra,* 493, 494; cf. *Berizzi Bros. Co.* v. *The Pesaro, supra.*

The district court rightly declined to treat the suggestion as conclusive or sufficient as proof to require the court to relinquish its jurisdiction. But as the suggestion was tendered in support of an application to appear as a claimant in the suit, and as it put forth a claim to title and right to possession of the vessel, the Ambassador should have been permitted to intervene and, if so advised, to litigate its claims in the suit. In *Ex parte Muir, supra,* and in *The Pesaro, supra,* 219, the Ambassador of the intervening government challenged the jurisdiction of the court, but did not place himself or his Government in the attitude of a suitor. Here the application as construed by the trial court was for permission to intervene as a claimant. We think the applicant should be permitted to occupy that position if so advised.

The decree of the Court of Appeals will be reversed. The respondent will be permitted to intervene for the purpose of asserting the Spanish Government's ownership and right to possession of the vessel, and the order of the district court will be modified accordingly.

Reversed.

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

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[1] In The Jupiter, 1924 P. 236, 241, 244 (cf. The Jupiter No. 2, 1925 P. 69; The Jupiter No. 3, 1927 P. 122, 125), and in the recently reported The Cristina, 59 Lloyd's List Law Reports 43, 50, on which respondent relies, the possession taken in behalf of the claimant government was actual. The judgment in The Cristina appears to have proceeded on that ground. In The Jupiter, it appeared that before the suit was brought the master had repudiated the possession and ownership of the plaintiffs and held the vessel for the claimant government. The report of The Cristina in the Admiralty Division, 59 Lloyd's List Law Reports 1, 3, indicates that the master and crew were in the pay of the Spanish Government.

Counsel for Parties.

CONNECTICUT GENERAL LIFE INSURANCE CO. *v.* JOHNSON, TREASURER OF CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 316. Argued January 14, 1938.—Decided January 31, 1938.

1. A corporation which is allowed to come into a State and there carry on its business may claim, as an individual may claim, the protection of the Fourteenth Amendment against a subsequent application to it of state law. P. 79.
2. A Connecticut corporation conducted part of its life insurance business in California under license from that State and also entered into contracts with other insurance corporations likewise licensed to do business in California, reinsuring them against loss on policies of life insurance effected by them in California and issued to residents there. These reinsurance contracts were entered into in Connecticut, where the premiums were paid and where the losses, if any, were payable.

   Held that, as applied to such reinsurance business, a California tax on the privilege of the corporation to do business within the State, measured by the gross premiums received, was void under the due process clause of the Fourteenth Amendment. Pp. 78, 82.
3. A State may not tax the property and activities of a foreign corporation which are not within its boundaries. P. 80.

   The limits placed by the Fourteenth Amendment on the State's jurisdiction to tax are to be ascertained by reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of transactions within the State which it might but does not tax.

93 Cal. Dec. 4650; 67 P. 2d 675, reversed.

APPEAL from judgments affirming the dismissal on demurrer of two actions by the above-named insurance company against Johnson, State Treasurer of California, to recover taxes paid under protest. The cases were heard together in the court below.

Messrs. William Marshall Bullitt and *B. M. Anderson,* with whom *Mr. Raymond Benjamin* was on the brief, for appellant.

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

Mr. Justice Stone delivered the opinion of the Court.

Appellant is a Connecticut corporation, admitted to do an insurance business in California. In addition to its business conducted within that state it has entered into contracts with other insurance corporations likewise licensed to do business in California, reinsuring them against loss on policies of life insurance effected by them in California and issued to residents there. These reinsurance contracts were entered into in Connecticut where the premiums were paid and where the losses, if any, were payable. The question for decision is whether a tax laid by California on the receipt by appellant in Connecticut of the reinsurance premiums during the years 1930 and 1931, infringes the due process clause of the Fourteenth Amendment.

In suits brought in the state court by appellant against respondent, state treasurer, to recover the taxes paid, the Supreme Court of California sustained demurrers to the complaints and gave judgments for the respondent. The cases, having been consolidated, come here on a single appeal under § 237 (a) of the Judicial Code. 28 U. S. C. § 344 (a).

Section 14 of Art. XIII of the California constitution, as supplemented by Act of March 5, 1921 (Stats. 1921, c. 22, pp. 20, 21, Political Code, § 3664b), fixing the rate of tax, lays upon every insurance company doing business within the state an annual tax of 2.6% "upon the amount of the gross premiums received upon its business done in this state, less return premiums and reinsurance in companies or associations authorized to do business in this state. . . ." The Supreme Court of California has declared that the constitutional provision imposes

"a franchise tax exacted for the privilege of doing business" in the state. *Consolidated Title Securities Co.* v. *Hopkins,* 1 Cal. (2d) 414, 419; 35 P. (2d) 320; cf. *Carpenter* v. *People's Mutual Life Insurance Co.,* 94 Cal. Dec. 674; 74 P. (2d) 708.

Although in terms the "gross premiums received upon . . . business done in this state," less the specified deductions, are made the measure of the tax, the state court in this, as in an earlier case, *Connecticut General Life Insurance Co.* v. *Johnson,* 3 Cal. (2d) 83; 43 P. (2d) 278 (appeal dismissed for want of a properly presented federal question, 296 U. S. 535), has held that the measure includes the premiums on appellant's reinsurance policies effected and payable in Connecticut. In this case it has declared also that the policy of the state, expressed in the constitutional provision, is "to avoid double taxation without any loss of revenue to the state." To accomplish that end the deduction of reinsurance premiums paid to companies authorized to do business within the state is allowed, it is said, on the theory that the benefit of the deduction will be passed on to the reinsurer who, being authorized to do business within the state, may be taxed on the reinsurance premiums as a means of equalizing the tax and as an offset against the benefit of the deduction which he ultimately enjoys.

No contention is made that appellant has consented to the tax imposed as a condition of the granted privilege to do business within the state. Nor could it be, for it appears that appellant had conducted its business in California under state license for many years before the taxable years in question and before the taxing act was construed by the highest court of the state, in *Connecticut General Life Insurance Co.* v. *Johnson, supra,* to apply to premiums received in Connecticut from reinsurance contracts effected there. A corporation which is allowed to come into a state and there carry on its business may

claim, as an individual may claim, the protection of the Fourteenth Amendment against a subsequent application to it of state law. *Hanover Fire Insurance Co.* v. *Harding*, 272 U. S. 494; cf. *Kentucky Finance Corp.* v. *Paramount Auto Exchange Corp.*, 262 U. S. 544.

It is said that the state could have lawfully accomplished its purpose if the statute had further stipulated that the deduction should be allowed only in those cases where the reinsurance is effected in the state or the reinsurance premiums paid there. But as the state has placed no such limitation on the allowance of deductions, the end sought can be attained only if the receipt by appellant of the reinsurance premiums paid in Connecticut upon the Connecticut policies is within the reach of California's taxing power. Appellee argues that it is, because the reinsurance transactions are so related to business carried on by appellant in California as to be a part of it and properly included in the measure of the tax; and because, in any case, no injustice is done to appellant since the effect of the statute as construed is to redistribute the tax, which the state might have exacted from the original insurers but did not, by assessing it upon appellant to the extent to which it has received the benefit of the allowed deductions.

But the limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained by reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of transactions within the state. As a matter of convenience and certainty, and to secure a practically just operation of the constitutional prohibition, we look to the state power to control the objects of the tax as marking the boundaries of the power to lay it. Hence it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state

power to tax or regulate the corporation's property and activities elsewhere. *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194; *New York Life Insurance Co.* v. *Head,* 234 U. S. 149; *New York Life Insurance Co.* v. *Dodge,* 246 U. S. 357; *St. Louis Compress Co.* v. *Arkansas,* 260 U. S. 346; *Compañia General De Tabacos* v. *Collector,* 275 U. S. 87; *Home Insurance Co.* v. *Dick,* 281 U. S. 397; *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.,* 292 U. S. 143; *Boseman* v. *Connecticut General Life Ins. Co.,* 301 U. S. 196; *People ex rel. Sea Insurance Co.* v. *Graves,* 274 N. Y. 312; 8 N. E. (2d) 872; cf. *Provident Savings Life Assurance Society* v. *Kentucky,* 239 U. S. 103. It follows that such a tax, otherwise unconstitutional, is not converted into a valid exaction merely because the corporation enjoys outside the state economic benefits from transactions within it, which the state might but does not tax, or because the state might tax the transactions which the corporation carries on outside the state if it were induced to carry them on within.

Appellant, by its reinsurance contracts, undertook only to indemnify the insured companies against loss upon their policies written in California. The reinsurance involved no transactions or relationship between appellant and those originally insured, and called for no act in California. *Connecticut General Life Insurance Co.* v. *Johnson, supra,* 87; cf. *Morris & Co.* v. *Skandinavia Insurance Co.,* 279 U. S. 405, 408. Apart from the facts that appellant was privileged to do business in California, and that the risks reinsured were originally insured against in that state by companies also authorized to do business there, California had no relationship to appellant or to the reinsurance contracts. No act in the course of their formation, performance or discharge, took place there. The performance of those acts was not dependent upon any privilege or authority granted by it, and California laws afforded to them no protection.

The grant by the state of the privilege of doing business there and its consequent authority to tax the privilege do not withdraw from the protection of the due process clause the privilege, which California does not grant, of doing business elsewhere. *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1; *International Paper Co.* v. *Massachusetts,* 246 U. S. 135; *Louisville & Jeffersonville Ferry Co.* v. *Kentucky,* 188 U. S. 385, 398. Even though a tax on the privilege of doing business within the state in insuring residents and risks within it may be measured by the premiums collected, including those mailed to the home office without the state, *Equitable Life Assurance Society* v. *Pennsylvania,* 238 U. S. 143, and though the writing of policies without the state insuring residents and risks within it is taxable because within the granted privilege, *Compañia General De Tabacos* v. *Collector, supra,* 98, there is no basis for saying that reinsurance which does not run to the original insured, and which from its inception to its termination involves no action taken within California, even the settlement and adjustment of claims, is embraced in any privilege granted by that state. *Provident Savings Life Assurance Society* v. *Kentucky, supra,* 112; *Compañia General De Tabacos* v. *Collector, supra,* 96; cf. *Equitable Life Assurance Society* v. *Pennsylvania, supra,* 147; *Compañia General De Tabacos* v. *Collector, supra,* 98. All that appellant did in effecting the reinsurance was done without the state and for its transaction no privilege or license by California was needful. The tax cannot be sustained either as laid on property, business done, or transactions carried on within the state, or as a tax on a privilege granted by the state.

Reversed.

Mr. Justice Cardozo took no part in the consideration or decision of this case.

MR. JUSTICE BLACK, dissenting.

I do not believe that this California corporate franchise tax has been proved beyond all reasonable doubt to be in violation of the Federal Constitution [1] and I believe that the judgment of the Supreme Court of California should be affirmed. Traditionally, states have been empowered to grant or deny foreign corporations the right to do business within their borders,[2] and ". . . may exclude them arbitrarily or impose such conditions as . . . (they) will upon their engaging in business within (their) . . . jurisdiction." [3]

California laid an annual tax upon gross insurance premiums which the Supreme Court of California has construed to be "a franchise tax exacted for the privilege of doing business." In measuring this franchise tax imposed upon corporations the state includes reinsurance premiums paid to the corporation on contracts made without the state, *where such reinsurance protects citizens of the State of California.* There is no attempt by this tax to regulate the business of the insurance company in any state except California.

The record does not indicate that California made any contract with this Connecticut corporation guaranteeing it a permanent franchise to do business in California on the same terms and conditions upon which it entered the state.

"A state which freely granted the corporate privilege for intrastate commerce may change its policy. . . . in the absence of contract, there is no vested interest which requires the continuance of a legislative policy however

[1] Cf. *Ogden* v. *Saunders,* 12 Wheat. 213, 270.

[2] *Bank of Augusta* v. *Earle,* 13 Pet. 519; *Paul* v. *Virginia,* 8 Wall. 168; *Ducat* v. *Chicago,* 10 Wall. 410; *Horn Silver Mining Co.* v. *New York,* 143 U. S. 305.

[3] *Hanover Fire Ins. Co.* v. *Harding,* 272 U. S. 494, 507.

expressed—whether embodied in a charter or in a system of taxation." [4]

It may be that California believes that by this tax it can stimulate the reinsurance business of companies making their reinsurance contracts in California. The right of a state to foster its own domestic industries by its taxing system has been sustained by this Court.[5]

This Court has also frequently sustained the right of a state to impose conditions on foreign corporations in order to favor its own corporations.[6] If a state did not have this privilege it could not protect the domestic business of its own corporations from undesirable competition by foreign corporations. The State of California has the constitutional right to limit the privileges of its own corporations and to reserve the right to control their privileges and to define and limit their activities.[7] If California has the lawful constitutional right (as this Court has many times said it has) to impose conditions upon foreign corporations so as to protect domestic corporations, its own elected legislative representatives should be the judges of what is reasonable and proper in a democracy.

With reference to a corporate tax imposed by the State of Louisiana, this Court has said: "The appellants, by incorporating in some other state, or by spreading their business and activities over other states, cannot set at naught the public policy of Louisiana [California?]. . . . The policy Louisiana [California?] is free to adopt with

[4] Brandeis, J., dissenting, *Liggett Co.* v. *Lee*, 288 U. S. 517, 546.

[5] *New York* v. *Roberts*, 171 U. S. 658; *Magnano Co.* v. *Hamilton*, 292 U. S. 40; *Fox* v. *Standard Oil Co.*, 294 U. S. 87; *Aero Mayflower Transit Co.* v. *Georgia Commission*, 295 U. S. 285; *Alaska Fish Co.* v. *Smith*, 255 U. S. 44, 48.

[6] *Prudential Insurance Co.* v. *Cheek*, 259 U. S. 530, 536; *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181, 189.

[7] *Fifth Avenue Coach Co.* v. *New York*, 221 U. S. 467; *Stone* v. *Mississippi*, 101 U. S. 814, 820.

respect to the business activities of her own citizens she may apply to the citizens of other states who conduct the same business within her borders, and this irrespective of whether the evils requiring regulation arise solely from operations in Louisiana [California?] or are in part the result of extra-state transactions." [8]

But it is contended that the due process clause of the Fourteenth Amendment prohibits California from determining what terms and conditions should be imposed upon this Connecticut corporation to promote the welfare of the people of California.

I do not believe the word "person" in the Fourteenth Amendment includes corporations. "The doctrine of stare decisis, however appropriate and even necessary at times, has only a limited application in the field of constitutional law." [9] This Court has many times changed its interpretations of the Constitution when the conclusion was reached that an improper construction had been adopted.[10] Only recently the case of *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, expressly overruled a previous interpretation of the Fourteenth Amendment which had long blocked state minimum wage legislation. When a statute is declared by this Court to be unconstitutional, the decision until reversed stands as a barrier against the adoption of similar legislation. A constitutional interpretation that is wrong should not stand. I believe this Court should now overrule previous decisions which interpreted the Fourteenth Amendment to include corporations.

Neither the history nor the language of the Fourteenth Amendment justifies the belief that corporations are in-

[8] *Atlantic & Pac. Tea Co.* v. *Grosjean*, 301 U. S. 412, 427.

[9] Stone and Cardozo, JJ., concurring, *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 94.

[10] See collection of cases, Notes 1, 2, 3 and 4, Dissenting Opinion of Justice Brandeis, *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406–409.

cluded within its protection. The historical purpose of the Fourteenth Amendment was clearly set forth when first considered by this Court in the *Slaughter House Cases,* 16 Wall. 36, decided April, 1873—less than five years after the proclamation of its adoption. Mr. Justice Miller speaking for the Court said (p. 70):

"Among the first acts of legislation adopted by several of the States in the legislative bodies which claimed to be in their normal relations with the Federal government, were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value, while they had lost the protection which they had received from their former owners from motives both of interest and humanity. . . .

"These circumstances, whatever of falsehood or misconception may have been mingled with their presentation, forced . . . the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much. . . . [Congressional leaders] accordingly passed through Congress the proposition for the *fourteenth amendment, and . . . declined to treat as restored to their full participation in the government of the Union the States which had been in insurrection,* until they ratified that article by a formal vote of their *legislative bodies.*"

Certainly, when the Fourteenth Amendment was submitted for approval, the people were not told that the states of the South were to be denied their normal relationship with the Federal Government unless they ratified an amendment granting new and revolutionary rights to corporations. This Court, when the *Slaughter House Cases* were decided in 1873, had apparently discovered no such purpose. The records of the time can be searched in vain for evidence that this Amendment was adopted for the benefit of corporations. It is true

that in 1882, twelve years after its adoption, and ten years after the *Slaughter House Cases, supra,* an argument was made in this Court that a journal of the joint Congressional Committee which framed the Amendment, secret and undisclosed up to that date, indicated the Committee's desire to protect corporations by the use of the word "person." [11] Four years later, in 1886, this Court in the case of *Santa Clara County* v. *Southern Pacific Railroad,* 118 U. S. 394, decided for the first time that the word "person" in the Amendment did in some instances include corporations. A secret purpose on the part of the members of the Committee, even if such be the fact, however, would not be sufficient to justify any such construction. The history of the Amendment proves that the people were told that its purpose was to protect weak and helpless human beings and were not told that it was intended to remove corporations in any fashion from the control of state governments. The Fourteenth Amendment followed the freedom of a race from slavery. Justice Swayne said in the *Slaughter House Cases, supra,* that "by 'any person' was meant *all* persons within the jurisdiction of the State. No distinction is intimated on account of race or color." Corporations have neither race nor color. He knew the Amendment was intended to protect the life, liberty and property of *human* beings.

The language of the Amendment itself does not support the theory that it was passed for the benefit of corporations.

The first clause of § 1 of the Amendment reads: "All *persons* born or naturalized in the United States and sub-

[11] *San Mateo County* v. *Southern Pacific Railroad,* 116 U. S. 138. See Benj. B. Kendrick, Journal of the Joint Committee on Reconstruction (1914, New York); Howard J. Graham, The "Conspiracy Theory" of the Fourteenth Amendment, 47 Yale L. J. 371; Donald Barr Chidsey, The Gentleman from New York—A Life of Roscoe Conklin, Yale University Press (1935).

ject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Certainly a corporation cannot be naturalized and "persons" here is not broad enough to include "corporations."

The first clause of the second sentence of § 1 reads: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . ." While efforts have been made to persuade this Court to allow corporations to claim the protection of *this* clause, these efforts have not been successful.[12]

The next clause of the second sentence reads: "nor shall any State deprive any *person* of life, liberty or property without due process of law; . . ." It has not been decided that this clause prohibits a state from depriving a corporation of "life." This Court has expressly held that "the liberty guaranteed by the Fourteenth Amendment against deprivation without due process of law is the liberty of *natural, not artificial persons.*" [13] Thus, the words "life" and "liberty" do not apply to corporations, and of course they could not have been so intended to apply. However, the decisions of this Court which the majority follow hold that corporations are included in this clause insofar as the word "property" is concerned. In other words, this clause is construed to mean as follows:

"Nor shall any State deprive any *human being* of life, liberty or property without due process of law; nor shall any State deprive any corporation of property without due process of law."

The last clause of this second sentence of § 1 reads: "nor deny to any person within its jurisdiction the equal protection of the laws." As used here, "person" has been construed to include corporations.[14]

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[12] *Selover, Bates & Co.* v. *Walsh,* 226 U. S. 112, 126.

[13] *Western Turf Assn.* v. *Greenberg,* 204 U. S. 359, 363.

[14] *Gulf, C. & S. F. Ry. Co.* v. *Ellis,* 165 U. S. 150, 154.

Both Congress and the people were familiar with the meaning of the word "corporation" at the time the Fourteenth Amendment was submitted and adopted. The judicial inclusion of the word "corporation" in the Fourteenth Amendment has had a revolutionary effect on our form of government. The states did not adopt the Amendment with knowledge of its sweeping meaning under its present construction. No section of the Amendment gave notice to the people that, if adopted, it would subject every state law and municipal ordinance, affecting corporations, (and all administrative actions under them) to censorship of the United States courts. No word in all this Amendment gave any hint that its adoption would deprive the states of their long recognized power to regulate corporations.

The second section of the Amendment informed the people that representatives would be apportioned among the several states "according to their respective numbers, counting the whole number of *persons* in each State, excluding Indians not taxed." No citizen could gather the impression *here* that while the word "persons" in the second section applied to human beings, the word "persons" in the first section *in some instances* applied to corporations. Section 3 of the Amendment said that "no *person* . . . shall be a Senator or Representative in Congress," (who "engaged in insurrection"). There was no intimation *here* that the word "person" in the first section *in some instances* included corporations.

This Amendment sought to prevent discrimination by the states against classes or races. We are aware of this from words spoken in this Court within five years after its adoption, when the people and the courts were personally familiar with the historical background of the Amendment. "We doubt very much whether any action of a State not directed by way of discrimination against

the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision." [15] Yet, of the cases in this Court in which the Fourteenth Amendment was applied during the first fifty years after its adoption, less than one-half of one per cent. invoked it in protection of the negro race, and more than fifty per cent. asked that its benefits be extended to corporations.[16]

If the people of this nation wish to deprive the States of their sovereign rights to determine what is a fair and just tax upon corporations doing a purely local business within their own state boundaries, there is a way provided by the Constitution to accomplish this purpose. That way does not lie along the course of judicial amendment to that fundamental charter. An Amendment having that purpose could be submitted by Congress as provided by the Constitution. I do not believe that the Fourteenth Amendment had that purpose, nor that the people believed it had that purpose, nor that it should be construed as having that purpose.

I believe the judgment of the Supreme Court of California should be sustained.

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[15] *Slaughter House Cases, supra.*

[16] Charles Wallace Collins, The Fourteenth Amendment and the States, Boston (1912), p. 138.

BLACKTON *v.* GORDON.

CERTIORARI TO THE COURT OF ERRORS AND APPEALS OF NEW JERSEY.

No. 167. Argued January 5, 1938.—Decided January 31, 1938.

Section 12 of the Act of March 4, 1915, 46 U. S. C. § 601, exempting wages of seamen from attachment, *held* inapplicable to the wages of a master of a vessel. P. 92.

118 N. J. L. 159; 191 Atl. 761, affirmed.

CERTIORARI, 302 U. S. 667, to review a judgment affirming a judgment against the petitioner, 117 N. J. L. 40; 186 Atl. 689, in a suit to enforce against him a statutory liability based on his refusal to honor a writ of attachment.

Messrs. Clement K. Corbin and *Edward A. Markley* submitted on brief for petitioner.

Mr. Aaron Gordon, with whom *Mr. John W. Ockford* was on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The issue is whether the master of a vessel is entitled to the benefit of § 12 of the Act of March 4, 1915,[1] exempting wages of seamen from attachment.

The respondent recovered judgment against one Findlay, the captain of the tug Waverly, a registered vessel of the United States operating in New York Harbor. Under a state statute Findlay's wages due from his employer, the Erie Railroad Company, were attached by the service of an order on the petitioner, superintendent of the marine department of the railroad company. It is not disputed that if Findlay's wages were subject to

[1] c. 153, 38 Stat. 1164, 1169; U. S. C. Tit. 46, § 601.

garnishment the order, and its service upon the petitioner, were regular and lawful. The petitioner asserted that the federal statute exempted Findlay's wages from execution and refused to honor the order. Thereupon action was instituted by respondent against petitioner, pursuant to local statute which in such a case renders the recusant officer liable for the amount of the judgment. On the trial petitioner's motions for a nonsuit and for a directed verdict were denied and judgment went for the respondent. The petitioner successively appealed to the Supreme Court and the Court of Errors and Appeals. The judgment was affirmed.[2] Because of the importance of the question we granted the writ of certiorari.

The words of the statute are: "No wages due or accruing to any seaman or apprentice shall be subject to attachment or arrestment from any court . . ." While, within the purview of some of the acts concerning shipping, a master is included in the class designated seamen, in others the expression excludes the master.[3] In this case we must determine whether Congress intended, by § 12 of the Act of 1915, to extend to a master the exemption of seamen's wages from garnishment. Decision is aided by a consideration of the provision in its original setting. It was first enacted as § 61 of the Act of June 7, 1872,[4] which authorized the appointment of shipping commissioners to protect merchant seamen and to superintend their shipment and discharge. Scrutiny of the Act as a whole leads to the view that in all matters affecting wages seamen were treated as a class which excluded masters; and this conclusion is required by § 65,[5] which is in part: "That to avoid doubt in the construction of this act, every person having the command of any ship belonging to any

[2] 117 N. J. L. 40, 186 Atl. 689; 118 N. J. L. 159, 191 Atl. 761.

[3] *Warner* v. *Goltra*, 293 U. S. 155, 157, 158.

[4] 17 Stat. 262, 276.

[5] 17 Stat. 277.

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

In its present form the pertinent language of § 12 of the Act of March 4, 1915, is identical with that originally employed in § 61 of the Act of 1872, which became § 4536 of the Revised Statutes. Section 12 of the Act of March 4, 1915, reënacted the section, adding a provision to make it applicable to fishermen employed on fishing vessels as well as to seamen. The statute is now § 601 of Title 46 of the United States Code.

Section 65 of the Act of 1872 became § 4612 of the Revised Statutes and, with immaterial amendments, now is § 713 of Title 46 of the United States Code. Various other provisions of the Act of 1872 embodied in the Revised Statutes, either in their original form or as amended by the Act of March 4, 1915, and by the Merchant Marine Act of 1920,[6] now appear, with provisions of other statutes, as sections of Title 46 of the Code. In compiling it the original language of § 65 of the Act of 1872 "To avoid doubt in the construction of *this act,*" was, in § 713 of Title 46, changed to read: "In the construction of *this chapter.*" The change in phraseology has given rise to the impression that the definitions found in § 713 apply indifferently to the various statutes affecting merchant shipping.[7] To avoid confusion in determining the applicability of the definitions contained in that section, it is necessary to trace to their origin the substantive sections to which it may be deemed to refer, and to construe them in the light of the evident intent of Congress in the use

[6] c. 250, 41 Stat. 988.

[7] *Warner* v. *Goltra, supra,* p. 162.

of the word "seaman" in the original Act. Since the pertinent provision of § 12 of the Act of 1915 here under consideration and the definitions of § 713 of Title 46 of the Code were commonly derived from the Act of 1872 and have not been materially changed, they must be read in collocation, and when this is done, the intent of Congress to exclude masters from the exemption accorded seamen is plain.[8]

The petitioner contends that § 61 of the Act of 1872 was modified by the Act of June 9, 1874,[9] whereby the provisions of the Act of 1872 were made inapplicable to vessels in the coastwise trade. The latter Act has been carried into the Code as § 544 of Title 46, and it is said that the repeal of § 61 by the Act of March 4, 1915, and the reënactment of the section, slightly altered, did not operate to repeal the Act of 1874. In view of our decision that a master is not within the exemption granted by § 12 of the Act of 1915 we need not pass upon this question.

The judgment is

Affirmed.

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

[8] Cf. *Warner* v. *Goltra, supra,* p. 162.

[9] c. 260, 18 Stat. 64.

INDIANA EX REL. ANDERSON *v.* BRAND, TRUSTEE.

CERTIORARI TO THE SUPREME COURT OF INDIANA.

No. 256. Argued January 10, 1938.—Decided January 31, 1938.

1. Where a state court does not decide a cause upon an independent state ground, but, deeming a federal question to be before it, actually entertains and decides that question adversely to the federal right asserted, this Court has jurisdiction to review the judgment if final. P. 98.
2. This Court may not refuse jurisdiction because the state court might have based its decision, consistently with the record, upon an independent and adequate state ground. P. 98.
3. The opinion of the state court may be examined to ascertain whether a federal question was raised and decided or whether the court rested its judgment on an adequate non-federal ground. P. 98.
4. Any doubt here as to whether the validity of the state statute under the Federal Constitution was drawn into question, arising from the generality of a reference in the opinion of the state court, *held* removed by a certificate signed by all the justices of the state court, and made a part of the record, to the effect that the reference was to Art. I, § 10, of the Constitution of the United States. P. 99.
5. A legislative enactment may contain provisions which, when accepted as the basis of action by individuals, become contracts between them and the State, within the protection of Art. I, § 10, of the Federal Constitution. P. 100.
6. Where it is claimed that a state statute impairs the obligation of a contract alleged to have been created by an earlier statute, this Court, while according great weight to the views of the highest court of the State, must determine for itself questions as to the existence and effect of the contract and as to whether its obligation was impaired. P. 100.
7. The Indiana Teachers' Tenure Act of 1927 provided that a public school teacher who had served under contract for five or more successive years, and thereafter entered into a contract for further service with the school corporation, thereby became a "permanent teacher," and that the contract, upon the expiration of its stated

term, should be deemed an "indefinite contract" and remain in force until succeeded by a new contract signed by both parties or cancelled in the manner provided in the Act. A permanent teacher's contract must be in writing and could be cancelled only after notice and hearing, and for causes specified in the Act, but not for political or personal reasons. The teacher could cancel only upon five days' notice, but not during the school term nor within 30 days of the beginning thereof. An amendatory Act of 1933, as construed by the state court, repealed the earlier Act in so far as township teachers and schools were concerned, and permitted the termination of the employment of such teachers without regard to the conditions and limitations of the earlier Act. *Held* that, under the Act of 1927, the right of a permanent teacher to continued employment upon an indefinite contract was contractual, and the obligation of such a contract in the case of a township teacher was unconstitutionally impaired by the Act of 1933. P. 104.

8. Although every contract is made subject to the implied condition that its fulfillment may be frustrated by proper exercise of the police power, yet in order to have this effect the exercise of the power must be for an end which is in fact public and the means adopted must be reasonably adapted to that end. P. 108.
9. The state court's decision of a federal question in favor of the defendant being erroneous, and it not having passed upon a second ground of demurrer which appears to involve no federal question, and which may present a defense still open to the defendant, the cause is reversed and remanded for further proceedings. P. 109.

5 N. E. (2d) 531, 913; 7 N. E. (2d) 777, reversed.

CERTIORARI, 302 U. S. 678, to review a judgment affirming the dismissal, on demurrer to the complaint, of an action for a writ of mandate.

Messrs. Paul R. Shafer and *Thomas F. O'Mara,* with whom *Mr. Denver Harlan* was on the brief, for petitioner.

Messrs. Raymond Brooks and *Asa J. Smith,* with whom *Mr. George C. Gertman* was on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The petitioner sought a writ of mandate to compel the

respondent [1] to continue her in employment as a public school teacher. Her complaint alleged that as a duly licensed teacher she entered into a contract in September, 1924, to teach in the township schools and, pursuant to successive contracts, taught continuously to and including the school year 1932–1933; that her contracts for the school years 1931–1932 and 1932–1933 contained this clause: "It is further agreed by the contracting parties that all of the provisions of the Teachers' Tenure Law, approved March 8, 1927, shall be in full force and effect in this contract"; and that by force of that Act she had a contract, indefinite in duration, which could be cancelled by the respondent only in the manner and for the causes specified in the Act. She charged that in July, 1933, the respondent notified her he proposed to cancel her contract for cause; that, after a hearing, he adhered to his decision and the County Superintendent affirmed his action; that, despite what occurred in July, 1933, the petitioner was permitted to teach during the school year 1933–1934 and the respondent was presently threatening to terminate her employment at the end of that year. The complaint alleged the termination of her employment would be a breach of her contract with the school corporation. The respondent demurred on the grounds that (1) the complaint disclosed the matters pleaded had been submitted to the respondent and the County Superintendent who were authorized to try the issues and had lawfully determined them in favor of the respondent; and (2) the Teachers' Tenure Law had been repealed in respect of teachers in township schools. The demurrer was sustained and the petitioner appealed to the State

[1] The proceeding was instituted against the respondent's predecessor who then held the office of School Trustee; the respondent was subsequently substituted as defendant. Nothing turns on this substitution and both trustees will be referred to as the respondent.

Supreme Court which affirmed the judgment.[2] The court did not discuss the first ground of demurrer relating to the action taken in the school year 1932–1933, but rested its decision upon the second, that, by an Act of 1933, the Teachers' Tenure Law had been repealed as respects teachers in township schools; and held that the repeal did not deprive the petitioner of a vested property right and did not impair her contract within the meaning of the Constitution. In its original opinion the Court said: "The relatrix contends . . . that, having become a permanent teacher under the Teachers' Tenure Law before the amendment, she had a vested property right in her indefinite contract, which may not be impaired under the Constitution. The question is whether there is a vested right in a permanent teacher's contract; whether, under the tenure law, there is a grant which cannot lawfully be impaired by a repeal of the statute." Where the state court does not decide against a petitioner or appellant upon an independent state ground, but deeming the federal question to be before it, actually entertains and decides that question adversely to the federal right asserted, this Court has jurisdiction to review the judgment if, as here, it is a final judgment.[3] We cannot refuse jurisdiction because the state court might have based its decision, consistently with the record, upon an independent and adequate non-federal ground. And since the amendment of the judiciary act of 1789 [4] by the act of February 5, 1867 [5] it has always been held this Court may examine the opinion of the state court to ascertain whether a fed-

[2] 5 N. E. (2d) 531; on rehearing, 7 N. E. (2d) 777; dissenting opinion of Treanor, J., 5 N. E. (2d) 913.

[3] *Murdock* v. *Memphis,* 20 Wall. 590, 635–6; *Henderson Bridge Co.* v. *Henderson,* 173 U. S. 592, 608; *Rogers* v. *Hennepin County,* 240 U. S. 184, 188–189; *Grayson* v. *Harris,* 267 U. S. 352, 358; *Virginia* v. *Imperial Coal Sales Co.,* 293 U. S. 15, 16; *International Steel Co.* v. *National Surety Co.,* 297 U. S. 657, 666.

[4] § 25, 1 Stat. 85.

[5] § 2, 14 Stat. 386.

eral question was raised and decided, and whether the court rested its judgment on an adequate non-federal ground.[6] Any ambiguity arising from the generality of the court's reference to the Constitution is resolved by a certificate signed by all the Justices of the Court, made a part of the record, to the effect that the reference to the Constitution in the opinion was to Art. I, § 10 of the Constitution of the United States.[7] It thus appearing that the constitutional validity of the repealing act was drawn in question, and the statute sustained, we issued the writ of certiorari.

The court below holds that in Indiana teachers' contracts are made for but one year; that there is no contractual right to be continued as a teacher from year to year; that the law grants a privilege to one who has taught five years and signed a new contract to continue in employment under given conditions; that the statute is directed merely to the exercise of their powers by the school authorities and the policy therein expressed may be altered at the will of the legislature; that in enacting laws for the government of public schools the legislature exercises a function of sovereignty and the power to control public policy in respect of their management and operation cannot be contracted away by one legislature so as to create a permanent public policy unchangeable by succeeding legislatures. In the alternative the court declares that if the relationship be considered as controlled by the rules of private contract the provision for reëm-

[6] *Murdock* v. *Memphis,* 20 Wall. 590, 633–634; *Kreiger* v. *Shelby R. Co.,* 125 U. S. 39, 44; *Bank of Commerce* v. *Tennessee,* 163 U. S. 416, 421; *Thompson* v. *Maxwell Land Grant Co.,* 168 U. S. 451, 456; *Columbia Water Power Co.* v. *Columbia Electric St. Ry. Co.,* 172 U. S. 475, 488–489; *Abie State Bank* v. *Bryan,* 282 U. S. 765, 771; *Utley* v. *St. Petersburg,* 292 U. S. 106, 111; *Fox Film Corp.* v. *Muller,* 296 U. S. 207, 209.

[7] *International Steel Co.* v. *National Surety Co.,* 297 U. S. 657, 662.

ployment from year to year is unenforceable for want of mutuality.

As in most cases brought to this court under the contract clause of the Constitution, the question is as to the existence and nature of the contract and not as to the construction of the law which is supposed to impair it. The principal function of a legislative body is not to make contracts but to make laws which declare the policy of the state and are subject to repeal when a subsequent legislature shall determine to alter that policy. Nevertheless, it is established that a legislative enactment may contain provisions which, when accepted as the basis of action by individuals, become contracts between them and the State or its subdivisions within the protection of Art. I, § 10.[8] If the people's representatives deem it in the public interest they may adopt a policy of contracting in respect of public business for a term longer than the life of the current session of the legislature. This the petitioner claims has been done with respect to permanent teachers. The Supreme Court has decided, however, that it is the state's policy not to bind school corporations by contract for more than one year.

On such a question, one primarily of state law, we accord respectful consideration and great weight to the views of the State's highest court but, in order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made, what are its terms and conditions, and whether the State has, by later legislation, impaired its obligation.[9] This involves an appraisal of the statutes of the State and the decisions of its courts.

The courts of Indiana have long recognized that the employment of school teachers was contractual and have

[8] *New Jersey* v. *Yard*, 95 U. S. 104, 113, 114.

[9] *Phelps* v. *Board of Education*, 300 U. S. 319, 322, and cases cited.

afforded relief in actions upon teachers' contracts.[10] An Act adopted in 1899 [11] required all contracts between teachers and school corporations to be in writing, signed by the parties to be charged, and to be made a matter of public record. A statute of 1921 [12] enacted that every such contract should be in writing and should state the date of the beginning of the school term, the number of months therein, the amount of the salary for the term, and the number of payments to be made during the school year.

In 1927 the State adopted the Teachers' Tenure Act [13] under which the present controversy arises. The pertinent portions are copied in the margin.[14] By this Act it was provided that a teacher who has served under con-

[10] *City of Crawfordsville* v. *Hays,* 42 Ind. 200; *Charlestown School Twp.* v. *Hay,* 74 Ind. 127; *Harrison School Twp.* v. *McGregor,* 96 Ind. 185; *Kiefer* v. *Troy School Twp.,* 102 Ind. 279; 1 N. E. 560; *Sparta School Twp.* v. *Mendell,* 138 Ind. 188; 37 N. E. 604; *School City of Lafayette* v. *Bloom,* 17 Ind. App. 461; 46 N. E. 1016; *Henry School Twp.* v. *Meredith,* 32 Ind. App. 607; 70 N. E. 393; *Gregg School Twp.* v. *Hinshaw,* 76 Ind. App. 503; 132 N. E. 586.

[11] Act of Feb. 28, 1899, G. L. Ind. 1899, p. 173, Burns' Ind. Stat. Ann. 1933, §§ 28–4302 and 28–4303.

[12] Act of March 7, 1921; Acts of 1921, p. 195; Burns' Ind. Stat. Ann. 1933, § 28–4304.

[13] Act of March 8, 1927; Acts of 1927, p. 259, Burns' Ind. Stat. Ann. Supp. 1929, § 6967.1.

[14] "Section 1. Be it enacted by the general assembly of the State of Indiana, That any person who has served or who shall serve under contract as a teacher in any school corporation in the State of Indiana for five or more successive years, and who shall hereafter enter into a teacher's contract for further service with such corporation, shall thereupon become a permanent teacher of such school corporation. . . . Upon the expiration of any contract between such school corporation and a permanent teacher, such contract shall be deemed to continue in effect for an indefinite period and shall be known as an indefinite contract. Such an indefinite contract shall remain in force unless succeeded by a new contract signed by both parties or unless it shall be cancelled as provided in section 2 of this act: *Provided,* That teachers' contracts shall provide for the annual determination of the date of beginning and length of school terms by

tract for five or more successive years, and thereafter enters into a contract for further service with the school corporation, shall become a permanent teacher and the contract, upon the expiration of its stated term, shall be deemed to continue in effect for an indefinite period, shall be known as an indefinite contract, and shall remain in force unless succeeded by a new contract or cancelled as provided in the Act. The corporation may cancel the

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the school corporation: and, *Provided, further,* That teachers' contracts may contain provisions for the fixing of the amount of annual compensation from year to year by a salary schedule adopted by the school corporation and such schedule shall be deemed to be a part of such contract: and, *Provided, further,* That such schedule may be changed by such school corporation on or before May 1st of any year, such changes to become effective at the beginning of the following school year: *Provided,* That all teachers affected by such changes shall be furnished with printed copies of such changed schedule within thirty days after its adoption.

"Sec. 2. Any indefinite contract with a permanent teacher as defined in section 1 of this act may be cancelled only in the following manner: Not less than thirty days nor more than forty days before the consideration by any school corporation of the cancellation of any such contract, such teacher shall be notified in writing of the exact date, time when and place where such consideration is to take place; and such teacher shall be furnished a written statement of the reasons for such consideration, within five days after any written request for such statement; and such teacher shall, upon written request for a hearing, filed within fifteen days after the receipt by said teacher of notice of date, time and place of such consideration, be given such a hearing before the school board, in the case of cities and towns, and before the township trustee, in the case of townships; such hearing shall be held not less than five days after such request is filed and such teacher shall be given not less than five days' notice of the time and place of such hearing. Such teacher, at the hearing, shall have a right to a full statement of the reasons for the proposed cancellation of such contract, and shall have a right to be heard, to present the testimony of witnesses and other evidence bearing upon the reasons for the proposed cancellation of such contract. No such contract shall be cancelled until

contract, after notice and hearing, for incompetency, insubordination, neglect of duty, immorality, justifiable decrease in the number of teaching positions, or other good or just cause, but not for political or personal reasons. The teacher may not cancel the contract during the school term nor for a period of thirty days previous to the beginning of any term (unless by mutual agreement) and may cancel only upon five days' notice.

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the date set for consideration of the cancellation of such contract; nor until after a hearing is held, if such hearing is requested by said teacher; nor until, in the case of teachers, supervisors, and principals, the city or town superintendents, in cities and towns, and the county superintendents, in townships and in cities and towns not having superintendents, shall have given the school corporation his recommendations thereon, and it shall be the duty of such superintendent to present such recommendations upon five days' written notice to him by such school corporation. . . . Cancellation of an indefinite contract of a permanent teacher may be made for incompetency, insubordination (which shall be deemed to mean a wilful refusal to obey the school laws of this state or reasonable rules prescribed for the government of the public schools of such corporation), neglect of duty, immorality, justifiable decrease in the number of teaching positions or other good and just cause, but may not be made for political or personal reasons: . . .

"Sec. 4. No permanent teacher shall be permitted to cancel his indefinite contract during the school term for which his said contract is in effect nor for a period of thirty (30) days previous to the beginning of such school term unless such cancellation is mutually agreed upon; such permanent teacher shall be permitted to cancel his indefinite contract at any other time by giving a five days' notice to the school corporation. Any permanent teacher cancelling his indefinite contract in any other manner than in this section provided shall be deemed guilty of unprofessional conduct and the state superintendent is hereby authorized to suspend the license of such teacher for a period of not exceeding one year. . . .

"Sec. 6. This act shall be construed as supplementary to an act of the general assembly, page 195, acts 1921, entitled, 'An act concerning teachers' contracts and providing for the repeal of conflicting laws.'"

By an amendatory Act of 1933 [15] township school corporations were omitted from the provisions of the Act of 1927. The court below construed this Act as repealing the Act of 1927 so far as township schools and teachers are concerned and as leaving the respondent free to terminate the petitioner's employment. But we are of opinion that the petitioner had a valid contract with the respondent, the obligation of which would be impaired by the termination of her employment.

Where the claim is that the State's policy embodied in a statute is to bind its instrumentalities by contract, the cardinal inquiry is as to the terms of the statute supposed to create such a contract. The State long prior to the adoption of the Act of 1927 required the execution of written contracts between teachers and school corporations, specified certain subjects with which such contracts must deal, and required that they be made a matter of public record. These were annual contracts, covering a single school term. The Act of 1927 announced a new policy that a teacher who had served for five years under successive contracts, upon the execution of another was to become a permanent teacher and the last contract was to be indefinite as to duration and terminable by either party only upon compliance with the conditions set out in the statute. The policy which induced the legislation evidently was that the teacher should have protection against the exercise of the right, which would otherwise inhere in the employer, of terminating the employment at the end of any school term without assigned reasons and solely at the employer's pleasure. The state courts in earlier cases so declared.[16]

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[15] Act of March 1, 1933, Acts of 1933, p. 716, Burns' Ind. Stat. Ann. 1933, § 28–4307.

[16] *Ratcliff* v. *Dick Johnson School Twp.*, 204 Ind. 525; 185 N. E. 143; *Kostanzer* v. *State*, 205 Ind. 536; 187 N. E. 337; *State* v. *Stout*, 206 Ind. 58; 187 N. E. 267; *Arburn* v. *Hunt*, 207 Ind. 61; 191 N. E. 148.

The title of the Act is couched in terms of contract. It speaks of the making and cancelling of indefinite contracts. In the body the word "contract" appears ten times in § 1, defining the relationship; eleven times in § 2, relating to the termination of the employment by the employer, and four times in § 4, stating the conditions of termination by the teacher.

The tenor of the Act indicates that the word "contract" was not used inadvertently or in other than its usual legal meaning. By § 6 it is expressly provided that the Act is a supplement to that of March 7, 1921, *supra,* requiring teachers' employment contracts to be in writing. By § 1 it is provided that the written contract of a permanent teacher "shall be deemed to continue in effect for an indefinite period and shall be known as an indefinite contract." Such an indefinite contract is to remain in force unless succeeded by a new contract signed by both parties or cancelled as provided in § 2. No more apt language could be employed to define a contractual relationship. By § 2 it is enacted that such indefinite contracts may be cancelled by the school corporation only in the manner specified. The admissible grounds of cancellation, and the method by which the existence of such grounds shall be ascertained and made a matter of record, are carefully set out. Section 4 permits cancellation by the teacher only at certain times consistent with the convenient administration of the school system and imposes a sanction for violation of its requirements. Examination of the entire Act convinces us that the teacher was by it assured of the possession of a binding and enforceable contract against school districts.

Until its decision in the present case the Supreme Court of the State had uniformly held that the teacher's right to continued employment by virtue of the indefinite contract created pursuant to the Act was contractual.

In *School City of Elwood* v. *State ex rel. Griffin,* 203 Ind. 626; 180 N. E. 471, it was said (p. 634):

"The position of a teacher in the public schools is not a public office, but an employment by contract between the teacher and the school corporation. The relation remains contractual after the teacher has, under the provisions of a teachers' tenure law, become a permanent teacher—but the terms and conditions of the contract are thereafter governed primarily by the statute."

In *Kostanzer* v. *State,* 205 Ind. 536; 187 N. E. 337, an action in mandate to compel reinstatement of a discharged teacher, it was said (p. 547):

"If appellee's position is not an office appellants insist that mandamus is not available for the reason that the granting of mandatory relief results in enforcing a purely contractual right. It is true that mandatory relief against appellants will result in enforcing appellee's rights under her contract; but the duty which the judgment of the trial court compelled appellants to perform was a duty enjoined by statute and not by contract. The contract between appellants and appellee created a relation which entitled appellee to have appellants perform the duty in question; but the duty was not imposed by any provision of the contract."

And in the same case it was also said (pp. 548–549):

"The tenure act permits a teacher to cancel his contract at any time after the close of a school term up to thirty days prior to the beginning of the next school term, provided five days' notice is given, and appellant contends that there was no contract between appellee and appellants for the reason 'that a contract which does not bind both parties binds neither of them.' This proposition is undoubtedly supported by the law of contracts. But there is nothing in the law of contracts to prevent one party to a contract granting to the other the privilege of rescission or cancellation on terms not reserved to the former party. The local school corporations are agents of the state in the administration of the public schools and the

General Assembly has the power to prescribe the terms of the contract to be executed by these agents."

In *State* v. *Board of School Commissioners of Indianapolis,* 205 Ind. 582; 187 N. E. 392, an action in mandate to compel reinstatement of a discharged teacher, the court referred to the indefinite contract of a permanent teacher and held that it remained in full force and effect until succeeded by a new contract or cancelled as provided in § 2 of the Act.

In *Arburn* v. *Hunt,* 207 Ind. 61; 191 N. E. 148, it is said: "The source of authority for the so-called permanent teacher's contract is the statute. The legislature need not have provided for such contracts, but, since it did so provide, the entire statute, with all of its provisions, must be read into and considered as a part of the contract."

We think the decision in this case runs counter to the policy evinced by the Act of 1927, to its explicit mandate and to earlier decisions construing its provisions. Also that the decision in *Phelps* v. *Board of Education,* 300 U. S. 319, that the Act there considered did not create a contract, is not, as the court below suggests, authority for a like result here. *Dodge* v. *Board of Education,* 302 U. S. 74, on which the respondent relies is distinguishable, because the statute there involved did not purport to bind the respondent by contract to the payment of retirement annuities, and similar legislation in respect of other municipal employees had been consistently construed by the courts as not creating contracts.

The respondent urges that every contract is subject to the police power and that in repealing the Teachers' Tenure Act the legislature validly exercised that reserved power of the state. The sufficient answer is found in the statute. By § 2 of the Act of 1927 power is given to the school corporation to cancel a teacher's indefinite contract for incompetency, insubordination (which is to be deemed to mean wilful refusal to obey the school laws of the

state or reasonable rules prescribed by the employer), neglect of duty, immorality, justifiable decrease in the number of teaching positions or other good and just cause. The permissible reasons for cancellation cover every conceivable basis for such action growing out of a deficient performance of the obligations undertaken by the teacher, and diminution of the school requirements. Although the causes specified constitute in themselves just and reasonable grounds for the termination of any ordinary contract of employment, to preclude the assumption that any other valid ground was excluded by the enumeration, the legislature added that the relation might be terminated for any other good and just cause. Thus in the declaration of the state's policy, ample reservations in aid of the efficient administration of the school system were made. The express prohibitions are that the contract shall not be cancelled for political or personal reasons. We do not think the asserted change of policy evidenced by the repeal of the statute is that school boards may be at liberty to cancel a teacher's contract for political or personal reasons. We do not understand the respondent so to contend. The most that can be said for his position is that, by the repeal, township school corporations were again put upon the basis of annual contracts, renewable at the pleasure of the board. It is significant that the Act of 1933 left the system of permanent teachers and indefinite contracts untouched as respects school corporations in cities and towns of the state. It is not contended, nor can it be thought, that the legislature of 1933 determined that it was against public policy for school districts in cities and towns to terminate the employment of teachers of five or more years' experience for political or personal reasons and to permit cancellation, for the same reasons, in townships.

Our decisions recognize that every contract is made subject to the implied condition that its fulfillment may

be frustrated by a proper exercise of the police power but we have repeatedly said that, in order to have this effect, the exercise of the power must be for an end which is in fact public and the means adopted must be reasonably adapted to that end,[17] and the Supreme Court of Indiana has taken the same view in respect of legislation impairing the obligation of the contract of a state instrumentality.[18] The causes of cancellation provided in the Act of 1927 and the retention of the system of indefinite contracts in all municipalities except townships by the Act of 1933 are persuasive that the repeal of the earlier Act by the latter was not an exercise of the police power for the attainment of ends to which its exercise may properly be directed.

As the court below has not passed upon one of the grounds of demurrer which appears to involve no federal question, and may present a defense still open to the respondent, we reverse the judgment and remand the cause for further proceedings not inconsistent with this opinion.

Reversed.

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

MR. JUSTICE BLACK, dissenting.

In my opinion this reversal unconstitutionally limits the right of Indiana to control Indiana's public school system. I believe the judgment should be affirmed because:

[17] *Home Bdg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 438; *Worthen Co.* v. *Thomas,* 292 U. S. 426, 431, 432; *Worthen Co.* v. *Kavanaugh,* 295 U. S. 56, 60; *Treigle* v. *Acme Homestead Assn.,* 297 U. S. 189, 197.

[18] *Central Union Tel. Co.* v. *Indianapolis Tel. Co.,* 189 Ind. 210; 126 N. E. 628; *Downing* v. *Indiana State Board of Agriculture,* 129 Ind. 443; 28 N. E. 123.

(1) It does not appear in the record that a federal question was necessarily involved in the decision of the state court; [1]

(2) The record does not disclose beyond a reasonable doubt [2] that Indiana, by the Teachers Act of 1927, surrendered its sovereign, governmental right to change and alter at will legislative policy related to the public welfare, or that its legislature had the power to do so.

First. It does not appear from the record that a federal question "was necessarily involved in the decision; and that the state court could not have given the judgment or decree which they passed, without deciding it." [3] Therefore, "it is a matter of no consequence to us that the court may have gone further and decided a federal question." [4] "Where a case in this Court can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons." [5]

Petitioner's complaint disclosed: that, after a hearing, she was removed from her position as a teacher for causes including those set out in the statute, i. e., (1) "neglect of duty" and (2) "for other good and just cause"; and that the county superintendent, on appeal, approved her removal. A demurrer was sustained to the complaint. The demurrer assigned the general ground that the complaint failed to "state facts sufficient to constitute a good cause of action." One of the specific reasons set out for demurrer was that the complaint showed on its face that petitioner had been removed only after a proper notice and hearings before the township trustee and the county superintendent, in accordance with the requirements of the Act.

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[1] *Moore* v. *Mississippi,* 21 Wall. 636, 639.

[2] Cf. *Ogden* v. *Saunders,* 12 Wheat. 213, 270.

[3] *Armstrong* v. *Treasurer of Athens County,* 16 Pet. 281, 285.

[4] *Moore* v. *Mississippi, supra.*

[5] *Siler* v. *Louisville & N. R. Co.,* 213 U. S. 175, 193.

Under these circumstances, we can consider the decision of the Indiana courts as based on a finding of inadequacy in petitioner's complaint under Indiana law. This Court does not decide "questions of a constitutional nature unless absolutely necessary to a decision of the case." [6] We should not depart from this policy in order to strike down a law passed by a state in its sovereign capacity to establish legislative policies for the education of its people.

Second. This Court has declared that ". . . neither the [Fourteenth] amendment . . . nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote . . . education . . . of the people . . ." [7] Article 8, § 1 of the Constitution of Indiana provides: "Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly . . . to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all." In carrying out this constitutional mandate to provide education for the people of the State, the legislature of Indiana has found it necessary—as have other States—to alter legislative policy from time to time. The statutes and the decisions of Indiana indicate a laudable desire and a commendable effort not only to provide sufficient funds to

[6] *Burton* v. *United States*, 196 U. S. 283, 295. "If the experience of one hundred and fifty years of constitutional interpretation has taught any lesson, it is the unwisdom of making solemn declarations as to the meaning of that instrument which are unnecessary to decision. They can serve no useful purpose and their only effect may be to embarrass the Court when decision becomes necessary. *O'Donoghue* v. *United States*, 289 U. S. 516, 550; *Humphrey's Executor* v. *United States*, 295 U. S. 602, 626–627." Stone, J., dissenting, *Wright* v. *United States*, 302 U. S. 583, 604.

[7] *Barbier* v. *Connolly*, 113 U. S. 27, 31.

carry out these educational aspirations of the State, but also to provide reasonable security of employment for teachers. Such effort brought about the "Indiana Teachers Tenure Act of 1927." This law provided the conditions upon which "permanent" teachers with "indefinite contracts" could be removed from their positions, and was evidently intended to provide statutory security against their discharge by local school authorities for any causes except those specified in the law. These "permanent" teachers could cancel their "indefinite contracts" upon five days' notice at any time except during the school term or for a period of thirty days previous to it.

In 1933, the legislative representatives of the people of Indiana decided to change this policy by excluding township school corporations from its operation. The contention here is that the statutory tenure given teachers under the 1927 Act amounted to contracts with the state which could not be impaired by repeal or modification of the law.

The Indiana Supreme Court has consistently held, even before its decision in this case, that the right of teachers, under the 1927 Act, to serve until removed for cause, was *not given by contract, but by statute.* Such was the express holding in the two cases cited in the majority opinion: *Kostanzer* v. *State,* 205 Ind. 536; 187 N. E. 337; and *Elwood* v. *State,* 203 Ind. 626; 180 N. E. 471.

In *Kostanzer* v. *State, supra,* a teacher filed petition for *mandamus* alleging removal contrary to the "indefinite contract" obligation under the Act of 1927. Mandamus was opposed as an improper remedy because the teachers sought to compel action under a teachers tenure "*contract.*" Denying the contention that the teacher's rights were fixed by *contract,* the Supreme Court of Indiana said:

"But the duty which the judgment of the trial court compelled appellants to perform was a duty enjoined by

statute *and not by contract. . . . the duty was not imposed by any provision of the contract.* In *School City of Elwood* v. *State ex rel. Griffin, supra,* this same contention was disposed of in the following language: *'It is because of appellees' right under this statute* . . . that mandamus is the proper remedy in this case. . . . A public school teacher who, *under a positive provision of the statute, has a fixed tenure of employment or can be removed only in a certain manner prescribed by the statute, is entitled to reinstatement if he has been removed from his position in violation of his statutory rights.'*"

These cases demonstrate that the Supreme Court of Indiana has uniformly held that teachers did not hold their "indefinite" tenure under *contract,* but by grant of a repealable statute. In order to hold in this case that a contract was impaired, it is necessary to create a contract unauthorized by the Indiana legislature and declared to be non-existent by the Indiana Supreme Court.

In the similar case of *Phelps* v. *Board of Education,* 300 U. S. 319, coming to this Court from New Jersey, the Supreme Court of that State declared that:

"*The status of tenure teachers, while in one sense perhaps contractual, is in essence dependent on a statute,* . . . which the legislature at will may abolish, or whose emoluments it may change."

Under the New Jersey Act, which appears in the margin,[8] teachers could serve during "good behavior and

[8] The New Jersey Act (as quoted in *Phelps* v. *Board of Education,* 300 U. S. 319, 320–321):

Section 1 (4 N. J. Comp. St. 1910, p. 4763). "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 *teacher shall be dismissed* or subjected to reduction of salary in said school district *except for inefficiency, incapacity, conduct unbecoming a teacher or*

efficiency" and subject to removal only after a hearing and for cause. The Supreme Court of New Jersey declared that the *tenure* of New Jersey teachers was *"in one sense* perhaps contractual." The Supreme Court of Indiana declared that the *tenure of Indiana teachers was not contractual.* Yet this Court in the case of *Phelps* v. *Board of Education, supra,* decided that New Jersey's discharge of its teachers employed by the State "in a sense perhaps contractual" did not impair their contracts. The Court now strikes down Indiana's Teachers Tenure Law after repeated decisions by the state's Supreme Court that the teachers tenure is *not contractual.* The intent of the New Jersey Act and the intent of the Indiana Act were evidently identical and in view of this fact, I believe that the decision on the New Jersey appeal and the majority decision on the Indiana appeal are irreconcilable.

The Act of 1927 certainly does not clearly establish that the people of Indiana intended to surrender their sovereign right to change their educational policies from time to time to meet new needs or changed conditions. Under these circumstances "The presumption is that such a law (Teachers Tenure Law) is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." [9]

It is the end of every government to promote the general welfare of its people and we do not assume *"that the government intended to diminish its power of accomplishing the end for which it was created."* [10]

The Supreme Court of Indiana here held that "the Tenure Law does not purport to give a teacher a *definite*

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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. . . ."

[9] *Dodge* v. *Board of Education,* 302 U. S. 74, 79.

[10] *Charles River Bridge* v. *Warren Bridge,* 11 Pet. 420, 547.

and permanent contract. The word *'indefinite'* is used in the statute itself. . . . The Tenure statute was only intended as a limitation upon the plenary power of local school officials to cancel contracts. . . . It was not intended as, *and cannot be,* a limitation upon the power of future Legislatures to change the law respecting teachers and their tenures. These are matters of public policy, of purely governmental concern, in which the legislative power cannot be exhausted or consumed, or contracted away, so as to limit the discretion of future General Assemblies." [11]

Prior to this decision and even before the 1927 Act, the Supreme Court of Indiana had said:

"With that [legislative] determination [relating to educational matters] the *judiciary can no more rightfully interfere, than can the Legislature with a decree or judgment pronounced by a judicial tribunal.* . . .

"As the power over schools is a legislative one, it is not exhausted by exercise. The Legislature having tried one plan is not precluded from trying another. It has a choice of methods, and may change its plans as often as it deems necessary or expedient; *and for mistakes or abuses it is answerable to the people, but not to the court.*" [12]

The clear purport of Indiana law is that its legislature cannot surrender any part of its plenary constitutional right to repeal, alter or amend existing legislation relating to the school system whenever the conditions demand change for the public good. Under Indiana law the legislature can neither barter nor give away its constitutional investiture of power. It can make no contract in conflict with this sovereign power. The construction of the constitution of Indiana by the Supreme Court of Indiana *must be accepted as correct.* That court holds that Indi-

[11] 5. N. E. (2d) 531, 532.

[12] *State ex rel. Clark* v. *Haworth,* 122 Ind. 462; 23 N. E. 946.

ana's Constitution invests Indiana's legislature with *continuing* power to change Indiana's educational policies. It has here held that the legislature did not attempt or intend to surrender its constitutional power by authorizing *definite* contracts which would prevent the future exercise of this continuing, constitutional power. If the constitution and statutes of Indiana, as construed by its Supreme Court, prohibit the legislature from making a contract which is inconsistent with a continuing power to legislate, there could have been no *definite* contracts to be impaired. "The contracts designed to be protected by the [Federal Constitution] . . . are contracts by which *perfect rights, certain definite, fixed private rights* of property, are vested. . . . It follows, then, upon principle, that, in every perfect or competent government, there must exist a general power to enact and to repeal laws; and to create, and change or discontinue, the agents designated for the execution of those laws." [13]

Merits of a policy establishing a permanent teacher tenure law are not for consideration here. We are dealing with the constitutional right of the people of a sovereign state to control their own public school system as they deem best for the public welfare. This Court should neither make it impossible for states to experiment in the matter of security of tenure for their teachers, nor deprive them of the right to change a policy if it is found that it has not operated successfully.

The Indiana Constitution gives the State legislature *complete authority* to control the public school system. The State Supreme Court declares that under this authority the legislature can change school plans as often as it believes a change will promote the interest of education "*and for mistakes or abuses it is answerable to the people,*

[13] *Butler* v. *Pennsylvania,* 10 How. 402, 416.

but not to the court."[14] I believe the people of Indiana, if they prefer, have the right under the Federal Constitution to entrust this important public policy to their elective representatives rather than to the courts. Democracy permits the people to rule. I cannot agree that the constitutional prohibition against impairment of contracts was intended to—or does—transfer in part the determination of the educational policy of Indiana from the legislature of that State to this Court.

Indiana, in harmony with our national tradition, seeks to work out a school system, offering education to all, as "essential to the preservation of free government." That great function of an advancing society has heretofore been exercised by the states. I find no constitutional authority for this Court to appropriate that power. Indiana's highest court has said that the *State did not,* and has strongly indicated that the *legislature could not,* make contracts with a *few citizens,* that would take away from *all the citizens,* the continuing power to alter the educational policy for the best interests of Indiana school children. The majority decision now places in this Court a power which has been exercised by the states since the adoption of our Constitution. The people have not surrendered that power to this Court by constitutional amendment.

For these reasons I cannot agree to the majority decision and I believe the judgment of the Supreme Court of Indiana should be affirmed.

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[14] *State ex rel. Clark* v. *Haworth, supra.*

FOSTER ET AL., EXECUTORS, *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 189. Argued January 10, 11, 1938.—Decided January 31, 1938.

1. For the purpose of the federal income tax, earnings accumulated by a corporation prior to March 1, 1913 are deemed capital. P. 121.
2. Amounts distributed by a corporation in partial liquidation, i. e., in cancellation or redemption of part of its stock, are, under subsection (c) of § 115 of the Revenue Act of 1928, chargeable to capital, which, for this purpose, includes March 1, 1913 surplus, and are not to be considered a distribution of earnings or profits within the meaning of subsection (b) for the purpose of determining the taxability of subsequent distributions. Pp. 121–122.

84 Ct. Cls. 193; 17 F. Supp. 191, affirmed.

CERTIORARI, 302 U. S. 667, to review a judgment against the petitioners in a suit to recover an alleged overpayment of income taxes. In the trial court, upon the death of the original plaintiff, petitioners, her executors, were substituted as parties plaintiff.

Mr. William P. McCool argued the cause, and *Messrs. R. Kemp Slaughter, Hugh C. Bickford,* and *C. Clifton Owens* were on the brief, for petitioners.

Mr. Arnold Raum, with whom *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *George H. Foster* were on the brief, for the United States.

MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioners' right (as executors) to an income tax refund depends upon whether a dividend paid by the Foster Lumber Company in 1930 is tax exempt as representing corporate earnings accumulated before March 1, 1913.

This dividend is taxable under the Revenue Act of 1928 [1] if paid from earnings accumulated after 1913. The Court of Claims found the dividend taxable.[2]

Petitioners contend that the 1930 dividend was traceable to the Company's pre-1913 accumulations because its post-1913 earnings had been exhausted by a distribution in 1929. The circumstances of the 1929 distribution and the 1930 dividend were:

The Foster Lumber Company was a family corporation, organized in 1896 with a capital stock of $200,000. March 1, 1913, when the federal income tax became effective, the increased value of the company's property and its undistributed profits were more than $3,725,000. Petitioners insist that a distribution of $1,025,000 on October 10, 1929, completely exhausted the $330,578.98 total undistributed profits which had accumulated since March 1, 1913. This 1929 distribution, however, was not a dividend. It was paid by the company to cancel and liquidate five hundred shares of its own $100 par value stock and represented payment of $2,050 per share, the agreed value as of March, 1913. February 11, 1930, the company declared a $225,000 dividend and this refund is sought for the tax paid upon a shareholder's part of this dividend. Between October 10, 1929 (the date of the $1,025,000 stock purchase) and February 11, 1930 (the date of the $225,000 dividend) the company's earnings amounted to only $82,758.17. Petitioners take the position that only $82,758.17 of this $225,000 dividend of 1930 can be taxed, urging that the balance is tax exempt because it must be treated as representing pre-1913 accumulations.

Subsection (a) of § 115 of the Revenue Act of 1928 [3] defines "dividend," for income tax purposes, as "any

[1] c. 852, 45 Stat. 791.

[2] 17 F. Supp. 191; (supplemental opinion) 18 F. Supp. 790.

[3] Revenue Act of 1928, c. 852, 45 Stat. 791, 822.

distribution made by a corporation to its shareholders, . . . out of its earnings or profits *accumulated after February 28, 1913.*"

Subsection (b) of this income tax law exempts corporate earnings and profits accumulated before March 1, 1913. This subsection also provides that for income tax purposes all distributions are paid from "the most recently accumulated earnings or profits." The obvious purpose of the provision was to prevent corporations from attributing dividend payments to pre-1913 accumulations to avoid taxes imposed upon profits earned after March, 1913. Petitioners' contention is that the $330,578.98 earned after 1913, as "the most recently accumulated earnings or profits" was automatically exhausted in part payment of the $1,025,000 stock purchase and thus escaped taxation. In this manner, pre-1913 corporate non-taxable earnings could be used to avoid taxes on corporate profits earned after 1913.

We have previously said that Subsections (a) and (b), *supra,* construed together, disclose legislative purpose that pre-1913 accumulations shall not be distributed "in such a fashion as to permit profits accumulated after that date to escape taxation." [4] Petitioners ask that we now construe these provisions in a way which would facilitate the escape of such profits from taxation and thereby defeat the undoubted purpose of Congress. We are urged so to expand and broaden an exemption granted by Congress as a "concession to the equity of stockholders" [5] that such concession would in reality serve to nullify and defeat the tax on corporate profits earned after 1913. Courts should construe laws in harmony with the legislative intent and seek to carry out legislative purpose. With respect to the tax provisions under consideration, there is no uncertainty as to the legislative purpose to

[4] *Helvering* v. *Canfield,* 291 U. S. 163, 168.

[5] *Lynch* v. *Hornby,* 247 U. S. 339, 346.

tax post-1913 corporate earnings. We must not give effect to any contrivance which would defeat a tax Congress plainly intended to impose. The use of bookkeeping terms and accounting forms and devices cannot be permitted to devitalize valid tax laws.

The transaction under which this Company paid $1,025,000 cash for its own stock of $50,000 par value does not fall within Subsections (a) and (b) of § 115. Its character and effect are determined by Subsections (c) and (h) which relate to distributions in complete or partial corporate liquidation.[6]

Subsection (c), governing this stock purchase transaction, directs that ". . . In the case of amounts distributed in partial liquidation . . . the part of such distribution which is *properly chargeable to capital account shall not be considered a distribution of earnings or profits within the meaning of subsection (b) . . . for the purpose of determining the taxability of subsequent distributions . . .*" [7]

This provision of the Revenue Act of 1928 also substantially obtained in the Revenue Act of 1924.[8] Prior even to the 1924 Act, this Court had determined that, for income tax purposes, earnings of a corporation accumulated prior to 1913 are to be considered capital.[9] In the

[6] Cf. *Hellmich* v. *Hellman,* 276 U. S. 233, 237.

[7] Subsection (h) (Revenue Act of 1928, *supra,* at 823): "Definition of partial liquidation.—As used in this section the term 'amounts distributed in partial liquidation' means a distribution by a corporation in complete cancellation or redemption of a part of its stock, or one of a series of distributions in complete cancellation or redemption of all or a portion of its stock."

[8] § 201 (c), c. 234, 43 Stat. 253, 255.

[9] ". . . we are bound to consider accumulations that accrued to a corporation prior to January 1, 1913, as . . . capital, . . ." *Southern Pacific Co.* v. *Lowe,* 247 U. S. 335 (1917). Also, see *Lynch* v. *Turrish,* 247 U. S. 221; *Doyle* v. *Mitchell Bros. Co.,* 247 U. S. 179 (1917); ". . . what is called the stockholder's share in the accumu-

light of these decisions, Congress obviously intended that corporate funds distributed under the circumstances here shown should be "chargeable to capital account" and that stock purchases of the type here involved should not be considered "for the purpose of determining the taxability of subsequent distributions by the corporation."

Acceptance of petitioners' contention would permit corporate profits accumulated since March, 1913 to escape taxation, contrary to the provisions and purpose of the 1928 Revenue Act. The bookkeeping mingling of corporate earnings and profits made before and after March 1, 1913, does not alter the Act nor can such action render taxable profits non-taxable. In this case, the distribution of $1,025,000 was "properly chargeable to capital account" and was not paid out of profits earned since March 1, 1913.

The $1,025,000, paid for the Company's stock, cannot, therefore, be considered "for the purpose of determining the taxability of subsequent distributions by the corporation" and this purchase of stock did not exhaust any part of the $330,578.98 profits accumulated since 1913. It follows that the total dividend of 1930 received by petitioners' decedent is taxable and the judgment of the Court of Claims is

Affirmed.

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

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lated profit of the company is capital, . . ." *Eisner* v. *Macomber,* 252 U. S. 189, 219 (1919). Cf.: ". . . income . . . (received) . . . prior to the adoption of the Sixteenth Amendment . . . had become capital prior to the adoption of the Amendment . . ." *Old Colony R. Co.* v. *Commissioner,* 284 U. S. 557; and ". . . the accumulated profits, as they stood on March 1, 1913, constituted capital of the company . . ." *Helvering* v. *Canfield,* 291 U. S. 163, 167.

UNITED GAS PUBLIC SERVICE CO. *v.* TEXAS ET AL.

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS.

No. 13. Argued October 15, 18, 1937. Reargued December 14, 15, 1937.—Decided February 14, 1938.

1. Procedure of a state commission in fixing the rate of a public utility; of a state court of first instance in a review by a trial *de novo;* and of a state appellate court in reviewing the judgment sustaining the rate,—*held* consistent with due process under the Fourteenth Amendment. Pp. 128 *et seq.*, 138.
2. It is not the function of this Court, in reviewing a judgment of a state court, to determine whether the procedure in that court was in accordance with the state law; the final judgment of the state court determines that it was. P. 139.
3. The power of a State over the procedure of its courts includes the power to require that issues of fact be decided by jury, even in a complicated and difficult case involving the adequacy of a rate fixed for a public utility. P. 139.
4. On a trial of a rate case in which the issue of confiscation was put before a jury on a general charge with respect to the elements to be considered in determining whether the rate would yield a fair return on the value of the company's property used and useful in the public service,—*held* that the company was not entitled under the Fourteenth Amendment to have special issues framed and submitted covering some but not all of the items involved in the determination. P. 141.
5. This Court will review the findings of fact by a state court (1) where a federal right has been denied as a result of a finding shown by the record to be without evidence to support it, and (2) where a conclusion of law as to a federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts, such analysis being made, not to determine issues of fact arising on conflicting testimony or inference, but to perform this Court's proper function in deciding the question of law arising upon the findings which the evidence permits. P. 142.
6. Upon a trial of the issue of confiscation, a public utility is not entitled to have property not used or useful in its business in-

cluded in the rate base even though it was so included by the commission that fixed the rate. P. 144.

7. In fixing a rate for the future, the rate-making authority, in its consideration of returns from operations, is not limited to a particular year—especially a year of abnormal economic conditions; and similarly, a trial court may consider the results of the utility's operations for a series of years, including those intervening between the time of promulgation of the rate, and the time of trial, and determine the issue of confiscation in the light of the average return thus shown. P. 145.

8. In estimating what will be the returns from a rate which has not been put into effect, a court is entitled to a reasonable basis for prediction, especially in view of a contemplated emergence from a period of extreme economic depression. P. 145.

89 S. W. 2d 1094, affirmed.

APPEAL from the affirmance of a judgment sustaining an order of the Railroad Commission of Texas fixing a rate for the appellant Gas Company in the City of Laredo. The Supreme Court of Texas declined to grant a writ of error. With respect to the validity of a provision of the order making the questioned rate retroactive, this Court is equally divided.

Messrs. John P. Bullington and *F. G. Coates* for appellant on the reargument. *Mr. F. G. Coates,* with whom *Mr. John P. Bullington* was on the brief, for appellant on the original argument.

Messrs. Alfred M. Scott and *Edward H. Lange,* with whom *Mr. William McCraw,* Attorney General of Texas, was on the brief, for appellees on the reargument and on the original argument.

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

Appellant, United Gas Public Service Company, challenges the validity of a rate fixed by the Railroad Commission of Texas for natural gas supplied by appellant for domestic uses in the City of Laredo.

The City Council of Laredo, on December 15, 1931, enacted an ordinance fixing gas rates which included a rate of 40 cents per 1000 cubic feet for domestic consumption, with a provision for a discount of 10 per cent. on payment of bills within ten days, the ordinance to become effective on January 1, 1932. The rate had previously been 75 cents per m. c. f. with a 10 per cent. discount for payment within ten days. The Texas Border Gas Company, which was supplying natural gas to consumers in Laredo, filed an appeal with the Railroad Commission and posted the required supersedeas bond in accordance with the provisions of Articles 6058 and 6059 of the Revised Civil Statutes of Texas (1925).[1] The condition of

[1] "Art. 6058. *Appeal from city control.*—When a city government has ordered any existing rate reduced, the gas utility affected by such order may appeal to the Commission by filing with it on such terms and conditions as the Commission may direct, a petition and bond to review the decision, regulation, ordinance, or order of the city, town or municipality. Upon such appeal being taken the Commission shall set a hearing and may make such order or decision in regard to the matter involved therein as it may deem just and reasonable. The Commission shall hear such appeal *de novo*. Whenever any local distributing company or concern, whose rates have been fixed by any municipal government, desires a change of any of its rates, rentals or charges, it shall make its application to the municipal government where such utility is located and such municipal government shall determine said application within sixty days after presentation unless the determination thereof may be longer deferred by agreement. If the municipal government should reject such application or fail or refuse to act on it within said sixty days, then the utility may appeal to the Commission as herein provided. But said Commission shall determine the matters involved in any such appeal within sixty days after the filing by such utility of such appeal with said Commission or such further time as such utility shall in writing agree to, but the rates fixed by such municipal government shall remain in full force and effect until ordered changed by the Commission.

"Art. 6059. *Appeal from orders.*—If any gas utility or other party at interest be dissatisfied with the decision of any rate, classification,

the bond was that the Company should refund to the City for the benefit of consumers any excess of rates collected "over and above the rates and charges that shall be finally determined to be a fair and reasonable return upon the value of its property used and useful in supplying natural gas and natural gas service to the City of Laredo."

Prior to the hearing before the Commission, the South Texas Gas Company, which owned and operated the transmission properties and transported the gas sold to the Texas Border Gas Company at the Laredo city gate, was made a party to the proceeding. The Texas Border Gas Company applied to the City for an increase of rates and, because of the City's failure to act, took an appeal to the Commission as the statute provided. The two appeals were consolidated. The United Gas Public Service Company, a Delaware corporation, entered its appearance on both appeals alleging that it had acquired the properties of both companies. The Commission, by order of June 13, 1933, fixed a rate of 55 cents per m. c. f. with a penalty of 10 per cent. for non-payment within ten

rule, charge, order, act or regulation adopted by the Commission, such dissatisfied utility or party may file a petition setting forth the particular cause of objection thereto in a court of competent jurisdiction in Travis County against the Commission as defendant. Said action shall have precedence over all other causes on the docket of a different nature and shall be tried and determined as other civil causes in said court. Either party to said action may have the right of appeal; and said appeal shall be at once returnable to the appellate court, and said action so appealed shall have precedence in said appellate court of all causes of a different character therein pending. If the court be in session at the time such right of action accrues, the suit may be filed during such term and stand ready for trial after ten days notice. In all trials under this article the burden of proof shall rest upon the plaintiff, who must show by clear and satisfactory evidence that the rates, regulations, orders, classifications, acts or charges complained of are unreasonable and unjust to it or them."

days, and the order was made retroactive to January 1, 1932. 2 P. U. R. (N. S.) 503.

The United Gas Public Service Company then brought suit in the District Court of the United States for the Southern District of Texas to restrain the enforcement of the Commission's order. On July 26, 1933, the State of Texas, the members of the Commission and the City instituted the present suit in the District Court of Travis County in the nature of an appeal under Article 6059 [2] for the purpose of protecting the jurisdiction of the state court and of enforcing the Commission's order if determined to be valid. The state court thereupon stayed all proceedings by the Commission, or by the officials of the State and City, to enforce the Commission's order until the determination of the suit. On August 1, 1933, the District Court of the United States composed of three judges, 28 U. S. C. 380, stayed all proceedings in that court pending the final determination of the suit in the state court. Subject to the order of the state court, the Company has continued to charge its 75 cent rate.

The trial in the state court resulted in a judgment on April 24, 1934, which sustained the Commission's order of June 13, 1933, except so far as its rate was made retroactive to January 1, 1932, that part of the order being held invalid. The Company then appealed to the Court of Civil Appeals, which rendered its judgment on October 30, 1935, reforming the judgment of the trial court so as to declare the retroactive portion of the Commission's order valid and enforceable and affirming the judgment as thus modified. 89 S. W. (2d) 1094. The Supreme Court of the State refused writ of error.

A motion to dismiss the appeal taken to this Court from the judgment of the Court of Civil Appeals was denied. 301 U. S. 667. Upon hearing, the Court ordered reargu-

[2] See Note 1.

ment, noting that it especially desired to hear the parties on the state of the evidence as to the effect of the application of the Commission's rate to the years 1932 and 1933, that is, as to the revenues and expenses for those years on that basis, and as to the effect upon the rights of the appellant, with respect to those years, of the bond given on its appeal to the Commission. 302 U. S. 647. Reargument has been had accordingly.

Appellant, invoking the due process and equal protection clauses of the Fourteenth Amendment of the Federal Constitution, contends that in the state proceedings it has been denied procedural due process and also that the prescribed rate is confiscatory.

The proceedings before the Commission and its rulings. The Commission gave a full hearing. It received voluminous evidence offered by appellant and the City as to every phase of the controversy and their counsel were fully heard in argument. The opinion of the Commission reviews the history of the utility from the time that the Texas Border Gas Company received its franchise from the City in 1909. The Commission found the interrelation of the companies concerned and that the present appellant, which had become the owner of the properties of the former operating companies, was itself a unit of the United Gas System. It was in view of the "interrelated company operation and ownership," that the gathering, transmission and distribution properties used and useful in serving the city of Laredo were valued as a combined property. As consumers in a number of other communities within the Laredo area were also served, it became necessary to allocate to Laredo its appropriate proportion. Methods of allocation were submitted by the respective parties and the Commission adopted a weighted average per cent., which had been taken by the City's engineer as an approximate mean between two percentages used by the Company's engineer, as coming the

closest to a fair and correct allocation. Evidence of historical cost and of reproduction cost new less depreciation was submitted. The Company's appraisal on the basis of reproduction cost new, less depreciation, was $1,231,601. The appraisal of the City's engineer on the same basis was $810,698. The City adduced evidence showing the depreciated historical cost as of July 31, 1932, to be $709,991.23.

The Commission for the purpose of its valuation divided the properties into three groups, (a) gathering system, (b) transmission system, and (c) distribution system. The Commission stated and considered the respective appraisals of each group. While the City included an allowance of $124,668 as the depreciated cost of that portion of the transmission lines extending from Pescadito Junction to the Jennings Field, a distance of about 26 miles, the Commission found "that this line was used only one day during the twelve months' period ending July 31, 1932, in transporting gas to Laredo," and further that "the condition of this line is such that it could neither safely nor profitably transport the necessary volume of gas to the City." The Commission concluded that, if the Company's properties were reproduced, that section of the line would not be necessary.

The Commission then considered the questions of working capital, of going concern value and of accrued depreciation. After referring to the respective estimates, the Commission decided that "the over-all per cent. condition" of the properties was 78 per cent.

The Commission's conclusion was that the total "present fair value" of the properties was $885,000. The Commission said:

"In arriving at a decision and making an order herein that is deemed by the Commission to be just and reasonable, we have carefully and fully considered all the evidence presented and all the facts and circumstances re-

flected by the record herein; and upon giving due consideration to all the elements of value inhering in the property involved in this proceeding, have valued the Company's properties as an operating concern, with business attached; have made ample allowance for materials and supplies, working cash, and general overheads; and have included in such value the Pescadito-Jennings Transmission Line and the West Jennings Gathering System (although the record clearly discloses that these last two named property items are neither being used, nor are they necessary as standby equipment), and we find the present fair value of the properties of the Company used, and useful in the gathering, transporting and distributing of natural gas within the City of Laredo, Texas, to be in the sum of $885,000."

The Commission fixed the annual depreciation rate which should be allowed at 3 per cent. The Commission also found that an annual rate of return of 7 per cent. on the present value of the properties was adequate.

With respect to "available revenue," the Commission said that the Company had presented a "setup" of operating revenues and expenses for the twelve months' period ending July 31, 1932, only. On the other hand, the City had presented a similar "setup" covering the years ending June 30, 1929, 1930 and 1931, and for the year ending July 31, 1932—a period of four years. The Commission was of the opinion that the one year ending July 31, 1932, should not be taken as a test period. It was believed to be a matter of common knowledge that "from a general business standpoint the year 1932 was the worst year since 1929." The City's exhibit was deemed to show that the fiscal year 1931 was also subnormal, and the Commission concluded that neither that year, nor an average of those two years, should be taken as an adequate test. The Commission also thought that it would be unfair to the Company to take the year 1930

or an average of the three years, 1930, 1931 and 1932, as it appeared that the year 1930 was the best year in point of gross revenues that the Company had experienced since 1928. On the whole, the Commission thought that justice would be done if an average of revenues and expenses for the four fiscal years, 1929, 1930, 1931 and 1932, should be taken as the test period for the computation upon which a fair return should be predicated.

It had been stipulated by the parties at the outset that a rate of five cents per m. c. f. was a fair and reasonable price of gas at the well. While the Commission did not make specific findings with respect to revenues and expenses for the years which it took as a basis, it did reject certain allowances for which the Company contended. As to an allowance of a gathering charge in relation to gas purchased from the Carolina-Texas field, the gathering lines in which were the property of an affiliate, the Commission allowed a charge of one-half of one per cent. instead of the one per cent. which the Company sought. With respect to items not particularized by the Commission, we think that it substantially appears from its opinion that the Commission, save as to the items disallowed, accepted the City's exhibit which covered the revenues and expenses for the four-year period and stated separately the items contained therein which were deemed to be questionable.

The Commission found the rate, for all domestic uses, of 55 cents per m. c. f., the minimum bill per user per month to be one dollar and the penalty for non-payment within ten days to be 10 per cent., to be "just and reasonable." The Commission found that its application would produce "a net return in excess of seven per cent (7%) per annum on the present fair value of the properties, after provision for operations and reserve for depreciation." The Commission ordered that the rate should be effective from and after January 1, 1932, and that there

should be refunded to the City of Laredo for the benefit of domestic gas consumers the difference between the amount collected under the existing rate and the amount that would have been due by consumers under the Commission's order.

The proceedings in the District Court of Travis County.—The trial was essentially *de novo*. It was begun in March, 1934, and was had before a jury, a motion by the appellants to have the jury discharged and the cause determined by the court being overruled. The entire record before the Commission was placed in evidence and additional testimony was introduced as to property values, depreciation reserve accrual, revenues, expenses, rates of return, etc. It appears that the evidence was brought as near as possible to the time of trial. The evidence as to revenues and expenses which appellant adduced again related to the year ending July 31, 1932, and the years 1932 and 1933, and the appellees introduced evidence for the four-year period, to which they had addressed their computations before the Commission, and also for the year 1933.

At the close of the evidence, appellant moved for a peremptory instruction in its favor and also for the suspension of the Commission's order for the years 1932 and 1933. These motions were overruled. Appellant then moved to have the case submitted to the jury on "special issues" and not upon a "special charge." The court stated that in its view its charge was on "special issue" and hence complied with the request. The appellant then moved to submit to the jury certain special issues which were separately stated; that is, that the jury should make separate findings as to the values of component parts of appellant's property during the years 1932 and 1933, respectively, also as to the amount of the necessary materials and supplies and cash working capital, and the amount which should be allowed for "going value," and

as to the average cost of gas at the well mouth and the proper annual allowance for the depreciation reserve. These requests were refused.

The trial court submitted to the jury a single special issue as follows:

"Do you find that the order of the Railroad Commission of Texas bearing date June 13, 1933, providing for a fifty-five cent gas rate to residential consumers within the city of Laredo, Texas, under the facts introduced in evidence before you, is unreasonable and unjust as to defendant, United Gas Public Service Company. Answer this question 'yes' or 'no'."

The court prefaced that submission with the following definitions and instructions:

That by "fair return" was meant that the appellant was entitled to earn a rate "on the present fair value of its property which it employs for the convenience of the public equal to that generally being made at the same time within the same general part of the country upon investments in other business undertakings which are attended by like risks and uncertainties." That the rate of return should be reasonably sufficient "to assure confidence in the financial soundness of the utility and should be adequate under efficient and economical management to maintain and support its credit and enable it to raise money necessary for the proper discharge of its duties."

That by "fair value" was meant "the reasonable worth of the property at this time that is being used and useful in the public service." That by "used and useful" was meant that it embraces all the property "actually being used" in that service and also such property as was reasonably necessary to permit "continuous and efficient service."

That by "operation expenses" was meant such expenses as were incurred in the operation of appellant's property in furnishing gas to the people of Laredo.

That by "annual depreciation" was meant the amount per annum that was reasonably necessary to compensate for the wearing out and any necessary replacements and retirements of appellant's property.

That by "reproduction cost new" was meant "the cost to the owner under the conditions which may reasonably be expected to exist if the property were to be reproduced new."

That by "going value" was meant the added value of appellant's property as a whole, used and useful for serving the City, over the sum of the values of its component parts, by reason of the fact "that it is an operating, assembled and established property, functioning with a trained personnel, a co-ordinated plant and property, with customers attached, and its business established."

Referring to the findings of the Commission, and the transcripts of evidence and exhibits, which were before the Commission and had been introduced in evidence, the court told the jury that the same might be considered for the purpose of assisting the jury in determining whether the Commission's order was unreasonable and unjust and for no other purpose. The court concluded its charge with the following instructions:

"You are instructed that the burden of proof is upon the defendant, United Gas Public Service Company, to show by clear and satisfactory evidence that the rate promulgated by the Railroad Commission in its said order of June 13, 1933, is unreasonable and unjust as to it.

"You are further instructed that in determining your answer to said issue in the light of all the evidence introduced in this case the defendant, United Gas Public Service Company, is entitled to receive a fair return at this time on the present fair value of its property that is used and useful in the public service after first deducting all necessary operating expenses and a fair and reasonable amount for the annual depreciation of said property, and

that in considering what is a fair value of said property you will take into consideration all elements of value that have been introduced in evidence before you, including reproduction cost new of said property and the amount of going value (if any) that inheres in said property.

"By 'unreasonable and unjust' is meant that the rate prescribed and adopted in the said order of the Railroad Commission was so low as to have not provided for a fair return upon the fair value of defendant's property used and useful in supplying the service furnished by the United Gas Public Service Company to the inhabitants within the city of Laredo, Texas."

Appellant took exceptions to the court's charge and to the refusal of its requests.

The jury answered the special issue in the negative. Appellant's motion for judgment *non obstante veredicto* was denied and judgment was entered.

The court in its judgment ruled that the provision in the Commission's order requiring the refund of the excess collections over the Commission's rate was a separable part, and as the court was of the opinion that the Commission's retroactive application of its rate to January 1, 1932, and the provision for a refund, were invalid, that part of the Commission's order was set aside without prejudice to the right of the City to recover the excess collections, should that provision be sustained on appeal. The judgment then enjoined appellant from making any charge in excess of the Commission's rate, with direction for supersedeas pending appeal upon the filing of a described bond. A motion for a new trial, in which appellant again stated its objections to the court's rulings, was denied.

The ruling of the Court of Civil Appeals.—The appellate court reached the conclusion that appellant had not only failed to establish its claim for reversal, and for judgment in its favor, but that "when viewed in the light

of the presumption in favor of the validity of the Commission's rate order, and of the quantum and character of proof required to overcome such presumption, the evidence adduced was insufficient, as a matter of law, to show that the 55¢ rate order was either unjust and unreasonable or confiscatory." In that view, the court added, "all questions of practice," presented by appellant, "go out of the case."

The court noted the fact that the Commission had reluctantly included in the valuation of the property the items of $124,688, representing the Pescadito-Jennings transmission pipe line, and also had "included the West Jennings Gathering System at a value of $10,342", although the Commission found that these "two property items are neither used nor are they necessary as standby equipment." The court also said that there was evidence before both the trial court and the Commission which tended to show "the fair value of appellant's property to be about $700,000; and that a 2% annual accrual for depreciation would be fair and reasonable." Referring to the evidence as to operating revenues and expenditures, the court set forth tables based on the computations of an expert accountant of the appellees showing average net revenues for the four-year period and the year 1933. These calculations were on the basis of appellant's existing 75 cent rate. The court thus stated the criterion which it applied in overruling appellant's contentions:

"The rule is settled that rates are not based upon the results of business of any one year alone, but upon what is estimated as being the average business over a period of years; the future being gauged as nearly as possible by the past experience. . . . It is also the rule that only actual experience under the rate complained of can furnish any real criterion or guide as to the effect of the rate on the business; and that this experience should be obtained by a practical test for such a period of time as

will under the facts of the particular business determine the matters which are of doubtful or uncertain influence. In absence of an actual test of the rate, the court on appeal must resolve all doubts against the complaining party; pare down valuations unsparingly; and the rate must appear to be clearly confiscatory, or unjust and unreasonable before the court should by injunction restrain its enforcement in advance of actual experience of the practical results of the rate. And while the equal protection, the due course, and the due process clauses of the fundamental laws of both state and nation guard against the taking of, or compelling of the use of private property for public service without just compensation, still they do not assure the public utility the right under all conditions and circumstances to have a return upon the value of the property so used. If actual experience for a proper period of time under the rate complained of should reveal sufficient reasons, the rate order may then be changed through proper channels."

Proceeding on this principle, the court said:

"In the instant case appellant has continuously charged and collected the 75¢ rate; hence no actual test has been made under the lower 55¢ rate. An actual test of the lower rate might have resulted in a larger return by bringing about an increase in appellant's business, and manifestly this court would not be warranted in holding that the lower rate was either confiscatory, or unjust and unreasonable, as a matter of law, in advance of an actual test of the rate; . . . So when the property valuation is pared down to this lowest valuation (about $700,000), and doubtful items of expenses are deducted, the net revenues received by appellant under the 75¢ rate for the year ending December 31, 1933, would afford more than a 11% return. And calculations based on the $700,000 valuation and the estimated difference in revenues between the 55¢ rate and the 75¢ rate, show a return of more

than 7% for the year 1933. But even if the lower rate did not or would not yield a return of 7% for the year 1933, this court would not be warranted in enjoining the enforcement of the rate, because the test period was too short, no actual test was made under the lower rate and the undisputed evidence showed the year to be abnormal."

In concluding its opinion, the court held that the trial court erred in its ruling that the retroactive provision of the Commission's order was invalid. The appellate court said that on the appeal to the Commission to review the City's ordinance, the Commission was authorized to suspend the rate fixed by the City and to require the utility to give a bond "on such terms and conditions as the Commission may direct." The trial court had refused to receive the bond in evidence but it appeared in the record. The appellate court quoted its condition and noted that the supersedeas bond filed on appeal to that court was similarly conditioned. The court held that the Commission had the power upon determining that the rate fixed by the City's ordinance was unreasonable to "substitute its own just and reasonable rate therefor, and to make it effective as of date of the city ordinance rate for which it was substituted."

The Court of Civil Appeals then entered judgment sustaining the retrospective and refund provision of the Commission's order and affirming the judgment of the trial court as thus modified.

First.—The question of procedural due process.—There is no ground for holding that appellant did not have a fair hearing before the Commission. Appellant's evidence was received and weighed; its arguments were heard and considered. The Commission made findings as to the value of appellant's property, the permissible allowance for depreciation and the rate of return. The amounts of revenues and expenses for the four years

which the Commission took as a basis sufficiently appear, as already stated, from the City's exhibit to which the Commission referred in its opinion. The estimated amount of revenue at the Commission's rate appears from a simple calculation, applying the rate of return to the rate base after the annual allowance for depreciation. In the Commission's procedure there was no lack of the due process required by the Federal Constitution. *Railroad Commission of California* v. *Pacific Gas & Electric Co.,* 302 U. S. 388; *Los Angeles Gas Co.* v. *Railroad Commission,* 289 U. S. 287, 304, 305; *West Ohio Gas Co.* v. *Public Utilities Comm'n (No. 1),* 294 U. S. 63, 70.

With respect to the proceedings in the state courts, appellant urges that the case was not tried and determined as required by state law, and we are referred to the state statutes and the decisions of the Texas courts as to the proper procedure in the trial court and on appeal. It is not our function, in reviewing a judgment of the state court, to decide local questions. We are concerned solely with asserted federal rights. The final judgment of the state court in the instant case must be taken as determining that the procedure actually adopted satisfied all state requirements. *John* v. *Paullin,* 231 U. S. 583, 585; *Lee* v. *Central of Georgia Ry. Co.,* 252 U. S. 109, 110; *Central Union Co.* v. *Edwardsville,* 269 U. S. 190, 194, 195.

As to the requirement of due process under the Federal Constitution, appellant contends that it was denied the independent judicial judgment upon the facts and law to which it was entitled. See *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287; *Bluefield Water Works Co.* v. *Public Service Comm'n,* 262 U. S. 679; *State Corporation Comm'n* v. *Wichita Gas Co.,* 290 U. S. 561, 569; *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 49. The proceeding in the state court undoubtedly purported to afford an independent judicial review. As the Court of Civil Appeals of Texas said in the instant case, the

trial of the issues whether the rate was unreasonable or confiscatory was "*de novo.*" Appellant itself recognizes that the trial "was essentially *de novo*, new and full testimony being introduced as to property value, depreciation reserve accrual, revenues, expenses, rates of return, etc." Appellant's evidence was received by the trial court and appellant's contentions were heard. The question whether due process in the court's procedure was accorded thus comes to the mode of trial; that is, (1) the propriety of a trial by jury, and (2) the manner in which the issues were submitted to the jury.

We do not fail to appreciate the difficulty in presenting to a jury the complicated issues in a rate case, especially where, as here, the evidence is voluminous, embracing the conflicting valuations of experts and a host of details in appraisals and in accounts of operations, with elaborate tabulations. Even in trials of such cases without a jury the service of a special master for the analysis of the details in evidence with respect to values and return has been found advisable. We have had abundant occasion to become familiar with the difficulty of such determinations. But we are not dealing with questions of policy as to procedure. The State is entitled to determine the procedure of its courts, so long as it provides the requisite due process. And on that question we have never held that it is beyond the power of the State to provide for the trial by a jury of questions of fact because they are complicated. Cases at law triable by a jury in the federal courts often involve most difficult and complex questions, as, for example, in patent cases at law presenting issues of validity and infringement. See *Tucker* v. *Spalding,* 13 Wall. 453, 455; *Keyes* v. *Grant,* 118 U. S. 25, 36, 37; *Royer* v. *Schultz Belting Co.,* 135 U. S. 319, 325; *Coupe* v. *Royer,* 155 U. S. 565, 578, 579. Most difficult questions of fact in protracted trials, with much conflicting expert testimony, are not infrequently presented in criminal cases triable by jury. The issue of life or death may be

decided in such a case. We have held that a State may modify a trial by jury or abolish it altogether, *Walker* v. *Sauvinet,* 92 U. S. 90; *Maxwell* v. *Dow,* 176 U. S. 581; *Frank* v. *Mangum,* 237 U. S. 309, but never that the time-honored method of resolving questions of fact by a jury must be abandoned by a State under compulsion of the Federal Constitution. And we find no warrant for such a ruling now.

The question remains as to the manner in which the instant case was submitted to the jury. The special issue was submitted whether the Commission's rate was "unreasonable and unjust as to defendant." This submission, under the court's instruction in relation to the import of the phrase "unreasonable and unjust," covered, as appellant conceded at this bar, the issue whether the rate was confiscatory. Appellant did not ask to have the issue of confiscation submitted by the use of that precise term. The question then is as to the denial of the submission of the particular issues which appellant requested and as to the character of the instructions given by the trial court.

The special issues which appellant requested were for findings as to the value of component parts of appellant's property during the years 1932 and 1933 and as to the amounts necessary to cover material and supplies, working capital, going value, and certain other items. It will be observed that these special issues did not embrace all the questions which the jury should consider, as for example, the questions of operating revenues, operating expenses and return for the period to which the evidence before the Court appropriately related and not simply for the years 1932 and 1933. If trial by jury was permissible, as we hold it was, we cannot say—putting aside questions of correct practice under the state law not reviewable here—that appellant was entitled under the Federal Constitution to have special issues framed and submitted to the jury, much less that appellant could demand that the particu-

lar items it mentioned should be singled out and specially passed upon. We consider that question in the light of the total power which the State possesses to provide for jury trials, and for the manner of conducting them, and not with respect to any alleged limitations imposed by state statutes. See *Castillo* v. *McConnico,* 168 U. S. 674, 683.

We have stated at some length, and need not repeat, the general instructions given by the trial court. The jury were instructed as to the right of appellant to receive a fair return on the fair value of its property that is used and useful in the public service and that the jury should take into consideration all elements of value that had been introduced in evidence, including the reproduction cost new of the property and the amount of going value, if any, that inhered in it. The court defined the terms that it used, such as "fair return," "fair value," "used and useful," "operation expenses," "annual depreciation," "reproduction cost new" and "going value," and the court explained what would constitute an adequate rate of return. No instructions were given which could be taken in any sense to conflict with appellant's federal right; on the contrary, the jury, if it duly followed the instructions, could not but enforce that right.

Appellant, while objecting to the charge upon grounds that are not impressive, did not submit and request amplified instructions which might have aided the jury's consideration. Appellant was apparently content to object to the pertinent instructions that were given, and to a general charge, and to stand upon its limited requests as to special issues.

Upon such a record we are unable to hold that there was a denial of federal right so far as procedural due process is concerned.

Second.—The question of confiscation.—We have said that our inquiry in rate cases coming here from a state

court "is whether the action of the state officials in the totality of its consequences is consistent with the enjoyment by the regulated utility of a revenue something higher than the line of confiscation." *West Ohio Gas Co.* v. *Public Utilities Comm'n (No. 1), supra.* This Court will review the findings of fact by a state court (1) where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it, and (2) where a conclusion of law as to a federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts. *Kansas City Southern Ry. Co.* v. *Albers Commission Co.,* 223 U. S. 573, 591; *Northern Pacific Ry. Co.* v. *North Dakota,* 236 U. S. 585, 593; *Norfolk & Western Ry. Co.* v. *Conley,* 236 U. S. 605, 609, 610; *Aetna Life Insurance Co.* v. *Dunken,* 266 U. S. 389, 394. We make that analysis, not to determine issues of fact arising on conflicting testimony or inferences, and thus to usurp the function of the state court as a trier of the facts, but to perform our own proper function in deciding the question of law arising upon the findings which the evidence permits. *Kansas City Southern Ry. Co.* v. *Albers Commission Co., supra.*

Here, the issues of fact were determined in the trial court. Counsel agree that under the state practice the Court of Civil Appeals had no authority to make findings of fact. "Where the evidence is without conflict, it may render judgment. But where there is any conflict in the evidence on a material issue, it has no authority to substitute its findings of fact for those of the trial court." *Post* v. *State,* 106 Tex. 500, 501; 171 S. W. 707. The Court of Civil Appeals held not only that appellant had failed to make good its claim that it was entitled to judgment in its favor but that, having regard to the presumption in favor of the Commission's rate order and the clear and satisfactory proof required to overcome such pre-

sumption, appellant's evidence was insufficient as matter of law to show that the Commission's rate was confiscatory. The reasoning of the Court of Civil Appeals was directed to the decision of those legal questions. Upon the issue of confiscation, the judgment of the trial court was affirmed and thus its finding of fact was not disturbed.

Separate questions are presented (1) as to the value of appellant's property and (2) as to its return from operations. As to the first, the Commission found the value to be $885,000. But the Commission stated that this valuation included property which was neither used nor useful. If it be assumed that the Commission in the exercise of its legislative discretion might include that property in fixing a "reasonable rate," still appellant would not be entitled to its inclusion on the issue of confiscation. While the evidence as to value was conflicting, we are unable to conclude that there was not adequate evidence to sustain a finding that the total property used and useful, after making deductions for the portions not of that sort, was worth not more than $750,000.

Appellant complains that the Court of Civil Appeals based its conclusion upon a valuation of "$700,000" which appellant contends is inadmissible, and that the appellate court misapplied the rule as to the burden of proof in holding that the value must be "pared down unsparingly" to that amount. But we must distinguish "between what was said and what was done," between "dictum and decision," between reasoning and conclusion. *Dayton Power & Light Co.* v. *Public Utilities Comm'n,* 292 U. S. 290, 298, 302. What the appellate court did was to affirm the judgment of the trial court and if, as we think, a valuation of appellant's property at $750,000 would have adequate support in the evidence, we need go no further in relation to that part of the case.

With respect to return from operations, the crucial question is whether appellant was entitled to have the rate for the future fixed with sole regard to the result of operations in the years 1932 and 1933, as appellant contends, or it was permissible to fix the rate upon a consideration of the returns for a number of years, that is, for the four years prior to July 31, 1932, as taken by the Commission, or for that period and the years 1932 and 1933, as shown by the evidence before the trial court. The Commission held its hearing in the latter part of 1932 and made its order in June, 1933. Apart from the question raised by the retrospective feature of its order, we think it manifest that in fixing its rate for the future the Commission was not limited to the results of operations for the year ending July, 1932. Not only was that but a single year, but the Commission regarded it as an abnormal year and the propriety of its ruling in that respect is supported by common knowledge of economic conditions at that time. Similarly, the trial court, sitting in the spring of 1934, was not bound to limit its vision to the results of 1932 and 1933. What would happen in the future was necessarily a matter of prophecy. The Commission's rate had not been put into effect and in estimating what would be the consequence of the requirement the court was entitled to a reasonable basis for prediction, especially in view of a contemplated emergence from a period of extreme depression. As the Court of Civil Appeals observed, the way was open to the appellant to seek a change in the rate on proof of actual experience. Of course, appellant was entitled to take its chances on appellate review of the trial court's judgment, but it cannot complain of the delay incident to that review and its case must be judged as it stood before the trial court. We hold that there was no error in taking into consideration the results of appellant's operations for the years 1929 to 1933, inclusive, according to the evidence produced in the

trial court, and in determining the issue of confiscation in the light of the average return thus shown.

Appellees introduced evidence tending to show that appellant's operating revenues, calculated on the basis of the 55 cent rate and after deducting the operating expenses deemed to be allowable and the annual allowance for depreciation, for the years ending June 30, 1929, 1930, and 1931, and July 31, 1932, yielded net amounts of $106,815.36, $123,293.02, $91,554.04, and $48,556.88, respectively, and for the year 1933, $46,371.85. Appellant contends that on the basis of the 55 cent rate its net operating revenue for 1932 would have been but $10,086.25, and for 1933, $18,408.39. We do not think it necessary, so far as concerns the validity of the Commission's rate in its prospective application, to extend this opinion by stating in detail the contentions *pro* and *con* as to these estimates, questions which largely relate to the permissible allowances for operating expenses. We are satisfied that if we consider the results of appellant's operations for the entire period, 1929 to 1933, the evidence was adequate to support the judgment of the trial court.

Third.—With respect to the question of the validity of that part of the Commission's order which made its rate retroactive to January 1, 1932, considered in the light of the evidence relating to the intervening period and of the bond given on the appeal to the Commission from the City's ordinance, this Court is equally divided and the judgment of the Court of Civil Appeals in that relation is accordingly affirmed.

Judgment affirmed.

MR. JUSTICE REED took no part in the consideration and decision of this case.

MR. JUSTICE BLACK, concurring.

Although I concur in sustaining the judgment of the court below, I do not agree that the rights of this Delaware corporation doing business in Texas are derived from the

Fourteenth Amendment [1] or that the Fourteenth Amendment deprives Texas of its constitutional power to determine the reasonableness of intra-state utility rates in that State.

Even applying the Fourteenth Amendment under the prevailing doctrine, I do not believe that this Court (apart from procedural questions) is called upon to do more than determine the sole question of confiscation. Any indication by this Court of the value of the company's property will unjustifiably affect and control subsequent valuations for rate making purposes.[2]

The record discloses a striking absence of satisfactory evidence of the actual cost of the company's properties; its funded indebtedness; the actual investments of stockholders in the company; profits in past years; and the percentage of past profits to actual investment. These matters have important bearing upon the issue of confiscation. There is evidence that only a part of the company's depreciation reserve, accumulated over and above expenditures for repairs and property maintenance, reaches approximately $500,000—or over 40% to 70% of the various estimated values of all the company's assets. In addition appellant has not shown beyond a reasonable doubt that there is an actual investment of stockholders—over and above the amount of borrowed capital—which could be confiscated.[3] Appellant has obviously failed to establish all the elements necessary to prove beyond a reasonable doubt [4] that the rate fixed by the State will result in confiscation of its property.

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[1] See dissent filed in *Connecticut General Life Ins. Co.* v. *Johnson*, *ante*, p. 83.

[2] See *McCardle* v. *Indianapolis Water Co.*, 272 U. S. 400; *McCart* v. *Indianapolis Water Co.*, 302 U. S. 419; 13 F. Supp. 110; 89 F. (2d) 522, 525, 526.

[3] Cf. *Chicago & G. T. Ry. Co.* v. *Wellman*, 143 U. S. 339; see dissent in *McCart* case, *supra*.

[4] Cf. *San Diego Land Co.* v. *National City*, 174 U. S. 739, 754; *Ogden* v. *Saunders*, 12 Wheat. 213, 270.

OPERATING EXPENSES.—The record shows that appellant is one of many corporate associates and affiliates connected with the Electric Bond and Share Company and the United Gas System. Practically all operating expenses appeared as inter-company charges among these associates, affiliates, etc. Under these circumstances confiscation cannot be established merely by proof that the books of appellant show alleged expenditures purporting to have been made by or through its affiliates, associates, etc. The strong presumption of the validity of these rates—fixed by a State—can be overcome only by proof that each expenditure, alleged to have been made or incurred by or through an associate or affiliate, was in fact so made or incurred and was fair and reasonable. Such proof was not made in this case. As an illustration, a witness testifying for the City said that it was impossible for him to ascertain proper operating expenses for the year 1933, because his examination was confined to the South Texas Border Gas Company and the South Texas Gas Company "and all I saw in support of these items was inter-company invoices, and I was not able or had no way of determining whether items were proper or not."

Since the major part of appellant's income is absorbed by associated companies in the name of "operating expenses" and by intercorporate transactions, the operations and expenses of these associates, affiliates, etc., are brought within the field of inquiry. Referring to intercorporate transactions of holding companies, subsidiaries, associates, affiliates, etc., this Court has said:

"It is urged that as these averments were uncontradicted they constitute, when taken with the facts previously stated, a *prima facie* case for the reasonableness of the rate charged. This might well be true were it not for the fact of unity of ownership and control of the pipe line and the distribution system. An averment of negotiation and effort to procure a reduction in the wholesale rate

means little in the light of the fact that the negotiators are both acting in the same interest,—that of the holding company which controls both. All of these facts so averred in the pleadings would be far more persuasive with respect to the propriety of the rate *if the parties were independent of each other and dealing at arm's length.* Where, however, they constitute but a single interest and involve the embarkation of the total capital in what is in effect one enterprise, *the elements of double profit and of the reasonableness of inter-company charges must necessarily be the subject of inquiry and scrutiny before the question as to the lawfulness of the retail rate based thereon can be satisfactorily answered.*

". . . The argument is made that the proofs demanded by the Commission will involve an extensive and unnecessary valuation of the pipe-line company's property and an analysis of its business, and that this burden should not be thrown upon appellant. Whether this is so we need not now decide. It is enough to say that in view of the relations of the parties, and the power implicit therein arbitrarily to fix and maintain costs as respects the distributing company which do not represent the true value of the service rendered, *the state authority is entitled to a fair showing of the reasonableness of such costs, although this may involve a presentation of evidence which would not be required in the case of parties dealing at arm's length and in the general and open market, subject to the usual safeguards of bargaining and competition.*" [5]

[5] *Western Distributing Co.* v. *Public Service Comm'n,* 285 U. S. 119, 126, 127.

"Purchases are frequently made by a member or members of a system from affiliates or subsidiaries, and with comparative infrequency from strangers. At times obscurity or confusion has been born of such relations. There is widespread belief that transfers between affiliates or subsidiaries complicate the task of rate-making for regulatory commissions and impede the search for truth. *Buyer*

Not only did appellant fail to prove the reasonableness of its intercompany dealings, but it did not—as requested in open court—produce a *full* list of salaries paid by its associates, affiliates, etc. It is true that evidence did show that *some* of the officers of associates, affiliates, etc., received from $65,000 to $100,000 a year but there was no proof of the reasonableness of such salaries or of their effect upon appellant's local gas distribution expenses.

This Court has previously declared the importance of salaries in determining the question of confiscation in *Chicago & G. T. Ry. Co.* v. *Wellman,* 143 U. S. 339, 345. There it was said:

"Of what do these operating expenses consist? Are they made up partially of extravagant salaries; fifty to one hundred thousand dollars to the president, and in like proportion to subordinate officers? Surely, before the courts are called upon to adjudge an act of the legislature fixing . . . maximum . . . rates for railroad companies to be unconstitutional, . . . they should be fully advised as to what is done with the receipts and earnings of the company. . . . While the protection of vested rights of property is a supreme duty of the courts, it has not come to this, that the legislative power rests subservient to the discretion of any railroad corporation which may, by exorbitant and unreasonable salaries, or in some other improper way, transfer its earnings into what it is pleased to call 'operating expenses.' "

When a public utility chooses to pay out a large part of its "operating expenses" to corporate associates, affiliates, etc., these payments might conceivably be used to

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and seller in such circumstances may not be dealing at arm's length, and the price agreed upon between them may be a poor criterion of value. Dayton Power & Light Co. v. *Public Utilities Comm'n of Ohio,* 292 U. S. 290, 295; *Western Distributing Co.* v. *Public Service Comm'n of Kansas,* 285 U. S. 119; *Smith* v. *Illinois Bell Telephone Co.,* 282 U. S. 133." *American Telephone & Telegraph Co.* v. *United States,* 299 U. S. 232, 239.

drain the operating company's income and to inflate the "operating expenses." Inflated operating expenses inevitably lead to inflated rates. Since affiliates, associates, etc., do not ordinarily deal at "arm's length" appellant had the burden of proving the fairness and reasonableness of all expenditures made or charged as inter-company transactions.

DUE PROCESS AND TRIAL BY JURY.—Appellant contended in the court below that *"the submission of this case . . . to a jury will deprive this defendant of that character of hearing and trial contemplated under the Constitution and laws of the United States and of the Constitution and laws of the State of Texas."* Appellant here further insists that over appellant's protest, the court below did submit the cause to a jury *"Despite the recognized inability of such a body to deal adequately with proof of that nature . . . , despite appellant's vigorous protest and efforts to extricate itself from this situation . . ."*

The Constitution of the United States does not prohibit trial by jury, but the Seventh Amendment, judicially construed as a limitation on the federal government,[6] provides:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, *the right of trial by jury shall be preserved,* and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

This Court said in 1855[7] that "The words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land' in *Magna Charta.*" Again this Court said:[8]

[6] *Barron* v. *Baltimore,* 7 Pet. 243, 247; *Edwards* v. *Elliott,* 21 Wall. 532, 557.

[7] *Murray's Lessee* v. *Hoboken Land & Imp. Co.,* 18 How. 272, 276.

[8] *Thompson* v. *Utah,* 170 U. S. 343, 349, 350.

"When Magna Charta declared that no freeman should be deprived of life, etc., *'but by the judgment of his peers or by the law of the land,'* it referred to a trial by twelve jurors. Those who emigrated to this country from England brought with them this great privilege 'as their birthright and inheritance, . . .' . . . 'The trial . . . by a jury of one's country, is justly esteemed one of the principal excellencies of our Constitution; for what greater security can any person have in his life, liberty or estate, than to be sure of not being divested of, or injured in any of these, without the sense and verdict of twelve honest and impartial men of his neighborhood? . . .'"

There is nothing in the letter or spirit of our Constitution or any constitutional amendment, which deprives a state of the right to submit issues of fact to a trial by jury. That Constitution indicates no preference for determination of facts by judges or masters appointed by judges. On the contrary, our Federal Constitution, the State Constitutions, and our national tradition demonstrate a well-established preference for trial by jury.

"One of the objections made to the acceptance of the Constitution as it came from the hands of the Convention of 1787 was that it did not, in express words, *preserve the right of trial by jury,* and that under it, *facts tried by a jury could be reëxamined by the courts of the United States* otherwise than according to the rules of the common law. The Seventh Amendment was intended to meet these objections, *and to deprive the courts of the United States of any such authority.*" [9]

Further, "Upon the reasoning in the case just referred to [*The Justices* v. *Murray,* 9 Wall. 274, 278] it would seem to be clear that the last clause of the Seventh Amendment *forbids the retrial by this court* of the facts tried by the jury in the present case. . . .

[9] *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226, 243.

". . . Even if we were of opinion in view of the evidence that the jury erred in finding that no property right, of substantial value in money, had been taken from the railroad company, by reason of the opening of a street across its right of way, *we cannot, on that ground, reëxamine the final judgment of the state court. We are permitted only to inquire whether the trial court prescribed any rule of law for the guidance of the jury that was in absolute disregard of the company's right to just compensation.*" [10]

This cause was tried in the courts of Texas in accordance with regular court procedure applicable to such cases. The facts were submitted to a jury as provided by the constitution and laws of that State, and in harmony with the traditions of the people of this nation. Under these circumstances, no proper interpretation of the words "due process of law" contained in the Fourteenth Amendment, can justify the conclusion that appellant has been deprived of its property contrary to that "due process." In October, 1877, this Court in *Davidson* v. *New Orleans,* 96 U. S. 97, 105—in discussing the Fourteenth Amendment—said:

"But however this may be, or under whatever other clause of the Federal Constitution we may review the case, it is not possible to hold *that a party has, without due process of law,* been deprived of his property, when, as regards the issues affecting it, *he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case.*"

I concur in the affirmance.

Separate opinion of MR. JUSTICE McREYNOLDS and MR. JUSTICE BUTLER.

MR. JUSTICE BUTLER and I are of opinion that the judgment under review should be reversed. We adhere to the

[10] *Id.,* 244, 246.

doctrine announced in *Ohio Valley Co.* v. *Ben Avon Borough*, 253 U. S. 287, and often reaffirmed. When rates fixed for a public service corporation by an administrative body are alleged to be confiscatory the Federal Constitution requires that fair opportunity be afforded for submitting the controversy to a judicial tribunal for determination upon its own independent judgment both as to law and facts. Here such opportunity has been denied.

June 13, 1933, the Texas Railroad Commission directed appellant to observe a new schedule of rates. By bill presented to the United States District Court June 29, 1933, appellant challenged this action as confiscatory. July 26, 1933, the Commission began this proceeding in the state court by filing an original petition which, among other things, alleged—

"Notwithstanding defendant's remedies are adequate and complete in the courts of this State, and notwithstanding every constitutional and legal right to which it may be entitled is and will be fully safeguarded and protected in said court, the defendant, nevertheless, elected to and did, on or about the 29th day of June, 1933, file its bill of complaint in the District Court of the United States for the Southern District of Texas, Laredo Division, in a cause entitled, United Gas Public Service Company, plaintiff *v.* Lon A. Smith, et al., defendants, No. 32 in Equity, and being a cause wherein your defendant is plaintiff and wherein each and all of your plaintiffs are defendants, except the State of Texas. . . ."

"In said action in said United States District Court, United Gas Public Service Company alleges in substance and effect that the order entered by the Railroad Commission of Texas fixed and prescribed a rate confiscatory of its property used and useful in the public service, and alleged that said order is unconstitutional and upon said allegation [obtained] a temporary restraining order out of said court enjoining and restraining your plaintiffs and

each of them (except the State of Texas) from compelling or attempting to compel your defendant to observe said order of said Commission."

"Plaintiffs allege that the defendant is attempting to evade the laws of this State and the lawful order of the Railroad Commission of Texas fixing and prescribing rates and charges for the distribution and sale of natural gas within the limits of the City of Laredo, and that in charging a rate in excess of that prescribed by the Railroad Commission, plaintiffs herein, and each of them, are suffering irreparable injury, and that there is no adequate remedy prescribed by the laws of this State which will protect the public interest involved and the rights of plaintiffs herein."

"Plaintiffs are desirous of having the constitutional questions involved in the attack being made by United Gas Public Service Company upon the Commission's order heard and determined in the courts of this State, and to that end desire this court to enter a stay of proceedings in accordance with the provisions of Section 38 [380 *], Title 28, U. S. C. to the end that all proceedings in the district courts of the United States will be stayed pending a final determination of this cause in the courts of this State."

* Sec. 380, Title 28 U. S. C. ". . . It is further provided that if before the final hearing of such application [to a federal court for injunction] a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the State, that the suit in the State courts is not being prosecuted with diligence and good faith. . . ."

"This action is filed in this court in the nature of an appeal under the terms of Article 6059, Revised Civil Statutes, but such appeal is not taken because the plaintiffs herein are dissatisfied with the rates and charges prescribed in the Commission's said order, but primarily for the purpose of protecting the jurisdiction of this Court and its venue to hear and finally determine the matters in controversy and to enforce the said order, if it should be determined to be valid upon final hearing."

The petition asked: That the defendant appear and answer; that upon final trial the plaintiffs have an appropriate judgment; that defendant be enjoined from charging any rates other than those fixed by the Commission; also that an order issue staying further proceedings by the Commission pending the termination of this suit, &c.

July, 26, 1933, the state court entered a stay order as prayed. August 17, 1933, upon the Commission's application, the United States District Court ordered that all proceedings in that court be stayed, pending final action by the state court.

Under the compulsion indicated, appellant unwillingly appeared in the state court and filed an answer setting up its rights under the Federal Constitution. The matter was supposed to stand in that court for hearing *de novo*. Voluminous evidence was presented by both sides.

Notwithstanding appellant's definite objections and its duly presented requests for adequate instructions, a single issue was submitted to the jury. "Do you find that the order of the Railroad Commission of Texas bearing date June 13, 1933, providing for a fifty-five cent gas rate to residential consumers within the city of Laredo, Texas, under the facts introduced in evidence before you, is unreasonable and unjust as to defendant, United Gas Public Service Company? Answer this question 'Yes,' or 'No.'" The jury answered "No," and judgment affirming the Commission's order in part was entered.

The Court of Civil Appeals took the cause for review upon the record made in the District Court. The following excerpts from its opinion sufficiently indicate the reasons which moved it partly to sustain and partly to overrule the judgment of the trial court and finally to approve the Commission's action *in toto*.

"We have reached the conclusion that appellant not only failed to establish its claim for reversal and rendition of judgment in its favor, but that when viewed in the light of the presumption in favor of the validity of the Commission's rate order, and of the quantum and character of proof required to overcome such presumption, the evidence adduced was insufficient, as a matter of law, to show that the 55¢ rate order was either unjust and unreasonable or confiscatory. In view of this conclusion, all questions of practice presented in 'Part II.' of the brief go out of the case."

"In absence of an actual test of the rate, the court on appeal must resolve all doubts against the complaining party; pare down valuations unsparingly; and the rate must appear to be clearly confiscatory, or unjust and unreasonable before the court should by injunction restrain its enforcement in advance of actual experience of the practical results of the rate."

"That in advance of any actual test of the practical result of the new rate, the court on appeal will not disturb the rate where it is based upon conflicting evidence as to valuations of property, or as to any other item used as a basis for the calculation of the rate; because to do so would merely substitute the findings of the court or jury upon conflicting evidence for that of the Commission, and would therefore permit the court to exercise the legislative function of rate-making. R. R. Commission *v.* Shupee, 57 S. W. (2d), 295; affirmed 73 S. W. (2d), 505. And that by 'resolving all doubts against' the appellant, 'and using valuations pared down unsparingly,' there could

have been no reasonable doubt in the judicial mind that the 55¢ rate was neither confiscatory nor unjust and unreasonable. Newton *v.* Consolidated Gas Co., 258 U. S., 165."

Considering the rules which the Court of Civil Appeals declared applicable to the trial, quite evidently appellant had no adequate opportunity to submit the law and facts relevant to the controversy to a fair judicial tribunal for determination according to its own independent judgment.

A tribunal required to accept weighty presumptions against a defendant, resolve all doubts against it, pare down valuations to the utmost and refuse a judgment in its favor when the evidence is conflicting as to valuations or other important elements, could not reach an independent judgment in respect of the law and facts—could not arrive at a fair judicial determination. To us the proceedings in the state courts seem an empty show.

NEW YORK EX REL. CONSOLIDATED WATER CO. *v.* MALTBIE ET AL.

APPEAL FROM THE SUPREME COURT OF NEW YORK.

No. 380. Argued February 3, 4, 1938.—Decided February 14, 1938.

A public utility in New York, complaining of an order reducing its rates, sought a review by certiorari, which under the state practice is limited to questions of law. *Held:*

1. That it had no standing to say that the limitation deprived it of due process of law. P. 160.

2. That of the questions of law presented, including the question whether there was evidence to sustain the findings of fact made by the rate-fixing body, none was a substantial federal question. *Id.*

Appeal from 275 N. Y. 357; 9 N. E. 2d 961, dismissed.

Mr. Thayer Burgess, with whom *Mr. George H. Kenny* was on the brief, for appellant.

Mr. Gay H. Brown, with whom *Mr. Wendell P. Brown* was on the brief, for appellees.

PER CURIAM.

In a proceeding before the Public Service Commission of the State of New York relating to rates for water supplied by appellant to the City of Utica and adjacent communities, the Commission, on June 28, 1933, after full hearing and upon findings determining the fair value of the property of appellant used and useful in rendering service to its customers, the amount of annual operating income required to yield a six per cent. return upon such fair value, and the average operating income of the company for the years 1930 and 1931 (as adjusted to allow for additional expense), directed appellant to file a schedule of rates which should effect a reduction in its annual operating revenues of at least $120,000 per annum. The Commission denied a rehearing with permission to apply for an increase of rates if, after a reasonable time, it should appear that a definite change in prices had occurred.

In certiorari proceedings, appellant challenged these determinations and orders as unlawful and confiscatory, in violation of the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States. The Appellate Division, Third Department, of the Supreme Court of the State, sustained the action of the Commission, 245 App. Div. 866; 282 N. Y. S. 412, and the Court of Appeals affirmed the order of the Appellate Division. 275 N. Y. 357; 9 N. E. 2d 961. The case comes here on appeal which appellees move to dismiss for the want of jurisdiction upon the ground that no substantial federal question is involved.

1. Appellant contends that it is entitled to the exercise of the independent judgment of a court as to the law and the facts with respect to the issue of confiscation and that

such a review has not been accorded because of the limitations imposed by the state practice in certiorari proceedings. 275 N. Y. at p. 370; 9 N. E. 2d 961. Appellant has no standing to raise this question as appellant itself sought review by certiorari and has not invoked the plenary jurisdiction of a court of equity and it does not appear that this remedy is not available under the state law. *Matter of Pennsylvania Gas Co.* v. *Public Service Comm'n,* 211 App. Div. 253, 256; 207 N. Y. S. 599; *Matter of New Rochelle Water Co.* v. *Maltbie,* 248 App. Div. 66, 70; 289 N. Y. S. 388.

2. Upon the review of the Commission's orders by certiorari, only questions of law were open under the state practice, including the question whether there was evidence to sustain the findings of the Commission. 275 N. Y. at p. 366; 9 N. E. 2d 961. In that view no substantial federal question is presented. *Cedar Rapids Gas Co.* v. *Cedar Rapids,* 223 U. S. 655, 668–670; *Interstate Commerce Comm'n* v. *Louisville & Nashville R. Co.,* 227 U. S. 88, 91, 92; *New York ex rel. New York & Queens Gas Co.* v. *McCall,* 219 N. Y. 84, 88–90; 245 U. S. 345, 348, 349. The motion to dismiss is granted.

Dismissed.

Mr. Justice Cardozo took no part in the consideration and decision of this case.

NEW YORK LIFE INSURANCE CO. *v.* GAMER, EXECUTRIX.

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

No. 323. Argued January 13, 1938.—Decided February 14, 1938.

A life insurance company stipulated to pay double indemnity (twice the face of the policy) upon receipt of due proof that death of the insured resulted, directly and independently of all other causes, from bodily injury effected solely through external, violent and accidental means, but that double indemnity should not be payable if the death resulted from self-destruction. The insured died of a rifle shot. In an action on the policy in which only the right to the additional payment was in controversy, the issue raised by the pleadings was whether the death was accidental, the company claiming suicide. *Held:*

1. That the burden was upon the plaintiff to prove by a preponderance of the evidence that the death was accidental. P. 171.

2. The presumption that the death was due to accident rather than suicide lost its application to the case when evidence was introduced sufficient to sustain a finding that death was not due to accident. *Id.*

3. This presumption requiring the inference of accident rather than suicide in a case of violent death is a rule of law; it is not evidence and may not be given the weight of evidence. *Id.*

Travellers' Insurance Co. v. *McConkey,* 127 U. S. 661, distinguished.

90 F. (2d) 817, reversed.

CERTIORARI, 302 U. S. 670, to review the affirmance of a judgment recovered by the present respondent in an action on a life insurance policy. See also 76 F. (2d) 543.

Mr. J. A. Poore, with whom *Messrs. M. S. Gunn* and *Charles R. Leonard* were on the brief, for petitioner.

The physical facts show suicide. It is unnecessary to show motive. *New York Life Ins. Co.* v. *Trimble,* 69 F. (2d) 849, 851; *Aetna Life Ins. Co.* v. *Tooley,* 16 F. (2d) 243, 244; *Burkett* v. *New York Life Ins. Co.,* 56 F. (2d)

105, 107, 108; but in the record there is evidence of motive.

Surmise or conjecture of accident will not sustain the judgment. *Pennsylvania Ry. Co.* v. *Chamberlain,* 288 U. S. 333; *New York Life Ins. Co.* v. *Anderson,* 66 F. (2d) 705, 709; *Frankel* v. *New York Life Ins. Co.,* 51 F. (2d) 933, 935; *Aetna Life Ins. Co.* v. *Tooley,* 16 F. (2d) 243, 245; *New York Life Ins. Co.* v. *Alman,* 22 F. (2d) 98, 101; *Burkett* v. *New York Life Ins. Co.,* 56 F. (2d) 105, 108; *Stevens* v. *White City,* 285 U. S. 195.

The District Court should have sustained the motion for a directed verdict for the defendant.

The complaint alleges that the death of the insured "resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means and . . . that the death of said insured *did not result from self-destruction* (but) resulted directly from the accidental discharge of a firearm, to-wit: a rifle. . . ."

The answer denies that the death of insured resulted from the accidental discharge of a rifle, and alleges that the death of the insured resulted from self-destruction.

This is not a suit for *death,* but for *death by accident.* The defendant at all times offered to pay the *death* claim, and tendered the money in exchange for a full release, which was refused.

The burden is upon the plaintiff to prove her cause of action, "death by accident," which proof would negative death by intention. *U. S. Fidelity & Guaranty Co.* v. *Blum,* 270 Fed. 946; *Travelers' Ins. Co.* v. *Wilkes,* 76 F. (2d) 701; (*International Life Ins. Co.* v. *Carroll,* 17 F. (2d) 42, 43, distinguished); *Jefferson Standard Life Ins. Co.* v. *Clemmer,* 79 F. (2d) 724; *Federal Life Ins. Co.* v. *Zebec,* 82 F. (2d) 961, 963; *New Amsterdam Casualty Co.* v. *Breschini,* 64 F. (2d) 887, 890; *Fidelity & Casualty Co.* v. *Driver,* 79 F. (2d) 713, 714.

It seems clear that if the plaintiff must show death by accident, it must negative death by intentional means, such as suicide; and if the defendant must prove death by suicide, it must likewise negative death by accident. *Travelers' Insurance Co.* v. *McConkey,* 127 U. S. 661, distinguished.

The cause of death being unexplained, a presumption arises in accordance with human experience that it was not caused by suicide, and this presumption temporarily aided the plaintiff on whom was the burden of persuasion. This required the defendant to go forward with its evidence, or the issue of suicide would go against it, but did not place the burden on defendant of proving suicide, or change the burden of proof resting on the plaintiff. *Mobile* v. *Turnipseed,* 219 U. S. 35.

The proper construction and interpretation to be placed upon the *McConkey* case has given rise to much contrariety of opinion. See *Jefferson Standard Life Ins. Co.* v. *Clemmer,* 79 F. (2d) 724, 731.

The Circuit Court of Appeals erred in sustaining the instructions to the jury that the presumption of law is that the death was not voluntary; that this presumption has the weight and effect of evidence, and is binding on the jury and they must find according to the presumption until it is overcome by evidence, and that the burden of overcoming such presumption is on the defendant. *Mobile* v. *Turnipseed,* 219 U. S. 35; *Western & A. R. Co.* v. *Henderson,* 279 U. S. 639; *Heiner* v. *Donnan,* 285 U. S. 312; *Atlantic Coast Line R. Co.* v. *Ford,* 287 U. S. 502; *Del Vecchio* v. *Bowers,* 296 U. S. 280. [Citing many cases in the Circuit Courts of Appeals, including *Ariasi* v. *Orient Insurance Co.,* 50 F. (2d) 548, from the Ninth Circuit.] Also: Thayer, Preliminary Treatise on Evidence, pages 314, 336, 337, 339; 5 Wigmore on Evidence, 2d ed., §§ 2487–2498, and chap. 88; Jones' Commentaries on Evidence, 2d ed. 1926, §§ 30, 256.

Mr. William Meyer, with whom *Mr. Francis P. Kelly* was on the brief, for respondent.

It is our contention that upon the trial plaintiff was required to prove that Gamer died on the morning of April 10th and that he died as a result of external and violent means. This proof was then aided by the presumption of law that his death was accidental, which, in the absence of contradictory proof, was sufficient to take the case to the jury. The evidence in this case was sufficient to take the case to the jury, if indeed it did not justify a directed verdict for plaintiff. *Gunning* v. *Cooley,* 281 U. S. 90; *Small Company* v. *Lamborn,* 267 U. S. 248; *Murray Co.* v. *Harrill,* 51 F. (2d) 883, 884; *Pythian Knights* v. *Beck,* 181 U. S. 49. See also, *Missouri State Life Ins. Co.* v. *West,* 67 F. (2d) 468; *Fidelity & Casualty Co.* v. *Pittinger,* 63 F. (2d) 880; *Home Benefit Assn.* v. *Sargent,* 142 U. S. 691; *Gamer* v. *New York Life Ins. Co.,* 76 F. (2d) 543.

It is generally held that the defense that death resulted from causes which by the terms of the policy relieve the insurer from liability, is an affirmative defense, to be alleged by insurer in its answer. *Sullivan* v. *Metropolitan Life Ins. Co.,* 96 Mont. 254, 266; 29 P. (2d) 1064; *Kingsland* v. *Metropolitan Life Ins. Co.,* 97 Mont. 558, 569; 37 P. (2d) 335; *Vicars* v. *Aetna Life Ins. Co.,* 158 Ky. 1; 164 S. W. 106; *Dent* v. *National Life & Accident Ins. Co.,* 6 S. W. (2d) 195; *American Central Life Ins. Co.* v. *Alexander,* 39 S. W. (2d) 86.

It is for the jury to decide whether death was accidental, as neither suicide nor murder will be presumed from the killing of an individual. *McClur* v. *New York Life Ins. Co.,* 50 F. (2d) 972; *Metropolitan Life Ins. Co.* v. *Broyer,* 20 F. (2d) 818, 820; *Wells Fargo Co.* v. *Mutual Life Ins. Co.,* 66 F. (2d) 890, 893; *Connecticut Life Ins. Co.* v. *Maher,* 70 F. (2d) 441.

The decision upon the first appeal is now the law of the case.

Travelers' Insurance Co. v. *McConkey,* 127 U. S. 661, has not been disapproved by this Court.

[Counsel invited attention to certain statutes of Montana defining presumption, and to Montana decisions; *State* v. *District Court,* 72 Mont. 213; 232 Pac. 201, 203 (3); *Arnold* v. *Genzberger,* 31 P. (2d) 296, 305; *Renland* v. *First National Bank,* 90 Mont. 424; 4 P. (2d) 488; *McMahon* v. *Cooney,* 95 Mont. 138; 25 P. (2d) 131; *Nichols* v. *New York Life Ins. Co.,* 88 Mont. 132, 292 Pac. 253; *Maki* v. *Murray Hospital,* 91 Mont. 251; 7 P. (2d) 228, 232; *State* v. *Nielson,* 57 Mont. 137; 187 Pac. 639; *Union Bank & Trust Co.* v. *State Bank,* 103 Mont. 260; 62 P. (2d) 677, 684; also to many California cases.]

Mr. Justice Butler delivered the opinion of the Court.

April 10, 1933, the deceased died by gunshot. Petitioner had insured his life by a policy in which it agreed to pay his executors ten thousand dollars upon proof of death without regard to its cause, or twenty thousand dollars in case of death resulting from accident as defined by a provision the pertinent parts of which follow. "The Double Indemnity . . . shall be payable upon receipt of due proof that the death of the Insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means . . . Double Indemnity shall not be payable if the Insured's death resulted from self-destruction, whether sane or insane."

Respondent sued petitioner in a state court for twenty thousand dollars. There being diversity of citizenship, defendant removed the case to the federal court for the district of Montana. The complaint alleges that the death of the insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means and did not result from self-destruction but directly from the accidental discharge of a rifle.

Defendant's answer concedes that plaintiff is entitled to the face of the policy, and alleges a deposit of that amount with interest in court. It denies that death resulted from bodily injury effected through accidental means; and specifically denies that it resulted from the accidental discharge of a rifle or other fire-arm. And "as an affirmative defense," it alleges that the death of the insured resulted from self-destruction by intentionally discharging a loaded rifle into his body with intent to take his life.

The case came on for trial and, at the close of the evidence, the judge on motion of defendant directed the jury to return a verdict in its favor. Plaintiff appealed; the circuit court of appeals held that the question whether the death was accidental should have been submitted to the jury, and reversed the judgment. 76 F. (2d) 543. At the second trial plaintiff went forward; at the close of all the evidence defendant requested the court to direct a verdict in its favor, insisting that plaintiff had failed to prove accidental death and that the evidence showed death was caused by self-destruction, and was not sufficient to sustain a verdict for the plaintiff. The court denied the motion and submitted the case to the jury.

Its charge contained the following:

"In this case the defendant alleges that the death of E. Walter Gamer was caused by suicide. The burden of proving this allegation by a preponderance, or greater weight of the evidence is upon the defendant. The presumption of law is that the death was not voluntary and the defendant . . . must overcome this presumption and satisfy the jury by a preponderance of the evidence that his death was voluntary.

"Ordinarily . . . in the absence of a plea by the defendant of suicide or self-destruction the burden would be upon, and it still is upon the plaintiff in this case to prove that Walter Gamer died from external, violent and acci-

dental means, but by its answer . . . the . . . Company has admitted that . . . [he] died through external and violent means. . . . The question remains as to whether the death was accidentally caused, or the means of the death was accidental or whether it was suicide. But when the defendant took the position that it takes here it assumed the burden of proving to you by a preponderance of the evidence that Walter Gamer killed himself voluntarily. . . .

"The presumption of law is that the death was not voluntary and the defendant in order to sustain the issue of suicide . . . must overcome this presumption and satisfy the jury, by a preponderance of the evidence, that his death was voluntary . . ."

The jury gave plaintiff a verdict for twenty thousand dollars with interest, and the court entered judgment in her favor for that amount. Defendant appealed, alleging that the trial judge erred in denying its motion for a directed verdict and in giving each of the quoted instructions. The circuit court of appeals affirmed. 90 F. (2d) 817. This Court granted a writ of certiorari.

There are presented for decision, questions whether the trial court erred in refusing to direct a verdict for defendant or in giving any of the instructions quoted above.

The circuit court of appeals has twice held the evidence sufficient to sustain a verdict for plaintiff. It found that the facts brought forward at the second trial are not substantially different from those presented on the first appeal. There is no substantial controversy as to the principal evidentiary circumstances upon which depends decision of the controlling issue, whether the death of the insured was accidental. As we are of opinion that the trial court erred in giving the challenged instructions, and the judgment is to be reversed and the case remanded to the district court where another trial may be had, we

refrain from discussion of the evidence. We find it sufficient to sustain a verdict for or against either party. Defendant was not entitled to a mandatory instruction.

The form and substance of the challenged instructions suggest that the trial judge followed those brought before this Court in *Travellers' Ins. Co.* v. *McConkey,* 127 U. S. 661. The opinion of the circuit court of appeals reads that case to require approval of the instructions here in question. As it has not been uniformly interpreted, we shall examine its principal features. There the accident policy sued on covered bodily injuries effected through external, violent and accidental means when such injuries alone occasioned death or disability. A proviso declared that no claim should be made under the policy when the death or injury had been caused by suicide, or by intentional injuries inflicted by the insured or by any other person. The complaint alleged that the insured had been accidently shot by a person or persons unknown to plaintiff, by reason of which he instantly died. The answer denied that death was occasioned by bodily injuries effected through external, violent and accidental means, and alleged that it was caused by suicide, or by intentional injuries inflicted either by the insured or by some other person.

The statement of the case quotes the following instructions (pp. 663–664):

"The plaintiff . . . gives evidence of the fact that the insured was found dead . . . from a pistol shot through the heart. This evidence satisfies the terms of the policy with respect to the fact that the assured came to his death by 'external and violent means,' and the only question is whether the means by which he came to his death were also 'accidental.'

"It is manifest that self-destruction cannot be presumed. . . . The plaintiff is therefore entitled to recover unless the defendant has by competent evidence overcome

this presumption and satisfied the jury by a preponderance of evidence that the injuries which caused the death of the insured were intentional on his part.

"Neither is murder to be presumed . . .; but if the jury find . . . that the insured was in fact murdered, the death was an accident as to him . . . If . . . the injuries of the insured . . . were not intentional on his part the plaintiff has a right to recover. . . . The inquiry . . . is resolved into a question of suicide, because if the insured was murdered the destruction of his life was not intentional on his part.

"The defendant, in its answer, alleges that the death of the insured was caused by suicide. The burden of proving this allegation by a preponderance of evidence rests on the defendant."

This Court held that the trial judge erred in charging that if the insured was murdered plaintiff was entitled to recover and on that ground reversed the judgment and remanded the case with directions to grant a new trial.

It was not necessary to consider any other question. But, for guidance of the trial ordered, the Court discussed other parts of the charge.

At the outset the opinion declares that under the issue presented by the general denial it was incumbent on plaintiff to show that the death was the result not only of external and violent, but also of accidental means. It states that the two "principal facts to be established were external violence and accidental means, producing death. The first was established when it appeared that death ensued from a pistol shot through the heart of the insured. The evidence on that point was direct and positive; . . . Were the means by which the insured came to his death also accidental? If he committed suicide, then the law was for the company, because the policy . . . did not extend to . . . self-destruction . . ."

The opinion proceeds (p. 667): "Did the court err in saying to the jury that, upon the issue as to suicide, the

law was for the plaintiff, unless that presumption was overcome by competent evidence? This question must be answered in the negative. The condition that direct and positive proof must be made of death having been caused by external, violent, and accidental means, did not deprive the plaintiff, when making such proof, of the benefit of the rules of law established for the guidance of courts and juries in the investigation and determination of facts."

The statement just quoted, lacking somewhat of the precision generally found in opinions of the Court prepared by its eminent author, has been variously construed. The question it propounds does not fully reflect the substance of the charge which put on the defendant the burden of proving suicide by preponderance of the evidence. However, the opinion shows that the burden was on plaintiff to prove death by accident as defined in the contract. It contains nothing to suggest that the court deemed the issue as to burden of proof arising on general denial to be affected by defendant's allegation of suicide. It held that if the insured committed suicide, plaintiff had no claim; that, from the fact of death by violence, accident would be presumed, and that unless the presumption was overcome by evidence the law was for plaintiff. The opinion does not indicate the quantum of proof required to put an end to the presumption. It is consistent with, if indeed it does not support, the rule that the presumption is not evidence and ceases upon the introduction of substantial proof to the contrary. Thayer, Preliminary Treatise on Evidence, p. 346. *Mobile, J. & K. C. R. Co.* v. *Turnipseed,* 219 U. S. 35, 43. *Western & Atlantic R. Co.* v. *Henderson,* 279 U. S. 639, 642, 644. *Heiner v. Donnan,* 285 U. S. 312, 329. *Atlantic Coast Line* v. *Ford,* 287 U. S. 502, 506. *Del Vecchio* v. *Bowers,* 296 U. S. 280, 286. *Nichols* v. *New York Life Ins. Co.,* 88 Mont. 132, 139 *et seq.;* 292 P. 253. The opinion did not definitely sustain any of

the charges to which it referred. It falls far short of sustaining the instructions challenged in the present case.

Under the contract in the case now before us, double indemnity is payable only on proof of death by accident as there defined. The burden was on plaintiff to allege and by a preponderance of the evidence to prove that fact. The complaint alleged accident and negatived self-destruction. The answer denied accident and alleged suicide. Plaintiff's negation of self-destruction taken with defendant's allegation of suicide served to narrow the possible field of controversy. Only the issue of accidental death *vel non* remained. The question of fact to be tried was precisely the same as if plaintiff merely alleged accidental death and defendant interposed denial without more. *Travelers' Ins. Co.* v. *Wilkes,* 76 F. (2d) 701, 705. *Fidelity & Casualty Co.* v. *Driver,* 79 F. (2d) 713, 714. Cf. *Home Benefit Assn.* v. *Sargent,* 142 U. S. 691.

Upon the fact of violent death without more, the presumption, i. e., the applicable rule of law, required the inference of death by accident rather than by suicide. As the case stood on the pleadings, the law required judgment for plaintiff. *Travellers' Ins. Co.* v. *McConkey, supra,* 665. It was not submitted on pleadings but on pleadings and proof. In his charge the judge had to apply the law to the case as it then was. The evidence being sufficient to sustain a finding that the death was not due to accident, there was no foundation of fact for the application of the presumption; and the case stood for decision by the jury upon the evidence unaffected by the rule that from the fact of violent death, there being nothing to show the contrary, accidental death will be presumed. The presumption is not evidence and may not be given weight as evidence. *Despiau* v. *United States Casualty Co.,* 89 F. (2d) 43, 44. *Jefferson Standard Life*

Ins. Co. v. *Clemmer,* 79 F. (2d) 724, 730. *Travelers' Ins. Co.* v. *Wilkes, supra,* 705. *Fidelity & Casualty Co.* v. *Driver, supra,* 714. *Frankel* v. *New York Life Ins. Co.,* 51 F. (2d) 933, 935. *Ocean Accident & Guarantee Corp.* v. *Schachner,* 70 F. (2d) 28, 31. But see: *New York Life Ins. Co.* v. *Ross,* 30 F. (2d) 80. *Tschudi* v. *Metropolitan Life Ins. Co.,* 72 F. (2d) 306, 308, 310. *Nichols* v. *New York Life Ins. Co., supra.*

In determining whether by the greater weight of evidence it has been established that the death of the insured was accidental, the jury is required to consider all admitted and proved facts and circumstances upon which the determination of that issue depends and, in reaching its decision, should take into account the probabilities found from the evidence to attend the claims of the respective parties.

The challenged instructions cannot be sustained.

Judgment reversed.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration or decision of this case.

MR. JUSTICE BLACK, dissenting.

The judgment below rests upon an insurance policy contract made in Butte, Montana. Plaintiff filed suit for more than $3,000 in a Montana state court, and the insurance company—because it was not a Montana corporation—was able to remove the suit to the Federal District Court. Plaintiff's judgment in the District Court was affirmed by the Court of Appeals. This Court now reverses plaintiff's judgment because the District Court instructed the jury that—evidence having established the death of the insured by violent and external means—the law presumed from these facts that the death "was not voluntary and . . . the defendant must overcome this presumption and satisfy the jury by a preponderance of

the evidence, that his death was voluntary. . . ." The policy of insurance was a Montana contract and even though the company was able to remove plaintiff's case to a Federal court, I believe the plaintiff's rights should be determined by Montana law. Under Montana law I believe the above instructions were proper.

The Supreme Court of Montana has said: [1]

"Where, as here, death is shown as the result of *external and violent means* and the issue is whether it was due to accident or suicide, the *presumption is in favor of accident.*"

The majority agree with the Montana law up to this point, saying:

"Upon the fact of *violent death without more, the presumption,* i. e., the applicable rule of law, *required the inference of death by accident rather than by suicide.*" At this point, agreement ends between the rule here declared by the majority and the law of Montana.

Under Montana law the presumption that violent death was accidental and not suicidal continues and does not disappear unless the evidence "*all* points to suicide . . . with such certainty as to preclude any other reasonable hypothesis"; and the presumption continues for the jury's consideration except ". . . when the evidence points overwhelmingly to suicide as the cause of death." [2]

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[1] *Nichols* v. *New York Life Ins. Co.,* 88 Mont. 132, 140; 292 P. 253, 255.

[2] *Nichols* v. *New York Life Ins. Co., supra,* at 141. In a case involving an action on an insurance policy, in which the *McConkey* case, *supra,* was followed, the Supreme Court of Montana said:

"The testimony as to the incidents connected with the death of the insured is slight, but is sufficient to establish the death of insured by external and violent means. . . .

". . . if plaintiff had 'shown by the fair weight of the evidence that the assured came to his death as the result of a pistol shot . . ., then the law will presume that the shot was accidental, and that it was not inflicted with murderous or suicidal intent. And under

Contrary to this clear statement by the Montana Supreme Court is the different rule clearly announced by the majority here in holding that the presumption disappears after the insurance company introduced evidence merely "*sufficient to sustain* a finding that the death was not due to accident."

This Court does not find that the evidence in this case excludes every other reasonable hypothesis but suicide or that all of the evidence points "unerringly to suicide as the cause of death." [3] On the contrary the majority opinion states:

"We find it [the evidence] sufficient to sustain a verdict for or against either party. Defendant was not entitled to a mandatory instruction."

It is obvious that the majority here declare a rule based neither on Montana law nor federal statute. This federal judicial rule must none the less be followed in suits on insurance policies tried in federal courts. The result

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such circumstances the burden will be upon the defendant to overcome this presumption, and to show that the death was not caused by accidental means.'

"It is apparent, therefore, that under the great weight of authority plaintiff's evidence made a *prima facie* case. As said by this court in numerous decisions, when a *prima facie* case is made by plaintiff, the defendant must rebut the case so made, or fail in the action." *Withers* v. *Pacific Mutual Life Ins. Co.*, 58 Mont. 485, 491, 492, 493, 494; 193 P. 566, 568.

"Testimony constituting a mere contradiction of the facts established presumptively by the *prima facie* case does not necessarily suffice to overthrow the same. . . . the *prima facie* case must not only be contradicted but overcome as well. When such case is made, contradictory testimony merely amounts to a conflict in the evidence, with the ultimate facts to be determined by the court or jury, as the case may be." *State* v. *Nielsen*, 57 Mont. 137, 143; 187 P. 639, 640. Cf. *Johnson* v. *Chicago, M. & St. P. Ry. Co.*, 52 Mont. 73; 155 P. 971. See, *Renland* v. *First National Bank*, 90 Mont. 424, 437; 4 P. 2d 488.

[3] Cf. *Nichols* v. *New York Life Ins. Co., supra*, at 144.

is that suits on policies for less than $3,000 tried in state courts will frequently be decided by rules different from the rule which governs similar suits tried in federal courts because they involve more than $3,000. In an orderly and consistent system of jurisprudence, it is important that the same law should fix and control the right of recovery on substantially identical contracts made in the same jurisdiction and under the same circumstances. Neither the company nor the policyholder should obtain an advantage by the application of a different law governing the contract merely because the case can be removed to a federal court.

It was to avoid such results—among other reasons—that § 725, U. S. C., Title 28, was passed. It provides:

"The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

In this case, the law determining the burden of proof as to suicide affects the substantial rights of the parties.[4] Substantial rights arising from an insurance contract are governed by the law of the state where the contract is made.[5] Since the court below instructed the jury in accordance with the law of Montana, I do not believe the charge constituted reversible error.

Nor can I agree that we should approve a general rule governing trials in federal courts which in my judgment transfers *jury functions* to judges. The effect of the decision here is to give the trial judge the right to decide *when sufficient evidence has been introduced to take from the jury* the right to find accidental death from proof of

[4] Cf. *Central Vermont Ry. Co.* v. *White,* 238 U. S. 507, 511, 512; *New Orleans & N. E. R. Co.* v. *Harris,* 247 U. S. 367, 371, 372.

[5] *Pritchard* v. *Norton,* 106 U. S. 124, 130; *Northwestern Mutual Life Ins. Co.* v. *McCue,* 223 U. S. 234, 246, 247.

death by violent and external means. This inevitably follows if the presumption, or right of the jury to infer death by accident, "disappears" whenever the judge believes sufficient evidence of suicide has been introduced.

Stripped of discussions of legal formulas designated as "presumptions" and "burden of proof," the net result of the rule of "disappearing presumptions" is that trial judges in federal courts (irrespective of state rules) have the power to determine when sufficient "substantial evidence" has been produced to justify taking from the jury the right to render a verdict on evidence which—had the judge not found it overcome by contradictory evidence—would have justified a verdict. The judge exercises this power as a "trier of fact" although evidence, previously introduced and sufficient to support a verdict, has neither been excluded nor withdrawn.

Proof of death by external and violent means has uniformly been held to establish death by accident. The extreme improbability of suicide is complete justification for a finding of death from accident under these circumstances. While it has been said that this *proof of accidental death* was based on "presumption," in reality—whatever words or formulas are used—what is meant is that a litigant has offered adequate evidence to establish accidental death. To attribute this *adequacy of proof* to a "presumption" does not authorize or empower the judge to say that this "adequate proof" (identical with legal "presumption") has "disappeared." If the evidence offered by plaintiff provides adequate proof of accidental death upon which a jury's verdict can be sustained, mere *contradictory* evidence cannot overcome the original "adequate proof" unless the authority having the constitutional power to weigh the evidence and decide the facts believes the contradictory evidence has overcome the original proof. The *jury*—not the *judge*—should decide when there has been "substantial" evidence which overcomes

the previous adequate proof. Here, this Court holds that at the conclusion of plaintiff's evidence the jury had adequate proof upon which to find accidental death, and which would authorize a verdict that insured died as a result of accident, but also holds that, after subsequent contradictory evidence of defendant, the judge (not the jury) could decide that plaintiff's adequate proof (presumption) had "disappeared" or had been overcome by this subsequent contradictory testimony. This took from the jury the right to decide the weight and effect of this subsequent contradictory evidence. Such a rule gives parties a *trial by judge,* but does not preserve, in its entirety, that *trial by jury* guaranteed by the Seventh Amendment to the Constitution. I cannot agree to a conclusion which, I believe, takes away any part of the constitutional right to have a jury pass upon the weight of *all of the facts* introduced in evidence.

I believe the judgment of the court below should be affirmed.

SOUTH CAROLINA STATE HIGHWAY DEPARTMENT ET AL. *v.* BARNWELL BROTHERS, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA.

No. 161. Argued January 4, 1938.—Decided February 14, 1938.

1. In the absence of national legislation covering the subject in its relation to interstate commerce, a State, in order to conserve its highways and promote safety thereon, may adopt regulations limiting the weight and width of the vehicles that use them, applicable without discrimination to those moving in interstate commerce and to those moving only within the Stae. P. 184.
2. Such regulations being, in general, within the competency of the State, judicial inquiry into their validity, under the commerce clause as well as under the Fourteenth Amendment, is limited to

the question whether the restrictions imposed are reasonably adapted to the end sought. P. 190.

In resolving this question, the court can not act as Congress does when, after weighing all the conflicting interests, state and national, it determines when and how much the state regulatory power shall yield to the larger interests of a national commerce; nor is it called upon, as are state legislatures, to determine what, in its judgment, is the most suitable restriction to be applied of those that are possible, or to choose that one which in its opinion is best adapted to all the diverse interests affected.

3. A South Carolina statute prohibits use on the state highways of motor trucks and "semi-trailer" motor trucks wider than 90 inches or heavier, including load, than 20,000 lbs. A federal court enjoined its enforcement on specified highways as to vehicles engaged in interstate commerce. It found that much of the interstate motor-truck traffic normally passing over these highways would be barred from the State if the restrictions were enforced, and concluded, that, in the light of their effect upon interstate commerce, the restrictions were unreasonable. To reach this conclusion, the court weighed conflicting evidence and made its own determinations as to the weight and width of motor trucks commonly used in interstate traffic and the capacity of the specified highways to accommodate such traffic without injury to them or danger to their users. It found, among other things, that interstate carriage by motor truck has become a national industry; that a very large proportion of the trucks used in interstate transportation are 96 inches wide and of gross weight, when loaded, of more than 10 tons; that the specified highways constitute a connected system, improved with the aid of federal money grants, as a part of a national system; that not gross weight but wheel or axle weight, is the factor to be considered in the preservation of concrete highways; that the vehicles used in interstate commerce are so designed and the pressure of their weight is so distributed by their wheels and axles that gross loads of more than 20,000 lbs. can be carried over concrete roads without damage to the surface; that the highways in question could sustain without injury a wheel load of from 8000 to 9000 lbs. or an axle load of double those weights; that the weight limitation of the statute, especially as applied to semi-trailer motor trucks, is unreasonable as a means of preserving the highways and has no reasonable relation to safety of the public using them; and that the width limitation of 90 inches is unreasonable when applied to standard con-

crete highways of the State, in view of the fact that all other States permit a width of 96 inches, which is the standard width of trucks engaged in interstate commerce. *Held:*

(1) That since the adoption of one weight or width regulation rather than another is a legislative not a judicial choice, constitutionality is not to be determined by weighing in the judicial scales the merits of the legislative choice and rejecting it if the weight of evidence presented in court appears to favor a different standard. P. 191.

(2) The legislative judgment is presumed to be supported by facts known to the legislature unless facts judicially known or proved preclude that possibility. *Id.*

(3) In reviewing the present determination, this Court must examine the record, not to see whether the findings of the court below are supported by evidence, but to ascertain whether it is possible to say that the legislative choice is without rational basis. *Id.*

(4) Not only does the record fail to exclude that possibility, but it shows affirmatively that there is adequate support for the legislative judgment. Pp. 192 *et seq.*

17 F. (2d) 803, reversed.

Appeal from a final decree of a district court of three judges which enjoined the South Carolina State Highway Department, the State Public Service Commission and numerous state officers, from enforcing, as against the plaintiffs while engaged in interstate commerce on certain specified highways, a statute limiting the weight and width of motor trucks and "semi-trailer" trucks. There was a provision in the decree that the injunction should not extend to bridges not strong enough to support heavy trucks or too narrow to accommodate such traffic safely, with a proviso that the State Highway Department should post certain warning notices at such bridges, and should enforce the law against their use by such trucks. The Interstate Commerce Commission and two private corporations were permitted to intervene as plaintiffs, and two railroad companies and the receiver of another were permitted to intervene as defendants.

Messrs. Steve C. Griffith and *Thomas W. Davis,* with whom *Messrs. John M. Daniel,* Attorney General, *J. Ivey Humphrey* and *M. J. Hough,* Assistant Attorneys General, of South Carolina, *Eugene S. Blease, Douglas McKay, M. G. McDonald,* and *J. B. S. Lyles* were on the briefs, for appellants.

Messrs. S. King Funkhouser and *Frank Coleman,* with whom *Mr. J. Ninian Beall* was on the brief, for appellees.

By leave of Court, briefs of *amici curiae* were filed by *Mr. Otto Kerner,* Attorney General of Illinois; *Messrs. Hubert Meredith,* Attorney General, and *M. B. Holifield,* Assistant Attorney General, of Kentucky; *Messrs. William McCraw,* Attorney General, and *George P. Kirkpatrick,* Assistant Attorney General, of Texas, on behalf of their respective States, in support of appellants; by *Solicitor General Reed, Assistant Attorney General Jackson,* and *Mr. Elmer B. Collins,* on behalf of the United States, and by *Mr. Cary D. Landis,* Attorney General, on behalf of the State of Florida,—in support of appellees.

Mr. Justice Stone delivered the opinion of the Court.

Act No. 259 of the General Assembly of South Carolina, of April 28, 1933, 38 Stat. 340, prohibits use on the state highways of motor trucks and "semi-trailer motor trucks" whose width exceeds 90 inches, and whose weight including load exceeds 20,000 pounds. For purposes of the weight limitation § 2 of the statute provides that a semi-trailer motor truck, which is a motor propelled truck with a trailer whose front end is designed to be attached to and supported by the truck, shall be considered a single unit. The principal question for decision is whether these prohibitions impose an unconstitutional burden upon interstate commerce.

Appellees include the original plaintiffs below, who are truckers and interstate shippers; the Interstate Commerce Commission; and certain others who were permitted to intervene as parties plaintiff. The suit was brought in the district court for eastern South Carolina against various state officials, to enjoin them from enforcing §§ 4 and 6 of the Act among others,[1] on the ground that they have been superseded by the Federal Motor Carrier Act of 1935, c. 498, 49 Stat. 546; that they infringe the due process clause of the Fourteenth Amendment; and that they impose an unconstitutional burden on interstate commerce. Certain railroads interested in restricting the competition of interstate motor carriers were permitted to intervene as parties defendant.

The district court of three judges, after hearing evidence, ruled that the challenged provisions of the statute have not been superseded by the Federal Motor Carrier Act, and adopted as its own the ruling of the state Supreme Court in *State ex rel. Daniel* v. *John P. Nutt Co.,* 180 S. C. 19; 185 S. E. 25, that the challenged provisions, being an exercise of the state's power to regulate the use of its highways so as to protect them from injury and to insure their safe and economical use, do not violate the Fourteenth Amendment. But it held that the weight and width prohibitions place an unlawful burden on interstate motor traffic passing over specified highways of the state, which for the most part are of concrete or a concrete base surfaced with asphalt. It accordingly enjoined the enforcement of the weight provision against interstate motor carriers on the specified highways, and also

[1] "§ 4. Weight.—No person shall operate on any highway any motor truck or semi-trailer truck [sic] whose gross weight, including load, shall exceed 20,000 pounds.

"§ 6. Width.—No person shall operate on any highway any motor truck or semi-trailer motor truck whose total outside width, including any part of body or load, shall exceed 90 inches."

the width limitation of 90 inches, except in the case of vehicles exceeding 96 inches in width. It exempted from the operation of the decree, bridges on those highways "not constructed with sufficient strength to support the heavy trucks of modern traffic or too narrow to accommodate such traffic safely," provided the state highway department should place at each end of the bridge proper notices warning that the use of the bridge is forbidden by trucks exceeding the weight or width limits and provided the proper authorities take the necessary steps to enforce the law against such use of the bridges. The case comes here on appeal under § 266 of the Judicial Code.

The trial court rested its decision that the statute unreasonably burdens interstate commerce, upon findings, not assailed here, that there is a large amount of motor truck traffic passing interstate in the southeastern part of the United States, which would normally pass over the highways of South Carolina, but which will be barred from the state by the challenged restrictions if enforced, and upon its conclusion that, when viewed in the light of their effect upon interstate commerce, these restrictions are unreasonable.

To reach this conclusion the court weighed conflicting evidence and made its own determinations as to the weight and width of motor trucks commonly used in interstate traffic and the capacity of the specified highways of the state to accommodate such traffic without injury to them or danger to their users. It found that interstate carriage by motor trucks has become a national industry; that from 85 to 90% of the motor trucks used in interstate transportation are 96 inches wide and of a gross weight, when loaded, of more than ten tons; that only four other states prescribe a gross load weight as low as 20,000 pounds; and that the American Association of State Highway Officials and the National Conference on Street and Highway Safety in the Department of

Commerce have recommended for adoption weight and width limitations in which weight is limited to axle loads of 16,000 to 18,000 pounds and width is limited to 96 inches.

It found in detail that compliance with the weight and width limitations demanded by the South Carolina Act would seriously impede motor truck traffic passing to and through the state and increase its cost; that 2,417 miles of state highways, including most of those affected by the injunction, are of the standard construction of concrete or concrete base with asphalt surface, 7½ or 8 inches thick at the edges and 6 or 6½ inches thick at the center; that they are capable of sustaining without injury a wheel load of 8,000 to 9,000 pounds or an axle load of double those amounts, depending on whether the wheels are equipped with high pressure or low pressure pneumatic tires; that all but 100 miles of the specified highways are from 18 to 20 feet in width; that they constitute a connected system of highways which have been improved with the aid of federal money grants, as a part of a national system of highways; and that they constitute one of the best highway systems in the southeastern part of the United States.

It also found that the gross weight of vehicles is not a factor to be considered in the preservation of concrete highways, but that the appropriate factor to be considered is wheel or axle weight; the vehicles engaged in interstate commerce are so designed and the pressure of their weight is so distributed by their wheels and axles that gross loads of more than 20,000 pounds can be carried over concrete roads without damage to the surface; that a gross weight limitation of that amount, especially as applied to semi-trailer motor trucks, is unreasonable as a means of preserving the highways; that it has no reasonable relation to safety of the public using the highways; and that the width limitation of 90 inches is un-

reasonable when applied to standard concrete highways of the state, in view of the fact that all other states permit a width of 96 inches, which is the standard width of trucks engaged in interstate commerce.

In reaching these conclusions, and at the same time holding that the weight and width limitations do not infringe the Fourteenth Amendment, the court proceeded upon the assumption that the commerce clause imposes upon state regulations to secure the safe and economical use of highways a standard of reasonableness which is more exacting when applied to the interstate traffic than that required by the Fourteenth Amendment as to all traffic; that a standard of weight and width of motor vehicles which is an appropriate state regulation when applied to intrastate traffic may be prohibited because of its effect on interstate commerce, although the conditions attending the two classes of traffic with respect to safety and protection of the highways are the same.

South Carolina has built its highways and owns and maintains them. It has received from the federal government, in aid of its highway improvements, money grants which have been expended upon the highways to which the injunction applies. But appellees do not challenge here the ruling of the district court that Congress has not undertaken to regulate the weight and size of motor vehicles in interstate motor traffic, and has left undisturbed whatever authority in that regard the states have retained under the Constitution.

While the constitutional grant to Congress of power to regulate interstate commerce has been held to operate of its own force to curtail state power in some measure,[2]

[2] State regulations affecting interstate commerce, whose purpose or effect is to gain for those within the state an advantage at the expense of those without, or to burden those out of the state without any corresponding advantage to those within, have been thought to impinge upon the constitutional prohibition even though Congress

it did not forestall all state action affecting interstate commerce. Ever since *Willson* v. *Black Bird Creek Marsh Co.*, 2 Pet. 245, and *Cooley* v. *Board of Port Wardens*, 12 How. 299, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress. Nothwithstanding the commerce clause, such regulation in the absence of Congressional action has for the most part been left to the states by the decisions of this Court, subject to the other applicable constitutional restraints.

The commerce clause, by its own force, prohibits discrimination against interstate commerce, whatever its form or method, and the decisions of this Court have recognized that there is scope for its like operation when state legislation nominally of local concern is in point of

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has not acted. *Hall* v. *DeCuir*, 95 U. S. 485, 497–498; *Wabash, St. L. & P. R. Co.* v. *Illinois*, 118 U. S. 557, 575–578; *Bowman* v. *Chicago & N. W. R. Co.*, 125 U. S. 465, 498; *Western Union Telegraph Co.* v. *James*, 162 U. S. 650, 659, with which compare *Western Union Telegraph Co.* v. *Pendleton*, 122 U. S. 347, 358; *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1, with which compare *Geer* v. *Connecticut*, 161 U. S. 519, and *New York ex rel. Silz* v. *Hesterberg*, 211 U. S. 31; *Baldwin* v. *Seelig*, 294 U. S. 511, 524; see *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, 27 *et seq.*

Underlying the stated rule has been the thought, often expressed in judicial opinion, that when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state. See *Cooley* v. *Board of Port Wardens*, 12 How. 299, 315; *Gilman* v. *Philadelphia*, 3 Wall. 713, 731; *Escanaba Co.* v. *Chicago*, 107 U. S. 678, 683; *Lake Shore & M. S. R. Co.* v. *Ohio ex rel. Lawrence*, 173 U. S. 285, 294; cf. *Pound* v. *Turck*, 95 U. S. 459, 464; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 205; *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 499.

fact aimed at interstate commerce, or by its necessary operation is a means of gaining a local benefit by throwing the attendant burdens on those without the state. *Robbins* v. *Shelby County Taxing District,* 120 U. S. 489, 498; *Caldwell* v. *North Carolina,* 187 U. S. 622, 626.[3] It was to end these practices that the commerce clause was adopted. See *Gibbons* v. *Ogden,* 9 Wheat. 1, 187; *Brown* v. *Maryland,* 12 Wheat. 419, 438–439; *Cooley* v. *Board of Port Wardens, supra; State Freight Tax,* 15 Wall. 232, 280; *State Tax on Railway Gross Receipts,* 15 Wall. 284, 289, 297–298; *Cook* v. *Pennsylvania,* 97 U. S. 566, 574; *Maine* v. *Grand Trunk R. Co.,* 142 U. S. 217; *Baldwin* v. *Seelig,* 294 U. S. 511, 522; II Farrand, Records of the Federal Convention, 308; III *id.* 478, 574, 548; The Federalist, No. XLII; 1 Curtis, History of the Constitution, 502; Story on the Constitution, § 259. The commerce clause has also been thought to set its own limitation upon state control of interstate rail carriers so as to preclude the subordination of the efficiency and convenience of interstate traffic to local service requirements.[4]

[3] Footnote 2, *supra.*

[4] See *Illinois Central R. Co.* v. *Illinois,* 163 U. S. 142; *Cleveland, C. C. & St. L. R. Co.* v. *Illinois,* 177 U. S. 514; *Mississippi Railroad Comm'n* v. *Illinois Central R. Co.,* 203 U. S. 335; *Atlantic Coast Line R. Co.* v. *Wharton,* 207 U. S. 328; *Herndon* v. *Chicago, R. I. & P. R. Co.,* 218 U. S. 135; *Chicago, B. & Q. R. Co.* v. *Railroad Commission,* 237 U. S. 220; *St. Louis & San Francisco R. Co.* v. *Public Service Comm'n,* 254 U. S. 535. Cf. *Gladson* v. *Minnesota,* 166 U. S. 427; *Lake Shore & M. S. R. Co.* v. *Ohio ex rel. Lawrence,* 173 U. S. 285; *Gulf, C. & S. F. R. Co.* v. *Texas,* 246 U. S. 58, where statutes requiring local service no greater than necessary for fair accommodation of local needs were held constitutional. Although the states have usually been allowed to impose burdens on interstate railroads in the interest of local safety, *Smith* v. *Alabama,* 124 U. S. 465; *Nashville, C. & St. L. R. Co.* v. *Alabama,* 128 U. S. 96; *New York, N. H. & H. R. Co.* v. *New York,* 165 U. S. 628; *Chicago, R. I. & P. R. Co.* v. *Arkansas,* 219 U. S. 453; *St. Louis, I. M. & S. R. Co.* v. *Arkansas,* 240 U. S. 518; cf. *Hennington* v. *Georgia,* 163 U. S. 299,

But the present case affords no occasion for saying that the bare possession of power by Congress to regulate the interstate traffic forces the states to conform to standards which Congress might, but has not adopted, or curtails their power to take measures to insure the safety and conservation of their highways which may be applied to like traffic moving intrastate. Few subjects of state regulation are so peculiarly of local concern as is the use of state highways. There are few, local regulation of which is so inseparable from a substantial effect on interstate commerce. Unlike the railroads, local highways are built, owned and maintained by the state or its municipal subdivisions. The state has a primary and immediate concern in their safe and economical administration. The present regulations, or any others of like purpose, if they are to accomplish their end, must be applied alike to interstate and intrastate traffic both moving in large volume over the highways. The fact that they affect alike shippers in interstate and intrastate commerce in large number within as well as without the state is a safeguard against their abuse.

From the beginning it has been recognized that a state can, if it sees fit, build and maintain its own highways, canals and railroads and that in the absence of Congressional action their regulation is peculiarly within its competence, even though interstate commerce is materially affected. *Minnesota Rate Cases,* 230 U. S. 352, 416. Congress not acting, state regulation of intrastate carriers has been upheld regardless of its effect upon interstate commerce. *Id.* With respect to the extent and nature of the local interests to be protected and the unavoidable effect upon interstate and intrastate commerce alike, regulations of the use of the highways are akin to

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an unnecessarily harsh restriction, even though it is in the interest of safety, has been held to be unconstitutional. *Seaboard Air Line Ry.* v. *Blackwell,* 244 U. S. 310.

local regulation of rivers, harbors, piers and docks, quarantine regulations, and game laws, which, Congress not acting, have been sustained even though they materially interfere with interstate commerce.[5]

[5] Among the state regulations materially affecting interstate commerce which this Court has upheld, Congress not acting, are those which sanction obstructions in navigable rivers, *Willson* v. *Black-Bird Creek Marsh Co.*, 2 Pet. 245; *Ex parte McNiel*, 13 Wall. 236; *Pound* v. *Turck*, 95 U. S. 459; *Wilson* v. *McNamee*, 102 U. S. 572; *Huse* v. *Glover*, 119 U. S. 543; cf. *Sands* v. *Manistee River Improvement Co.*, 123 U. S. 288; approve the erection of bridges over navigable streams, *Gilman* v. *Philadelphia*, 3 Wall. 713; *Escanaba Co.* v. *Chicago*, 107 U. S. 678; *Cardwell* v. *American River Bridge Co.*, 113 U. S. 205; *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1; *Lake Shore & M. S. R. Co.* v. *Ohio*, 165 U. S. 365; require payment of fees as an incident to use of harbors, *Cooley* v. *Board of Port Wardens*, 12 How. 299; *Steamship Co.* v. *Joliffe*, 2 Wall. 450; *Anderson* v. *Pacific Coast S. S. Co.*, 225 U. S. 187; *Clyde Mallory Lines* v. *Alabama ex rel. State Docks Comm'n*, 296 U. S. 261; cf. *Mobile County* v. *Kimball*, 102 U. S. 691; control the location of docks, *Cummings* v. *Chicago*, 188 U. S. 410; impose wharfage charges, *Packet Co.* v. *Keokuk*, 95 U. S. 80; *Packet Co.* v. *Catlettsburg*, 105 U. S. 559; *Transportation Co.* v. *Parkersburg*, 107 U. S. 691; *Ouachita Packet Co.* v. *Aiken*, 121 U. S. 444; establish inspection and quarantine laws, *Turner* v. *Maryland*, 107 U. S. 38; *Morgan's S. S. Co.* v. *Louisiana Board of Health*, 118 U. S. 455; *Patapsco Guano Co.* v. *North Carolina Board of Agriculture*, 171 U. S. 345; *Rasmussen* v. *Idaho*, 181 U. S. 198; *Smith* v. *St. Louis & S. W. R. Co.*, 181 U. S. 248; *Reid* v. *Colorado*, 187 U. S. 137; *New Mexico ex rel. McLean & Co.* v. *Denver & R. G. R. Co.*, 203 U. S. 38; *Asbell* v. *Kansas*, 209 U. S. 251; *Red "C" Oil Mfg. Co.* v. *Board of Agriculture*, 222 U. S. 380; *Savage* v. *Jones*, 225 U. S. 501; *Pure Oil Co.* v. *Minnesota*, 248 U. S. 158; *Mintz* v. *Baldwin*, 289 U. S. 346; cf. *Railroad Co. v. Husen*, 95 U. S. 465; *Minnesota* v. *Barber*, 136 U. S. 313; *Brimmer* v. *Rebman*, 138 U. S. 78; and regulate the taking or exportation of domestic game, *Geer* v. *Connecticut*, 161 U. S. 519; *New York ex rel. Silz* v. *Hesterberg*, 211 U. S. 31; cf. *Foster-Fountain Packing Co. v. Haydel*, 278 U. S. 1, 13, holding invalid a local regulation ostensibly designed to conserve a natural resource but whose purpose and effect were to benefit Louisiana enterprise at the expense of businesses outside the state.

The nature of the authority of the state over its own highways has often been pointed out by this Court. It may not, under the guise of regulation, discriminate against interstate commerce. But "In the absence of national legislation especially covering the subject of interstate commerce, the State may rightly prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens." *Morris* v. *Duby,* 274 U. S. 135, 143. This formulation has been repeatedly affirmed, *Clark* v. *Poor,* 274 U. S. 554, 557; *Sprout* v. *South Bend,* 277 U. S. 163, 169; *Sproles* v. *Binford,* 286 U. S. 374, 389, 390; cf. *Morf* v. *Bingaman,* 298 U. S. 407, and never disapproved. This Court has often sustained the exercise of that power although it has burdened or impeded interstate commerce. It has upheld weight limitations lower than those presently imposed, applied alike to motor traffic moving interstate and intrastate. *Morris* v. *Duby, supra; Sproles* v. *Binford, supra.* Restrictions favoring passenger traffic over the carriage of interstate merchandise by truck have been similarly sustained, *Sproles* v. *Binford, supra; Bradley* v. *Public Utilities Comm'n,* 289 U. S. 92, as has the exaction of a reasonable fee for the use of the highways. *Hendrick* v. *Maryland,* 235 U. S. 610; *Kane* v. *New Jersey,* 242 U. S. 160; *Interstate Busses Corp.* v. *Blodgett,* 276 U. S. 245; *Morf* v. *Bingaman, supra;* cf. *Ingels* v. *Morf,* 300 U. S. 290.

In each of these cases regulation involves a burden on interstate commerce. But so long as the state action does not discriminate, the burden is one which the Constitution permits because it is an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states.

Congress, in the exercise of its plenary power to regulate interstate commerce, may determine whether the

burdens imposed on it by state regulation, otherwise permissible, are too great, and may, by legislation designed to secure uniformity or in other respects to protect the national interest in the commerce, curtail to some extent the state's regulatory power. But that is a legislative, not a judicial function, to be performed in the light of the Congressional judgment of what is appropriate regulation of interstate commerce, and the extent to which, in that field, state power and local interests should be required to yield to the national authority and interest. In the absence of such legislation the judicial function, under the commerce clause as well as the Fourteenth Amendment, stops with the inquiry whether the state legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought. *Sproles* v. *Binford, supra; Stephenson* v. *Binford,* 287 U. S. 251, 272.

Here the first inquiry has already been resolved by our decisions that a state may impose non-discriminatory restrictions with respect to the character of motor vehicles moving in interstate commerce as a safety measure and as a means of securing the economical use of its highways. In resolving the second, courts do not sit as legislatures, either state or national. They cannot act as Congress does when, after weighing all the conflicting interests, state and national, it determines when and how much the state regulatory power shall yield to the larger interests of a national commerce. And in reviewing a state highway regulation where Congress has not acted, a court is not called upon, as are state legislatures, to determine what, in its judgment, is the most suitable restriction to be applied of those that are possible, or to choose that one which in its opinion is best adapted to all the diverse interests affected. *Transportation Co.* v. *Parkersburg,* 107 U. S. 691, 695. When the action of a legislature is

within the scope of its power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts, but for the legislative body, on which rests the duty and responsibility of decision. *Jacobson* v. *Massachusetts,* 197 U. S. 11, 30; *Laurel Hill Cemetery* v. *San Francisco,* 216 U. S. 358, 365; *Price* v. *Illinois,* 238 U. S. 446, 451; *Hadacheck* v. *Sebastian,* 239 U. S. 394, 408–414; *Thomas Cusack Co.* v. *Chicago,* 242 U. S. 526, 530; *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365, 388; *Zahn* v. *Board of Public Works,* 274 U. S. 325, 328; *Standard Oil Co.* v. *Marysville,* 279 U. S. 582, 584. This is equally the case when the legislative power is one which may legitimately place an incidental burden on interstate commerce. It is not any the less a legislative power committed to the states because it affects interstate commerce, and courts are not any the more entitled, because interstate commerce is affected, to substitute their own for the legislative judgment. *Morris* v. *Duby, supra,* 143; *Sproles* v. *Binford, supra,* 389, 390; *Minnesota Rate Cases, supra,* 399, 400; *Smith* v. *St. Louis & S. W. R. Co.,* 181 U. S. 248, 257; *Reid* v. *Colorado,* 187 U. S. 137, 152; *New York ex rel. Silz* v. *Hesterberg,* 211 U. S. 31, 42, 43.

Since the adoption of one weight or width regulation, rather than another, is a legislative not a judicial choice, its constitutionality is not to be determined by weighing in the judicial scales the merits of the legislative choice and rejecting it if the weight of evidence presented in court appears to favor a different standard. Cf. *Worcester County Trust Co.* v. *Riley,* 302 U. S. 292, 299. Being a legislative judgment it is presumed to be supported by facts known to the legislature unless facts judicially known or proved preclude that possibility. Hence, in reviewing the present determination we examine the record, not to see whether the findings of the court below are supported by evidence, but to ascertain upon the whole

record whether it is possible to say that the legislative choice is without rational basis. *Standard Oil Co.* v. *Marysville, supra; Borden's Farm Products Co.* v. *Ten Eyck,* 297 U. S. 251, 263; s. c. 11 F. Supp. 599, 600. Not only does the record fail to exclude that possibility, but it shows affirmatively that there is adequate support for the legislative judgment.

At the outset it should be noted that underlying much of the controversy is the relative merit of a gross weight limitation as against an axle or wheel weight limitation. While there is evidence that weight stresses on concrete roads are determined by wheel rather than gross load weights, other elements enter into choice of the type of weight limitation. There is testimony to show that the axle or wheel weight limitation is the more easily enforced through resort to weighing devices adapted to ascertaining readily the axle or wheel weight. But it appears that in practice the weight of truck loads is not evenly distributed over axles and wheels; that commonly the larger part of the load—sometimes as much as 70 to 80%—rests on the rear axle and that it is much easier for those who load trucks to make certain that they have complied with a gross load weight limitation than with an axle or wheel weight limitation. While the report of the National Conference on State and Highway Safety, on which the court below relied, suggested a wheel weight limitation of 8,000 or 9,000 pounds, it also suggested that a gross weight limitation might be adopted and should be subject to the recommended wheel limitation. But the conference declined to fix the amount of gross weight limitation, saying: "In view of the varying conditions of traffic, and lack of uniformity in highway construction in the several States, no uniform gross-weight limitations are here recommended for general adoption throughout the country." The choice of a weight limitation based on convenience of application and consequent lack of

need for rigid supervisory enforcement is for the legislature, and we cannot say that its preference for the one over the other is in any sense arbitrary or unreasonable. The choice is not to be condemned because the legislature prefers a workable standard, less likely to be violated than another under which the violations will probably be increased but more easily detected. It is for the legislature to say whether the one test or the other will in practical operation better protect the highways from the risk of excessive loads.

If gross load weight is adopted as the test it is obvious that the permissible load must be somewhat lighter than if the axle or wheel weight test were applied. With the latter the gross weight of a loaded motor truck can never exceed twice the axle and four times the wheel limit. But the fact that the rear axle may and often does support as much as 70 or 80% of the gross load, with wheel weight in like proportion, requires that a gross load limit be fixed at considerably less than four times the permissible wheel limit.

There was testimony before the court to support its conclusion that the highways in question are capable of sustaining without injury a wheel load of 8,000 or 9,000 pounds, the difference depending upon the character of the tire in use, as against a wheel load of as much as 8,000 pounds, which would be possible under the statutory load limit of 20,000 pounds as applied to motor trucks, and approximates the axle limit in addition to the gross load limit recommended by the National Conference on Street and Highway Safety. Much of this testimony appears to have been based on theoretical strength of concrete highways laid under ideal conditions, and none of it was based on an actual study of the highways of South Carolina or of the subgrade and other road building conditions which prevail there and which have a material bearing on the strength and durability of such highways. There is

uncontradicted testimony that approximately 60% of the South Carolina standard paved highways in question were built without a longitudinal center joint which has since become standard practice, the portion of the concrete surface adjacent to the joint being strengthened by reinforcement or by increasing its thickness; and that owing to the distribution of the stresses on concrete roads when in use, those without a center joint have a tendency to develop irregular longitudinal cracks. As the concrete in the center of such roads is thinner than that at the edges, the result is that the highway is split into two irregular segments, each with a weak inner edge which, according to the expert testimony, is not capable of supporting indefinitely wheel loads in excess of 4,200 pounds.

There is little in the record to mark any controlling distinction between the application of the gross load weight limitation to the motor truck and to the semi-trailer motor truck. There is testimony which is applicable to both types of vehicle, that in case of accident the danger from the momentum of a colliding vehicle increases with gross load weight. The record is without convincing evidence of the actual distribution, in practice, of the gross load weight over the wheels and axles of the permissible types of semi-trailer motor trucks, but this does not enable us to say that the legislature was without substantial ground for concluding that the relative advantages of a gross load over a wheel weight limitation are substantially the same for the two types, or that it could not have concluded that they were so nearly alike for regulatory purposes as to justify the adoption of a single standard for both, as a matter of practical convenience. Even if the legislature were to accept appellees' assumption that net load weights are, in practice, evenly distributed over the wheels supporting the load of a permissible semi-trailer so that with the statutory gross

load limit the load on the rear axle would be about 8,000 pounds it might, as we have seen, also conclude that the danger point would then have been reached in the case of some 1,200 miles of concrete state roads constructed without a center joint.

These considerations, with the presumption of constitutionality, afford adequate support for the weight limitation without reference to other items of the testimony tending to support it. Furthermore, South Carolina's own experience is not to be ignored. Before adoption of the limitation South Carolina had had experience with higher weight limits. In 1924 it had adopted a combined gross weight limit of 20,000 pounds for vehicles of four wheels or less, and an axle weight limit of 15,000 pounds. In 1930 it had adopted a combined gross weight limit of 12½ tons with a five ton axle weight limit for vehicles having more than two axles. Act No. 721, 33 Stat. 1182; Act No. 685, 36 Stat. 1192, 1193. In 1931 it appointed a commission to investigate motor transportation in the state, to recommend legislation, and to report in 1932. The present weight limitation was recommended by the commission after a full consideration of relevant data, including a report by the state engineer who had constructed the concrete highways of the state and who advised a somewhat lower limitation as necessary for their preservation. The fact that many states have adopted a different standard is not persuasive. The conditions under which highways must be built in the several states, their construction and the demands made upon them, are not uniform. The road building art, as the record shows, is far from having attained a scientific certainty and precision, and scientific precision is not the criterion for the exercise of the constitutional regulatory power of the states. *Sproles* v. *Binford, supra,* 388. The legislature, being free to exercise its own judgment, is not bound by that of other legislatures. It would hardly be contended

that if all the states had adopted a single standard none, in the light of its own experience and in the exercise of its judgment upon all the complex elements which enter into the problem, could change it.

Only a word need be said as to the width limitation. While a large part of the highways in question are from 18 to 20 feet in width, approximately 100 miles are only 16 feet wide. On all the use of a 96 inch truck leaves but a narrow margin for passing. On the road 16 feet wide it leaves none. The 90 inch limitation has been in force in South Carolina since 1920 and the concrete highways which it has built appear to be adapted to vehicles of that width. The record shows without contradiction that the use of heavy loaded trucks on the highways tends to force other traffic off the concrete surface onto the shoulders of the road adjoining its edges and to increase repair costs materially. It appears also that as the width of trucks is increased it obstructs the view of the highway, causing much inconvenience and increased hazard in its use. It plainly cannot be said that the width of trucks used on the highways in South Carolina is unrelated to their safety and cost of maintenance, or that a 90 inch width limitation adopted to safeguard the highways of the State, is not within the range of the permissible legislative choice.

The regulatory measures taken by South Carolina are within its legislative power. They do not infringe the Fourteenth Amendment, and the resulting burden on interstate commerce is not forbidden.

Reversed.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration or decision of this case.

MATY, ADMINISTRATRIX, *v.* GRASSELLI CHEMICAL CO.

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

No. 378. Argued February 3, 1938.—Decided February 14, 1938.

In an action for personal injuries, the plaintiff alleged his employment as a worker in a specified department of defendant's plant and that while so employed he suffered the injuries through inhaling gases etc. attributable to defendant's negligence. An amendment of the complaint broadened the description of the place of employment where the injuries were sustained so as to include another department located in another building of the same plant. *Held* that the amendment did not introduce a new cause of action within the meaning of the New Jersey statute of limitations. P. 199.

89 F. (2d) 456, reversed.

CERTIORARI, 302 U. S. 663, to review the reversal of a judgment for the defendant, the present respondent, in an action for personal injuries begun in a New Jersey state court and removed to the federal district court. Upon the death of the plaintiff, the present petitioner was substituted, as administratrix, by the court below.

Mr. Thomas F. Gain, with whom *Messrs. Charles L. Guerin, Mario Turtur,* and *Francis Shunk Brown* were on the brief, for petitioner.

Mr. Louis Rudner, with whom *Mr. Carl E. Geuther* was on the brief, for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioner (plaintiff) filed a complaint alleging that he was injured while employed in the silicate department of respondent's (defendant's) chemical plant. Later, and more than two years after the date of his injuries, he amended his complaint. The only effect of the amend-

ment was to broaden the description of the place of employment where the injuries were sustained so as to include the phosphate department located in the same plant but in a different building 500 feet removed from the silicate department.

The sole question is: Did the New Jersey statute of limitations of two years bar the amendment because it set out a new cause of action?

The cause, originally brought in the New Jersey State Court, was removed, because of diversity of citizenship, to the District Court for New Jersey, where a verdict for plaintiff was set aside and judgment entered for defendant. The Court of Appeals affirmed, holding that the amendment to the complaint set out a new cause of action and was barred by the New Jersey statute of limitations.[1]

The pertinent part of the New Jersey statute of limitations reads: [2]

". . . all actions hereafter accruing for injuries to persons caused by the wrongful act, neglect or default of any . . . corporation or corporations within this State, *shall be commenced and instituted within two years next after the cause of such action shall have accrued and not after.*"

The original complaint alleged:

"1. The plaintiff was in the employ of the defendant in the month of *November, 1933, and for some time prior thereto* at defendant's plant in Grasselli, County of Union and State of New Jersey.

"2. The plaintiff was employed by the defendant as furnace man, operator and general worker in the Silicate Department of defendant's plant."

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[1] 89 F. (2d) 456. While the cause was pending in the Court of Appeals, the plaintiff died and his wife, the present plaintiff, was substituted as Administratrix. Both are referred to as petitioner (plaintiff).

[2] 3 N. J. Comp. St. 1910, p. 3164, § 3; P. L. 1896, p. 119.

The complaint further alleged that plaintiff was injured while so employed by inhaling gases or injurious substances proximately caused by respondent's failure to protect plaintiff from unnecessary dangers and to provide plaintiff a reasonably safe place in which to work.

The amendment—added more than two years after the injuries were sustained—caused Paragraph 2 of the complaint to read as follows:

"2. The plaintiff was employed by the defendant as furnace man, operator and general worker in the Silicate Department of defendant's plant *and was also employed in other Departments of the defendant's plant where he performed his duties as he was directed to do during his employment in the Phosphate Department and Dorr department.*" (New matter represented by italics.)

This amendment did not change plaintiff's cause of action. The original action was brought for injuries sustained by inhaling harmful substances while the plaintiff was in the defendant's employ previous to and including November 1933. The essentials of this cause of action were employment; injury by or from harmful gases or substances while engaged in the employment; and proof that the injuries resulted from the negligent failure of defendant to protect plaintiff from unnecessary dangers and to provide plaintiff with a reasonably safe place in which to work. The responsibility of respondent was the same whether the harmful gases or substances were inhaled in the silicate department, the phosphate department, the Dorr department or any other department where plaintiff was performing his duties under his employment. It is not reasonably possible to say that petitioner's right of recovery under the original complaint and under the amended complaint were two separate and distinct causes of action. Petitioner can have only one recovery for the one single injury alleged as a result of a breach of one continuing duty under one continuous employment.

The New Jersey Court of Errors and Appeals very clearly declared that State's rule applying to the operation of its statute of limitations, in 1935, as follows:

". . . amendments in causes where the statute of limitations has run, . . . 'will not, as a rule, be held to state a new cause of action *if the facts alleged show, substantially, the same wrong with respect to the same transaction,* or *if it is the same matter more fully and differently laid,* or *if the gist of the action, or the subject of the controversy remains the same;* and this is true although . . . the alleged incidents of the transaction, may be different. *Technical rules will not be applied in determining whether the cause of action stated in the original and amended pleadings are identical,* since, in the strict sense, almost any amendment may be said to change the original cause of action.' " [3]

Under this rule laid down by the New Jersey Court, as to New Jersey's statute of limitations, the amended complaint here substantially alleged the same wrong as the original complaint; relied upon the identical matter *more fully and differently laid;* and the essential elements of the action and the controversy remained the same between the parties after as before the amendment.

Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent the achievement of that end. The original complaint in this cause and the amended complaint were not based upon different causes of action. They referred to the same kind of employment, the same general place of employ-

[3] *Magliaro* v. *Modern Homes, Inc.,* 115 N. J. L. 151, 156–157; 178 A. 733, 736; *O'Shaughnessy* v. *Bayonne News Co.,* 154 A. 13; 9 N. J. Misc. 345, 347; and see, *New York Central & H. R. R. Co.* v. *Kinney,* 260 U. S. 340; and *United States* v. *Memphis Cotton Oil Co.,* 288 U. S. 62.

ment, the same injury and the same negligence. Proper pleading is important, but its importance consists in its effectiveness as a means to accomplish the end of a just judgment. The effect of the amendment here was to facilitate a fair trial of the existing issues between plaintiff and defendant. The New Jersey statute of limitations did not bar the amended cause of action. The court below was in error. Since the judgment of the Court of Appeals was based only on a consideration and improper application of the statute of limitations, the cause is reversed and remanded to the Court of Appeals for further proceedings in harmony with these views.

Reversed.

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

MOOKINI ET AL. *v.* UNITED STATES.

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

No. 319. Argued February 2, 1938.—Decided February 28, 1938.

1. The Act of March 8, 1934, (28 U. S. C. 723a) empowering this Court to prescribe rules of practice with respect to proceedings after determination of guilt in criminal cases in "District Courts of the United States, including the District Courts of Alaska, Hawaii, Puerto Rico, Canal Zone and Virgin Islands," and in the other courts named, does not require that rules when prescribed shall be identical for all the courts mentioned or that rules for all shall be prescribed at the same time. P. 203.
2. In the rules heretofore promulgated by this Court (May 7, 1934, 292 U. S. 661) limited to proceedings in criminal cases in "District Courts of the United States" and in the Supreme Court of the District of Columbia and subsequent appellate proceedings, the term "District Courts of the United States" means constitutional courts created under Art. III of the Constitution; it does not embrace legislative courts such as the District Court for the Territory of Hawaii. P. 205.

3. As the Criminal Appeals Rules were not made applicable to the District Court of the Territory of Hawaii, they did not change the time for appeals from that court to the Circuit Court of Appeals as allowed by the Act of February 13, 1925. 28 U. S. C. 225, 230. P. 205.
4. The provision in the organic Act of Hawaii (48 U. S. C. 645) that appeals from the District Court of that Territory to the Circuit Court of Appeals for the Ninth Circuit shall be had "in the same manner as appeals are allowed from district courts to circuit courts of appeal as provided by law," does not require that the Criminal Appeals Rules prescribed by this Court for District Courts of the United States shall be held applicable to the District Court of Hawaii. P. 205.

92 F. (2d) 126, reversed.

CERTIORARI, 302 U. S. 674, to review a judgment dismissing an appeal.

Mr. O. P. Soares submitted on brief for petitioners.

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

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

Petitioners were convicted in the District Court of the Territory of Hawaii of violating § 35 of the Criminal Code relating to fraudulent claims. 18 U. S. C. 80. The verdict was rendered on May 28, 1935; motions for a new trial were overruled on June 19, 1935; and petitioners were sentenced on June 29, 1935. Appeal was allowed by the District Court on September 27, 1935.

The Circuit Court of Appeals, finding that the appeal was not taken in the manner or within the time permitted by the Criminal Appeals Rules promulgated by this Court on May 7, 1934 (Rule III, 292 U. S. 662, 663), dis-

missed the appeal. 92 F. (2d) 126. In view of the importance of the question as to the application of the Criminal Appeals Rules to the District Court of the Territory of Hawaii, we granted certiorari.

It is not questioned that the appeal to the Circuit Court of Appeals was allowed within the three months' period specified in § 8 (c) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 940; 28 U. S. C. 225, 230; 48 U. S. C. 645.

The Criminal Appeals Rules were promulgated pursuant to the Act of March 8, 1934, amending the Act of February 24, 1933. 28 U. S. C. 723a. The Act authorized this Court—

"to prescribe, from time to time, rules of practice and procedure with respect to any and all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases in district courts of the United States, including the District Courts of Alaska, Hawaii, Puerto Rico, Canal Zone, and Virgin Islands, in the Supreme Courts of the District of Columbia, Hawaii, and Puerto Rico, in the United States Court for China, in the United States Circuit Courts of Appeals, in the Court of Appeals of the District of Columbia, and in the Supreme Court of the United States."

In order to aid the Court in exercising its authority under the statute, the Attorney General of the United States at the request of the Court submitted on May 26, 1933, a draft of proposed rules. These were expressly limited to proceedings in cases brought in the District Courts of the United States and in the Supreme Court of the District of Columbia. The reason for this limitation was thus stated by the Attorney General:

"The Rules are limited in their application to proceedings in cases instituted in the District Courts of the United States and in the Supreme Court of the District of Columbia. There is not sufficient data at hand upon

which to predicate proposals at this time relative to practice and procedure in cases instituted in the District Courts of Alaska, Hawaii, Puerto Rico, Canal Zone, and Virgin Islands, or in the Supreme Courts of Hawaii and Puerto Rico, or in the United States Court for China. It is thought that it would be the part of wisdom to establish the rules for practice and procedure for Continental United States before attempting to provide for the Territories, Insular Possessions and Consular Courts, as these situations will undoubtedly require special treatment because of local conditions and the distance separating the trial court from the Appellate Court."

In considering and revising the draft thus submitted, we approved this suggestion. The rules were accordingly limited to proceedings—

"in criminal cases in District Courts of the United States and in the Supreme Court of the District of Columbia, and in all subsequent proceedings in such cases in the United States Circuit Courts of Appeals, in the Court of Appeals of the District of Columbia, and in the Supreme Court of the United States." Order of May 7, 1934, 292 U. S. 661.

No provision was made with respect to proceedings in cases brought in the District Courts of Alaska, Hawaii, Puerto Rico, Canal Zone and Virgin Islands, in the Supreme Courts of Hawaii and Puerto Rico, or in the United States Court for China. We entertain no doubt of our authority to limit the application of the new rules in this way. The statute empowered the Court to prescribe rules "from time to time" with respect "to any or all proceedings," after determination of guilt, in criminal cases in the courts which were severally described. The statute contains no requirement that the Court must prescribe identical rules with respect to all the courts mentioned regardless of varying conditions, or that rules for all these courts must be prescribed at one and the same time. On

the contrary, the manifest intention of the Congress was to permit the Court to exercise its discretion concerning the application of the rules.

The term "District Courts of the United States," as used in the rules, without an addition expressing a wider connotation, has its historic significance. It describes the constitutional courts created under Article III of the Constitution. Courts of the Territories are legislative courts, properly speaking, and are not District Courts of the United States. We have often held that vesting a territorial court with jurisdiction similar to that vested in the District Courts of the United States does not make it a "District Court of the United States." *Reynolds* v. *United States,* 98 U. S. 145, 154; *The City of Panama,* 101 U. S. 453, 460; *In re Mills,* 135 U. S. 263, 268; *McAllister* v. *United States,* 141 U. S. 174, 182, 183; *Stephens* v. *Cherokee Nation,* 174 U. S. 445, 476, 477; *Summers* v. *United States,* 231 U. S. 92, 101, 102; *United States* v. *Burroughs,* 289 U. S. 159, 163. Not only did the promulgating order use the term District Courts of the United States in its historic and proper sense, but the omission of provision for the application of the rules to the territorial courts and other courts mentioned in the authorizing act clearly shows the limitation that was intended.

As the Criminal Appeals Rules were not made applicable to the District Court of the Territory of Hawaii, they did not supersede or alter the provisions of the Act of February 13, 1925, as to appeals from that court to the Circuit Court of Appeals. 28 U. S. C. 225, 230. The provision of the Organic Act of Hawaii (48 U. S. C. 645) to which the court below refers, that appeals from the District Court of the Territory to the Circuit Court of Appeals should be taken in the same manner as appeals from district courts, was always subject to modification in the discretion of the Congress which in its future legislation could make or authorize such distinctions in ap-

pellate procedure as appeared to be wise. The Act authorizing this Court to promulgate rules for criminal appeals, which should have the effect of legislation necessarily modified the former statutory provisions so as to give the Court full authority to prescribe the time and manner of taking appeals and to leave the Court free to determine to what courts, within the range of the authorization, its rules should apply. Pursuant to this authority, the Court has limited its rules so that they do not govern appeals from the District Court of the Territory of Hawaii and there is nothing in the earlier legislation which compels the extension of the rules beyond their intended and expressed application.

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

Reversed.

MR. JUSTICE CARDOZO took no part in the consideration and decision of this case.

SOUTHWESTERN BELL TELEPHONE CO. *v.* OKLAHOMA ET AL.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA.

No. 560. Argued February 7, 1938.—Decided February 28, 1938.

Upon appeal from the State Corporation Commission, the Supreme Court of Oklahoma affirmed an order fixing the rates of a telephone company, such affirmance being, under the state constitution, a legislative act, and therefore not reviewable by appeal to this Court. The company then filed a petition for rehearing asking for a judicial review, which petition was denied without statement of reason. Upon appeal to this Court, the company contended that the denial of the petition was a judicial review, while the State's Attorney General insisted that the whole proceeding was legislative in character and that adequate judicial

review could be obtained under the power of the state court to issue writs of mandamus and prohibition to the Commission. *Held:*

1. That, in the absence of a definite decision to that effect by the state court, this Court can not conclude that the state law provides no judicial review of such order. P. 212.

2. Assuming that the State affords a judicial remedy, there is no means of knowing whether the state court denied the petition because an application for rehearing, after the legislative determination, was not the proper way under the state practice to invoke the judicial power, or whether it entertained the application and by its ruling passed upon the controversy in a judicial capacity. *Id.*

3. This Court is therefore without jurisdiction to review the denial of the petition. *Id.*

Appeal dismissed.

APPEAL from a judgment denying a petition for rehearing in the nature of a judicial review after a decision, 181 Okla. 246, affirming an order of the Corporation Commission of the State fixing rates for telephone service.

Mr. Mac Q. Williamson, Attorney General of Oklahoma, with whom *Messrs. J. B. A. Robertson* and *S. J. Gordon* were on the brief, for appellees.

Mr Erwin W. Clausen, with whom *Messrs. J. R. Spielman, C. M. Bracelen* and *John H. Cantrell* were on the brief, for appellant.

PER CURIAM.

Motion to dismiss, for the want of jurisdiction, an appeal from a determination of the Supreme Court of Oklahoma, made September 14, 1937, denying a "petition for rehearing in the nature of judicial review" after a decision affirming an order of the Corporation Commission of the State fixing rates for telephone service. The motion is upon the ground that the proceeding in the state court was legislative and was not a suit within the mean-

ing of § 237 of the Judicial Code (28 U. S. C. 344) governing our appellate jurisdiction.

The constitution of Oklahoma authorizes the Corporation Commission to prescribe rates "for transportation and transmission companies." Art. IX, § 18. Appellant, operating telephone lines, is a "transmission company." Art. IX, § 34. Appeals from the Commission may be taken only to the Supreme Court of the State. Art. IX, § 20. No court of the State, other than the Supreme Court by way of appeal, has jurisdiction "to review, reverse, correct, or annul" any action of the Commission within the scope of its authority, save that writs of mandamus and prohibition will lie from the Supreme Court to the Commission "in all cases where such writs, respectively, would lie to any inferior court or officer." *Id.* In case of appeal, no new or additional evidence may be introduced in the Supreme Court, but the Supreme Court has jurisdiction to consider and determine "the reasonableness and justness of the action of the Commission appealed from, as well as any other matter arising under such appeal." The action of the Commission is to be regarded "as *prima facie* just, reasonable, and correct," but the court may, when it deems necessary in the interests of justice, remand to the Commission any case pending on appeal "and require the same to be further investigated by the Commission, and reported upon to the court (together with a certificate of such additional evidence as may be tendered before the Commission by any party in interest), before the appeal is finally decided." Art. IX. § 22.

Section 23 of Article IX provides:

"Whenever the court, upon appeal, shall reverse an order of the Commission affecting the rates, charges, or the classifications of traffic of any transportation or transmission company, it shall, at the same time, substitute therefor such orders as, in its opinion, the Commission

should have made at the time of entering the order appealed from; otherwise the reversal order shall not be valid. Such substituted order shall have the same force and effect (and none other) as if it had been entered by the Commission at the time the original order appealed from was entered."

In the instant case, the Corporation Commission on March 18, 1935, after hearing, made its order fixing appellant's rates (Okla. Corp. Com. Rep., 1935, p. 558), and on appeal the Supreme Court of the State, on July 13, 1937, affirmed the order. 181 Okla. 246; 71 P. 2d 747.

Appellant concedes that this decision was legislative in character, in view of the authority conferred by the above-quoted provision of § 23 of Article IX and its construction by the state court. See *Pioneer Telephone & Telegraph Co.* v. *State,* 40 Okla. 417, 425, 426; 138 Pac. 1033; *Swain* v. *Oklahoma Railway Co.,* 168 Okla. 133, 134–136; 32 P. 2d. 51; *Oklahoma Cotton Ginners' Assn.* v. *State,* 174 Okla. 243, 248, 251; 51 P. 2d 327. Compare *Prentis* v. *Atlantic Coast Line Co.,* 211 U. S. 210, 226, 227; *Oklahoma Natural Gas Co.* v. *Russell,* 261 U. S. 290, 291. But appellant contends that the Supreme Court of the State "completed its legislative review and function by the filing of its opinion of July 13, 1937," and that appellant was then free to invoke the jurisdiction of the court to exercise its judicial power and function by an application for "a judicial review." This, appellant states, was the purpose of its petition for rehearing.

In support of that petition, appellant urged upon the Supreme Court of the State the consideration of the provisions of the state constitution with respect to the vesting of judicial power and the appellate jurisdiction of the court (Art. VII, §§ 1 and 2); of the bill of rights guaranteeing a judicial remedy for every injury (Art. II, § 6); of § 22 of Article IX providing that, on appeals to the

Supreme Court from the Corporation Commission, that court should have jurisdiction to determine "the reasonableness and justness" of the action of the Commission "as well as any other matter" arising on the appeal; and of § 34 of Article IX that the provisions of that Article should "always be so restricted in their application as not to conflict with any of the provisions of the Constitution of the United States, and as if the necessary limitations upon their interpretation had been herein expressed in each case." In concluding the submission of its petition for rehearing appellant insisted that the Supreme Court of the State "not only has the power, right, jurisdiction and authority, now to review this case judicially, which right, power, jurisdiction and authority it has not heretofore possessed, but that it is the duty of this court to do so at this stage of the proceeding, in order that appellant may have the legislative order or enactment fixing its rates for future application at Tulsa reviewed by an appropriate federal court with the least possible delay and cost, if such should later be found necessary, resulting from an adverse decision by this [the state] court."

The ruling of the state court was expressed in the following journal entry:

"Now on this 14th day of September 1937, the Court having considered appellant's Petition for Rehearing in the Nature of Judicial Review, doth overrule and deny same, to which appellant is allowed exception."

At appellant's request, the state court granted supersedeas and stayed its mandate pending appellant's application for the allowance of an appeal to this Court and the determination of the appeal if taken. An appeal was then allowed by the Chief Justice of the state court and the case is thus brought here.

The Attorney General of the State, moving to dismiss the appeal, insists that appellant's contention that the

action of the state court in denying the petition for rehearing "was a judicial review, is wholly erroneous"; that the appeal is "from a purely legislative consideration of the questions involved." The substance of the Attorney General's argument is shown in the following statement:

"This Petition for Rehearing . . . was not sufficient to confer, upon the Supreme Court of Oklahoma, jurisdiction and power to treat the record then before it as a new cause involving a judicial review, and no record was before said court warranting said court to treat same as a judicial appeal, nor was the said record, nor its contents, treated as such by appellant, nor the court, and no judicial issues were raised in said legislative review. It is not the rule to permit the character of controversies to be completely changed, either in form or substance, after the opinion of a court has been handed down, and this is especially true when the same is sought to be accomplished, for the first time by a so-called petition for rehearing in which the only subject mentioned was the request for a judicial review for the first time in the history of the case."

The Attorney General, however, does not concede that the State of Oklahoma "does not furnish an adequate judicial review of questions such as are involved in this proposed appeal." On the contrary, "the State asserts that appellant has, and has had, an adequate method of relief." When pressed upon the argument at bar to state what judicial remedy was open to appellant under the state constitution, the Attorney General referred to the power conferred upon the Supreme Court by the proviso in § 20 of Article IX to issue writs of mandamus and prohibition to the Commission. No decision of the state court as to the questions which would be open upon an application for such a writ has been brought to our attention.

Appellant states that the question now presented is one of first impression; that the action of the state court

in this case "constitutes the first construing of this [the present] procedure which that court has ever made. There are no specific precedents."

The novelty of the procedure, and the lack of exposition in the brief ruling, leave us in doubt as to the true import of the denial of the petition for rehearing. In view of the serious questions which would be raised if it were determined that the State provides no means of obtaining a judicial review of an order of the Commission fixing rates, alleged to be confiscatory, in the case of a transportation or transmission company, we should not reach such a conclusion in the absence of a definite decision by the state court to that effect. Neither party before us advances a contention that there is such a lack of judicial remedy. Appellant says that judicial review is available through the procedure appellant has chosen and that the denial of its petition for rehearing was judicial action. The Attorney General asserts the contrary, contending that judicial remedy exists but must be sought in another manner. But—assuming that the State affords a judicial remedy—whether the state court has denied appellant's petition because an application for rehearing after what is conceded by both parties to be a legislative determination was not the proper way under the state practice to invoke the judicial power, or has entertained the application and by its ruling has passed upon the controversy in a judicial capacity, we have no means of knowing.

We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the

judgment as rendered could not have been given without deciding it. *De Saussure* v. *Gaillard,* 127 U. S. 216, 234; *Johnson* v. *Risk,* 137 U. S. 300, 306, 307; *Wood Mowing & Reaping Machine Co.* v. *Skinner,* 139 U. S. 293, 295, 297; *Whitney* v. *California,* 274 U. S. 357, 360, 361; *Lynch* v. *New York,* 293 U. S. 52, 54.

Applying this rule, the motion to dismiss must be granted.

Dismissed.

Mr. Justice Cardozo took no part in the consideration and decision of this case.

CENTURY INDEMNITY CO. *v.* NELSON.

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

No. 362. Argued February 2, 1938.—Decided February 28, 1938.

After the submission of a law case tried without a jury, the District Court ordered "that judgment be entered for plaintiff . . . upon findings of facts and conclusions of law to be presented." Thereafter, in accordance with a rule of the court, special findings of fact and conclusions of law were proposed by each side; those offered by the plaintiff were adopted by the judge and formal judgment was ordered and entered. *Held* that the first order was preliminary; that rejections of defendant's proposed findings were rulings made "in the progress of the trial," within the meaning of 28 U. S. C. § 875, and reviewable by the Circuit Court of Appeals. P. 215.

90 F. (2d) 644, reversed.

Certiorari, 302 U. S. 674, to review the affirmance of a judgment of the District Court in an action at law tried without a jury.

Mr. Jewel Alexander, with whom *Mr. Oliver Dibble* was on the brief, for petitioner.

Mr. Joe G. Sweet submitted on brief for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

This cause went up by appeal from the District Court, Northern District, California. Of the twenty-eight assignments of error, eleven, based upon the trial court's refusal of certain requested special findings, were rejected by the Circuit Court of Appeals. It held the requests "were made too late," that "the findings were proposed after the trial had been completed and after the court had announced its decision and hence did not occur during the trial." To support this view it cited *Continental National Bank* v. *National City Bank,* (9th Cir.) 69 F. (2d) 312, 317, which affirms—"It is settled that they [requests for findings] came too late if made after judgment even though the trial judge, after judgment, granted leave to make the request."

A jury having been duly waived, the trial judge heard evidence. At the conclusion of this counsel for both sides made motions for judgment and findings. The minutes of May 31, 1934, show—"This case having been heretofore heard and submitted and due consideration having been had, it is ordered that judgment be entered for plaintiff, with interest and costs, upon findings of facts and conclusions of law to be presented."

The bill of exceptions recites—"Thereafter, [after requests for judgment and findings] the case was orally argued before the court and was submitted upon written briefs. Thereafter and on June 1, 1934, [May 31 ?] and outside the presence of the parties, the Court made and entered its order granting judgment to the plaintiff with findings to be submitted. Thereafter proposed findings of fact and conclusions of law were served and lodged with the Court by plaintiff, and within the time allowed by law the defendant served and lodged its proposed special findings of fact and conclusions of law in lieu of those proposed by the plaintiff.

"Thereafter and on June 16, 1934, the Court, without the presence of the parties, signed the proposed special findings of fact and conclusions of law of the plaintiff and filed same on said date as the findings and conclusions of the Court, and judgment was entered on said June 16, 1934."

June 16, 1934, "Special Findings and Conclusions of Law" presented for plaintiff Nelson were signed by the District Court and were filed. The document concluded thus—

"From the foregoing Findings of Fact the court concludes that judgment should be entered in favor of the plaintiff and against the defendant in the sum of Six Thousand ($6000.00) Dollars together with interest thereon at the legal rate of seven per cent (7%) per annum from the date of the commencement of this action, to-wit: September 24, 1931, together with plaintiff's costs of suit incurred herein, and that upon satisfaction of said Judgment the Clerk of this court should deliver to the defendant the assignment by plaintiff against the San Francisco Iron & Metal Company, a corporation in bankruptcy.

"Let judgment be entered accordingly."

Sec. 875, Title 28, U. S. C. A., is in the margin;[1] also Rule 42, District Court Northern District of California.[2]

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[1] Section 875, Title 28, U. S. C. A.

Review in cases tried without jury. When an issue of fact in any civil cause in a district court is tried and determined by the court without the intervention of a jury, according to section 773 of this title, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment.

[2] Rule 42, United States District Court, Northern District of California.

Findings . . . In actions at law, where a request for special findings of fact is made and granted, and in suits in equity, no judgment

We are unable to accept the conclusion below that within the intent of the statute the "progress of the trial" ended on June 1, when the court ordered "that judgment be entered for plaintiff, with interest and costs, upon findings of fact and conclusions of law to be presented," and thereafter it was too late adequately to present special findings of fact. The qualifying words in the order "upon findings of fact and conclusions of law to be presented" are appropriate to suggest "merely a preliminary order" and reservation of opportunity for further action. Considering them along with Rule 42 and the subsequent action by counsel for both sides and the court—all without suggestion of objection—it appears plain enough that all parties understood the cause was "in progress of trial" until entry of the final judgment on June 16. Rule 42 is susceptible of the interpretation insisted upon by counsel for petitioner and ap-

shall be entered until the findings and, in an equity suit, the conclusions of law, shall have been signed and filed or waived as hereinafter provided; but the rendition of the decision or opinion shall be deemed and considered, and shall be entered by the Clerk, as merely a preliminary order for judgment. Within five days after written notice of the decision, the prevailing party shall prepare a draft of the findings and, in an equity suit, of the conclusions of law, and deliver the same to the Clerk for the Judge and serve a copy thereof upon the adverse party, who may, within five days thereafter, deliver to the Clerk and serve upon the adverse party such proposed amendments or additions as he may desire.

If the prevailing party fails to present such draft as above provided, the adverse party may prepare a draft thereof and deliver the same to the Clerk for the Judge and serve a copy thereof on the prevailing party within five days thereafter.

The findings of fact and, where required, the conclusions of law, shall thereafter be settled by the Judge, and when so settled shall be engrossed within five days thereafter, and shall be then signed and filed. A failure to comply with the requirements of this rule may be deemed to be a waiver of findings by the party so failing.

parently they proceeded in good faith according to that view. In so doing, we think they were right. See *Clement* v. *Phoenix Ins. Co.*, Fed. Cases 2,882.

Continental National Bank v. *National City Bank* does not discuss Rule 42 and went upon facts which seem materially different from those presented by this record.

Refusal to consider the eleven assignments of error arose from what we regard as wrongful interpretation and application of § 875 and Rule 42. Their evident purpose is to insure orderly and timely presentation to the judge of matters deemed important in advance of any definite action by him in respect of them. They should not be so narrowly construed as to defeat their real purpose.

It is not necessary in the circumstances to treat the first order for judgment (June 1) as ending "the progress of the trial." All counsel and the presiding judge seem, rightly we think, to have entertained a wholly different view and to have acted accordingly.

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

Reversed.

Mr. Justice Cardozo took no part in the consideration or decision of this case.

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

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

No. 128. Argued December 17, 1937.—Decided February 28, 1938.

The compensation received (1) by a liquidator appointed by the State Comptroller to wind up insolvent banks pursuant to Florida statutes; (2) by legal counsel employed by the Insurance Department of New York for services in liquidating insolvent insurance companies taken over by the state Superintendent of Insurance, pursuant to New York statutes; (3) by an attorney in the Department of Justice of Pennsylvania assigned by the Attorney General for legal work relating to winding up of insolvent banks taken over by the state Secretary of Banking pursuant to Pennsylvania statutes. *Held* (p. 222) subject to income taxation by the Federal Government, it appearing:

1. That the compensation in each instance was paid from the assets of the liquidating corporation, not from funds belonging to the State;

2. That no one of the taxpayers was an officer of the State in the strict sense of that term;

3. That the businesses about which they were employed were not utilized by the States in the discharge of their essential governmental duties;

4. That the corporations were private enterprises, and their funds private property.

88 F. (2d) 869, and *Id.* 873, reversed.
89 *id.* 699, affirmed.
92 *id.* 150, reversed.

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* Together with No. 129, *Helvering, Commissioner of Internal Revenue,* v. *Tunnicliffe,* on certiorari to the Circuit Court of Appeals for the Fifth Circuit; No. 287, *McLoughlin* v. *Commissioner of Internal Revenue,* on certiorari to the Circuit Court of Appeals for the Second Circuit; and No. 597, *Helvering, Commissioner of Internal Revenue,* v. *Freedman,* on certiorari to the Circuit Court of Appeals for the Third Circuit.

CERTIORARI to review decisions of Circuit Courts of Appeals in four cases on appeals from decisions of the Board of Tax Appeals sustaining income tax assessments. In Nos. 128, 129 and 597 (34 B. T. A. 956) the Board's ruling was reversed by the lower court; in No. 287, the Board's ruling, 34 B. T. A. 963, was affirmed.

Solicitor General Reed, with whom *Assistant Attorney General Morris,* and *Messrs. Sewall Key, Berryman Green,* and *Warner W. Gardner* were on the briefs, for the Commissioner.

Mr. Harry M. Voorhis for respondent in Nos. 128 and 129. *Mr. H. M. Hampton* was on the brief with *Mr. Voorhis* in No. 129.

Mr. Bernhard Knollenberg, with whom *Messrs. Jesse Hoyt* and *Alfred C. Bennett* were on the brief, for respondent in No. 287.

Mr. John W. Townsend for respondent in No. 597.

By leave of Court, briefs of *amici curiae* were filed by *Messrs. John J. Bennett, Jr.,* Attorney General, *Henry Epstein,* Solicitor General, *John F. X. McGohey, Colin McLennan,* and *John C. Crary,* Assistant Attorneys General, of New York, on behalf of that State, in support of petitioner in No. 287; and by *Mr. Herbert Pope,* on behalf of Charles C. Stilwell, in support of the respondent in No. 597.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Has the Federal Government power to tax compensation paid to attorneys and others out of corporate assets for necessary services rendered about the liquidation of

an insolvent corporation by a state officer proceeding as required by her statutes?

The opinions below state the essential facts—not in dispute; make adequate references to the relevant statutory provisions; and cite numerous authorities.

No. 128.

Under Florida statutes when a bank becomes insolvent "The State Comptroller may appoint a liquidator [subject to dismissal] to take charge of the assets and affairs of such bank . . . [who,] under the direction and supervision of the Comptroller, shall take possession of the books and records and assets of every description . . . and in his name shall sue for and collect all debts and claims belonging to it, and upon the order of the court of competent jurisdiction may sell or compound all bad or doubtful debts and on like order may sell all real and personal property . . . and sue for and enforce the individual liability of the stockholders." He shall "pay all money received by him to the State Treasurer to be held as a special deposit . . . shall make quarterly reports, or when called upon, to the Comptroller." The appointment must follow notice and be confirmed by the Circuit Court. Liquidation expenses are payable out of the corporate funds held by the Treasurer. "The compensation of the liquidator shall be fixed by the Comptroller and shall be based upon the amount of work actually and necessarily performed, and shall in no case exceed five per cent of the cash collected."

Respondent Therrell, liquidator for several banks, devoted substantially all his time to the work. He held no commission from the Governor, took no oath of office but was formally appointed by the Comptroller and gave bond. His compensation, for 1931 and 1932, paid from corporate assets, was assessed by the Commissioner for federal income taxes. The Board of Tax Appeals approved; but the Circuit Court of Appeals found immun-

ity under the Federal Constitution. *Therrell* v. *Commissioner of Internal Revenue,* 88 F. (2d) 869.

No. 129.

Respondent Tunnicliffe, liquidator of insolvent banks appointed by the Comptroller of Florida, was assessed for federal income taxes upon the sums received for services during 1931 and 1932. The Board of Tax Appeals approved; the Circuit Court of Appeals ruled otherwise upon its opinion in No. 128. *Tunnicliffe* v. *Commissioner of Internal Revenue,* 88 F. (2d) 873. Both causes present the same points.

No. 287.

Petitioner McLoughlin was employed by the Insurance Department of New York as legal counsel in the Liquidation Bureau and received for services during 1932, $5,125.00. This bureau is in charge of a Deputy Superintendent of Insurance a civil service employe whose salary is paid by the State. It employs many persons—superintendents, attorneys, bookkeepers, stenographers, adjusters, accountants, etc.

Under the statutes the Superintendent may apply to the court for an order to take over the assets of an insolvent insurance company and liquidate its affairs. When this issues the corporate charter is dissolved and the Superintendent must proceed to collect assets, adjust claims, etc. He determined petitioner's compensation and caused it to be paid from assets of the several companies in liquidation according to the time devoted to each.

The Commissioner assessed this compensation for federal income tax; the Board of Tax Appeals approved. The Circuit Court of Appeals affirmed, and definitely held it was not exempted by the Federal Constitution. *McLoughlin* v. *Commissioner of Internal Revenue,* 89 F. (2d) 699.

No. 597.

Freedman, employed as an attorney in Pennsylvania's Department of Justice, received annual salary of

$3,000.00. The Attorney General has power to appoint attorneys to represent any department, board or commission of the State and fix their compensation. The Secretary of Banking has broad powers over banks. When one becomes unsound he may, after notice and hearing and with the Attorney General's consent, take possession and wind up its affairs. All necessary expenses, including compensation of attorneys, special deputies, assistants and others employed about the proceedings, are paid from funds of the corporation.

During 1932 the respondent was assigned for legal work relating to closed banks and was paid by the Secretary of Banking out of their funds. The Commissioner assessed the sum so received for federal income tax. The Board of Tax Appeals approved; the Circuit Court of Appeals declared the salary exempt. *Freedman* v. *Commissioner of Internal Revenue,* 92 F. (2d) 150.

What limitations does the Federal Constitution impose upon the United States in respect of taxing instrumentalities and agencies employed by a State and, conversely, how far does it inhibit the States from taxing instrumentalities and agencies utilized by the United States, are questions often considered here. *McCulloch* v. *Maryland* (1819), 4 Wheat. 316; *Weston* v. *Charleston* (1829), 2 Pet. 449; *Dobbins* v. *Commissioners of Erie County,* 16 Pet. 435; *Lane County* v. *Oregon,* 7 Wall. 71; *Veazie Bank* v. *Fenno,* 8 Wall. 533, 556; *South Carolina* v. *United States,* 199 U. S. 437, 457; *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514; *Indian Motocycle Co.* v. *United States,* 283 U. S. 570; *Burnet* v. *Jergins Trust,* 288 U. S. 508, 516; *Ohio* v. *Helvering,* 292 U. S. 360, 368; *Helvering* v. *Powers,* 293 U. S. 214; *Rogers* v. *Graves,* 299 U. S. 401; *Brush* v. *Commissioner,* 300 U. S. 352.

The Constitution contemplates a national government free to use its delegated powers; also state governments capable of exercising their essential reserved powers; both operate within the same territorial limits; consequently the Constitution itself, either by word or necessary inference, makes adequate provision for preventing conflict between them.

Among the inferences which derive necessarily from the Constitution are these: No State may tax appropriate means which the United States may employ for exercising their delegated powers; the United States may not tax instrumentalities which a State may employ in the discharge of her essential governmental duties—that is those duties which the framers intended each member of the Union would assume in order adequately to function under the form of government guaranteed by the Constitution.

By definition precisely to delimit "delegated powers" or "essential governmental duties" is not possible. Controversies involving these terms must be decided as they arise, upon consideration of all the relevant circumstances. Notwithstanding discordant views which have sometimes arisen because of varying emphasis given to one or another of such circumstances, it is now settled doctrine that the inferred exemption from federal taxation does not extend to every instrumentality which a State may see fit to employ. Exemption depends upon the nature of the undertaking; it is cabined by the reason which underlies the inference.

Veazie Bank v. *Fenno, supra,* sustained a tax laid by the Federal Government upon notes issued by state banks, notwithstanding the view entertained by two Justices that it amounted to "taxation of the powers and faculties of the state governments, which are essential to their sovereignty, and to the efficient and independ-

ent management and administration of their internal affairs."

South Carolina v. *United States, supra,* gave occasion for much consideration of the Federal Government's power to tax instrumentalities utilized by a State. It ruled, against a stout dissent, that although South Carolina had the right to control the sale of liquors through the dispensary system, nevertheless Congress could tax the dispensers who acted as agents of the State in making sales. "Looking, therefore, at the Constitution in the light of the conditions surrounding at the time of its adoption, it is obvious that the framers in granting full power over license taxes to the National Government meant that that power should be complete, and never thought that the States by extending their functions could practically destroy it."

Burnet v. *Jergins Trust, supra,* upheld a federal tax upon the receipts by the lessee of oil lands which belonged to the City of Long Beach, California. "The subject of the tax is so remote from any governmental function as to render the effect of the exaction inconsiderable as respects the activities of the city."

In *Ohio* v. *Helvering, supra,* we held that the agencies and operations of the State of Ohio in the conduct of its Department of Liquor Control were subject to excise taxes prescribed by Congress. "Whenever a State engages in a business of a private nature it exercises non-governmental functions and the business, though conducted by the State, is not immune from the exercise of the power of taxation which the Constitution vests in the Congress."

Helvering v. *Powers, supra,* ruled that the compensation of members of the Board of Trustees of the Boston Elevated Railway Company was subject to the federal income tax notwithstanding they were appointed by the

Governor of the State, confirmed by the Council, and endowed with large powers to regulate and fix fares, etc. "The fact that the State has power to undertake such enterprises, and that they are undertaken for what the State conceives to be the public benefit, does not establish immunity."

The cases last referred to strikingly illustrate the outcome of efforts here to apply the recognized doctrine in respect of taxing State agencies. According to them and others of like nature due weight, we are unable to conclude that the Commissioner erred in making any one of the assessments involved in the four cases presently before us. He gave proper application to the rule which we must recognize as established. The compensation of the taxpayers was paid from corporate assets—not from funds belonging to the State. No one of them was an officer of the State in the strict sense of that term. The business about which they were employed was not one utilized by the State in the discharge of her essential governmental duties. The corporations in liquidation were private enterprises; their funds were the property of private individuals.

It follows that the judgments in Nos. 128, 129 and 597 must be reversed; the judgment in No. 287 must be affirmed.

Nos. 128, 129, and 597, reversed.
No. 287 affirmed.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration or decision of this case.

53383°—38——15

UNITED STATES ET AL. *v.* GRIFFIN ET AL., RECEIVERS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

No. 63. Argued November 19, 1937. Reargued January 3, 1938.—Decided February 28, 1938.

1. Lack of jurisdiction of the District Court over the subject-matter can not be waived by the parties; when discovered on appeal, dismissal of the bill must be ordered. P. 229.
2. The jurisdiction to set aside orders of the Interstate Commerce Commission, conferred upon the District Court of three judges by the Urgent Deficiencies Act of October 22, 1913, does not apply to negative orders. P. 232.
3. An order of the Interstate Commerce Commission declining, upon re-examination, to increase the compensation for carrying mail fixed by an earlier order pursuant to the Railway Mail Pay Act, is a negative order. P. 234.
4. Orders of the Interstate Commerce Commission fixing the compensation payable by the Government to railroads for carrying the mails, even if affirmative orders, are not subject to the extraordinary remedy of the Urgent Deficiencies Act, since they are not within the reasons for it, namely, to guard against ill-considered action by a single judge and to avert delays ordinarily incident to litigation, in cases of wide public interest. P. 234.

   Denial of jurisdiction under the Urgent Deficiencies Act, leaves open other ways to judicial review of orders respecting railway mail pay. P. 238.
5. A suit under the Urgent Deficiencies Act to set aside an order concerning mail pay is not primarily against the Commission, but is a suit against the United States. The United States can not be sued without authority specifically conferred. The Railway Mail Pay Act does not confer that authority. P. 238.

Reversed.

APPEAL from a decree of the District Court of three judges, which set aside an order of the Interstate Commerce Commission refusing an increase of railway mail pay over what had previously been allowed, and which

directed the Commission to take "such further action in the premises as the law requires in view of the annulment and setting aside of" its order.

Mr. Edward M. Reidy, with whom *Solicitor General Reed, Assistant Attorney General Jackson,* and *Messrs. Elmer B. Collins* and *Daniel W. Knowlton* were on the briefs, for appellants on the reargument and on the original argument.

Mr. Moultrie Hitt, with whom *Messrs. G. Kibby Munson* and *Gregory Hankin* were on the briefs, for appellees on the reargument and on the original argument.

Mr. Justice Brandeis delivered the opinion of the court.

The sole question requiring decision is one of statutory construction: The Railway Mail Pay Act of July 28, 1916, c. 261, § 5, 39 Stat. 412, 425, 429, 430, provides that the Interstate Commerce Commission "shall establish by order a fair, reasonable rate or compensation to be received" by railroads for carrying the mail; [1] and authorizes the Commission to modify the order upon a "re-examination." The Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219, 220 (amending Act of June 18, 1910, c. 309, 36 Stat. 539) declares that district courts shall have jurisdiction "of cases brought to enjoin, set

[1] "The Postmaster General is authorized and directed to adjust the compensation to be paid to railroad companies for the transportation and handling of the mails and furnishing facilities and services in connection therewith upon the conditions and the rates hereinafter provided." 39 U. S. C. § 524.

"All railway common carriers are hereby required to transport such mail matter as may be offered for transportation by the United States in the manner, under the conditions, and with the service prescribed by the Postmaster General and shall be entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith." 39 U. S. C. § 541.

aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission." May suit be brought under the Urgent Deficiencies Act to set aside an order refusing, upon "re-examination," to increase the allowance for railway mail compensation theretofore made to this carrier?

The suit was brought, under the Urgent Deficiencies Act, in the federal court for southern Georgia, by the receivers of the Georgia & Florida Railroad against the United States and the Interstate Commerce Commission, to set aside an order made May 10, 1933, under the Railway Mail Pay Act, Railway Mail Pay, Georgia & Florida R. Co., 192 I. C. C. 779; and to grant a permanent injunction. By that order the Commission had denied upon a "re-examination" an application further to increase the compensation allowed by the order of July 10, 1928. Railway Mail Pay, 144 I. C. C. 675. The 1928 order had, upon a "re-examination," increased the compensation originally fixed by order of December 23, 1919. Railway Mail Pay, 56 I. C. C. 1. As grounds for setting aside the order of May 10, 1933, the receivers alleged, among other things, that the order was unlawful, because the finding that the existing rates were fair and reasonable was without evidence to support it and contrary to the evidence and that the order will violate the Fifth Amendment by taking property without just compensation.

The jurisdiction of the court was not challenged; and the case was heard by three judges on the merits. A decree was rendered setting aside as unlawful the order of May 10, 1933, and directing the Commission to take further action. Additional hearings were then had by the Commission; and on February 4, 1936, it again declined to order any increase over that which had been allowed July 10, 1928. Railway Mail Pay, Georgia & Florida R. Co., 214 I. C. C. 66. The last order of the

Commission was assailed by a supplemental bill on the same grounds as that assailed in the original bill. The jurisdiction of the court was not challenged; the case was again heard on the merits by three judges; and a decree was entered setting aside the order of February 4, 1936, and directing the Commission to take "such further action in the premises as the law requires in view of the annulment and setting aside of" the order.

From that decree the United States and the Interstate Commerce Commission have appealed to this Court. Here, although answering to the merits, they challenged the jurisdiction of the District Court. Since lack of jurisdiction of a federal court touching the subject matter of the litigation cannot be waived by the parties, we must upon this appeal examine the contention; and, if we conclude that the District Court lacked jurisdiction of the cause, direct that the bill be dismissed. *United States* v. *Corrick,* 298 U. S. 435, 440. We at first thought that the District Court had jurisdiction, and ordered a reargument of the case on the merits. But, upon further consideration of the jurisdictional question, we are of opinion that the remedy provided by the Urgent Deficiencies Act is not applicable to this order.

First. The Railway Mail Pay Act terminated the system theretofore prevailing of service under voluntary contracts.[2] As embodied in United States Code, Title 39,

[2] Prior to the Act of 1916, the carriage of mail by railroads—with the exception of some aided by land grant—was held to be not compulsory "at adequate compensation to be judicially determined," *Atchison, T. & S. F. Ry.* v. *United States,* 225 U. S. 640, 650, but under contracts voluntarily entered into with the Postmaster General. *New York, N. H. & H. R. Co.* v. *United States,* 251 U. S. 123, 127. For the legislation prior to 1916 concerning compensation of railroads for carrying the mail, see Railway Mail Pay, 56 I. C. C. 1, 3–7. For the several proposals prior to 1916 to modify the laws governing such transportation, see Report of Postmaster General to Congress August 12, 1911, H. R. Doc. 105, 62d Congress, 1st Session; Senate

§§ 523 to 568, it provides in forty-six sections comprehensively for the character, means and methods of mail transportation; defines the authority of the Postmaster General; and describes the obligations of the railroads and their right to compensation, which is to be fixed by the Commission.

"The Interstate Commerce Commission is hereby empowered and directed to fix and determine from time to time the fair and reasonable rates and compensation for the transportation of such mail matter by railway common carriers and the services connected therewith, prescribing the method or methods by weight, or space, or both, or otherwise, for ascertaining such rate or compensation, and to publish the same, and orders so made and published shall continue in force until changed by the commission after due notice and hearing." 39 U. S. C. § 542.

"For the purpose of determining and fixing rates or compensation hereunder the commission is authorized to make such classification of carriers as may be just and reasonable and, where just and equitable, fix general rates applicable to all carriers in the same classification." 39 U. S. C. § 549.

"At the conclusion of the hearing the commission shall establish by order a fair, reasonable rate or compensation to be received, at such stated times as may be named in the order, for the transportation of mail matter and the service connected therewith, and during the continuance of the order the Postmaster General shall pay the carrier

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Bill 7371, House Bill 23721, 62d Congress, 2d Session; Railway Mail Pay, Report of Joint Committee on Compensation for the Transportation of the Mail, August 31, 1914, H. R. Doc. 1155, 63d Congress, 2d Session; Senate Bill 6405, House Bill 17042, 63d Congress, 2d Session; Senate Bill 4175, House Bill 10242, 64th Congress, 1st Session.

from the appropriation for inland transportation by railroad routes such rate or compensation." 39 U. S. C. § 551.

Eleven sections of the act deal with the procedure on hearings before the Commission.[3] No provision is made for a judicial review. But provision is made for administrative review by "reëxamination" of an order.

"Either the Postmaster General or any such carrier may at any time after the lapse of six months from the entry of the order assailed apply for a reëxamination and thereupon substantially similar proceedings shall be had with respect to the rate or rates for service covered by said application, provided said carrier or carriers have an interest therein." 39 U. S. C. § 553.

There have been many administrative reviews by "re-examination." [4] The case at bar appears to be the only

[3] Section 544 provides: "The procedure for the ascertainment of the rates and compensation shall be as provided in sections 545 to 554 of this title"; and § 554 provides: "For the purposes of Sections 524 to 568 of this title the Interstate Commerce Commission is hereby vested with all the powers which it is authorized by law to exercise in the investigation and ascertainment of the justness and reasonableness of freight, passenger, and express rates to be paid by private shippers."

[4] The first order fixing compensation for transportation of mail was made by the Commission December 23, 1919. Railway Mail Pay, 56 I. C. C. 1. By it rates were fixed on the general system of flat rates on a space basis, with higher rates for certain short lines less than 100 miles in length. Since then the Commission has made orders on applications for re-examination under 39 U. S. C. § 553, in many cases. Railway Mail Pay, New England Lines, 85 I. C. C. 157, on reargument, 95 I. C. C. 204, 104 I. C. C. 521; Railway Mail Pay, Certain Intermountain and Pacific Coast Short-Line Railroads, 95 I. C. C. 493, on reargument, 104 I. C. C. 521; Railway Mail Pay, Woodstock Ry. Co. et al., 96 I. C. C. 43, on reargument, 104 I. C. C. 521; Railway Mail Pay, Canadian Nat. Ry. et al., 109 I. C. C. 13; Railway Mail Pay, Alabama, Tenn. & No. Ry., 112 I. C. C. 151; Railway Mail Pay, Certain Intermountain and Pacific Coast Short

instance in which an attempt has been made to set aside a mail order by suit under the Urgent Deficiencies Act.

Second. The Urgent Deficiencies Act provides a method of judicial review of orders of the Interstate Commerce Commission possessing the following extraordinary features: (1) The original hearing in the district court is not before a single judge, but before three, of whom one must be a circuit judge; (2) From the decree of the district court as so constituted a direct appeal to the Supreme Court is granted as of right, instead of a review by a circuit court of appeals; (3) Upon both the trial court and the Supreme Court rests the obligation to give the case precedence over others. These features were first introduced by the Expediting Act of 1903, 32 Stat. 823, for suits by the United States to enforce the antitrust and commerce laws. They were extended by the Hepburn Act of 1906, § 5, 34 Stat. 584, 590, 592, to suits to enforce or to set aside orders of the Interstate Commerce Commission. When that jurisdiction was vested in the Commerce Court provisions with like effect were pro-

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Line Railroads, 120 I. C. C. 439, on reconsideration, 151 I. C. C. 734; Railway Mail Pay, Winston-Salem Southbound Ry., 123 I. C. C. 33; Railway Mail Pay, 144 I. C. C. 675; Railway Mail Pay, 151 I. C. C. 734; Railway Mail Pay, Georgia & Florida R., 192 I. C. C. 779, on rehearing, 214 I. C. C. 66.

A number of other decisions relating to railway mail pay have also been made. Railway Mail Pay, Certain Short Lines, 165 I. C. C. 774; Railway Mail Pay, Jacksonville & H. R. et al., 174 I. C. C. 781; Railway Mail Pay, Illinois Terminal Co., 174 I. C. C. 796; Railway Mail Pay, Macon, D. & S. R. et al., 185 I. C. C. 715; Railway Mail Pay, N. J. & N. Y. R., 198 I. C. C. 504; Railway Mail Pay, Piedmont & No. Ry., 216 I. C. C. 467.

Similar orders have been entered under the Electric Railway Mail Pay Act, 40 Stat. 742, 748. Electric Railway Mail Pay, 58 I. C. C. 455; Electric Railway Mail Pay, 98 I. C. C. 737. Compare Transmission of Mail by Pneumatic Tubes in the City of New York, 85 I. C. C. 207.

vided for cases coming before it. 36 Stat. 539. To its jurisdiction the district court succeeded, with these features, under the Urgent Deficiencies Act.

In the opinion of Congress jurisdiction with the extraordinary features of the Urgent Deficiencies Act was justified by the character of the cases to which it applied—cases of public importance because of the widespread effect of the decisions thereof. In such cases Congress sought to guard against ill-considered action by a single judge and to avert the delays ordinarily incident to litigation. In construing the Act, this Court concluded that despite the broad language used in the Commerce Court Act, Congress could not have intended to include in this special jurisdiction suits to set aside every kind of order issued by the Commission. For substantially every decision, and every other kind of action by the Commission is expressed in, or is followed by, an order; and many of the orders are obviously not of such public importance and widespread effect as to justify, in cases affecting them, the extraordinary features of the Urgent Deficiencies Act.

The Commerce Court had (36 Stat. 539) jurisdiction "over all cases of the following kinds":

"First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.

"Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission. . . ."

This Court concluded that, as the intent of Congress was "to relieve parties in whole or in part from the duty of obedience to orders which are found to be illegal," there was jurisdiction to set aside only those kinds of orders which there was jurisdiction to enforce; that a distinction must be drawn between "affirmative" and "negative"

orders; and that jurisdiction under the Commerce Court Act was applicable only to "affirmative" orders. *Procter & Gamble Co.* v. *United States,* 225 U. S. 282; *Hooker* v. *Knapp,* 225 U. S. 302. Since the abolition of the Commerce Court, that rule has been consistently followed in cases brought under the Urgent Deficiencies Act. *Lehigh Valley R. Co.* v. *United States,* 243 U. S. 412; *Piedmont & Northern Ry. Co.* v. *United States,* 280 U. S. 469; *Standard Oil Co.* v. *United States,* 283 U. S. 235; *United States* v. *Corrick,* 298 U. S. 435. Compare *Delaware & Hudson Co.* v. *United States,* 266 U. S. 438; *United States* v. *Los Angeles & Salt Lake R. Co.,* 273 U. S. 299.

The order of February 4, 1936, here assailed, does not command either the Government or the Railroad to do anything. It is simply a refusal, upon a second "re-examination" of the order of July 11, 1928, further to increase the compensation thereby awarded upon a "re-examination" of the compensation originally awarded by the order made December 23, 1919. The order assailed, being a refusal to change the existing status, was a "negative" order. The District Court lacked jurisdiction to set it aside, and should have dismissed the bill.

Third. Congress cannot be assumed to have made the extraordinary remedy of the Urgent Deficiencies Act applicable for the determination of the validity of railway mail pay orders, even if "affirmative." The issue here is whether the existing mail revenue of $35,728 should be increased for the year by $31,227. There is no wide public interest in its speedy determination. There is no danger of temporarily interrupting the mail service through the improvident issue of an injunction by a single judge. Only the method or amount of payments currently to be made would be affected. Such orders are in character unlike those under the Boiler Inspection Act, 36 Stat. 913, as amended, 38 Stat. 1192, 43 Stat. 659, and the Inland Waterways Corporation Act, 43 Stat. 360, 361,

as amended, 45 Stat. 978, 48 Stat. 968, of which jurisdiction was taken although the statutes contained no provision for judicial review.[5]

In *Great Northern Ry. Co.* v. *United States,* 277 U. S. 172, we held that there was not jurisdiction under the Urgent Deficiencies Act of a suit to set aside an order of the Interstate Commerce Commission made under Title II of the Transportation Act of 1920 determining the amount due a railroad on the Government's guaranty of income for the period following relinquishment of federal control. And in *United States* v. *Los Angeles & Salt Lake R. Co.,* 273 U. S. 299, we held that there was not jurisdiction under the Urgent Deficiencies Act of a suit to set aside a final order under the Valuation Act, even though that statute was enacted as an amendment to the Interstate Commerce Act itself. 37 Stat. 701, as amended, 41 Stat. 456, 474, 493, 42 Stat. 624.[6]

In recent years the field of administrative determination has been widely extended; and the duty of making many of these determinations has been imposed upon the Interstate Commerce Commission.[7] Some of the statutes contain specific provision making applicable ju-

[5] *Baltimore & Ohio R. Co.* v. *United States,* 293 U. S. 454; *United States* v. *Illinois Central R. Co.,* 291 U. S. 457; compare *Mississippi Valley Barge Line Co.* v. *United States,* 292 U. S. 282.

[6] Compare *United States* v. *Illinois Central R. Co.,* 244 U. S. 82; *Delaware & Hudson Co.* v. *United States,* 266 U. S. 438; *United States* v. *Atlanta, B. & C. R. Co.,* 282 U. S. 522.

[7] Among the statutes delegating to the Commission administrative duties in addition to those which it performs under the Interstate Commerce Act are: *Postal Service:* Railway Mail Pay Act, 39 Stat. 412, 425, 430; Electric Railway Mail Pay Act, 40 Stat. 742, 748; New York City Pneumatic Tube Mail Pay Act, 42 Stat. 652, 661; Fourth Class Mail Regulations Act, 43 Stat. 1053, 1067, as amended, 45 Stat. 940, 942; Air Mail Act, 48 Stat. 933, 935, as amended, 48 Stat. 1243, 49 Stat. 614. *Railroad Operation:* Safety Appliance Act, 27 Stat. 531, as amended, 32 Stat. 943, 36 Stat. 298; Boiler Inspection Act, 36 Stat. 913, 914, as amended, 38 Stat. 1192, 43 Stat. 659;

risdiction under the Urgent Deficiencies Act. This is true of the Emergency Railroad Transportation Act of 1933, 48 Stat. 211, 216, as amended, 49 Stat. 376, and of the Motor Carrier Act of 1935, 49 Stat. 543, 550. Compare Transportation of Explosives Act (Criminal Code, § 233), 35 Stat. 554, 555, as amended, 35 Stat. 1088, 1135, 41 Stat. 1445. It is true likewise of several statutes under which the determinations are to be made by other administrative tribunals. Shipping Act of 1916, 39 Stat. 728, 738, superseded by 49 Stat. 1985 (United States Shipping Board); Packers & Stockyards Act of 1921, 42 Stat. 159, 168 (Secretary of Agriculture); Perishable Agricultural Commodities Act of 1930, 46 Stat. 531, 535 (Secretary of Agriculture); Emergency Railroad Transportation Act of 1933, *supra* (Federal Coördinator of Transportation); Communications Act of 1934, 48 Stat. 1064, 1093, as amended, 50 Stat. 189 (Federal

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Locomotive Ash Pan Act, 35 Stat. 476; Accident Investigation Act, 36 Stat. 350, 351; Hours of Service Act, 34 Stat. 1415; Railway Labor Act, 44 Stat. 577, as amended, 48 Stat. 1185, 49 Stat. 1189; Transportation Act of 1920, Title II, 41 Stat. 456, 457, as amended, 44 Stat. 1450; Emergency Railroad Transportation Act of 1933, 48 Stat. 211, 216, as amended, 49 Stat. 376. *Railroad Finance:* Clayton Antitrust Act, 38 Stat. 730, 734, as amended, 43 Stat. 939, 48 Stat. 1102; Reconstruction Finance Corporation Act, 47 Stat. 711, as amended, 48 Stat. 20, 99, 120, 1109, 49 Stat. 1, 796, 50 Stat. 5, 357; Bankruptcy Act, § 77, 47 Stat. 1474, as amended, 49 Stat. 911, 1969. *Miscellaneous:* Transportation of Explosives Act (Criminal Code, § 233), 35 Stat. 554, 555, as amended, 35 Stat. 1088, 1135, 41 Stat. 1445; Standard Time Zone Act, 40 Stat. 450; St. Louis Bridge Act, 43 Stat. 7, 8; Inland Waterways Corporation Act, 43 Stat. 360, as amended, 45 Stat. 978, 48 Stat. 968, 49 Stat. 958; Radio Act of 1927, 44 Stat. 1162, 1173, superseded by 48 Stat. 1064; Motor Carrier Act of 1935, 49 Stat. 543, 550.

Although enacted as Part II of the Interstate Commerce Act, the Motor Carrier Act of 1935 is included in this list because it seems more properly classified as a complete and independent statute than as merely an amendment to the Act of 1887.

Communications Commission).[8] The orders for which review is provided by each of these statutes are like the orders under the Interstate Commerce Act fixing rates payable by shippers. Improper injunctive relief of such orders or delay in final determination of their validity may seriously affect the public interest by preventing or obstructing action under those statutes.

While the compensation fixed in a railway mail pay order is ordinarily measured by a rate, the ultimate question determined by the Commission is, as in the *Great Northern* case, the proper compensation to be paid by the Government to the railroad for services and the use of its property—the *quantum meruit* for carrying the mail. There is nothing in the history of the Railway Mail Pay Act which requires that the Urgent Deficiencies Act be made applicable to the determination of the validity of such orders.[9]

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[8] Compare Merchant Marine Act of 1936, 49 Stat. 1985, 1987 (United States Maritime Commission). A similar procedure has also been provided for certain suits to enjoin the enforcement or operation of state and federal statutes on the ground that they are unconstitutional. Judicial Code, § 266, 36 Stat. 557, 1162, as amended, 37 Stat. 1013, 43 Stat. 938; Judiciary Act of 1937, 50 Stat. 751, 752.

[9] The provision calling for the Interstate Commerce Commission to fix the rates at which the mail is to be carried was introduced in the Senate as an amendment to the bill by Senator Cummins of Iowa. In answer to questions as to "whether the amendment provides for an appeal in this case as in other rate-making cases before the Interstate Commerce Commission," he stated: "I think it would permit the same review. . . . There would be the same remedy precisely under my amendment for the railway companies that now exists in the case of the establishment of a rate for a private shipper. . . . It is provided for in just the same way the present law does." 53 Cong. Rec., 9694–95. No further reference to judicial review occurs in the debates on this provision in either House; and no reference to judicial review was made in the report of the Committee of either House, nor in that of the Conference Committee whose recommendations were adopted. See Sen. Rep. 459, H. R. Rep. 91, H. R. Rep. 981, 64th Cong., 1st Sess.

Fourth. The absence in the Railway Mail Pay Act of a provision for judicial review and the denial of jurisdiction under the Urgent Deficiencies Act do not preclude every character of judicial review. If the Commission makes the appropriate finding of reasonable compensation but fails, because of an alleged error of law, to order payment of the full amount which the railroad believes is payable under the finding, the Court of Claims has jurisdiction of an action for the balance, as the claim asserted is one founded upon a law of Congress. *Missouri Pacific R. Co.* v. *United States,* 271 U. S. 603. Compare *United States* v. *New York Central R. Co.,* 279 U. S. 73, affirming 65 Ct. Cl. 115, 121.[10] And since railway mail service is compulsory, the Court of Claims would, under the general provisions of the Tucker Act, have jurisdiction also of an action for additional compensation if an order is confiscatory. *United States* v. *Great Falls Mfg. Co.,* 112 U. S. 645; *North American Transportation & Trading Co.* v. *United States,* 253 U. S. 330, 333; *Jacobs* v. *United States,* 290 U. S. 13, 16. Moreover, as district courts have jurisdiction of every suit at law or in equity "arising under the postal laws," 28 U. S. C., § 41 (6), suit would lie under their general jurisdiction if the Commission is alleged to have acted in excess of its authority, or otherwise illegally. Compare *Powell* v. *United States,* 300 U. S. 276, 288, 289. But a suit under the Urgent Deficiencies Act to set aside an order concerning mail pay is not primarily one against the Commission. Primarily, it is a suit against the

[10] Other decisions of the Court of Claims under the Railway Mail Pay Act of 1916 are: *Chicago & E. I. Ry.* v. *United States,* 63 Ct. Cl. 585; *Nevada County N. G. R. Co.* v. *United States,* 65 Ct. Cl. 327; *Chicago & E. I. Ry. Co.* v. *United States,* 72 Ct. Cl. 407; *Macon, D. & S. R. Co.* v. *United States,* 78 Ct. Cl. 251; 79 Ct. Cl. 298. Compare *Pere Marquette Ry. Co.* v. *United States,* 59 Ct. Cl. 538; *New Jersey & N. Y. R. Co.* v. *United States,* 80 Ct. Cl. 243.

United States.[11] And the United States can be sued only when authority so to do has been specifically conferred.

The Railway Mail Pay Act does not confer that authority.

Decree reversed—with direction to the District Court to dismiss the bill without costs to either party.

Reversed.

MR. JUSTICE BLACK agrees with the result and fully with all of the opinion except paragraph *Fourth*.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration or decision of this case.

UNITED STATES *v.* ILLINOIS CENTRAL RAILROAD CO.

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

No. 352. Argued January 14, 17, 1938.—Decided February 28, 1938.

Cattle in a railway car were brought to the place where they were to be unloaded for water, feed and rest, as required by the Act of June 29, 1906, arriving there before the period allowed by the Act for their continuous confinement in the car had expired, but unloading was delayed beyond that period owing to the fact that the carrier's yardmaster, aware of the situation, negligently failed to notify another employee of the carrier whose duty it was to unload them. *Held* that the carrier "knowingly and willfully" failed to comply with the statute and was subject to the penalty thereby prescribed. P. 242.

In statutes denouncing offenses involving turpitude, "willfully" is generally used to mean with evil purpose, criminal intent or the like; but in those denouncing acts not in themselves wrong

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[11] Compare Judicial Code § 211, 36 Stat. 542, 1150, as amended, 38 Stat. 219, 28 U. S. C. § 48; *Lambert Run Coal Co.* v. *Baltimore & Ohio R. Co.*, 258 U. S. 377, 382.

it often denotes conduct which is intentional, or knowing, or voluntary, as distinguished from accidental, or conduct marked by careless disregard of its rightfulness.

90 F. (2d) 213, reversed.

CERTIORARI, 302 U. S. 671, to review the affirmance of a judgment for the Railroad Company in an action by the United States to recover a penalty.

Mr. Gordon Dean argued the cause, and *Solicitor General Reed, Assistant Attorney General McMahon,* and *Mr. W. Marvin Smith* were on the brief, for the United States.

Mr. Selim B. Lemle, with whom *Messrs. Arthur A. Moreno, E. C. Craig, Charles N. Burch, H. D. Minor,* and *Clinton H. McKay* were on the brief, for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Petitioner brought this suit in the federal court for eastern Louisiana to recover from respondent a penalty for violation of the Act of June 29, 1906, 34 Stat. 607, 45 U. S. C. §§ 71–74. Upon an agreed statement, the court found the facts, stated its conclusions of law and gave judgment for respondent. The circuit court of appeals affirmed. 90 F. (2d) 213. This Court granted a writ of certiorari. 302 U. S. 671.

The question for decision is whether, as a matter of law, the facts found show conclusively that respondent knowingly and willfully failed to comply with the requirements of the first section of the Act.

It declares that no carrier whose road forms a part of a line over which cattle shall be conveyed from one State to another shall confine the same in cars for longer than 28 consecutive hours without unloading them into properly equipped pens for rest, water and feeding unless pre-

vented by storm or by other accidental and unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight; upon the written request of the owner the time of confinement may be extended to 36 hours. Section 2 requires that animals so unloaded shall be properly fed and watered. Section 3 provides: "Any railroad . . . who knowingly and willfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than $100 nor more than $500 . . ." recoverable by civil action in the name of the United States. § 4.

The petition alleged that respondent knowingly and willfully confined cattle in a car for 37 hours without unloading them. The answer admitted that the cattle were continuously confined in the car from three o'clock in the afternoon of October 8, 1932, when loaded at point of shipment, Hermanville, Mississippi, until four o'clock of the morning of October 10 when unloaded at destination, New Orleans, Louisiana, but directly put in issue the allegation that respondent knowingly and willfully so confined the cattle. It alleged that the car arrived at New Orleans at 11: 35 in the evening of October 9; that having received advance information of the approximate time of arrival and of the time when the 36-hour period would expire, respondent's yardmaster, in order promptly to handle the shipment, procured an extra engine and crew immediately upon arrival of the car to take it to the stockyards and, before the expiration of the permissible time of confinement, there place it for unloading; that the yardmaster negligently failed to notify the employee, whose duty it was to unload; and because of his oversight and negligence the cattle were continuously confined in the car for 37 hours.

A motion by petitioner for judgment on the pleadings having been overruled, the parties waived trial by jury and stipulated evidentiary facts in substance as alleged

in the answer. They left open the question whether respondent knowingly and willfully confined the cattle for more than 36 hours. The case was submitted for decision on the agreed statement without more. The court found evidentiary facts in accordance with the stipulation, held failure to unload within the time was due to the negligence of the yardmaster, and concluded that respondent did not knowingly and willfully fail to comply with the statute.

The case depends upon the meaning of the phrase "knowingly and willfully," used in § 3 to characterize the transgressions for which penalties are imposed. The Act is to be construed to give effect to its humanitarian provisions, and as well to the exceptions in favor of the carriers. *Chicago & N. W. Ry. Co.* v. *United States,* 246 U. S. 512, 517–518. The penalty is not imposed for unwitting failure to comply with the statute. *United States* v. *Sioux City Stock Yards Co.,* 162 Fed. 556, 562. *United States* v. *Stockyards Terminal Ry. Co.,* 178 Fed. 19, 23. *St. Joseph Stockyards Co.* v. *United States,* 187 Fed. 104; *Oregon-Washington R. & Nav. Co.* v. *United States,* 205 Fed. 341, 343. But in this case, the respondent knew when the permissible period of confinement would expire, brought the car to destination, and, within the time allowed, placed it for unloading. By allowing the 36 hours to expire, it "knowingly" failed to comply with the statute.

Mere omission with knowledge of the facts is not enough. The penalty may not be recovered unless the carrier is also shown "willfully" to have failed. In statutes denouncing offenses involving turpitude, "willfully" is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States* v. *Murdock,* 290 U. S. 389, 394, shows that it often denotes that

which is "intentional, or knowing, or voluntary, as distinguished from accidental," and that it is employed to characterize "conduct marked by careless disregard whether or not one has the right so to act." The significance of the word "willfully" as used in § 3 now before us, was carefully considered by the circuit court of appeals for the eighth circuit in *St. Louis & S. F. R. Co.* v. *United States,* 169 Fed. 69. Speaking through Circuit Judge Van Devanter, now Mr. Justice Van Devanter, the court said (p. 71): " 'Willfully' means something not expressed by 'knowingly,' else both would not be used conjunctively. . . . But it does not mean with intent to injure the cattle or to inflict loss upon their owner because such intent on the part of a carrier is hardly within the pale of actual experience or reasonable supposition. . . . So, giving effect to these considerations, we are persuaded that it means purposely or obstinately and is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements." That statement has been found a useful guide to the meaning of the word "willfully" and to its right application in suits for penalties under § 3. *United States* v. *Stockyards Terminal Ry. Co., supra,* 23. *St. Joseph Stockyards Co.* v. *United States, supra,* 105. *Oregon-Washington R. & Nav. Co.* v. *United States,* 205 Fed. 337, 339. *St. Louis Merchants' Bridge T. Ry. Co.* v. *United States,* 209 Fed. 600. See also *Chicago, B. & Q. R. Co.* v. *United States,* 194 Fed. 342, 346. *United States* v. *Kansas City Southern Ry. Co.,* 202 Fed. 828, 833.

Considered as unaffected by the yardmaster's negligence, respondent's failure to take the cattle from the car already placed at the yard for unloading, unquestionably discloses disregard of the statute and indifference to its requirements and compels the conclusion that, within the meaning of § 3, respondent willfully violated its duty

to unload as required by § 1. It is immaterial whether the yardmaster's negligence or oversight was intentional or excusable. As between the government and respondent, the latter's breach is precisely the same in kind and degree as it would have been if its yardmaster's failure had been intentional instead of merely negligent. The duty violated did not arise out of the relation of employer and employee but was one that, in virtue of the statute, was owed by respondent to the shippers and the public. As respondent could act only through employees, it is responsible for their failure. To hold carriers not liable for penalties where the violations of §§ 1 and 2 are due to mere indifference, inadvertence or negligence of employees would defeat the purpose of § 3. Whether respondent knowingly and willfully failed is to be determined by the acts and omissions which characterize its violation of the statute and not upon any breach of duty owed to it by its employees. Respondent's contention that it is not liable because its failure was due to the negligence or oversight of the yardmaster cannot be sustained. *Montana Cent. Ry. Co.* v. *United States,* 164 Fed. 400, 403. *United States* v. *Atlantic Coast Line R. Co.,* 173 Fed. 764, 769. Cf. *Oregon-Washington R. & Nav. Co.* v. *United States,* 205 Fed. 337, 340.

Reversed.

Mr. Justice Cardozo and Mr. Justice Reed took no part in the consideration or decision of this case.

McCOLLUM, TRUSTEE IN BANKRUPTCY, *v.* HAMILTON NATIONAL BANK.

CERTIORARI TO THE SUPREME COURT OF TENNESSEE.

No. 342. Argued January 31, 1938.—Decided February 28, 1938.

Rev. Stats. § 5197 governs the rates of interest chargeable by national banks, and § 5198 provides that, if a greater rate has been paid, the person paying it, or his legal representative, may recover twice the amount from the bank. Where the person entitled became bankrupt and the action against the bank was by his trustee in bankruptcy, the state court first granted judgment for double the usurious interest, but set off the judgment against the bankrupt's indebtedness to the bank. *Held:*

1. Although the form of action prescribed is debt, the cause of action is *ex delicto* and the recovery punitive; no set-off is permissible in the proceeding, either before or after judgment. P. 247.

2. Punishment for usury does not depend upon payment of the borrower's debt. P. 249.

Reversed.

CERTIORARI, 302 U. S. 670, to review the affirmance of a decree granting recovery to a trustee in bankruptcy in a suit against the bank under Rev. Stats. § 5198, but setting off the judgment against the bankrupt's debts to the bank.

Messrs. Joseph W. Thompson and *Joseph B. Roberts* for petitioner.

Mr. C. W. K. Meacham, with whom *Mr. J. B. Sizer* was on the brief, for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Section 5197, Revised Statutes,[1] governs the rates of interest to be taken by national banking associations and

[1] 12 U. S. C., § 85.

§ 5198[2] declares that the receiving of a rate of interest greater than that allowed, when knowingly done, shall be deemed a forfeiture of the entire interest and provides that, in case a greater rate has been paid, the person paying it may recover back twice the amount, in a suit in the nature of an action of debt. Petitioner is trustee in bankruptcy of Lookout Planing Mills, a corporation. He brought this suit under § 5198 in the chancery court of Hamilton County, Tennessee, to recover from respondent the penalty imposed by that section. Respondent answered denying liability, and by cross-bill alleged the bankrupt owed it $25,493.70 on notes, and prayed that it be allowed to set off its claim against any judgment that petitioner might obtain. Petitioner's answer to the cross-bill asserted that recovery of the penalty did not depend on payment of the debt.

The chancellor found that the bankrupt paid and respondent knowingly received $5,235.55 as interest based on a rate in excess of that permitted and gave him judgment for double that amount. He ruled that after judgment petitioner's claim was subject to set-off and ordered that the amount awarded him be applied as a credit upon the debt. The state supreme court held the set-off permissible under the Bankruptcy Act, § 68 (a), and expressly authorized by § 8769 of the Tennessee Code and

[2] 12 U. S. C., § 86: "The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: *Provided*, That such action is commenced within two years from the time the usurious transaction occurred."

declared that petitioner would be required to do equity by having his claim credited on the larger one owing to the respondent by the bankrupt.

The question is whether respondent is entitled to have the amount of the judgment for penalty credited on its claim against the bankrupt estate.

When the bank knowingly received illegal interest, it immediately became liable for, and the borrower became entitled to recover from it, a penalty of twice the amount of the interest thus paid. *Farmers' & Mechanics' National Bank* v. *Dearing,* 91 U. S. 29. *Lake Benton First National Bank* v. *Watt,* 184 U. S. 151. Upon petitioner's appointment as trustee in bankruptcy, the bankrupt's right to recover the penalty vested in him. Bankruptcy Act, § 70 (a), 11 U. S. C. § 110 (a). *First National Bank* v. *Lasater,* 196 U. S. 115, 118. *Reed* v. *American-German Nat. Bank,* 155 Fed. 233. The penalty is to be enforced according to the terms of the statute. Guilt being established, the law itself fixes the punishment at precisely twice the usurious exaction paid; it may not be enhanced or mitigated because of aggravating circumstances or equitable considerations. As the sum demanded is certain, recovery in an action of debt is authorized, though the claim arises not in contract but in tort. *Chaffee & Co.* v. *United States,* 18 Wall. 516, 538. The liability can only be enforced in an action "brought specially and exclusively for that purpose,—where the sole issue is the guilt or innocence of the accused, without the presence of any extraneous facts which might confuse the case." *Barnet* v. *National Bank,* 98 U. S. 555, 559. One paying a national bank usurious interest and entitled to enforce the penalty may not recover it by way of set-off in a suit brought upon his note to the bank. *Haseltine* v. *Central Bank,* 183 U. S. 132, 137. *Barnet* v. *National Bank, supra. Dreisbach* v. *National Bank,* 104 U. S. 52. *Stephens* v. *Monongahela Bank,* 111 U. S. 197.

See *Schuyler National Bank* v. *Gadsden,* 191 U. S. 451, 456.

Reasons, at least as cogent as those that uphold that rule, support the contention that the state court erred in permitting respondent to credit the amount of petitioner's judgment for penalty upon the notes given it by the bankrupt. To allow respondent to satisfy the judgment for penalty by mere deduction from its claim against the bankrupt's estate is to detract from the punishment definitely prescribed. The sentence specifically required by the law may not be cut down by implication, set-off or construction; for that would narrow the statute and tend to defeat its purpose. See *United States* v. *Wiltberger,* 5 Wheat. 76, 95. *Fasulo* v. *United States,* 272 U. S. 620, 628.

The right of set-off here involved does not at all depend upon the Tennessee statute upon which, at least in part, the state supreme court rested its ruling. Sections 5197 and 5198, Revised Statutes, define petitioner's right to recover, and respondent's liability for, the penalty; the Bankruptcy Act governs liquidation and distribution of the bankrupt's estate. It results that the validity of the challenged provision of the decree depends upon the right of set-off in bankruptcy. Bankruptcy Act, § 68 (a), 11 U. S. C. § 108 (a). Cf. *Yates* v. *Jones National Bank,* 206 U. S. 158, 179. *Farmers' & Mechanics' National Bank* v. *Dearing, supra. McDaniel National Bank* v. *Bridwell,* 74 F. (2d) 331.

Section 68 (a) declares: "In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed and paid." The words "debts" and "credits" as there used are correlative. What is a debt on one side is a credit on the other. *Libby* v. *Hopkins,* 104 U. S.

303, 309. Liability for the penalty does not arise in contract but is laid *in invitum* as a disciplinary measure. Nor does the judgment determining the extent of guilt and declaring sentence change the liability for penalty to one for debt. *Chase* v. *Curtis,* 113 U. S. 452, 463–464. *Boynton* v. *Hall,* 121 U. S. 457, 465–466.

As the penalty may be enforced only in a suit brought exclusively for that purpose so that the trial of guilt or innocence may not be embarrassed by any other question, it is plain that the payment of any debt owed by the plaintiff to the bank may not be held a condition precedent to the determination of that issue. Punishment for usury does not depend upon payment of the borrower's debt. It follows that respondent is not entitled to satisfy petitioner's judgment by deducting the amount of it from respondent's claim against the bankrupt's estate. *Meredith* v. *American National Bank,* 127 Tenn. 90, 94; 153 S. W. 479. *Exeter National Bank* v. *Orchard,* 43 Neb. 579, 582; 61 N. W. 833. *Morehouse* v. *Second National Bank,* 30 Hun 628. Reason, well supported by authority, requires that the penalty for usury so specifically prescribed shall be paid according to the terms of the statute.

Reversed.

Mr. Justice Cardozo took no part in the consideration or decision of this case.

WESTERN LIVE STOCK ET AL. *v.* BUREAU OF REVENUE ET AL.

APPEAL FROM THE SUPREME COURT OF NEW MEXICO.

No. 322. Argued January 31, 1938.—Decided February 28, 1938.

1. The mere formation of a contract between persons of different States is not within the protection of the commerce clause, unless the performance is within its protection, at least in the absence of Congressional action. P. 253.
2. Taxation of a local business or occupation which is separate and distinct from the transportation and intercourse which are interstate commerce is not forbidden merely because, in the ordinary course, such transportation or intercourse is induced or occasioned by the business. P. 253.
3. A statute of New Mexico levied on all engaged within the State in the business of publishing newspapers or magazines a privilege tax of 2% on the gross receipts from the sale of advertising. Appellants, whose only office and place of business was within the State, prepared, edited and published there a journal, the circulation of which was partly interstate. Part of their receipts from advertising was derived from contracts with advertisers out of the State. Such contracts involved interstate transmission, from advertisers to appellants, of cuts, mats, information, copy, etc.; also payment through interstate facilities. *Held,* the tax as applied to appellants in respect of the sums received under such advertising contracts did not infringe the commerce clause of the Federal Constitution. Pp. 259–260.

   So far as the advertising rates reflected a value attributable to the maintenance of a circulation of the magazine interstate, the burden on the interstate business was too remote and too attenuated to call for a rigidly logical application of the doctrine that gross receipts from interstate commerce may not be made the measure of a tax.
4. The commerce clause does not relieve those engaged in interstate commerce from their just share of the state tax burden, even though the cost of doing the business be thereby increased. P. 254.
5. The vice characteristic of such local taxes, measured by gross receipts from interstate commerce, as have been held invalid, was that they placed on the commerce burdens of such a nature as

were capable, in point of substance, of being imposed, or added to, with equal right by every State which the commerce touched, merely because interstate commerce was being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce. The tax here involved is not subject to that objection. P. 255.

6. The business of preparing, printing and publishing magazine advertising is peculiarly local and distinct from its circulation whether or not that circulation be interstate commerce. P. 258.
7. In reconciling opposing demands that interstate commerce bear its share of local taxation, and, on the other hand, not be subjected to multiple tax burdens merely because it is interstate commerce, practical rather than logical distinctions must be sought. P. 259.
8. *Fisher's Blend Station* v. *State Tax Comm'n,* 297 U. S. 650, and *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292, distinguished. Pp. 260-261.

41 N. M. 288; 67 P. 2d 505, affirmed.

Appeal from a judgment affirming a judgment against the appellants in a suit brought by them to recover taxes paid under protest and alleged to have been unlawfully exacted.

Mr. D. A. Macpherson, Jr., with whom *Mr. J. R. Modrall* was on the brief, for appellants.

Mr. Frank H. Patton, Attorney General, with whom *Mr. Richard E. Manson,* Assistant Attorney General, of New Mexico, was on the brief, for appellees.

Mr. Justice Stone delivered the opinion of the Court.

Section 201, c. 7, of the New Mexico Special Session Laws of 1934, levies a privilege tax upon the gross receipts of those engaged in certain specified businesses.[1]

[1] "Sec. 201. There is hereby levied, and shall be collected by the Tax Commission, privilege taxes, measured by the amount or volume of business done, against the persons, on account of their business

Subdivision I imposes a tax of 2% of amounts received from the sale of advertising space by one engaged in the business of publishing newspapers or magazines. The question for decision is whether the tax laid under this statute on appellants, who sell without the state, to advertisers there, space in a journal which they publish in New Mexico and circulate to subscribers within and without the state, imposes an unconstitutional burden on interstate commerce.

Appellants brought the present suit in the state district court to recover the tax, which they had paid under protest, as exacted in violation of the commerce clause of the Federal Constitution. The trial court overruled a demurrer to the complaint and gave judgment for appellants, which the Supreme Court reversed. 41 N. M. 141; 65 P. 2d 863. Appellants refusing to plead further, the district court gave judgment for the appellees, which the Supreme Court affirmed. 41 N. M. 288; 67 P. 2d 505. The case comes here on appeal from the second judgment under § 237 of the Judicial Code.

Appellants publish a monthly livestock trade journal which they wholly prepare, edit, and publish within the state of New Mexico, where their only office and place of business is located. The journal has a circulation in New Mexico and other states, being distributed to paid subscribers through the mails or by other means of transportation. It carries advertisements, some of which are

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activities, engaging, or continuing, within the State of New Mexico, in any business as herein defined, and in the amounts determined by the application of rates against gross receipts, as follows:

. . . . . .

"I—At an amount equal to two percent of the gross receipts of any person engaging or continuing in any of the following businesses: . . . publication of newspapers and magazines (but the gross receipts of the business of publishing newspapers or magazines shall include only the amounts received for the sale of advertising space) . . ."

obtained from advertisers in other states through appellants' solicitation there. Where such contracts are entered into, payment is made by remittances to appellants sent interstate; and the contracts contemplate and provide for the interstate shipment by the advertisers to appellants of advertising cuts, mats, information and copy. Payment is due after the printing of such advertisements in the journal and its ultimate circulation and distribution, which is alleged to be in New Mexico and other states.

Appellants insist here, as they did in the state courts, that the sums earned under the advertising contracts are immune from the tax because the contracts are entered into by transactions across state lines and result in the like transmission of advertising materials by advertisers to appellants, and also because performance involves the mailing or other distribution of appellants' magazines to points without the state.

That the mere formation of a contract between persons in different states is not within the protection of the commerce clause, at least in the absence of Congressional action, unless the performance is within its protection, is a proposition no longer open to question. *Paul* v. *Virginia,* 8 Wall. 168; *Hooper* v. *California,* 155 U. S. 648; *New York Life Ins. Co.* v. *Deer Lodge County,* 231 U. S. 495; cf. *Ware & Leland* v. *Mobile County,* 209 U. S. 405; *Engel* v. *O'Malley,* 219 U. S. 128. Hence it is unnecessary to consider the impact of the tax upon the advertising contracts except as it affects their performance, presently to be discussed. Nor is taxation of a local business or occupation which is separate and distinct from the transportation and intercourse which is interstate commerce forbidden merely because in the ordinary course such transportation or intercourse is induced or occasioned by the business. *Williams* v. *Fears,* 179 U. S. 270; *Ware & Leland* v. *Mobile County, supra; Browning* v. *Waycross,*

233 U. S. 16; *General Railway Signal Co.* v. *Virginia,* 246 U. S. 500, 510; *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165. Here the tax which is laid on the compensation received under the contract is not forbidden either because the contract, apart from its performance, is within the protection of the commerce clause, or because as an incident preliminary to printing and publishing the advertisements the advertisers send cuts, copy and the like to appellants.

We turn to the other and more vexed question, whether the tax is invalid because the performance of the contract, for which the compensation is paid, involves to some extent the distribution, interstate, of some copies of the magazine containing the advertisements. We lay to one side the fact that appellants do not allege specifically that the contract stipulates that the advertisements shall be sent to subscribers out of the state, or is so framed that the compensation would not be earned if subscribers outside the state should cancel their subscriptions. We assume the point in appellants' favor and address ourselves to their argument that the present tax infringes the commerce clause because it is measured by gross receipts which are to some extent augmented by appellants' maintenance of an interstate circulation of their magazine.

It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business. "Even interstate business must pay its way," *Postal Telegraph-Cable Co.* v. *Richmond,* 249 U. S. 252, 259; *Ficklen* v. *Shelby County Taxing Dist.,* 145 U. S. 1, 24; *Postal Telegraph Cable Co.* v. *Adams,* 155 U. S. 688, 696; *Galveston, H. & S. A. Ry. Co.* v. *Texas,* 210 U. S. 217, 225, 227, and the bare fact that one is carrying on interstate commerce does not relieve him from many forms of state taxation which add to the cost of his business. He is subject to a property tax on

the instruments employed in the commerce. *Western Union Teleg. Co.* v. *Attorney General,* 125 U. S. 530; *Cleveland, C., C. & St. L. Ry. Co.* v. *Backus,* 154 U. S. 439; *Adams Express Co.* v. *Ohio State Auditor,* 165 U. S. 194; *Adams Express Co.* v. *Kentucky,* 166 U. S. 171; *Western Union Tel. Co.* v. *Missouri ex rel. Gottlieb,* 190 U. S. 412; *Old Dominion S. S. Co.* v. *Virginia,* 198 U. S. 299, and if the property devoted to interstate transportation is used both within and without the state a tax fairly apportioned to its use within the state will be sustained. *Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U. S. 18; *Cudahy Packing Co.* v. *Minnesota,* 246 U. S. 450. Net earnings from interstate commerce are subject to income tax, *United States Glue Co.* v. *Oak Creek,* 247 U. S. 321, and if the commerce is carried on by a corporation a franchise tax may be imposed, measured by the net income from business done within the state, including such portion of the income derived from interstate commerce as may be justly attributable to business done within the state by a fair method of apportionment. *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113; cf. *Bass, Ratcliff & Gretton* v. *State Tax Comm'n,* 266 U. S. 271.

All of these taxes in one way or another add to the expense of carrying on interstate commerce, and in that sense burden it; but they are not for that reason prohibited. On the other hand, local taxes, measured by gross receipts from interstate commerce, have often been pronounced unconstitutional. The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed (*Fargo* v. *Michigan,* 121 U. S. 230; *Philadelphia & Sou. S. S. Co.* v. *Pennsylvania,* 122 U. S. 326; *Galveston, H. & S. A. R. Co.* v. *Texas, supra; Meyer* v. *Wells, Fargo & Co.,* 223 U. S. 298) or added to (*Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292; *Fisher's Blend Station* v. *State Tax*

Comm'n, 297 U. S. 650) with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce. *See Philadelphia & Sou. S. S. Co.* v. *Pennsylvania, supra,* 346; *Case of State Freight Tax,* 15 Wall. 232, 280; Bradley, J., dissenting in *Maine* v. *Grand Trunk Ry. Co.,* 142 U. S. 217, 235; cf. *Pullman's Palace Car Co.* v. *Pennsylvania, supra,* 26. The multiplication of state taxes measured by the gross receipts from interstate transactions would spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove. *Baldwin* v. *G. A. F. Seelig, Inc.,* 294 U. S. 511, 523.

It is for these reasons that a state may not lay a tax measured by the amount of merchandise carried in interstate commerce, *Case of State Freight Tax, supra,* or upon the freight earned by its carriage. *Fargo* v. *Michigan, supra; Philadelphia & Sou. S. S. Co.* v. *Pennsylvania, supra,* restricting the effect of *State Tax on Railway Gross Receipts,* 15 Wall. 284, with which compare Miller, J., dissenting in that case at p. 297. Taxation measured by gross receipts from interstate commerce has been sustained when fairly apportioned to the commerce carried on within the taxing state, *Wisconsin & M. Ry. Co.* v. *Powers,* 191 U. S. 379; *Maine* v. *Grand Trunk Ry. Co., supra; Cudahy Packing Co.* v. *Minnesota, supra; United States Express Co.* v. *Minnesota,* 223 U. S. 335, and in other cases has been rejected only because the apportionment was found to be inadequate or unfair. *Fargo* v. *Michigan, supra; Galveston, H. & S. A. R. Co.* v. *Texas, supra; Meyer* v. *Wells, Fargo & Co., supra,* with which compare *Wisconsin & M. Ry. Co.* v. *Powers, supra.* Whether the tax was sustained as a fair means of measuring a local privilege or franchise, as in *Maine* v. *Grand Trunk Ry. Co., supra; Ficklen* v. *Shelby County Taxing*

Dist., supra; American Manufacturing Co. v. *St. Louis,* 250 U. S. 459, or as a method of arriving at the fair measure of a tax substituted for local property taxes, *Cudahy Packing Co.* v. *Minnesota, supra; United States Express Co.* v. *Minnesota, supra;* cf. *Postal Telegraph Cable Co.* v. *Adams, supra;* see *McHenry* v. *Alford,* 168 U. S. 651, 670–671, it is a practical way of laying upon the commerce its share of the local tax burden without subjecting it to multiple taxation not borne by local commerce and to which it would be subject if gross receipts, unapportioned, could be made the measure of a tax laid in every state where the commerce is carried on. A tax on gross receipts from tolls for the use by interstate trains of tracks lying wholly within the taxing state is valid, *New York, L. E. & W. R. Co.* v. *Pennsylvania,* 158 U. S. 431; cf. *Henderson Bridge Co.* v. *Kentucky,* 166 U. S. 150, although a like tax on gross receipts from the rental of railroad cars used in interstate commerce both within and without the taxing state is invalid. *Fargo* v. *Michigan, supra.* In the one case the tax reaches only that part of the commerce carried on within the taxing state; in the other it extends to the commerce carried on without the state boundaries, and, if valid, could be similarly laid in every other state in which the business is conducted.

In the present case the tax is, in form and substance, an excise conditioned on the carrying on of a local business, that of providing and selling advertising space in a published journal, which is sold to and paid for by subscribers, some of whom receive it in interstate commerce. The price at which the advertising is sold is made the measure of the tax. This Court has sustained a similar tax said to be on the privilege of manufacturing, measured by the total gross receipts from sales of the manufactured goods both intrastate and interstate. *American Manufacturing Co.* v. *St. Louis, supra,* 462. The actual sales prices which

measured the tax were taken to be no more than the measure of the value of the goods manufactured, and so an appropriate measure of the value of the privilege, the taxation of which was deferred until the goods were sold. *Ficklen* v. *Shelby County Taxing Dist., supra,* sustained a license tax measured by a percentage of the gross annual commissions received by brokers engaged in negotiating sales within for sellers without the state.

Viewed only as authority, *American Manufacturing Co.* v. *St. Louis, supra,* would seem decisive of the present case. But we think the tax assailed here finds support in reason, and in the practical needs of a taxing system which, under constitutional limitations, must accommodate itself to the double demand that interstate business shall pay its way, and that at the same time it shall not be burdened with cumulative exactions which are not similarly laid on local business.

As we have said, the carrying on of a local business may be made the condition of state taxation, if it is distinct from interstate commerce, and the business of preparing, printing and publishing magazine advertising is peculiarly local and distinct from its circulation whether or not that circulation be interstate commerce. Cf. *Puget Sound Stevedoring Co. v. State Tax Comm'n,* 302 U. S. 90, 94. No one would doubt that the tax on the privilege would be valid if it were measured by the amount of advertising space sold. *Utah Power & Light Co.* v. *Pfost, supra; Federal Compress & W. Co.* v. *McLean,* 291 U. S. 17, or by its value. *Oliver Iron Mining Co.* v. *Lord,* 262 U. S. 172; *Hope Natural Gas Co.* v. *Hall,* 274 U. S. 284. Selling price, taken as a measure of value whose accuracy appellants do not challenge, is for all practical purposes a convenient means of arriving at an equitable measure of the burden which may be imposed on an admittedly taxable subject matter. Unlike the measure of the tax sustained in *American Manufacturing Co.* v. *St. Louis, supra,* it does not embrace

the purchase price (here the magazine subscription price) of the articles shipped in interstate commerce. So far as the advertising rates reflect a value attributable to the maintenance of a circulation of the magazine interstate, we think the burden on the interstate business is too remote and too attenuated to call for a rigidly logical application of the doctrine that gross receipts from interstate commerce may not be made the measure of a tax. Experience has taught that the opposing demands that the commerce shall bear its share of local taxation, and that it shall not, on the other hand, be subjected to multiple tax burdens merely because it is interstate commerce, are not capable of reconciliation by resort to the syllogism. Practical rather than logical distinctions must be sought. See *Galveston, H. & S. A. R. Co.* v. *Texas, supra,* 227. Recognizing that not every local law that affects commerce is a regulation of it in a constitutional sense, this Court has held that local taxes may be laid on property used in the commerce; that its value for taxation may include the augmentation attributable to the commerce in which it is employed; and, finally, that the equivalent of that value may be computed by a measure related to gross receipts when a tax of the latter is substituted for a tax of the former. See *Galveston, H. & S. A. R. Co.* v. *Texas, supra,* 225.

Here it is perhaps enough that the privilege taxed is of a type which has been regarded as so separate and distinct from interstate transportation as to admit of different treatment for purposes of taxation, *Utah Light & Power Co* v. *Pfost, supra; Federal Compress & W. Co.* v. *McLean, supra; Chassaniol* v. *Greenwood,* 291 U. S. 584, and that the value of the privilege is fairly measured by the receipts. The tax is not invalid because the value is enhanced by appellant's circulation of their journal interstate any more than property taxes on railroads are invalid because property value is increased by the circumstance that the railroads do an interstate business.

But there is an added reason why we think the tax is not subject to the objection which has been leveled at taxes laid upon gross receipts derived from interstate communication or transportation of goods. So far as the value contributed to appellants' New Mexico business by circulation of the magazine interstate is taxed, it cannot again be taxed elsewhere any more than the value of railroad property taxed locally. The tax is not one which in form or substance can be repeated by other states in such manner as to lay an added burden on the interstate distribution of the magazine. As already noted, receipts from subscriptions are not included in the measure of the tax. It is not measured by the extent of the circulation of the magazine interstate. All the events upon which the tax is conditioned—the preparation, printing and publication of the advertising matter, and the receipt of the sums paid for it—occur in New Mexico and not elsewhere. All are beyond any control and taxing power which, without the commerce clause, those states could exert through its dominion over the distribution of the magazine or its subscribers. The dangers which may ensue from the imposition of a tax measured by gross receipts derived directly from interstate commerce are absent.

In this and other ways the case differs from *Fisher's Blend Station* v. *State Tax Comm'n, supra,* on which appellants rely. There the exaction was a privilege tax laid upon the occupation of broadcasting, which the Court held was itself interstate communication, comparable to that carried on by the telegraph and the telephone, and was measured by the gross receipts derived from that commerce. If broadcasting could be taxed, so also could reception. *Station WBT, Inc.* v. *Poulnot,* 46 F. (2d) 671.[2]

[2] Great Britain levies an annual license tax on radio receiving apparatus. See Wireless Telegraphy Act of 1904, c. 24, 4 Edw. 7, as explained by c. 67, 15 & 16 Geo. 5, and implemented by regulation printed in Great Britain, Post Office Guide, July, 1936.

In that event a cumulative tax burden would be imposed on interstate communication such as might ensue if gross receipts from interstate transportation could be taxed. This was the vice of the tax of a percentage of the gross receipts from goods sold by a wholesaler in interstate commerce, held invalid in *Crew Levick Co.* v. *Pennsylvania, supra.* In form and in substance the tax was thought not to be one for the privilege of doing a local business separable from interstate commerce. Cf. *American Manufacturing Co.* v. *St. Louis, supra.* In none of these respects is the present tax objectionable.

Affirmed.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER are of opinion that the judgment should be reversed.

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

NATIONAL LABOR RELATIONS BOARD *v.* PENNSYLVANIA GREYHOUND LINES, INC., ET AL.

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

No. 413. Argued February 4, 1938.—Decided February 28, 1938.

1. Upon a finding that an employer has created and fostered a labor organization of employees and dominated its administration in violation of § 8 (1), (2) of the National Labor Relations Act of July 5, 1935, the National Labor Relations Board has authority, under § 10 (c) of the Act, in addition to ordering the employer to cease these practices, to require him to withdraw all recognition of the organization as the representative of his employees and to post notices informing them of such withdrawal. Pp. 263, 268.
2. Whether continued recognition by the employer of the employees' association would in itself be a continuing obstacle to the exercise of the employees' right of self-organization and to bargain col-

lectively through representatives of their own choosing, is an inference of fact to be drawn by the Board from the evidence reviewed in its subsidiary findings, and when supported by evidence the Board's finding of the fact is conclusive. P. 270.

3. The Board's findings in this case that the employer had engaged in unfair labor practices, and that withdrawal of recognition of the employee association by the employer, accompanied by suitable publicity, would appropriately give effect to the policy of the Act, were amply supported by the evidence. P. 271.
4. To enable the Board to determine whether the employer had violated the statute or to make an appropriate order against him, the presence of the employees' association was not essential and it was not entitled to notice and hearing. P. 271.
5. An order of the Board such as that requiring the employer to withdraw recognition of the employees' association, and to post notice of such action, lawful when made, does not become moot because it is obeyed or because changing circumstances may lessen the need for it. P. 271.

91 F. 2d 178, reversed.

CERTIORARI, 302 U. S. 676, to review a judgment denying in part a petition of the National Labor Relations Board for enforcement of an order.

Mr. Charles Fahy, with whom *Solicitor General Reed, Assistant Solicitor General Bell,* and *Messrs. Robert L. Stern, Robert B. Watts,* and *Laurence A. Knapp* were on the brief, for petitioner.

Mr. Ivan Bowen, with whom *Messrs. Charles H. Young* and *M. H. Boutelle* were on the brief, for respondents.

MR. JUSTICE STONE delivered the opinion of the Court.

The main question for decision is whether, upon a finding that an employer has created and fostered a labor organization of employees and dominated its administration in violation of § 8 (1), (2) of the National Labor Relations Act of July 5, 1935 (c. 372, 49 Stat. 449, 29 U. S. C., § 151, *et seq.*), the National Labor Relations Board, in addition to ordering the employer to cease these practices,

can require him to withdraw all recognition of the organization as the representative of his employees and to post notices informing them of such withdrawal.

Respondent Pennsylvania Greyhound Lines, Inc., is a corporation operating a passenger motor bus system between the Atlantic Coast and Chicago and St. Louis. Respondent Greyhound Management Company, an affiliate of the Pennsylvania Company, performs various services relating to employee personnel of the latter and its affiliated corporations. Together, respondents act as employers of those employees working at the Pittsburgh Garage of the Pennsylvania Company and together actively deal with labor relations of those employees.

Upon charges filed by Local Division No. 1063, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, a labor organization, the Board issued its complaint, as permitted by § 10 (b) of the Act, charging that respondents had engaged in specified unfair labor practices affecting interstate commerce, in violation of § 8. After notice to respondents, and hearing, the Board found that they had engaged in unfair labor practices by interfering with, restraining, and coercing employees in the exercise of their rights, guaranteed by § 7, in that they had dominated and interfered with the formation and administration of a labor organization of their employees, Employees Association of the Pennsylvania Greyhound Lines, Inc., and had contributed financial and other support to it in violation of § 8 (1), (2).

The Board ordered that respondents cease each of the specified unfair labor practices. It further ordered that they withdraw recognition from the Employees Association as employee representative authorized to deal with respondents concerning grievances, terms of employment, and labor disputes, and that they post conspicuous notices in all the places of business where such employees are en-

gaged, stating that the "Association is so disestablished and that respondents will refrain from any such recognition thereof." 1 N. L. R. B. 1.

Upon the Board's petition under § 10 (e) to enforce the order, heard April 1, 1936, the Court of Appeals for the Third Circuit gave judgment after a delay of one year and two months, during which there were three postponements and two rearguments. It struck from the order all provisions requiring the withdrawal by respondents of recognition of the Employees Association and publication of notice of withdrawal, and directed that in other respects the Board's order be enforced. 91 F. (2d) 178. The court thought that the Board was without authority to order the employers to withhold recognition from the Association, without notice to it and opportunity for a hearing, and without an election by the employees to choose a labor organization to represent them. We granted certiorari, 302 U. S. 676, the questions involved being of importance in the administration of the National Labor Relations Act.

Respondents do not assail the Board's findings of fact as without support in the evidence, and the principal questions for decision are of law, whether in the circumstances disclosed by the findings the Board acted within the authority conferred upon it by §§ 7, 8 and 10 of the Act. Section 7 provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

Section 8 declares:

"It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

"(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: . . ."

By § 10 (b) the Board is given authority to hear complaints of unfair labor practices upon evidence; and § 10 (c)[1] directs that when the Board finds that any person has engaged in unfair labor practices it "shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of this Act. . . ."

Notwithstanding the mandatory form of § 10 (c), its provisions in substance leave to the Board some scope for the exercise of judgment and discretion in determining, upon the basis of the findings, whether the case is one requiring an affirmative order, and in choosing the particular affirmative relief to be ordered. Hence, upon the challenge of the affirmative part of an order of the Board, we look to the Act itself, read in the light of its history, to ascertain its policy, and to the facts which the Board has found, to see whether they afford a basis for its judgment that the action ordered is an appropriate means of carrying out that policy.

The history of the Act and its language show that its ruling purpose was to protect interstate commerce by

[1] "Sec. 10 (c). The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . ."

securing to employees the rights established by § 7 to organize, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for that and other purposes. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 23, 33. This appears both from the formal declaration of policy in § 1 of the Act, *National Labor Relations Board* v. *Jones & Laughlin Steel Corp., supra,* 22–24, and from § 7, in itself a declaration of the policy which, in conjunction with § 10 (c), it adopts as the controlling guide to administrative action.

Before enactment of the National Labor Relations Act this Court had recognized that the maintenance of a "company union," dominated by the employer, may be a ready and effective means of obstructing self-organization of employees and their choice of their own representatives for the purpose of collective bargaining. Section 2 (3) of the Railway Labor Act of 1926, had provided that representatives, for the purposes of the Act, should be designated by employer and employees "without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other." We had held that in enforcing this provision, employer recognition of a company union might be enjoined and the union "disestablished," as an appropriate means of preventing interference with the rights secured to employees by the statute. *Texas & N. O. R. Co.* v. *Brotherhood of Railway & S. S. Clerks,* 281 U. S. 548, 560; see also *Virginian Ry. Co.* v. *System Federation No. 40,* 300 U. S. 515, 542 *et seq.*

Congress, in enacting the National Labor Relations Act, had in mind the experience in the administration of the Railway Labor Act, and declared that the former was "an amplification and further clarification of the principles" of the latter. Report of the House Committee on

Labor, H. R. 1147, 74th Cong., 1st Sess., p. 3. It had before it the *Railway Clerks* case which had emphasized the importance of union recognition in securing collective bargaining, Report of the Senate Committee on Education and Labor, S. Rep. 573, 74th Cong., 1st Sess., p. 17, and there were then available data showing that once an employer has conferred recognition on a particular organization it has a marked advantage over any other in securing the adherence of employees, and hence in preventing the recognition of any other.[2] The National Labor Relations Act continued and amplified the policy of the Railway Labor Act by its declaration in § 7, and by providing generally in § 8 that any interferences in the exercise of the rights guaranteed by § 7 and specifically the domination or interference with the formation or administration of any labor organization were unfair labor practices. To secure to employees the benefits of self-organization and collective bargaining through representatives of the employees' own choosing, the Board was authorized by § 10 (c) to order the abandonment of unfair labor practices and to take affirmative action which would carry out the policy of the Act.

In recommending the adoption of this latter provision the Senate Committee called attention to the decree which, in the *Railway Clerks* case, had compelled the employer to "disestablish its company union as representative of its employees." Report of the Senate Committee

[2] On the significance of recognition in collective bargaining see Commons and Andrews, Principles of Labor Legislation (Harper & Bros., 4th ed., 1936), p. 372; Catlin, The Labor Problem (Harper & Bros., 1935), pp. 431, 522; Rufener, Principles of Economics (Houghton-Mifflin Co., 1927), p. 399; Twentieth Century Fund, Inc., Labor and the Government (1935), p. 47; Yoder, Labor Economics and Labor Problems (1933), p. 443; U. S. Department of Labor, Bureau of Labor Statistics, Characteristics of Company Unions, Bulletin No. 634, Chs. VII, XXII.

on Education and Labor, *supra.* The report of the House Committee on Labor on this feature of the Act, after pointing out that collective bargaining is "a sham when the employer sits on both sides of the table by supporting a particular organization with which he deals," declared: "The orders will of course be adapted to the need of the individual case; they may include such matters as refraining from collective bargaining with a minority group, recognition of the agency chosen by the majority for the purposes of collective bargaining, posting of appropriate bulletins, refraining from bargaining with an organization corrupted by unfair labor practices." Report of the House Committee on Labor, *supra,* pp. 18, 24.

It is plain that the challenged provisions of the present order are of a kind contemplated by Congress in the enactment of § 10 (c) and are within its terms. There remains the question whether the findings adequately support them.

The Board's subsidiary findings of fact fully sustain its conclusion that respondents had engaged in unfair labor practices, by active participation in the organization and administration of the Employees Association, which they dominated throughout its history, and to whose financial support they had contributed; and that they had interfered with, restrained and coerced their employees in the exercise of the rights confirmed by § 7 to form for themselves a labor organization and to bargain collectively through representatives of their own choosing.

It is unnecessary to repeat in full detail the facts disclosed by the findings. They show that before the enactment of the National Labor Relations Act, respondents, whose employees were unorganized, initiated a project for their organization under company domination. In the course of its execution officers or other representatives of respondent were active in promoting the plan, in

urging employees to join, in the preparation of the details of organization, including the by-laws, in presiding over organization meetings, and in selecting employee representatives of the organization.

The by-laws and regulations provided that all motorbus operators, maintenance men and clerical employees, after three months service, automatically became members of the Association, and that only employees were eligible to act as employee representatives. No provisions were made for meetings of members, nor was a procedure established whereby employees might instruct their representatives, or whereby those representatives might disseminate information or reports. Grievances were to be taken up with regional committees with final review by a Joint Reviewing Committee made up of an equal number of regional chairmen and of management representatives, but review in those cases could not be secured unless there was a joint submission of the controversy by employee and management representatives.

Change of the by-laws without employer consent was precluded by a provision that amendment should be only on a two-thirds vote of the Joint Reviewing Committee, composed of equal numbers of employer and employee representatives. Employees paid no dues, all the Association expenses being borne by the management.

Although the Association was in terms created as a bargaining agency for the purpose of "providing adequate representation" for respondents' employees by "securing for them satisfactory adjustment of all controversial matters," it has functioned only to settle individual grievances. On the one recorded occasion when the employees sought a wage increase, the company representatives prevented its consideration by refusing to join in the submission to the Joint Reviewing Committee.

In May, 1935, shortly before the passage of the Act, certain of respondents' Pittsburgh employees organized a local union, Local Division No. 1063 of the Amalga-

mated Association of Street, Electric Railway and Motor Coach Employees of America, affiliated with the American Federation of Labor, and continued to hold meetings of the organization after the passage of the Act on July 5, 1935. Before and after that date, respondents' officers were active in warning employees against joining the union and in threatening them with discharge if they should join, and in keeping the union meetings under surveillance.

Section 10 (e) declares that the Board's findings of fact "if supported by evidence, shall be conclusive." Whether the continued recognition of the Employees Association by respondents would in itself be a continuing obstacle to the exercise of the employees' right of self-organization and to bargain collectively through representatives of their own choosing, is an inference of fact to be drawn by the Board from the evidence reviewed in its subsidiary findings. See *Swayne & Hoyt* v. *United States,* 300 U. S. 297.

We may assume that there are situations in which the Board would not be warranted in concluding that there was any occasion for withdrawal of employer recognition of an existing union before an election by employees under § 9 (c), even though it had ordered the employer to cease unfair labor practices. But here respondents, by unfair labor practices, have succeeded in establishing a company union so organized that it is incapable of functioning as a bargaining representative of employees. With no procedure for meetings of members or for instructing employee representatives, and with no power to bring grievances before the Joint Reviewing Committee without employer consent, the Association could not without amendment of its by-laws be used as a means of the collective bargaining contemplated by § 7; and amendment could not be had without the employer's approval.

In view of all the circumstances the Board could have thought that continued recognition of the Association would serve as a means of thwarting the policy of collective bargaining by enabling the employer to induce adherence of employees to the Association in the mistaken belief that it was truly representative and afforded an agency for collective bargaining, and thus to prevent self-organization. The inferences to be drawn were for the Board and not the courts. *Swayne & Hoyt* v. *United States, supra.* There was ample basis for its conclusion that withdrawal of recognition of the Association by respondents, accompanied by suitable publicity, was an appropriate way to give effect to the policy of the Act.

As the order did not run against the Association it is not entitled to notice and hearing. Its presence was not necessary in order to enable the Board to determine whether respondents had violated the statute or to make an appropriate order against them. See *General Investment Co.* v. *Lake Shore & M. S. Ry. Co.,* 260 U. S. 261, 285–286.

Respondents suggest that the case has become moot by reason of the fact that since the Board made its order it has certified the Brotherhood of Railroad Trainmen as representative of the motorbus drivers of the Pennsylvania company for purposes of collective bargaining and that in a pending proceeding under § 9 (c) for the certification of a representative of the other Pittsburgh employees, to which the Employees' Association is not a party, the Pennsylvania company and Local Division No. 1063, who are parties, have made no objection to the proposed certification. But an order of the character made by the Board, lawful when made, does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made.

We have considered but find it unnecessary to comment upon other objections to the order, of less moment.

Reversed.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration or decision of this case.

NATIONAL LABOR RELATIONS BOARD *v.* PACIFIC GREYHOUND LINES, INC.

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

No. 504. Argued February 4, 1938.—Decided February 28, 1938.

1. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, ante,* p. 261, followed.
2. The evidence and subsidiary findings in this case support the conclusion of the National Labor Relations Board that continued recognition of a company union by an employer would be a continuing obstacle to the exercise of the employees' right of self-organization and of collectively bargaining through representatives of their own choosing, and justified its order requiring the employer to withdraw all recognition of such union and give appropriate notice of the withdrawal to employees. P. 275.

91 F. 2d 458, reversed.

CERTIORARI, 302 U. S. 679, to review a judgment setting aside, in part, an order of the National Labor Relations Board, upon a petition for its enforcement.

Mr. Charles Fahy, with whom *Solicitor General Reed, Assistant Solicitor General Bell,* and *Messrs. Robert L. Stern, Robert B. Watts,* and *Laurence A. Knapp* were on the brief, for petitioner.

Mr. Ivan Bowen, with whom *Mr. M. H. Boutelle* was on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

This case, which comes here on certiorari to the Court of Appeals for the Ninth Circuit, presents the same issues discussed in No. 413, *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, ante,* p. 261, but on a somewhat different state of facts. The only question requiring separate consideration is whether, in the case in which the National Labor Relations Board has ordered respondent to cease certain unfair labor practices, including the domination and financial support of a company union, the facts justify its further order that respondent withdraw all recognition of the union and give appropriate notice of the withdrawal to employees.

The Court of Appeals for the Ninth Circuit sustained the Board's findings and all of its order except the affirmative parts relating to withdrawal of recognition of the company union, which it set aside. 91 F. (2d) 458. The authority conferred on the Board by § 10 (c) of the National Labor Relations Act to direct withdrawal of employer recognition when such an order will carry out the policies of the National Labor Relations Act was considered and sustained in the *Pennsylvania Greyhound Lines* case, *supra.* The question calling for attention here is whether the facts found by the Board afford a basis for its conclusion that the policies of the Act will be effectuated by the present order.

The findings show that respondent, an interstate carrier by motor bus, took an active and leading part in the organization in 1933 of the Drivers' Association, a labor organization of its employees; that respondent had since continuously interfered with and dominated the internal administration of the Association, and contributed to its support; that through such domination it had obtained a

"working agreement" with the Association in which it was stipulated that grievances of any employee should be presented first to his superior officer and then to respondent's president, whose decision should be final.

Before the enactment of the National Labor Relations Act, respondent twice made successful use of the Association as a means to forestall attempts to organize its employees, one in 1933 by the Brotherhood of Locomotive Engineers and Firemen, and another in 1934 by the employees themselves who sought to establish a Brotherhood of Motor Coach Operators. Respondent's officers were active in persuading, threatening and coercing employees to join or remain members of the Drivers' Association, and not to join the rival unions. In 1935, following the passage of the National Labor Relations Act, there was a renewed but unsuccessful attempt by respondent's employees to establish an organization affiliated with the Brotherhood of Locomotive Engineers and Firemen. The attempt was met by persuasions and warnings of respondent's employees, by its officers, not to join the new union, and by threats of discharge if they should join. The Board found that the respondent had engaged in unfair labor practices in violation of § 8 (1), (2), and ordered the cessation of these practices and withdrawal of respondent's recognition of the Drivers' Association.

While the formal provisions, in constitution and by-laws, for insuring employer control of the company union in the *Pennsylvania* case are wanting here, the record shows, as the Board found, that employer control of the Drivers' Association was none the less effective. During a period of three years it had been successfully used by respondent as an instrument for preventing three successive attempts for the organization by respondent's employees of a union free from company domination. In

ordering withdrawal of recognition of the Drivers' Association by respondent, the Board pointed out that a mere order to cease the unfair labor practices "would not set free the employee's impulse to seek the organization which would most effectively represent him"; that continued recognition of the Drivers' Association would provide respondent "with a device by which its power may now be made effective unobtrusively, almost without further action on its part. Even though he would not have freely chosen" the Association "as an initial proposition, the employee, once having chosen, may by force of a timorous habit, be held firmly to his choice. The employee must be released from these compulsions."

Whether the continued recognition of the Drivers' Association by respondent would be a continuing obstacle to the exercise of the employees' right of self-organization and to bargain collectively through representatives of their own choosing, was an inference of fact which the Board could draw if there was evidence to support it. Section 10 (e); see *Swayne & Hoyt* v. *United States,* 300 U. S. 297. We cannot say that the Board's conclusion was without support in the evidence and in the subsidiary findings which respondent does not challenge.

Reversed.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration or decision of this case.

UNITED STATES *v.* KLEIN, ESCHEATOR OF PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

No. 439. Argued February 11, 1938.—Decided February 28, 1938.

1. Moneys due by a defendant in a suit in the federal district court, to certain bondholders whose whereabouts were unknown, were by direction of the court paid into its registry. Unclaimed for more than five years, the fund was deposited in the U. S. Treasury, as required by R. S. § 996. Under that section the money remains subject to the order of the district court to be paid to the persons entitled to it upon full proof of their right. In the exercise of a jurisdiction conferred by state statute, a state court subsequently decreed escheat of the fund and directed the state escheator to apply to the district court for an order that the money be paid to him. There was no contention on behalf of the United States of actual or possible escheat to the United States, or that it had any interest in the money adverse to the unknown bondholders. *Held,* that the decree of the state court was not an unconstitutional interference with the federal court nor an invasion of the sovereignty of the United States. Pp. 280, 282.
2. While a federal court which has taken possession of property in the exercise of the judicial power conferred by the Constitution and laws of the United States is said to acquire exclusive jurisdiction, the jurisdiction is exclusive only in so far as restriction of the power of other courts is necessary for appropriate control and disposition of the property by the federal court. P. 281.

326 Pa. 260; 192 A. 256, affirmed.

APPEAL from a decree affirming a decree declaring an escheat of certain moneys, theretofore deposited in the federal Treasury pursuant to R. S. § 996, and authorizing the state escheator to prosecute the State's claim to them. The United States appeared in opposition to the proceedings below, asserting jurisdictional objections.

Assistant Attorney General Whitaker, with whom *Solicitor General Reed, Assistant Solicitor General Bell,* and *Messrs. Paul A. Sweeney,* and *Henry A. Julicher* were on the brief, for the United States.

Mr. A. Jere Creskoff, with whom *Mr. Albert H. Ladner, Jr.* was on the brief, for appellee.

MR. JUSTICE STONE delivered the opinion of the Court.

The question for decision is whether statutes of the Commonwealth of Pennsylvania, Purdon's Penn. Statutes, Tit. 27, §§ 41, 45, 282, 334, are unconstitutional because they authorize interference with a federal court and an invasion of the sovereignty of the United States, in so far as they purport to confer jurisdiction on a state tribunal to declare the escheat of moneys deposited in the registry of the federal court and later covered into the Treasury of the United States.

In a suit brought by secured bondholders in the district court for eastern Pennsylvania to compel payment of the bonds by a defendant on the ground that it had appropriated the security to itself, a decree was entered in favor of the plaintiffs and other bondholders similarly situated, with provision for notice to the latter that they file their claims in the suit. *Brown* v. *Pennsylvania Canal Co.,* 229 Fed. 444; *Pennsylvania Canal Co.* v. *Brown,* 235 Fed. 669; *Brown* v. *Pennsylvania R. Co.,* 250 Fed. 513. It appearing that certain of the bondholders had not filed their claims and could not be found, the defendant was directed by the court to pay into its registry the money due to such bondholders, which was then placed in a designated despositary of the United States, in the name and to the credit of the court, pursuant to R. S. § 995, 28 U. S. C. § 851. On June 30, 1926, the fund was deposited in the Treasury of the United States as required by R. S. § 996, 28 U. S. C., § 852, in the case of funds paid into court and unclaimed for more than five years.

In 1934 the present appellee, as Escheator of the Commonwealth of Pennsylvania, proceeding under the Penn-

sylvania statutes which authorize the escheat of moneys paid into court where the persons entitled to them have remained unknown for seven years, petitioned the district court to declare an escheat of the fund. The court dismissed the petition, without prejudice, on the grounds that appellee had not yet procured a declaration of escheat, which was deemed necessary in order to perfect the Commonwealth's title, and that the court was without jurisdiction to make such a declaration. Thereupon the Pennsylvania escheat statutes were amended, Act of June 28, 1935, P. L. 475, to confer upon the Court of Common Pleas jurisdiction to decree an escheat of moneys deposited in the custody or under the control of any court of the United States within the Commonwealth.[1]

[1] As amended, the statutes provide:

"Sec. 41. . . . Whenever an escheat has occurred, or shall occur, of any money or property deposited in the custody of, or under the control of, any court of the United States in and for any district within this Commonwealth, or in the custody of any depository, clerk or other officer of such court, the court of common pleas of the county in which such court of the United States sits, shall have jurisdiction to ascertain if an escheat has occurred, and to enter a judgment or decree of escheat in favor of the Commonwealth.

"Sec. 282. . . . After the owner, beneficial owner, or person entitled to any of the following named moneys or property, shall be and remain unknown, or the whereabouts thereof shall have been unknown, for the period of seven successive years, such moneys or property shall be escheatable to the Commonwealth, and shall be escheated in the manner hereinafter provided, with interest actually accrued thereon to the date of the decree for the escheat of the same, namely: . . .

"(b) Any moneys, estate, or effects paid into or deposited in any court of this Commonwealth, or in any Federal court in and for any district within the Commonwealth, or in the custody of any officer of any such court.

"Sec. 334. That whensoever any money, estate or effects, shall have been, or shall hereafter be paid into, or deposited in the custody or be under the control of any court of this Commonwealth, or of any court of the United States in and for any district within this

The present suit was brought by appellee in the Court of Common Pleas, No. 5, of Philadelphia County, upon a petition setting out the facts already detailed and praying a declaration that the fund had escheated to the Commonwealth. The United States appeared in the suit and moved to dismiss the petition on the ground that the state court was without jurisdiction to escheat moneys in the custody of the United States or of its courts. The order of the Court of Common Pleas granting the motion was reversed by the Supreme Court of Pennsylvania, which held that the statutes relating to escheat of funds in the custody of federal courts, conferred jurisdiction on the court to declare the escheat and was subject to no constitutional infirmity since exercise of that jurisdiction involved no interference with the federal court and no attempted control over funds in its custody. 322 Pa. 481; 192 Atl. 256.

The United States then filed an answer and upon a trial of the issues the Court of Common Pleas gave its decree declaring that the fund had escheated to the Commonwealth and that appellee had authority to claim it, and directing him to apply to the district court for an order that the moneys be paid to him as Escheator. The State Supreme Court affirmed so much of the decree as declared the escheat and authorized appellee to prosecute the claim of the Commonwealth to the moneys. 326 Pa. 260; 192 Atl. 256. From its decree of affirmance the case comes here on appeal under § 237 of the Judicial Code.

Section 996 of the Revised Statutes directs that when the right to moneys paid into federal courts has been ad-

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Commonwealth, or shall be in the custody of any depository, registry, or of any receiver, clerk, or other officer of any of said courts, and the rightful owner or owners thereof shall have been or shall be unknown for the space of seven years, the same shall escheat to the Commonwealth, subject to all legal demands on the same."

judicated and they are unclaimed for more than five years, they shall be deposited in the Treasury of the United States, in the name of the United States. It further provides: "Any person or persons or any corporation or company entitled to any such money may, on petition to the court from which the money was received . . . and upon notice to the United States attorney and full proof of right thereto, obtain an order of court directing the payment of such money to the claimant, and the money deposited as aforesaid shall constitute and be a permanent appropriation for payments in obedience to such orders." [2]

The Government does not, in pleading or argument, set up any right, title or interest in the present fund adverse to the unknown bondholders. It does not contend that the fund has been or can be escheated to the United States. It agrees with the contention of appellee, which we accept as correctly interpreting the applicable federal statutes, that the fund remains subject to the order of the district court to be paid to the persons lawfully entitled to it upon proof of their ownership. But it insists here, as in the state courts, that the decree declaring the escheat is an unconstitutional interference with a court of the United States, an invasion of its sovereignty, and is an attempt, void under the Fourteenth Amendment, to exercise jurisdiction over the absent bondholders and

[2] The Permanent Appropriation Repeal Act, June 26, 1934, c. 756, 48 Stat. 1224, 1230, § 17, declares that appropriation accounts appearing on the books of the government, including "Unclaimed moneys of individuals whose whereabouts are unknown (Justice)," "are abolished, and any unobligated balances under such accounts as of June 30, 1935, shall be covered into a trust fund receipt account in the Treasury to be designated 'Unclaimed Moneys of Individuals Whose Whereabouts Are Unknown.' . . . There are authorized to be appropriated, annually, from such account such sums as may be necessary to meet any expenditures of the character now chargeable to the appropriation accounts abolished by this section. . . ."

the moneys, neither of which are shown to be within the state.

While a federal court which has taken possession of property in the exercise of the judicial power conferred upon it by the Constitution and laws of the United States is said to acquire exclusive jurisdiction, the jurisdiction is exclusive only in so far as restriction of the power of other courts is necessary for the federal court's appropriate control and disposition of the property. *Penn General Casualty Co.* v. *Pennsylvania ex rel. Schnader,* 294 U. S. 189; see *Leadville Coal Co.* v. *McCreery,* 141 U. S. 475, 477. Other courts having jurisdiction to adjudicate rights in the property do not, because the property is possessed by a federal court, lose power to render any judgment not in conflict with that court's authority to decide questions within its jurisdiction and to make effective such decisions by its control of the property. *Penn General Casualty Co.* v. *Pennsylvania ex rel. Schnader, supra;* see *Heidritter* v. *Elizabeth Oil-Cloth Co.,* 112 U. S. 294, 304; cf. *Buck* v. *Colbath,* 3 Wall. 334, 342; *Riehle* v. *Margolies,* 279 U. S. 218. Similarly a federal court may make a like adjudication with respect to property in the possession of a state court. *Yonley* v. *Lavender,* 21 Wall. 276; *Byers* v. *McAuley,* 149 U. S. 608, 620; *Security Trust Co.* v. *Black River National Bank,* 187 U. S. 211, 227; *Waterman* v. *Canal-Louisiana Bank & T. Co.,* 215 U. S. 33, 43–46; *Commonwealth Trust Co.* v. *Bradford,* 297 U. S. 613, 619; *General Baking Co.* v. *Harr,* 300 U. S. 433.

In this case jurisdiction was acquired by the district court, by reason of diversity of citizenship, to adjudicate the rights of the parties. That function performed, it now retains jurisdiction for the sole purpose of making disposition of the fund under its control, by ordering payment of it to the persons entitled as directed by the federal statute. Beyond whatever is needful and appropri-

ate to the accomplishment of that end, the jurisdiction and possession of the federal district court does not operate to curtail the power which the state may constitutionally exercise over persons and property within its territory.

The present decree for escheat of the fund is not founded on possession and does not disturb or purport to affect the Treasury's possession of the fund or the district court's authority over it. Nor could it do so. *Penn General Casualty Co.* v. *Pennsylvania, supra; United States* v. *Bank of New York & T. Co.,* 296 U. S. 463, 478. At most the decree of the state court purports to be an adjudication upon the title of the unknown claimants in the fund by a proceeding in the nature of an inquest of office as in the case of escheated lands, compare *Security Savings Bank* v. *California,* 263 U. S. 282, 287, with *Hamilton* v. *Brown,* 161 U. S. 256, 263, and to confirm the authority of appellee to make claim to the moneys. It is subordinate to every right asserted and decreed in the federal suit and effective only so far as it establishes rights derived from them. Neither the nature of the suit in the district court nor the federal statutes preclude transfer of or change in the interest of the unknown claimants, either by judicial proceedings in the state court or otherwise, pending final disposition of the fund by the federal court. Section 996 of the Revised Statutes contemplates that changes in ownership of the fund may occur, since it provides that after the right to the fund has been finally adjudicated and it has been covered into the Treasury it shall be paid over to any person entitled, upon full proof of his right to receive it.

Since the Government has not set up and does not assert any claim or interest in the fund apart from the possession acquired under the decree of the district court and the statutes of the United States, it is unnecessary to consider now the effect on the decree of the state court of the fund's absence from the state, and the absence or

nonresidence of the unknown claimants, if such is the case. All such questions will be open and may be raised and decided whenever application is made to the district court for payment over of the fund.

Affirmed.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration or decision of this case.

SAINT PAUL MERCURY INDEMNITY CO. *v.* RED CAB COMPANY.

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

No. 274. Submitted January 10, 1938.—Decided February 28, 1938.

1. There is a strong presumption that the plaintiff in a state court has not claimed a large amount in order to confer jurisdiction by removal on a federal court, and that the parties have not colluded to that end. P. 290.
2. The status of the case as disclosed by the plaintiff's complaint is controlling in the case of a removal, since the defendant must file his petition before the time for answer or forever lose his right to remove. P. 291.
3. Jurisdiction of the District Court acquired through removal is not lost by plaintiff's subsequent reduction of his claim to less than the jurisdictional amount. P. 292.

90 F. 2d 229, reversed.

CERTIORARI, 302 U. S. 669, to review a judgment dismissing an appeal from a judgment recovered in an action on a contract of insurance. The action had been removed from a state court. The respondent here conceded that the ruling below was erroneous and prayed that the cause be remanded for decision of the merits.

Mr. Burke G. Slaymaker submitted on brief for petitioner.

Mr. William E. Reiley submitted for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The decision under review is that, although, at the time of removal of a cause from a state court, the complaint disclosed an amount in controversy requisite to the federal court's jurisdiction, a subsequent amendment, reducing the sum claimed to substantially less than that amount, necessitates remand to the state court. We granted the writ of certiorari because of alleged conflict with our decisions and with those of other federal courts.

The respondent, a corporation of Indiana, issued a summons out of the Superior Court of Marion County, Indiana, against the petitioner, a Minnesota corporation doing business in Indiana, and one Harlan as its agent. The complaint alleged that the respondent was subject to the provisions of the Indiana Workmen's Compensation Act and had entered into a contract of insurance with the petitioner, evidenced by a binder, whereby the petitioner insured the respondent against loss or expense by reason of claims for compensation for a period of thirty days from December 30, 1933, and agreed to act for the respondent in the filing of reports and notices under the Act; that, during the term of the insurance, employes of the respondent had suffered injury in the course of employment and made claims therefor; that the petitioner had been notified of each injury and investigated it in connection with the claim for compensation; that after the expiration of the contract the petitioner notified the respondent that it would not recognize any of the claims and denied liability under the binder; that as a consequence respondent was compelled to employ attorneys, investigators, and medical assistants to investigate and satisfy claims covered by the contract and to pay employes who had suffered injuries during the contract period, and

to pay, or obligate itself to pay, for medical, hospital, or dental bills in connection with such injuries; to the damage of the respondent in the sum of $4,000. It was alleged that the petitioner had acted, in making the contract, through Harlan, its authorized agent and representative, and an order was prayed that Harlan retain all moneys due by him to the petitioner for the purpose of answering any judgment which might be recovered. The complaint concluded by demanding $4,000 and other appropriate relief. Upon the petitioner's timely application the cause was removed to the United States District Court for Southern Indiana. The respondent thereafter filed an amended complaint, the substance of which is not now material, and later a "second amended complaint for breach of contract and for damages," in which the allegations of the original complaint were repeated and damages were claimed in the sum of $4,000. An exhibit was attached which gave the names of the employes and the amounts expended in connection with their asserted injuries totaling $1,380.89. The court dismissed Harlan as a defendant, transferred the cause to the law docket, and overruled a demurrer to the complaint as not stating facts sufficient to constitute a cause of action. The answer denied the making of the contract. A jury trial was waived and the court made findings, stated its conclusions, and entered judgment for the respondent for $1,162.98. The petitioner appealed. The Court of Appeals refused to decide the merits on the ground that as the record showed respondent's claim did not equal the amount necessary to give the District Court jurisdiction, the case should have been remanded to the state court.[1]

The question presented is one of statutory construction. The act defining the jurisdiction of district courts of the

[1] 90 F. (2d) 229.

United States is § 24 of the Judicial Code.[2] So far as here material, the Code confers jurisdiction of a suit of a civil nature, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000 and is between citizens of different states.

Authority for removal of certain causes from a state to a federal court was first given by § 12 of the Judiciary Act of 1789 [3] which permitted removal of a civil suit, instituted by a citizen of the state in which the suit was brought, against a citizen of another state, where the matter in dispute exceeded the sum or value of $500, exclusive of costs. Such removal could be had only at the instance of the nonresident defendant. The Act of July 27, 1866,[4] enlarged the privilege of removal by providing that if, in such a civil suit, it was shown that a nonresident defendant was party to a separable controversy, which could be determined without the presence of other defendants, that defendant might remove the cause.

The Judiciary Act of 1875 [5] altered preëxisting law to permit suits involving a controversy between citizens of different states to be removed by either party. The Judiciary Acts of 1887–1888 [6] increased the jurisdictional amount to more than $2,000, exclusive of interest and costs, and confined the right of removal to a nonresident defendant, and the Judicial Code increased the limit to over $3,000, exclusive of interest and costs, and also restricted the privilege to nonresident defendants.[7] The

[2] Act of March 3, 1911, c. 231, § 24, as amended, 36 Stat. 1091, U. S. C. Tit. 28, § 41.

[3] Act of Sept. 24, 1789, § 12, 1 Stat. 73, 79.

[4] c. 288, 14 Stat. 306.

[5] Act of March 3, 1875, 18 Stat. 470.

[6] Act of March 3, 1887, § 1, 24 Stat. 552; Act of Aug. 13, 1888, § 1, 25 Stat. 433.

[7] Act of March 3, 1911, c. 231, §§ 24 and 28, 36 Stat. 1087, 1091, 1094.

statute governing dismissal or remand for want of jurisdiction is § 37 of the Code.[8]

"If in any suit commenced in a district court, or removed from a State court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just.

This provision first appeared as § 5[9] of the Act of March 3, 1875 (*supra*), and save for the elision of a concluding clause, and the substitution of "district court" for "circuit court," is identical with that section. It was included in the Judiciary Acts of 1887–1888, *supra,* and has been continuously in force since 1875. It altered the practice by requiring the court to dismiss or remand of its own motion in a proper case although want of jurisdiction was not raised by appropriate motion or by plea or answer,[10] but did not change the substantial basis for

[8] Act of March 3, 1911, c. 231, § 37, 36 Stat. 1098, U. S. C. Tit. 28, § 80.

[9] 18 Stat. 472.

[10] Prior to 1875 the courts did not act of their own motion but upon a motion to dismiss or a plea in abatement. *Smith* v. *Kernochen,* 7 How. 198; *McNutt* v. *General Motors Acceptance Corp.,* 298 U. S. 178, 183. Since then it has been their duty not only to act upon a motion to dismiss, (*Steigleder* v. *McQuesten,* 198 U. S. 141) or, if the state practice permits, upon a denial of jurisdiction

the court's action. The principles governing dismissal of a cause initiated in the federal court or the remand of one begun in a state court have remained as they were before the section was adopted.

The intent of Congress drastically to restrict federal jurisdiction in controversies between citizens of different states has always been rigorously enforced by the courts. The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls[11] if the claim is apparently made in good faith.[12]

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in the answer, (*Gilbert* v. *David,* 235 U. S. 561; *North Pacific S. S. Co.* v. *Soley,* 257 U. S. 216) but to act *sua sponte* (*McNutt* v. *General Motors Acceptance Corp., supra,* 184) upon any disclosure, whether in the pleadings or the proofs, which satisfies the court, in the exercise of a sound judicial discretion, that the plaintiff did not in fact have a claim for the jurisdictional amount or value, and knew, or reasonably ought to have known, that fact. *Williams* v. *Nottawa,* 104 U. S. 209, 211; *McNutt* v. *General Motors Acceptance Corp., supra,* 184. It is plaintiff's burden both to allege with sufficient particularity the facts creating jurisdiction, in view of the nature of the right asserted, and, if appropriately challenged, or if inquiry be made by the court of its own motion, to support the allegation. *McNutt* v. *General Motors Acceptance Corp., supra,* pp. 182–189; *KVOS* v. *Associated Press,* 299 U. S. 269. Even an appellate court must notice the absence of the elements requisite to original jurisdiction or to a removal. *Williams* v. *Nottawa, supra; Robinson* v. *Anderson,* 121 U. S. 522; *McNutt* v. *General Motors Acceptance Corp., supra; American Bridge Co.* v. *Hunt,* 130 Fed. 302; *International & G. N. R. Co.* v. *Hoyle,* 149 Fed. 180.

[11] *Wilson* v. *Daniel,* 3 Dall. 401, 407, 408; *Barry* v. *Edmunds,* 116 U. S. 550; *Sherman* v. *Clark,* 3 McLean 91, Fed. Cas. 12763; *Stuckert* v. *Alexander,* 4 F. Supp. 172.

[12] *Peeler* v. *Lathrop,* 48 Fed. 780; *Ung Lung Chung* v. *Holmes,* 98 Fed. 323; *Washington County* v. *Williams,* 111 Fed. 801; *Greene County Bank* v. *Teasdale Comm'n Co.,* 112 Fed. 801; *American Sheet & Tin Plate Co.* v. *Winzeler,* 227 Fed. 321; *Owen M. Bruner Co.* v. *O. R. Manefee Lumber Co.,* 292 Fed. 985; *Walker Grain Co.* v. *Southwestern Tel. & Tel. Co.,* 10 F. (2d) 272.

It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.[13] The inability of plaintiff to recover an amount adequate to give the court jurisdiction does not show his bad faith or oust the jurisdiction.[14] Nor does the fact that the complaint discloses the existence of a valid defense to the claim.[15] But if, from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed, or if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction, the suit will be dismissed.[16] Events oc-

[13] *Barry* v. *Edmunds, supra; Wetmore* v. *Rymer,* 169 U. S. 115, 122; *Put-In-Bay Waterworks Co.* v. *Ryan,* 181 U. S. 409, 432–433; *Hampton Stave Co.* v. *Gardner,* 154 Fed. 805.

[14] *Smithers* v. *Smith,* 204 U. S. 632; *Holden* v. *Utah & M. M. Co.,* 82 Fed. 209; *Maffet* v. *Quine,* 95 Fed. 199; *Kunkel* v. *Brown,* 99 Fed. 593; *Ung Lung Chung* v. *Holmes, supra; Washington County* v. *Williams, supra; Denver City Tramway Co.* v. *Norton,* 141 Fed. 599; *Hampton Stave Co.* v. *Gardner, supra; O. J. Lewis Mercantile Co.* v. *Klepner,* 176 Fed. 343; *St. Tammany Bank & T. Co.* v. *Winfield,* 263 Fed. 371; *Ragsdale* v. *Rudich,* 293 Fed. 182; *Walker Grain Co.* v. *Southwestern Tel. & Tel. Co.,* 10 F. (2d) 272; *Kimel* v. *Missouri State Life Ins. Co.,* 71 F. (2d) 921; *Simecek* v. *United States National Bank,* 91 F. (2d) 214.

[15] *Interstate Bldg. & L. Assn.* v. *Edgefield Hotel Co.,* 109 Fed. 692; *Armstrong* v. *Walters,* 219 Fed. 320; *Mullins Lumber Co.* v. *Williamson & Brown Land Co.,* 246 Fed. 232.

[16] *Williams* v. *Nottawa, supra; Barry* v. *Edmunds, supra; Vance* v. *W. A. Vandercook Co.,* 170 U. S. 468; *Lion Bonding & S. Co.* v. *Karatz,* 262 U. S. 77; *First National Bank* v. *Louisiana Highway Comm'n,* 264 U. S. 308; *Simon* v. *House,* 46 Fed. 317; *Horst* v. *Merkley,* 59 Fed. 502; *Cabot* v. *McMaster,* 61 Fed. 129; *Bank of Arapahoe* v. *David Bradley & Co.,* 72 Fed. 867; *Armstrong* v. *Walters, supra; Maurel* v. *Smith,* 220 Fed. 195; *Le Roy* v. *Hartwick,* 229 Fed. 857; *Sclarenco* v. *Chicago Bonding Co.,* 236 Fed. 592; *Operators Piano Co.* v. *First Wisconsin Trust Co.,* 283 Fed. 904; *Wilderman* v. *Roth,* 17 F. (2d) 486; *Chick* v. *New England Tel. & Tel.*

curring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction.[17]

What already has been said, and circumstances later to be discussed, lead to the conclusion that a dismissal would not have been justified had the suit been brought in the federal court. The principles which govern remand of a removed cause, more urgently require that it should not have been remanded. In a cause instituted in the federal court the plaintiff chooses his forum. He knows or should know whether his claim is within the statutory requirement as to amount. His good faith in choosing the federal forum is open to challenge not only by resort to the face of his complaint, but by the facts disclosed at trial, and if from either source it is clear that his claim never could have amounted to the sum necessary to give jurisdiction there is no injustice in dismissing the suit. Indeed, this is the court's duty under the Act of 1875. In such original actions it may also well be that plaintiff and defendant have colluded to confer jurisdiction by the method of the one claiming a fictitious amount and the other failing to deny the veracity of the averment of amount in controversy. Upon disclosure of that state of facts the court should dismiss.

A different situation is presented in the case of a suit instituted in a state court and thence removed. There is a strong presumption that the plaintiff has not claimed a large amount in order to confer jurisdiction on a federal court or that the parties have colluded to that end.[18]

Co., 36 F. (2d) 832; *Nixon* v. *Town Taxi, Inc.*, 39 F. (2d) 618; *Cohn* v. *Cities Service Co.*, 45 F. (2d) 687; *Miller-Crenshaw Co.* v. *Colorado Mill Co.*, 84 F. (2d) 930.

[17] *Mutual Life Ins. Co.* v. *Rose*, 294 Fed. 122; *Hood* v. *Bell*, 84 F. (2d) 136.

[18] In *Smith* v. *Greenhow*, 109 U. S. 669, 671, a case of trespass for entering plaintiff's premises and carrying away goods of the value of $100, interfering with plaintiff's business, annoying and disturbing him, &c., the damages were laid at $6,000. Though there was not

For if such were the purpose suit would not have been instituted in the first instance in the state but in the federal court. It is highly unlikly that the parties would pursue this roundabout and troublesome method to get into the federal court by removal when by the same device the suit could be instituted in that court.[19] Moreover, the status of the case as disclosed by the plaintiff's complaint is controlling in the case of a removal, since the defendant must file his petition before the time for answer or forever lose his right to remove.[20] Of course,

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diversity of citizenship, as the pleadings raised a federal question, the cause was removed. It was remanded as the circuit court thought there was no federal question involved. The decision was reversed. Speaking of the facts disclosed the court said: "There is a ground for remanding the cause suggested by the record, but not sufficiently apparent to justify us in resorting to it to support the action of the circuit court. The value of the property taken is stated in the declaration to be but $100, although the damages for the alleged trespass are laid at $6,000. . . . We cannot, of course, assume as a matter of law, that the amount laid, or a less amount, greater than $500, is not recoverable upon the case stated in the declaration, and cannot therefore justify the order remanding the cause, on the ground that the matter in dispute does not exceed the sum or value of $500. But if the circuit court had found, as matter of fact, that the amount of damages stated in the declaration was colorable, and had been laid beyond the amount of a reasonable expectation of recovery, for the purpose of creating a case removable under the act of Congress, so that, in the words of the 5th section of the act of 1875, it appeared that the suit 'did not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court,' the order remanding it to the State court could have been sustained." This appears to be the only reported case of a removal by the plaintiff as authorized by the Act of 1875, and is distinguishable on that ground, as respects the possibility that plaintiff's claim may have been colorable for the purpose of removing the case.

[19] *Hayward* v. *Nordberg Mfg. Co.*, 85 Fed. 4, 9. (Per Taft, Lurton and Clark, JJ.)

[20] *Gordon* v. *Longest*, 16 Pet. 97; *Kanouse* v. *Martin*, 15 How. 198; *Chesbrough* v. *Northern Trust Co.*, 252 U. S. 83, affirming *Chesbrough* v. *Woodworth*, 251 Fed. 881; *Muns* v. *DeNemours*, 2 Wash.

if, upon the face of the complaint, it is obvious that the suit cannot involve the necessary amount, removal will be futile and remand will follow.[21] But the fact that it appears from the face of the complaint that the defendant has a valid defense, if asserted, to all or a portion of the claim, or the circumstance that the rulings of the district court after removal reduce the amount recoverable below the jurisdictional requirement,[22] will not justify remand. And though, as here, the plaintiff after removal, by stipulation, by affidavit, or by amendment of his pleadings, reduces the claim below the requisite amount, this does not deprive the district court of jurisdiction.[23]

C. C. 463, Fed. Cas. 9931; *Riggs* v. *Clark,* 71 Fed. 560; *Hayward* v. *Nordberg Mfg. Co., supra; Johnson* v. *Computing Scale Co.,* 139 Fed. 339.

[21] *North American T. & T. Co.* v. *Morrison,* 178 U. S. 262.

[22] *Levinski* v. *Middlesex Banking Co.,* 92 Fed. 449; *Tennent-Stribling Shoe Co.* v. *Roper,* 94 Fed. 739; *Mannheimer* v. *Nederlandsche,* 6 F. Supp. 564. *Contra: Jones* v. *Western Union Tel. Co.,* 233 Fed. 301.

[23] *Kanouse* v. *Martin, supra; Kirby* v. *American Soda Fountain Co.,* 194 U. S. 141; *Wright* v. *Wells,* Pet. C. C. 220, Fed. Cas. 18,101; *Roberts* v. *Nelson,* 8 Blatchf. 74, Fed. Cas. 11,907; *Zinkeisen* v. *Hufschmidt,* 1 Cent. L. J. 144, Fed. Cas. 18,214; *Waite* v. *Phoenix Ins. Co.,* 62 Fed. 769; *Riggs* v. *Clark, supra; Hayward* v. *Nordberg Mfg. Co., supra; Johnson* v. *Computing Scale Co., supra; Coffin* v. *Philadelphia, W. & B. R. Co.,* 118 Fed. 688; *Donovan* v. *Dixieland Amusement Co.,* 152 Fed. 661; *Bernheim* v. *Louisville Property Co.,* 221 Fed. 273; *Jellison* v. *Krell Piano Co.,* 246 Fed. 509; *Twin Hills Gasoline Co.* v. *Bradford Oil Corp.,* 264 Fed. 440; *Kane* v. *Reserve Oil Corp.,* 52 F. (2d) 972; *Travelers' Protective Assn.* v. *Smith,* 71 F. (2d) 511; *Beddings* v. *Great Eastern Stages, Inc.,* 6 F. Supp. 529. *Contra: Hughes & Co.* v. *Peper Tobacco Warehouse Co.,* 126 Fed. 687. In two tort cases where large damages were claimed, but it appeared at trial that plaintiff's injuries and losses were so slight that a verdict for more than a fraction of the jurisdictional amount could not be sustained the courts remanded. Though not placed upon that ground, their action may have been

Thus events occurring subsequent to removal which reduce the amount recoverable, whether beyond the plaintiff's control or the result of his volition, do not oust the district court's jurisdiction once it has attached.[24] This is well illustrated by *Kirby* v. *American Soda Fountain Co.*, 194 U. S. 141, 146, where in a suit brought by Kirby he alleged that he was induced by the company's false representations to agree to the exchange of his apparatus for one made by the defendant and to pay $2025 in addition. He prayed the cancellation of his obligation to pay the balance of $2025, damages of $2500, and general relief. The cause was removed to the circuit court. The company answered denying Kirby's charges of fraud, relied upon a written agreement alleged to contain all the terms of the contract, asserted full performance on its part, and that he had paid but $325 on his obligation to pay $2025. By cross-complaint, the company demanded $1700 and interest from Kirby and the establishment of a lien on the apparatus delivered to him. Kirby answered that he had voluntarily dismissed the original suit brought by him and that the cross-bill was not within the jurisdiction of the court because it did not claim in excess of $2,000, exclusive of interest and costs. The plea was overruled and judgment rendered on the cross-complaint. In affirming, the court referred to the amount demanded in Kirby's original complaint and said: "The matter in dispute having thus been made to exceed the sum or value of two thousand dollars, exclusive of interest and costs, defendant presented his petition and bond for removal,

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justified by the conviction that the defendant when it removed knew that the amount involved was too little to give jurisdiction: *Turmine* v. *West Jersey & S. R. Co.*, 44 F. (2d) 614; *American Stores Co.* v. *Gerlach*, 55 F. (2d) 658.

[24] The same principle applies in cases where a fixed amount is requisite to jurisdiction on appeal. *Lee* v. *Watson*, 1 Wall. 337; *Cooke* v. *United States*, 2 Wall. 218.

and the cause was thereupon removed. The jurisdiction thus acquired by the Circuit Court was not divested by plaintiff's subsequent action."

Fifty years earlier in *Kanouse* v. *Martin,* 15 How. 198, the court had held that voluntary reduction of the amount demanded below the sum necessary to give the circuit court jurisdiction could not defeat that jurisdiction once removal proceedings had been perfected. In reliance upon these precedents many cases, cited in Note 23, have been decided.

We think this well established rule is supported by ample reason. If the plaintiff could, no matter how *bona fide* his original claim in the state court, reduce the amount of his demand to defeat federal jurisdiction the defendant's supposed statutory right of removal would be subject to the plaintiff's caprice. The claim, whether well or ill founded in fact, fixes the right of the defendant to remove, and the plaintiff ought not to be able to defeat that right and bring the cause back to the state court at his election. If he does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove.[25]

This view is further supported by the authorities as to causes in which jurisdiction depends on diversity of citizenship. It uniformly has been held that in a suit properly begun in the federal court the change of citizenship of a party does not oust the jurisdiction.[26] The same

[25] *Woods* v. *Massachusetts Protective Assn.,* 34 F. (2d) 501. And an amendment in the state court reducing the claim below the jurisdictional amount before removal is perfected is effective to invalidate removal and requires a remand of the cause: *Maine* v. *Gilman,* 11 Fed. 214; *Waite* v. *Phoenix Ins. Co., supra; Harley* v. *Firemen's Fund Ins. Co.,* 245 Fed. 471.

[26] *Morgan's Heirs* v. *Morgan,* 2 Wheat. 290, 297; *Mullan* v. *Torrance,* 9 Wheat. 537; *Dunn* v. *Clarke,* 8 Pet. 1; *Clarke* v. *Mathew-*

rule governs a suit originally brought in a state court and removed to a federal court.[27]

The decisions as to remand of a cause removed because it involves a separable controversy are not inconsistent with those concerning remand for lack of jurisdictional amount. In the case of a separable controversy, if, after removal, the plaintiff discontinues or dismisses as to the defendant who removed, so that there no longer exists any separable controversy, the cause must be remanded.[28] If a cause be removed on this ground the whole case, including the controversy between citizens of the same state, is taken over by the federal court only because one or more of the defendants is entitled to invoke its jurisdiction. The basis of federal jurisdiction failing, it is proper that the remaining parties, who were involuntarily taken into the federal court, should, upon the cessation of the separable controversy which was the cause of their transmission to another tribunal, have their case returned to the state court.

The present case well illustrates the propriety of the rule that subsequent reduction of the amount claimed cannot oust the district court's jurisdiction. Suit was instituted in the state court June 5, 1934. The lump sum claimed was largely in excess of $3,000, exclusive of interest and costs. The items which went to make up the respondent's demand for indemnity were numerous and

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son, 12 Pet. 164; *Tug River Coal & Salt Co.* v. *Brigel,* 86 Fed. 818, affirming 73 Fed. 13.

[27] *Haracovic* v. *Standard Oil Co.,* 105 Fed. 785; *Lebensberger* v. *Scofield,* 139 Fed. 380. Change of parties by substitution or by intervention does not oust the jurisdiction: *Phelps* v. *Oaks,* 117 U. S. 236; *Hardenbergh* v. *Ray,* 151 U. S. 112; *Wichita R. & Light Co.* v. *Public Utilities Comm'n,* 260 U. S. 48.

[28] *Texas Transportation Co.* v. *Seeligson,* 122 U. S. 519; *Torrence* v. *Shedd,* 144 U. S. 527; *Iowa Homestead Co.* v. *Des Moines N. & R. Co.,* 8 Fed. 97; *Bane* v. *Keefer,* 66 Fed. 610; *Youtsey* v. *Hoffman,* 108 Fed. 699; *Cassidy* v. *Atlanta & C. A. L. Ry. Co.,* 109 Fed. 673; *Sklarsky* v. *Great Atlantic & P. Tea. Co.,* 47 F. (2d) 662.

each, in turn, was itself the total of several items of expenditure or liability. There is nothing to indicate that all of the sums for which reimbursement was claimed had actually been expended prior to the beginning of suit or that the sums thereafter to be expended had been ascertained. Not until the second amended complaint was filed in the United States court, in November 1934, did the respondent furnish a statement of the particulars of its claim. That statement is not inconsistent with the making of a claim in good faith for over $3,000 when the suit was instituted. Nor is there evidence that the petitioner when it removed the cause knew, or had reason to believe, that the respondent's claim, whether well or ill founded in law or fact, involved less than $3,000. On the face of the pleadings petitioner was entitled to invoke the jurisdiction of the federal court, and a reduction of the amount claimed, after removal, did not take away that privilege.

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

Reversed.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration or decision of this case.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* BULLARD, EXECUTOR.

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

No. 349. Argued February 1, 1938.—Decided February 28, 1938.

1. A decree in Illinois, entered by consent in compromise of litigation, operated to abrogate a trust as violative of the rule against perpetuities and to establish the trustor's absolute ownership of the assets. *Held,* that a new deed of trust made by the trustor pursuant to the compromise and conveying to some of the parties the same beneficial interests that they would have received under the original conveyance if valid, can not be related back to the creation of the original trust, but must stand independently, for the purpose of determining the application of a federal tax provision enacted between the dates of the two conveyances. P. 300.
2. Sec. 302 (c) of the Rev. Act of 1926, as amended by Joint Resolution of March 3, 1931, requires the inclusion in a decedent's gross taxable estate of property of which the decedent has at any time made a transfer, by trust or otherwise, under which the transferor retained for life the possession or enjoyment of the income from the property, except in case of a *bona fide* sale for an adequate and full consideration in money or money's worth. *Held:*

   (1) That the exception did not apply where the transferee gave up nothing but an interest in an earlier transfer, which was adjudged void by a consent decree entered in pursuance of a compromise. P. 300.

   (2) The joint resolution is valid as to future non-testamentary transfers in the nature of gifts, since:

      (a) Congress may lay an excise on gifts at different rates for those which are and those which are not subject to reservation of a life estate; calling it an estate tax does not affect its validity. P. 301.

      (b) Congress may treat such transfers as testamentary to prevent avoidance of estate taxes. P. 301.

90 F. 2d 144, reversed.

CERTIORARI, 302 U. S. 671, to review the reversal by the court below of a decision of the Board of Tax Appeals, 34 B. T. A. 243, upholding an estate tax.

Assistant Attorney General Morris, with whom *Solicitor General Reed,* and *Messrs Sewall Key, Ellis N. Slack,* and *Arnold Raum* were on the brief, for petitioner.

Mr. Samuel S. Holmes, with whom *Messrs. William D. Mitchell* and *Lorentz B. Knouff* were on the brief, for respondent.

By leave of Court, *Mr. Herman Aaron* filed a brief as *amicus curiae,* in support of respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The petitioner challenges a decision holding unconstitutional the provision of § 302 (c) of the Revenue Act of 1926,[1] as amended by Joint Resolution of Congress of March 3, 1931,[2] which requires the inclusion in a decedent's gross taxable estate of property transferred by irrevocable deed with reservation of a life estate. On account of alleged conflict with our decisions and of the important constitutional question presented we granted the writ of certiorari.

Clara R. Smith, a resident of Illinois, died in 1933. In 1927 she transferred securities, by irrevocable deed, to her son Edward, in trust to pay the income to her for life and, upon her death, to divide the corpus into three equal parts, the income from a part to be paid to each of her three children, Lora, Bessie, and Edward, during their lives, with remainders of the daughters' shares to their respective children; upon Edward's death leaving no issue the income from his share to be paid to his widow for life and, upon her death, the remainder to be added, in equal shares, to the daughters' trust funds. Edward died in 1928 leaving a widow but no issue.

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[1] c. 27, 44 Stat. 9, 70; U. S. C. Tit. 26, § 411 (c).

[2] c. 454, 46 Stat. 1516; U. S. C. Tit. 26, § 411 (c).

In 1931 dissatisfaction with the administration of the trust impelled the decedent to seek its abrogation. Examination of the instrument disclosed violation of the rule against perpetuities. A bill was accordingly filed in an Illinois state court to have the trust declared void. The son's widow answered denying invalidity. A guardian *ad litem* representing the interests of infant beneficiaries in remainder also opposed the prayer of the bill. Subsequently, to avoid family discord and amicably to settle the pending litigation, a compromise agreement was made by the decedent and all the adult beneficiaries, consenting to the entry of a decree on condition that the decedent would declare a new trust of approximately one-third of the securities in the existing trust whereby Edward's widow should enjoy a life interest identical to that given her by the 1927 trust and, upon her death, the remainder should be equally divided between the decedent's daughters. The agreement further required the making of testamentary provision for the decedent's daughters and grandchildren, and certain outright gifts to the latter. In pursuance of the agreement, the decedent, on February 17, 1932, executed a new irrevocable deed of trust conveying approximately one-third of the corpus of the former trust and reserving to herself a life interest in the income, and executed a new will. A consent decree was then entered in the equity suit, the guardian *ad litem* representing to the court that the settlement would be advantageous to the minor beneficiaries.

The Commissioner's inclusion of the corpus of the trust of February 17, 1932, in the gross estate was sustained by the Board of Tax Appeals.[3] The Circuit Court of Appeals reversed the Board's decision.[4] We are of opinion that the action of the Commissioner and the Board should have been affirmed.

[3] 34 B. T. A. 243.

[4] 90 F. (2d) 144.

First. Both the Board and the Court held that the decree of the state court, notwithstanding its entry pursuant to stipulation, adjudicated the rights of the parties, abrogated the trust of 1927, and established the decedent's absolute ownership of the assets. This conclusion is fully supported by decisions of the Supreme Court of Illinois and we accept it. It follows that the respondent's contention that the transfer of 1932 has no independent existence and that, in legal effect, the trust for the son's widow stems from the deed of 1927, must be overruled.

Second. The trust of 1932 was created after the adoption of the Joint Resolution of March 3, 1931, which required inclusion in the gross estate of the value at the date of death of all property to the extent of any interest therein of which a decedent has at any time made a transfer by trust or otherwise under which the transferor retained for life the possession or enjoyment of the income from the property, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. It is urged that the settlement of the dispute as to the invalidity of the trust deed of 1927, conditioned, as it was, upon the making of the new trust, constitutes such a bona fide sale, for adequate consideration, as to bring the trust of 1932 within the exception. The argument is that the decree setting aside the 1927 trust merely gave judicial sanction to the compromise agreement and that the contract was for an adequate and valuable consideration and would, therefore, have been enforced by a court of equity at the instance of any of the parties to it.

While recognizing that a decree thus begotten has the same force and effect as a decree *in invitum,* the respondent seeks to go behind the decree and spell out a sale by Edward's widow of her interest under the 1927 trust for the interest conferred upon her by the 1932 trust. The court below has held the position untenable and we

agree. The decree declared the 1927 trust void and revested the trust assets in the decedent. If that trust was, as the Illinois court decreed, void and ineffective because it violated the rule against perpetuities the son's widow took no interest under it and gave nothing to procure the 1932 transfer.

Third. The Commissioner relies not only upon the Joint Resolution of March 3, 1931, but upon § 803 (a) of the Revenue Act of 1932.[5] We need not consider the latter since the Joint Resolution, if legally enforcible, in express terms authorized his inclusion of the trust fund in the decedent's gross estate. As the Resolution was adopted nearly a year prior to the creation of the 1932 trust no claim is or can be made that, as to that transaction, it is retroactive. The contention is that the transfer was *inter vivos,* was presently effective, was irrevocable, was not made in contemplation of, or effective at, death, and that Congress was, therefore, without power to make it the subject of an estate or inheritance tax; that, while the transfer might, by appropriate legislation, have been taxed as a gift, to tax it as in the nature of a testamentary disposition is a denial of due process. The contention is unsound for several reasons. Since Congress may lay an excise upon gifts it is of no significance that the exaction is denominated an estate tax or is found in a statute purporting to levy an estate tax. Moreover, Congress having the right to classify gifts of different sorts might impose an excise at one rate upon a gift without reservation of a life estate and at another rate upon a gift with such reservation. Such a classification would not be arbitrary or unreasonable. A further vindication of the exaction is the authority of Congress to treat as testamentary, transfers with reservation of a

[5] c. 209, 47 Stat. 169, 279; U. S. C. Tit. 26, § 411 (c).

power or an interest in the donor. The legislative history of the Joint Resolution, to which reference is made in *Hassett* v. *Welch, post,* p. 303, demonstrates that the purpose of the legislation was to prevent avoidance of estate taxes. As has been said by the Court of Appeals of New York:[6] "It is true that an ingenious mind may devise other means of avoiding an inheritance tax, but the one commonly used is a transfer with reservation of a life estate."

We have recently sustained the prospective operation of a provision including in the gross estate property which a decedent has transferred retaining power alone, or in conjunction with any other person, to alter, amend, or revoke.[7] We held the purpose of the clause was to prevent avoidance of tax and the measure was reasonably calculated to that end. As applied to a trust created after its enactment the Joint Resolution does not violate the Fifth Amendment.

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

Reversed.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration or decision of this case.

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[6] *In the Matter of Keeney,* 194 N. Y. 281, 287; 87 N. E. 428; affirmed 222 U. S. 525.

[7] *Helvering* v. *City Bank Farmers T. Co.,* 296 U. S. 85, 90. Compare *Milliken* v. *United States,* 283 U. S. 15; *Tyler* v. *United States,* 281 U. S. 497.

HASSETT, FORMER ACTING COLLECTOR, *v.* WELCH ET AL., EXECUTORS.*

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

No. 375. Argued February 1, 1938.—Decided February 28, 1938.

1. Sec. 302 (c) of the Rev. Act of 1926, which required that there be included in a decedent's estate, for estate tax purposes, any property interest of which the decedent has "at any time" made a transfer in contemplation of or intended to take effect in possession or enjoyment at or after death, was amended by the Joint Resolution of March 3, 1931, to include "a transfer under which the transferor has retained for his life . . . the possession or enjoyment of, or the income from, the property." Section 803 (a) of the Rev. Act of June 6, 1932, substantially reënacts this provision. *Held:*

   (1) That the added provision does not apply to transfers made before, by decedents who died after, the enactment of the Joint Resolution. P. 307.

   (2) This construction is confirmed (a) by the legislative history and administrative interpretation of the Joint Resolution; (b) by its reënactment in the light of that interpretation. P. 309.

2. Section 302 (h) of the Rev. Act of 1926, provided "Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act." Subdivision (c) dealt with transfers in contemplation of, or intended to take effect in possession or enjoyment at or after, death. The Joint Resolution of 1931, *supra*, amended § 302 (c) to include non-testamentary

* Together with No. 484, *Helvering, Commissioner of Internal Revenue,* v. *Marshall, Administrator.* On writ of certiorari to the Circuit Court of Appeals for the Second Circuit.

transfers with reservation of life estate to transferor. *Held* that § 302 (h) does not make the amendment apply retroactively to the kind of transfers thereby added. P. 313.

3. An adoption by one section of a statute of the particular provisions of another section by specific and descriptive reference does not embrace other particulars added later by amendment to the section so referred to. P. 314.
4. In the absence of clear expression to the contrary, a law is presumed to operate prospectively. *Id.*
5. If doubt exists as to the construction of a taxing statute, the doubt should be resolved in favor of the taxpayer. *Id.*

90 F. 2d 833; 91 F. 2d 1010, affirmed.

CERTIORARI, 302 U. S. 674, 677, to review two decisions of Circuit Courts of Appeals against estate tax assessments. In No. 375, the taxpayers appealed from a judgment of the District Court for the Collector, 15 F. Supp. 692. In No. 484, there was an appeal by the Commissioner from the adverse decision of the Board of Tax Appeals.

Assistant Attorney General Morris, with whom *Solicitor General Reed,* and *Messrs. Sewall Key* and *Arnold Raum* were on the briefs, for petitioners.

Mr. William D. Mitchell, with whom *Messrs. James Lenox Banks, Jr.,* and *George H. Craven* were on the brief, for respondent in No. 484.

Messrs. John L. Hall and *Claude R. Branch,* with whom *Messrs. Henry Hixon Meyer* and *Edward C. Thayer* were on the brief, for respondents in No. 375.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The petitioners ask us to hold that § 302 (c) of the Revenue Act of 1926 [1] as amended by the Joint Resolution of Congress of March 3, 1931,[2] and § 803 (a) of the

[1] c. 27, 44 Stat. 9, 70; U. S. C. Tit. 26, § 411 (c).

[2] c. 454, 46 Stat. 1516; U. S. C. Tit. 26, § 411 (c).

Revenue Act of 1932,[3] includes in the gross estate of a decedent, for estate tax, property which, before the adoption of the amendments, was irrevocably transferred with reservation of a life estate to the transferor; and that, so applied, the statute does not offend the due process clause of the Fifth Amendment of the Constitution. The numerous cases pending in the courts and the Board of Tax Appeals involving these questions, and the claim that decisions of this court have not settled the matter, moved us to grant certiorari.

The respondents in No. 375 are executors under the will of a decedent who died November 20, 1932. On February 13, 1924, voluntarily and without valuable consideration, he transferred to a trustee property which he expected to receive under the will of his brother, reserving to himself the income for life, directing division of the income after his death between nephews and nieces and distribution of the corpus, upon the death of the survivor of them, amongst their then living issue. After his brother's death, and on October 22, 1926, he duly ratified and confirmed the original trust instrument. The Commissioner ruled that the value of the trust assets should be included in the decedent's gross estate, in the view that the transfer was testamentary, because made in contemplation of death, or intended to take effect in possession or enjoyment at or after death, within the meaning of § 302 (c) of the Revenue Act of 1926. The respondents paid the resulting tax and sued for refund in the District Court of Massachusetts. Judgment went for the Collector.[4] The Circuit Court of Appeals held that the District Court erred in concluding that the transfer was made in contemplation of death or was intended to take effect in possession or enjoyment after death. The petitioner nevertheless insisted upon the legality of the

[3] c. 209, 47 Stat. 169, 279; U. S. C. Tit. 26, § 411 (c).

[4] 15 F. Supp. 692.

exaction as the decedent died after the 1931 and 1932 amendments of § 302 (c), which declared the property transferred a part of the gross estate for computation of estate tax, in virtue of the reservation to the transferor of the income for his life. The court overruled the contention, holding that, if so retroactively enforced, the legislation violated the Fifth Amendment of the Constitution, and reversed the judgment.[5] In his application for certiorari the petitioner did not assign error to the Circuit Court's ruling as to the nontestamentary character of the transfer but confined his attack to the decision that the amendments of § 302 (c) could not constitutionally be invoked to sustain the tax.

In No. 484 it appears that the decedent died intestate June 4, 1933. The respondent, her son, is her administrator. November 15, 1920, she transferred to him certain cash and securities. On the same day they entered into an agreement reciting an understanding that, in case of his death during her life, the securities and cash should be reconveyed to her and, in the meantime, he should pay her such portions of the income therefrom as she might from time to time request in writing; that while he held the securities he might invest and reinvest; that he should bequeath her all the assets constituting the fund, in case she survived him; that she would reimburse him for any increased income taxes payable by him in virtue of his ownership of the fund and that, if she should survive him and take the property under his will, she would reimburse his estate for state and federal inheritance taxes due by reason of the bequest. The agreement contained other provisions for the safeguarding and separate custody of the fund during the mother's life. The respondent paid the decedent portions of the income upon her request. He executed a will bequeath-

[5] 90 F. (2d) 833.

ing the property to her on the terms mentioned in the agreement, but upon her death, he revoked the bequest. The Commissioner included the value of the fund in the decedent's gross estate, holding that she had made a transfer within the terms of § 302 (c) of the Revenue Act of 1926, as amended in 1931 and 1932. The Board of Tax Appeals reversed the Commissioner's determination and the Court of Appeals affirmed its action [6] upon the authority of the decision of the Circuit Court of Appeals of the First Circuit in No. 375 and that of the Seventh Circuit in *Helvering* v. *Bullard, ante,* p. 297.

Counsel for the Government argue that the Joint Resolution of 1931 and § 803 (a) of the Revenue Act of 1932 were intended to impose an estate tax measured by transfers of the sort therein described which had been irrevocably made prior to the passage of the legislation and that, so construed, they are not arbitrarily or unreasonably retroactive and do not offend the due process clause of the Fifth Amendment. Counsel for respondents answer that the enactments were intended to operate only upon transfers subsequently consummated and, if construed to reach the past transfers here involved, violate the amendment. We hold that the statutes are prospective in their operation and do not impose a tax in respect of past irrevocable transfers with reservation of a life interest.

Ascertainment of the intended application of the Joint Resolution of March 3, 1931, and § 803 (a) of the Revenue Act of 1932, involves a reading of them in the light of cases construing similar phraseology of earlier acts, their legislative history and administrative interpretation. There is agreement that § 803 (a) reënacted the substance of the Joint Resolution with but slight verbal differences. It will, therefore, be necessary to quote only

[6] 91 F. (2d) 1010.

the Resolution. By it § 302 (c) of the Revenue Act of 1926, *supra,* was amended to provide:

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

. . . . . .

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *including a transfer under which the transferor has retained for his life or any period not ending before his death* (1) *the possession or enjoyment of, or the income from, the property* or (2) *the right to designate the persons who shall possess or enjoy the property or the income therefrom;* except in case of a bona fide sale for an adequate and full consideration in money or money's worth."

The matter in ordinary type is § 302 (c) as it was prior to amendment; the additions are in italics.

The Government relies on the words "at any time" as demonstrating that the legislation was intended to apply to transfers made before its adoption and is so unequivocal as to leave no room for construction. This phrase, appearing in an earlier revenue act, had, however, been held not to render the statute effective upon transfers antedating the passage of the Act [7] and Congress apparently realized that the expression did not carry the statute back so as to embrace transactions consummated before its passage; for, in subsection (h) of § 302 of the Act of 1926,[8] in referring to transactions and interests

[7] *Shwab* v. *Doyle,* 258 U. S. 529; *Union Trust Co.* v. *Wardell,* 258 U. S. 537; construing § 202 of the Act of Sept. 8, 1916, 39 Stat. 777.

[8] 44 Stat. 71, U. S. C. Tit. 26, § 411 (h).

giving rise to a tax by virtue of preceding subsections, it directed that they should be taxable "whether made, created, arising, existing, exercised, or relinquished before or after the enactment *of this Act*." [9] We conclude that the meaning of the section is not so free from doubt as to preclude inquiry concerning the legislative purpose.

The history of the Resolution is of material aid in its construction. Section 302 (c) of the Act of 1926, like earlier acts, measured the tax by the inclusion in the gross estate of property of which the decedent had made a voluntary transfer in contemplation of, or intended to take effect in possession or enjoyment at or after his death. Notwithstanding the Treasury had ruled that a transfer of assets with a reservation of income for the donor's life came within the definition this court held otherwise.[10] Dissatisfied with the decision, the Government sought a reversal of it but, in three judgments, announced on March 2, 1931, the ruling was reaffirmed.[11] In the opinions in these cases, which led to the preparation and adoption of the Resolution, the court said there was "no question of the constitutional authority of the Congress to impose prospectively a tax with respect to transfers or trusts of the sort here involved . . ." There then remained one day of the current session of Congress. The Treasury drafted an amendment of § 302 (c) to bring trusts of this type within its sweep, in the form of the Joint Resolution of March 3, 1931, which was sent to Congress on the day of our decisions and was passed,

[9] Compare *Shwab* v. *Doyle, supra,* at p. 536; *Lewellyn* v. *Frick,* 268 U. S. 238, 252.

[10] *May* v. *Heiner,* 281 U. S. 238, construing § 402 (c) of the Revenue Act of 1918, 40 Stat. 1057, 1097.

[11] *Burnet* v. *Northern Trust Co.,* 283 U. S. 782; *Morsman* v. *Burnet,* 283 U. S. 783; *McCormick* v. *Burnet,* 283 U. S. 784, construing § 402 (c) of the Revenue Act of 1921 and § 302 (c) of the Revenue Act of 1924.

under a suspension of the rules, on the next day, the last of the session.[12]

Because its passage was considered exigent the Resolution was adopted without having been printed and in reliance on statements made from the floor. The Congressional Record discloses the understanding of the Congress with respect to its scope. Mr. Garner, of the House Ways and Means Committee, stated: "The Committee on Ways and Means this afternoon had a meeting and unanimously reported the resolution just passed. We did not make it retroactive for the reason that we were afraid that the Senate would not agree to it." [13]

Mr. Hawley, of the same Committee, in charge of the Resolution, stated, in answer to a question: "It provides that hereafter no such method shall be used to evade the tax" and, referring to the situation created by the decisions of this court, he said:

"It is entirely apparent that if this situation is permitted to continue, the Federal estate tax will be seriously affected. Entirely apart from the refunds that may be expected to result, it is to be anticipated that many persons will proceed to execute trusts or other varieties of transfers under which they will be enabled to escape the estate tax upon their property. It is of the greatest importance therefore that this situation be corrected and that this obvious opportunity for tax avoidance be removed. It is for that purpose that the joint resolution is proposed."

This language, we think, scarcely bears the interpretation put upon it by Government counsel,—that the tax was meant to be laid on estates of all who died after the adoption of the Resolution.

Bearing in mind that the Resolution was prepared and its passage recommended by the Treasury, the adminis-

[12] Cong. Rec., 71st Cong., 3rd Sess., Vol. 74, Part 7, p. 7198.

[13] Cong. Rec., 71st Cong., 3rd Sess., Vol. 74, Part 7, pp. 7198–7199.

trative interpretation supports in uncommon measure the view that it was not intended to operate upon transfers completed prior to its passage. Promptly upon its passage the Department issued T. D. 4314,[14] approved by the Secretary of the Treasury May 22, 1931, which was in the form of a letter to collectors of internal revenue and others concerned. It quoted the language of the resolution and stated:

"In view of the decisions of the Supreme Court of the United States in Nichols *v.* Coolidge, (274 U. S., 531 [T. D. 4072, C. B. VI–2, 351]), May *v.* Heiner, (281 U. S., 238 [Ct. D. 186, C. B. IX–1, 382]), Coolidge *v.* Long, (282 U. S., 582), Burnet *v.* Northern Trust Co. (51 S. Ct., 342), Edgar M. Morsman, jr., *v.* Burnet, (51 S. Ct., 343) and Cyrus H. McCormick *v.* Burnet (51 S. Ct., 343), the portion added by the amendment to section 302 (c) of the Revenue Act of 1926, as set forth above in italic, will, notwithstanding the provisions of section 302 (h) of that Act, be applied *prospectively* only; i. e., to such transfers coming within the amendment as were made *after* 10.30 p. m., Washington, D. C., time, March 3, 1931.

"Regulations 70, 1929 edition, will be amended to make the changes necessitated by the amendment to section 302 (c) of the Revenue Act of 1926 and the above decisions of the Supreme Court." (Italics in the original.)

April 11, 1932, Regulations 70 were amended by T. D. 4336 and, in part, read:

"Art. 18. *Retention of possession, enjoyment, or income.*—Any transfer which was made by the decedent after 10.30 p. m., Washington, D. C., time, March 3, 1931, and under which he retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the

[14] C. B. X–1, 450.

right to designate the persons who shall possess or enjoy the property or the income therefrom, is taxable, provided such transfer was not a bona fide sale for an adequate and full consideration in money or money's worth."

Not only is the legislative history of § 803 (a) of the Act of 1932 bare of indication of any purpose that it should affect past transfers, but what appears tends to disprove any such thought.[15] Moreover, the reënactment of the Resolution of 1931 in the light of the administrative rulings requires the conclusion that Congress approved and adopted the administrative construction of the provision it reënacted.[16]

Regulations 80, approved November 7, 1934, after paraphrasing § 803 (a), concluded: "The provisions of this subdivision do not apply (1) if the transfer was made prior to 10.30 p. m., eastern standard time, March 3, 1931, and (2) if the decedent died prior to 5 p. m. eastern standard time, June 6, 1932 [The date of passage of the Revenue Act of 1932]. See section 506 of the Revenue Act of 1934." This regulation was retained as Article 18 in the 1937 edition of Regulations 80 issued October 26,

[15] The reports of the Committees of both House and Senate contain this statement: "The purpose of this amendment to section 302 (c) of the revenue act of 1926 is to clarify in certain respects the amendments made to that section by the joint resolution of March 3, 1931, which were adopted to render taxable a transfer under which the decedent reserved the income for his life. The joint resolution was designed to avoid the effect of decisions of the Supreme Court holding such a transfer not taxable if irrevocable and not made in contemplation of death. Certain new matter has also been added, which is without retroactive effect" (House Committee Report No. 708, 72nd Cong., 1st Sess.; Senate Committee Report No. 665, same session).

[16] *Brewster* v. *Gage*, 280 U. S. 327, 337; *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459, 466; *McFeely* v. *Commissioner*, 296 U. S. 102, 108; *United States* v. *Safety Car Heating & L. Co.*, 297 U. S. 88, 95.

1937. Thus while the regulations have been altered to treat § 803 (a) of the 1932 Act as retroactively affecting transfers made after March 3, 1931, the Department has consistently ruled that the Resolution of 1931 has no application to transfers made prior to its adoption. The position thus recently taken is inconsistent in its treatment of the two like enactments and is difficult to understand in view of the consistent interpretation of the Joint Resolution but it fails to weaken the force of that consistent interpretation with knowledge of which Congress reënacted the same provision in 1932.

The Government urges that all of these circumstances which are persuasive that the enactments were intended to operate for the future are overborne by § 302 (h) of the Revenue Act of 1926, which is:

"Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, *as severally enumerated and described therein,* whether made, created, arising, existing, exercised, or relinquished before or after the enactment of *this* Act." (Italics supplied.)

It will be remembered that the Joint Resolution of 1931 amended § 302 (c) of the Act of 1926 to cover transfers such as are here involved. It made no reference to any other portion of that Act. Since § 302 (c) in its original form was, by § 302 (h), made applicable to transfers whether made before or after the Act of 1926, the contention is that it has like operation and effect as respects the provision added to it by the amendment. And the same argument is advanced with respect to the amendment of subsection (c) by the Act of 1932.

Resort is had to canons of constructions as an aid in ascertaining the intent of the legislature. It may occur that the intent is so clear that no such resort should be indulged, and the Government claims this is such a case.

The matter is, we think, involved in sufficient ambiguity to warrant our seeking such aid. A well-settled canon tends to support the position of respondents: "Where one statute adopts the particular provisions of another by a specific and descriptive reference to the statute or provisions adopted, the effect is the same as though the statute or provisions adopted had been incorporated bodily into the adopting statute . . . Such adoption takes the statute as it exists at the time of adoption and does not include subsequent additions or modifications of the statute so taken unless it does so by express intent."[17] The weight of authority holds this rule respecting two separate acts applicable where, as here, one section of a statute refers to another section which alone is amended.[18]

In view of other settled rules of statutory construction, which teach that a law is presumed, in the absence of clear expression to the contrary, to operate prospectively;[19] that, if doubt exists as to the construction of a taxing statute, the doubt should be resolved in favor of the taxpayer,[20] we feel bound to hold that the Joint Resolution of 1931 and § 803 (a) of the Act of 1932 apply only to transfers with reservation of life income made subsequent to the dates of their adoption respectively.

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[17] Lewis' Sutherland on Statutory Construction, 2d ed., Vol. II, pp. 787–8.

[18] *Calumet Foundry & M. Co.* v. *Mroz,* 79 Ind. App. 305; 137 N. E. 627; *State* v. *Beckner,* 197 Iowa 1252; 198 N. W. 643; *Crohn* v. *Telephone Co.,* 131 Mo. App. 313; 109 S. W. 1068; *Gustafson* v. *Hammond Irrigation Dist.,* 87 Mont. 217; 287 Pac. 640; *Flanders* v. *Town of Merrimack,* 48 Wis. 567; 4 N. W. 741; *contra, American Bank* v. *Goss,* 236 N. Y. 488, 142 N. E. 156.

[19] *United States* v. *Heth,* 3 Cranch 399, 413; *Reynolds* v. *M'Arthur,* 2 Pet. 417, 434; *Shwab* v. *Doyle,* 258 U. S. 529; *United States* v. *Magnolia Petroleum Co.,* 276 U. S. 160, 162.

[20] *Gould* v. *Gould,* 245 U. S. 151; *Shwab* v. *Doyle, supra; Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, 348; *White* v. *Aronson,* 302 U. S. 16.

Holding this view, we need not consider the contention that the statutes as applied to the transfers under consideration deprive the respondents of their property without due process in violation of the Fifth Amendment.

The judgments are

Affirmed.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration or decision of these cases.

ESCANABA & LAKE SUPERIOR RAILROAD CO. *v.* UNITED STATES ET AL.

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

No. 415. Argued February 4, 7, 1938.—Decided February 28, 1938.

1. Whether the Interstate Commerce Commission should approve a pooling agreement between competing carriers, under § 5 (1) of the Interstate Commerce Act, is a question of public interest and welfare. Other carriers, as well as shippers and other persons, are entitled to be heard on this question; but a carrier which is not a party to the agreement is not a "carrier involved," within the meaning of the section, even if adversely affected by it, and may not frustrate the agreement by withholding its assent. P. 319.
2. The 'M' railroad carried iron ore from the mines to a lake port, part of the way over its own line and thence to the port over the line of 'E' railroad under a trackage agreement. The 'N' railroad carried such ore from the mines to the port over its own line. Both 'N' and 'M' interchanged other freight with 'E' at their respective connections with that line. To effect economies, 'M' and 'N' applied for and obtained from the Interstate Commerce Commission, under § 5 (1) of the Interstate Commerce Act, an order sanctioning an agreement between them under which ore consigned over either would be routed over 'N', and the ore business be pooled between them; and under which 'M' and 'N' were also to pool their receipts from other traffic interchanged by

either of them with 'E'. *Held* that 'E' was not a "carrier involved" in the pooling agreement, within the meaning of the section above mentioned, and that its assent was not necessary to the Commission's approval. Pp. 317–322.

'E' was not a carrier of the ore hauled by 'M' under the trackage agreement; it received no part of the freight paid; issued no bills-of-lading, and maintained no tariff for that transportation. It neither held itself out to serve in that respect nor rendered any service to shippers of ore; and, as respects the proposed pooling of freights on the other interchanged traffic, it was not a carrier involved in the service rendered up to the exchange points.

21 F. Supp. 151, affirmed.

APPEAL from a decree dismissing a bill to set aside an order of the Interstate Commerce Commission.

Mr. John S. Burchmore, with whom *Mr. Clark M. Robertson* was on the brief, for appellant.

Mr. J. Stanley Payne, with whom *Acting Solicitor General Bell, Assistant Attorney General Jackson,* and *Messrs. Elmer B. Collins* and *Daniel W. Knowlton* were on the brief, for the United States and the Interstate Commerce Commission.

Mr. C. R. Sutherland, with whom *Mr. O. W. Dynes* was on the brief, for Scandrett et al., intervening defendants.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This is an appeal from the judgment of a specially constituted District Court [1] dismissing the appellant's bill which prayed relief against an order of the Interstate Commerce Commission approving and authorizing a proposed pooling agreement between two other railroads.[2]

[1] 21 F. Supp. 151.

[2] 210 I. C. C. 599; 219 I. C. C. 285.

The single question presented is whether the appellant is a "carrier involved" within the meaning of § 5 (1) of the Interstate Commerce Act.[3]

The appellant, hereinafter sometimes called "Escanaba," is a Michigan corporation operating a railroad which does business in intrastate and interstate commerce. Its line extends from Escanaba, Michigan, a port on Lake Michigan, northwesterly some sixty-three miles to Channing, which is on the northern border of the Menominee ore district. This district was reached in 1900, and still is served, by the lines of the Chicago and Northwestern Railroad Company (herein denominated "Northwestern") extending from the mines in a general southeasterly direction to the Northwestern's ore docks at Escanaba. The Chicago, Milwaukee, St. Paul and Pacific Railroad Company (herein called "Milwaukee") had in and prior to 1900 a line reaching the Menominee district but the ore shipped over this line went south to a connection with the Soo Line and thence eastward to a destination other than Escanaba. Milwaukee and Escanaba entered into an agreement in 1900 whereby the former was to have trackage rights for its trains of iron ore from Channing to Escanaba, where the Milwaukee constructed its own ore docks for the lading of ore into lake steamers, and trackage rights for the return of its empty cars from Escanaba to Channing. On the footing of this contract Escanaba made a large investment in roadway suitable for the accommodation of Milwaukee's trains.

The details of the agreement are unimportant. It will suffice to say that Milwaukee had no right to carry passengers or freight, including ore, to intermediate points on the line of Escanaba; had no schedules for its ore

[3] Act of Feb. 4, 1887, c. 104, 24 Stat. 380, as amended by Transportation Act of Feb. 28, 1920, c. 91, § 407, 41 Stat. 480, U. S. C. Tit. 49, § 5 (1).

trains; operated them by its own personnel and power, subject, however, to the control of the line by Escanaba's dispatchers and signal men. Milwaukee was to pay for the privilege a certain wheelage charge which, in no event, was to be less than $27,000 a year whether the total wheelage amounted to that sum or not; and was to pay certain other amounts towards the maintenance of Escanaba's line. A renewal of this agreement is now in force and will so remain until January 1, 1951.

Milwaukee's docks at Escanaba have fallen into disrepair. To avoid the large expenditure required to restore them, and to retain a share of the ore transportation, Milwaukee negotiated a pooling agreement with Northwestern under the terms of which ore consigned over either line from the mines to Escanaba will be routed over Northwestern's line and use Northwestern's docks at Escanaba and the ore business of both lines will be pooled on an agreed basis. Inasmuch as certain freight other than iron ore has been interchanged by Milwaukee with Escanaba at Channing and by Northwestern with Escanaba at Escanaba, and, as it is believed the ore pooling arrangement and discontinuance of Milwaukee's ore haulage over Escanaba's tracks may cause Escanaba to abandon the western end of its line, thus preventing the interchange of Milwaukee and Escanaba at Channing, it is further agreed that Milwaukee and Northwestern shall pool the receipts from interchange traffic exchanged by either of them with Escanaba, to recompense Milwaukee for possible loss of business resulting from the ore traffic pool. The two railroads, parties to the pooling agreement, submitted it to the Interstate Commerce Commission for approval.[4] That body held that the proposed discontinuance of operation by Milwaukee over Escanaba's line under the trackage agreement

[4] They were represented before the Commission by their respective trustees appointed under § 77 of the Bankruptcy Act.

amounted to an abandonment as defined by § 1 (18) of the Interstate Commerce Act [5] and, without the Commission's approval of the abandonment, the pooling agreement could not become effective. The Commission, therefore, refused to pass upon it. Thereupon the parties resubmitted the pooling agreement together with a conditional application by Milwaukee for abandonment of its ore haulage over Escanaba. Escanaba intervened in the proceeding, and resisted the issue of an order of approval. A hearing was had at which not only Escanaba but many shippers and communities on its line presented evidence. The Commission made the findings required by §§ 1 (18) and 5 (1) of the Act, particularly that the proposed pooling arrangement and abandonment of the line by Milwaukee would promote the public interest and convenience and issued orders authorizing the proposed arrangement. Escanaba has abandoned the contention made in the District Court, and there overruled, that the Commission's findings are not supported by any evidence, and here attacks only the alleged error of law of the Commission and the court below in holding that it is not a "party involved" in the pooling agreement within the meaning of § 5 (1), whose assent is necessary to the approval of the Commisison.

Section 5 (1) of the original Interstate Commerce Act in sweeping terms forbade all pooling of freights of different and competing railroads and all agreements for division of aggregate or net proceeds of their earnings or any portion thereof. The Transportation Act, 1920, qualified this prohibition by excepting such arrangements as should have the specific approval of the Commission, and that approval was thus conditioned:

"That whenever the Commission is of opinion, after hearing upon application of any carrier or carriers engaged in the transportation of passengers or property sub-

[5] U. S. C. Tit. 49, § 1 (18).

ject to this Act, or upon its own initiative, that the division of their traffic or earnings, to the extent indicated by the Commission, will be in the interest of better service to the public, or economy in operation, and will not unduly restrain competition, the Commission shall have authority by order to approve and authorize, *if assented to by all the carriers involved,* such division of traffic or earnings, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises." (Italics supplied.)

The controversy revolves around the meaning of the phrase "if assented to by all the carriers involved." Escanaba insists that it is a carrier involved in the proposed agreement, and its assent is necessary to an affirmative order of the Commission. The appellees deny that it is such and the Commission and the District Court have held with them. We are of opinion that the decree of the District Court was right and must be affirmed.

First. The amendment of § 5 (1) of the original statute by the Transportation Act, 1920, was one of the alterations made in the Act as a result of experience gained from unified operation of the railroads under federal control. The strict sanctions of the original Act, intended to preserve competition between carriers, were, in a number of instances, relaxed. Mergers and consolidations were authorized, pooling arrangements were to be permitted, extensions and abandonments were made lawful and divisions of joint through rates might be adjusted, all for the sake of economy and efficiency and the prevention of destructive competitive practices, and all subject to the supervision and control of the Interstate Commerce Commission, and its finding that the action proposed or ordered would be in the public interest. These amendments are to be given liberal construction in aid of the purposes Congress had in mind. Under the new provi-

sions, Milwaukee and Northwestern might have merged or consolidated if the Commission found such a procedure would be in the public interest. Similar considerations would justify their proposed pooling of freight transportation. Shippers over Escanaba's lines, communities served by it, and, indeed, shippers in communities on distant lines and persons having no other interest than that of the general public welfare, were entitled to be heard before the Commission and to present whatever proofs might tend to show that the proposed agreement would or would not be for the public welfare. They, however, are not "carriers involved," mentioned in § 5 (1). Escanaba had the undoubted right accorded it to appear and to be heard on the question of the public interest and welfare and indeed so had every carrier having connections with Milwaukee and Northwestern. The question involved in the appellant's contention is whether it or any other carrier, not actually a party to the pooling agreement, is a "carrier involved" within the meaning of the Act, so that it may frustrate the agreement by withholding its assent.

Second. Escanaba is not a carrier of the ore which is hauled between Channing and Escanaba under the trackage agreement. It receives no part of the freight paid, it issues no bills of lading, it maintains no tariffs covering that transportation. It neither holds itself out to serve in that respect nor renders any service to shippers of ore; and, as respects the proposed pooling of freights on Milwaukee's traffic, exchanged with it at Channing, and Northwestern's traffic, exchanged with it at Escanaba, is not a carrier involved in the service rendered up to the exchange points, which is to be pooled. But it is said that the word "involved" connotes something more than a party to an agreement; that it embraces any railroad affected by the arrangement. And, it is urged, Escanaba will be seriously injured by the proposed arrangement, in

spite of the continuing obligation of Milwaukee to pay it a minimum of $27,000 per annum until 1951.

If a carrier not a party, but adversely affected, is "involved" in the sense of § 5 (1) Escanaba's assent is a condition precedent to authorization by the Commission. We must then determine the meaning of the phrase as used in the statute. Aid is afforded by the context. The section gives the Commission authority to approve and authorize, "if assented to by all the carriers involved, . . . under such rules and regulations, and for such consideration *as between such carriers* and upon such terms and conditions," as the Commission shall find just and reasonable. This reference to the mutual considerations to be exchanged by "such carriers" shows that Congress meant by the phrase "all the carriers involved," those, and those only, who are parties to the pooling of freights and the division of the proceeds. Escanaba, however, insists that if the section is to be construed to require the assent of none but the parties to the pooling agreement it is mere surplusage. It points out that Milwaukee and Northwestern have assented and are now merely asking the approval and authorization of the Commission. The argument, however, overlooks the fact that the Commission may authorize pooling on the application of a single carrier or upon its own initiative. In the first case the assent of one or more other carriers, and in the second the assent of all the carriers is a prerequisite to its action. It appears, therefore, that though confined to the parties to the pool, the requirement that all carriers involved shall assent has a proper office in the statutory scheme.

Third. In view of Escanaba's relation to the traffic involved in the proposed pool, the decision that its assent is a prerequisite to the plan's operation would involve the gravest inconvenience and perhaps render the provision of § 5 (1) nugatory. It is difficult to conceive of any pooling arrangement between two carriers which will not affect, in a greater or less degree, other carriers who inter-

change traffic with one or the other of the pooling roads, or with their connections. If the private interest of any such outside carrier should move it to refuse its assent to the arrangement it could, in the view urged by the appellant, veto the proposal although, on the whole and in the long view, the consummation of the plan might greatly enhance the economies of operation of large and important carriers and so promote the public interest. We cannot believe that every carrier, in such sense affected by a proposed pool to which it is not a party, was intended to have a status different from, and perhaps at war with, the interest of the general public in the efficient and economical operation of the railroads envisaged by the Transportation Act.

We conclude that not only the words of the statute but the obvious policy and intent underlying its provisions require an affirmance of the judgment of the District Court.

Affirmed.

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

LAUF ET AL. *v.* E. G. SHINNER & CO.

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

No. 293. Argued January 12, 1938.—Decided February 28, 1938.

1. An unincorporated labor union demanded of an employer that he require all his employees, none of whom belonged to the union, on pain of dismissal, to join it and make it their bargaining agent. The employees, though left free in the matter by the employer, refused to join, having an organization of their own. The employer having rejected the demand, the members of the union, for the purpose of coercing him and in a conspiracy to destroy his business if he refused to yield, caused false and misleading signs to be placed before his markets; caused persons who were not his

employees to parade and picket before the markets; falsely accused him of being unfair to organized labor in dealings with employees, and, by molestation, annoyance, threats, and intimidation, prevented patrons and prospective patrons of the employer from patronizing the markets. Irreparable injury resulted. *Held:*

(1) That there was a "labor dispute" within the meaning of Wisconsin Labor Code, §§ 103.62, 103.53, and of the Norris-LaGuardia Act, 29 U. S. C. § 113 (c). P. 327.

(2) In a suit brought by the employer against the union for an injunction, the substantive rights of the parties were governed by the state law, as construed by the state Supreme Court. *Id.*

(3) An injunction was too broad which included peaceful picketing, advertising the employer as unfair to organized labor, solicitation of customers not to trade, etc., these being acts which are made lawful by the Wisconsin Labor Code, § 103.53, if fraud, violence or threat thereof are not involved. P. 328.

(4) The District Court was without jurisdiction to grant an injunction in the absence of findings of fact required by the Norris-LaGuardia Act, 29 U. S. C. § 117. P. 329.

(5) The declarations of policy in the two Acts mentioned, to the effect that employees shall have full freedom of association, designation of representatives of their own choosing, etc., free from coercion of their employers, did not put the case beyond the scope of those Acts, since those declarations do not narrow the definition of "labor dispute" in the Acts; and the rights of the parties and the jurisdiction of the federal courts are to be determined according to the express provisions applicable to labor disputes as so defined. P. 330.

2. Since the courts below did not pass on the questions of the legality under the Wisconsin law, of the acts charged to have been done by the union, or the constitutionality of that law in legalizing any of such acts, no opinion is expressed on these questions, and the case is remanded. P. 330.

90 F. 2d 250, reversed.

CERTIORARI, 302 U. S. 669, to review the affirmance of a decree permanently enjoining acts on the part of a labor union,—picketing, parade of misleading signs, solicitation of customers, etc.—directed against the plaintiff, a retail dealer in meats. See also 82 F. 2d 68.

Mr. A. W. Richter argued the cause, and *Mr. Morris Fromkin* was on the brief, for petitioners.

Mr. Walter L. Gold for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This is a suit to restrain the petitioners from picketing the respondent's place of business; from coercing the respondent to discharge any of its employes who do not belong to the petitioning union, or to compel them to become members of the union and to accept it as their bargaining agent and representative; and from advertising that the respondent is unfair to organized labor, or molesting customers or prospective customers or persuading them to cease patronizing it. After a hearing, and upon findings of fact and conclusions of law, the District Court granted a preliminary injunction. The Circuit Court of Appeals affirmed.[1] Upon final hearing the parties relied upon the record as made in the preliminary hearing and some additional testimony.

The District Court found the following facts: The respondent is a Delaware corporation maintaining five meat markets in Milwaukee, Wisconsin. The petitioners are, respectively, an unincorporated labor union and its business manager, citizens and residents of Wisconsin. The respondent's employes number about thirty-five; none of them are members of the petitioning union. The petitioners made demand upon the respondent to require its employes, as a condition of their continued employment, to become members of the union. The respondent notified the employes that they were free to do this and that it was willing to permit them to join but they declined

[1] *Lauf* v. *Shinner & Co.*, 82 F. (2d) 68.

and refused to join. The union had not been chosen by the employes to represent them in any matter connected with the respondent. For the purpose of coercing the respondent to require its employes to join the union and to accept it as their bargaining agent and representative, as a condition of continued employment, and for the purpose of injuring and destroying the business if the respondent refused to yield to such coercion, the petitioners conspired to do the following things and did them: They caused false and misleading signs to be placed before the respondent's markets; caused persons who were not respondent's employes to parade and picket before the markets; falsely accused respondent of being unfair to organized labor in its dealings with employes, and, by molestation, annoyance, threats, and intimidation prevented patrons and prospective patrons of respondent from patronizing its markets; respondent suffered and will suffer irreparable injury from the continuance of the practice and customers will be intimidated and restrained from patronizing the stores as a consequence of petitioners' acts. There is more than $3,000 involved in the controversy.

The District Court held that no labor dispute, as defined by federal or state law, exists between the respondent and the petitioners or either of them; that the respondent is bound to permit its employes free agency in the matter of choice of union organization or representation; and that the respondent had no adequate remedy at law. It entered a final decree enjoining the petitioners from seeking to coerce the respondent to discharge any of its employes for refusal to join the union or to coerce the respondent to compel employes to become members of the organization, from advertising that the respondent is unfair to organized labor, and from annoying or molesting patrons or persuading or soliciting customers, present or prospective, not to patronize the respondent's markets.

The Circuit Court of Appeals affirmed the decree.[2] By reason of alleged conflict with a decision of the Supreme Court of Wisconsin, [222 Wis. 383; 268 N. W. 270, 873] and with our decision in *Senn* v. *Tile Layers Protective Union,* 301 U. S. 468, we granted the writ of certiorari.

In the Court of Appeals the petitioners assigned error to certain of the District Court's findings of fact as well as to its conclusions of law. In this court the only errors assigned are to the holdings that, on the facts found, there was no labor dispute and that the Norris-LaGuardia Act and the Wisconsin Labor Code had no bearing on the case as made. In these circumstances we accept the findings of fact and confine our inquiry to the correctness of the District Court's conclusions based upon them.

The institution of the suit in the federal court is justified by the findings as to diversity of citizenship and the amount in controversy. As the acts complained of occurred in Wisconsin the law of that State governs the substantive rights of the parties. But the power of the court to grant the relief prayed depends upon the jurisdiction conferred upon it by the statutes of the United States.

First. The District Court erred in holding that no labor dispute, as defined by the law of Wisconsin, existed between the parties. Section 103.62, paragraph (3) of the Wisconsin Labor Code,[3] is:

"The term 'labor dispute' includes any controversy concerning the terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, or concerning employment relations, or any other controversy arising out of the respective interests of employer and employe, regardless of whether or not the disputants stand in the proximate relation of employer and employe."

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[2] 90 F. (2d) 250.

[3] Wisconsin Statutes, 1937, c. 103, § 103.62.

The District Court was bound by the construction of the section by the Supreme Court of the State,[4] which has held a controversy indistinguishable from that here disclosed to be a labor dispute within the meaning of the statute.[5]

Second. The District Court erred in not applying the provisions of § 103.53[6] of the Wisconsin Labor Code, which declares certain conduct lawful in labor disputes; *inter alia* "giving publicity to . . . the existence of, or the facts involved in, any dispute . . . by . . . patrolling any public street . . . without intimidation or coercion, or by any other method not involving fraud, violence, breach of the peace, or threat thereof"; advising, urging, or inducing, without fraud, violence or threat thereof, others to cease to patronize any person; peaceful picketing or patrolling, whether singly or in numbers. A Wisconsin court could not enjoin acts declared by the statute to be lawful;[7] and the District Court has no greater power to do so. The error into which the court fell as to the existence of a labor dispute led it into the further error of issuing an order so sweeping as to enjoin acts made lawful by the State statute. The decree forbade all picketing, all advertising that the respondent was unfair to organized labor and all persuasion and solicitation of customers or prospective customers not to trade with respondent.

[4] *Senn* v. *Tile Layers Union, supra,* p. 477.

[5] *American Furniture Co.* v. *Chauffeurs, Teamsters & Helpers Union,* 222 Wis. 338, 268 N. W. 250. See, also, *Senn* v. *Tile Layers Union, supra.*

[6] Wisconsin Statutes, 1937, c. 103, § 103.53.

[7] *Senn* v. *Tile Layers Protective Union,* 222 Wis. 383, 400, 268 N. W. 270, 872; *American Furniture Co.* v. *Chauffeurs, Teamsters & Helpers Union, supra.*

Third. The District Court erred in granting an injunction in the absence of findings which the Norris-LaGuardia Act [8] makes prerequisites to the exercise of jurisdiction.

Section 13 (c) of the Act [9] is:

"The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment regardless of whether or not the disputants stand in the proximate relation of employer and employee."

This definition does not differ materially from that above quoted from the Wisconsin Labor Code, and the facts of the instant case bring it within both.

Section 7 [10] declares that "no court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined" except after a hearing of a described character, "and except after findings of fact by the court, to the effect (a) that unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained" and that no injunction "shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same . . ." By subsections (b) to (e) it is provided that relief shall not be granted unless the court finds that substantial and irreparable injury to complainants' property will follow; that as to

[8] Act of March 23, 1932, c. 90, 47 Stat. 70, U. S. C. Tit. 29, § 101 *et seq.*

[9] 47 Stat. 73; U. S. C. Tit. 29, § 113 (c).

[10] 47 Stat. 71; U. S. C. Tit. 29, § 107.

each item of relief granted greater injury will be inflicted upon the complainant by denying the relief than will be inflicted upon defendants by granting it; that complainant has no adequate remedy at law; and that the public officers charged with the duty to protect complainants' property are unable or unwilling to provide adequate protection. There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States.[11] The District Court made none of the required findings save as to irreparable injury and lack of remedy at law. It follows that in issuing the injunction it exceeded its jurisdiction.

Fourth. The Court of Appeals erred in holding that the declarations of policy in the Norris-LaGuardia Act and the Wisconsin Labor Code to the effect that employes are to have full freedom of association, self-organization, and designation of representatives of their own choosing, free from interference, restraint or coercion of their employers, puts this case outside the scope of both acts since respondent cannot accede to the petitioner's demands upon it without disregarding the policy declared by the statutes. This view was expressed in the court's first opinion on the appeal from the issue of an interlocutory injunction,[12] and the opinion on the appeal from the final order adopts what was said on the earlier appeal as the law of the case. We find nothing in the declarations of policy which narrows the definition of a labor dispute as found in the statutes. The rights of the parties and the jurisdiction of the federal courts are to be determined according to the express provisions applicable to labor disputes as so defined.

Fifth. Since the courts below were of opinion that a labor dispute, as defined by state and federal statutes,

[11] *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 233–234.

[12] 82 F. (2d) 68, 72–73.

had not been shown, they did not pass on the questions of the legality, under the Wisconsin law, of the acts charged to have been done by the petitioners or the constitutionality of that law in legalizing any of such acts. As the case must go back for further proceedings, we express no opinion upon these questions.

The judgment is reversed and the cause remanded to the District Court for further proceedings in conformity with this opinion.

Reversed.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration or decision of this case.

MR. JUSTICE BUTLER, dissenting.

The opinion just announced reflects faithfully though quite nakedly the findings of fact. These and uncontradicted details disclose the circumstantial basis of the suit. Local No. 73 is an unincorporated labor union, never in any way related to respondent. None of its employees is a member of the union; all have definitely rejected the suggestion that they join it. In every legal sense, the union is a stranger both to respondent and its employees. Shortly before petitioners conspired to destroy respondent's business, one Joyce, of the American Federation of Labor, called by telephone respondent's vice-president, Russell, at his Chicago office. The latter's uncontradicted narration of the conversation follows: "Mr. Joyce . . . said 'We are in Milwaukee and want you fellows to join our Union up there. They tell me up there you are the man I must see, to get a contract signed for Shinner & Company with the Butchers Union up there.' I told him I could not sign any contract with him, that our men had their own association and were perfectly well satisfied, and didn't want to belong to any other union. He said 'Well, I am going there tonight

and if you don't join, I will declare war on you.' I said 'There is nothing I can do about it.' He said 'All right, the war is on, and may the best man win,' and he hung up."

Then followed *a demand by the union that respondent compel its employees, on pain of dismissal from their employment, to join the union and constitute it their bargaining representative and agent.* Respondent rightly declined to undertake any such interference with the liberty of its employees, but informed them that they were free to do as they saw fit. It left them wholly free to join or not to join the union; the union was left free to invite, urge, persuade or induce them to join. Every one who respects the lawful exercise of individual liberty of action must regard the attitude of the respondent as being above criticism and beyond reproach. The opinion of the Court just announced does not suggest a contrary view.

Under these circumstances, the union, in order to force respondent to coerce its employees, and in pursuance of a conspiracy to that end, publicly and falsely accused respondent of being unfair to labor in dealing with its employees; and by means of false placards and banners and by picketing, molestation, annoyance, threats and intimidation it prevented, and when this suit was brought was continuing to prevent, patrons and prospective patrons from dealing with respondent—all to the latter's serious and irreparable injury.

1. Respondent's business constitutes a property right; and the free opportunity of respondent and its customers to deal with one another in that business is an incident inseparable therefrom. It is hard to imagine a case which more clearly calls for equitable relief; and the court below rightly granted an injunction. *Truax* v. *Corrigan,* 257 U. S. 312, 327, and cases cited.

But here it is held that the decree conflicts with the Norris-LaGuardia Act. That the action demanded by petitioners of respondent with respect to its employees, if taken, would have been morally indefensible is plain; that it would have been against the declared policy of the Act is equally plain. That Act, 29 U. S. C., § 102,[1] declares that under prevailing conditions, the individual unorganized worker, "though he should be free to decline to associate with his fellow workers" should "have full freedom of association, self-organization, and designation of representatives of his own choosing," and should "be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives," etc. This declaration of policy, as the introductory clause plainly recites, was intended as an

[1] Section 2 of the Act of March 23, 1932, 47 Stat. 70, 29 U. S. C. § 102:

"Public policy in labor matters declared. In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is hereby declared as follows:

"Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he 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; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are hereby enacted."

aid "in the interpretation" of the Act and "in determining the jurisdiction and authority of the courts" under the Act. If respondent had joined the conspiracy and yielded to the demand of the union its action as an employer of labor unquestionably would have constituted an "interference, restraint, or coercion" of its employees in the designation of their representatives, in the teeth of the declared policy of the Act.

The opinion of the Court asserts, however, that this definite declaration of policy in no way narrows the definition of the phrase "labor dispute" found in substantive provisions of the Act. But that statement cannot be intended to suggest that the declaration of policy does not affect the meaning and application of the words used, for the opening clause of that declaration is precisely to the contrary. Whether a labor dispute exists in a given case depends upon the facts; and in each case the phrase "labor dispute" is to be interpreted in harmony with the declared policy of the Act. That is the congressional mandate and courts are required to observe it. In *Ozawa* v. *United States,* 260 U. S. 178, 194, we said "It is the duty of this Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail." See also to the same effect, *Heydenfeldt* v. *Daney Gold & S. M. Co.,* 93 U. S. 634, 638; *Holy Trinity Church* v. *United States,* 143 U. S. 457, 459 *et seq.; Fleischmann Construction Co.* v. *United States,* 270 U. S. 349, 360; *Karnuth* v. *United States,* 279 U. S. 231, 243. The principle applies here with peculiar force;

for it is an unnatural assumption to suppose that Congress intended by general definition of the flexible term "labor dispute" to annul its own very explicit declaration in respect to the policy to be observed by the courts in the administration of the Act.

The decision just announced ignores the declared policy of Congress that the worker should be free to decline association with his fellows, that he should have full freedom in that respect and in the designation of representatives, and especially that he should be free from interference, restraint, or coercion of employers. To say that a "labor dispute" is created by the mere refusal of respondent to comply with the demand that it compel its employees to designate the union as their representative unmistakably subverts this policy and consequently puts a construction upon the words contrary to the manifest congressional intent.

Moreover, the immediately preceding section of the Act, 29 U. S. C., § 101,[2] provides that no restraining order or injunction in a case involving or growing out of a labor dispute shall issue "contrary to the public policy declared in this chapter." Sections 101 and 102 taken together constitute nothing less than an expression of the legislative will that the court shall enforce the public policy set forth in § 102 and shall have regard thereto in reaching a determination as to whether it has jurisdiction to issue an injunction in any particular case. Since the

[2] Section 1 of the Act of March 23, 1932, 47 Stat. 70, 29 U. S. C. § 101:

"Issuance of restraining orders and injunctions; limitation; public policy. No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter."

whole aim of the injury here inflicted and threatened to be inflicted by the union was to compel respondent to influence and coerce its employees in the designation of their representatives, the acts of the union were in plain defiance of the declared policy of Congress, and find no support in its substantive provisions.

2. But putting aside the congressional declaration of policy as an indication of meaning, and considering the phrase entirely apart, the facts of this case plainly do not constitute a "labor dispute" as defined by the Act. Undoubtedly "dispute" is used in its primary sense as meaning a verbal controversy involving an expression of opposing views or claims. The Act itself, 29 U. S. C., § 113 (c), so regards it: "The term 'labor dispute' includes any controversy concerning terms or conditions of employment," etc. In this case, there was no interchange or consideration of conflicting views in respect of the settlement of a controversial problem. There was simply an overbearing demand by the union that respondent should do an unlawful thing and a natural refusal on its part to comply. If a demand by a labor union that an employer compel its employees to submit to the will of the union, and the employer's refusal, constitute a labor controversy, the highwayman's demand for the money of his victim and the latter's refusal to stand and deliver constitute a financial controversy.

There being an utter lack of connection between the petitioners and respondent or its employees, the union was an intruder into the affairs of the employer and its employees. The union had the right to try to persuade the employees to join its organization; but persuasive methods failing, its right under the law in any manner to intermeddle came to an end. It lawfully could not coerce the employees to abandon their own organization and to join Local No. 73 any more than the employees could coerce the union to disband and its members to join

their organization. Otherwise, the worker would not "be free," as the Act requires, "to decline to associate with his fellows"; nor would he have "full freedom of association, self-organization and designation of representatives of his own choosing." Clearly the union could not be authorized by statute to resort to coercive measures *directly* against the employees to compel submission to its wishes, for that would be to give one group of workmen autocratic power of control in respect of the liberties of another group, in contravention of the Fifth Amendment as well as of the policy of Congress expressly declared in this Act. And that being true, the attempt to coerce submission through constrained interference of the employer was equally unlawful.

So far as concerns the question here involved, the phrase "labor dispute" is the basic element of the Act. For unless there was such a dispute—that is to say, a "controversy"—the Act does not even purport to limit the district court's jurisdiction in equity. The phrase must receive a sensible construction in harmony with the congressional intent and policy. There can be no dispute without disputants. Between whom was there a dispute here? There was none between the union and respondent's employees; for the latter were considered by the union mere pawns to be moved according to the arbitrary will of the union. There was none between respondent and its employees; for they were in full accord. And finally there was none between the union and respondent; for it would be utterly unreasonable to suppose Congress intended that the refusal of a conscientious employer to transgress the express policy of the law should constitute a "labor dispute" having the effect of bringing to naught not only the policy of the law, but the obligation of a court of equity to respect it and to restrain a continuing and destructive assault upon the property rights of the employer, as to which no adequate remedy at law existed.

3. As to what constitutes a "labor dispute" within the meaning of the Wisconsin statute, the interpretation put upon it by the highest court of that state is binding here. *Knights of Pythias* v. *Meyer,* 265 U. S. 30, 32. *Morehead* v. *New York ex rel. Tipaldo,* 298 U. S. 587, 609. But this Court authoritatively declares the meaning of Acts of Congress and is required to decide for itself what constitutes a "labor dispute," which, within the meaning of the Norris-LaGuardia Act, will have the effect of abridging the jurisdiction of a federal court.

The things here found to have been done for the purpose of coercing respondent to compel its employees to join the union are not declared lawful by the Wisconsin statute or by the courts of that state. Cf. *American Furniture Co.* v. *Chauffeurs, T. & H. Union,* 222 Wis. 338; 268 N. W. 250; *Senn* v. *Tile Layers Protective Union,* 222 Wis. 383; 268 N. W. 270, 872. While this Court refrains from condemning the means employed by petitioners, the opinion contains nothing to suggest that their conduct was not wrongful and unlawful. The publicity and peaceful picketing declared legal by Wisconsin laws are utterly unlike the display of libelous signs, parade of pickets, false accusations, molestation, threats and intimidation employed by the union, not on behalf of former or present employees of respondent, but to destroy the business of respondent. Here, by means everywhere held to be unlawful, the union carried on and was continuing to carry on a campaign of destruction in order to coerce respondent to deprive its employees of their right of freedom of association, self-organization and designation of representatives of their own choosing. That the Wisconsin statute does not attempt to make lawful the means employed by the union to impose its will upon respondent and its employees clearly appears from this Court's portrayal of that law in *Senn* v. *Tile Layers Union,* 301 U. S. 468.

The opinion in that case states (p. 478): "The judgment of the highest court of the state establishes that both the means employed and the end sought by the unions are legal under its law . . . The Legislature of Wisconsin has declared that 'peaceful picketing and patrolling' on the public streets and places shall be permissible 'whether engaged in singly or in numbers' provided this is done 'without intimidation or coercion' and free from 'fraud, violence, breach of the peace or threat thereof.' The statute provides that the picketing must be peaceful; and that term as used implies not only absence of violence but absence of any unlawful act. It precludes the intimidation of customers. It precludes any form of physical obstruction or interference with the plaintiff's business. It authorizes giving publicity to the existence of the dispute 'whether by advertising, patrolling any public streets or places where any person or persons may lawfully be'; but precludes misrepresentation of the facts of the controversy. And it declares that 'nothing herein shall be construed to legalize a secondary boycott.' . . . Inherently, the means authorized are clearly unobjectionable. In declaring such picketing permissible Wisconsin has put this means of publicity on a par with advertisements in the press. . . . The picketing was peaceful. The publicity did not involve a misrepresentation of fact; nor was any claim made below that relevant facts were suppressed."

The state statute, defining "labor disputes" and declaring the means that lawfully may be used against employers in such controversies, does not purport to make lawful either the end here sought by petitioners or the means they employed to attain it. Their purpose was not unionization of respondent's employees, for they already belonged to a labor organization of their own choosing. The purpose was to coerce the employees to join a particular organization which they had already repudiated. There

is nothing in the state or federal statutes that purports to give labor unions or individuals so contriving the status of party to a "labor dispute." Coercion of employees to surrender their freedom of self-organization is repugnant to both statutes. Wis. Stats., 1937, § 103.51. 29 U. S. C. §§ 101, 102. Cf. *American Furniture Co.* v. *Chauffeurs, T. & H. Union,* 222 Wis. 338; 268 N. W. 250; *Senn* v. *Tile Layers Protective Union,* 222 Wis. 383; 268 N. W. 270, 872; *Senn* v. *Tile Layers Union,* 301 U. S. 468. There is no ground upon which petitioners' purpose in this case or the means employed to accomplish it can be supported as lawful.

4. The case is a simple one. Respondent's employees had no connection with the union, and were unwilling to have any. The union, being unable to persuade the employees to assent to its wishes in that regard, undertook to subjugate them to its will by coercing an unlawful interference with their freedom of action on the part of the employer. If that is a "labor dispute," destructive of the historical power of equity to intervene, then the Norris-LaGuardia Act attempts to legalize an arbitrary and alien state of affairs wholly at variance with those principles of constitutional liberty by which the exercise of despotic power hitherto has been curbed. And nothing is plainer under our decisions than that if the Act does that, its effect will be to deprive the respondent of its property and business without due process of law, in contravention of the Fifth Amendment. *Truax* v. *Corrigan, supra,* 327–328.

I am of opinion that the circuit court of appeals rightly held that this case discloses no "labor dispute" within the meaning of the Norris-LaGuardia Act; that the union's coercive attack upon respondent was unlawful under state law and in violation of the policy declared by the federal statute, and was properly enjoined; and that, there being no "labor dispute" as defined by that Act, its pro-

visions as to allegations, proof, and findings do not apply. I would affirm the judgment.

MR. JUSTICE MCREYNOLDS concurs in this opinion.

UNITED STATES *v.* PATRYAS.

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

No. 445. Argued February 11, 1938.—Decided February 28, 1938.

Under § 307 of the World War Veterans Act, as amended July 3, 1930, a claim for total permanent disability on a reinstated and converted War Risk policy can not be contested upon the bare ground that the total and permanent disability existed before the insurance was reinstated. P. 342.

Section 307 provides that policies of insurance "issued, reinstated, or converted shall be incontestable from the date of issuance, reinstatement, or conversion, except for fraud, nonpayment of premiums, or on the ground that the applicant was not a member of the military or naval forces of the United States."

The converted policy sued on promised to pay in the event of total, permanent disability, upon due proof of such disability "while this policy is in force." Unlike original policies issued under the War Risk Act, it contained no clause expressly excluding liability for total, permanent disability incurred before the policy was applied for.

90 F. 2d 715, affirmed.

CERTIORARI, 302 U. S. 676, to review the affirmance of a judgment recovered against the Government on a Veteran's policy of insurance.

Mr. Wilbur C. Pickett, with whom *Solicitor General Reed, Assistant Solicitor General Bell,* and *Messrs, Julius C. Martin* and *W. Marvin Smith* were on the brief, for the United States.

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

MR. JUSTICE BLACK delivered the opinion of the Court.

January 31, 1918, Stanley J. Patryas (respondent), then a soldier, purchased from the government a $10,000 yearly renewable War Risk Insurance contract which he permitted to lapse after his honorable discharge from the Army, July 29, 1919. June 28, 1927, while a patient at a Veterans' Government Hospital, he obtained reinstatement of his War Risk policy and immediately converted it into a five year renewable term policy upon which he paid premiums to June 1932. Claiming total permanent disability, the veteran obtained, in the District Court, a verdict and judgment on his reinstated policy. Finding the issues for the veteran, the jury fixed the date of permanent total disability at 1924—a date three years before his policy was reinstated.

The Court of Appeals affirmed.[1]

The government's right to contest this policy is limited by the following statutory provision: [2]

". . . policies of insurance . . . issued, reinstated, or converted shall be incontestable from the date of issuance, reinstatement, or conversion, except for fraud, nonpayment of premiums, or on the ground that the applicant was not a member of the military or naval forces of the United States, . . ."

The question here is:

Can the government, in the absence of fraud or bad faith, "contest" and defeat payment of total permanent disability insurance, sold to a World War veteran, on the ground that the veteran was totally and permanently disabled before the policy was reinstated and converted?

First. The government contends that "Congress has

[1] 90 F. (2d) 715.

[2] Sec. 307, World War Veterans Act, 1924, as amended July 3, 1930, c. 849, § 24, 46 Stat. 1001.

not, . . . authorized . . . insurance benefits for total, permanent disability existing prior to any contract of insurance on which the claim is made."

The original War Risk Insurance Act of October 6, 1917,[3] provided:

"That in order to give *every* commissioned *officer* and *enlisted man* and to *every member* of the *Army Nurse Corps* (female) and of the *Navy Nurse Corps* (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents . . . , the United States, upon application to the bureau and *without medical examination, shall grant* insurance against the death or total permanent disability of any such person . . ."

The War Risk Insurance Act must be considered in the light of its passage during the war, while men and women were being called into war service. This requires recognition of its generous and liberal purpose to provide " greater protection for (soldiers, sailors and nurses) . . . and their dependents."[4] Its passage indicated Congress conclusively presumed that every person, who had successfully undergone mental and physical examination for war service, was—when inducted into such service—insurable against death and total permanent disability.[5] The Act commanded that insurance against death and total permanent disability be granted, without medical examination, to *every* applicant who had previously been examined and accepted for war service. Congress manifestly intended by these sweeping provisions that policies should be granted without regard to the health of applicants and should be enforceable obligations against the government. Any other construction of this broad, war

[3] Sec. 400, War Risk Insurance Act of Oct. 6, 1917, c. 105, 40 Stat. 409.

[4] See, *United States* v. *Arzner*, 287 U. S. 470, 472.

[5] See, *United States* v. *Domangue*, 79 F. (2d) 647, 648.

time legislative grant to soldiers, sailors and nurses would take away the benefits Congress intended them to receive. The provisions of the War Risk Insurance Act are sufficiently comprehensive and inclusive to authorize its administrators to grant insurance covering past or future total permanent disability, if such action is found necessary to carry out its far reaching national plan and purposes.

Second. It is contended that the government can contest liability on the ground that the veteran was totally and permanently disabled prior to the reinstatement, despite the provision that such policy "shall be *incontestable* . . . except for fraud, nonpayment of premiums, or on the ground that the applicant was not a member of the military or naval forces of the United States, . . ." It is urged that this provision "has no application where, as here, the validity of the policy is not questioned and liability under it is denied solely on the ground that a loss has not occurred during the period of insurance protection." However, it is admitted that this policy did not "expressly exclude total permanent disability *occurring prior to insurance protection, as did the language of the original term contract.*"

This converted policy of insurance provided protection against loss from two causes: namely, death and total permanent disability. A provision making a policy "incontestable" except for certain clearly designated reasons, is wholly meaningless and ineffective if, after proof of the loss insured against, the policy can be contested upon grounds wholly different from those set out in the exception. The object of the provision is to assure the insured that payment on his policy will not be delayed by contests and lawsuits on grounds not saved by the exceptions.[6] Here, it has been established that the veteran is

[6] *Northwestern Mutual Life Ins. Co.* v. *Johnson,* 254 U. S. 96, 101, 102.

totally and permanently disabled. Yet his policy is contested on the ground that it does not insure against this disability because it existed before the policy was issued. If this defense can be interposed, his policy has never actually protected him against total permanent disability. Since permanent total disability is one of the two risks insured against in the policy, any contest (not based on the exceptions) which may prevent the policyholder's recovery for such admitted total permanent disability—existing while the policy is in force—is a "contest" forbidden by the "incontestable" provision.

No legal obstacle prevents parties, if they so desire, from entering into contracts of insurance to protect against loss that may possibly have already occurred. Marine insurance and ante-dated fire insurance policies frequently afford protection against risks which, unknown to the parties, have already attached.[7]

Even with the benefit of scrupulous good faith, it is not always easy to determine with complete certainty whether or not total permanent disability exists. This uncertainty may lead an insurer, after his own investigation, and for adequate compensation, to treat unknown past and uncertain prospective disability, upon the same basis. This case is an illustration. Here, the government has never admitted that the veteran is totally and permanently disabled. It not only issued him a policy against such disability—with complete knowledge of his then condition—but in this continued contest has denied that the policyholder was totally and permanently dis-

[7] *General Interest Ins. Co.* v. *Ruggles*, 12 Wheat. 408; see, *Hooper* v. *Robinson*, 98 U. S. 528, 537; *Pendergast* v. *Globe & R. Fire Ins. Co.*, 246 N. Y. 396; 159 N. E. 183; *Hallock* v. *Commercial Ins. Co.*, 26 N. J. L. (2 Dutch.) 268; see, *Springfield Fire & M. Ins. Co.* v. *National Fire Ins. Co.*, 51 F. (2d) 714, 718–719. A valid aleatory contract may be based on an unknown past event. 3 Williston, On Contracts, (Rev. ed.), § 888.

abled at any time—before, when, or after the policy was issued. There was also a sharp conflict of evidence on this disputed fact.

When a policy of disability insurance is issued after complete examination by the insurer and full and fair disclosure by both parties, there is no legal reason why the insurer cannot contract to afford full protection against loss resulting from past as well as prospective disability. This veteran's policy did not expressly limit liability to *prospective* total permanent disability. The provisions of the policy in this regard contain a promise to pay the veteran "in . . . event of the total permanent disability . . . (and) Upon due proof of the total permanent disability of the Insured while this policy is in force, . . ." Original policies issued under the War Risk Act expressly excluded liability for total permanent disability incurred before the policy "was applied for." The deliberate omission, in the converted policies, of this previous exclusion, the language and purport of the original Act and its amendments, the administrative interpretations and legislative history, all throw a flood of light on the intention to include liability for disabilities existing prior to the issuance of the policies.

For more than a decade prior to 1934, (during which period this veteran's policy was purchased), the Bureau, unvaryingly observing the statutory mandate, announced and applied the practice that "insurance was incontestable except for the grounds specifically enumerated" in the incontestable provision. A "*subsequent rating* of permanent total disability *effective as of a date prior to the date of reinstatement,*" under this consistent administrative interpretation and practice, did "not affect the validity of such reinstatement." Because of court decisions and rulings by the Comptroller General tending to nullify and defeat this administrative practice [8] the Veterans'

[8] 9 Compt. Gen. 291; *Jordan* v. *United States,* 36 F. (2d) 43; *Golden* v. *United States,* 34 F. (2d) 367.

Administration urged the amendment of July 3, 1930, to confirm its practice and to strengthen and clarify the incontestable provision. For this purpose, the Administrator of Veterans' Affairs testified before the Senate Committee as to the necessity for this amendment:[9]

"This is a very sweeping amendment and will place beyond contest many contracts and policies of insurance which otherwise would be contestable. It is a well recognized principle of commercial insurance companies, however, and *in reality is only a clarification of the existing law which was practically nullified by a recent decision of the Comptroller General.*"

The Solicitor of Veterans' Affairs also testified:

". . . the present World War Veterans Act of 1924, as amended, contains a provision to the effect that where a policy is maintained in force for a period of six months, it should be incontestable, except for fraud or nonpayment of premiums. *We have followed that, and in all cases where the policy has remained in force for six months* we have paid the claim, irrespective of the merits of it, unless there was fraud or failure to pay premiums. . . . However, under date of January 16, 1930, *notwithstanding the long practice of the bureau,* the Comptroller General, in the case of Mabry W. Woodall, held that if a man *was permanently and totally disabled* at the time he applied for a reinstatement of insurance, or conversion of insurance, . . . *the policy was not incontestable, the statute did not protect it . . .*"

In the *Woodall* case referred to, the Comptroller General had held:

"... if the insured *was in fact* dead or *permanently and totally disabled, at the date of application, reinstatement or conversion, . . . the insurance was subject to subsequent contest.*

. . . . . .

[9] H. R. 10381, 71st Cong., 2d Sess., Hearings Senate Committee on Finance, pages 90–91.

"Accordingly, the rule may be stated that *where the Veterans' Bureau has heretofore established or may hereafter establish the condition of permanent total disability at or prior to date of original application for insurance, or application for reinstatement and/or conversion of insurance, . . . the insurance should be considered as invalid . . .*"

The Senate Report on this amendment [10] stated:

"*The purpose is to make all contracts or policies of insurance incontestable from date of issuance, reinstatement, or conversion, for all reasons except fraud, nonpayment of premiums, or that the applicant was not a member of the military or naval forces of the United States. This incontestability would protect contracts . . . where the applicant was not in the required state of health, or was permanently and totally disabled prior to the date of application, . . .* It is appreciated that this is a broad provision, but it was felt that *it was necessary* in order to do justice to the veterans, . . . and *to overcome decisions of the Comptroller General which practically nullified the section as it now exists.*"

The conclusion is inescapable that Congress enacted the 1930 amendment in order to overcome the effect of the above rulings of the courts and the Comptroller General, and with the intention to sustain the Bureau's previous administrative interpretation and practice under the incontestable provision.

To resist payment of this veteran's insurance policy on the ground that he was totally and permanently disabled prior to the issue of the policy, is to "contest" payment within the generally accepted meaning of the word and violates the "incontestable" provision. The purchaser of a policy contract containing a provision that

[10] Senate Report No. 1128, p. 10, 71st Cong., 2d Sess., on H. R. 13174.

the insurer waives its right to contest except for fraud, nonpayment of premiums, and lack of military or naval service, is entitled to rely on the plain terms and inducements of the provision which limits the grounds for contest of liability to those specifically reserved.[11] The incontestable provision here means that a claim of a veteran whose death or total permanent disability is established shall not be contested except for fraud, nonpayment of premiums or on the ground that the insured had not really been a member of the war forces of the nation or because he was included in Title 38, U. S. C., § 447.[12] Congress evidently believed these exceptions afforded the government ample protection against impositions or unjust claims and intended to limit the right to contest these policies to the specific grounds reserved in the exceptions. The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration or decision of this case.

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[11] See, *Northwestern Mutual Life Ins. Co.* v. *Johnson, supra,* at 102.

[12] 38 U. S. C., § 518, and § 447. This reference to § 447 excluded from the benefits of this incontestable provision any person who had been discharged or dismissed from the service on the ground that he was "guilty of mutiny, treason, spying, or any offense involving moral turpitude, or willful and persistent misconduct, of which he was found guilty by a court-martial, or that he was an alien, conscientious objector who refused to perform military duty or refused to wear the uniform, or a deserter, . . ."

ADAIR *v.* BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSN.

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

No. 365. Argued February 2, 1938.—Decided February 28, 1938.

1. Subdivisions (e) and (n) of § 75 of the Bankruptcy Act, which provide for exercise of such control over the property of the farmer-debtor as the court deems in his best interest and in that of his creditors, look to the maintenance of the farm as a going concern and authorize, in a proper case, the continuance of the farm operations after the filing of the petition. P. 354.
2. A conciliation commissioner, appointed pursuant to § 75 of the Bankruptcy Act and Rule L of the General Orders in Bankruptcy, exercises judicial powers like those of a referee in bankruptcy; his acts in authorizing expenditure of funds in his charge, if performed in good faith and not in violation of any rule or positive enactment, are judicial acts for which he can not be held personally liable. P. 357.
3. In a proceeding under § 75 of the Bankruptcy Act, proceeds of the sale of a crop of grapes were spent by the conciliation commissioner in harvesting the crop and in work for the preservation of the vineyard and cultivation of the crop for the next year. Part of the disbursements were made before the farmer-debtor was adjudged a bankrupt, and part thereafter by direction of the referee. A creditor claimed the gross proceeds of the sale under a mortgage of the crop sold and future crops. The same creditor had a mortgage on the farm. *Held:*

   (1) That, as the commissioner acted either judicially, as conciliation commissioner, or ministerially, as an arm of the court by authority of the referee, he was not personally liable to the creditor. P. 358.

   (2) Expenditures, reasonable in amount, for gathering the crop sold, and also those in preparation for the next year's crop and for maintenance of the property, were proper charges on the fund, being for its protection and in the interest of the mortgagee. P. 360.

90 F. 2d 750, reversed.

CERTIORARI, 302 U. S. 674, to review a judgment which reversed an order of the district court settling the final account of the present petitioner as a conciliation commissioner in a bankruptcy proceeding.

Mr. William Lemke, with whom *Mr. Harold M. Sawyer* was on the brief, for petitioner.

Mr. Hugo A. Steinmeyer, with whom *Mr. William C. Day* was on the brief, for respondent.

MR. JUSTICE REED delivered the opinion of the Court.

This writ was asked to review a decree of the Circuit Court of Appeals for the Ninth Circuit, upholding the objections and exceptions of the respondent, a creditor, to the final account of petitioner, a conciliation commissioner appointed under § 75 (a) of the Bankruptcy Act, and reversing the order of the District Court which had settled and allowed the account. The Circuit Court of Appeals held that the petitioner should have been required to pay to respondent the gross proceeds of the grape crop harvested on the debtor's land after the debtor had filed his petition under § 75 of the Bankruptcy Act, without any deduction for moneys spent in harvesting that crop and for other purposes, because of the fact that the crop was subject to a chattel mortgage held by respondent. 90 F. (2d) 750. In view of the importance of the question with respect to proceedings instituted under § 75 of the Bankruptcy Act, this Court granted certiorari.

On August 6, 1934, Andrea Cuccia, a farmer, filed an adequate petition under § 75 (a) to (r) of the Bankruptcy Act, showing by the schedules secured claims to respondent of over $12,000 and unsecured claims of a

slightly larger amount, and expressing his desire to effect a composition or extension of time to pay his debts. His petition was referred to Noah Adair, the Conciliation Commissioner for the County of San Bernardino, California. On January 7, 1935, an amended petition was filed by the debtor, stating that he had failed to obtain the approval of his creditors to a composition or extension proposal and praying that he might be adjudged a bankrupt under the provisions of § 75, subsection (s) of the Bankruptcy Act, as enacted June 28, 1934. Adjudication was entered and the proceedings referred to the Referee in Bankruptcy. On October 14, 1935, the District Court, on a motion by the respondent, dismissed the petition. On March 16, 1936, the debtor attempted to invoke the benefits of the amended § 75 (s), but we are not here concerned with that petition and the subsequent proceedings (set out in *Bank of America National Trust & S. Assn.* v. *Cuccia,* 93 F. (2d) 754, decided December 30, 1937, on rehearing, by the Circuit Court of Appeals for the Ninth Circuit).

The respondent, at the beginning of and throughout the proceedings, held a matured note of the debtor and his wife, secured by a deed of trust on certain lands in the County of San Bernardino, California, and by a mortgage on the crops growing or to be grown on the same lands, during 1933 and 1934, or prior to the payment in full of the total indebtedness. The crop mortgage required the mortgagor to cultivate, harvest and deliver the crop to the mortgagee, without cost to the mortgagee, for sale and application of the proceeds to the debt.

The present controversy had its origin in the respondent's petition to the Court, on February 6, 1936, for an accounting by the conciliation commissioner of funds realized from crops sold off the debtor's premises in 1934. In response to the order of the District Court, the conciliation commissioner made an accounting as appears in

the footnote.[1] The Bank objected to the account on the ground that the money was the proceeds of the sale

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[1] Account—Filed February 17, 1936:

September 26, 1934—An account in the name of Andrea Cuccia and Noah Adair was opened with the American National Bank, San Bernardino, California, and a deposit of $1,437.37 was made	$1,437.37
September 26, 1934—Cash, labor, for 20 men on ranch. Court Order issued *	340.00
October 1, 1934—Andrea Cuccia	59.33
October 30, 1934—Andrea Cuccia, 14 days labor Court order issued	42.00
November 27, 1934—Andrew Cuccia, $15. living expense $20. filing fee under 75(s) and $20. feed for horse. Court order	55.00
December 20, 1934—Andrea Cuccia, $10. feed for horse and $10. living expense	20.00
January 22, 1935—Andrea Cuccia, $20. and labor on grove $144.00	164.00
[fol. 18] January 22, 1935—D. W. Richards indemnity fee under Section 75(s)	18.25
February 1, 1935—Andrea Cuccia, labor, 8 men, 11 days each	264.00
February 15, 1935—Andrea Cuccia labor	90.00
March 15, 1935—Andrea Cuccia, $45. labor; $20. hay and $10. living expense	75.00
April 19, 1935—Jos. E. Rich, Court Reporter	22.50
April 19, 1935—Ralph W. Eckhardt, attorneys fee	50.00
April 19, 1935—Andrea Cuccia, 37 days work of hired men.	111.00
May 11, 1935—Andrea Cuccia, sulphur for grapes	60.00
June 1, 1935—Andrea Cuccia, labor for two men working in grapes	30.00
Total	$1,401.08
Tax, etc	.60
	$1,401.68

Balance in bank to date, $35.69.

* [The "court order" refers to an order entered by petitioner himself. The only order entered by the District Court as to these expenditures was its order of approval of the account filed by petitioner.]

of a crop covered by the chattel mortgage above referred to and that the disbursements from the fund were made without valid order by the District Court and without the Bank's notice or knowledge of any court order. It was further objected that after adjudication in bankruptcy under § 75 (s) the conciliation commissioner had no jurisdiction. Petitioner stated in his answer and testimony that the items appearing prior to the adjudication in bankruptcy of January 7, 1935, were disbursed, on his orders as conciliation commissioner, either to gather the 1934 crop or to provide for care of the property, and that the items appearing from January 22 through June 1, 1935, were disbursed under the direction of the referee in bankruptcy. The District Court, finding that the expenditures of the conciliation commissioner were made in good faith and for the purpose of conserving the estate, settled and allowed the account. The Circuit Court of Appeals directed the disallowance of the account and the payment by the conciliation commissioner to the respondent of the gross proceeds of the mortgaged crop.

First. The powers granted by the bankruptcy clause of the Constitution, Article 1, § 8, cl. 4, are not limited to the bankruptcy law and practice in force in England or the States at the time of its adoption. *Continental Illinois Nat. Bank & T. Co.* v. *Chicago, R. I. & P. Ry. Co.,* 294 U. S. 648, 668. Then the interests of the creditor alone were protected. Progressive liberalization of bankruptcy and insolvency laws, in an effort to avert the evils of liquidation, has furnished opportunity for composition in bankruptcy proceedings and later for composition and extension of debts in relief proceedings for individual debtors, for reorganization of railroads and other corporations, and for public debtor proceedings.[2]

[2] Bankruptcy Act of 1867, as amended by the Act of 1874, c. 390, § 17, 18 Stat. 178, 182; Act of March 3, 1933, c. 204, 47 Stat. 1467; Act of June 7, 1934, c. 424, 48 Stat. 911; Act of June 28, 1934, c.

Section 75 of the Bankruptcy Act [3] provides similar opportunities for the rehabilitation of farmers. *Wright* v. *Vinton Branch Bank,* 300 U. S. 440, 456. It is sought to accomplish this rehabilitation through composition or extension of debts, subsections (e) to (l). On failure of composition and extension, further opportunity for rehabilitation is afforded the debtor, through provisions enabling him to retain possession of his property, under conditions favorable to its ultimate redemption by him. These steps are carried out under judicial supervision, subsection (s).[4]

To accomplish its purpose, § 75 provides that the filing of a petition shall effect a stay.[5] Such a stay under

869, 48 Stat. 1289; Act of April 10, 1936, c. 186, 49 Stat. 1198; Act of April 11, 1936, c. 210, 49 Stat. 1203, Act of August 16, 1937, c. 657, 50 Stat. 653.

[3] Subsections (a) to (r) were added by the Act of March 3, 1933, c. 204, § 1, 47 Stat. 1470–1473, and subsections (a) and (b) amended by the Act of June 7, 1934, c. 424, §§ 8 and 9, 48 Stat. 911, 925. Subsection (s), the first Frazier-Lemke Act, was added June 28, 1934, c. 869, 48 Stat. 1289. Subsequent to the decision in *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555, various subsections, including (s), were amended by the new Frazier-Lemke Act, August 28, 1935, c. 792, 49 Stat. 942.

[4] Subsection (s) in effect at the institution of this proceeding for the relief of a debtor was held unconstitutional in *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555. The new subsection (s) was approved in *Wright* v. *Vinton Branch,* 300 U. S. 440.

[5] Subsection (o) of § 75 (which has never been amended) provides:

"(o) Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings shall not be instituted, or if instituted at any time prior to the filing of a petition under this section, shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the court:

"(1) Proceedings for any demand, debt, or account, including any money demand;

judicial discretion as to enforcement of claims does not take property without due process and is constitutional. *Continental Illinois Nat. Bank & T. Co.* v. *Chicago, R. I. & P. Ry. Co., supra,* at pages 675 *et seq.* and 680 *et seq.; Wright* v. *Vinton Branch, supra,* 460; *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398. In order to operate and protect the property during the stay, and pending confirmation or other disposition of the composition or extension proposal, the statute provides in subsections (e) and (n)[6] for the exercise by the court of "such control

"(2) Proceedings for foreclosure of a mortgage on land, or for cancellation, rescission, or specific performance of an agreement for sale of land or for recovery of possession of land;

"(3) Proceedings to acquire title to land by virtue of any tax sale;

"(4) Proceedings by way of execution, of attachment, or garnishment;

"(5) Proceedings to sell land under or in satisfaction of any judgment or mechanic's lien; and

"(6) Seizure, distress, sale, or other proceedings under an execution or under any lease, lien, chattel mortgage, conditional sale agreement, crop payment agreement, or mortgage."

[6] These subsections, as originally enacted, read:

"(e) . . . After the filing of the petition and prior to the confirmation or other disposition of the composition or extension proposal by the court, the court shall exercise such control over the property of the farmer as the court deems in the best interests of the farmer and his creditors."

"(n) The filing of a petition pleading for relief under this section shall subject the farmer and his property, wherever located, to the exclusive jurisdiction of the court. In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the court, the title, powers, and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition or answer was filed."

Subsection (e) has never been amended. Subsection (n) was amended in respects not material here, by the Act of August 28, 1935, c. 792, 49 Stat. 942.

over the property of the farmer as the court deems in the best interests of the farmer and his creditors." These provisions look toward the maintenance of the farm as a going concern, and afford clear authority, in a proper case, for the continuance of the operations of the farm after the filing of a petition under § 75 of the Bankruptcy Act.

Second. In holding the conciliation commissioner personally liable, we think the lower court misconceived the nature of his office. At the time of filing the original petition for composition and extension, August 6, 1934, § 75 of the Bankruptcy Act was comprised of subsections (a) to (s) inclusive. Subsections (a) to (r) made provision for conciliation commissioners, set up the same qualifications for eligibility to this office as are required for the office of referee, authorized the conciliation commissioners to receive and transmit the petitions and schedules, to call the first meeting of creditors, with notice of terms of composition or extension, to hear the parties in interest, to prepare final inventory, to supervise the farmer's affairs during an extension period and to distribute the consideration after a composition. In accordance with § 75, subsection (b), this Court, as of April 24, 1933, established Rule L, governing proceedings under § 75, (a) to (r) inclusive, as an addition to the General Orders in Bankruptcy, 288 U. S. at 641. Rule L provided for reference to the conciliation commissioner, and his carrying out of the duties outlined above. The commissioner was given, in so far as consistent with § 75 and Rule L, "all the powers and duties of a referee in bankruptcy," to be carried out under the General Orders in Bankruptcy. Rule L (11). Sections 38 and 39 of the Bankruptcy Act and subsections 3 and 6 of Rule L indicate the wide extent of the authority of the conciliation commissioner. Under § 38, Bankruptcy Act, clause four, the referee is empowered to "perform such part of the

duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this Act conferred on courts of bankruptcy . . ."[7]

In view of the foregoing the conciliation commissioner had the authority, prior to the adjudication of bankruptcy under § 75 (s), to act as the "court," in the first instance and subject to review, in controlling the property of the debtor "in the best interests of the farmer and his creditors." § 75 (e). *In re Wiedmer,* 82 F. (2d) 566. Under this authority the conciliation commissioner acted in authorizing the expenditures shown on the account for gathering the crop of 1934, preparing for the crop of 1935, and paying fees and expenses. It is plain that the conciliation commissioner, like the referee (*White* v. *Schloerb,* 178 U. S. 542, 546; *Mueller* v. *Nugent,* 184 U. S. 1, 13) exercises some of the "judicial authority" of the bankruptcy court. The acts just detailed were judicial acts. Error within his jurisdiction does not subject him to personal liability. *Randall* v. *Brigham,* 7 Wall. 523, 535. See also *Bradley* v. *Fisher,* 13 Wall. 335; *Alzua* v. *Johnson,* 231 U. S. 106; *Yaselli* v. *Goff,* 275 U. S. 503. Cf. *First National Bank* v. *Bonner,* 74 F. (2d) 139, 142; *United States* v. *Ward,* 257 Fed. 372,

[7] "Applications of bankrupts for compositions," as used in this clause, does not refer to proceedings of debtor for rehabilitation under § 75. And even under § 12, the referee has authority to proceed with steps preliminary to the application for confirmation of the composition proposal. Cf. General Order XII, paragraph 3; *In re Bloodworth-Stembridge Co.,* 178 Fed. 372.

Rule 77 of the District Court for the Southern District of California reads as follows: "Rule 77.—Jurisdiction of Referees. It is ordered that the Referees in Bankruptcy of said Court be, and they are hereby vested with jurisdiction in all bankruptcy cases within the limits of their respective counties, to perform all the duties conferred on Courts of Bankruptcy, which Referees may be required or authorized to perform; except as otherwise provided by General Order in Bankruptcy No. XII."

377. This doctrine is quite clear when, as here, no rule or positive enactment was violated and the acts were bona fide.

The fact that the proceeds of the crop were banked to the joint account of the debtor and the conciliation commissioner may have obscured the judicial character of the latter. Better practice would suggest that the account appear in the name of the debtor, with the counter-signature of the conciliation commissioner required for withdrawals. Also, at an early, preferably the first, meeting of creditors, the method of handling the business of the debtor pending confirmation or further order should have been developed and proper orders entered. Cf. § 12 (a), Bankruptcy Act. This does not appear to have been done. These irregularities do not suffice to withdraw from the conciliation commissioner his judicial protection. *Alzua* v. *Johnson,* 231 U. S. 106.

Some disbursements were made after the adjudication in bankruptcy under subsection (s) and the reference of the proceedings to a referee in bankruptcy. It is unnecessary to decide whether, under § 75 (s) as originally enacted, the conciliation commissioner could have continued to act as referee. In this case, there was no further reference of the proceedings to petitioner, and he continued to act solely at the direction of the referee in bankruptcy. His uncontradicted testimony was as follows:

"When this matter was referred to D. W. Richards as referee I wanted him to take the money I had on hand and become the custodian of it. He asked me to keep the money and said he would trust me in the expenditure of the money while it was under him and that he would O. K. the checks, so all the checks that were written after it went to D. W. Richards were O. K.'d by him and I wrote the checks at his request."

Without determining the effect of the unconstitutionality of subsection (s) upon the steps taken under its

authority, it appears that the petitioner acted either judicially, continuing to exercise his powers as conciliation commissioner, or ministerially, as an arm of the court, under the direction and with the approval of the referee. Under the facts of this case we do not think petitioner is personally liable for these disbursements. Cf. *First National Bank* v. *Bonner,* 74 F. (2d) 139, 142.

Third. Moreover, the expenditures assailed by respondent were proper, at least with respect to the principal items (which are the only ones we shall consider)—the amounts spent in harvesting the 1934 crop, which was sold in order to create the fund, and the amounts spent for preservation of the vineyard and for the cultivation of the 1935 crop. There is no showing that petitioner was improvident. Reference is made in his account to money paid to the farmer as "living expenses," but the record discloses that the amounts paid the debtor did not exceed the ordinary wages for the work he actually and necessarily performed in the maintenance of the vineyard. Compare *Wright* v. *Vinton Branch, supra,* 300 U. S. at 466; *In re Barrow,* 98 Fed. 582.

The court below ruled that under the crop mortgage the farmer had the obligation to cultivate and harvest the crop at his own expense, and therefore the gross proceeds belonged to respondent. This conclusion disregards the fact that the debtor did not harvest the grapes as an ordinary mortgagor. He had come into court seeking relief under § 75 of the Bankruptcy Act. The filing of his petition put the property in the control of the court and the harvesting of the crop and the preservation of the property became a matter for the concern and action of the court.

Respondent certainly cannot complain of the devotion of the proceeds of the 1934 crop to the cost of harvesting that crop. The care and harvesting of that crop represented the only way to preserve its worth (cf. *Union*

Trust Co. v. *Illinois Midland Ry. Co.,* 117 U. S. 434, 455), and the cost of protecting a fund in court is everywhere recognized as a dominant charge on that fund. See *Bronson* v. *La Crosse R. Co.,* 1 Wall. 405, 410; *Shepherd* v. *Pepper,* 133 U. S. 626, 652; *Thompson* v. *Phenix Ins. Co.,* 136 U. S. 287, 293; *Atlantic Trust Co.* v. *Chapman,* 208 U. S. 360, 376; *Wright* v. *Vinton Branch, supra,* 300 U. S. at 468. The rule applies even in ordinary bankruptcy proceedings [8] since the secured creditor benefits from the disbursement.[9]

And since the creditor in this case had a lien on the crop for future years and on the real estate, we cannot say that the money expended for maintenance of the real estate and toward production of the 1935 crop was not likewise for its benefit. Compare *Wright* v. *Vinton Branch, supra,* 300 U. S. at 468.[10] Respondent itself has

[8] Though the court orders a sale free of liens without the consent of the lienholder, the cost of preserving the property is deducted before the proceeds are turned over to him. *C. B. Norton Jewelry Co.* v. *Hinds,* 245 Fed. 341, 343; *In re N. Y. & Phila. Package Co.,* 225 Fed. 219, 224; *In re Hansen & Birch,* 292 Fed. 898, 899; *In re Westmoreland,* 4 F. (2d) 602, 603; *In re Prince & Walker,* 131 Fed. 546, 551; *In re Davis,* 155 Fed. 671, 673.

[9] See *Virginia Securities Corp.* v. *Patrick Orchards,* 20 F. (2d) 78, 81; *C. B. Norton Jewelry Co.* v. *Hinds,* 245 Fed. 341, 343; *In re Prince & Walker,* 131 Fed. 541, 546.

[10] The Court said:

"(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

suggested, in another connection (see *Bank of America National Trust & S. Assn.* v. *Cuccia, supra*), that the grape vines require "cultivation, pruning and care," lest they "deteriorate." It is unnecessary to determine the effect of an expenditure of the proceeds of a crop where the mortgagee has no lien on the property preserved and protected by the expenditures.

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

Reversed.

MR. JUSTICE MCREYNOLDS concurs in the result.

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

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* BANKLINE OIL CO.*

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

No. 387. Argued February 9, 1938.—Decided March 7, 1938.

1. The deduction for depletion in the taxation of profits from oil and gas wells is allowed as an act of grace, in recognition of the fact that mineral deposits are wasting assets, and is intended as compensation to the owner for the part used up in production. P. 366.

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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."

* Together with No. 388, *Bankline Oil Co.* v. *Commissioner of Internal Revenue,* also on writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit.

2. Making the deduction arbitrary—a per cent. of gross income from the property—was for convenience and did not alter the fundamental theory of the depletion allowance. P. 367.
3. The allowance of a per cent. "of the gross income from the property," i. e. income from oil and gas, is made to the recipients of the gross income by reason of their capital investment in the oil and gas in place. *Id.*
4. A mere processor who derives an economic advantage through contracts with producers of oil or gas but who has no capital investment in the mineral deposit, has not such an "economic interest" in the oil or gas in place that he may have an allowance for their depletion. *Id.*
5. The Revenue Acts of 1926 and 1928 provide that in computing net income there shall, in the case of oil and gas wells, be an allowance for depletion of "27½ per centum of the gross income from the property during the taxable year." The taxpayer, a corporation, derived income from the sale of gasoline which it extracted from "wet" (natural) gas obtained under contracts with producers. The contract in each case required the taxpayer to lay a pipeline from the well to its plant, connecting the pipe with the casing-head or gas trap at the mouth of the well; it required the producer to deliver into the pipeline, at the casing-head or trap, the gas produced at the well; and required the taxpayer to extract the gasoline from the gas so delivered and to pay the producer a specified share of the gross proceeds of its sale or a specified share of the gasoline. *Held*, that the taxpayer was not entitled to an allowance for depletion, since it had no interest in the wells or in the "wet" gas in place, and took no part in the production of it. Pp. 364–367.

   The taxpayer had the right to have the gas delivered, but did not produce it and could not compel its production. The pipelines and equipment, which it provided, facilitated the delivery of the gas produced, but the agreement for their installation granted no interest in the gas in place. Nor was such an interest created by the provision for payment for the gas delivered, whether the payment was made in money out of the proceeds of the gasoline extracted or by delivery of the agreed portion of the gasoline. Whether or not the "wet" gas had a market value and, if it had, whether that value was greater than the amount paid for it, is in no sense determinative. The taxpayer was still a processor, paying for what it received at the well's mouth.

6. Where a State leases its land to a private party for extraction of oil and gas, reserving a royalty, a federal tax on the lessee's profits from the operations is not invalid as an unconstitutional burden on a state instrumentality. *Burnet* v. *Jergins Trust*, 288 U. S. 508. P. 369.

See *Helvering* v. *Mountain Producers Corp.*, *post*, p. 376.

90 F. 2d 899, reversed in part; affirmed in part.

CERTIORARI, 302 U. S. 675, on two petitions, directed to different rulings made in the court below upon review of decisions of the board of Tax Appeals, 33 B. T. A. 910.

Assistant Solicitor General Bell, with whom *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key, A. F. Prescott,* and *Warner W. Gardner* were on the briefs, for the Commissioner.

Mr. Martin J. Weil, with whom *Mr. A. L. Weil* was on the briefs, for the Bankline Oil Company.

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

No. 387.—This case presents the question whether respondent, the Bankline Oil Company, is entitled to an allowance for depletion with respect to gas produced from certain oil and gas wells. The ruling of the Board of Tax Appeals that the taxpayer had no depletable interest (33 B. T. A. 910) was reversed by the Circuit Court of Appeals. 90 F. (2d) 899. Because of an asserted conflict with the principles applicable under the decisions of this Court, we granted certiorari.

Respondent in the years 1927 to 1930 operated a casinghead gasoline plant in the Signal Hill Oil Field, Los Angeles County, California. Respondent had entered into contracts with oil producers for the treatment of wet gas by the extraction of gasoline. The Board of Tax Appeals made the following findings:

Natural gas, commonly known as "wet gas" as it flows from the earth, is not a salable commodity. It is only through processing—by separation of the gasoline therefrom—rendering it dry, that it may be sold for commercial uses. Conversely, it is only through the separation of dry gas from wet gas that the gasoline is salable. It is this process that produces casinghead gasoline. The content of gasoline in wet gas varies from one-half gallon to six gallons a thousand cubic feet of gas produced, depending upon its richness. Respondent's contracts provided, generally, that it should install and maintain the necessary pipe lines and connections from casingheads or traps at the mouth of the well to its plant, through which the producer agreed to deliver the natural gas produced at the well, and that respondent should extract the gasoline therefrom, respondent to pay the producer 33⅓ per cent. of the total gross proceeds derived from the sale of gasoline extracted from wet gas, or, at producer's option, to deliver to the producer 33⅓ per cent. of the salable gasoline so extracted. A slightly different type of contract provided for the outright "purchase" from the producer of all natural gas produced at a given well, the respondent paying 33⅓ per cent. of the gross proceeds received by it from the sale of the gasoline extracted from such gas. Some of the dry gas remaining after removal of the gasoline was blown to the air and wasted because there was no market for it, while some was sold to public utilities, and in that case respondent accounted to the producer for a proportion of the proceeds provided for under the contract, and some was returned to the wells to be used for pressure purposes.

The Government maintains that under the contracts respondent took no part in the production of the wet gas, conducted no drilling operations upon any of the producing premises, did not pump oil or gas from the wells, and

had no interest as lessor or lessee, or as sub-lessor or sub-lessee, in any of the producing wells.

Respondent states that in accordance with the provisions of the contracts it attached pipe lines to the various wells, carried the gas from those wells to its plant, where the gas from the wells of the different producers was commingled, and removed the gasoline therefrom. The gasoline was sold and respondent accounted to each producer "for one-third of the proceeds of the producer's *pro rata* of the gasoline made." Respondent contends that it was entitled to deduct for depletion 27½ per cent. of the difference between the price which it paid for the wet gas and its fair market value at the mouths of the wells. Respondent took the "prevailing royalty," which it deemed to be established by the evidence, as that market value, and treated the difference between the amount respondent paid and the greater prevailing royalty as respondent's gross income for the purpose of applying the statute. Revenue Acts of 1926, § 204 (c) (2), § 234 (a) (8); 1928, § 23 (l) (m), § 114 (b) (3).

The Circuit Court of Appeals was of the opinion that respondent had acquired an economic interest in the wet gas in place and was entitled to an allowance for depletion. But as no finding had been made of the market value of the wet gas, or of respondent's net income from the property, the court remanded the case to the Board of Tax Appeals to the end that respondent might supplement its proof and that an allowance for depletion should be made in accordance with the evidence produced.

In order to determine whether respondent is entitled to depletion with respect to the production in question, we must recur to the fundamental purpose of the statutory allowance. The deduction is permitted as an act of grace. It is permitted in recognition of the fact that the mineral deposits are wasting assets and is intended as compensation to the owner for the part used up in production.

United States v. *Ludey,* 274 U. S. 295, 302. The granting of an arbitrary deduction, in the case of oil and gas wells, of a percentage of gross income was in the interest of convenience and in no way altered the fundamental theory of the allowance. *United States* v. *Dakota-Montana Oil Co.,* 288 U. S. 459, 467. The percentage is "of the gross income from the property,"—a phrase which "points only to the gross income from oil and gas." *Helvering* v. *Twin Bell Syndicate,* 293 U. S. 312, 321. The allowance is to the recipients of this gross income by reason of their capital investment in the oil or gas in place. *Palmer* v. *Bender,* 287 U. S. 551, 557.

It is true that the right to the depletion allowance does not depend upon any "particular form of legal interest in the mineral content of the land." We have said, with reference to oil wells, that it is enough if one "has an economic interest in the oil, in place, which is depleted by production"; that "the language of the statute is broad enough to provide, at least, for every case in which the taxpayer has acquired, by investment, any interest in the oil in place, and secures, by any form of legal relationship, income derived from the extraction of the oil, to which he must look for a return of his capital." *Palmer* v. *Bender, supra.* But the phrase "economic interest" is not to be taken as embracing a mere economic advantage derived from production, through a contractual relation to the owner, by one who has no capital investment in the mineral deposit. See *Thomas* v. *Perkins,* 301 U. S. 655, 661.

It is plain that, apart from its contracts with producers, respondent had no interest in the producing wells or in the wet gas in place. Respondent is a processor. It was not engaged in production. Under its contracts with producers, respondent was entitled to a delivery of the gas produced at the wells, and to extract gasoline therefrom, and was bound to pay to the producers the stipulated amounts. Some of the contracts, reciting that the

producer was the owner of the gas produced, provided for its treatment by respondent. Other contracts were couched in terms of purchase. In either case the gas was to be delivered to respondent at the casingheads or gas traps installed by the producer. Respondent had the right to have the gas delivered, but did not produce it and could not compel its production. The pipe lines and equipment, which respondent provided, facilitated the delivery of the gas produced but the agreement for their installation granted no interest in the gas in place. Nor was such an interest created by the provision for payment for the gas delivered, whether the payment was made in money out of the proceeds of the gasoline extracted or by delivery of the agreed portion of the gasoline. Whether or not the wet gas had a market value and, if it had, whether that value was greater than the amount respondent paid, is in no sense determinative. Respondent was still a processor, paying for what it received at the well's mouth. As the Board of Tax Appeals said: "It is safe to say, we believe, that this petitioner [respondent] had no enforceable rights whatsoever under its contracts prior to the time the wet gas was actually placed in its pipe line, i. e., after it had passed beyond the casingheads and gas traps supplied by the producer into the pipe line, except the right, perhaps, to demand that the producer deliver whatever was produced through its pipe lines for treatment during the period of contractual relationship."

Undoubtedly, respondent through its contracts obtained an economic advantage from the production of the gas, but that is not sufficient. The controlling fact is that respondent had no interest in the gas in place. Respondent had no capital investment in the mineral deposit which suffered depletion and is not entitled to the statutory allowance.

The judgment of the Circuit Court of Appeals in this relation is *reversed* and the decision of the Board of Tax Appeals is affirmed.

No. 388.—In 1929, the State of California leased to J. H. Barneson oil and gas lands in Santa Barbara County, reserving a royalty. We assume, for the purposes of this case, as it was assumed below, that the lease was of tidelands owned by the State. Barneson acted on behalf of petitioner, the Bankline Oil Company, in obtaining the lease, which was duly assigned to petitioner and approved by the State. Claiming that the income received from operations under the lease was exempt from the federal income tax, upon the ground that such a tax would constitute an unconstitutional burden upon a state instrumentality, petitioner sought to recover the tax paid for the year 1930. The Circuit Court of Appeals, affirming the decision of the Board of Tax Appeals (33 B. T. A. 910), overruled petitioner's contention. 90 F. (2d) 899. In view of the importance of the question, certiorari was granted.

We are of opinion that the decision of the Circuit Court of Appeals was right. As petitioner was engaged in its own business in producing the oil, it was bound to pay a federal income tax upon its profits even though its operations were conducted on state lands. We are unable to find any substantial distinction between the instant case and that of *Burnet* v. *Jergins Trust,* 288 U. S. 508, where the city of Long Beach, California, made an oil and gas lease to a private party covering part of a tract owned by the city, the proceeds of the oil and gas sales being divided between the city and the lessee. The claim of immunity by the lessee as an instrumentality of the State, acting through the city, was held to be untenable.

So far as the case of *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, which was distinguished in *Burnet* v. *Jergins Trust, supra,* may be regarded as supporting a dif-

ferent view, it is disapproved. See *Helvering* v. *Mountain Producers Corp., post,* p. 376.

The judgment of the Circuit Court of Appeals with respect to petitioner's income from the lease is affirmed.

Judgment in No. 387 reversed; in No. 388 affirmed.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER concur in the result.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration and decision of this case.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* O'DONNELL.

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

No. 406. Argued February 9, 10, 1938.—Decided March 7, 1938.

A shareholder in a corporation owning oil properties has no interest in the oil and gas in place—no capital investment—which will entitle him to an allowance for depletion under Revenue Act of 1926, §§ 204 (c) (2), 214 (a) (9); nor, upon sale of his shares to one who acquires the wells from the corporation, does he acquire such depletable interest through the vendee's covenant to pay him a portion of the net profits from development and operation of the properties. P. —.

90 F. 2d 907, reversed.

CERTIORARI, 302 U. S. 676, to review the affirmance of a decision of the Board of Tax Appeals, 32 B. T. A. 1277, which overruled a deficiency income tax assessment.

Assistant Solicitor General Bell, with whom *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *A. F. Prescott* were on the brief, for petitioner.

Mr. A. Calder Mackay, with whom *Mr. Thomas R. Dempsey* was on the brief, for respondent.

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

Respondent, Thomas A. O'Donnell, owned one-third of the capital stock of the San Gabriel Petroleum Company. By contract of January 9, 1918, he sold this stock to the Petroleum Midway Company, Ltd. As consideration, the Midway Company agreed to pay to respondent one-third of the net profits from the development and operation of the oil and gas properties then owned by the San Gabriel Company and which the Midway Company agreed to acquire. That acquisition was made, the properties thus acquired were developed and operated, and one-third of the net profits thus derived were paid to respondent to August 4, 1926. With respect to such payments in the years 1925 and 1926, respondent claimed deduction for depletion, which the Board of Tax Appeals allowed, overruling the Commissioner of Internal Revenue. 32 B. T. A. 1277. The Circuit Court of Appeals affirmed the decision of the Board. 90 F. (2d) 907. We granted certiorari. See *Helvering* v. *Bankline Oil Co., ante,* p. 362.

The question is whether respondent had an interest, that is, a capital investment, in the oil and gas in place. Revenue Act of 1926, § 204 (c) (2); § 214 (a) (9). *Palmer* v. *Bender,* 287 U. S. 551, 557; *Helvering* v. *Twin Bell Syndicate,* 293 U. S. 312, 321; *Thomas* v. *Perkins,* 301 U. S. 655, 661; *Helvering* v. *Bankline Oil Co., supra.* As a mere owner of shares in the San Gabriel Company, respondent had no such interest. Treasury Regulations No. 69, Art. 201. The ownership of the oil and gas properties was in the corporation. When the Midway Company acquired these properties from the San Gabriel Company and operated them, the Midway Company became the owner of the oil and gas produced. It was the owner of the gross proceeds or income upon which the statutory allowance for depletion was to be computed.

Helvering v. *Twin Bell Syndicate, supra.* The agreement to pay respondent one-third of the net profits derived from the development and operation of the properties was a personal covenant and did not purport to grant respondent an interest in the properties themselves. If there were no net profits, nothing would be payable to him. No trust was declared by which respondent could claim an equitable interest in the *res.* As consideration for the sale of his stock in the San Gabriel Company respondent bargained for and obtained an economic advantage from the Midway Company's operations but that advantage or profit did not constitute a depletable interest in the oil and gas in place. *Palmer* v. *Bender, supra; Helvering* v. *Bankline Oil Co., supra.*

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

Reversed.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration and decision of this case.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* ELBE OIL LAND DEVELOPMENT CO.

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

No. 446. Argued February 10, 1938.—Decided March 7, 1938.

The taxpayer sold all of its interest in certain oil and gas properties in consideration of cash down and deferred payments in several stated amounts, the agreement further providing that, when the vendee had been reimbursed for expenditures in acquisition, development and operation, the taxpayer should receive one-third of the net profits of production and operation of the properties. *Held:*

1. That there was an absolute sale divesting the taxpayer of all interest or investment in the properties, including oil and gas in place. P. 375.

2. The provision for payment from profits was merely a personal covenant of the vendee. *Id.*

3. The taxpayer is not entitled under the Revenue Act of 1928, § 114 (b) (3) to a deduction for depletion computed on the cash payments. *Id.*

Neither the cash payments nor the agreement for a share of subsequent profits constituted an advance royalty, or a "bonus" in the nature of an advance royalty, within the decisions recognizing a right to the depletion allowance with respect to payments of that sort.

4. The words "gross income from the property," as used in the statute governing the allowance for depletion, mean gross income received from the operation of the oil and gas wells by one who has a capital investment therein,—not income from the sale of the oil and gas properties themselves. P. 375.

91 F. 2d 127, reversed.

CERTIORARI, 302 U. S. 677, to review the reversal of a decision of the Board of Tax Appeals, 34 B. T. A. 333, sustaining the Commissioner's disallowance of deductions for depletion.

Assistant Solicitor General Bell, with whom *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Ellis N. Slack* were on the brief, for petitioner.

Mr. George T. Altman for respondent.

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

The question is whether certain payments received by respondent in the years 1928 and 1929 constituted "gross income from the property," within the meaning of that phrase as used in relation to oil and gas wells in § 114 (b) (3) of the Revenue Act of 1928, so as to entitle respondent to the prescribed depletion allowance. The Cir-

cuit Court of Appeals, reversing the decision of the Board of Tax Appeals (34 B. T. A. 333), sustained respondent's claim. 91 F. (2d) 127. Certiorari was granted because of an asserted conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *Commissioner* v. *Fleming,* 82 F. (2d) 324.

Respondent is a California corporation which acquired certain properties consisting of oil and gas prospecting permits, drilling agreements, leases and equipment. Development work resulted in the discovery of oil. On October 3, 1927, respondent conveyed all its right, title and interest in the described properties to the Honolulu Consolidated Oil Company. The latter agreed to pay to respondent $350,000 upon the execution of the agreement and, if the Honolulu Company should not elect to abandon the purchase (in accordance with one of the stipulations), the additional sums of $400,000 in each of the years 1928, 1929 and 1930, and the further sum of $450,000 in 1931. After the time when the Honolulu Company had been fully reimbursed as provided in the agreement for all its expenditures in the acquisition, development and operation of the properties, respondent was to receive monthly one-third of the net profits resulting from the production and operation. After careful stipulations with respect to such reimbursement and the computation of net profits, the agreement provided:

"Anything in this agreement contained to the contrary notwithstanding, it is the intention of the parties to this agreement that the full ownership, possession and control of all the properties, the subject of this agreement, and of all of the personal property acquired and/or used on and in connection with the operation and development of the properties, the subject of this agreement, shall be vested in Honolulu, and Elbe shall have no interest in or to said properties or in or to any personal property used on or in connection with the operation or development of the said properties or in or to the salvage value of any thereof,

except as provided by paragraph 9" [relating to abandonment of the purchase and reconveyance].

The first payment of $350,000 was received by respondent in 1927 and being greater than the cost of all the properties transferred, respondent reported as taxable income the difference between that cost basis and the amount received. In its income tax returns for the years 1928 and 1929, respondent reported the payments of $400,000 received in each of the years and claimed 27½ per cent. thereof as an allowance for depletion. This is the claim which has been sustained below.

We agree with the conclusion of the Board of Tax Appeals that the contract between the respondent and the Honolulu Company provided for an absolute sale of all the properties in question, including all the oil and gas in place, and that respondent did not retain any interest or investment therein. The aggregate sum of $2,000,000 was paid as an agreed purchase price to which was to be added the one-third of the net profits payable on the conditions specified. We are unable to conclude that the provision for this additional payment qualified in any way the effect of the transaction as an absolute sale or was other than a personal covenant of the Honolulu Company. See *Helvering* v. *O'Donnell, ante,* p. 370. In this view, neither the cash payments nor the agreement for a share of subsequent profits constituted an advance royalty, or a "bonus" in the nature of an advance royalty, within the decisions recognizing a right to the depletion allowance with respect to payments of that sort. Such payments are made to the recipient as a return upon his capital investment in the oil or gas in place. See *Burnet* v. *Harmel,* 287 U. S. 103, 111, 112; *Murphy Oil Co.* v. *Burnet,* 287 U. S. 299, 302. Payments of the purchase price which are received upon a sale of oil and gas properties are in a different category. The words "gross income from the property," as used in the statute governing the allowance for depletion, mean gross in-

come received from the operation of the oil and gas wells by one who has a capital investment therein,—not income from the sale of the oil and gas properties themselves. See *Darby-Lynde Co.* v. *Alexander,* 51 F. (2d) 56, 59. We conclude that as respondent disposed of the properties, retaining no investment therein, it was not entitled to make the deduction claimed for depletion. *Palmer* v. *Bender,* 287 U. S. 551, 557; *Helvering* v. *Twin Bell Syndicate,* 293 U. S. 312, 321; *Thomas* v. *Perkins,* 301 U. S. 655, 661; *Helvering* v. *Bankline Oil Co., ante,* p. 362; *Helvering* v. *O'Donnell, supra.*

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

Reversed.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration and decision of this case.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* MOUNTAIN PRODUCERS CORPORATION.

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

No. 600. Argued February 10, 1938.—Decided March 7, 1938.

1. The allowance for depletion in the case of oil and gas wells is fixed by Rev. Act 1926, § 204 (2), arbitrarily at a specified per cent. of the "gross income from the property," for convenience of administration; the allowance is an act of grace; the rule prescribed can not be varied to suit particular equities; the term "gross income from the property," means gross income from the oil and gas, and must be taken in its natural sense,—such income may be more or less than market value according to the bearing of particular contracts. P. 381.

2. The Rev. Act of 1926 provides that in the case of oil and gas wells "the allowance for depletion shall be 27½ per centum of the gross income from the property during the taxable year." The taxpayer, a corporation owning oil and gas properties, made a contract with a refining company pursuant to which, until a day specified, all the oil produced by the taxpayer was sold to the refiner at prices based on the average price received by the refiner for gasoline and kerosene, the refiner taking delivery from measuring tanks near the wells. As part of the price of the oil purchased, the refiner agreed to conduct the production operations. *Held* that the taxpayer's "gross income from the property" was the sum of the payments received from the refiner without adding the cost of production defrayed by the refiner under the contract. P. 378.

3. A school section, part of the land granted by the United States to the State of Wyoming for educational purposes by the Enabling Act of July 10, 1890, 26 Stat. 222, 223, was leased by the State to a private corporation for production of oil and gas, the State reserving a royalty. The Enabling Act provides that the proceeds of the land shall constitute a permanent school fund, and authorizes the State to lease for not more than five years. The lessee executed a declaration of trust, that it held an undivided 50% of the lease and its net proceeds for the benefit of the taxpayer in this case. *Held:*

(1) That, as respects the power of the Federal Government to tax income from the lease, no distinction can be made between the income received by the lessee and the income received by the *cestui que trust*. Pp. 382–383.

(2) A federal tax on such income is not subject to constitutional objection as a tax upon an instrumentality of the State and as constituting a direct and substantial interference with the execution of the trust assumed by the State under the Enabling Act. Pp. 383–387.

Burnet v. *Coronado Oil & Gas Co.*, 285 U. S. 393 and *Gillespie* v. *Oklahoma*, 257 U. S. 501, overruled.

92 F. 2d 78, reversed.

CERTIORARI, 302 U. S. 681, to review the reversal of a decision of the Board of Tax Appeals, 34 B. T. A. 409, which affirmed, in reduced amount, a deficiency assessment.

Assistant Solicitor General Bell, with whom *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key, Maurice J. Mahoney, Warner W. Gardner,* and *Edward J. Ennis* were on the brief, for petitioner.

Mr. Harold D. Roberts, with whom *Mr. Randolph E. Paul* was on the brief, for respondent.

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

Respondent, Mountain Producers Corporation, owned all the capital stock of the Wyoming Associated Oil Corporation and filed a consolidated income tax return for the year 1925. Two distinct questions are involved with respect to the taxable income of the above-mentioned affiliate. These are (1) as to the amount of the gross income of the affiliate for the purpose of the statutory allowance for depletion in the case of oil and gas wells (Revenue Act of 1926, § 204 (c) (2), § 234 (a) (8)); and (2) as to a claim of exemption from taxation of income received by the affiliate under a trust agreement with the owner of an oil and gas lease from the State of Wyoming. The Board of Tax Appeals decided against respondent upon both points (34 B. T. A. 409) and its decision was reversed by the Circuit Court of Appeals. 92 F. (2d) 78. Because of an asserted conflict with a decision of the Circuit Court of Appeals for the Ninth Circuit in the case of *Bankline Oil Co.* v. *Commissioner,* 90 F. (2d) 899, (see *Helvering* v. *Bankline Oil Co., ante,* p. 362), we granted certiorari.

First.—Wyoming Associated, organized in 1919, held certain placer mining claims, leases and operating agreements in the Salt Creek Oil Field in Natrona County, Wyoming. Pursuant to the Oil and Gas Leasing Act of Congress of February 25, 1920, the company exchanged its placer claims for government leases, and later certain

exchanges were made with the Midwest Oil Company and the Wyoming Oil Fields Company. In 1923, Wyoming Associated made a contract with the Midwest Refining Company by which the former agreed to sell to the latter all the oil produced by it in the Salt Creek Oil Field and the Refining Company agreed to purchase such oil until January, 1934, upon a sliding scale of prices based upon the average price received by the Refining Company for gasoline and kerosene. Wyoming Associated agreed to give the Refining Company free use of all storage facilities, pipe lines, buildings and equipment, and so much of the oil and gas produced as might be reasonably necessary for production purposes. The Refining Company agreed, as part of the price of the oil thus purchased, to drill, case and maintain all wells, supply water, install and operate pumps, and conduct all development and production operations. The Refining Company agreed to take delivery of the purchased oil at the outlet gates of the measuring tanks located at or near the wells.

Respondent contended that the gross income of Wyoming Associated from its properties during the taxable year, for the purpose of the statutory allowance for depletion, consisted of the total cash payments received by Wyoming Associated, plus the cost of production defrayed by the Refining Company under its contract. The amount of that cost was shown by stipulation. The Board of Tax Appeals limited the gross income of Wyoming Associated to the cash payments received. The Circuit Court of Appeals was of the opinion that the cost of production incurred by the Refining Company should be added in the view that, had Wyoming Associated produced the oil at its own expense, its gross income would have been the amount which it received for the oil sold and it would thus have obtained in cash the proportionate amount which represented the cost of the production.

Laying emphasis upon the provision of the contract that the Refining Company should perform its services as a part of the purchase price of the oil, respondent contends that it is irrelevant that the Refining Company acted for its own benefit; that the production and lifting services were performed prior to delivery of the oil, and that the Refining Company was acting as the agent for Wyoming Associated down to the point of delivery and not until then became a vendee; that thus Wyoming Associated did not sell oil under the ground but oil severed from the ground and treated for delivery; that it was not essential for respondent to show that the total price under the contract must be either above or below the market price at any specified time, and that the price as fixed by the contract controlled the dealings and the taxes of the parties. Respondent agrees that an interest in oil or gas or some type of ownership is essential to the right of deduction for depletion and assumes that no one but Wyoming Associated owned any interest in the oil and gas in place.

The Government argues that the cash price received for the oil is the seller's entire "gross income from the property" where, as in this instance, the oil is purchased under a contract by which a refiner agrees to defray the expense of the development and production operations and to pay a cash price based on the prices it obtains for the products it sells at its refinery; that the oil production operations were conducted by the Refining Company for its own benefit in order to obtain the oil at a price it deemed to be favorable; that the method of determining the purchase price under the contract was not related to the field market price of oil but was expressly related to a different basis, which might be greater, that is, to a basis consisting of the current prices obtained by the Refining Company for its gasoline and kerosene; that if the development operations had been unsuccess-

ful and no oil had been produced, the services of the Refining Company would still have been paid for by the owner's promise to sell at a fixed price whatever oil might be produced, and that this should be taken to be the meaning of the provision that the Refining Company should perform its services as part of the price for oil purchased; that the owner of oil in place, instead of preparing it for delivery and sale, may prefer to lessen his work, lower his price and thus decrease his gross income from the property, and in such case the services which the buyer may perform are not to be regarded as part of that income.

We think that the Government's argument is sound. The evident purpose of the statutory provision controls. It is a unique provision to meet a special case. Analogies sought to be drawn from other applications of the revenue acts may be delusive and lead us far from the intent of Congress in this instance. Congress has recognized that in fairness there should be compensation to the owner for the exhaustion of the mineral deposits in the course of production. *United States* v. *Ludey,* 274 U. S. 295, 302. But to appraise the actual extent of depletion on the particular facts in relation to each taxpayer would give rise to problems of considerable perplexity and would create administrative difficulties which it was intended to overcome by laying down a simple rule which could be easily applied. To this end, the taxpayer was permitted to deduct a specified percentage of his gross income from the property. See *United States* v. *Dakota-Montana Oil Co.,* 288 U. S. 459, 461. Congress was free to give such an arbitrary allowance as the deduction was an act of grace. In answer to the contention that the provision may produce "unjust and unequal results," we have remarked that this is likely to be so "wherever a rule of thumb is applied without a detailed examination of the facts affecting each taxpayer." *Helvering* v. *Twin Bell Syndicate,* 293 U. S. 312, 321.

The rule being of this sort for obvious purposes of administrative convenience, we must apply it in the simple manner it contemplates. The 27½ per cent. allowed is a fixed factor, not to be increased or lessened by asserted equities. The term "gross income from the property" means gross income from the oil and gas (*Helvering* v. *Twin Bell Syndicate, supra*) and the term should be taken in its natural sense. With the motives which lead the taxpayer to be satisfied with the proceeds he receives we are not concerned. If, in this instance, the development operations had failed to produce oil, it would hardly be said that the expense of drilling, borne under contract by another, constituted "gross income" of the taxpayer within the meaning of the statute. Nor, when oil or gas is produced, does the statute base the percentage on market value. The gross income from time to time may be more or less than market value according to the bearing of particular contracts. We do not think that we are at liberty to construct a theoretical gross income by recourse to the expenses of production operations. The Refining Company for its own purposes undertook the expense of those operations, and Wyoming Associated was content to receive as its own return the cash payments for the oil produced, leaving to the Refining Company the risks of production.

We are of the opinion that the cash payments made by the Refining Company constituted the gross income of Wyoming Associated and were the basis for the computation of the depletion allowance.

Second.—The State of Wyoming, in 1919, made a lease for the term of five years to the Midwest Oil Company covering a section of "school land" (section 36, township 40 north, range 79 west) for the purpose of producing oil and gas, reserving a royalty to the State. The lease was superseded in 1923 by another lease of like import, running from 1924, the royalty to the State being fixed at 65 per cent. of oil and gas produced. In

1923, the Midwest Oil Company executed a declaration of trust, that it held an undivided 50 per cent. interest in the lease, and in the net proceeds to be realized therefrom, and all renewals thereof, for the benefit of Wyoming Associated. In 1925, the State received the agreed royalty of the oil produced and the proceeds of the sale of the remaining oil were divided between Wyoming Associated and the Midwest Oil Company.

The question is whether Wyoming Associated is subject to a federal income tax with respect to the amount it thus received. Immunity is claimed upon the ground that in this relation Wyoming Associated is a state instrumentality.

By the Enabling Act, the land in question was granted to the State of Wyoming for educational purposes, the proceeds to constitute a permanent school fund. Authority was given to lease such land for not more than five years. Act of July 10, 1890, c. 664, §§ 4, 5, 26 Stat. 222, 223. Apart from the fact that the claim is made by Wyoming Associated by virtue of the declaration of trust, and not by the lessee, the case would fall directly within the decision in *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, relating to a federal tax upon net income derived by a lessee under a lease of "school lands" by the State of Oklahoma. In *Burnet* v. *Jergins Trust,* 288 U. S. 508, we limited the application of the *Coronado* case, saying that the doctrine invoked was to be applied strictly. But a distinction solely upon the ground that the income in the instant case was received under a declaration of trust by the lessee, and not by the lessee itself, does not appear to be substantial and we are of the opinion that the *Coronado* case and the decision upon which it rested should be reconsidered in the light of our other decisions as to the taxing power.

The *Coronado* case was decided as a corollary to the case of *Gillespie* v. *Oklahoma,* 257 U. S. 501. The Court there denied to Oklahoma the right to enforce its tax

upon net income derived by a lessee from sales of his share of oil and gas received under leases of restricted Indian lands. See *Choctaw, O. & G. R. Co.* v. *Harrison,* 235 U. S. 292; *Indian Territory Illuminating Oil Co.* v. *Oklahoma,* 240 U. S. 522. As Oklahoma was thus barred from enforcing its tax upon the income of a federal lessee of Indian lands, the Court in the *Coronado* case held that a similar principle should be applied to the enforcement of a federal tax upon the income of the State's lessee of school lands. In such a case, as the State was executing a trust imposed by Congress as a condition of the State's entering the Union, the cases in which the State had engaged in business enterprises, apart from what should be deemed to be its essential governmental functions, were thought to be inapplicable. 285 U. S. p. 400.

The ground of the decision in the *Gillespie* case, as stated by Mr. Justice Holmes in speaking for the Court, was that "a tax upon the leases" was "a tax upon the power to make them, and could be used to destroy the power to make them" (240 U. S. p. 530) and that a tax "upon the profits of the leases" was "a direct hamper upon the effort of the United States to make the best terms that it can for its wards." In the light of the expanding needs of State and Nation, the inquiry has been pressed whether this conclusion has adequate basis; whether in a case where the tax is not laid upon the leases as such, or upon the government's property or interest, but is imposed upon the gains of the lessee, like that laid upon others engaged in similar business enterprises, there is in truth such a direct and substantial interference with the performance of the government's obligation as to require immunity for the lessee's income. We have held that the ruling in the *Gillespie* case should be limited strictly to cases closely analogous (*Burnet* v. *Coronado Oil & Gas Co., supra*), and the distinctions

thus maintained have attenuated its teaching and raised grave doubt as to whether it should longer be supported.

In numerous decisions we have had occasion to declare the competing principle, buttressed by the most cogent considerations, that the power to tax should not be crippled "by extending the constitutional exemption from taxation to those subjects which fall within the general application of non-discriminatory laws, and where no direct burden is laid upon the governmental instrumentality and there is only remote, if any, influence upon the exercise of the functions of government." *Willcuts* v. *Bunn,* 282 U. S. 216, 225, and illustrations there cited. Thus we have held that the compensation paid by a State or a municipality to a consulting engineer for work on public projects may be subjected to a federal income tax (*Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 524) and that the income of independent contractors engaged in carrying on government enterprises may be taxed. *James* v. *Dravo Contracting Co.,* 302 U. S. 134. We have always recognized that no constitutional implications prohibit a non-discriminatory tax upon the property of an agent of government merely because it is the property of such an agent and used in the conduct of the agent's operations and necessary for the agency. *McCulloch* v. *Maryland,* 4 Wheat. 316, 436; *Railroad Company* v. *Peniston,* 18 Wall. 5, 33; *Alward* v. *Johnson,* 282 U. S. 509, 514. The Congress may tax state banks upon the average amount of their deposits, although deposits of state funds by state officers are included. *Manhattan Company* v. *Blake,* 148 U. S. 412. Both the Congress and the States have the power to tax transfers or successions in case of death, and this power extends to the taxation by a State of bequests to the United States and to the taxation by the Congress of bequests to States or their municipalities. *United States* v. *Perkins,* 163 U. S. 625; *Snyder* v. *Bettman,* 190 U. S. 249, 253, 254.

While a tax on the interest payable on state and municipal bonds has been held to be invalid as a tax bearing directly upon the exercise of the borrowing power of the Government (*Weston* v. *Charleston,* 2 Pet. 449, 468, 469; *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429, 586), the sale of the bonds by their owners after they have been issued by the State or municipality is regarded as a transaction distinct from the contracts made by the government in the bonds themselves, and the profits of such sales are subject to the federal income tax. *Willcuts* v. *Bunn, supra,* p. 227. See, also, *Burnet* v. *Jergins Trust, supra; Helvering* v. *Therrell, ante,* p. 218; and *Helvering* v. *Bankline Oil Co., ante,* p. 362.

In *Group No. 1 Oil Corporation* v. *Bass,* 283 U. S. 279, profits derived by a lessee from the sale of oil and gas produced under a lease from the State of Texas were held not to be immune from federal taxation. This decision was distinguished in the *Coronado* case upon the narrow ground that under the law of Texas the leases effected a present sale to the lessee of the oil and gas in place. In *Indian Territory Oil Co.* v. *Board of Equalization,* 288 U. S. 325, the Court sustained a non-discriminatory *ad valorem* tax imposed by the State of Oklahoma on oil extracted from restricted Indian lands under leases approved by the Secretary of the Interior, where the oil had been removed from the lands and stored in the owner's tanks and the Indians had no further interest in it.

These decisions in a variety of applications enforce what we deem to be the controlling view—that immunity from non-discriminatory taxation sought by a private person for his property or gains because he is engaged in operations under a government contract or lease cannot be supported by merely theoretical conceptions of interference with the functions of government. Regard must be had to substance and direct effects. And where

it merely appears that one operating under a government contract or lease is subjected to a tax with respect to his profits on the same basis as others who are engaged in similar businesses, there is no sufficient ground for holding that the effect upon the Government is other than indirect and remote. We are convinced that the rulings in *Gillespie* v. *Oklahoma, supra,* and *Burnet* v. *Coronado Oil & Gas Co., supra,* are out of harmony with correct principle and accordingly they should be, and they now are, overruled.

In the instant case, we find no ground for concluding that the tax upon the profits of Wyoming Associated derived under its lease from the State constituted any direct and substantial interference with the execution of the trust which the State has assumed, and the decision of the Circuit Court of Appeals to the contrary must be reversed.

Reversed.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration and decision of this case.

MR. JUSTICE BUTLER, dissenting.

At least since *M'Culloch* v. *Maryland* (1819), 4 Wheat. 316, the dual form of government resulting from the adoption of the Constitution has been deemed necessarily to imply that no State may tax the operations of the Federal Government in the exertion of powers that the people delegated to it and that, for the same reason, the Federal Government may not tax the operations of any State in the exertion of any of its essential functions of government. As to that principle, the urgency of governmental demand for money does not justify yielding here. No one can foresee the extent to which the decision just announced surrenders it. The transactions of a State

for the purpose of raising money to provide for schools are admittedly within the principle as heretofore it has been understood and applied. Now this Court makes it lawful for the United States to lay tribute upon them.

A few citations will be sufficient to suggest the character of the change so wrought.

M'Culloch v. *Maryland* held that impliedly the Federal Constitution forbade imposition by Maryland of any tax upon the operations of the Bank of the United States within that State. There Chief Justice Marshall, speaking for a unanimous Court, demonstrates (p. 426): "1st. That a power to create implies a power to preserve. 2nd. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve. 3d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme."

Farmers & Mechanics Bank v. *Minnesota* (1914), 232 U. S. 516, held that a State cannot tax bonds issued by a territory of the United States; that a tax upon the bonds is a tax on the government issuing them; that such a tax, if allowed at all, may be carried to an extent that will entirely arrest governmental operations. The Court rested that decision upon *M'Culloch* v. *Maryland,* saying (p. 521): "The principle has never since been departed from, and has often been reasserted and applied." [1]

Choctaw, O. & G. R. Co. v. *Harrison* (1914), 235 U. S. 292, held that, where by agreement with an Indian tribe the United States assumed a duty in regard to operation of coal mines, the lessees of the mines were instrumentalities of the government and could not be subjected to a state occupation or privilege tax.[2]

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[1] Citing *Osborn* v. *U. S. Bank,* 9 Wheat. 738, 859; *Home Savings Bank* v. *Des Moines,* 205 U. S. 503, 513; *Grether* v. *Wright,* 75 Fed. 742, 753.

[2] Citing *M'Culloch* v. *Maryland,* 4 Wheat. 316; *Farmers & Mechanics Bank* v. *Minnesota,* 232 U. S. 516.

Indian Territory Oil Co. v. *Oklahoma* (1916), 240 U. S. 522, held that oil leases in Oklahoma made by the Osage tribe were under the protection of the Federal Government; that the corporation owning the leases was a federal instrumentality and that therefore the State could not tax its interest in the leases, either directly or by taxing the capital stock of the corporation owning them.[3]

Gillespie v. *Oklahoma* (1922), 257 U. S. 501, held that net income derived from leases like those considered in *Choctaw, O. & G. R. Co.* v. *Harrison, supra,* and *Indian Territory Oil Co.* v. *Oklahoma, supra,* could not be taxed by the State; for the lessee was an instrumentality used by the United States in fulfilling its duties to the Indians.[4] The Court said (p. 506): "The same considerations that invalidate a tax upon the leases invalidate a tax upon the profits of the leases, and, stopping short of theoretical possibilities, a tax upon such profits is a direct hamper upon the effort of the United States to make the best terms that it can for its wards."

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[3] Citing *Choctaw, O. & G. R. Co.* v. *Harrison,* 235 U. S. 292.

[4] Citing *Choctaw, O. & G. R. Co.* v. *Harrison,* 235 U. S. 292; *Indian Territory Oil Co.* v. *Oklahoma,* 240 U. S. 522; *Howard* v. *Gipsy Oil Co.,* 247 U. S. 503; *Large Oil Co.* v. *Howard,* 248 U. S. 549.

As to taxability of gains from interstate commerce, see *U. S. Glue Co.* v. *Oak Creek,* 247 U. S. 321; *Shaffer* v. *Carter,* 252 U. S. 37, 57.

In *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, 399, 400, it is stated that *Gillespie* v. *Oklahoma* has often been referred to as the expression of an accepted principle, citing *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 522; *Jaybird Mining Co.* v. *Weir,* 271 U. S. 609, 613; *Northwestern Mutual Ins. Co.* v. *Wisconsin,* 275 U. S. 136, 140; *Heiner* v. *Colonial Trust Co.,* 275 U. S. 232, 234; *Shaw* v. *Gibson-Zahniser Oil Corp.,* 276 U. S. 575, 579; *Panhandle Oil Co.* v. *Mississippi ex rel. Knox,* 277 U. S. 218, 221, 222; *Carpenter* v. *Shaw,* 280 U. S. 363, 366; *Willcuts* v. *Bunn,* 282 U. S. 216, 229; *Group No. 1 Oil Corp.* v. *Bass,* 283 U. S. 279, 282, 283; *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, 576; *Choteau* v. *Burnet,* 283 U. S. 691, 696.

Jaybird Mining Co. v. *Weir* (1926), 271 U. S. 609, held that where mining land was leased by incompetent Indian owners with the approval of the Secretary of the Interior, in consideration of royalty in kind, a state *ad valorem* tax assessed to lessee on ores in bins on the land, before sale or segregation, was void as an attempt to tax an agency of the Federal Government.[5]

In *Burnet* v. *Coronado Oil & Gas Co.* (1932), 285 U. S. 393, it appeared that lands granted by the United States to Oklahoma for the support of common schools were leased by the State to a private company for extraction of oil and gas, the State reserving a part of the gross production, the proceeds of which were paid into the school fund. We held that the lease was an instrumentality of the State in the exercise of a strictly governmental function, and that application of the federal income tax to the income derived from the lease by the lessee was therefore unconstitutional.[6]

To reach in this case the conclusion that respondent's affiliate is subject to federal income tax on the proceeds of its share of the oil received under the lease of state school lands, this Court expressly overrules *Gillespie* v. *Oklahoma, supra,* and *Burnet* v. *Coronado Oil & Gas Co., supra;* and with them necessarily goes a long line of decisions of this and other courts. The opinion brings forward no real reason for so sweeping a change of con-

[5] Citing *Farmers & Mechanics Bank* v. *Minnesota,* 232 U. S. 516; *Choctaw, O. & G. R. Co.* v. *Harrison,* 235 U. S. 292; *Indian Territory Oil Co.* v. *Oklahoma,* 240 U. S. 522; *Gillespie* v. *Oklahoma,* 257 U. S. 501; *Howard* v. *Gipsy Oil Co.,* 247 U. S. 503; *Large Oil Co.* v. *Howard,* 248 U. S. 549.

[6] Following *Gillespie* v. *Oklahoma,* 257 U. S. 501. Citing *Texas* v. *White,* 7 Wall. 700, 725; *Collector* v. *Day,* 11 Wall. 113; *Pollock* v. *Farmers Loan & Trust Co.,* 157 U. S. 429, 584; *Farmers & Mechanics Bank* v. *Minnesota,* 232 U. S. 516, 527.

struction of the Constitution. It is to the plain disadvantage of Indian wards of the National Government and school children of the several States; it threatens many business arrangements that have been made for their benefit.

I dissent.

MR. JUSTICE MCREYNOLDS concurs in this opinion.

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

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

No. 324. Argued January 14, 1938.—Decided March 7, 1938.

Section 293 (b) of the Revenue Act of 1928, Title I, provides that, if any part of a deficiency is due to fraud with intent to evade tax, 50% of the total amount of the deficiency (in addition to such deficiency) shall be assessed, collected and paid. Section 146 (b) of the same Title declares that any person who wilfully attempts in any manner to evade or defeat any tax imposed by the Title, shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction be subject to fine and imprisonment.

Held: That an acquittal of a charge of wilful attempt to evade, under § 146 (b), does not bar assessment and collection of the 50% addition prescribed by § 293 (b). P. 397 *et seq.*

The doctrine of *res judicata* is inapplicable because of the difference in quantum of proof in civil and criminal cases; the acquittal was merely an adjudication that the proof was not sufficient to overcome all reasonable doubt of guilt. P. 397.

The doctrine of double jeopardy is inapplicable because the 50% addition to tax provided by § 293 (b) is not primarily punitive but is a remedial sanction imposed as a safeguard for protection of the revenue and to reimburse the Government for expense and loss resulting from the taxpayer's fraud. As such it may be enforced by a civil procedure to which the accepted rules and

constitutional guaranties governing the trial of criminal prosecutions do not apply. P. 398.

Coffee v. *United States,* 116 U. S. 436, and *United States* v. *La Franca,* 282 U. S. 568, distinguished.

89 F. 2d 873, reversed.

CERTIORARI, 302 U. S. 670, to review a judgment reversing in part a decision of the Board of Tax Appeals, 32 B. T. A. 1093, which sustained a deficiency income tax assessment, with a 50% addition for fraud.

Mr. Edward S. Greenbaum, with whom *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Lucius A. Buck* were on the brief, for petitioner.

Mr. William Wallace for respondent.

The fifty per centum addition to the tax deficiency is a penalty intended for punishment.

As fraud presupposes a plan conceived before its execution, it must of necessity be wilful. There can be no act of fraudulent evasion under § 293 (b) that would not also be a wilful evasion under § 146 (b). The penalty prescribed by § 293 (b) is imposed only because of acts which, when committed, constitute a crime.

The fact that the words "tax" or "addition to the deficiency" are used to describe the imposition, or that collection is made through the Bureau of Internal Revenue of the Treasury Department, is of no significance if the real purpose of the imposition is to define and suppress a crime. *Child Labor Tax Case,* 259 U. S. 20; *Helwig* v. *United States,* 188 U. S. 605; *Dorsheimer* v. *United States,* 7 Wall. 166.

Even though termed a tax, the assessment is under suspicion of not being a true tax, when levied because of illegal acts. *United States* v. *La Franca,* 282 U. S. 568. If "evidence of a crime is essential to the imposition of

a tax, the courts do not hesitate to pronounce it a penalty, even if it may incidentally bring in revenue." *Regal Drug Corp.* v. *Wardell,* 260 U. S. 386; *Lipke* v. *Lederer,* 269 U. S. 557. Nor does the fact that the penalty may be superimposed on what is clearly a tax lessen the penal character of the former. *Helwig* v. *United States, supra,* 614–616; 17 Ops. Atty. Gen. 433; 23 Ops. Atty. Gen. 398.

A review of the decisions of this Court compels us to the conclusion that (1) if a so-called tax is meant primarily to suppress a certain kind of conduct, rather than to supply regular revenue for the support of the Government, or (2) if the addition is greatly out of proportion to the ordinary tax, or (3) if it is levied upon a particular act because of its fraud, then it is regarded as a penalty and punishment rather than a mere tax. Cases *supra,* and *Passavant* v. *United States,* 148 U. S. 214; *Wright* v. *Blakeslee,* 101 U. S. 174; *Bartlett* v. *Kane,* 16 How. 263; *Moore Shipbuilding Co.* v. *United States,* 50 F. 2d 288. *Tayloe* v. *Sandford,* 7 Wheat. 13, 17; and *Stearns* v. *United States,* 22 Fed. Cas. 1188, 1192, distinguished.

All of the cases above cited which held the addition to be a penalty or punishment were civil in their nature. In all of them the rules of evidence and of procedure applicable to civil actions were applied, except that the defendant could not be compelled to bear witness against himself. *Lees* v. *United States,* 150 U. S. 476, 480; *Boyd* v. *United States,* 116 U. S. 616. This application of rules of civil procedure included admissibility of evidence, *United States* v. *Zucker,* 161 U. S. 475, also quantum of proof, *United States* v. *Regan,* 232 U. S. 37, and direction of verdicts, *Hepner* v. *United States,* 213 U. S. 103. The penalties were either assessed by administrative officials or sued for in a civil action.

Despite the fact that the statutory provisions so enforced were civil in their nature, or at most *quasi criminal*—this term was applied to them in *Boyd* v. *United States, supra,* (p. 634)—they were uniformly held to be penalties, *i. e.,* punishment for wrongful conduct. In none of the cases did the fact of adherence to the civil forms of action militate against a determination that the imposition was penal in character. *Oceanic Navigation Co.* v. *Stranahan,* 214 U. S. 320, distinguished.

Neither the method of collection nor the taxpayer's inability to invoke the aid of equity to enjoin collection are determinative of the punitive character of such additions. *Helwig* v. *United States, supra; United States* v. *Chouteau,* 102 U. S. 603, 611; *Dorsheimer* v. *United States, supra.*

In *Stockwell* v. *United States,* 13 Wall. 531, no question of double jeopardy was presented nor did the Court by using the word "compensatory" mean to detract from the essentially punitive character of the penalty.

The constitutional provisions against double jeopardy bar any present imposition of the fifty per centum addition to the tax. *Boyd* v. *United States,* 116 U. S. 616; *Murphy* v. *United States,* 272 U. S. 630; *United States* v. *Warner Brothers Pictures, Inc.,* 13 F. Supp. 614; *United States* v. *Donaldson-Shultz Co.,* 148 Fed. 581; *United States* v. *Chouteau,* 102 U. S. 603; *Coffey* v. *United States,* 116 U. S. 436; *Various Items* v. *United States,* 282 U. S. 577; *United States* v. *Glidden Co.,* 78 F. 2d 639; 296 U. S. 652.

All the facts and intents requisite to the imposition of the 50% addition to the deficiency were put in issue and determined against the Government in the criminal trial, and the judgment of acquittal bars petitioner from obtaining a second judgment based upon the same facts and intents.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Revenue Act of 1928, c. 852, § 293, 45 Stat. 791, provides, in dealing with assessment of deficiencies in income tax returns:

"(b) *Fraud.*—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected and paid. . . ."

The question for decision is whether assessment of the addition is barred by the acquittal of the defendant on an indictment under § 146 (b) of the same Act for a wilfull attempt to evade and defeat the tax.

The Commissioner of Internal Revenue found that Charles E. Mitchell of New York had, in his income tax return for the year 1929, fraudulently deducted from admitted gross income an alleged loss of $2,872,305.50 from a purported sale of 18,300 shares of National City Bank stock to his wife; that he had fraudulently failed to return the sum of $666,666.67 received by him as a distribution from the management fund of the National City Company, of which he was chairman; and that these fraudulent acts were done with intent to evade the tax. On December 8, 1933, the Commissioner notified Mitchell that there was a deficiency in his tax return of $728,709.84 and, on account of the fraud, a 50 per cent. addition thereto in the sum of $364,354.92.

Mitchell appealed to the Board of Tax Appeals, which sustained the Commissioner's determination. 32 B. T. A. 1093. Upon a petition for review, the Circuit Court of Appeals concluded that there was ample evidence to support the Board's findings that Mitchell had fraudulently made deduction of the loss and that he had fraudulently failed to return the amount received from the management fund; and that, despite the facts hereafter stated,

the Board was free to find the facts according to the evidence. It accordingly affirmed the assessment of the deficiency of $728,709.84. But it reversed the Board's approval of the additional assessment of $364,354.92, because of the following facts:

Before the deficiency assessment was made Mitchell had been indicted in the federal court for southern New York under § 146 (b) of the Revenue Act of 1928, which provides:

"Any person . . . who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than 5 years, or both, together with the costs of prosecution."

The first count charged that Mitchell "unlawfully, willfully, knowingly, feloniously, and fraudulently did attempt to defeat and evade an income tax of, to wit, $728,709.84, upon his net income for 1929." He was tried on the indictment and acquitted on all the counts. The item of $728,709.84 set out in the first count is the same item as that involved in the deficiency assessed; and both arose from the same transactions of Mitchell. But the addition of $364,354.92 by reason of fraud was not involved in the indictment.

The Circuit Court of Appeals held that the prior judgment of acquittal was not a bar under the doctrine of *res judicata;* and hence it affirmed the assessment of the $728,709.84. But it held that our decisions in *Coffey* v. *United States,* 116 U. S. 436, and *United States* v. *La Franca,* 282 U. S. 568, required it "to treat the imposition of the penalty of 50 per cent. as barred by the prior acquittal of Mitchell in the criminal action." 89 F. (2d) 873. Mitchell's petition for certiorari to review so much of the judgment as upheld the assessment of the de-

ficiency of $728,709.84 was denied. 302 U. S. 723. The Commissioner's petition to review so much of the judgment as denied the 50 per centum in addition was granted, because of the importance in the administration of the revenue laws of the questions presented and alleged conflict in decisions. 302 U. S. 670.

First. Mitchell contends that the claim for the 50 per cent. is barred by the doctrine of *res judicata.* He asserts that all the facts and intents requisite to the imposition of the 50 per centum addition to the deficiency were put in issue and determined against the Government in the criminal trial, and that hence, under the doctrine of *res judicata* the judgment of acquittal bars it from obtaining a second judgment based upon the same facts and intents. Since this proceeding to determine whether the amount claimed is payable as a tax is a proceeding different in its nature from the indictment for the crime of wilfully attempting to evade the tax, the contention that the doctrine of estoppel by judgment applies rests wholly on the assertion that the issues here presented were litigated and determined in the criminal proceeding. Compare *Tait* v. *Western Maryland Ry. Co.,* 289 U. S. 620, 623. But this is not true.

The difference in degree of the burden of proof in criminal and civil cases precludes application of the doctrine of *res judicata.* The acquittal was "merely . . . an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused." *Lewis* v. *Frick,* 233 U. S. 291, 302. It did not determine that Mitchell had not wilfully attempted to evade the tax. That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled. *Stone* v. *United States,* 167 U. S. 178, 188; *Murphy* v. *United States,* 272 U. S. 630, 631, 632. Compare *Chantangco* v. *Abaroa,* 218 U. S.

476, 481, 482.[1] Where the objective of the subsequent action likewise is punishment, the acquittal is a bar, because to entertain the second proceeding for punishment would subject the defendant to double jeopardy; and double jeopardy is precluded by the Fifth Amendment whether the verdict was an acquittal or a conviction. *Murphy* v. *United States,* 272 U. S. 630, 632.

The Government urges that application of the doctrine of *res judicata* is precluded also by the difference in the issues presented in the two cases; that although the indictment and this proceeding arise out of the same transactions and facts, the issues in them are not the same; that on the indictment the issue was whether Mitchell had "willfully" attempted to "evade or defeat" the tax; that whether he had done so "fraudulently" was not there an issue, *United States* v. *Scharton,* 285 U. S. 518; compare *United States* v. *Murdock,* 290 U. S. 389, 397; and that in this proceeding the issue is specifically whether the deficiency was "due to fraud." Compare *Burton* v. *United States,* 202 U. S. 344, 380. Since there was not even an adjudication that Mitchell did not wilfully attempt to evade or defeat the tax, it is not necessary to decide whether such an adjudication would be decisive also of this issue of fraud. Compare *Hanby* v. *Commissioner,* 67 F. (2d) 125, 129.

Second. Mitchell contends that this proceeding is barred under the doctrine of double jeopardy because the 50 per centum addition of $364,354.92 is not a tax, but a criminal penalty intended as punishment for allegedly fraudulent acts. Unless this sanction was intended as punishment, so that the proceeding is essentially criminal,

[1] *United States* v. *Warner Bros. Pictures, Inc.,* 13 F. Supp. 614 (E. D. Mo.), affirmed on other grounds, 298 U. S. 643; *United States* v. *Donaldson-Schultz Co.,* 148 Fed. 581 (C. C. A. 4); *United States* v. *Schneider,* 35 Fed. 107 (C. C. D. Ore.); *Sanden* v. *Morgan,* 225 Fed. 266, 268–69 (S. D. N. Y.)

the double jeopardy clause provided for the defendant in criminal prosecutions is not applicable.

1. In assessing income taxes the Government relies primarily upon the disclosure by the taxpayer of the relevant facts. This disclosure it requires him to make in his annual return. To ensure full and honest disclosure, to discourage fraudulent attempts to evade the tax, Congress imposes sanctions. Such sanctions may confessedly be either criminal or civil. As stated in *Oceanic Steam Navigation Co.* v. *Stranahan,* 214 U. S. 320, 339:

"In accord with this settled judicial construction, the legislation of Congress from the beginning, not only as to tariff but as to internal revenue, taxation and other subjects, has proceeded on the conception that it was within the competency of Congress, when legislating as to matters exclusively within its control, to impose appropriate obligations and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power."

Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense. The question for decision is thus whether § 293 (b) imposes a criminal sanction. That question is one of statutory construction. Compare *Murphy* v. *United States,* 272 U. S. 630, 632.

Remedial sanctions may be of varying types. One which is characteristically free of the punitive criminal element is revocation of a privilege voluntarily granted.[2]

[2] Typical of this class of sanctions is the deportation of aliens. *Fong Yue Ting* v. *United States,* 149 U. S. 698; *Low Wah Suey* v. *Backus,* 225 U. S. 460; *Zakonaite* v. *Wolf,* 226 U. S. 272; *Bugajewitz* v. *Adams,* 228 U. S. 585; *Ng Fung Ho* v. *White,* 259 U. S. 276; *United States ex rel. Bilokumsky* v. *Tod,* 263 U. S. 149. Disbarment is likewise a sanction of this type. *Ex parte Wall,* 107 U. S

Forfeiture of goods or their value and the payment of fixed or variable sums of money are other sanctions which have been recognized as enforcible by civil proceedings since the original revenue law of 1789. Act of July 31, 1789, c. 5, § 36, 1 Stat. 29, 47. In spite of their comparative severity, such sanctions have been upheld against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions. *Passavant* v. *United States,* 148 U. S. 214; *United States* v. *Zucker,* 161 U. S. 475; *Hepner* v. *United States,* 213 U. S. 103; *Oceanic Steam Navigation Co.* v. *Stranahan,* 214 U. S. 320; *Chicago, B. & Q. Ry. Co.* v. *United States,* 220 U. S. 559, 578; *United States* v. *Regan,* 232 U. S. 37; *Grant Bros. Construction Co.* v. *United States,* 232 U. S. 647, 660; *Murphy* v. *United States,* 272 U. S. 630; *Various Items* v. *United States,* 282 U. S. 577; *Lloyd Sabaudo Societa* v. *Elting,* 287 U. S. 329, 334.[3]

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265. Compare also *Hawker* v. *New York,* 170 U. S. 189, 196, 199–200; *Board of Trade* v. *Wallace,* 67 F. (2d) 402, 407 (C. C. A. 7); *Farmers' Livestock Commission Co.* v. *United States,* 54 F. (2d) 375, 378 (E. D. Ill.).

[3] See also notes 7 to 13, *infra.* The distinction here taken between sanctions that are remedial and those that are punitive has not generally been specifically enunciated. In determining whether particular rules of criminal procedure are applicable to civil actions to enforce sanctions, the cases have usually attempted to distinguish between the type of procedural rule involved rather than the kind of sanction being enforced. Thus *Hepner* v. *United States,* 213 U. S. 103, 111–112, holding that a verdict may be directed for the Government, and *United States* v. *Regan,* 232 U. S. 37, 50, holding that the Government need not prove its case beyond a reasonable doubt, distinguished *Boyd* v. *United States,* 116 U. S. 616, and *Lees* v. *United States,* 150 U. S. 476, holding that the defendant could not be required to be a witness against himself on the ground that "the guaranty in the Fifth Amendment to the Constitution against compulsory self-incrimination . . . is of broader scope than are the guaranties in Article III and the Sixth Amendment governing trials in criminal prosecutions." 232 U. S. at 50. Compare also *Pierce* v. *United States,* 255 U. S. 398, 401.

2. The remedial character of sanctions imposing additions to a tax has been made clear by this Court in passing upon similar legislation. They are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud.[4] In *Stockwell* v. *United States,* 13 Wall. 531, 547, 551, the Court said of a provision which added double the value of the goods:

"It must therefore be considered as remedial, as providing indemnity for loss. And it is not the less so because the liability of the wrongdoer is measured by double the value of the goods received, concealed, or purchased, instead of their single value. The act of abstracting goods illegally imported, receiving, concealing or buying them, interposes difficulties in the way of a government seizure, and impairs, therefore, the value of the government right. It is, then, hardly accurate to say that the only loss the government can sustain from concealing the goods liable to seizure is their single value, or to assert that the liability imposed by the statute of double the value is arbitrary and without reference to indemnification. Double the value may not be more than complete indemnity. . . .

"The act of 1823 was, as we have seen, remedial in its nature. Its purpose was to secure full compensation for interference with the rights of the United States. . . ." [5]

3. In §§ 276 and 293 it is provided that collection of the 50 per centum addition, like that of the primary tax it-

[4] *Taylor* v. *United States,* 3 How. 197, 210; *Bartlett* v. *Kane,* 16 How. 263, 274; *Cliquot's Champagne,* 3 Wall. 114, 145; *Dorsheimer* v. *United States,* 7 Wall. 166, 173; *Passavant* v. *United States,* 148 U. S. 214, 221. Compare *McDowell* v. *Heiner,* 9 F. (2d) 120 (W. D. Pa.), affirmed on opinion below, 15 F. (2d) 1015 (C. C. A. 3); *Doll* v. *Evans,* 7 Fed. Cas. No. 3,969 (C. C. E. D. Pa.); *Stearns* v. *United States,* 22 Fed. Cas. No. 13,341 (C. C.).

[5] Compare *United States* v. *Claflin,* 97 U. S. 546, 552–53.

self, may be made "by distraint" as well as "by a proceeding in court." If the section provided a criminal sanction, the provision for collection by distraint would make it unconstitutional.[6] Compare *Lipke* v. *Lederer*, 259 U. S. 557; *Regal Drug Corp.* v. *Wardell*, 260 U. S. 386. See also *United States* v. *Chouteau*, 102 U. S. 603, 611; *Boyd* v. *United States*, 116 U. S. 616; *Lees* v. *United States*, 150 U. S. 476; *United States* v. *La Franca*, 282 U. S. 568. That Congress provided a distinctly civil procedure for the collection of the additional 50 per centum indicates clearly that it intended a civil, not a criminal, sanction. Civil procedure is incompatible with the accepted rules and constitutional guaranties governing the trial of criminal prosecutions, and where civil procedure is prescribed for the enforcement of remedial sanctions, those rules and guaranties do not apply. Thus the determination of the facts upon which liability is based may be by an administrative agency instead of a jury,[7] or if the prescribed proceeding is in the form of a civil suit,

[6] Even though Congress may not provide civil procedure for the enforcement of punitive sanctions, nothing in the Constitution prevents the enforcement of distinctly remedial sanctions by a criminal instead of a civil form of proceeding. Compare *United States* v. *Stevenson*, 215 U. S. 190, with *United States* v. *Regan*, 232 U. S. 37, both enforcing the sanction prescribed in 34 Stat. 898. The fact that a criminal procedure is prescribed for the enforcement of a sanction may be an indication that it is intended to be punitive, but cannot be deemed conclusive if alternative enforcement by a civil proceeding is sustained.

[7] *Passavant* v. *United States*, 148 U. S. 214; *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U. S. 320; *Elting* v. *North German Lloyd*, 287 U. S. 324, 327–28; *Lloyd Sabaudo Societa* v. *Elting*, 287 U. S. 329, 334; cf. *Hamburg-American Line* v. *United States*, 291 U. S. 420; *Osaka Shosen Kaisha Line* v. *United States*, 300 U. S. 98. Compare also *San Souci* v. *Compagnie Francaise de Navigation A Vapeur*, 71 F. (2d) 651, 653 (C. C. A. 1); *Lloyd Royal Belge, S. A.* v. *Elting*, 61 F. (2d) 745, 747 (C. C. A. 2); *Navigazione Libera Triestina* v. *United States*, 36 F. (2d) 631, 633

a verdict may be directed against the defendant;[8] there is no burden upon the Government to prove its case beyond a reasonable doubt,[9] and it may appeal from an adverse decision;[10] furthermore, the defendant has no constitutional right to be confronted with the witnesses

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(C. C. A. 9); *Clay* v. *Swope,* 38 Fed. 396 (C. C. D. Ky.). And see cases cited in note 2, *supra.*

Administrative determination of sanctions imposed by the income tax laws has likewise been upheld. *Berlin* v. *Commissioner,* 59 F. (2d) 996, 997 (C. C. A. 2); *McDowell* v. *Heiner,* 9 F. (2d) 120 (W. D. Pa.), aff'd on opinion below, 15 F. (2d) 1015 (C. C. A. 3); *Board* v. *Commissioner,* 51 F. (2d) 73, 76 (C. C. A. 6); *Wickham* v. *Commissioner,* 65 F. (2d) 527, 531–32 (C. C. A. 8); *Little* v. *Helvering,* 75 F. (2d) 436, 439 (C. C. A. 8); *Bothwell* v. *Commissioner,* 77 F. (2d) 35, 38 (C. C. A. 10); *Doll* v. *Evans,* Fed. Cas. No. 3,969 (C. C. E. D. Pa.).

[8] *Hepner* v. *United States,* 213 U. S. 103; *Four Packages* v. *United States,* 97 U. S. 404, 412; *Chicago, B. & Q. Ry. Co.* v. *United States,* 220 U. S. 559, 578. Compare *United States* v. *Thompson,* 41 Fed. 28 (C. C. S. D. N. Y.); *United States* v. *Atlantic Coast Line,* 182 Fed. 284 (S. D. Ga.).

[9] *Lilienthal's Tobacco* v. *United States,* 97 U. S. 237, 265–67, 271; *United States* v. *Regan,* 232 U. S. 37; *Grant Bros. Construction Co.* v. *United States,* 232 U. S. 647, 660. Compare *New York Central & H. R. R. Co.* v. *United States,* 165 Fed. 833, 839 (C. C. A. 1); *Grain Distillery No. 8* v. *United States,* 204 Fed. 429 (C. C. A. 4); *Pocahontas Distilling Co.* v. *United States,* 218 Fed. 782, 786 (C. C. A. 4); *United States* v. *Louisville & N. Ry. Co.,* 162 Fed. 185 (S. D. Ala.), aff'd, 174 Fed. 1021 (C. C. A. 5); *St. Louis-S. W. Ry. Co.* v. *United States,* 183 Fed. 770, 771 (C. C. A. 5); *United States* v. *Illinois Central R. Co.,* 170 Fed. 542, 545–546 (C. C. A. 6); *Atchison, T. & S. F. Ry. Co.* v. *United States,* 178 Fed. 12, 14 (C. C. A. 8); *Missouri, K. & T. Ry. Co.* v. *United States,* 178 Fed. 15, 17–18 (C. C. A. 8). Compare also Act of March 2, 1799, c. 22, § 71, 1 Stat. 627, 678; *Locke* v. *United States,* 7 Cranch 339, 348; *Cliquot's Champagne,* 3 Wall. 114, 143–44.

[10] Compare *United States* v. *Claflin,* 97 U. S. 546; *United States* v. *Zucker,* 161 U. S. 475; *United States* v. *Regan,* 232 U. S. 37. See also *United States* v. *Baltimore & O. S. W. R. Co.,* 159 Fed. 33, 38 (C. C. A. 6), modified, 220 U. S. 94; *United States* v. *Louisville &*

against him,[11] or to refuse to testify;[12] and finally, in the civil enforcement of a remedial sanction there can be no double jeopardy.[13]

4. The fact that the Revenue Act of 1928 contains two separate and distinct provisions imposing sanctions, and that these appear in different parts of the statute, helps to make clear the character of that here invoked.[14] The sanction of fine and imprisonment prescribed by § 146 (b) for wilfull attempts "in any manner to evade or de-

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N. R. Co., 167 Fed. 306, 307–308 (C. C. A. 6); *United States* v. *Illinois Central R. Co.*, 170 Fed. 542, 545 (C. C. A. 6). Compare *United States* v. *Sanges*, 144 U. S. 310.

Similarly, if the Government is successful it may recover costs as in other civil suits. *Grant Bros. Construction Co.* v. *United States*, 232 U. S. 647, 665. See also *United States* v. *Southern Pacific Co.*, 172 Fed. 909, 911 (C. C. D. Ore.); *United States* v. *Minneapolis, St. P. & S. S. M. Ry. Co.*, 235 Fed. 951, 952–953 (D. Minn.).

[11] *United States* v. *Zucker*, 161 U. S. 475; *Grant Bros. Construction Co.* v. *United States*, 232 U. S. 647, 660.

[12] Compare *United States ex rel. Bilokumsky* v. *Tod*, 263 U. S. 149, 155. We do not construe *Boyd* v. *United States*, 116 U. S. 616, or *Lees* v. *United States*, 150 U. S. 476, as holding to the contrary where the sanction involved is remedial, not punitive. See note 3, *supra*.

[13] *Murphy* v. *United States*, 272 U. S. 630; *Various Items* v. *United States*, 282 U. S. 577. Compare *Egner* v. *United States*, 16 F. (2d) 597 (C. C. A. 3); *Wood* v. *United States*, 204 Fed. 55, 57 (C. C. A. 4); *United States* v. *St. Louis-S. W. Ry. Co.*, 184 Fed. 28, 32 (C. C. A. 5); *Slick* v. *United States*, 1 F. (2d) 897, 898 (C. C. A. 7). See also *United States* v. *Three Copper Stills*, 47 Fed. 495, 499 (D. Ky.); *United States* v. *Olsen*, 57 Fed. 579, 582–586 (N. D. Cal.); *Castle* v. *United States*, 17 F. Supp. 515, 518–520 (Ct. Cl.). Compare *Hanby* v. *Commissioner*, 67 F. (2d) 125 (C. C. A. 4).

[14] The Board of Tax Appeals said in Mitchell *v.* Commissioner, 32 B. T. A. 1093, 1136: "A careful study of the two sections convinces us that they are basically different in character and were enacted for wholly different purposes. The language of the two sections differs widely and contemplates situations which may require entirely dissimilar proof."

feat any [income] tax," introduced into the Act under the heading "Penalties," is obviously a criminal one. The sanction of 50 per centum addition "if any part of any deficiency is due to fraud with intent to evade tax," prescribed by § 293 (b), introduced into the Act under the heading "Additions to the Tax," was clearly intended as a civil one. This sanction, and other additions to the tax, are set forth in Supplement M, entitled "Interest and Additions to the Tax." The supplement includes, besides § 293 (b), §§ 291, 292, 293 (a) and 294. Section 291 prescribes a 25 per centum addition for failure to make and file a return; § 292 prescribes interest at the rate of 6 per cent. per annum upon the deficiency from the date prescribed for payment of the tax; § 293 (a), an addition of 5 per centum if the deficiency "is due to negligence, or intentional disregard of rules and regulations but without intent to defraud"; and § 294 prescribes an addition to the tax of 1 per centum per month in case of non-payment. Obviously all of these "Additions to the Tax" were intended by Congress as civil incidents of the assessment and collection of the income tax.[15]

Third. Mitchell insists that *Coffey* v. *United States,* 116 U. S. 436, requires affirmance of the judgment; the Government argues that this case is distinguishable, and, if not, that it should be disapproved. The Circuit Court of Appeals, citing *Stone* v. *United States,* 167 U. S. 178, 186–189, and later cases, recognized that the rule of the *Coffey* case "did not apply to a situation where there had been an acquittal on a criminal charge followed by a civil action requiring a different degree of proof"; but

[15] Section 104 imposes a somewhat similar additional tax of 50 per cent. of the net income in the case of corporations formed or availed of for the purpose of avoiding surtax on their shareholders through improper accumulation of surplus. Compare *United Business Corp.* v. *Commissioner,* 62 F. (2d) 754 (C. C. A. 2).

construing § 293 (b) as imposing a penalty designed to punish fraudulent tax dodgers "and not as a mere preventive measure," it thought that the *Coffey* case and *United States* v. *La Franca,* 282 U. S. 568, required it "to treat the imposition of the penalty of 50 per cent. as barred by the prior acquittal of Mitchell in the criminal action." Since we construe § 293 (b) as imposing a civil administrative sanction, neither case presents an obstacle to the recovery of the $364,354.92, the 50 per centum addition here in issue.

Reversed.

MR. JUSTICE MCREYNOLDS is of opinion that the judgment of the Circuit Court of Appeals should be affirmed.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration or decision of this case.

TICONIC NATIONAL BANK ET AL. *v.* SPRAGUE ET AL.

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

No. 374. Argued February 2, 3, 1938.—Decided March 7, 1938.

1. As an incident to the right to recover the amount of a bank deposit, the depositor is entitled to interest as damages for the failure to pay upon demand. P. 410.
2. The obligation of a national bank to pay interest as damages for detention of a debt is not cut off by suspension of its business and appointment of a receiver. P. 410.
3. The rule that in pro rata distribution, to creditors of an insolvent national bank, interest on claims is limited to interest accrued prior to insolvency, does not apply to the claim of a secured creditor against the assets covered by his lien. The secured creditor may enforce his lien against his security to satisfy both principal and interest. P. 411.

90 F. 2d 641, affirmed.

CERTIORARI, 302 U. S. 675, to review the affirmance of a decree of the District Court, 14 F. Supp. 900, ordering the receiver of a national bank to make payment to the present respondents of a sum constituting a trust fund, with interest.

Mr. George P. Barse, with whom *Messrs. F. Harold Dubord, Trevor V. Roberts,* and *James Louis Robertson* were on the brief, for petitioners.

Mr. Harvey D. Eaton for respondents.

By leave of Court, *Acting Solicitor General Bell,* and *Messrs. Russell L. Snodgrass* and *Frederick E. Baukhages, III,* filed a brief on behalf of the Reconstruction Finance Corporation, as *amicus curiae,* in support of respondents.

MR. JUSTICE REED delivered the opinion of the Court.

The question for decision is whether or not a secured creditor of a national bank, holding a non-interest bearing claim, is entitled to interest for any period subsequent to the insolvency of the bank, when the assets on which he has a lien are sufficient to pay the principal and interest but the total assets of the bank are not sufficient to pay in full all creditors' claims as of the date of insolvency.

On March 28, 1931, respondent Lottie F. Sprague delivered $5,022.18 to the trust department of the Ticonic National Bank of Waterville, Maine, in trust, under an agreement which authorized the trustee to invest in bonds or securities and to deposit at least $1,000 in its savings department at usual rates of interest; required specified monthly payments, subject to certain conditions, to Margaret Sprague, also a respondent here; and reserved to the grantor the right to revoke the trust and resume possession of the trust funds.

The Ticonic Bank had been authorized by the Federal Reserve Board to act in a trust capacity, as provided in § 11 (k) of the Federal Reserve Act, as amended (12 U. S. C., § 248 (k)). That Act provides that funds held in trust awaiting investment "shall not be used by the bank in the conduct of its business unless it shall first set aside in the trust department United States bonds or other securities" approved by the Board of Governors of the Federal Reserve System, and further provides that "In the event of the failure of such bank the owners of the funds held in trust for investment shall have a lien on the bonds or other securities so set apart in addition to their claim against the estate of the bank."

Pending investment of funds under the Sprague trust, and pursuant to its resolution implementing the statutory provision just quoted, the Ticonic Bank placed the funds of this trust, along with other trust funds awaiting investment or distribution, as a deposit in its commercial checking department to the credit of its trust department, and secured the total amount of such funds by setting aside in the trust department bonds, including $20,000 Kingdom of Denmark 6's, 1942, at least equal in value to the total amount of such deposits.

On July 29, 1935, respondents, the settlor and beneficiary, brought this suit in the District Court for Maine to have the bonds held as security with respect to the trust. It appears that on August 3, 1931, Ticonic Bank sold its assets (including the Denmark bonds) to the Peoples National Bank (later called Peoples-Ticonic National Bank) in consideration of its agreement to "assume or pay all the indebtedness of said Ticonic Bank to its depositors"; that Ticonic Bank then went into voluntary liquidation; that on March 4, 1933, the Peoples-Ticonic Bank was closed; that Arthur Picher was appointed receiver for Peoples-Ticonic Bank on November 6, 1933, and subsequently, on June 28, 1934, for the Ti-

conic Bank, which had been continuing its voluntary liquidation.

The lower courts treated the suit, brought against both banks and against Picher as receiver, as one to assert and enforce the lien protecting the uninvested funds. They held that, in view of § 11 (k) of the Federal Reserve Act, as amended, respondents had acquired a lien upon the bonds set apart by the Ticonic Bank to secure the deposit of the trust department; and that this lien had never been discharged or divested and so extended to the proceeds of the Denmark bonds, which had been sold by the receiver for $20,722.66. We do not pause to state the conclusions of fact and of law by means of which the lower courts arrived at this result, for in the grant of the writ of certiorari this Court declined to review the ruling that a statutory lien for the protection of the owners of the funds held for investment extended to the proceeds of the Denmark bonds, the lower courts having predicated their decision in large part on the facts of this particular case.

The decrees below did not end with the matters just stated. The District Court, finding that the proceeds of the bonds exceeded the trust funds on deposit,[1] held the respondents entitled to payment in full of $3,649.65, the amount to which the Sprague trust account had been reduced, with interest from the date of the filing of the bill of complaint. At first the Circuit Court of Appeals reversed that part of the decree allowing interest, but on rehearing it affirmed the decree in toto, approving the allowance of interest out of the proceeds of the Denmark bonds, which it assumed were sufficient to meet with in-

[1] The total uninvested trust funds on deposit in the commercial department of the Ticonic Bank amounted to about $10,000 at the time of the sale of its assets, and to about $12,000 when the Peoples-Ticonic Bank was closed in 1933.

terest the amount of all trust deposits. It ruled that although the requirement of ratable distribution precludes the recovery of interest against the general funds of an insolvent national bank, the general creditors have no rights in the trust funds here involved until after the secured claims are paid.

The attention of this Court was called to the fact that the ruling conflicted with decisions in other circuits, where secured creditors were held not entitled to any interest after the suspension of the national bank,[2] and for this reason certiorari was granted, limited to this question of interest.

As an incident to the right to recover an unexpended balance in a deposit, a depositor is entitled to interest as damages for the failure to pay that balance upon demand.[3] Compare *Stewart* v. *Barnes*, 153 U. S. 456, 462; *United States* v. *North Carolina*, 136 U. S. 211, 216.

The bank's obligation to pay interest as damages for the detention of the debt is not cut off by suspension of its business and receivership. The principle has been established, and claimants held entitled to such interest, in cases where the principal amount of each of the claims was paid in full from the assets of the bank (*National Bank* v. *Mechanics' National Bank*, 94 U. S. 437), including if necessary the double liability of the shareholders (*Richmond* v. *Irons*, 121 U. S. 27, 64).

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[2] *Richman* v. *First Methodist Episcopal Church*, 76 F. (2d) 344, 346 (C. C. A. 3d), certiorari denied, *Long* v. *First Methodist Episcopal Church*, 296 U. S. 593; *Douglass* v. *Thurston County*, 86 F. (2d) 899, 909 (C. C. A. 9th); *Fash* v. *First National Bank*, 89 F. (2d) 110, 112 (C. C. A. 10th).

[3] We need not explore petitioner's suggestion, that if interest is granted at all it should be measured from an earlier date than that of the judicial demand contained in the bill of complaint, since respondent has filed no cross-petition for certiorari complaining of that restriction (*Langnes* v. *Green*, 282 U. S. 531, 536–538).

It is true that in the liquidation of national banks, dividends from the general funds on unsecured claims are made pro rata upon the amount of each claim as of the date of the insolvency, *White* v. *Knox,* 111 U. S. 784. This method of distribution gives a proportional part of the available funds to each creditor, in accordance with the statute requiring a "ratable dividend." R. S. § 5236. Whether the reason for this method of determining dividends is to avoid prejudice from the inevitable delay of court proceedings for liquidation (*In re Humber Ironworks & Shipbuilding Co.,* IV Ch. App. Cas. 643, 646; *American Iron & Steel Mfg. Co.* v. *Seaboard Air Line Ry.,* 233 U. S. 261, 266; cf. *People* v. *American Loan & Trust Co.,* 172 N. Y. 371, 379; 65 N. E. 200); to facilitate administration (*Sexton* v. *Dreyfus,* 219 U. S. 339, 344; *Chemical National Bank* v. *Armstrong,* 59 Fed. 372, 378); or because on that date the creditors acquire a right in rem against the assets in the hands of the receiver (*Chemical National Bank* v. *Armstrong, supra,* 379; *Merrill* v. *National Bank of Jacksonville,* 173 U. S. 131, 140; *Sexton* v. *Dreyfus, supra,* 345) is immaterial. Dividends are paid on that basis. It is in order to assure equality among creditors as of the date of insolvency that interest accruing thereafter is not considered. But interest is proper where the ideal of equality is served, and so a creditor whose claim has been erroneously disallowed is entitled on its allowance to interest on his dividends from the time a ratable amount was paid other creditors. *Armstrong* v. *American Exchange National Bank,* 133 U. S. 433, 470.

The rule of *White* v. *Knox, supra,* does not require that interest be denied to the secured creditors unless the principle of equality of distribution is to be applied as between all creditors. Secured creditors have two sources of payment for their claims—the liability of the debtor and the

liability of the pledged or mortgaged assets. One is personal, the other in rem. The liability in personam of the bank gives rise to a claim in rem against the free assets in the hands of the receiver; the claim in rem against the security continues as a claim in rem against that same security. With respect to the former the secured creditors have merely the same rights as any general creditor, and in so far as dividends are paid to secured creditors from free assets, they share ratably with the unsecured creditors, and their claims bear interest to the same date, that of insolvency. Compare *Merrill* v. *National Bank of Jacksonville,* 173 U. S. at 146; *Aldrich* v. *Chemical National Bank,* 176 U. S. 618, 638. But to the extent that one debt is secured and another is not there is manifestly an inequality of rights between the secured and unsecured creditors, which cannot be affected by the principle of equality of distribution (*American Iron & Steel Mfg. Co.* v. *Seaboard Air Line Ry., supra,* at 266; *Chemical National Bank* v. *Armstrong, supra,* at 376–377), and interest accruing after insolvency may not be withheld on account of that principle.

The rule as to the date to which interest is to be allowed on secured claims sharing pro rata with unsecured claims, cannot apply to the disposition of pledged or mortgaged assets subject to the lien of individual creditors, unless we are to disregard the rights in these assets prior to insolvency. But "liens, equities or rights arising . . . prior to insolvency and not in contemplation thereof, are not invalidated." *Scott* v. *Armstrong,* 146 U. S. 499, 510; *Merrill* v. *National Bank of Jacksonville,* 173 U. S. 131, 145. By contract or, as in this case, by statute, the secured creditors gain or are given a lien on or right in property "in addition to their claim against the estate of the bank." Section 11 (k) of the Federal Reserve Act as amended. The statutory lien prior to receivership withdrew the pledged security from the assets

of the bank available to general creditors, in so far as might be necessary to satisfy the lien. Though title to the collateral was in the name of the bank, it was subject to this lien, and to that extent the property pledged could not properly be said to belong to the bank for purposes of distribution to creditors. *Scott* v. *Armstrong, supra* at 510.

As the obligation to pay interest is not destroyed by the insolvency and as the rights of the secured creditor in his collateral, contractual or statutory, are likewise unaffected, we are of the opinion that a secured creditor of a national bank in receivership may enforce his lien against his security, where it is sufficient to cover both principal and interest, until his claim for both is satisfied.

With respect to analogous liquidations the rule just announced has long been in force.[4] This Court has already held that a lienholder may look to his lien not only for the principal but also for interest accruing up to the date of payment, though his debtor has gone into bankruptcy (*Coder* v. *Arts,* 213 U. S. 223, 245, affirming, 152 Fed. 943, 950) or into equity receivership (*American Iron & Steel Mfg. Co.* v. *Seaboard Air Line Ry.,* 233 U. S. 261), and though interest will be denied the unsecured creditors if the assets are insufficient to pay all claims in full. Compare *In re Humber Ironworks & Shipbuilding Co.,* IV Ch. App. Cas. 643, with *In re Humber Ironworks & Shipbuilding Co.,* V Ch. App. Cas. 88. The same rule was applied to state banks in *Washington-Alaska Bank* v. *Dexter Horton National Bank,* 263 Fed. 304, 306.

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[4] Compare 7 Vin. Abr. 110: "*A mortgagee shall have his interest run on* upon a bankrupt's estate, because he hath a right in rem, *but as to other interest, it ceaseth on the bankruptcy.* Per Ld. Chan. King, 18 July 1729."

Petitioners suggest that the rule just laid down may have the effect of penalizing the unsecured creditors for the precaution of the receiver in litigating doubtful claims asserted against segregated assets. This could be true only where the interest accruing to the secured creditors during the pendency of the litigation exceeds the appreciation in value of, and the income from, the security. And since in many cases if the receiver is successful his conduct of the litigation will inure to the advantage of the general creditors, they may fairly be charged with the expenses of contesting the claim, including interest by way of damages. Cf. *Chemical National Bank* v. *Armstrong, supra,* 59 Fed. at 384.

Affirmed.

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

UNITED STATES *v.* WURTS.

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

No. 499. Argued February 28, 1938.—Decided March 14, 1938.

Under § 610 of the Revenue Act of 1928, barring suits in the name of the United States to recover amounts erroneously refunded, unless brought within two years "after the *making* of such refund," the period of limitation begins to run, not from the time of the allowance of the refund (the date when the Commissioner approves the schedule of overassessments), but from the time of its payment. P. 416.

91 F. 2d 547, reversed.

CERTIORARI, 302 U. S. 678, to review the affirmance of a judgment for the taxpayer in a suit by the United States to recover an erroneous refund of taxes.

Mr. Arnold Raum, with whom *Solicitor General Reed, Assistant Solicitor General Bell, Assistant Attorney Gen-*

eral Morris, and *Messrs. Sewall Key* and *J. Louis Monarch* were on the brief, for the United States.

Mr. Claude C. Smith, with whom *Messrs. Russell Duane* and *Sanford D. Beecher* were on the brief, for respondent.

Mr. Justice Black delivered the opinion of the Court.

Under the Revenue Act of 1928,[1] forbidding suit by the United States to recover an erroneous tax refund unless brought "within two years after the making of such refund," does the two year limitation begin when the refund is allowed or when it is paid?

The Court of Appeals affirmed [2] the District Court's judgment holding the Government barred by this limitation because the present suit was not brought within two years after the Commissioner allowed the refund by signing the schedule of over-assessments.

The facts show that:

March 15, 1932, the Commissioner erroneously approved a refund of taxes paid by respondent for the year 1929. April 30, 1932, a check was mailed to the taxpayer for this erroneous refund. April 26, 1934, more than two years after the allowance of the refund, but less than two years after actual payment, the Government brought this suit to recover the erroneous refund.

The Government by appropriate action can recover funds which its agents have wrongfully, erroneously, or illegally paid.[3] "No statute is necessary to authorize the United States to sue in such a case. The right to sue is independent of statute, . . ." *United States* v. *Bank of the Metropolis,* 15 Pet. 377, 401. Section 610 of the

[1] Revenue Act of 1928, c. 852, 45 Stat. 791, § 610.

[2] 91 F. (2d) 547.

[3] *Wisconsin Central Railroad* v. *United States,* 164 U. S. 190, 212; see *United States* v. *Burchard,* 125 U. S. 176, 180, 181.

1928 Act, relied upon as barring recovery of this erroneous and unwarranted tax refund, does not grant the Government a new right, but is a limitation of the Government's long-established right to sue for money wrongfully or erroneously paid from the public treasury. Ordinarily, recovery of Government funds, paid by mistake to one having no just right to keep the funds, is not barred by the passage of time.[4] There is no contention here that respondent has any right to retain this refund erroneously paid by the Government. His defense is that the statutory bar prevents recovery. The Government's right to recover funds, from a person who received them by mistake and without right, is not barred unless Congress has "clearly manifested its intention" [5] to raise a statutory barrier.

Section 610—urged by respondent as a statutory barrier—requires that the Government bring suit "before the expiration of two years *after the making of such* [*erroneous*] *refund. . . .*" Respondent contends that the Revenue Act of 1932 [6] indicated Congressional intent to designate the date of *allowance* of a refund (the date the Commissioner signs the schedule of over-assessments) as the date of refund for computing the period of limitations under § 610. The 1932 Act provides:

"Where the Commissioner has (before or after June 6, 1932) signed a schedule of overassessments in respect of any internal revenue tax imposed by [the Revenue Act of 1932] or any prior revenue Act, the date on which he first signs such schedule (if after May 28, 1928) shall be considered *as the date of allowance* of refund or credit in respect of such tax." This Act in no manner

[4] *Grand Trunk Western Ry. Co.* v. *United States,* 252 U. S. 112, 121.

[5] Compare, *United States* v. *Nashville, C. & St. L. Ry. Co.,* 118 U. S. 120, 125.

[6] Revenue Act of 1932, c. 209, 47 Stat. 169, § 1104.

relates to limitations on suits for erroneous refunds. It has no purpose in common with § 610 of the 1928 Act. The 1932 Act throws no light on the meaning of § 610.

Section 610 is clear when its words are given their commonly accepted import. "Congress may well be supposed to have used language in accordance with the common understanding."[7] Webster's New International Dictionary (2d ed., Unabridged) defines "refund" as "that which is refunded" and defines the transitive verb as: "to return (money) in restitution, repayment . . ." Only by ignoring the common understanding of words could "making . . . [a] refund" be considered synonymous with "allowing a refund."

That Congress had in mind the separate and distinct meanings of these two expressions is clearly demonstrated in House Report No. 2, 70th Congress, 1st Session, p. 34, 35, containing the Committee Report on the Revenue Act of 1928:

"The section (610) provides that any erroneous refund, . . . may be recovered by suit brought in the name of the United States if such suit is begun within two years *after the making of the refund.*"

Immediately following, in referring to § 614, the Report stated:

"The principal change made in existing law is that in the case of a refund the interest period now terminates *with the allowance of the refund, a date which often precedes the actual making of the refund . . .*"

The Commissioner's signature on a schedule of overassessments does not finally establish a claimant's right to a refund and does not preclude further investigation and consideration of the claim. The Commissioner could later take his signature from the schedule and as pointed out by this Court might—even after a check was signed

[7] *Union Pacific R. Co.* v. *Hall,* 91 U. S. 343, 347.

and mailed—cancel the payment and revoke the authority of payment erroneously made.[8]

It would require language so clear as to leave room for no other reasonable construction in order to induce the belief that Congress intended a statute of limitations to begin to run before the right barred by it has accrued. Obviously, the Government had no right to sue this taxpayer to recover money before money had been paid to him. The construction urged by respondent would allow the statute of limitations to begin to run against recovery on an erroneous payment before any such payment is made. As said by a House Committee in reporting on a statute of limitations contained in a revenue act,[9] "Logically the period of limitation should run from the date of payment, since it is at that time that the right accrues."

We are of opinion that Congress did not intend the limitations of § 610 to run against the Government until the Government's right "has accrued in a shape to be effectually enforced."[10]

This statute does not begin to run against the Government when a claim is erroneously allowed. It begins to run from the date of payment. The judgment below is not in accord with this construction of the statute and is

Reversed.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration or decision of this case.

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[8] *Daube* v. *United States*, 289 U. S. 367, 372.

[9] House Report No. 179, 68th Congress, 1st Session, p. 27.

[10] Cf., *Borer* v. *Chapman*, 119 U. S. 587, 602.

Syllabus.

ELECTRIC BOND & SHARE CO. ET AL. *v.* SECURITIES AND EXCHANGE COMM'N ET AL.

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

No. 636. Argued February 7, 8, 9, 1938.—Decided March 28, 1938.

1. A system of holding companies controlled, through stock ownership, the operations of subsidiary companies which served gas and electricity to the public in many States, partly in interstate commerce. Some of the holding companies were themselves partly engaged in selling, purchasing or transmitting electricity across state lines. The system furnished expert service, and performed construction work, for the subsidiary utilities, and in so doing made continuous and extensive use of the mails and the instrumentalities of interstate commerce. And such instrumentalities were from time to time used in other transactions, such as the distribution of securities. *Held* that the holding companies were engaged in activities within the reach of congressional regulation. P. 431.
2. Section 5 of Title I of the Public Utility Act of Aug. 26, 1935, requires holding companies, as defined, to register with the Securities and Exchange Commission and to file a registration statement giving information with respect to the organization, financial structure and nature of the business of the registrants together with various details of operations. Section 4 (a) prohibits the use of the mails and the facilities of interstate commerce to those companies which fail to register. Section 32 provides that if any provision of the Title should be held invalid the others shall not be affected. *Held:*

   (1) The separability clause reverses the presumption of inseparability. P. 433.

   (2) Sections 4 (a) and 5 are not so woven into the Title that there is any inherent or practical difficulty in enforcing them separately while reserving all questions as to the validity of the other provisions of the Title. P. 434.

   (3) Although registration underlies and precedes the application of the other regulatory provisions, §§ 4 (a) and 5 were intended to be independently operative and enforceable as regulations requiring holding companies to furnish the information called for by § 5 (b) in registration statements. P. 435.

(4) The legislative history of the Act is consistent with this view. P. 438.

3. Corporations engaged in interstate commerce can not escape regulation by acting through subsidiaries. P. 440.

4. In view of the relation of the holding companies in this case to interstate commerce, and to the national economy, Congress had power to exact of them the information required by § 5 of Title I of the Public Utility Act, and to visit their failure with the penalties prescribed by § 4 (a), restraining their use of interstate commerce and postal facilities while they remain holding companies and refuse to register. P. 439.

5. In a suit by the Securities and Exchange Commission under § 18 (f), Title I, Public Utility Act, brought to enforce only compliance with §§ 4 (a) and 5, the requirements and validity of the other provisions of the Title not being involved in the actual controversy,—*held* that a counterclaim and cross-bill by which the defendants invoked the Federal Declaratory Judgment Act, and sought to have the other provisions declared unconstitutional, was properly dismissed. P. 443.

92 F. 2d 580, affirmed.

CERTIORARI, 302 U. S. 681, to review the affirmance of a decree of the District Court which granted an injunction and dismissed a counterclaim and cross-bill in a suit against numerous corporations, brought by the Securities and Exchange Commission under § 18 (f) of Title I of the Public Utility Act of 1935. Other corporations had intervened in the District Court as defendants. The injunction forbade the holding-company defendants, as long as they continued to be holding companies and failed to register, from using the mails or the facilities of interstate commerce as banned by § 4 (a) of the Act. The counterclaim and cross-bill prayed for a declaratory judgment declaring the whole Title void, and that the Commission and its members, the Attorney General and the Postmaster General be enjoined from enforcing any of its provisions. See the opinion of Mack, Circuit Judge, in 18 F. Supp. 131.

Messrs. Thomas D. Thacher and *John F. MacLane,* with whom *Messrs. Frank A. Reid* and *A. J. G. Priest* were on the brief, for petitioners.

The Act is wholly invalid because of its scope and all-inclusive provisions. It inseparably commingles intrastate and interstate companies and activities by common definitions and provisions and cannot be confined by judicial limitation to companies or activities within the power of Congress.

It must be regarded as a whole and read in its entirety to determine the separability of any section or sections. Particular sections cannot be isolated and considered in a vacuum without regard to their setting and context and their functional relationship to the Act as a whole.

Thus reading §§ 4 (a) and 5 (separated by the decision of the courts below from the regulatory or control provisions of the Act) it is clear that they are not a substantive regulation by themselves but are purely auxiliary to such regulatory or control provisions, specifically §§ 6 to 13.

Their inseparability is demonstrated by the declared scope and purpose of the Act (§ 1) which makes manifest that it was the intention of Congress by its enactment to control public utility holding companies, even to the point of their destruction.

In this light, §§ 6 to 13 (the control sections) are the bone and sinew of the Act. They are the sections which Congress relied upon to accomplish its declared purpose of "eliminating" the evils in public utility holding company systems.

Sections 4 (a) and 5, reinforced by the heavy penalties of 29, merely implement this system of controls. 4 (a) coerces holding companies to register and thereby to submit to such controls. 5 (a) provides the mechanics for registration, and 5 (b) provides for furnishing the basic

information concerning the companies upon which the controls specified by 6 to 13 are to operate.

Sections 4 (a) and 5 do not constitute a separable system of regulation by publicity. Not only was no such independent function intended, but, as demonstrated by their relationship to the Act, they cannot perform any such function. The contents of the registration statement prescribed by § 5 (b) do not relate to, and thus cannot regulate, the activities described by 4 (a), but do relate to, and furnish the basic information for, the application of the control system. The contents of the registration statement may not be disclosed except in the discretion of the Commission (22). Consequently, regulation by publicity is not its function.

If §§ 4 (a) and 5 be regarded as a separable statutory enactment, they are not a constitutional, valid and reasonable regulation of interstate commerce and the mails. Section 5 (a) is not a regulation of commerce or the mails, nor is it claimed to be. As previously shown, 5 (b) relied upon alone to support the penalties of 4 (a) is not regulatory of the transactions thereby prohibited nor of any business in interstate commerce.

Considered alone, § 5 (b) is a naked grant of inquisitorial or visitatorial power and is invalid because not an exercise of any constitutional power. Unless the Commission has some function to perform with respect to the information furnished, it becomes an unlawful delegation of legislative power to the Commission, since the form and content are to be prescribed entirely by rules and regulations of the Commission in its concept of the public interest and the interest of investors and consumers.

Section 5 (b) cannot be supported by 4 (a), which, being merely a penalty, cannot validate regulations with which it coerces compliance.

Assuming power to exclude holding companies from interstate business and normal use of the mails and in-

strumentalities of interstate commerce, such power cannot be used to coerce compliance with unconstitutional regulation. Standing by itself as a naked penalty, § 4 (a) contravenes the Fifth, Sixth and Eighth Amendments to the Constitution.

If, therefore, the decree cannot be supported on the foundation of §§ 4 (a) and 5 standing alone, it is necessary to find such support in the substantive regulatory system of the Act, *i. e.,* the controls of §§ 6 to 13.

These sections do not regulate interstate commerce or the use of the mails. The companies which comprise the electric and gas utility industry are not, as such, instrumentalities or agents of interstate commerce, nor is their business, as such, interstate commerce. Some of the companies do engage in particular business or transactions which constitute interstate commerce and which may be regulated, but other companies do no such business. This Act predicates the regulation of all alike merely on the holding company relationship and not upon engagement in any business or activities which constitute or affect interstate commerce.

Nor are the control sections predicated upon or confined to the regulation of activities constituting or directly affecting interstate commerce or the use of the mails. They relate to the issue and sale of securities (§§ 6–7); to the acquisition of assets or securities (§§ 8–10); to sundry corporate and financial transactions (§ 12); to the reorganization or dissolution of holding company systems (§ 11); and to the performance of service, sales and construction contracts (§ 13). In none of these sections is interstate commerce or the use of the mails a condition of the regulation of a particular transaction, nor need the company whose transactions are so regulated be engaged in interstate commerce or activities directly affecting such commerce.

Conversely, the Act invades the reserved powers of the States, in violation of the Tenth Amendment, in its interference with purely intrastate transactions, and in its control of purely intrastate corporations in the exercise of charter powers given them by the States of their incorporation.

The absence of any standard for the Commission's action in the various matters entrusted to its control, except its untrammelled conception of the public interest and the interest of investors and consumers, makes the Act an unconstitutional delegation of legislative powers to the Commission, in violation of Article I, § 1 of the Constitution.

The Act is lacking in due process and offends against the Fifth Amendment. Fundamentally, its essential concept is not regulation by prescribed standards of law, but the transfer of control of corporations from their directors and stockholders to the Commission, in terms so broad that management is transferred from the owners of the property to the public. This power extends to the control of their essential activities, and even to the disposal of their property and assets, and the reorganization of the companies themselves.

If the decree of the court below is correct in requiring defendants to register, on the theory of the separability of §§ 4 (a) and 5 unsupported by the control provisions, the defendants, being under a duty to register, and being threatened with irreparable injury by the controls of the Act, have a right to relief under their cross-bill either by way of injunction or declaratory judgment, against those control sections which become applicable to them immediately upon registration.

If the holding companies themselves have not the right to question these controls by their cross-bill, the intervening subsidiary defendants, immediately affected in all

respects equally with their parent holding companies by the registration of the latter, have the right by their intervention and cross-bills to obtain an adjudication as to whether or not the controls of the Act to which they are thereby subjected are constitutional as to them.

Assistant Attorney General Jackson and *Mr. Benjamin V. Cohen,* with whom *Attorney General Cummings, Solicitor General Reed, Assistant Solicitor General Bell,* and *Messrs. Allen E. Throop, Thomas G. Corcoran, Paul A. Freund, John J. Abt,* and *Frederick B. Wiener* were on the brief, for respondents.

The bill and answer involve solely the validity of the registration provisions.

The registration provisions are not inherently inseparable from the other provisions of the Act. Compliance with them does not prejudice the right of a registrant to contest other provisions. They are capable of separate operation and enforcement.

The legislative history of the Act corroborates the presumption of separability.

The registration provisions are a substantial regulatory measure in themselves and would not be too fragmentary to stand alone.

Defendants can not attack provisions of the Act not otherwise in controversy merely to show that the registration provisions would be too fragmentary to stand if such other provisions were invalid.

The registration provisions are a valid exercise of the federal power over interstate commerce and the mails.

The activities enumerated in § 4 (a) are subject to federal regulation by the informatory process.

Congress has the power to prevent the use of the channels of interstate commerce and the postal facilities for a purpose or in a manner deemed contrary to sound public policy.

The power of Congress under the commerce clause is not limited to forbidding the transportation of articles intrinsically harmful.

The question of the power of Congress to meet evils which are not spread or perpetuated by the use of the channels of interstate commerce is not here involved.

The power of Congress to regulate the use of the channels of interstate commerce or the mails is not abridged by the fact that the use of such channels of intercourse is incidental or sporadic or is not the major activity of the user.

The registration provisions do not violate any rights guaranteed to the defendants under the Fifth Amendment.

They involve no unconstitutional delegation of power.

The cross-bill presented no case or controversy but sought only an advisory opinion on hypothetical facts.

As a suit for an injunction, the cross-bill, in the absence of threats of enforcement by the cross-defendants, presents no controversy with them.

As a suit for a declaratory judgment, the cross-bill, in the absence of threats of enforcement by the cross-defendants, presents no "actual controversy" with them.

Even if the cross-bill had presented a controversy with the cross-defendants, the District Court could not properly have granted defendants an injunction or declaratory judgment because they have proved no damage, irreparable or otherwise.

Defendants do not seek equity with clean hands in bringing, before they have registered, a cross-bill which presupposes that their failure to register is unlawful.

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

The Securities and Exchange Commission brought this suit to enforce the provisions of §§ 4 (a) and 5 of the

Public Utility Holding Company Act of 1935. 49 Stat. 803, 812, 813. These sections provide for registration with the Commission of holding companies, as defined, § 5 (a), and prohibit the use of the mails and the instrumentalities of interstate commerce to those companies which fail to register. § 4 (a). Section 5 (b) provides for the filing of a registration statement giving information with respect to the organization, financial structure and nature of the business of the registrant, together with various details of operations.

Defendants, including intervenors, contested the validity of these provisions and sought by cross bill a declaratory judgment that the Act was invalid in its entirety, as being in excess of the powers granted to Congress by § 8 of Article I, and in violation of § 1 of Article I and of the Fifth and Tenth Amendments, of the Constitution of the United States. The District Court sustained the validity of §§ 4 (a) and 5, and granted an injunction accordingly. The cross bill was dismissed for want of equity and for lack of any actual controversy within the meaning of the Federal Declaratory Judgment Act of 1934. 18 F. Supp. 131. The Circuit Court of Appeals affirmed the decree. 92 F. (2d) 580. Certiorari was granted.

The suit was brought against the Electric Bond and Share Company and fourteen associated public utility companies. Of these, it appears that seven have ceased to be holding companies within the meaning of the Act, two [1] before the cause was heard by the District Court and five [2] since the decree. The remaining companies against whom the decree of injunction runs are Electric Bond and Share Company, American Gas and Electric

[1] Idaho Power Company and The Montana Power Company.

[2] United Gas Corporation, United Gas Public Service Company, Houston Gulf Gas Company, Nebraska Power Company, and Power Securities Company.

Company, American Power & Light Company, National Power & Light Company, Electric Power & Light Corporation, Lehigh Power Securities Corporation, Utah Power & Light Company, and Pacific Power & Light Company.

The decree provides in substance, as to each of these defendants, that after a day specified and until such defendant shall cease to be a holding company as defined in the Act, or shall register with the Securities and Exchange Commission as provided in § 5 (a), it shall not carry on any of the activities in interstate commerce or through the mails which are forbidden to non-registered holding companies by Paragraphs (1), (2), (3), (4) and (6) of § 4 (a). The provisions of §§ 4 (a) and 5 are set forth in the margin.[3]

[3] "Sec. 4. (a). After December 1, 1935, unless a holding company is registered under section 5, it shall be unlawful for such holding company, directly or indirectly—

"(1) to sell, transport, transmit, or distribute, or own or operate any utility assets for the transportation, transmission, or distribution of, natural or manufactured gas or electric energy in interstate commerce;

"(2) by use of the mails or any means or instrumentality of interstate commerce, to negotiate, enter into, or take any step in the performance of, any service, sales, or construction contract undertaking to perform services or construction work for, or sell goods to, any public-utility company or holding company;

"(3) to distribute or make any public offering for sale or exchange of any security of such holding company, any subsidiary company or affiliate of such holding company, any public-utility company, or any holding company, by use of the mails or any means or instrumentality of interstate commerce, or to sell any such security having reason to believe that such security, by use of the mails or any means or instrumentality of interstate commerce, will be distributed or made the subject of a public offering;

"(4) by use of the mails or any means or instrumentality of interstate commerce, to acquire or negotiate for the acquisition of any security or utility assets of any subsidiary company or affiliate of

The decree further provides that the injunction and the dismissal of the cross bill shall be without prejudice "to any rights or remedies in law or in equity" which defendants may have after registration, and leaves defendants free to challenge the validity of any of the provisions of the Act other than §§ 4 (a) and 5. The dismissal of the

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such holding company, any public-utility company, or any holding company;

"(5) to engage in any business in interstate commerce; or

"(6) to own, control, or hold with power to vote, any security of any subsidiary company thereof that does any of the acts enumerated in paragraphs (1) to (5), inclusive, of this subsection.

. . . . . .

"Sec. 5. (a) On or at any time after October 1, 1935, any holding company or any person [sic] purposing to become a holding company may register by filing with the Commission a notification of registration, in such form as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers. A person shall be deemed to be registered upon receipt by the Commission of such notification of registration.

"(b) It shall be the duty of every registered holding company to file with the Commission, within such reasonable time after registration as the Commission shall fix by rules and regulations or order, a registration statement in such form as the Commission shall by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers. Such registration statement shall include—

"(1) such copies of the charter or articles of incorporation, partnership, or agreement, with all amendments thereto, and the bylaws, trust indentures, mortgages, underwriting arrangements, voting-trust agreements, and similar documents, by whatever name known, of or relating to the registrant or any of its associate companies as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers;

"(2) such information in such form and in such detail relating to, and copies of such documents of or relating to, the registrant and its associate companies as the Commission may by rules and regulations

cross bill is also declared to be without prejudice "to any rights or remedies in law or in equity" which the intervening defendants "may have or be entitled to upon the Act

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or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers in respect of—

"(A) the organization and financial structure of such companies and the nature of their business;

"(B) the terms, position, rights, and privileges of the different classes of their securities outstanding;

"(C) the terms and underwriting arrangements under which their securities, during not more than the five preceding years, have been offered to the public or otherwise disposed of and the relations of underwriters to, and their interest in, such companies;

"(D) the directors and officers of such companies, their remuneration, their interest in the securities of, their material contracts with, and their borrowings from, any of such companies;

"(E) bonus and profit-sharing arrangements;

"(F) material contracts, not made in the ordinary course of business, and service, sales, and construction contracts;

"(G) options in respect of securities;

"(H) balance sheets for not more than the five preceding fiscal years, certified, if required by the rules and regulations of the Commission, by an independent public accountant;

"(I) profit and loss statements for not more than the five preceding fiscal years, certified, if required by the rules and regulations of the Commission, by an independent public accountant;

"(3) such further information or documents regarding the registrant or its associate companies or the relations between them as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers.

"(c) The Commission by such rules and regulations or order as it deems necessary or appropriate in the public interest or for the protection of investors or consumers, may permit a registrant to file a preliminary registration statement without complying with the provisions of subsection (b); but every registrant shall file a complete registration statement with the Commission within such reasonable period of time as the Commission shall fix by rules and regulations or order, but not later than one year after the date of registration.

"(d) Whenever the Commission, upon application, finds that a registered holding company has ceased to be a holding company, it

being made applicable to them by the registration of any holding company of which they are subsidiary companies." All rights of defendants, including intervenors, are thus fully reserved with respect to the application to them of any provision of the Act outside of those contained in the particular sections which are enforced by the decree.

Petitioners insist that the Act is invalid as a whole; that the provisions of §§ 4 (a) and 5 are not separable from the remainder; that these provisions, if separately considered, do not constitute a valid regulation of interstate commerce and the mails; and that the cross bill presented a controversy upon the merits of which the defendants, including intervenors, were entitled to the judgment of the court.

First. The initial question is whether the defendant companies, against which the decree for injunction runs, are engaged in activities which bring them within the ambit of congressional authority. Upon this point there seems to be no serious controversy, and for the purpose of the present decision we do not find it necessary to make a comprehensive statement of the corporate setup and operations of the respective defendants. The facts were fully set forth in an elaborate stipulation which underlay the findings of fact of the trial court. A brief statement addressed to the point now under consideration will suffice.

Electric Bond and Share Company is styled in the findings as "the top holding company" in "a holding-company system" in which all the other defendants and intervening defendants together with numerous other companies are subsidiaries. Electric Bond and Share Company owns substantial minorities of the voting stocks

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shall so declare by order and upon the taking effect of such order the registration of such company shall, upon such terms and conditions as the Commission finds and in such order prescribes as necessary for the protection of investors, cease to be in effect. The denial of any such application by the Commission shall be by order."

of the defendants American Gas and Electric Company, American Power & Light Company, National Power & Light Company, and Electric Power & Light Corporation. These companies in turn own directly or through subholding companies substantial majorities, in some cases approximating complete ownership and in all cases sufficient to insure voting control, of the common stocks of operating gas and electric utilities. The "electric operations" of subsidiaries in the Bond and Share system are conducted in thirty-two States. Some operate only within a single State, some in two or more States, transmitting energy across state lines for their own account, and some sell energy at wholesale in interstate commerce.

Until shortly prior to the institution of this suit Electric Bond and Share Company rendered services to both holding and operating companies under service contracts. After the approval of the Act, it formed a wholly-owned subsidiary, Ebasco Services Incorporated, to take over the servicing of the operating companies, and the servicing of the holding companies was discontinued. The performance of service contracts by Ebasco, operating as a subsidiary and on behalf of Electric Bond and Share Company, constitutes an extensive business in rendering continuous expert, specialized, and technical service, advice, and assistance to the serviced companies upon every phase of the utility enterprise. Phoenix Engineering Corporation, a wholly-owned subsidiary of Ebasco, performs construction work for subsidiary public-utility companies in the Bond and Share system. The American Gas and Electric Company also performs services for subsidiary operating companies.

We need not go further in the description of the operations of these Companies, as petitioners concede that the carrying out of these service contracts, as found by the trial court, involves continuous and extensive use of the

mails and instrumentalities of interstate commerce, although petitioners are careful to qualify the concession by saying that they agree with the trial court that "this is not to say that the entire business of Ebasco or American Gas constitutes interstate commerce and is therefore subject to unlimited federal regulation."

Petitioners also state with respect to American Power & Light Company, National Power & Light Company, and Electric Power & Light Corporation, that while it is insisted that these are simply investment holding companies and that their business as such is not interstate commerce, they may "from time to time engage in transactions in interstate commerce or may use the instrumentalities of interstate commerce in particular transactions, such as the distribution of securities, in such manner that those particular activities become the subject of federal regulation."

The trial court found that one or more subsidiary electric-utility companies of Lehigh Power Securities Corporation "are regularly engaged in selling, purchasing, or transmitting some electric energy across state lines"; and that Utah Power & Light Company and Pacific Power & Light Company are both holding companies and electric-utility companies and that the transmission of electric energy across state lines is part of the enterprise of each.

In the light of the findings supported by the stipulation, we perceive no ground for a conclusion that the defendant companies which are enjoined are not engaged in activities within the reach of the congressional power.

Second. Challenging the validity of the Act in its entirety, petitioners contend that §§ 4 (a) and 5 cannot be separated from the other provisions of the Act and thus be separately sustained and enforced. They urge that these sections are purely auxiliary to the subsequent or "control provisions" of the Act (§§ 6 to 13); that the

object of this suit is to compel submission to an integrated system of control and that the sole question is whether the Act as a whole, "or enough to accomplish its general plan," is constitutional. They insist that this question must be determined before they may be compelled to register.

(1) In this branch of the case, petitioners address their argument to the *intent* of Congress, rather than to its *power*. But Congress has defined its intent as to separability. Section 32 of the Act provides:

"If any provision of this title [4] or the application of such provision to any person or circumstances shall be held invalid, the remainder of the title and the application of such provision to persons or circumstances other than those as to which it is held invalid shall not be affected thereby."

This provision reverses the presumption of inseparability—that the legislature intended the Act to be effective as an entirety or not at all. Congress has established the opposite presumption of divisibility. *Williams* v. *Standard Oil Co.,* 278 U. S. 235, 242; *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165, 184; *Champlin Refining Co.* v. *Corporation Commission,* 286 U. S. 210, 235. Congress has thus said that the statute is not an integrated whole, which as such must be sustained or held invalid. On the contrary, when validity is in question, divisibility and not integration is the guiding principle. Invalid parts are to be excised and the remainder enforced. When we are seeking to ascertain the congressional purpose, we must give heed to this explicit declaration.

(2) It is evident that the provisions of §§ 4 (a) and 5 are not so interwoven with the other provisions of the

[4] The "title" is "Title I—Control of Public-Utility Holding Companies."

Act that there is any inherent or practical difficulty in the separation and independent enforcement of the former while reserving all questions as to the validity of the latter. The administrative construction of the statute was formulated in that view. Rule 4 of the Commission provided that any person, in filing any statement under the Act, might include an express reservation of constitutional and legal rights. It was on the basis of that construction that this suit was prosecuted and was limited to the enforcement of §§ 4 (a) and 5. All rights and remedies as to all other provisions of the Act are, as we have seen, expressly reserved to the defendants by the decree. Nor can it be said that this reservation is illusory. If this decree is affirmed, it will constitute a specific adjudication that registration will be without prejudice to future challenge of the validity of any provision of the Act, or requirement of the Commission, outside of §§ 4 (a) and 5. It is idle to contend that registration pursuant to the decree will subject the defendants to the Act as an integrated whole or bring into operation against them what the decree expressly excludes.

(3) Although there is no practical obstacle to the separate enforcement of the provisions of §§ 4 (a) and 5, the argument is pressed that in reason and design there is an essential unity of these provisions and the so-called "control provisions" which forbids such enforcement. Petitioners urge that §§ 4 (a) and 5 "merely implement the system of controls"; that the policy of the Act as declared in § 1 (c) is to compel "the simplification and the elimination of holding company systems"; and that the objective cannot be attained by informatory processes but only by such regulation or control as will "eliminate" the evils.

The Government replies that while the other provisions are applicable only to registered companies and their subsidiaries, §§ 4 (a) and 5 are drafted so as to be opera-

tive independently and that the registration provisions themselves constitute "an effective instrument of informatory regulation." "If, for example," argues the Government, "section 11 dealing with corporate reorganizations were adjudged invalid, there is no inherent reason why the other regulatory provisions could not be enforced as the Congress provided. And if section 13 dealing with service contracts were adjudged invalid, there is no inherent reason why the registration provisions, or sections 6 and 7 regulating security issues, or sections 8, 9 and 10 dealing with utility acquisitions, could not be administered in accordance with their terms." "Likewise," it is said, "the purpose and effect of the registration provision—regulation by the informatory process—are the same whether registration is considered as a separate statute regulating utility holding companies, or as but one part of a comprehensive statute containing many different regulations of utility holding companies." Moreover, as observed by the District Court, § 1 (c) in its entirety negatives any conclusion that the simplification and elimination of holding companies "is the sole policy or the whole end and object of the Act, which, as stated, is 'to meet the problems and eliminate the evils, as enumerated in this section, connected with public utility holding companies,' " and thus "simplification and elimination" are but a means and not "the exclusive means" deemed to be essential for the purpose of effectuating such policy "in whole or insofar as may be constitutionally possible."

We think that the manner in which the Act is framed and the variety of provisions it contains, when viewed in the light of the presumption of divisibility, justify that conclusion. The fact that registration underlies the application of subsequent requirements of the statute does not prevent the provisions of §§ 4 (a) and 5 from having a purpose and a value of their own. Section 5 not only

provides in paragraph (a) for the filing of a "notification of registration" but also requires by paragraph (b) every registered holding company to submit, within a reasonable time after registration, a "registration statement" containing a variety of detailed information as to corporate structure and activities. Thus § 5 (b) is itself a "control" provision, which is immediately operative. The duty to supply the described information is separately and definitely prescribed.

It cannot be denied that a requirement of this sort is a regulation which Congress could have regarded as important in itself and could have made the subject of a separate statute. The fact that it is found in a statute imposing other regulations, or that it precedes the application of the others, does not deprive it of its essential character and its capacity to stand alone. Regulation requiring the submission of information is a familiar category. Information bearing upon activities which are within the range of congressional power may be sought not only by congressional investigation as an aid to appropriate legislation, but through the continuous supervision of an administrative body. See *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447, 474; *Interstate Commerce Commission* v. *Goodrich Transit Co.,* 224 U. S. 194, 211; *American Telephone & Telegraph Co.* v. *United States,* 299 U. S. 232, 235, 237. Congress may use this method in connection with a comprehensive scheme of regulation, as, for example, in the case of the Interstate Commerce Commission and the Federal Communications Commission; or Congress may employ this informatory process independently. An illustration of the latter is found in the statute relating to newspapers and periodicals, enjoying the privileges accorded to second class mail, which requires an annual statement setting forth the names and addresses of the editor, publisher, business manager, owner, and, in case of ownership by a

corporation, the stockholders, and also the names of known bondholders or other security holders, together with a statement as to circulation. 39 U. S. C. 233. See *Lewis Publishing Co.* v. *Morgan,* 229 U. S. 288.

Petitioners refer to the limitations upon publicity contained in § 22 and contrast this provision with that of the Securities Act of 1933, § 6 (d), 48 Stat. 74, 78. But § 22 provides that the information shall be available to the public when in the judgment of the Commission its disclosure would be in the public interest or the interest of investors or consumers. The limitations are plainly intended to safeguard particular information which may be regarded as of a private or confidential character and as not directly concerning the public interest. They do not detract from the value which may be deemed to attach to the requirement that the described information should be furnished, whether as an aid to legislation or as facilitating administrative supervision or as securing a desirable publicity.

Both parties invoke the legislative history of the Act. Petitioners contend that this shows that control, not publicity, was intended. The Government insists that the legislative history supports the presumption of separability. It is unnecessary to review the details of the arguments or the cited statements from the legislative halls. The Act speaks for itself with sufficient clarity. The Government points to six groups of regulatory provisions contained in the Act, viz., registration (§§ 4 and 5); issuance of securities (§§ 6 and 7); acquisition of securities and utility assets (§§ 8, 9 and 10); corporate simplification and reorganization (§ 11); service contracts and other inter-company transactions (§§ 12 and 13); and reports and accounts (§§ 14 and 15). We see nothing in the legislative history of the Act which requires the conclusion that all these groups were intended to constitute a unitary system, no part of which can fail without destroying the

rest. On the contrary, we think that the intent of Congress is that these various groups of regulations, as well as particular provisions of each group, should be regarded as separable so that, if any such group or provision should be found to be invalid, that invalidity should not extend to the remaining parts if by reason of their nature and as a practical matter they could be separately sustained and enforced.

Congress provided in § 18 (f) that the Commission might bring an action to enforce compliance with the Act or any rule, regulation or order thereunder, and that upon a proper showing a permanent or temporary injunction or decree should be granted. In pursuance of that authority, the present action was brought solely to enforce the provisions of §§ 4 (a) and 5. We find no basis for holding that these provisions cannot be separately enforced if they are valid and we turn to that question. In view of this conclusion as to separability, it is unnecessary to go through the statute in order to determine whether other provisions are valid or invalid, and we do not intimate that there would not be found in any event a workable system in addition to the registration sections.

Third. Petitioners contend that, standing by themselves, §§ 4 (a) and 5 transgress constitutional restrictions. These sections have three parts. Section 5 (a) provides for the filing of a notification of registration. Section 5 (b) makes it the duty of every registered holding company to file a registration statement, with documents and certain detailed information, within a reasonable time after registration. Section 4 (a) prescribes the penalty for failure to register under § 5. As the requirement of information is in itself a permissible and useful type of regulation (*Interstate Commerce Commission* v. *Brimson, supra; Interstate Commerce Commission* v. *Goodrich Transit Co., supra; American Telephone & Telegraph Co.* v. *United States, supra*), the question is whether the par-

ticular demand, here assailed, can be validly addressed to the defendants enjoined by the decree, and, if so, whether it exceeds constitutional limits because of the character and extent of the information sought.

The findings of the District Court based upon the stipulation of facts leave no room for doubt that these defendants are engaged in transactions in interstate commerce. That they conduct such transactions through the instrumentality of subsidiaries cannot avail to remove them from the reach of the federal power. It is the substance of what they do, and not the form in which they clothe their transactions, which must afford the test. The constitutional authority confided to Congress could not be maintained if it were deemed to depend upon the mere modal arrangements of those seeking to escape its exercise. Compare *Northern Securities Co.* v. *United States,* 193 U. S. 197. We need not now determine to what precise extent these defendants are actually engaged in interstate commerce. It is enough that they do have continuous and extensive operations in that commerce, and Congress cannot be denied the power to demand the information which would furnish a guide to the regulation necessary or appropriate in the national interest. Regulation is addressed to practices which appear to need supervision, correction or control. And to determine what regulation is essential or suitable, Congress is entitled to consider and to estimate whatever evils exist.

Congress has set forth in the Act what it considers to be the factual situation and the need of federal supervision. The following statement is found in paragraph (a) of § 1:

"Public-utility holding companies and their subsidiary companies are affected with a national public interest in that, among other things, (1) their securities are widely marketed and distributed by means of the mails and instrumentalities of interstate commerce and are sold to a

large number of investors in different States; (2) their service, sales, construction, and other contracts and arrangements are often made and performed by means of the mails and instrumentalities of interstate commerce; (3) their subsidiary public-utility companies often sell and transport gas and electric energy by the use of means and instrumentalities of interstate commerce; (4) their practices in respect of and control over subsidiary companies often materially affect the interstate commerce in which those companies engage; (5) their activities extending over many States are not susceptible of effective control by any State and make difficult, if not impossible, effective State regulation of public-utility companies."

Congress has further declared in paragraph (b) of that section, upon the basis of facts disclosed by the reports of the Federal Trade Commission and of the Committee on Interstate and Foreign Commerce of the House of Representatives, and otherwise ascertained, the circumstances in which the national interest and the interest of investors and consumers may be adversely affected by the operation of public utility holding companies. And after this catalogue of the abuses which may exist in the circumstances described, Congress declares it to be its policy "to meet the problems and eliminate the evils as enumerated in this section, connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce." Without attempting to state the limits of permissible regulation in the execution of this declared policy, we have no reason to doubt that from these defendants, with their highly important relation to interstate commerce and the national economy, Congress was entitled to demand the fullest information as to organization, financial structure and all the activities which could have any bearing upon the exercise of congressional authority. The regulation found in § 5 (b)

goes no further than to require this information and we are of the opinion that its validity must be sustained.

Section 4 (a) prescribes the penalty for failure to register under § 5, and that section as an incident to registration imposes the duty to file the described registration statement. Treating the requirements of §§ 4 (a) and 5 as a separable part of the Act, the question is whether that penalty may be validly imposed.

In the imposition of penalties for the violation of its rules, Congress has a wide discretion. Sanctions may be of various types. See *Helvering* v. *Mitchell, ante,* p. 391. They may involve the loss of a privilege which would otherwise be enjoyed. *Id.* Note 2. When Congress lays down a valid rule to govern those engaged in transactions in interstate commerce, Congress may deny to those who violate the rule the right to engage in such transactions. *Champion* v. *Ames,* 188 U. S. 321; *United States* v. *Delaware & Hudson Co.,* 213 U. S. 366, 415; *Brooks* v. *United States,* 267 U. S. 432, 436, 437; *Gooch* v. *United States,* 297 U. S. 124; *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.,* 299 U. S. 334, 346, 347. And while Congress may not exercise its control over the mails to enforce a requirement which lies outside its constitutional province, when Congress lays down a valid regulation pertinent to the use of the mails, it may withdraw the privilege of that use from those who disobey. *Champion* v. *Ames, supra; Lewis Publishing Co.* v. *Morgan,* 229 U. S. 288.

In the instant case, the penalty attaches to the use of the instrumentalities of commerce and of the mails by those who, engaged in that use, refuse to submit to § 5 and thus through registration and the statement which is incident to registration to supply the information which Congress is entitled to demand, and has demanded, with respect to their organization and practices. Each one of the paragraphs of § 4 (a), as related to the requirements of § 5, is addressed to those in that class. We think

that the imposition of such a penalty does not transgress any constitutional provision.

The decree enforces this penalty by injunction as the Act itself authorizes. § 18 (f). The terms of the injunction follow closely the provisions of § 4 (a) and do not extend beyond them. To escape the penalty and the enforcing provisions of the decree, all that the defendants have to do is to register with the Commission and assume, under § 5, the obligation to file the described registration statement. All their rights and remedies with respect to other provisions of the statute remain without prejudice. Their objections to the affirmative provisions of the decree are untenable.

Fourth. The District Court did not err in dismissing the cross bill. Defendants are not entitled to invoke the Federal Declaratory Judgment Act in order to obtain an advisory decree upon a hypothetical state of facts. See *New Jersey* v. *Sargent,* 269 U. S. 328; *United States* v. *West Virginia,* 295 U. S. 463; *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 324; *Anniston Manufacturing Co.* v. *Davis,* 301 U. S. 337, 355. By the cross bill, defendants seek a judgment that each and every provision of the Act is unconstitutional. It presents a variety of hypothetical controversies which may never become real. We are invited to enter into a speculative inquiry for the purpose of condemning statutory provisions the effect of which in concrete situations, not yet developed, cannot now be definitely perceived. We must decline that invitation. *Anniston Manufacturing Co.* v. *Davis, supra.*

The decree is

Affirmed.

Mr. Justice McReynolds dissents.

Mr. Justice Cardozo and Mr. Justice Reed took no part in the consideration and decision of this case.

LOVELL *v.* CITY OF GRIFFIN.

APPEAL FROM THE COURT OF APPEALS OF GEORGIA.

No. 391. Argued February 4, 1938.—Decided March 28, 1938.

1. Whether a federal question was properly presented to and decided by a state court is itself a federal question, to be decided by this Court upon appeal. P. 450.
2. Freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action. P. 450.
3. Municipal ordinances adopted under state authority constitute state action within the meaning of the Fourteenth Amendment. P. 450.
4. A city ordinance forbidding as a nuisance the distribution, by hand or otherwise, of literature of any kind without first obtaining written permission from the City Manager, violates the Fourteenth Amendment; strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. P. 450.

   So *held* as applied to distribution of pamphlets and magazines in the nature of religious tracts.
5. The liberty of the press is not confined to newspapers and periodicals. It embraces pamphlets and leaflets. P. 452.
6. One who is prosecuted for disobeying a license ordinance which is void on its face may contest its validity without having sought a permit under it. P. 452.

55 Ga. App. 609; 191 S. E. 152, reversed.

Appeal from a judgment affirming a sentence imposed for violation of a city ordinance. The Supreme Court of the State denied a review.

Mr. O. R. Moyle for appellant.

Messrs. Hughes Spalding and *Sumter M. Kelley* submitted on brief for appellee.

This ordinance is a police measure which deals with the practice of distributing circulars, handbooks, adver-

tising and other literature within the city limits. If it be kept in mind that every municipality is faced with a sanitary problem in removing from its streets papers, circulars and other like materials, the reasons for the adoption of such an ordinance become apparent. Clearly there is a permissible field for such a regulation within constitutional limitations. Nothing in the ordinance is aimed at or relates to the right to worship as one may prefer, or the right to speak or write with complete freedom. The fact the appellant may have in her own mind associated her forbidden activities with her religious convictions does not establish any legal or constitutional connection between them. *Commonwealth* v. *Plaisted,* 148 Mass. 375; *Smith* v. *People,* 51 Colo. 271; *State* v. *Marble,* 72 Ohio St. 21; *Streitch* v. *Board of Education,* 34 S. D. 169; *State* v. *Big Sheep,* 75 Mont. 219; *McMasters* v. *State,* 21 Okla. Crim. 318; *Reynolds* v. *United States,* 98 U. S. 145; *State* v. *Neitzel,* 69 Wash. 567; *Commonwealth* v. *Herr,* 229 Pa. St. 132.

Appellant is not a member of the press. The record in this case does not place her in the class of persons who are entitled to invoke the constitutional provisions touching the freedom of the press. Moreover, she was not convicted for anything she was speaking or writing. Neither does the ordinance prohibit her from speaking or writing as her judgment may dictate. The requirement of the ordinance that she is not to distribute printed matter which others have published, without a permit, involves in no way the constitutional right of free speech. *Iroquois Transportation Co.* v. *DeLaney Co.,* 205 U. S. 354; *Lee* v. *New Jersey,* 207 U. S. 67; *Fidelity & Casualty Co.* v. *Freeman,* 109 F. 847; *Missouri, K. & T. R. Co.* v. *Cade,* 233 U. S. 642.

The ordinance does restrict the right to distribute circulars, advertising matter and other literature in the city, in the absence of a permit from the City Manager.

It is urged that this restraint involves a denial of due process and the equal protection of the law, in that the City Manager is clothed with unqualified discretion in granting or denying the permit. This is scarcely a denial of the equal protection of the law, since it applies in like manner to all persons. A substantial question as to due process might have been involved in the case except for the following essential facts, to-wit:

(a) Appellant failed to raise in any proper manner the issue of due process in the trial court. The Court of Appeals so ruled, and rightly. *Coleman* v. *Griffin,* 55 Ga. App. 123; *Curtis* v. *Helen,* 171 Ga. 256; *Jordan* v. *State,* 172 Ga. 857; *Palmer* v. *Phinizy,* 151 Ga. 589; *Louisville & N. Ry. Co.* v. *Woodford,* 234 U. S. 46.

(b) Appellant did not apply to the City Manager for a permit. She is not in a position of having suffered from the exercise of the arbitrary and unlimited power of which she complains. Had she made application for a permit and had she been denied one without adequate reason, her constitutional rights would have been infringed. She seeks to claim the benefit of the presumption that an application by her for a permit would have been denied. Nothing in the record justifies such an assumption. The fact that the City Manager is clothed with arbitrary power, if it be a fact, affords the appellant no ground of complaint unless and until she has suffered from the exercise of this power. It is submitted that it is proper for the city to provide by ordinance that all persons distributing materials described by the ordinance be required to apply for a permit. If so, no person desiring to engage in this activity can suffer any legal wrong by reason of the ordinance until the application for a permit has been denied. Until the contrary appears from experience, it will be presumed that all persons legally entitled to a permit will be granted one. Had the appellant applied for one and been denied without substantial cause, a

question of due process would have arisen. Even then, it would be necessary, in order to get a hearing in this Court, for the appellant to raise this question in the manner required by the accepted rules of practice, and this she has not done.

By leave of Court, briefs of *amici curiae* were filed by *Messrs. Francis Biddle* and *Osmond K. Fraenkel,* on behalf of the American Liberties Union, and by *Messrs. Samuel Slaff* and *George Slaff,* on behalf of the Workers' Defense League, in support of appellant.

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

Appellant, Alma Lovell, was convicted in the Recorder's Court of the City of Griffin, Georgia, of the violation of a city ordinance and was sentenced to imprisonment for fifty days in default of the payment of a fine of fifty dollars. The Superior Court of the county refused sanction of a petition for review; the Court of Appeals affirmed the judgment of the Superior Court (55 Ga. App. 609; 191 S. E. 152); and the Supreme Court of the State denied an application for certiorari. The case comes here on appeal.

The ordinance in question is as follows:

"Section 1. That the practice of distributing, either by hand or otherwise, circulars, handbooks, advertising, or literature of any kind, whether said articles are being delivered free, or whether same are being sold, within the limits of the City of Griffin, without first obtaining written permission from the City Manager of the City of Griffin, such practice shall be deemed a nuisance, and punishable as an offense against the City of Griffin.

"Section 2. The Chief of Police of the City of Griffin and the police force of the City of Griffin are hereby required and directed to suppress the same and to abate

any nuisance as is described in the first section of this ordinance."

The violation, which is not denied, consisted of the distribution without the required permission of a pamphlet and magazine in the nature of religious tracts, setting forth the gospel of the "Kingdom of Jehovah." Appellant did not apply for a permit, as she regarded herself as sent "by Jehovah to do His work" and that such an application would have been "an act of disobedience to His commandment."

Upon the trial, with permission of the court, appellant demurred to the charge and moved to dismiss it upon a number of grounds, among which was the contention that the ordinance violated the Fourteenth Amendment of the Constitution of the United States in abridging "the freedom of the press" and prohibiting "the free exercise of petitioner's religion." This contention was thus expressed:

"Because said ordinance is contrary to and in violation of the first amendment to the Constitution of the United States, which reads:

'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.'

"Said ordinance is also contrary to and in violation of the fourteenth amendment to the Constitution of the United States, which had the effect of making the said first amendment applicable to the States, and which reads:

'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

"Said ordinance absolutely prohibits the distribution of any literature of any kind within the limits of the City of Griffin without the permission of the City Manager and thus abridges the freedom of the press, contrary to the provisions of said quoted amendments.

"Said ordinance also prohibits the free exercise of petitioner's religion and the practice thereof by prohibiting the distribution of literature about petitioner's religion in violation of the terms of said quoted amendments."

The Court of Appeals, overruling these objections, sustained the constitutional validity of the ordinance, saying—

"The ordinance is not unconstitutional because it abridges the freedom of the press or prohibits the distribution of literature about the petitioner's religion, in violation of the fourteenth amendment to the constitution of the United States."

While in a separate paragraph of its opinion the court said that the charge that the ordinance was void because it violated a designated provision of the state or federal constitution without stating wherein there was such a violation, was too indefinite to present a constitutional question, we think that this statement must have referred to other grounds of demurrer and not to the objection above quoted which was sufficiently specific and was definitely ruled upon. The contention as to restraint "upon the free exercise of religion," with respect to the same ordinance, was presented in the case of *Coleman* v. *City of Griffin,* 55 Ga. App. 123, and the appeal was dismissed for want of a substantial federal question, 302 U. S. 636. *Reynolds* v. *United States,* 98 U. S. 145, 166, 167; *Davis*

v. *Beason,* 133 U. S. 333, 342, 343. But, in the *Coleman* case, the Court did not deal with the question of freedom of speech and of the press, as it had not been properly presented. We think that this question was adequately presented and was decided in the instant case. Whether it was so presented and was decided is itself a federal question. *Carter* v. *Texas,* 177 U. S. 442, 447; *Ward* v. *Love County,* 253 U. S. 17, 22; *First National Bank* v. *Anderson,* 269 U. S. 341, 346; *Schuylkill Trust Co.* v. *Pennsylvania,* 296 U. S. 113, 121. This Court has jurisdiction.

Freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action. *Gitlow* v. *New York,* 268 U. S. 652, 666; *Stromberg* v. *California,* 283 U. S. 359, 368; *Near* v. *Minnesota,* 283 U. S. 697, 707; *Grosjean* v. *American Press Co.,* 297 U. S. 233, 244; *De Jonge* v. *Oregon,* 299 U. S. 353, 364. See, also, *Palko* v. *Connecticut,* 302 U. S. 319. It is also well settled that municipal ordinances adopted under state authority constitute state action and are within the prohibition of the amendment. *Raymond* v. *Chicago Union Traction Co.,* 207 U. S. 20; *Home Telephone & Telegraph Co.* v. *Los Angeles,* 227 U. S. 278; *Cuyahoga River Power Co.* v. *Akron,* 240 U. S. 462.

The ordinance in its broad sweep prohibits the distribution of "circulars, handbooks, advertising, or literature of any kind." It manifestly applies to pamphlets, magazines and periodicals. The evidence against appellant was that she distributed a certain pamphlet and a magazine called the "Golden Age." Whether in actual administration the ordinance is applied, as apparently it could be, to newspapers does not appear. The City Manager testified that "every one applies to me for a

license to distribute literature in this City. None of these people (including defendant) secured a permit from me to distribute literature in the City of Griffin." The ordinance is not limited to "literature" that is obscene or offensive to public morals or that advocates unlawful conduct. There is no suggestion that the pamphlet and magazine distributed in the instant case were of that character. The ordinance embraces "literature" in the widest sense.

The ordinance is comprehensive with respect to the method of distribution. It covers every sort of circulation "either by hand or otherwise." There is thus no restriction in its application with respect to time or place. It is not limited to ways which might be regarded as inconsistent with the maintenance of public order or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets. The ordinance prohibits the distribution of literature of any kind at any time, at any place, and in any manner without a permit from the City Manager.

We think that the ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his "Appeal for the Liberty of Unlicensed Printing." And the liberty of the press became initially a right to publish "*without* a license what formerly could be published only *with* one." [1] While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the

[1] See Wickwar, "The Struggle for the Freedom of the Press," p. 15.

constitutional provision. See *Patterson* v. *Colorado,* 205 U. S. 454, 462; *Near* v. *Minnesota,* 283 U. S. 697, 713–716; *Grosjean* v. *American Press Co.,* 297 U. S. 233, 245, 246. Legislation of the type of the ordinance in question would restore the system of license and censorship in its baldest form.

The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion. What we have had recent occasion to say with respect to the vital importance of protecting this essential liberty from every sort of infringement need not be repeated. *Near* v. *Minnesota, supra; Grosjean* v. *American Press Co., supra; De Jonge* v. *Oregon, supra.*[2]

The ordinance cannot be saved because it relates to distribution and not to publication. "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." *Ex parte Jackson,* 96 U. S. 727, 733. The license tax in *Grosjean* v. *American Press Co., supra,* was held invalid because of its direct tendency to restrict circulation.

As the ordinance is void on its face, it was not necessary for appellant to seek a permit under it. She was

[2] See also, *Starr Company* v. *Brush,* 185 App. Div. (N. Y.) 261; 172 N. Y. S. 851; *Dearborn Publishing Co.* v. *Fitzgerald,* 271 Fed. 479; *In re Campbell,* 64 Cal. App. 300; 221 Pac. 952; *Coughlin* v. *Sullivan,* 100 N. J. L. 42; 126 Atl. 177. Compare *People* v. *Armstrong,* 73 Mich. 288; 41 N. W. 275; *Chicago* v. *Schultz,* 341 Ill. 208; 173 N. E. 276; *People* v. *Armentrout,* 118 Cal. App. Supp. 761; 1 P. 2d 556.

entitled to contest its validity in answer to the charge against her. *Smith* v. *Cahoon,* 283 U. S. 553, 562.

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

Reversed.

MR. JUSTICE CARDOZO took no part in the consideration and decision of this case.

SANTA CRUZ FRUIT PACKING CO. *v.* NATIONAL LABOR RELATIONS BOARD.

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

No. 536. Argued March 7, 1938.—Decided March 28, 1938.

1. A corporation was engaged, in California, in the business of canning fruits and vegetables, raised in the State, and in disposing of its large output locally and in interstate and foreign commerce, 37% going to destinations beyond the State, partly on f. o. b. shipment and much of it by water. The goods shipped by boat were carried to the wharves on trucks loaded at the plant by warehousemen employed there. Many of these, upon being locked out by the company for having joined a labor union, formed a picket line, and this was so maintained that eventually the movement of trucks from warehouse to wharves ceased entirely. The teamsters refused to haul, the warehousemen at the dock warehouses declined to handle, and the stevedores between dock and ship refused to load, the company's goods. The National Labor Relations Board found that the discharge of the employees and the refusal to reinstate them constituted an unlawful discrimination under the National Labor Relations Act and that the acts of the company tended to lead, and had led, to labor disputes burdening and obstructing interstate commerce. It ordered the company to desist from such practices, to reinstate, with back pay, the discharged employees, and to post notices, etc. *Held* that the case was within the jurisdiction of the Board and that the order was properly sustained by the Circuit Court of Appeals. Pp. 463 *et seq.*

2. Sales to purchasers in another State are not withdrawn from federal control because the goods are delivered f. o. b. at stated points within the State of origin for transportation. P. 463.
3. The federal power to protect interstate commerce in commodities does not depend upon their kind and has been applied to the practices of manufacturers, processors and labor unions. *Carter* v. *Carter Coal Co.*, 298 U. S. 238, did not establish a different principle or overrule the earlier decisions. P. 466.
4. The power of Congress to protect interstate commerce in manufactured articles from burdens and obstructions springing from labor disputes in the factory is not dependent upon an origin outside of the State of the raw materials used in the manufacturing process; nor is the place where the manufacturer makes his sales a controlling element, if the sales in fact are in interstate commerce. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1. P. 464.
5. Cases respecting the state power to tax goods which have not begun to move in interstate commerce, or have come to rest within the State, or to adopt local police measures affecting them, do not deal with the extent of the power of Congress over interstate commerce but are concerned with the question whether a particular exercise of state power, in view of its nature and operation, must be deemed to be in conflict with that paramount authority. P. 466.
6. Where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a close and substantial relation to interstate commerce in order to justify the federal intervention for its protection. P. 466.
7. This principle is essential to the maintenance of our constitutional system. *Id.*
8. In maintaining the balance of the constitutional grants and limitations, it is inevitable that we should define their applications in the gradual process of inclusion and exclusion. And what is reasonably clear in a particular application is not to be overborne by the simple and familiar dialectic of suggesting doubtful and extreme cases. P. 467.
9. The question whether the labor practices of an employer are practices "affecting commerce," as defined by § 2 (6) of the National Labor Relations Act, can not be answered by mere reference to the percentage of the product sold in interstate and foreign commerce. The question that must be faced under the Act upon particular facts is whether the unfair labor practices involved have such a

close and substantial relation to the freedom of interstate commerce from injurious restraint that these practices may constitutionally be made the subject of federal cognizance through provisions looking to the peaceable adjustment of labor disputes. P. 467. 91 F. 2d 790, affirmed.

CERTIORARI, 302 U. S. 680, to review the affirmance of a judgment affirming in part an order of the National Labor Relations Board.

Mr. J. Paul St. Sure for petitioner.

Where there has been no antecedent movement of the raw products in commerce, the business of canning, labeling, packing, storing and loading of fruit and vegetables produced wholly in California is not "in commerce." A labor dispute therein cannot burden or obstruct a commerce which has not begun. Therefore the National Labor Relations Act does not apply and the Board had no jurisdiction. *Carter* v. *Carter Coal Co.,* 298 U. S. 238; *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495; *Veazie* v. *Moor,* 14 How. 568; *Coe* v. *Errol,* 116 U. S. 517; *Kidd* v. *Pearson,* 128 U. S. 1; *Chassaniol* v. *Greenwood,* 291 U. S. 584; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245; *Oliver Mining Co.* v. *Lord,* 262 U. S. 172; *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165; *Lehigh Valley R. Co.* v. *Pennsylvania,* 145 U. S. 192.

Where small quantities of a raw product are shipped into the State for canning and sale to local trade in California, the National Labor Relations Act does not apply for the reason that commerce in such product has ended, and the canning and subsequent handling are local affairs; and labor disputes in such affairs do not directly burden or obstruct commerce. *Schechter Poultry Corp.* v. *United States, supra; East Ohio Gas Co.* v. *Tax Commission,* 283 U. S. 465; *Public Utilities Comm'n* v. *Landon,* 249 U. S. 236; *Atlantic Coast Line* v. *Standard*

Oil Co., 275 U. S. 257; *Industrial Assn. of San Francisco* v. *United States*, 268 U. S. 64.

Unless this Court is willing to go so far as to say that the power of Congress extends over all labor disputes involving production industries, the Board did not have jurisdiction in this case, for the reason that the constitutional power of Congress cannot be made to depend on the intention of the producer to sell its product in interstate or foreign commerce, or the fortuitous circumstance that he may ultimately sell a part of such product outside the State wherein it is produced. *Kidd* v. *Pearson*, 128 U. S. 1; *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210; *Federal Compress & W. Co.* v. *McLean*, 291 U. S. 17; *Oliver Mining Co.* v. *Lord, supra; Chassaniol* v. *Greenwood, supra; Heisler* v. *Thomas Colliery Co., supra; Arkadelphia Milling Co.* v. *St. Louis S. W. R. Co.*, 249 U. S. 134; *Carter* v. *Carter Coal Co., supra.*

The designation of petitioner's produce as "hot cargo" by the International Longshoremen's Association and the refusal of such association to handle such product was an unlawful conspiracy in violation of the Federal Anti-Trust Act and a violation of the Sloss Arbitration Award; and any burden or obstruction to commerce resulting therefrom is indirect and remote and does not extend the power of Congress or the jurisdiction of the Board over petitioner's production business. *Bedford Cut Stone Co.* v. *Journeymen S. C. Assn.*, 274 U. S. 37; *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443; *Coronado Coal Co.* v. *United Mine Workers*, 268 U. S. 295; *Lowe* v. *Lawlor*, 208 U. S. 274; *Anderson* v. *Ship Owners Assn.*, 272 U. S. 359; *Local 167 I. B. T.* v. *United States*, 291 U. S. 293.

The instant case is not in any respect comparable to the cases wherein this Court had held that by reason of the

effects or burdens on interstate commerce the power of Congress extends to the regulation of intrastate affairs.

Rate Cases: *Houston E. & W. T. R. Co.* v. *United States,* 234 U. S. 342; *Florida* v. *United States,* 282 U. S. 194; *Railroad Commission* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563.

Board of Trade and Stockyards Cases: *Board of Trade* v. *Olsen,* 262 U. S. 1; *Hill* v. *Wallace,* 259 U. S. 44; *Swift & Co.* v. *United States,* 196 U. S. 375; *Stafford* v. *Wallace,* 258 U. S. 495; *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420.

Railway Appliance, Employers' Liability, and Railway Labor Cases: *Southern R. Co.* v. *United States,* 222 U. S. 20; *Baltimore & O. R. Co.* v. *Interstate Commerce Comm'n,* 221 U. S. 612; *Mondou* v. *New York, N. H. & H. R. Co.,* (Second Employers' Liability Cases), 223 U. S. 1; *Texas & N. O. R. Co.* v. *Brotherhood of R. & S. S. Clerks,* 281 U. S. 548; *Virginian R. Co.* v. *System Federation No. 40,* 300 U. S. 515.

Anti-Trust Cases: *Standard Oil Co.* v. *United States,* 221 U. S. 1; *United States* v. *American Tobacco Co.,* 221 U. S. 106; *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211.

Mr. Charles Fahy, with whom *Solicitor General Reed, Assistant Solicitor General Bell,* and *Messrs. Robert L. Stern, Robert B. Watts, Laurence A. Knapp* and *Philip Levy* were on the brief, for respondent.

Petitioner is engaged in canning, packing, and shipping fruit and vegetables in Oakland, California. It is the fourth or fifth in size of such canneries in that State, which is the center of the canning industry in the United States; and annually ships large quantities of its products in interstate and foreign commerce. Stoppage of operations as a result of industrial strife in petitioner's plant would directly obstruct the movement of those

commodities in interstate and foreign commerce. There thus exists a "close and intimate" relation between petitioner's operations and the flow of commerce; and the National Labor Relations Act accordingly may validly be applied to petitioner's plant. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 41.

1. This conclusion is not affected by the fact that the products processed by petitioner are grown in California. In the *Jones & Laughlin* case the Court expressly stated that its decision did not turn on the conception that the manufacturing process was carried on in a "stream" or "flow" of commerce, wherein the raw materials arriving from without the State came to rest temporarily at the plant and later went forward again in interstate commerce (301 U. S. at 36). The contention that the stream of commerce had been broken, the Court held was not relevant to the issue involved (301 U. S. at 41). The determinative factor was the obstructing effect of industrial strife upon the interstate movement of goods.

Carter v. *Carter Coal Co.*, 298 U. S. 238, does not support petitioner's contention. The *Carter* decision did not purport to rest on the difference between mining operations and manufacturing enterprises which utilize raw materials obtained through the channels of interstate commerce. Nor did this Court in the *Jones & Laughlin* case, in holding that the *Carter* case was not controlling, suggest that it was to be distinguished upon such a ground. The danger of an obstruction to interstate commerce, and the appropriateness of the means adopted by the Congress to remove it, were the decisive factors in each decision.

The *Jones & Laughlin* decision establishes that the Congress has power to prevent the obstruction to interstate commerce caused by the unfair labor practices condemned in the present Act. Neither the fact nor the degree of obstruction to commerce in manufactured prod-

ucts can in reason depend upon the place of origin of the raw materials. As this Court stated in the *Jones & Laughlin* case, Congressional authority over interstate commerce extends to the protection of such commerce "no matter what the source of the dangers which threaten it" (301 U. S. at 36–37). No distinction can properly be drawn between activities which obstruct interstate commerce in raw materials, in manufactured products, or both.

The geographic fact of concentration of natural resources in particular regions, far from lessening national concern in the industries immediately dependent upon those resources, heightens it. It does so none the less because of the natural, if not necessary, circumstance of the location of such industries at the point of concentration of the resources. The view which petitioner urges would frustrate one of the great purposes of the commerce power as realized in this statute, by removing from the reach of Congressional protection industries whose operations in interstate and foreign commerce are of vital importance to the national welfare and whose interruption or cessation by industrial strife would create problems of the deepest national concern.

2. Approximately 37 per cent. of the product of petitioner's plant is shipped in interstate or foreign commerce. The same employees prepare and ship both the goods which go to points outside California and those which do not. No separation of the employees into those working on goods destined for interstate shipment and those working on goods to be consumed in California is possible. Congress has power to regulate both interstate and intrastate activities when they are inseparably intermingled in this way. *Shreveport Case,* 234 U. S. 342. The suggestion that the power of Congress over such intermingled transactions disappears if more than 50 per cent. of the transactions are intrastate would establish an arbitrary and impractical rule of thumb in violation of the funda-

mental principle of the supremacy of federal power. A review of the decisions in which this Court has sustained federal regulation of intrastate activities because of their deleterious effects upon commerce demonstrates that the validity of such legislation has never turned upon whether the interstate commerce affected was greater in quantity than the intrastate transactions which were necessarily subjected also to the regulation imposed. Clearly, protection to interstate commerce need not be withheld because in affording that protection intrastate commerce is also safeguarded.

By leave of Court, *Messrs. H. W. O'Melveny, Walter K. Tuller,* and *Louis W. Myers* filed a brief as *amici curiae,* supporting petitioner.

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

The National Labor Relations Board on April 2, 1936, after hearing, found that petitioner, Santa Cruz Fruit Packing Company, a California corporation, had been engaged in unfair labor practices affecting commerce within the meaning of § 8, subdivisions (1) and (3) and § 2, subdivisions (6) and (7) of the National Labor Relations Act, and ordered petitioner to desist from such practices, to reinstate with back pay certain employees who had been discharged, and to post appropriate notices. 1 N. L. R. B. 454. Upon petition of the Board, the Circuit Court of Appeals affirmed the order so far as it related to petitioner's employees at its Oakland plant. 91 F. (2d) 790. In view of the importance of the question with respect to the application of the National Labor Relations Act, this Court granted certiorari.

There is no dispute as to the pertinent facts. The findings of the Board, supported by evidence, show the following:

Petitioner is engaged at its plant at Oakland in canning, packing and shipping fruit and vegetables, the bulk of

which are grown in that State. During the "peak" season, petitioner employs from 1200 to 1500 persons of whom about 30 are warehousemen. The total "pack" in the year 1935 amounted to about 1,699,270 cases. Of this amount about 37 per cent. were shipped in interstate or foreign commerce, 9.02 per cent. being sent to foreign countries and approximately 473,620 cases, or about 27.89 per cent. to various points in the United States outside California. The sales to purchasers outside the State were under either f. o. b. or c. i. f. San Francisco Bay Point contracts.

The methods of transportation are by water, rail and truck. Export shipments go by water and this is also the chief sort of carriage to points within the United States outside California, about 20 per cent. being shipped by rail and an undetermined amount by truck directly to the point of destination. "There is a constant stream of loading and shipping of products" out of petitioner's plants throughout the entire year. From 3,000 to 4,000 cases are loaded daily in the various vehicles of conveyance. That loading is a substantial and regular part of the work of the warehousemen in petitioner's employ. When the shipments are by rail or overland trucks, these employees load directly into the equipment of the principal carriers. When shipments are by boat, the warehousemen load the cases into the trucks which carry the goods to the docks.

Weighers, Warehousemen and Cereal Workers Local 38–44, International Longshoremen's Association, is a labor organization affiliated with the American Federation of Labor. Its efforts to organize the Oakland plant were begun in July, 1935, and many of the permanent warehousemen made application for membership. When this came to the attention of petitioner early in August, the General Manager announced that he would not permit a union in the plant because of competitive conditions. On their return from a union meeting at which the men

were to be initiated, members of the night shift were prevented from entering the plant and the next morning the members of the day crew were similarly excluded. A picket line then formed, on the morning of August 8th, was maintained until September 27th with such effectiveness that eventually the movement of trucks from warehouses to wharves ceased entirely. The Board found: "The teamsters refused to haul Santa Cruz merchandise; the warehousemen at the dock warehouses who ordinarily unload the canned goods from the cars prior to their reloading into the ships, since they were members of the same union as the Santa Cruz warehousemen, also declined to handle Santa Cruz cargo. As members of the sister union, I. L. A. 38–79, the stevedores who move the goods from dock to ship also refused to move Santa Cruz cargo both at the East Bay and San Francisco docks during the entire period that the picket line was maintained. Other unions whose members refused to move 'hot' Santa Cruz cargo were those members of the Sailors who comprised the crews of steam schooners and whose duties include the handling of cargo." Petitioner points out that the refusal of the other unions to handle petitioner's goods was a violation of an arbitration award made in October, 1934, following the San Francisco maritime strike of that year.

The Board found that interference with the activities of employees in forming or joining labor organizations results in strikes and industrial unrest which habitually have had the effect in the canning industry of impeding the movement of canned products in interstate and foreign commerce. Reference was made to official statistics of the United States Department of Labor in relation to the canning and preserving industries from which it appeared that of the fifteen strikes and lockouts in 1934, and the first six months of 1935, eight were the outcome of difficulties in regard to union recognition and discrimi-

nation for union activities, 7,484 workers being involved in those stoppages.

The Board concluded that the discharge of the employees named and the refusal to reinstate them constituted an unlawful discrimination under the National Labor Relations Act and that the acts of petitioner had led and tended to lead to labor disputes burdening and obstructing commerce.

Petitioner contends that the manufacturing and processing in which petitioner is engaged are local activities and that the Board was without jurisdiction over the labor dispute involved in this case.

First. There is no question that petitioner was directly and largely engaged in interstate and foreign commerce. We have often decided that sales to purchasers in another State are not withdrawn from federal control because the goods are delivered f. o. b. at stated points within the State of origin for transportation. See *Savage* v. *Jones,* 225 U. S. 501, 520; *Texas & N. O. R. Co.* v. *Sabine Tram Co.,* 227 U. S. 111, 114, 122; *Pennsylvania R. Co.* v. *Clark Bros. Coal Mining Co.,* 238 U. S. 456, 465–468. A large part of the interstate commerce of the country is conducted upon that basis and the arrangements that are made between seller and purchaser with respect to the place of taking title to the commodity, or as to the payment of freight, where the actual movement is interstate, do not affect either the power of Congress or the jurisdiction of the agencies which Congress has established. *Pennsylvania R. Co.* v. *Clark Bros. Coal Mining Co., supra.*

Second. The power of Congress extends not only to the making of rules governing sales of petitioner's products in interstate commerce, as, for example, with respect to misbranding under the Federal Food and Drugs Act (21 U. S. C., §§ 1 to 26), or with respect to forbidden dis-

criminations in prices under the Clayton Act (15 U. S. C. 13), but also to the protection of that interstate commerce from burdens, obstructions and interruptions, whatever may be their source. *Second Employers' Liability Cases,* 223 U. S. 1, 51. The close and intimate effect which brings the subject within the reach of federal power may be due to activities in relation to productive industry, although that industry when separately viewed is local. It is upon this well-established principle that the constitutional validity of the National Labor Relations Act has been sustained. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 38.

Petitioner urges that the principle is inapplicable here as the fruits and vegetables which petitioner prepares for shipment are grown in California and petitioner's operations are confined to that State. It is not a case where the raw materials of production are brought into the State of manufacture and the manufactured product is handled by the manufacturer in other States. In view of the interstate commerce actually carried on by petitioner, the conclusion sought to be drawn from this distinction is without merit. The existence of a continuous flow of interstate commerce through the State may indeed readily show the intimate relation of particular transactions to that commerce. *Stafford* v. *Wallace,* 258 U. S. 495, 516; *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1, 33. But, as we said in the *Jones & Laughlin* case, the instances in which the metaphor of a "stream of commerce" has been used are but particular, and not exclusive, illustrations of the protective power which Congress may exercise. "The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce. Burdens and obstructions may be due to injurious actions springing from other sources." *Id.,* p. 36.

Such injurious action burdening and obstructing interstate trade in manufactured articles may spring from labor disputes irrespective of the origin of the materials used in the manufacturing process. And the place where the manufacturer makes his sales is not controlling if the sales in fact are in interstate commerce. A few illustrations, from our many decisions, will suffice. In *Loewe* v. *Lawlor* [1908], 208 U. S. 274, 302, the conspiracy of the "United Hatters," to compel the plaintiffs to unionize their factory, was held to fall within the Federal Anti-Trust Act because it was aimed at the destruction of the interstate trade in the manufactured hats. In *United Mine Workers* v. *Coronado Co.* [1922], 259 U. S. 344, 407, 408, the Court said that "Coal mining is not interstate commerce and the power of Congress does not extend to its regulation as such," but that "if Congress deems certain recurring practices, though not really part of interstate commerce, likely to obstruct, restrain or burden it, it has the power to subject them to national supervision and restraint." And in the second *Coronado* case [1925], 268 U. S. 295, 310, the Court held that the evidence was adequate to show that the purpose was to stop the production of non-union coal and prevent its shipment to markets of other States, and that a combination to that end would constitute a direct violation of the Anti-Trust Act. Another illustration is found in *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Assn.* [1927], 274 U. S. 37, 48, where a conspiracy of stone cutters was held to have "the immediate purpose and necessary effect of restraining future sales and shipments in interstate commerce" of the building stone which was quarried at petitioner's plants.

With respect to the federal power to protect interstate commerce in the commodities produced, there is obviously no difference between coal mined, or stone quarried, and fruit and vegetables grown. The same principle must apply, and has been applied, to injurious restraints of

interstate trade which are caused by the practices of manufacturers and processors. *Standard Oil Co.* v. *United States,* 221 U. S. 1; *United States* v. *American Tobacco Co.,* 221 U. S. 106. The case of *Carter* v. *Carter Coal Co.,* 298 U. S. 238, did not establish a different principle or overrule the decisions which we have cited. See *National Labor Relations Board* v. *Jones & Laughlin Steel Corp., supra,* p. 41. Nor are the cases in point which are cited by petitioner with respect to the exercise of the power of the State to tax goods, which have not begun to move in interstate commerce or have come to rest within the State, or to adopt police measures as to local matters. In that class of cases the question is not with respect to the extent of the power of Congress to protect interstate commerce, but whether a particular exercise of state power in view of its nature and operation must be deemed to be in conflict with that paramount authority. *Bacon* v. *Illinois,* 227 U. S. 504, 516; *Stafford* v. *Wallace, supra,* p. 526; *Minnesota* v. *Blasius,* 290 U. S. 1, 8.

Third. It is also clear that where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a close and substantial relation to interstate commerce in order to justify the federal intervention for its protection. However difficult in application, this principle is essential to the maintenance of our constitutional system. The subject of federal power is still "commerce," and not all commerce but commerce with foreign nations and among the several States. The expansion of enterprise has vastly increased the interests of interstate commerce but the constitutional differentiation still obtains. *Schechter Corporation* v. *United States,* 295 U. S. 495, 546. "Activities local in their immediacy do not become interstate and national because of distant repercussions." *Id.,* p. 554.

To express this essential distinction, "direct" has been contrasted with "indirect," and what is "remote" or "dis-

tant" with what is "close and substantial." Whatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution such as "interstate commerce," "due process," "equal protection." In maintaining the balance of the constitutional grants and limitations, it is inevitable that we should define their applications in the gradual process of inclusion and exclusion.

There is thus no point in the instant case in a demand for the drawing of a mathematical line. And what is reasonably clear in a particular application is not to be overborne by the simple and familiar dialectic of suggesting doubtful and extreme cases. The critical words of the provision of the National Labor Relations Act in dealing with the described labor practices are "affecting commerce," as defined. § 2 (6). It is plain that the provision cannot be applied by a mere reference to percentages and the fact that petitioner's sales in interstate and foreign commerce amounted to 37 per cent., and not to more than 50 per cent., of its production cannot be deemed controlling. The question that must be faced under the Act upon particular facts is whether the unfair labor practices involved have such a close and substantial relation to the freedom of interstate commerce from injurious restraint that these practices may constitutionally be made the subject of federal cognizance through provisions looking to the peaceable adjustment of labor disputes.

The question of degree is constantly met in other relations. It is met whenever the Interstate Commerce Commission is required to find whether an intrastate rate or practice of an interstate carrier causes an undue and unreasonable discrimination against interstate or foreign commerce. 49 U. S. C. § 13(4). *The Shreveport Case,* 234 U. S. 342, 351. It is met under the Federal Employers' Liability Act, where the question is whether the

employee's occupation at the time of his injury is "in interstate transportation or work so closely related to such transportation as to be practically a part of it." *Chicago & N. W. Ry. Co.* v. *Bolle,* 284 U. S. 74, 78, 79; *New York, N. H. & H. R. Co.* v. *Bezue,* 284 U. S. 415, 420. It is met in the enforcement of the Clayton Act in determining whether the effect of the described provisions in contracts for the sale of commodities is "to substantially lessen competition." 15 U. S. C., 13, 14. *Standard Fashion Co.* v. *Magrane-Houston Co.,* 258 U. S. 346, 356, 357; *Federal Trade Comm'n* v. *Raladam Co.,* 283 U. S. 643, 647, 648.

Such questions cannot be escaped by the adoption of any artificial rule.

Fourth. The direct relation of the labor practices and the resulting labor dispute in the instant case to interstate commerce and the injurious effect upon that commerce are fully established. The warehousemen in question were employed by petitioner in loading its goods either into the cars of carriers or into the trucks which transported the goods to the docks for shipment abroad or to other States. The immediacy of the effect of the forbidden discrimination against these warehousemen is strikingly shown by the findings of the Board. When the men found themselves locked out because of their joining the union, they at once formed a picket line and this was maintained with such effectiveness that eventually "the movement of trucks from warehouse to wharves ceased entirely." The teamsters refused to haul, the warehousemen at the dock warehouses declined to handle, and the stevedores between dock and ship refused to load, petitioner's goods. These became, in the parlance of the men, "hot" cargo. Petitioner says that this was an unlawful conspiracy of those sympathizing with its discharged warehousemen, but it was the discrimination against them which led directly to the interference

with the movement from the plant and elicited the support so effectively given.

It would be difficult to find a case in which unfair labor practices had a more direct effect upon interstate and foreign commerce.

The relief afforded by the Board, in requiring petitioner to desist from the unfair labor practices condemned by the Act and to reinstate the discharged employees with back pay, was properly sustained by the Circuit Court of Appeals, and its order is affirmed.

Affirmed.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration and decision of this case.

MR. JUSTICE BUTLER, dissenting.

Carter v. *Carter Coal Co.*, 298 U. S. 238, decided that Congress lacks power to regulate terms and conditions of employment of those engaged in local production of commodities sold and about to be shipped in interstate commerce. The circuit court of appeals found two questions for solution. One was whether upon that point the *Carter* case, in 1936, has been overruled by our decision in 1937 in *Labor Board* v. *Jones & Laughlin,* 301 U. S. 1. The second was whether the power extends to cases where only 39% of goods locally produced are shipped in interstate commerce. The court, one judge dissenting, upheld the order. Each of the judges wrote an opinion; two held this Court has overruled the *Carter* case.

If the decision of the *Carter* case upon the point stated stands, the Board's order cannot be upheld. The lower court made its decision depend upon that question. Save authoritatively to decide it here, there was no reason for granting the writ. But the opinion just announced does not refer to the question.

In the *Jones & Laughlin* and companion cases, four dissenting Justices thought the Court then departed from well-established principles followed in the *Carter* case and quoted (p. 96) a passage from it expounding what it meant by "direct" effect on interstate commerce as distinguished from what is "indirect." And the dissenting opinion insisted (p. 97) that, under the *Carter* decision, the facts in those cases did not disclose any direct effect upon interstate commerce, and said: "A more remote and indirect interference with interstate commerce or a more definite invasion of the powers reserved to the states is difficult, if not impossible, to imagine."

But the dissent failed to elicit from the Court any statement as to whether it meant to overrule the *Carter* case. The opinion does not discuss that case. It does, however, contain the following (p. 41): "In the *Carter* case . . . the Court was of the opinion that the provisions of the statute relating to production were invalid upon several grounds,—that there was improper delegation of legislative power, and that the requirements not only went beyond any sustainable measure of protection of interstate commerce but were also inconsistent with due process. These [meaning the *Schechter* and *Carter*] cases are not controlling here." The later decisions of this Court involving the power of Congress to deal with labor relations in local production do not refer to the *Carter* case. At least until this Court definitely overrules that decision, it should be followed.

Upon the authority of that case, I would reverse the order of the circuit court of appeals on the ground that, as applied here, the Act is unconstitutional.

MR. JUSTICE MCREYNOLDS concurs in this opinion.

DEITRICK, RECEIVER, ET AL. *v.* STANDARD SURETY & CASUALTY CO.

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

No. 455. Argued March 7, 8, 1938.—Decided March 28, 1938.

1. A defense of fraud, good against a national bank in an action to enforce a contract, is good against the bank's receiver in such an action. P. 479.
2. The receiver of a national bank sought to enforce against a surety company, as contracts made to the bank, bonds purporting to have been executed by the company through a general agent and purporting to guarantee payment of certain notes held by the bank. The surety alleged and the proofs showed that the bonds were obtained by the bank through the fraud of the bank's president in collusion with the surety's agent. There was evidence that the agent knew the bonds would be shown to the bank directors and to any others entitled to inquire concerning the notes, for the purposes of deception. *Held* that the pleadings afforded no basis for a recovery by the receiver upon the theory that because the Comptroller and national bank examiners were deceived by the bonds to the injury of creditors, therefore the surety was estopped to deny their validity as against the receiver, representative of such creditors. P. 479.

90 F. 2d 862, 866, affirmed.

CERTIORARI, 302 U. S. 676, to review the affirmance of judgments and decrees of the District Court in actions at law brought by the predecessor of the above-named petitioner, receiver of a national bank, to recover from the surety company on bonds held by the bank, and in suits in equity brought by the surety company in a state court and subsequently removed, in which the surety sought to have the bonds canceled for fraud. The cases were heard in conjunction by the District Court, and evidence was taken and findings were made by an Auditor and Master. That court dismissed the actions and decreed in the surety's favor.

Messrs. George P. Barse and *Robert E. Goodwin,* with whom *Messrs. Richard M. Nichols, James Louis Robertson,* and *Trevor V. Roberts* were on the brief, for petitioners.

Messrs. Frederic H. Chase and *Raymond P. Baldwin,* with whom *Mr. Frank H. Stewart* was on the brief, for respondent.

Mr. Justice McReynolds delivered the opinion of the Court.

The Boston-Continental National Bank, established in December 1930 through consolidation of Boston National Bank and Continental National Bank, became insolvent. December 17, 1931, a receiver appointed by the Comptroller of the Currency took charge of its affairs. Petitioner is his successor. Among the bank's effects were four "Note-Guaranty" Bonds—$40,000, $52,000, $20,000 and $20,000—alike in form, dated in August and December 1930 and June and July 1931, with certain "endorsements" showing extensions. Each purported to be executed by the maker of a described note as principal with Respondent as surety, and was conditioned to pay to the bank the amount of the note upon default, &c.

In June and September 1932 the Receiver brought separate actions at law upon three of these bonds. In each he alleged that the Company was indebted to him for the specified penalty with interest; and for this he asked judgment. The three declarations are alike in form and allegations. One, typical of all, is copied below.[1]

[1] Declaration—

Now comes the plaintiff in the above-entitled action and says that on December 22, 1931, he was appointed receiver of Boston-Continental National Bank by the Comptroller of the Currency of the United States, that he duly qualified and is now acting as such receiver.

And the plaintiff says that the defendant duly entered into, executed under seal and delivered to the Continental National Bank of

There also is one of the Note-Guaranty Bonds, typical of all.[2] Each declaration exhibited a bond, alleged that thereby the Company bound itself to pay the bank a

Boston, now known as Boston-Continental National Bank, a written instrument or bond, copy whereof is hereto annexed marked "A" and hereby made a part hereof; that by the terms of said bond the defendant bound itself to pay said Continental National Bank of Boston the sum of forty thousand dollars ($40,000) in the event that four notes of ten thousand dollars ($10,000) each signed by Westchester Discount Corporation were not paid upon the due dates as set forth in said bond, the last due date being April 20, 1931; that some time prior to April 20, 1931, said bond was extended to June 20, 1931, by a written instrument called endorsement, copy whereof is hereto annexed marked "B"; that some time prior to June 20, 1931 said bond was extended to December 20, 1931 by a written instrument called endorsement, copy whereof is hereto annexed marked "C"; that the condition of said bond as extended as aforesaid has been broken in that Westchester Discount Corporation, the principal named therein, has not paid the notes described in said bond according to their terms, but on the contrary has failed, refused and declined to pay said notes and still continues so to refuse, notwithstanding the fact that all times have elapsed and all conditions have been fulfilled necessary to entitle the plaintiff to payment in full of said notes; that the defendant was duly notified of the default in accordance with the provisions of the bond; that the damages sustained by the plaintiff on account of the default of said Westchester Discount Corporation are in excess of forty thousand dollars ($40,000).

Wherefore, the defendant is indebted to the plaintiff in the penal sum of said bond with interest from December 20, 1931.

And the plaintiff says that this is an action at law arising under the Constitution and laws of the United States and is a case for winding up the affairs of said Boston-Continental National Bank; and the District Court of the United States for the District of Massachusetts has original jurisdiction under Section 24 of the Judicial Code of the United States.

(Signed) By his Attorneys, ——— ———,
——— ———.

[2] Copy of Bond—

No. $40,000.00

Know all Men by these Presents, That we, Westchester Discount Corporation of Mount Vernon, New York, as Principal, and

specified sum in the event of default, which had occurred, &c., that damages had been sustained whereby the surety had become indebted "in the penal sum of said bond, with interest."

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the Standard Surety & Casualty Company of New York, a corporation organized and existing under the laws of the State of New York and having an usual place of business in Boston, as Surety, are held and firmly bound and obliged unto the Continental National Bank of Boston, a banking corporation duly organized under the laws of the Commonwealth of Massachusetts and having an usual place of business in Boston in the County of Suffolk, in the full and just sum of forty thousand dollars ($40,000.), to be paid to said Continental National Bank of Boston as hereinafter provided to which payment we bind ourselves, our heirs, executors, administrators firmly by these presents.

The condition of this obligation is such that if the said Westchester Discount Corporation shall upon the due dates as hereinafter indicated make to the Continental National Bank of Boston full and true payment of a schedule of four notes as listed below then this obligation shall be void, otherwise shall remain in full force and effect.

Schedule of Notes.

Date	Amount	Maturity
Dec. 20, 1930.....	$10,000.00	January 20, 1931
Dec. 20, 1930.....	10,000.00	February 20, 1931
Dec. 20, 1930.....	10,000.00	March 20, 1931
Dec. 20, 1930.....	10,000.00	April 20, 1931

In the event of default on the part of the principal on any note, the obligee shall notify the Home Office of the Surety Company at 80 John Street, New York City, New York, within ten (10) days by registered mail, of such default, and the Surety Company shall pay any liability hereunder, not exceeding the amount still unpaid on any or all of the aforesaid notes and in no event exceeding forty thousand dollars ($40,000.), said payment to be made by the Surety within thirty days after maturity of the final note.

Witness our hands and seals, and dated this 20th day of December, A. D. 1930.

WESTCHESTER DISCOUNT CORPORATION [SEAL],
By JOSEPH STONE, *Treas.*
STANDARD SURETY & CASUALTY COMPANY OF NEW YORK,
By PERCY G. CLIFF, *Attorney-in-fact.*

Answering, the Company denied liability and alleged that, as the bank well knew, the bond was executed without authority, had been fraudulently obtained, was invalid.

Before the three law actions were filed the Surety Company instituted four separate equitable proceedings in the Supreme Court, Suffolk County, Massachusetts, against the bank and makers of guaranteed notes. Each complaint alleged that the bank had fraudulently obtained the bond and asked that it be declared null and void. Later the Receiver became party in these causes and all were removed to the federal court. There, he filed separate answers, substantially alike, averring that the bond had been duly executed, that default had taken place and that damages amounting to the full amount of the specified penalty had been sustained. Each answer concluded—"Wherefore these defendants pray: 1. That the court determine the amount due from the plaintiff to Boston-Continental Bank and John B. Cunningham, its receiver, and order the plaintiff to pay the same with interest. 2. For such further relief as the court finds meet and just."

Copies of one complaint [3] and answer [4] thereto, typical of all, are in the margin.

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[3] Bill of Complaint—

1. The plaintiff is a corporation legally established and existing under the laws of the State of New York, having a usual place of business in Boston in the County of Suffolk in this Commonwealth.

2. The defendant Boston-Continental National Bank formerly called Continental National Bank of Boston, is a national banking association, legally established and existing under the laws of the United States of America, having its usual place of business in said Boston. The defendant Westchester Discount Corporation is a corporation established and existing under the laws of the State of New York having its usual place of business in Mount Vernon in the County of Westchester and State of New York.

3. The plaintiff is informed and believes and therefore avers that on or about December 20th, A. D. 1930 the defendant Westchester

A jury was waived in the law actions and the seven causes went to an Auditor and Master with instructions

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Discount Corporation and one Percy G. Cliff executed an instrument a copy of which is hereto annexed marked A and made a part hereof, and at the same time the defendant bank executed and delivered to said Cliff an instrument entitled "Release" a copy of which is hereto annexed Marked B and made a part hereof.

Thereafter, so the plaintiff is informed and believes and therefore avers, the said Cliff executed the instruments entitled "Endorsements" copies of which marked respectively C. and D. are hereto annexed and made parts hereof.

4. The plaintiff is informed and believes and therefore avers that all of the instruments aforesaid marked A. C. and D. were executed by said Cliff at the request and solicitation of the defendants without any consideration or security, without premium charged or paid or intended to be charged or paid therefor, upon the understanding between the defendants and said Cliff that said instruments were not binding obligations of the plaintiff, and upon the assurance and promise given by the defendants to said Cliff and upon the understanding that said instruments would not be used or enforced by said bank against the plaintiff, that the plaintiff should never be informed of the existence thereof, and that after remaining in the custody of the defendant bank for a short time they should be returned to said Cliff.

5. All of the instruments above described copies of which are hereto annexed marked A. C. and D. were executed by the said Cliff without authority from the plaintiff and without its knowledge or consent, as both defendants well knew. The plaintiff has only recently learned of the existence of said instruments which are now in the possession of the defendant bank.

Wherefore the plaintiff prays:

1. That the defendants be enjoined from enforcing or attempting to enforce the said instruments marked A. C. and D. or any of them by suit or otherwise.

2. That the said instruments marked A. C. and D. be declared null and void and that the defendant bank be ordered to deliver them up to be cancelled.

3. For such other and further relief as may be necessary and proper.

(Signed) By its Attorneys, ——— ———,

——— ———.

to report findings of fact and conclusions of law, the former to be final. After taking much evidence he reported with

[4] ANSWER OF BOSTON-CONTINENTAL NATIONAL BANK AND JOHN B. CUNNINGHAM, RECEIVER OF BOSTON-CONTINENTAL NATIONAL BANK.

Now come Boston Continental National Bank and John B. Cunningham, receiver of Boston-Continental National Bank, and for answer to the plaintiff's bill of complaint say as follows:

1. They admit the allegations contained in the first paragraph of the bill of complaint.

2. They admit the allegations contained in the second paragraph of the bill of complaint.

3. As to the allegations contained in the third paragraph of the bill of complaint, they say that the instrument, a copy whereof is attached to the bill of complaint marked "A", was duly executed by Westchester Discount Corporation by Joseph Stone, its treasurer, and was duly executed by the plaintiff, by Percy G. Cliff, its attorney-in-fact, and that an attested copy of said Cliff's general power of attorney was attached to the original instrument; that thereafter the plaintiff duly executed the instruments entitled "Endorsements" by said Cliff, its attorney-in-fact, copies of which endorsements are attached to the bill of complaint marked "C" and "D"; that if a purported release was delivered to said Cliff by Continental National Bank by Terrell M. Ragan in the form attached to the bill of complaint marked "B", such purported release was delivered without authority of the board of directors of said Continental National Bank, was executed without consideration and is voidable and void. Except as aforesaid, they deny the allegations contained in said paragraph 3 of the bill of complaint.

4. They deny the allegations contained in the fourth paragraph of the bill of complaint.

5. They deny the allegations contained in the fifth paragraph of the bill of complaint.

6. Further answering they say that the condition of said instrument, copy of which is attached to the bill of complaint marked "A" as extended by instruments, copies of which are attached to the bill of complaint marked "C" and "D", has been broken in that Westchester Discount Corporation, the principal named in said instrument, has not paid the notes described therein according to their terms, but on the contrary has failed, refused and declined to pay said notes and still continues so to refuse, notwithstanding the fact

a finding of facts showing clearly that the bank obtained the bonds through the fraud of its president, Ragan, and Cliff, general agent of the Company. Among other things he said: "I rule that the bonds and 'endorsements' in suit were not binding obligations in the hands of the bank as a going concern, for the reason that Ragan's knowledge of their infirmities is imputed to the bank; and that the bonds and 'endorsements' would not be binding obligations in the hands of the receiver, if his rights were derived solely from the bank as distinguished from its creditors." He further ruled that as Cliff, general agent of the Surety Company, knew the bonds would be shown to the bank directors and to any others entitled to inquire concerning the notes described therein for the purpose of deception, therefore "the bonds and 'endorsements' in suit are binding obligations in the hands of the receiver due to the fact that he represents the bank's creditors."

The District Court heard the causes on report and exceptions. It held the bonds void and further "adjudged and decreed that the counterclaim of the defendant receiver, set forth in his answer, be and the same is hereby dismissed."

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that all times have elapsed and all conditions have been fulfilled necessary to entitle Boston-Continental National Bank and John B. Cunningham, receiver of said bank, the successors to the obligee described therein, to payment in full of said notes; that the plaintiff was duly notified of the default in accordance with the provisions of the said instrument; that the damages sustained by these defendants on account of the default of said Westchester Discount Corporation are in excess of $40,000.

Wherefore these defendants pray:

1. That the court determine the amount due from the plaintiff to Boston-Continental National Bank and John B. Cunningham, its receiver, and order the plaintiff to pay the same with interest.

2. For such further relief as the court finds meet and just.

(Signed) By their Attorneys, ——— ———,

——— ———.

By stipulation the causes were joined for appeal upon a single record. The Circuit Court of Appeals affirmed the District Court and said: "The master and auditor held that the receiver in bringing these actions did not derive his right of recovery through the Bank, but because one or more creditors of the Bank were deceived, and as he represents creditors he derived his right of action through them. The receiver, however, makes no such allegations in his declaration." "It is clear from the pleadings that the receiver seeks to recover on these bonds as assets of the Bank. In such an action he stands no better than the Bank itself. All defenses open against the Bank in such a case are open against the receiver, and he is chargeable with knowledge of all facts known to the bank affecting the character of the claim." "If therefore, the contract with the Surety Company was illegal as to the Bank, because, as the master and auditor found, the Bank was charged with the knowledge of its president, a recovery based on the contract of surety cannot be had by the receiver, since a recovery must be based on the pleadings, and the allegations of liability in the plaintiff's declarations are based solely on the contract of surety." In respect of the Receiver's counterclaim set up in the equity suits it said: "The plaintiff's counterclaim distinctly raises the question of the validity of the bonds. The issue of trust for the benefit of creditors is not raised or suggested." "The obligations of the Surety Company based on the depositors of the bank being injured by the giving of the bonds, and the receiver's claim against the Surety Company based on a trust relationship are not mentioned, and, we think, are not raised by the plaintiff's counterclaim in the equity suits."

We agree with the conclusion reached by the Circuit Court of Appeals. Its judgment must be affirmed.

Counsel for the Petitioner here submit—"The Receiver's position rests primarily upon the proposition that the

circumstances surrounding the giving of the note-guaranty bonds by Cliff to the Bank accompanied by the supporting powers of attorney, . . . and the consequences which followed the credence given to said bonds and powers of attorney by the national bank examiners and the Comptroller, acting as the representatives of the depositors and other creditors, give rise, in a suit by the Receiver to enforce the bonds, to an *estoppel* which precludes the Surety Company from denying the validity of the bonds and from asserting as a defense that its agent acted fraudulently and without authority in executing the bonds and that a fraudulent official of the Bank knew of the agent's misconduct."

An examination of the pleadings makes it quite clear that the Receiver undertook to set up rights acquired by the insolvent bank through duly executed contracts between it and the Surety Company. He makes no suggestion of a purpose attributable to the company to mislead creditors or others; makes no allegations of damage except that sustained by the bank. He sets up no facts which would render unconscionable a denial of liability upon the bond because of the agent's fraud obviously induced by the president of the bank. In this state of the pleadings the Receiver may not have judgment; he cannot rely on something not complained of, nor can he have damages because of supposed deceptions which the pleadings fail to suggest.

In *Rankin* v. *City National Bank*, 208 U. S. 541, 545, 546, a suit by the receiver of the Capitol National Bank of Guthrie to recover the amount of an alleged deposit where it appeared "that the whole business, from beginning to end, was and was intended to be a mere juggle with books and papers to deceive the bank examiner," this Court denied the receiver's claim and said: "If the Guthrie Bank had sued while it was a going concern it could not have recovered, and the receiver stands no bet-

ter than the bank." We adhere to the doctrine there approved and regard it as decisive of the present cause.

Affirmed.

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

MR. JUSTICE BLACK, dissenting.

When two or more persons have jointly perpetrated a fraud with intent to injure others, justice and law combine to entitle injured parties to recover from any or all of the conspirators. Corporations can act only through agents. When, as here, two corporations, acting through authorized agents, have jointly perpetrated a fraud which was intended to—and did—injure others, a just rule of law should likewise hold both corporations jointly and severally responsible for the damages inflicted by them upon innocent parties.

In this case innocent depositors and other creditors of a now insolvent national bank suffered damages as a direct result of fraud wilfully perpetrated on them by joint action of the bank and the respondent surety corporation, acting through their agents. Because of the guilty participation of the bank president in this fraud, the opinion just read denies the receiver of the insolvent bank a recovery which would inure to the benefit of the innocent depositors. At the same time, however, the respondent surety corporation is freed from any responsibility to these innocent parties, in spite of the admitted guilty participation of its agent. That the agent of the respondent surety corporation was authorized to write the indemnity bonds used in the fraud is disclosed by the findings of the master and auditor—acting "under a stipulation that findings of fact shall be final." These findings show that:

The duly licensed agent of the surety company (respondent) conspired with the president of the bank to

supply indemnity bonds guaranteeing the payment of certain notes held by the bank, which bonds were to be placed among the assets of the bank for the purpose of deceiving federal bank examiners, the bank's directors and all others entitled to inquire as to the soundness of the notes; the surety company's agent also personally assured the examiners that the bonds were all right; no premium was paid the surety company and the bonds were intended by the respondent's duly authorized agent and the president of the bank to be valueless and used as "window dressings" to accomplish deceptions; respondent's duly licensed agent had a power of attorney "to make, execute and deliver . . . for and on its behalf as surety, any and all bonds . . . undertakings, or anything in the nature of any of them, . . . to all intents and purposes as if same had been duly executed and acknowledged by the regularly elected officers of the company . . . "; a copy of the power of attorney was attached to the bonds and the examiners inspected public records and verified the authenticity of this power of attorney; these bonds were executed after the examiners had notified the bank to make good an impairment of capital and the execution of these bonds caused the comptroller to withdraw his order to make good the impairment and as a result the bank continued to remain open, assumed additional obligations, and accepted further deposits in large amounts.

Since the receiver represents the creditors as well as the bank [1] he can sue in his own name to recover assets

[1] *Case* v. *Terrell*, 11 Wall. 199, 202; High, "On Receivers," 4th ed., §§ 314, 320; *In re Pleasant Hill Lumber Co.*, 126 La. 743, 757; 52 So. 1010; *Duke* v. *Stayton Co.*, 132 Wash. 69, 77; 231 Pac. 171; *Atlantic Trust Co.* v. *Dana*, 128 Fed. 209, 221; *De Stafano* v. *Almond Co.*, 107 N. J. Eq. 156, 159; 152 Atl. 2; *Industrial Mut. Dep. Co.'s Receiver* v. *Taylor*, 118 Ky. 851, 854; 82 S. W. 574; *Iglehart* v. *Todd*, 203 Ind. 427, 440; 178 N. E. 685.

on behalf of the bank or its creditors.[2] "It is the duty of the receiver of an insolvent corporation to take steps to set aside transactions which fraudulently or illegally reduce the assets available for the general creditors, even though the corporation itself was not in a position to do so." *Texas & Pacific Ry. Co.* v. *Pottorff,* 291 U. S. 245, 261. There is no occasion to consider whether the bank could recover against the insurance company on the indemnity bonds. "Enough that the receiver has the requisite capacity." *McCandless* v. *Furlaud,* 296 U. S. 140, 160. In the *McCandless* case (page 171), the minority view was that "the receiver's rights could rise no higher" than the corporation's rights. The majority rejected this viewpoint (page 159), holding that where corporate officers and shareholders combined with others to despoil a corporation, recovery could be had "either by the creditors directly or in their behalf by a receiver."

The receiver does not merely represent the corporation—the bank. The object of the appointment of a receiver is to collect and protect all of the insolvent's assets in the interest of the creditors first, then for the benefit of the stockholders. It has long been recognized that even in the case of a going bank the rights of depositors and the public would be jeopardized unless given protection in addition to that afforded by the bank's officers elected by the stockholders. For that reason, among others, the Government has provided a system of examination for all national banks.[3] Statutes require banks to make reports to the Comptroller of the Currency and to permit examinations by federal bank examiners. These examinations are designed to prevent such frauds as were perpetrated in this case. This objective will be frustrated if surety companies—with complete immunity—can, through their authorized agents, conspire with bank offi-

[2] See, *Kennedy* v. *Gibson,* 8 Wall. 498, 506.

[3] See, *Easton* v. *Iowa,* 188 U. S. 220, 238.

cials to deceive and trick bank examiners. The convenient fiction that knowledge of an officer of the bank is imputed to the bank itself is not sufficient to relieve respondent surety company from the consequences of the wrong committed by its authorized agent. There is not even a fiction under which knowledge can be imputed to innocent depositors. Strange, indeed, it is if the elaborate system of precautions provided by the Government to protect the interests of creditors of national banks by examination and visitation of federal officials must be held for naught by application of the fiction that the bank—not the injured depositors—knew everything its president knew. The interests of the bank and the interests of the depositors and creditors are not always identical. That their interests are recognized as separate and distinguishable is amply shown by laws passed to protect depositors and creditors of national banks. Public solicitude for protection of depositors is exemplified by the recent passage of the law insuring public deposits.[4]

The receiver filed suits at law side to recover on the several indemnity bonds. The surety company proceeded in equity praying cancellation of the bonds. All actions were tried on evidence before a master and auditor "under a stipulation that findings of fact shall be final." These findings set forth all of the rights of the receiver as the representative of the creditors, the stockholders and the bank.

In this case, the principles involved are of great importance. The decree below adjudged the indemnity bonds to be void and unenforceable. Since I believe the receiver was entitled under these actions to enforce the bonds and to protect the innocent victims of fraud, I would reverse the decree below.

MR. JUSTICE REED concurs in this opinion.

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[4] 12 U. S. C. § 264 *et seq.*

STATE FARM MUTUAL AUTOMOBILE INS. CO. *v.* COUGHRAN.

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

No. 519. Argued March 4, 1938.—Decided March 28, 1938.

1. Upon appeal in a law case tried without a jury, the Circuit Court of Appeals determines whether the findings support the judgment, but can not review the evidence. P. 487.
2. An automobile insurance policy provided that the insurance company should not be liable unless the car at the time of accident was being "operated" by the insured, his paid driver, members of his immediate family, or persons acting under his direction, nor if it was being "driven or operated" by any person violating any law as to age or driving license. There was a finding that the accident in question occurred while the car was being operated, with the permission of assured, by his wife, and was caused by her negligence. There was another finding that it occurred while it was being jointly operated by the wife and, with her permission but contrary to the orders of the husband, by a 13 year old girl, unlicensed and unlicensable under the law of California, who at the time of the accident was physically actuating instrumentalities of the automobile other than the means of direction; and that the proximate cause of the collision was the act of the wife in seizing the steering wheel at and immediately preceding the moment of impact. *Held:*

   (1) That the findings are not in conflict; the first refers to the conduct of the wife as the one in authority; the second details what really took place at moment of collision. P. 491.

   One may "operate" an automobile singly or jointly with another.

   (2) The risk was not within the policy. P. 487.
3. A person injured by an automobile in charge of the assured's wife, recovered judgment against both of them in an action defended by the husband's insurer under a non-waiver agreement; and, failing to collect it, sued the insurer. *Held* that proof that the machine, at the time of the accident, was being operated by the wife and a child, jointly, contrary to the husband's orders and contrary to law, was available as a defense under the policy, notwithstanding the insurer's failure to disclose it at the other trial. P. 492.

92 F. 2d 239, reversed.

CERTIORARI, 302 U. S. 679, to review the affirmance of a judgment recovered in an action on a policy of insurance.

Mr. Joseph A. Spray, with whom *Mr. Sydney L. Graham* was on the brief, for petitioner.

Mr. Raymond G. Stanbury, with whom *Mr. John F. Gilbert* was on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Petitioner's policy insured one R. O. Anthony, the owner, against liability for injuries caused by a designated automobile. As the result of alleged negligent and unlawful action by the assured's wife the car collided with a truck June 16, 1934. Respondent Coughran suffered injuries for which he recovered judgment against Anthony, also against his wife. Both were insolvent; a writ of execution against them was returned unsatisfied.

Thereupon respondent commenced this suit to recover of petitioner the amount of his unpaid judgment. He claimed this right under the policy and statute. Answering, the company exhibited the policy and denied liability. As a first separate defense it alleged that Anthony and his wife had not complied with certain terms of the contract. As a second—

"That said accident was an accident for which the defendant under the terms and conditions of said policy is not liable in that: At the time and place of the accident the automobile of the insured was being driven and operated by a person who was not the paid driver of the insured, nor a member of his immediate family, nor a person acting under the direction of the assured. This defendant alleges that the said automobile at the time of the accident was being driven and operated by a person in violation of the laws of the State of California as to age and as to driver's license and further alleges

that the driver of said car was a minor, being a female of the age of approximately 13 years."

There were other separate defenses.

A jury having been waived, the cause went to the court on the pleadings and evidence. It made findings of fact with conclusion of law and entered judgment for Coughran. Neither side requested other or different findings.

The Circuit Court of Appeals thought findings III and XII were inconsistent "and to elucidate the truth, a review of the testimony is required." After such review it ruled that the findings so elucidated were adequate and required affirmation of the challenged judgment. One judge thought otherwise and presented a separate opinion.

Under applicable statutes and repeated rulings here, the matter open for consideration upon the appeal was whether the findings of the trial court supported its judgment. To review the evidence was beyond the competency of the court. U. S. C. Title 28, §§ 773, 875; *Walnut* v. *Wade,* 103 U. S. 683, 688; *Stanley* v. *Supervisors of Albany,* 121 U. S. 535, 547; *Law* v. *United States,* 266 U. S. 494, 496.

Two persons were in the insured automobile when the accident occurred. Nancy Leidendeker, a girl of 13 without license to drive, occupied the driver's seat. By her side sat Helen B. Anthony, wife of the assured, an adult holding a driver's license.

The principal point upon which the petitioner now relies is that as the accident occurred when the car was being driven and operated by the young girl contrary to the owner's commands and in violation of California statutes, the policy did not cover his liability.

The policy (incorporated in the findings) under the heading "Terms and Conditions Forming a Part of This Policy," provides—

"(1) *Risks Not Assumed by This Company.* The Company shall not be liable and no liability or obligation

of any kind shall attach to the Company for losses or damage: . . . (A) . . . (D) Unless the said automobile is being operated by the Assured, his paid driver, members of his immediate family, or persons acting under the direction of the Assured; (E) Caused while the said automobile is being driven or operated by any person whatsoever either under the influence of liquor or drugs or violating any law or ordinance as to age or driving license; (F) . . ."

Applicable sections of the California Vehicle Act,—Stats. 1923, pp. 518, 519, 536; Stats. 1927, p. 1427; Stats. 1931, p. 2108—follow:

"Section 1. The following words and phrases used in this act shall have the meanings here ascribed to them."

. . . . . .

"Sec. 18. *'Operator.'* Every person who drives, operates or is in actual physical control of a motor vehicle upon a public highway."

"Sec. 76. *Unlawful to employ unlicensed chauffeur.* No person shall employ for hire as a chauffeur of a motor vehicle, any person not licensed as in this act provided. No person shall authorize or knowingly permit a motor vehicle owned by him or under his control, to be driven by any person who has no legal right to do so or in violation of the provisions of this act."

"Sec. 58. *Operators and chauffeurs must be licensed.*

"(a) It shall be unlawful for any person to drive a motor vehicle upon any public highway in this state, whether as an operator or a chauffeur, unless such person has been licensed as an operator or chauffeur; except such persons as are expressly exempted under this act." [Exception not applicable here.]

"Sec. 64. *What persons shall not be licensed as operators or chauffeurs.*

"(a) An operator's license shall not be issued to any person under the age of sixteen years and no chauffeur's license shall be issued to any person under the age of

eighteen years, provided that an operator's license may be issued to any minor over the age of fourteen years and less than sixteen years of age upon special application and statement of reasons by the parent or guardian of such minor."

Especially pertinent findings by the trial court follow:

"III. The court finds that on or about the 16th day of June, 1934, and while said policy was in full force and effect, one Helen B. Anthony operated the Chevrolet automobile referred to in and covered by the said policy of insurance with the permission and consent of the assured, R. O. Anthony, and operated the same negligently so as proximately to cause an accident and injury to the person and property of the plaintiff to his damage in the reasonable sum of Five Thousand Ninety-two and 55/100 Dollars ($5092.55)."

"IX. The court finds that it is true that the defendant, prior to the trial of the action in the state court entered into the non-waiver agreement received in evidence in this action with the assured, R. O. Anthony, and with Helen B. Anthony. That the said non-waiver agreement was executed just prior to the commencement of the trial of the state court action. That the plaintiff was not a party to that agreement and had no knowledge of any facts referred to therein and was not in privity with any of the defendants in the state court action and that so far as the conduct of the defendant affects the plaintiff in this action, the defendant managed and conducted the defense in the state court."

"XII. With regard to the second separate defense of defendant, the court finds that the said automobile at the time of the impact that resulted in the injury to the plaintiff was being jointly operated by Helen B. Anthony and Nancy Leidendeker; that said Helen B. Anthony was a member of the assured's immediate family and was an adult person over the age of twenty-one (21) years

who was licensed by the State of California to drive an automobile; and that said Nancy Leidendeker was a minor and not permitted under the applicable laws to operate a motor vehicle in the State of California; that the assured had forbidden said minor Nancy Leidendeker to drive any motor vehicle or automobile of which he was the owner or which he controlled; and that the action of said Nancy Leidendeker on the day of the accident and at the time of the impact involved in this action were in disobedience of and contrary to the commands, orders and instructions of the assured, R. O. Anthony; that at the time of the accident, insofar as the propulsion of the vehicle was concerned, other than the means of direction, all instrumentalities of said automobile were being physically actuated by said minor Nancy Leidendeker, with the acquiescence and knowledge of Helen B. Anthony and without any knowledge, acquiescence or consent on the part of the assured, R. O. Anthony; that the proximate and direct cause of the collision between the insured automobile and a truck owned by San Pedro Commercial Company was the act of Helen B. Anthony in seizing the steering wheel of the automobile at and immediately preceding the moment of impact and collision."

"XVI. That prior to the commencement of the trial of the said State court action the defendant had full knowledge of all the facts and circumstances concerning the presence of the said Nancy Leidendeker in the driver's seat or in a part of said seat, and all other facts relied on by the defendant as constituting a concealment and a defense of the case at bar, but that the defendant did not reveal said facts to the plaintiff or his counsel, and that plaintiff and his counsel had no knowledge that the said Nancy Leidendeker occupied any part of the driver's seat until said trial was completed."

"XVII. The court finds that prior to the collision between the insured automobile and a truck owned by the

San Pedro Commercial Company, Helen B. Anthony seized the steering wheel of the insured automobile and steered the same to the right, proximately causing the same to come into collision with the said truck and proximately causing the same to turn to its right, proximately causing the collision of plaintiff's car and the injuries and damages suffered by him."

When read together no material conflict exists between findings III and XII; there is no real difficulty in understanding the circumstances to which they are addressed. The first contains statements concerning the conduct of one in authority; the second describes in detail what really took place at the moment of collision. The word "operate" has varying meanings according to the context. Webster's New International Dictionary. One may operate singly with his own hands, or jointly with another, or through one or more agents.

From the findings it appears that when the accident occurred the automobile was not being operated by the assured, his paid driver, a member of his immediate family or a person acting under his direction, within fair intendment of the policy. Contrary to the owner's commands "insofar as the propulsion of the vehicle was concerned, other than the means of direction, all instrumentalities of said automobile were being physically actuated by said minor" who was inhibited by the statutes from driving or operating a motor vehicle within the State.

Just before the accident, Mrs. Anthony seized the steering wheel and by negligent manipulation of this caused the collision.

If, as found, the automobile was being jointly operated by the wife and the girl the risk was not within the policy. The latter was forbidden by law to operate or drive jointly or singly. If the wife was in control the statute forbade her to permit driving by the girl. In any view, when the

collision occurred the car was being driven or operated in violation of the statutes.

In support of his position respondent relies heavily upon *O'Connell* v. *N. J. Fidelity Ins. Co.*, 201 App. Div. (N. Y.) 117; 193 N. Y. S. 911; and *Williams* v. *Nelson*, 228 Mass. 191; 117 N. E. 189. These causes, we think, are not in point. They were decided upon facts and circumstances materially different from those here disclosed.

Respondent further submits that petitioner is precluded from any inquiry concerning who actually was driving the car when the accident occurred. He says the entire sequence of events surrounding Nancy Leidendeker was highly material and should have been litigated in the original tort action brought by Coughran against the Anthonys, and based solely upon permissive use. Also, if the facts then known by petitioner had been there revealed, it would have become apparent that the girl lacked permission to drive and that the wife exceeded the terms of her authorization; and that by suppressing these facts petitioner exposed the assured to a liability which otherwise might not have been imposed.

The judgment roll of the tort action is not before us; we are limited to the findings. That action was defended by the petitioner under a non-waiver agreement; the complaint alleged damages from negligence of the wife as driver and operator imputed to the husband. Defenses now presented by the Insurance Company against liability under the policy were not involved. Joint driving by Mrs. Anthony and the girl was not subject to inquiry.

Moreover, in the circumstances we may not conclude that respondent should prevail because petitioner failed to present facts in the tort action which he says if then presented might have defeated the very judgment upon which he now relies to support his claim.

485 Syllabus.

The judgment of the Circuit Court of Appeals must be reversed. The cause will be remanded to the District Court with instructions to enter judgment for the Insurance Company, petitioner here.

Reversed.

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

GUARANTY TRUST CO., EXECUTOR, *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 301. Argued January 12, 13, 1938.—Decided March 28, 1938.

A partnership whose fiscal year expired July 31, 1933, was dissolved by the death of a member in December, 1933. Decedent had kept his books on the cash receipts and disbursements basis and filed his returns for income tax for each calendar year on that basis. The partnership kept its books on a like basis, but made its returns for a fiscal year ending July 31. Upon a partnership accounting, his share of the profits from August 1 to date of his death was ascertained, and in the following January and February was paid to the executor. *Held,* that the decedent's taxable income for the calendar year 1933 includes his share of partnership profits from the beginning of the partnership fiscal year on Aug. 1, 1933, to the date of his death in the same year, in addition to his share of the partnership profits for its fiscal year ending July 31. Rev. Act 1932, § 182 (a). P. 495.

89 F. 2d 692, affirmed.

CERTIORARI, 302 U. S. 670, to review a judgment of the court below reversing an order of the Board of Tax Appeals. The Board's order, 34 B. T. A. 384, set aside a deficiency assessment.

Mr. Montgomery B. Angell, with whom *Messrs. John W. Davis* and *Weston Vernon, Jr.* were on the brief, for petitioner.

Mr. Edward J. Ennis, with whom *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *A. F. Prescott* were on the brief, for respondent.

Mr. Justice Stone delivered the opinion of the Court.

Whether a deceased partner's taxable income for the calendar year 1933 includes his share of partnership profits from the beginning of the partnership fiscal year on August 1, 1933, to the date of his death in the same year, in addition to his share of the partnership profits for its fiscal year ending July 31, is the question for decision.

Petitioner's testator, who died December 16, 1933, was a member of a New York partnership whose fiscal year expired on July 31, 1933. The partnership, with the addition of a new partner, was renewed, by agreement, for one year from August 1. After his death the surviving partners, by a further agreement, continued the partnership business from that date until July 31 of the next year, as of which date profits were to be determined, and thereafter from year to year. Decedent kept his books on the cash receipts and disbursements basis and filed his returns for income tax for each calendar year on that basis. The partnership kept its books on a like basis, but made its returns for a fiscal year ending July 31.

Upon a partnership accounting as of the date of decedent's death, his share of the profits from August 1 to that date was ascertained and in the following January and February was paid to petitioner, as executor. In making return for taxation of decedent's income for 1933, petitioner included decedent's share of the firm profits accruing for the year ending July 31, but omitted to re-

turn his share of the firm profits earned between that time and his death.

The Commissioner's determination of a deficiency based on the omitted income, was set aside by the Board of Tax Appeals. 34 B. T. A. 384. The Board's order was reversed by the Court of Appeals for the Second Circuit, which held that decedent's share of the partnership profits for the year ending July 31 and for the ensuing period ending December 16, 1933, was income of decedent in 1933 and taxable as such for that year. 89 F. (2d) 692. We granted certiorari, the question being of importance in the administration of the revenue laws, and the decision being challenged by petitioner as not in harmony with *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359.

Both by the practical construction given to the partnership agreement by petitioner and the surviving partners, and by the applicable provisions of the New York Partnership Act,[1] decedent's death dissolved the partnership, terminated his right to share in the profits, and fixed the date as of which the surviving partners were bound to

[1] New York Partnership Act, Laws of 1919, c. 408:

"Sec. 60. *Dissolution defined.*—The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.

"Sec. 61. *Partnership not terminated by dissolution.*—On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.

"Sec. 62. *Causes of dissolution.*—Dissolution is caused:

. . . . . .

"4. By the death of any partner;

. . . . . .

"Sec. 74. *Accrual of actions.*—The right to an account of his interest shall accrue to any partner, or his legal representative, as against the winding up partners or the surviving partners or the person or partnership continuing the business, at the date of dissolution, in the absence of agreement to the contrary."

account for the profits. *Darcy* v. *Commissioner,* 66 F. (2d) 581. Decedent's estate in fact received the profits accrued on the date of his death, and partnership profits thus accrued and distributable by reason of the death of a partner are his income, taxable as such. *Bull* v. *United States,* 295 U. S. 247. But petitioner insists that here they cannot be included in decedent's 1933 income for purposes of taxation, since in that case his partnership profits both for the full year ending July 31, 1933 and for the ensuing four and one-half months' period ending with his death in December, would be taxed as his profits for a single year. This it is said offends against the policy of the revenue acts to assess income taxes annually on the basis of twelve month periods and, so offending, conflicts with the appropriate construction of the applicable provisions of §§ 181, 182 of the Revenue Act of 1932, 47 Stat. 169, relating to the taxation of partnership profits.

Under the Act of 1932, as with earlier revenue acts, partnerships are not taxed upon their income. By § 189 they are required to file information returns showing the partnership profits and the respective shares of the partners in the profits. But § 181 provides that the partners shall be "liable for income tax only in their individual capacity," and § 182 (a) reads:

"*General rule.*—There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year. If the taxable year of a partner is different from that of the partnership, the amount so included shall be based upon the income of the partnership for any taxable year of the partnership ending within his taxable year."

Since the partnership is not a taxpayer, it has no taxable year in a literal sense. But as used in this section "taxable year of the partnership" means its fiscal year, for "taxable year" is defined by § 48 as including in its meaning

"a fiscal year . . . upon the basis of which the net income is computed" and "fiscal year" is defined as "an accounting period of twelve months ending on the last day of any month other than December." A "taxable year," it is declared, includes the period for which a return is made when, under the provisions of the act or regulations, a return for a fractional part of a year is required. As a partner's profits are ascertainable only on an accounting for such periods as may be fixed by law or by the partnership itself, and as the fiscal year or accounting period of the partnership may differ from that of the taxable year of the partner, § 182 (a), as a matter of convenience to taxpayers, authorizes and provides for this difference by requiring in that case that the partner's distributive share of the profits ascertained at the end of the partnership fiscal year shall be included in his taxable income for the year in which the fiscal year of the partnership ends.

Petitioner does not complain of the taxation of decedent's share of the partnership profits for the year ending July 31 as 1933 income. But it contends that the reference in § 182 (a) to the "taxable year of the partnership," and the requirement that the amount of the partner's taxable income "shall be based upon the income of the partnership for any taxable year of the partnership ending within his taxable year," read in their context and in the light of the practice long established by the revenue acts, of taxing income for twelve month periods, contemplate that a partner returning income for a calendar year shall be taxable in that year only upon his income from his firm for a single partnership year. This is said to be the case even though the income derived by a partner from the firm business between the end of the partnership fiscal year and the date of his death in the same year cannot be taxed in any other.

This argument is, we think, based upon a misconception of the policy of the Act and a mistaken construction

of § 182 (a). It is true that the acts of Congress taxing income have consistently laid the tax upon the net income received by or accrued to the taxpayer in a "taxable year," which is either the calendar year or a different fiscal year, as the taxpayer may elect. But they have never undertaken to limit the income taxable in any one year to that derived from the taxpayer's activities occurring in that or any other single year. The items of gross income and of allowed deductions to be included in the income return, are those of the taxpayer for his taxable year, even though they may have resulted from or be affected by his business transactions of other years. *Burnet* v. *Sanford & Brooks Co., supra,* 364, 365. Circumstances wholly fortuitous may determine the year in which income, whenever earned, is taxable, and may thus affect the amount of tax. Receipt of income or accrual of the right to receive it within the tax year is the test of taxability, not the time it has taken the taxpayer to earn it nor the duration of his investments which have finally resulted in profit. *Lucas* v. *Alexander,* 279 U. S. 573.

The revenue acts have consistently adhered to that policy in taxing the income of a partner. Since the partner is entitled to profits only upon a partnership accounting at the end of an accounting period, his profits become subject to income tax when and as they are thus ascertained. As in the case of all other taxpayers, the partner's net income is required by the general provisions of § 41 to be computed "on the basis of the taxpayer's annual accounting period," here the calendar year, so as clearly to reflect the income. And § 182 (a) commands that the distributive share of each partner in the partnership profits shall be included in computing his tax, whether distributed or not.

By these provisions the taxable income of a partner is limited to that share of the partnership earnings to

which he becomes entitled within his taxable year, but it includes all the distributive share of the partnership income which accrues to him in that year even though earned in an accounting period not wholly within the year, and though his return, as in the case of decedent, is on the cash receipts and disbursements basis. If the provisions stood alone it would seem plain that the profits accruing to decedent from the two partnership accountings within his taxable year would be taxable in that year, even though the accounting periods aggregated more than twelve months. We think the concluding sentence of § 182 (a), which provides for the case where the partner's taxable year differs from that of the partnership, does not call for any different result.

We need not inquire too meticulously whether the partnership "taxable year," within the meaning of § 182 (a), includes in the special circumstances of this case an accounting period of less than twelve months, here from July 31 to the death of decedent. Petitioner makes no contention that it does not, nor could well do so, for if not so included it is not within the phrase "any taxable year of the partnership," occurring in the second sentence of § 182 (a), on which petitioner relies to exclude the income for that period from taxation otherwise imposed by the general provisions of § 41 and the first sentence of § 182 (a). The argument is that the year ending July 31, 1933, was one partnership fiscal year or accounting period, and that the ensuing period until the death of decedent was another, and that the inclusion of the income for both periods in decedent's taxable income is precluded by the use of the phrase "any taxable year" in § 182 (a), which it is said must be taken to mean any one accounting period of the partnership.

But we think the sentence must be read as supplementing the preceding one and § 41, and not as limiting them. We can discern elsewhere in the Act no indication

of any Congressional purpose to relieve business income from taxation in the year when, under the applicable provisions of the statute, it is distributable to a partner. Sections 11 and 12 declare in all-inclusive terms that income taxes "shall be levied, collected, and paid for each taxable year upon the net income of every individual." It would require more precise words than those of § 182 (a) directing that the taxable income of a partner shall be based on partnership income for "any" accounting period of the partnership ending within its taxable year, to restrict the broad sweep of §§ 11, 12 and 41. Cf. *Heiner* v. *Colonial Trust Co.*, 275 U. S. 232, 234, 235; *Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84, 89; *United States* v. *Safety Car Heating & Lighting Co.*, 297 U. S. 88, 93; *Helvering* v. *Gowran*, 302 U. S. 238, 243, 244.

The purpose of § 182 (a) when read, as it must be, with these other sections, is obviously not to relieve a partner from taxation of any part of the distributive share of the partnership income during the year in which it is distributable. The object is rather to make certain that "the amount so included" in a partner's taxable income "shall be based upon the income of the partnership" distributable during the partner's taxable year, even though an accounting period of the partnership ending in that year may not be wholly within it.

This conclusion is supported by the legislative history of the second sentence of § 182 (a). The provision first appeared in § 218 (a) of the Revenue Act of 1918. As originally introduced, that section of the House bill which became the Revenue Act of 1918 provided for the taxation of the partner's distributive share of the net income of the partnership for "the last annual accounting period of the partnership," ending within his taxable year. By amendment the quoted phrase was stricken from the bill and the words "any accounting period of

the partnership" substituted. See H. R. 12863, 65th Cong., 3rd Sess. (Committee Print—As Agreed to in Conference). The amendment was obviously inconsistent with any purpose to limit the amount of the taxable income to that of any single or particular accounting period of the partnership ending within the partner's taxable year. The phrase was changed by § 182 (a) of the Revenue Act of 1928 to its present form, "any taxable year of the partnership." The continued use of the word "any" as qualifying the phrase "taxable year" in the 1928 and 1932 Acts, does not preclude the present tax if "taxable year" be taken to mean a partnership accounting period of less than twelve months. Reasons have already been given why, if it means an accounting period of a full year, the present tax is nevertheless due under § 41 and the first sentence of § 182 (a).

Affirmed.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE ROBERTS are of opinion that the judgment should be reversed.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration or decision of this case.

UNITED STATES v. O'DONNELL ET AL.

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

No. 487. Argued March 1, 2, 1938.—Decided March 28, 1938.

In a suit to quiet its title to a part of Mare Island in San Francisco Bay, within the territory acquired from Mexico by the Treaty of Guadalupe Hidalgo, the United States claimed under a deed to it in 1853 by Bissell and Aspinwall, who derived their title through a grant in 1841 by Alvarado, Mexican Governor of California, to Castro. Respondents claimed under a patent issued by California to Darlington in 1857, purporting to convey the land in question as a part of the swamp or overflowed lands granted to the State

by the Swamp Lands Act of 1850. The Board of Land Commissioners, created by the Mexican Claims Act of 1851, had confirmed the title of Bissell and Aspinwall in 1855. On appeal, the District Court had affirmed in 1857, although its decree was unsigned until 1930 when a *nunc pro tunc* decree was entered. While the proceedings before the Board were pending Bissell and Aspinwall had conveyed by deed to the United States. *Held:*

1. This Court accepts a concurrent finding by the District Court and the Circuit Court of Appeals that the lands in question were within the description of the deed to Castro. P. 508.

2. An adjudication in a mandamus proceeding brought by the respondents, that it was the duty of the Secretary of the Interior, under the Swamp Lands Act and the Act of July 23, 1866, to issue a patent of the lands here involved to California, and the issuance of it, are not decisive of any issue in this suit, and it is open to the United States to show that the lands did not pass under the Swamp Lands Act. P. 508.

3. The effect of the Swamp Lands Act was to invest the State *in praesenti* with an inchoate title to those lands falling within the description of the Act, to be perfected as of the date of the Act when the land should be identified and the patent issued. It did not include lands which the Government had not acquired, nor did it free any of them of obligations to which they were subject when it was passed. P. 509.

4. Swamp lands in California, being a part of the territory annexed by the Treaty of Guadalupe Hidalgo, were subject to all obligations imposed upon the United States with respect to them under the principles of international law by reason of the annexation, and by treaty obligations. P. 510.

5. The obligations assumed by the United States in respect of the territory annexed by the Treaty of Guadalupe Hidalgo antedated and were superior to any rights derived from the United States under the Swamp Lands Act. P. 511.

6. Claimants under the United States by virtue of statutes disposing of its public lands in California, are not "third persons" within the meaning of the Mexican Claims Act; and confirmation under that Act of claims under Mexican grants is conclusive upon all claiming under the United States. P. 512.

7. Confirmation of titles under the Mexican Claims Act is as effective and conclusive upon patents under the Swamp Lands Act as if made at the date of the Treaty. P. 513.

8. The decree of the Board of Land Commissioners confirming the title of Bissell and Aspinwall became final and conclusive within the provisions of the Mexican Claims Act, irrespective of the validity of the District Court's decree of affirmance. P. 513.

9. Proceedings under the Mexican Claims Act were not required to be adversary, and that they were not does not affect the validity of a determination by the Board. P. 524.

10. The acquisition by the United States of the title of Bissell and Aspinwall, while their claim was pending before the Board of Land Commissioners, did not involve, by reason of the State's interest under the Swamp Lands Act, any breach of equitable duty to California. Pp. 514 *et seq.*

11. There is no basis in the record for the conclusion that confirmation of the Bissell and Aspinwall claim by the Board of Land Commissioners was procured or allowed to stand through any fraud, concealment, bad faith, or breach of duty to California by the Government or its officers. P. 523.

12. The decree of the Board of Land Commissioners stands as a valid administrative determination of the validity of the Castro grant, undisturbed by any subsequent judicial proceedings, and is conclusive upon California and those claiming under her. P. 524.

91 F. 2d 14, reversed.

CERTIORARI, 302 U. S. 677, to review a decree reversing a decree of the District Court, which had held in favor of the United States in a suit brought by it to quiet title.

Assistant Attorney General McFarland, with whom *Solicitor General Reed, Assistant Solicitor General Bell,* and *Messrs. C. W. Leaphart, Oscar Provost* and *Philip Buettner* were on the brief, for the United States.

Messrs. William Stanley and *James E. Kelby,* with whom *Mr. Gordon Lawson* was on the brief, for respondents.

MR. JUSTICE STONE delivered the opinion of the Court.

This case involves the validity of the title of the United States to a part of Mare Island in San Francisco Bay,

which was reserved for public purposes by Presidential Proclamation in 1850, was selected by the Secretary as a navy yard pursuant to Act of Congress, was reserved for that purpose by Presidential Order in 1853, and since 1854 has been so used.

The lands in question are in the area acquired as a result of the Mexican War by the Treaty of Guadalupe Hidalgo, July 4, 1848, 9 Stat. 922, which guaranteed the property rights of Mexicans in the annexed territory. The United States claims under deed to it in 1853 by Bissell and Aspinwall and another, who derived their title under grant of May 20, 1841, by Alvarado, Mexican Governor of California, to Castro, a Mexican citizen, of the island La Yegua (Mare Island) "in all its extent." Respondents claim under a patent issued by California to Darlington in 1857, purporting to convey the land in question as a part of the swamp or overflowed lands granted to the state by the Swamp Lands Act of Congress, Sept. 28, 1850, c. 84, 9 Stat. 519.

Upon the military occupation of California during the Mexican War the United States military commander had proclaimed officially that Mexican land titles would receive due recognition by the United States,[1] and Art. 8 of the Treaty of 1848 with Mexico declared that the property rights of Mexicans in the annexed territory should be "inviolably respected." After the admission of California to statehood, September 9, 1850, Congress adopted the Mexican Claims Act of March 3, 1851, 9 Stat. 631, which established a Board of Land Commissioners with authority, upon petition of those claiming under Mexican or Spanish grants of land in the annexed territory, to pass

[1] Proclamation to the Inhabitants of California, July 7, 1846, at Monterey, by Commodore John D. Sloat, 29th Cong., 2d Sess., House Doc. No. 4, pp. 644–645; Proclamation, August 17, 1846, at Ciudad de Los Angeles, by Commodore and Governor R. F. Stockton, *id.*, pp. 669–670.

upon the validity of the grants. Right to a review of the Board's determination by the district court, and the Supreme Court of the United States, was allowed the claimants and the Government. By § 12 of the Act of August 31, 1852, 10 Stat. 76, 99, the Attorney General was given authority over appeals from decisions of the Board adverse to the interests of the United States.

Bissell and Aspinwall, the grantors of the United States, filed their petition before the Board, seeking confirmation of their title under the Castro grant of May 20, 1841. After hearing evidence the Board confirmed their title by decree of May 8, 1855. Upon appeal by the United States to the district court for northern California, the decree of the Board was affirmed. Appeal by the Government to the Supreme Court of the United States, allowed by the district court April 1, 1857, was dismissed by the Government in the same year. The decree of the district court was not signed or entered until a decree *nunc pro tunc* as of March 2, 1857, was signed, filed and entered on April 15, 1930.

While the proceedings were still pending before the Board, the claimants, Bissell and Aspinwall, on December 15, 1852, executed a contract to sell Mare Island to the United States, and on January 4, 1853, for a consideration of $83,491, they joined in a deed to the United States, without covenants except for further assurance. The deed purported to convey Mare Island, "including all the Tule or low land and marsh belonging to the same or which has ever been reputed or claimed to belong to the same . . ." On February 28, 1853, they executed a bond in favor of the United States in the sum of $200,000, conditioned upon the validity of their contract and the conveyance of "the entire and absolute fee simple Estate in the said tract of land known as Mare Island." The bond recited that they "shall at all times hereafter indemnify and save harmless the United States against any claim or title

to the said tract called Mare Island and its appurtenances which may be set up by or through any person or persons claiming under Victor Castro and his assigns" and that they should "also indemnify and save harmless the United States against any adverse claim or title in any other person or persons or body politic which may within two years from the date hereof, be made and thereafter be successfully established."

The 1857 California patent to Darlington was not recorded until June 6, 1879, when one Sawyer appears to have acquired the Darlington claim. See *Sawyer* v. *Osterhaus,* 212 Fed. 765, 767. The Secretary of the Interior having found that the lands in question were swamp lands within the Swamp Lands Act of 1850, the respondents in 1928 by mandamus compelled the Secretary to certify the lands for patent to the State of California. The court, in awarding the relief sought, at the same time declared with reference to the contentions made here, "the mere issuance of patent to California determines no legal or equitable right of the United States in the premises." *Work* v. *United States ex rel. O'Donnell,* 23 F. (2d) 136, 138.

The present suit was brought by the United States in the district court for northern California to quiet its title. Respondents, by their answer, put in issue the Government's ownership of the lands in question and asserted their title as tenants in common under the Darlington grant. They specifically challenged the existence and validity of the Castro grant, the validity of the decrees of confirmation of the title of Bissell and Aspinwall, and any prescriptive title of the United States. They prayed, as affirmative relief, that their title be quieted, and in support of their prayer alleged that the lands in question were not embraced in the Castro grant and also were swamp lands which had passed to California under the Swamp Lands Act.

The trial court made findings of fact and reached conclusions of law in favor of the United States on all these issues. Upon appeal, the Court of Appeals for the Ninth Circuit reversed and decreed "that the United States has no title to the patented lands in suit, and that the title is in and quieted in" respondents. 91 F. (2d) 14. The Court of Appeals found that Alvarado, the Mexican Governor of California, had executed the purported grant of Mare Island to Castro, including the land in question, but made no finding with respect to the adverse possession of the United States found by the district court. It held that the paper signed by Alvarado was incompetent evidence of the grant to Castro because of the lack of filing or recordation of the grant in the Mexican archives, see *Berreyesa* v. *United States*, 154 U. S. 623, and that the decrees of the Board of Land Commissioners and of the district court on appeal from the Board, confirming the Castro title, were null and void and worthless as evidence because the United States had purchased the interest of the claimants Bissell and Aspinwall while the proceedings were pending before the Board. It characterized the proceeding as collusive and the action of the United States in acquiring title during its pendency as breach of a trust duty assumed under the Swamp Lands Act to convey swamp lands to California, and as in effect a fraud upon the state. It rejected the contention of the United States that the pending Board proceeding for confirmation of the Castro grant withdrew the land in question from the operation of the Swamp Lands Act, which is the source of California's and respondents' alleged title to the land, and held that the reservations of the land made by Presidential proclamations for military and naval purposes were ineffective, because California had previously acquired an inchoate title under the Swamp Lands Act.

Respondents renew here the contention made below, based on an elaborate review of the evidence, that the swamp or overflowed lands in question were below high tide and were not within the exterior boundaries of Mare Island as it was known at the time of the Castro grant, and so were not intended by the grantor to be, and were not in fact, included in the description of the grant. Resolution of this issue turns upon appraisal of the evidence and the inferences to be drawn from it. As both courts below have found against respondents on this issue we shall not reëxamine the evidence here. We accept the concurrent findings as establishing the fact that the lands in question were within the description of the deed to Castro. *United States* v. *State Investment Co.,* 264 U. S. 206, 211; *Shappirio* v. *Goldberg,* 192 U. S. 232; cf. *Page* v. *Rogers,* 211 U. S. 575; *Washington Securities Co.* v. *United States,* 234 U. S. 76; *National Bank* v. *Shackleford,* 239 U. S. 81; *Risty* v. *Chicago, R. I. & P. Ry. Co.,* 270 U. S. 378.

Nor is the fact that a patent has issued to California, in obedience to the judgment in the mandamus proceeding brought by respondents in *Work* v. *United States ex rel. O'Donnell, supra,* decisive of any issue presented here. Upon the Secretary's approval of the survey of the land in question by the United States Surveyor General for the State of California, showing the lands to be swamp and overflowed at the date of the Swamp Lands Act, and the determination by the Secretary that the lands in question were then swamp and overflowed, it became his duty under the Swamp Lands Act, and under the Act of Congress of July 23, 1866, 14 Stat. 218, to certify the lands for patent to the state. See *Tubbs* v. *Wilhoit,* 138 U. S. 134. But the adjudication in mandamus that it was the duty of the Secretary to issue the patent under these acts, and the issuance of it, determined no legal or equitable right of the United States

in the premises. It remains open to the United States in this or any other appropriate proceeding, to show that the lands did not pass under the Swamp Lands Act. *United States* v. *Schurz,* 102 U. S. 378, 404; *Smelting Co.* v. *Kemp,* 104 U. S. 636, 641, 646; *United States* v. *Conway,* 175 U. S. 60, 68, and cases cited; see *Work* v. *United States ex rel. O'Donnell, supra,* 137, 138.

We accordingly direct our attention to the question, deemed pivotal below, whether, as the Court of Appeals held, the confirmation of the title of Bissell and Aspinwall under the Castro grant by the Board of Land Commissioners was invalid, so that the United States neither reserved nor acquired a title valid as against the State of California and respondents who claim under her. In answering, it will be an aid to adequate understanding of the points in issue to consider first the effect of the confirmation by the Board, without reference to the alleged collusion and fraudulent action of the United States or any of its officers.

The Swamp Lands Act of 1850 was effective to transfer an interest in the lands described in the Act, only so far as they were part of the public domain of the United States and thus subject to the disposal of Congress. The Act in terms purported to grant to the several states all swamp and overflowed lands located within their respective boundaries "which shall remain unsold at the passage of this Act." Section 2 made it the duty of the Secretary of Interior "to make out an accurate list and plats" of the lands described by the Act and to "cause a patent to be issued to the state therefor." The effect of these provisions was to invest the state *in praesenti* with an inchoate title to those lands falling within the description of the Act, to be perfected as of the date of the Act when the land should be identified and the patent issued as provided by § 2. *Wright* v. *Roseberry,* 121 U. S. 488; *United*

States v. *Minnesota,* 270 U. S. 181, 202–203. By its terms the Swamp Lands Act did not include swamp lands which the Government had sold, and it could not include lands which the Government had not acquired or free any of them of obligations to which they were subject when the Act was passed. *United States* v. *Minnesota, supra,* 206.

It is a familiar principle of public land law that statutes providing generally for disposal of the public domain are inapplicable to lands which are not unqualifiedly subject to sale and disposition because they have been appropriated to some other purpose. *Wilcox* v. *Jackson,* 13 Pet. 498, 513; *Missouri, K. & T. Ry. Co.* v. *Roberts,* 152 U. S. 114, 119; *Scott* v. *Carew,* 196 U. S. 100. This has been held to be the case even though the appropriation be afterwards set aside. *Leavenworth, L. & G. R. Co.* v. *United States,* 92 U. S. 733, 741, 745; *Newhall* v. *Sanger,* 92 U. S. 761. The general words of the granting act are to be read as subject to such exception. *Scott* v. *Carew, supra,* 111, 112; *Louisiana* v. *Garfield,* 211 U. S. 70, 77; *United States* v. *Minnesota, supra,* 206.

Swamp lands in California, being a part of the territory annexed by the Treaty of Guadalupe Hidalgo, were subject to all obligations imposed upon the United States with respect to them under the principles of international law by reason of the annexation, and by its treaty obligations.[2] Article 8 of the treaty stipulated

[2] The obligation imposed by the principles of international law to respect property rights within annexed territory is substantially that recognized by the treaty, *Soulard* v. *United States,* 4 Pet. 511; *United States* v. *Percheman,* 7 Pet. 51, 87; *Strother* v. *Lucas,* 12 Pet. 410, 436; *United States* v. *Repentigny,* 5 Wall. 211, 260; *Knight* v. *United States Land Assn.,* 142 U. S. 161, 184, and comprehends not only formal grants "but also any concession, warrant, order or permission to survey, possess or settle, whether evidenced by writing or parol, or presumed from possession." *Strother* v. *Lucas, supra,* 436; see *Soulard* v. *United States, supra.*

that Mexicans then established in the annexed territory should retain their property within that area, and that property belonging to Mexicans not established there should be respected. The protocol of May 26, 1848, interpretative of the treaty, which preceded the exchange of ratifications on May 30, 1848, declared that the grants of land made by Mexico in the ceded territory "preserve the legal value which they may possess, and the grantees may cause their legitimate [titles] to be acknowledged before the American tribunals," and that "Conformably to the law of the United States, legitimate titles to every description of property, personal and real, existing in the ceded territories are those which were legitimate titles under the Mexican law in California . . . up to the 13th of May, 1846 . . ." 61st Cong., 1st Sess., Sen. Doc. No. 357, pp. 1119–1120.

The obligations thus assumed by the United States antedated the Swamp Lands Act and were superior to any rights derived from the United States under that Act. The obligations were political in character, to be discharged in such manner and upon such terms as the United States might deem expedient in conformity to its treaty obligations. *Beard* v. *Federy,* 3 Wall. 478; *Grisar* v. *McDowell,* 6 Wall. 363, 379; *San Francisco* v. *LeRoy,* 138 U. S. 656; *Knight* v. *United States Land Assn.,* 142 U. S. 161, 183, 184. While the treaty provided that the claimants under Mexican grants might cause their titles to be acknowledged before American tribunals, it was silent as to the mode of selection or creation of such tribunals. The United States was left free to provide for them in its own way. Cf. *United States* v. *Ferreira,* 13 How. 40, 45. It could relegate all the multitude of claims under the Mexican grants to the ordinary procedure of courts with the inevitable delays and confusion affecting land titles in the vast annexed area. See *Beard* v. *Federy,*

supra, 493. It could set up an administrative tribunal acting by a more summary procedure [3] designed to establish with finality the status of all the Mexican grants as of the date of annexation. It chose the latter course by the creation of the Board of Land Commissioners, by the Act of March 3, 1851.

Under that Act the General Land Office was required to issue a patent for all claims finally confirmed "by the said commissioners, or by the said District or Supreme Court." The act declared that final decision of the Board, or the district or the Supreme Court should "be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons." Lands, the claim for which should be finally rejected, and lands, claims to which should not be presented to the Board within two years of the date of the Act were to be "deemed, held, and considered as part of the public domain."

The primary purpose of the Mexican Claims Act was the performance by the United States of its treaty obligations to quiet the titles of the claimants under Spanish and Mexican grants. But a necessary consequence of proceeding before the Commission, and one incidental to the determination of the validity of the titles of such claimants, was a determination whether, by the cession, the lands in question had become a part of the public domain of the United States. It is evident that the treaty obligations to quiet the title of claimants under Mexican grants would be defeated and the Mexican Claims Act would fail of its purpose if the finality of the Board's confirmation of claims under Mexican grants could be challenged by persons claiming under grants of public lands by the United States. For that reason it has been consistently held that claimants under the United States, by virtue of statutes disposing of its public lands in Cali-

[3] As to the number of the claims and the celerity with which they were disposed of, see 8 Op. Atty. Gen. 515.

fornia, are not "third persons" within the meaning of the Mexican Claims Act, and that confirmation under that act of claims under Mexican grants is conclusive upon all those claiming under the United States. *Beard* v. *Federy, supra,* 493; *More* v. *Steinbach,* 127 U. S. 70; *San Francisco* v. *LeRoy, supra; Knight* v. *United States Land Assn., supra,* 184; *Ward* v. *Mulford,* 32 Cal. 365, 370; *People* v. *San Francisco,* 75 Cal. 388, 400; 17 Pac. 522; cf. *United States* v. *Coronado Beach Co.,* 255 U. S. 472, 488. Such is the effect of confirmation by the Board of titles set up under Mexican grants, upon claimants under the Swamp Lands Act to lands in the annexed territory. That the Swamp Lands Act antedated the Mexican Claims Act and the confirmation of titles under it, is immaterial; for those claiming under the Swamp Lands Act took *cum onere*— subject to the treaty obligations of the United States and whatever procedure the United States might adopt in performance of those obligations for the quieting of titles under Mexican grants. Confirmation when made was as effective and conclusive upon all patents under the Swamp Lands Act as if made at the date of the treaty. *San Francisco* v. *LeRoy, supra,* 670; *Knight* v. *United States Land Assn., supra,* 185; *Ward* v. *Mulford, supra,* 370.

We do not stop to discuss the point, much argued at the Bar and in the briefs, whether the decree of the district court affirming the Board's decree of confirmation was void or otherwise defective because not signed at or about the time it was rendered. See *Mitchell* v. *Overman,* 103 U. S. 62, 64–65; *In re Wight,* 134 U. S. 136; *United States* v. *Stollar,* 180 Fed. 910, 912, 913; *International Harvester Co.* v. *Carlson,* 217 Fed. 736, 738. If it be taken that the Government has failed to prosecute its appeal to final decree in the district court, it is enough that the decree of the Board has never been set aside or otherwise disturbed. If the appeal was not still pending when the decree of the district court was entered *nunc pro tunc* in 1930, the de-

cree of the Board remains as effective as if no appeal had been taken, and has become final and conclusive within the provisions of the Act. *Beard* v. *Federy, supra; United States* v. *Ritchie,* 17 How. 525.

Apart from the considerations growing out of the purchase by the Government of the Bissell and Aspinwall title, now to be discussed, the decree of the Board, if not that of the district court, must be taken as conclusive on respondents, and as to them it is not open to this or any other court to reëxamine the existence or validity of the Castro grant.

The holding of the court below that the acquisition by the United States of the title of Bissell and Aspinwall, while their claim was pending before the Board of Land Commissioners, involved a breach of equitable duty to California of such character as to preclude the Government from taking any advantage of the Board's confirmation of the Castro grant, is predicated upon the assumption that by virtue of the Swamp Lands Act the United States became in effect the trustee of the lands in question for the benefit of the state and its successors in interest. It is true that in a loose and general sense the United States, pending issuance of a patent under other land grant acts, has been referred to as a trustee of lands to be patented, *Cornelius* v. *Kessel,* 128 U. S. 456, 460–1; *Benson Mining & Smelting Co.* v. *Alta Mining & Smelting Co.,* 145 U. S. 428, 432; *Orchard* v. *Alexander,* 157 U. S. 372, 383; *United States* v. *Anderson,* 194 U. S. 394; *Knapp* v. *Alexander-Edgar Lumber Co.,* 237 U. S. 162; *Payne* v. *New Mexico,* 255 U. S. 367, and the right of the state, before patent, to lands within the purview of the Swamp Lands Act has been referred to as "equitable." *Michigan Land & Lumber Co.* v. *Rust,* 168 U. S. 589, 591; *Brown* v. *Hitchcock,* 173 U. S. 473, 476.

Even where the right of the state under the Swamp Lands Act is unqualified, it would perhaps be more ac-

curate to say that the United States is no more than a donor granting without warranty those lands falling within the description and the purview of the statute, subject to a duty imposed by the statute, to perfect by survey and patent such inchoate title as it had conveyed to the state. Beyond this the United States, by the enactment of the Swamp Lands Act, assumed no duty. It gave no warranty of title. It assumed no obligations to the grantee subjecting itself to other claims of equitable duty. Sale of the lands to others does not make it accountable as a trustee of the proceeds. *United States* v. *Louisiana,* 127 U. S. 182, 191. In any case, the duty assumed by the United States under the treaty and the concomitant power thus reserved to it, was inconsistent with the assumption of trust duties toward the state by reason of the Swamp Lands Act. In the execution of that duty it was free to adopt any mode of procedure it saw fit for adjudication of the titles of claimants under Mexican grants. Even after the submission of their claims to the Board of Land Commissioners it could withdraw them from decision of the Board and courts and adjudicate them by Congressional action. *Grisar* v. *McDowell, supra,* 379. The tentative recognition by the treaty of the rights of the Mexican grantees and the full latitude which the Government had reserved to itself in the choice of modes of disposition of those claims, were incompatible with the assumption of trust duties by the Government with respect to them pending their final disposition. There is thus a complete absence of support for the supposed analogy between a sovereign government, in such circumstances, and a private grantor who has conveyed with warranty of title or who has undertaken by executory contract to convey title which he possesses or subsequently acquires and who, because he has thus assumed equitable duties, is sometimes spoken of as a trustee.

The Mexican Claims Act itself neither imposed nor recognized such duties. In authorizing the Board to pass on claims presented to it upon the evidence adduced by the claimant and the United States, it required no notice to be given to any third party. It gave to the Government the right to representation by an agent and made it his duty to collect testimony "in behalf of the United States," and to attend meetings of the Board. But the rôle of the Government was not that of a litigant. It was rather, as the Act itself declared, supervisory: "to superintend the interests of the United States" in the performance, through an administrative agency, of its treaty obligation to ascertain for the Mexican claimants, and for itself, what lands had been withdrawn from the public domain by the Mexican grants. "The United States did not appear in the courts as a contentious litigant; but as a great nation, acknowledging their obligation to recognise as valid every authentic title, and soliciting exact information to direct their executive Government to comply with that obligation." *United States* v. *Fossatt,* 21 How. 445, 450, 451.

At no stage of the Government's dealing with the titles under Mexican grants, either under the Swamp Lands Act or under the Mexican Claims Act, can we find the assumption on the part of the Government of any duty toward the state with respect to the swamp and overflowed lands other than that specified in the Swamp Lands Act itself, and that duty was fully performed when it issued to the state its patent to the lands in question in response to the mandate in *Work* v. *United States ex rel. O'Donnell, supra.*

We turn now to the consideration of the circumstances relied on to establish the proposition that the title now asserted by the United States was acquired as the result of a purposeful or conscious scheme to deprive the state of possible benefits under the Swamp Lands Act by means

of collusive proceedings before the Board of Land Commissioners and the district court. At the outset it is to be noted that this contention first emerges in this case in the opinion of the Court of Appeals below. There had previously been no suggestion of such a contention in any pleading or assignment of error, nor had the Government or its officers been charged with any fraud, collusion, concealment, or bad faith. The respondents, in seeking affirmative relief, made no assertion of that character. In such a state of the record, dereliction of officers of the United States in the performance of official duty is not lightly to be inferred seventy-five years after the event, and a court should be slow to find what would be in effect a fraudulent conspiracy on their part to deprive the state of the benefits of the Swamp Lands Act.

Upon the selection of Mare Island as a navy yard by the Secretary of the Navy, Mr. Crittenden, then Attorney General, had given an opinion to the effect that Mare Island was a part of the public domain subject only to the Castro grant, the claim under which was then pending before the Board of Land Commissioners. He concluded that there was sufficient basis for the claim to justify purchase of the claimant's title, which he recommended as a protection of the interests of the Government. See Opinion of Attorney General Cushing given to the Secretary of the Navy, April 9, 1853. 8 Op. Atty. Gen. 422. Then followed the purchase from Bissell and Aspinwall, in the circumstances already detailed. Those circumstances justify no inference that the defense of their claim was dishonest. The Government had far more to gain than to lose by defeating the Castro grant. As the grant covered the island "in all its extent," both upland and swamp, rejection of the claim would not only have given to the Government a return of the purchase price and expenses as guaranteed by its bond for title, but would have established its right to the entire island as a part

of the public domain, except perhaps the swamp land. Cf. *Newhall* v. *Sanger, supra.* The validity of the Castro grant was the only matter with respect to which the Board could render a decree which, under the procedure of the Mexican Claims Act, could become final and conclusive as to the claimant and the Government. So far as appears, each was as much concerned with the determination of that question after as before the Bissell and Aspinwall deed and bond, for accordingly as it was decided one way or the other, the one or the other stood to gain an amount equal to the purchase price of the property. The reasonableness of the purchase price is not challenged. The only effect of the deed and bond was to protect the Government against loss of the opportunity to acquire the land for a navy yard in case the property should be disposed of to some third person pending the Board's decision, and the Castro grant should be upheld.

Upon the opinion of Attorney General Cushing, already mentioned, the Court of Appeals placed its chief, indeed its only reliance for the conclusion that there was conscious dereliction on the part of the Government. In this opinion the Attorney General spoke of the Government's purchase of the Bissell and Aspinwall title as an accomplished fact, but nevertheless recommended that the claim be vigorously contested. This is said to be so inconsistent with the Government's dismissal of its appeal four years later as to indicate a "purposeful shift of position" to the detriment of the state, from which bad faith is to be inferred. But an attentive reading of the opinion in the light of subsequent events reveals no such inconsistency. In repudiating any thought that the claim should not be contested, he declared: "But I, as Attorney General, in view of the special duties imposed on me by the acts for settlement of private land claims in Cali-

fornia, and of my general obligation to look after the rights of the United States in the premises, cannot pursue this course. I must not admit that the purchase of the Castro claim by the United States operates in any way, either by implication or otherwise, as a waiver of the general rights of the United States in the premises, or as an assent, either express or implied, to the pretended validity of the grant to Castro." He pointed out that the claim "involves difficult and important questions of law, which the Commissioners, to be sure, have decided in favor of the claimants,[4] but which the Supreme Court may decide otherwise," and that he felt bound to protect the interests of the United States by an appeal because as a precedent the case would affect "many millions worth of land in California, which is otherwise public domain."

After pointing out that the State of California retained title to tide land below high water mark, and that the United States could not enjoy the use of Mare Island as a naval depot while its shores belonged to the state, he concluded with the recommendation that "California be invited to relinquish to the United States whatever claim, if any, she may have to the shores or the overflowed land of Mare Island." The opinion discloses that he had no thought of depriving the state of any rights which it might have under the Swamp Lands Act for it affirmatively shows that he was of opinion (erroneously as was later decided in *Beard* v. *Federy, supra,* and cases following it), that no rights of California under the Swamp Lands Act would be affected by the decisions of the Board.

With but little research it becomes apparent that the important questions of law affecting "many millions worth of

[4] The reference is obviously to claimants other than Bissell and Aspinwall, for at that time there had been no hearings by the Board on the claim of the latter and the Board had rendered no decision with respect to it.

land in California," which were involved in the Bissell and Aspinwall claim and which the Commissioner had already decided in other cases, were unrelated to any rights of the state under the Swamp Lands Act, and were in fact decided against the Government by this Court after the Attorney General had rendered his opinion and before the dismissal of the Government's appeal from the decree of the district court in the Bissell and Aspinwall case.[5] The opinion

[5] Of the "difficult and important questions of law" which were said in Attorney General Cushing's opinion to the Secretary of the Navy to be involved in the claim of Bissell and Aspinwall, one, mentioned in the letter itself, was whether a grant by a Mexican governor was valid in the absence of approval by the "Departmental Deputation." This question was answered in the affirmative by the Board, December 27, 1852, in passing on the Fremont claim; January 5, 1853, in the Larkin case; and in preliminary opinions in the Cervantes and Reading cases, rendered August 3, 1852, and August 9, 1852, respectively. This Court agreed with the Board on the general proposition, in *Fremont* v. *United States,* 17 How. 542, 563 (March 10, 1855); *United States* v. *Reading,* 18 How. 1, 7–8 (January 11, 1856); *United States* v. *Larkin* 18 How. 557, 563 (May 12, 1856). A special rule to the contrary was later pronounced as to island grants in *United States* v. *Osio,* 23 How. 273, decided March 12, 1860, but it cannot be said from the present record whether that rule was applicable to the Castro grant.

Also involved in the claim of Bissell and Aspinwall were five other questions, each of which had been decided by the Board before the Attorney General's opinion of April 9, 1853, and before the Board's later confirmation of the Bissell and Aspinwall claim. Each was decided by this Court against the Government before its dismissal of the appeal which it had taken April 1, 1857, from the district court's affirmance of that confirmation. The questions were:

(a) Whether the Mexican provincial governors had power to grant lands. It was decided in the affirmative in the preliminary opinion on the Cervantes claim, rendered by the Board August 3, 1852, and in a number of subsequent decisions, and was settled by this Court March 5, 1857, in *United States* v. *Peralta,* 19 How. 343.

(b) Whether the Mexican governors had power to grant any lands within ten leagues of the seacoast—the so-called littoral league question. It was decided adversely to the Government in a preliminary

evidences the strongest motives on the Government's part to contest the Bissell and Aspinwall claim, and the firm determination to prosecute the contest with vigor. The record of the proceedings before the Board plainly shows adherence to this purpose. Witnesses were produced by the Government to discredit the Castro grant; those produced by the claimants, including Alvarado who testified to his execution of the grant, were so vigorously cross-examined as to excite the Board's "strong suspicion" as to the authenticity of the Castro grant, which it nevertheless sustained in the light of all the evidence. Only after the "important questions of law" had been decided by this Court against the Government did it relax its efforts. Its change of position then, though purposeful, can hardly be said to be evidence of bad purpose.

The deed of Bissell and Aspinwall to the Government was recorded in Solano County, California, April 18, 1853.

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opinion in the Cervantes case, rendered by the Board August 3, 1852, and was settled by this Court May 12, 1856, in *Arguello* v. *United States,* 18 How. 539, and *United States* v. *Cervantes,* 18 How. 553.

(c) Whether the grantee's failure to furnish a map (*diseño*) with his petition for a grant, constitutes a fatal defect in title. It was decided by the Board adversely to the Government in the Fremont case, December 27, 1852, and was settled by this Court March 10, 1855, in *Fremont* v. *United States, supra.*

(d) Whether a grant is void for want of a condition requiring the grantee to take possession of and cultivate the land within a certain time. It was decided by the Board in the negative in the Larkin case, January 3, 1853, and was settled by this Court May 12, 1856, in *United States* v. *Larkin, supra.*

(e) Whether a grant is void for want of a clause informing the grantee that it would become indefeasible only after approval by the Departmental Deputation. It was involved in the Larkin claim, confirmed by the Board January 3, 1853, and was settled by this Court May 12, 1856, in *United States* v. *Larkin, supra.*

Chronological data have been secured from Hoffman's Land Cases, Appendix, and from the records filed in this Court in the cited cases.

The opinion of Attorney General Cushing was in October 3, 1853 transmitted by the Secretary of the Navy to the Governor of California who submitted it to the California Legislature January 4, 1854. California Senate Journal, 1854, 37; Appendix, Doc. No. 4. Being then fully advised by that opinion of the Government's purchase of the Bissell and Aspinwall claim and of its purpose to press for a determination of the validity of the Castro grant by the Board of Land Commissioners, the California Legislature by Act of May 11, 1854, Cal. Stat. 1854, c. 43, pp. 48–49, consented to the purchase of Mare Island for the purpose of establishing there a navy yard and proclaimed that all the lands within its limits were to be perpetually free of state taxation. It ceded to the Government lands on the island which are not here involved, with the proviso that the consent to the purchase and the cession to the Government should not "be construed in aid or support, directly or impliedly, of any conveyance or bond for title to the United States of the same lands heretofore made, or which may hereafter be made . . . or as a recognition on the part of the State of California of any claim, title or grant heretofore asserted or set up, or which may hereafter be asserted or set up by any person or persons . . ." The only bond for title then relating to Mare Island which is disclosed by the record was that of Bissell and Aspinwall, and the apparent purpose of the proviso was that the state's consent to the purchase should not enure to the benefit of Bissell and Aspinwall or any others in like situation, so as to relieve them from the obligation on their bond in the event that the Castro grant should be held invalid by the Board of Land Commissioners. Occupation of the island by the United States as a naval station followed in September, 1854. The Board rendered its decree of confirmation of the Castro grant May 8, 1855. The following memorandum appears among the papers in the case in the district court: "The United States being now the owner of

the titles of appellees, a confirmation of this claim enures to the benefit of the Government and no objection is therefore made to a decree in favor of the validity of the claim."

Thus, instead of action covertly taken by the Government with the purpose of depriving the state of any of its rights in the premises, we find high officers of the Government proclaiming in documents submitted to the Governor and Legislature of California the fact of the Government's acquisition of a conditional interest in the Bissell and Aspinwall claim, and its purpose to secure a determination of the validity of the grant by the Board of Land Commissioners. We see that, after this full disclosure, the state expressed consent to the purchase in such a way as to save to the Government unimpaired its rights under the Bissell and Aspinwall bond. Only after the confirmation of the Castro grant by the Board of Land Commissioners, and only after the important questions of law on which the Government relied to defeat the grant had been decided against it by this Court in other cases, did the Government relinquish its purpose to contest the Bissell and Aspinwall claim. We can find in this record no basis for saying that the confirmation by the Board was procured or allowed to stand through any fraud, concealment, bad faith, or breach of duty to California by the Government or its officers.

The contention that the decree of the Board is open to collateral attack as a nullity is thus reduced to the assertion that, by reason of the conditional interest of the Government under the Bissell and Aspinwall deed and bond, the contest before the Board may have been in some degree less vigorous than it otherwise would have been. To this the answer is that, as already shown, the Government owed no duty to the state to contest the claim and that in any case the proceeding before the Board was not adversary.

The Board was an administrative body, created as the Act declares "to ascertain and settle the private Land Claims in the State of California," by proceedings which were not required to be controversial. It was begun without notice to any other party. While the attendance by the "agent" of the United States was required in order that he might "superintend the interests of the United States," it did not appear in the rôle of litigant. *United States* v. *Fossatt, supra.* The Board was an administrative body, not a court. *United States* v. *Ritchie, supra; United States* v. *Fossatt, supra.* Review of its proceedings by direct appeal was not within the judicial power, and reëxamination of its determinations by the district court and the United States Supreme Court was sustained only on the theory that the appeal to the district court was the initiation of a suit to set aside the determination of the Board, in the course of which suit further evidence might be taken. *United States* v. *Ritchie, supra,* 533, 534; *Grisar* v. *McDowell, supra,* 375. Since the statute under which the Board was created did not require adversary proceedings, the validity of its administrative determination was unaffected by their absence. The decree of the Board, which stands undisturbed by any subsequent proceedings in the courts, cannot be disregarded as a nullity.

We conclude that the acquisition of the interest in the Bissell and Aspinwall title by the United States did not undermine that determination; that the proceedings in connection with their claim before the Board of Land Commissioners were free from fraud, bad faith, concealment or overreaching, and of any breach of duty to California on the part of the United States or its officers; and that the decree of the Board stands undisturbed as a valid administrative determination of the validity of the Castro grant and, as such, is conclusive upon the State

of California and on respondents who claim under her. The decree below must accordingly be

Reversed.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration or decision of this case.

CALMAR STEAMSHIP CORP. *v.* TAYLOR.

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

No. 594. Argued March 9, 1938.—Decided March 28, 1938.

1. The right of a seaman to maintenance and cure for an illness which befalls him during his service may continue for a period beyond the duration of the voyage, whether he be at home or abroad, and even though the illness be not caused by the employment. P. 529.
2. In the case of a seaman suffering from an incurable disease, which manifested itself during his employment but was not caused by it, the duty of the ship owner to furnish maintenance and cure does not extend beyond a fair time after the voyage in which to effect such improvement in the seaman's condition as reasonably may be expected to result from nursing, care, and medical treatment. P. 530.
3. In a suit brought by a seaman suffering from an incurable disease, which manifested itself during his employment though not caused thereby, an award of a lump sum in anticipation of a continuing need of maintenance and cure for life (based on his life expectancy), can not be sustained. P. 530.
4. The seaman's recovery in each such case must be measured by the reasonable cost of that maintenance and cure to which he is entitled at the time of the trial, including, in the discretion of the court, such amounts as may be needful in the immediate future for the maintenance and cure of a kind and for a period which can be definitely ascertained. P. 531.

92 F. 2d 84, reversed.

CERTIORARI, 302 U. S. 681, to review a decree affirming an award against the steamship company in a suit in admiralty for maintenance and cure.

Mr. Frank A. Bull, with whom *Messrs. O. D. Duncan* and *Russell T. Mount* were on the brief, for petitioner.

Mr. Abraham E. Freedman, with whom *Mr. Howard M. Long* was on the brief, for respondent.

Mr. Justice Stone delivered the opinion of the Court.

The question for decision is whether the duty of a ship owner to provide maintenance and cure for a seaman falling ill of an incurable disease while in its employ extends to the payment of a lump sum award sufficient to defray the cost of maintenance and cure for the remainder of his life.

Respondent was a member of the crew of petitioner's steamship "Losmar." Following an injury to his foot, allegedly caused by stubbing his toe against an object lying on the floor of the boiler room where he was employed, respondent was found to be afflicted with thrombo angiitis obliterans, otherwise known as Buerger's disease, an incurable malady of the veins and arteries. It is attended by interruptions of the blood stream, with consequent malnutrition of the affected parts, producing lesions, deteriorating changes of the tissues, and gangrene. Medical treatment and amputation of the affected parts may halt the advance of the disease, but its manifestations are likely to recur in other parts of the body, and medical opinion is that the disease tends to be progressive and may ultimately cause death. Care and treatment at frequent intervals, with periodic medical observation of the patient, are of aid in arresting its progress.

After February 12, 1935, when respondent was first hospitalized, he was given treatment at various marine hospitals, in the course of which he suffered four amputations upon the right foot and leg. On October 3, 1935, after his leg had been amputated below the knee, he

was discharged to the "Outpatient Department to return at intervals for reëxamination, and later to be fitted with an artificial limb." Petitioner, from time to time, paid respondent small sums for maintenance and cure, continuing to do so until March 10, 1936, when they totaled $487. At about this time respondent brought the present suit in admiralty to recover maintenance and cure, and, in another count, for petitioner's negligence in causing the injury. The trial court found that petitioner was not negligent, but held that respondent is entitled to recover the cost of maintenance and medical treatment so long as such treatment is necessary, and that as his affliction is incurable, there should be a lump sum award based on his life expectancy. Its decree awarding a recovery of $7000 was affirmed by the Court of Appeals. 92 F. (2d) 84. Because of the importance of this question, we granted certiorari, 302 U. S. 681, but denied a cross petition to review the Court of Appeals' affirmance of the decree for the ship owner on the negligence count, *post,* p. 643.

The ancient duty of a vessel and her owner to provide maintenance and cure for seamen injured or falling ill while in service was recognized and, to some extent, defined by this Court in *The Osceola,* 189 U. S. 158, 175. See also *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372; *Pacific S. S. Co.* v. *Peterson,* 278 U. S. 130. The duty, which arises from the contract of employment, *Cortes* v. *Baltimore Insular Line,* 287 U. S. 367, 371, does not rest upon negligence or culpability on the part of the owner or master, *id.; The City of Alexandria,* 17 Fed. 390 (D. C.); *The Mars,* 149 Fed. 729, 731 (C. C. A.); *Sorensen* v. *Alaska S. S. Co.,* 243 Fed. 280 (D. C.), aff'd 247 Fed. 294 (C. C. A.); *Brown* v. *The Bradish Johnson,* Fed. Cas. No. 1992, 1 Woods 301 (C. C.), nor is it restricted to those cases where the seaman's employment is the cause of the injury or illness. *The Wensleydale,* 41

Fed. 829 (D. C.); *The Bouker No. 2,* 241 Fed. 831 (C. C A.). It is not an award of compensation for the disability suffered, *The Wanderer,* 20 Fed. 140, 143 (C. C.), although breach of the duty may render the owner liable for the consequential damages suffered by the seaman. *Cortes* v. *Baltimore Insular Line, supra,* 371. The maintenance exacted is comparable to that to which the seaman is entitled while at sea, *The Henry B. Fiske,* 141 Fed. 188, 192 (D. C.); *The Mars,* 145 Fed. 446, 447, (D. C.), aff'd 149 Fed. 729 (C. C. A.); *The Bouker No. 2, supra,* 836, and "cure" is care, including nursing and medical attention during such period as the duty continues. *Whitney* v. *Olsen,* 108 Fed. 292, 297 (C. C. A.) and cases cited; *Daugherty* v. *Thompson-Lockhart Co.,* 211 Fed. 224, 227 (D. C.).

In *The Osceola, supra,* this Court reserved the point whether the duty of maintenance and cure extends beyond the duration of the voyage, and that question, so far as this Court is concerned, remains an open one. The reasons underlying the rule, to which reference must be made in defining it, are those enumerated in the classic passage by Mr. Justice Story in *Harden* v. *Gordon,* Fed. Cas. No. 6047 (C. C.): the protection of seamen, who, as a class, are poor, friendless and improvident, from the hazards of illness and abandonment while ill in foreign ports; the inducement to masters and owners to protect the safety and health of seamen while in service; the maintenance of a merchant marine for the commercial service and maritime defense of the nation by inducing men to accept employment in an arduous and perilous service.

It is plain that in many cases these purposes will not be accomplished if the owner's duty to furnish maintenance and cure ends with the voyage. If the injury or illness outlasts it, the seaman may still be left helpless and uncared for in a foreign port. Even if he is returned

to the home port the inducement to the owner to care for the health and safety of seamen during the voyage and the inducement to seamen to take the necessary risks of a hazardous calling will be materially lessened. The chances of their prompt restoration to a service whose preservation is in the public interest, will be diminished if the right to maintenance and cure ends with the voyage.

Tacit recognition is accorded these considerations in the great number of cases in the lower federal courts sustaining the right to maintenance and cure for a reasonable time after the voyage—"reasonable time" being appraised with reference to the special circumstances of each case. *The Bouker No. 2, supra,* 835, and cases cited at 834. It is true that in most of these cases the efficient cause of the injury or illness was some proven act of the seaman in the service of the ship, but there are others in which it was deemed enough that he was incapacitated when subject to the call of duty as a seaman, and that his incapacity continued after the voyage had ended. *The Bouker No. 2, supra,* 835; *The Wensleydale, supra.*

We accept as supported by evidence, the finding of the district court that respondent's disease and the amputations which he suffered were not caused by the injury to his foot. But we think that even in such a case, whether the seaman is at home or abroad, his right to maintenance and cure may outlast the voyage. The policy underlying the obligation, so cogently stated by Justice Story in *Harden* v. *Gordon, supra,* and the liberality with which admiralty courts have traditionally interpreted rules devised for the benefit and protection of seamen who are its wards, *Robertson* v. *Baldwin,* 165 U. S. 275, 287; *Cortes* v. *Baltimore Insular Line, supra,* 377; *The Arizona* v. *Anelich,* 298 U. S. 110, 123, call for some extension of the duty beyond the term of service. The practical inconvenience and the attendant danger to seamen in the application of a rule which would en-

courage the attempt by master or owner to determine in advance of any maintenance and cure, whether the illness was caused by the employment, are manifest.

There remain the questions whether in the case of a chronic illness the duty continues so long as medical attendance and care are beneficial, until death if the need lasts so long, and whether a lump sum may be awarded to defray the cost of meeting the anticipated need.

In answering the first we lay to one side those cases where the incapacity is caused by the employment. As to them considerations not present here may apply, which might be thought to require a more liberal application of the rule than we think is called for in this case. Cf. *Reed* v. *Canfield,* Fed. Cas. No. 11641 (C. C.), with the comments of Judge, later Justice Brown in *The J. F. Card,* 43 Fed. 92 (D. C.), and see those of Judge Hough in *The Bouker No. 2, supra,* 834. But we find no support in the policies which have generated the doctrine for holding that it imposes on the ship owner an indefinitely continuing obligation to furnish medical care to a seaman afflicted with an incurable disease, which manifests itself during his employment, but is not caused by it. So far as we are advised it is without support in the authorities. We can find no basis for saying that, if the disease proves to be incurable, the duty extends beyond a fair time after the voyage in which to effect such improvement in the seaman's condition as reasonably may be expected to result from nursing, care, and medical treatment. This would satisfy such demands of policy as underlie the imposition of the obligation. Beyond this we think there is no duty, at least where the illness is not caused by the seaman's service.

The award of a lump sum in anticipation of the continuing need of maintenance and cure for life or an indefinite period, is without support in judicial decision. Awards of small amounts to cover future maintenance

and cure of a kind and for a period definitely ascertained or ascertainable have occasionally been made. *The Mars,* 149 Fed. 729, 730 (C. C. A.); *Wilson* v. *Manhattan Canning Co.,* 205 Fed. 996, 997 (D. C.). But the award here seems to us to be inconsistent with the measure of the duty and the purposes to be effected by its performance. The duty does not extend beyond the seaman's need. *Raymond* v. *The Ella S. Thayer,* 40 Fed. 902, 903 (D. C.); *The J. F. Card, supra,* 95; *The Bouker No. 2, supra,* 835; *The Santa Barbara,* 263 Fed. 369, 371 (C. C. A.); *Stewart* v. *United States,* 25 F. (2d) 869, 870 (D. C.); *Marshall* v. *International Mercantile Marine Co.,* 39 F. (2d) 551, 553 (C. C. A.); cf. *Holt* v. *Cummings,* 102 Pa. 212; *contra, Reed* v. *Canfield, supra.* The amount and character of medical care which will be required in the case of an affliction, as well defined even as Buerger's disease, cannot be measured by reference to mortality tables. Moreover, courts take cognizance of the marine hospital service where seamen may be treated at minimum expense, in some cases without expense, and they limit recovery to the expense of such maintenance and cure as is not at the disposal of the seaman through recourse to that service. *The Bouker No. 2, supra,* 835; *Marshall* v. *International Mercantile Marine Co., supra,* 553, and cases cited. Furthermore, a duty imposed to safeguard the seaman from the danger of illness without succor, and to safeguard him, in case of illness, against the consequences of his improvidence, would hardly be performed by the payment of a lump sum to cover the cost of medical attendance during life.

The seaman's recovery must therefore be measured in each case by the reasonable cost of that maintenance and cure to which he is entitled at the time of trial, including, in the discretion of the court, such amounts as may be needful in the immediate future for the maintenance

and cure of a kind and for a period which can be definitely ascertained.

The courts below have made no findings sufficient to enable us to fix the amount which respondent is entitled to recover. The decree is accordingly reversed and the cause remanded to the district court for further proceedings in conformity with this opinion, and without prejudice to any later suit by respondent to recover maintenance and cure to which he may then be entitled.

Reversed.

MR. JUSTICE BLACK is of opinion that the judgment should be affirmed.

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

ADAMS, RECEIVER, *v.* NAGLE ET AL.*

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

No. 123. Argued December 16, 17, 1937. Reargued March 8, 9, 1938.—Decided March 28, 1938.

Stockholders of the "P" and "R" national banks brought bills in equity to enjoin the receiver from enforcing assessments, ordered by the Comptroller of the Currency pursuant to the statute governing the additional liability of shareholders, on the grounds that the action of the Comptroller in ordering the assessments was in excess of his statutory power, arbitrary, capricious, and a denial of due process of law. The bills alleged, *inter alia,* that the Comptroller erroneously disregarded agreements theretofore entered into between the "P" and "R" and the "F" banks, whereby the first two conveyed all of their assets to the last, which assumed all of their liabilities except liabilities to stockholders, and out of which

*Together with No. 124, *Adams, Receiver,* v. *Tobias et al.,* also on writ of certiorari to the Circuit Court of Appeals for the Third Circuit.

agreements arose claims against the "F" bank sufficient to pay the debts of the "P" and "R" banks without the necessity of assessment of stockholders. Upon the allegations of the bills, *held:*

1. The assessments were not subject to attack or frustration in these proceedings upon the grounds set forth in the bills. P. 538.

2. The agreements between the banks did not effect a consolidation in conformity with the National Banking Act, and the Comptroller was bound to deal with them, so far as their assets and liabilities were concerned and in respect of stockholders' liability, as three separate entities. P. 538.

3. It was not a condition precedent to the validity of the assessments that the Comptroller should have exhausted the assets of the "P" and "R" banks. P. 539.

4. The Comptroller's determination as to the necessity for the assessments was made in the exercise of the discretionary power vested in him and was final and conclusive. P. 540.

5. Collection of the assessments could not be made to await the outcome of litigation challenging the correctness of the Comptroller's decision as to the effect of the agreements between the banks. P. 544.

88 F. 2d 936, reversed.

CERTIORARI, 302 U. S. 665, to review a decree reversing orders of the District Court dismissing the bills of complaint in two suits brought by stockholders of two insolvent national banks to enjoin the receiver from enforcing assessments ordered by the Comptroller of the Currency. By order of the trial court the cases were consolidated for the purpose of appeal.

Messrs. Charles E. Wainwright and *George P. Barse,* with whom *Messrs. Brice Clagett* and *Charles W. Matten* were on the brief, for petitioners on the reargument and on the original argument.

Mr. Lemuel B. Schofield, with whom *Messrs. Edward W. Madeira* and *W. Bradley Ward* were on the brief, for respondents on the reargument and on the original argument.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

These are stockholders' suits to enjoin the receiver of two national banks from enforcing assessments ordered by the Comptroller of the Currency pursuant to the statute governing the additional liability of shareholders.[1]

The respondents in No. 123 are stockholders of the Penn National Bank and Trust Company of Reading, Pennsylvania; those in No. 124 are stockholders of the Reading National Bank and Trust Company of the same city; and the petitioner is receiver of both banks. The controversy has its origin in a transaction between the two banks and the Farmers National Bank and Trust Company of Reading. The causes of action are identical and it will suffice to outline the allegations of the bill in No. 123. These are:

On February 17, 1933, Penn and Reading were subjected to unusual withdrawals which depleted their reserves and placed both on the verge of insolvency. Due to this condition the two banks on that date entered into an agreement with the Farmers contemplating a consolidation of the three in accordance with Title 12 U. S. C. §§ 33 and 34. The agreement called for a valuation of the assets of the three banks with ensuing recapitalization and for the Comptroller's approval of the terms of consolidation as required by law. It further provided for transfer by Penn and Reading of all their assets to Farmers, with the right to hypothecate and rehypothecate them, and for assumption by Farmers of the liabilities of the transferring banks except that to stockholders, they reserving the right to enforce against their stockholders any statutory excess liability. Farmers was to operate

[1] R. S. § 5151; Act of Dec. 23, 1913, c. 6, § 23, 38 Stat. 273, U. S. C. Tit. 12, §§ 63 and 64.

their banking houses as its branches. On the same day Penn and Reading turned over their assets to Farmers, which mingled them with its own and thereafter dealt with them as its own. There is no assertion that on February 17 the Comptroller knew, or approved, of the agreement and transfer. It is alleged, however, that, by his direction, a supplemental agreement was made February 20, 1933, by which Penn and Reading guaranteed to Farmers that the assets of each would exceed in value its liabilities assumed by Farmers under the agreement of February 17; and that he acquiesced in the continued administration of the affairs of Penn and Reading by Farmers. On February 17 the assets of Penn which were transferred to Farmers had a reasonable market net value of $5,400,000 as against total liabilities of $5,100,000, and the assets of Farmers were of the fair value of $8,000,000 (to which is to be added the stockholders' liability for assessment in the amount of $1,000,000), as against liability to creditors of $9,000,000.[2] The claims of the two banks against Farmers were, at the date of transfer, and still are, more than sufficient, in the ordinary course of liquidation, to pay all of their liabilities without the necessity of an assessment of the stockholders.

Farmers continued to do business with the combined and commingled assets from February 17 to March 18, 1933. Then the Comptroller appointed a conservator who took possession of all of the assets. October 10, 1933, the Comptroller, without notice to Penn or Reading, their depositors, creditors, or stockholders, and without a hearing, ruled that the agreements of February 17 and February 20 were without legal effect and directed that the transfer and delivery of the assets, and the assumption of liabilities thereunder, should be disregarded; and

[2] The bill in No. 124 alleges that on the same day Reading's assets exceeded in value its liabilities of approximately $9,000,000.

he attempted to allocate among the three banks the assets theretofore transferred and delivered to Farmers. He appointed the same person he had previously named conservator for Farmers to be conservator of the other two banks. October 20, 1933, the Comptroller proposed a so-called plan of reorganization of the three banks which provided for the organization of a new national bank, the issue by it of stock and securities, the pledge of some of its assets to secure a loan from Reconstruction Finance Corporation, a sale of the assets in the possession of the conservator of Farmers to the new national bank, and a division of the proceeds on the basis of thirty-five per cent. to Farmers, twenty-five per cent. to Penn, and twenty-five per cent. to Reading. It is charged that this division was arbitrary and was based on a classification adopted from the report of national bank examiners dated April 24, 1933, and not on the financial condition of the banks as of February 17, 1933, the date of the execution of the agreement, transfer of assets, and assumption of liabilities. The conservator of all three banks, in furtherance of the plan, reconstructed the assets and liabilities of each as of April 24, 1933, made a division thereof amongst the banks, consummated the sale to the new bank, and apportioned the proceeds according to the plan. In so doing, in conformity with the Comptroller's ruling, he disregarded all rights and obligations arising from the agreement of February 17, 1933, and disregarded the claim of Penn, in the amount of $5,100,000, and the claim of Reading, in the amount of $9,000,000, against Farmers. The bills charge that this conduct was arbitrary, and that the Comptroller's ruling respecting the two agreements was beyond the powers conferred upon him by the National Bank Act or other statutory law, was an unlawful assumption of judicial powers not delegated to him by statute, or capable of being so delegated, was in violation of the rights of Penn and Reading, their depositors, other

creditors, and stockholders, and deprived them of their property without due process of law.

After consummation of the plan of reorganization the Comptroller certified that each of the three banks was insolvent and, in October and November 1934, appointed a receiver for each of them. January 15, 1935, he certified that, upon a proper accounting by the receivers of Penn and Reading, and a valuation of the uncollected assets remaining in their hands, it appeared that a 100% assessment was necessary to pay their debts and he accordingly ordered such an assessment. The bills characterize his conduct as a failure, neglect, and refusal to collect the claims of Penn and Reading against Farmers and a consequent failure to comply with the conditions and provisions of the statute authorizing assessments of stockholders, and as "in fraud of the rights" of Penn and Reading, their creditors and stockholders. His ignoring the claims is charged to have been "a grave error of law based upon his unwarranted assumption of judicial power in abrogating, cancelling, and waiving" the claims of Penn and Reading against Farmers, and "adjudicating the private rights and obligations of parties not subject to his power and control," which invalidated the assessments.

The receiver interposed motions to dismiss which were sustained by the District Court. The Circuit Court of Appeals reversed,[3] holding the bills set forth a cause of action since, if their allegations were true, the Comptroller had exceeded his statutory power and acted arbitrarily in ordering the assessments. The importance of the question involved and asserted conflict of decision moved us to grant certiorari.

The petitioner's position is that the agreement and transfer of assets to the Farmers did not effect a statutory consolidation; that the Comptroller was, there-

[3] 88 F. (2d) 936.

fore, at liberty to treat all three banks as separate entities for the purpose of assessing stockholders' liability and that stockholders may not, by a proceeding in equity, challenge his official findings as to insolvency and necessity for an assessment. The respondents say the Comptroller's power of assessment is conditioned on a basic or quasi-jurisdictional fact,—that the ordinary resources of a bank have been exhausted,—and, if they have not been, or are deficient only because of the Comptroller's unlawful abrogation of and refusal to require collection of a valid claim sufficient to pay the bank's debts, the assessment is subject to direct attack as in excess of that officer's statutory power, as arbitrary, capricious, and a denial of due process of law. We are of opinion that the assessments were not subject to attack or frustration in these proceedings upon the grounds set forth in the bills.

1. The agreements of February 17 and February 20 did not effect a consolidation in conformity with the National Banking Act so as to constitute the existing stockholders of Penn and Reading, together with the stockholders of Farmers, stockholders of a consolidated bank. The steps requisite to such consolidation were never taken.[4]

2. When the Comptroller took charge of the banks in question he was bound to deal with them, so far as their assets and liabilities were concerned and in respect of stockholders' liability, upon the basis that they were three separate associations. This conclusion is unaffected by the legality and effectiveness of the agreement of February 17, 1933, upon which respondents insist.[5] At most the agreement substituted a new asset—

[4] See U. S. C. Tit. 12, § 33.

[5] Compare *City National Bank* v. *Fuller*, 52 F. (2d) 870; *Wannamaker* v. *Edisto National Bank*, 62 F. (2d) 696, 699; *B. V. Emery & Co.* v. *Wilkinson*, 72 F. (2d) 10, 12.

the promise of Farmers—for the old assets. Respondents do not claim that the contract and the transfer pursuant to it worked a novation whereby the creditors of the transferring banks became creditors of the transferee. So far as the Comptroller was concerned these creditors were still those of the former and entitled to look to their assets for payment.

3. Whether the Comptroller took the view that the contracts and what was done under them were effective to commute the physical assets of Penn and Reading into a chose in action against Farmers, or that the transaction did not so operate but left Penn and Reading owners of their assets so far as they could be identified and segregated, it was not, as respondents suggest, a condition precedent to the validity of his assessment that he should have exhausted the assets of Penn and Reading.

At the argument the position was taken that the Comptroller was without power to lay an assessment until he had gotten in the avails of all the ordinary assets of the banks and that the claims of Penn and Reading against Farmers under the contract of February 17 were such ordinary assets. The conclusion is that until the receiver of Penn and Reading had recovered upon the contract and distributed the proceeds the Comptroller was without power to order an assessment. No decision of any court was cited to support this position, but it was sought to maintain it by reference to an amendment of the National Bank Act of June 3, 1864,[6] offered and adopted in the Senate. The purpose of this amendment was stated to be to "enable the receiver at any time whenever it becomes necessary, to enforce the individual liability; and in case it is not necessary, if the other assets are sufficient, he will not enforce this contingent liability, which is intended as an ultimate security of the

[6] c. 106, 13 Stat. 99.

creditors of the bank." We think the adoption of the amendment in the light of the explanation is far from sustaining the respondents' contention. It has always been recognized that if the assets of a closed national bank are sufficient to answer its liabilities the Comptroller is not to levy an assessment, but to him is confided the determination of the sufficiency of the assets and, if he concludes they are insufficient, it is not only his right but his duty immediately to invoke the contingent liability of the stockholders. This has been the invariable administrative practice and any other would tend to depreciate the availability and the value of stockholders' liability.

4. The question remains whether, if the Comptroller's action arose from mistake of fact or law, the remedy here invoked is appropriate. In establishing the national banking system Congress has invested the Comptroller, an administrative officer, with jurisdiction to appoint a receiver after investigation and a finding that a bank has become insolvent, and to order an assessment up to one hundred per cent. of the par value of the stock against the shareholders to pay creditors' claims if, upon an investigation, he finds that the assets are insufficient to pay the debts. Plainly these are questions for the exercise of administrative discretion. The necessity for vesting this power in an administrative officer springs from the desirability of prompt liquidation. It would be intolerable if the Comptroller's decision could be attacked collaterally in every suit by a receiver against the shareholders to collect the amount of the assessment. It is settled this cannot be done.[7] It would be equally intolerable if stockholders as a class could call upon a court to review the Comptroller's exercise of his discretion. For a court to entertain a suit for this purpose would be

[7] *Kennedy* v. *Gibson,* 8 Wall. 498, 505; *Casey* v. *Galli,* 94 U. S. 673, 681; *Bushnell* v. *Leland,* 164 U. S. 684.

to render nugatory the functions Congress has confided in the Comptroller. It has often been decided this may not be done.[8]

The respondents, however, urge, and the bill charges, that the Comptroller, in ruling that the contract of February 17 should be disregarded, and the receiver, in following this ruling, exceeded their statutory powers and acted arbitrarily and may be enjoined from enforcing an assessment based on the ruling. The contention rests upon a statement in *United States* v. *Knox,* 102 U. S. 425: "Although assessments made by the comptroller, under the circumstances of the first assessment in this case, and all other assessments, successive or otherwise, not exceeding the par value of all the stock of the bank, are conclusive upon the stockholders, yet if he were to attempt to enforce one made, clearly and palpably, contrary to the views we have expressed, it cannot be doubted that a court of equity, if its aid were invoked, would promptly restrain him by injunction." This was said in a case where a creditor sought a mandamus to compel the Comptroller to order an assessment, he having refused so to do on the ground that the very terms of the statute forbade such action. Relying on this expression a number of the federal courts have said that, while an assessment may not be collaterally attacked, it may be avoided by direct attack for "clear error of law, fraud, or mistake."[9] Respondents admit this statement is too broad. Other courts

[8] *Liberty National Bank* v. *McIntosh,* 16 F. (2d) 906; *Wannamaker* v. *Edisto National Bank, supra; Meeker* v. *Baxter,* 83 F. (2d) 183; *Davis Trust Co.* v. *Hardee,* 85 F. (2d) 571; *Acker* v. *Hamilton,* 85 F. (2d) 574; *Barbour* v. *Thomas,* 86 F. (2d) 510; *Church* v. *Hubbard,* 91 F. (2d) 406.

[9] See, e. g., *Deweese* v. *Smith,* 106 Fed. 438, 445; *B. V. Emery & Co.* v. *Wilkinson,* 72 F. (2d) 10, 12; *Trustees* v. *Picher,* 90 F. (2d) 741, 743; *United States Nat. Bank* v. *Pole,* 2 F. Supp. 153, 157; *Angeny* v. *Keuper,* 16 F. Supp. 542, 543.

have said that the only ground of successful attack is fraud on the part of the Comptroller.[10] This case presents no such basis for relief. The bills do not charge bad faith or fraud on the part of the Comptroller. The averment that his ruling with respect to the contract of February 17 and the consequent action of the receiver were "in fraud" of the rights of Penn and Reading and their stockholders falls far short of any charge of actual fraud. Indeed no suggestion of such fraud was advanced by respondents either in brief or in argument.

The respondents rely upon decisions holding that a bill in equity or a writ of mandamus will lie to compel an executive officer to comply with the plain mandate of a statute. These have no application for they deal with a situation wholly foreign to that here presented. Where a statute vests no discretion in an executive officer but to act under a given set of circumstances, or forbids his acting except upon certain named conditions, a court will compel him to act or to refrain from acting if he essays wholly to disregard the statutory mandate; but if a discretion is vested in him, and he is to act in the light of the facts he ascertains and the judgment he forms, a court cannot restrain him from acting on the ground that he has exceeded his jurisdiction by reason of an error either of fact or law which induced his conclusion. Plainly, therefore, the respondents are wrong in asserting that as the facts set forth in their bill charge the Comptroller with an error of law, he exceeded his authority.

The respondents further insist that their allegation that the Comptroller's action was "arbitrary," which is amplified and given content by the facts alleged and admitted by the motion to dismiss, requires a decree avoiding the assessment. The epithet "arbitrary," used in this

[10] *O'Conner* v. *Watson,* 81 F. (2d) 833, 836; *Meeker* v. *Baxter,* 83 F. (2d) 183, 186; *Davis Trust Co.* v. *Hardee,* 85 F. (2d) 571, 573; *Dunn* v. *O'Connor,* 89 F. (2d) 820, 827.

connection, can mean no more than do the other averments that the Comptroller, in reaching his conclusion, "committed grave error of law" in failing to regard the contract of February 17 as effective. It would be arbitrary, in the proper sense of the term, for an official to act in the teeth of a statute or stubbornly to refuse to act at all where a statute commands action, but where he essays to exercise the jurisdiction conferred upon him, though his errors may be subject to subsequent correction, they cannot be enjoined as an arbitrary exercise of his authority. To hold otherwise would render orderly administrative procedure impossible.

A reference to the situation with which the Comptroller was confronted when his receiver took charge of the banks will serve to demonstrate that a case was presented calling for the exercise of his discretion. The bill asserts that over a substantial period subsequent to the transfer of Penn's and Reading's assets to Farmers these were intermingled with Farmers' assets. It avers that an attempted segregation of assets was made upon the basis of a report of bank examiners dated April 24, 1933, more than two months after the transfer; it alleges that, at the date of transfer, Farmers owed $9,000,000 against which it had assets of $8,000,000 and a possible recovery by way of stockholders' liability of an additional million dollars; it fails to state what the condition of Farmers was when a conservator was appointed for it; what its condition was when a receiver was appointed for it; what its financial status is today. The pleader contents himself with the statement of a conclusion that the "claims" of Penn and Reading against Farmers were, at the time of transfer of their assets, and still are, sufficient in amount to pay all of those banks' creditors. But if the allegation is true, the only conclusion to be drawn from it is that in ordering the assessment the Comptroller erroneously estimated the value of the banks' assets. Whatever may be

thought of the legality of the transfer of assets pursuant to directors' action on the eve of insolvency, the creditors of Penn and Reading were not bound to look to Farmers and might prefer to look to the assets transferred or to so much of them as could be traced. And there well may have been reason for the Comptroller to doubt the legal efficacy of the transfer in the face of creditors' attack. These and other matters were to be considered by him in arriving at an informed judgment as to the availability and value of the assets of Penn and Reading to answer the claims of their creditors. As an exercise of the discretionary power vested in him, the Comptroller's action must be treated as final and conclusive as to the necessity for an assessment.

5. If the Comptroller's decision with respect to the contract of February 17 was erroneous as matter of law the stockholders may or may not have a remedy. But their remedy is not to attack, or seek to evade payment of, the assessment. The collection of the assessment cannot be made to await the outcome of litigation of that question. Moreover, if, as they assert, the Comptroller's judgment is wrong and the assets of Penn and Reading, consisting of their claims under the contract, are sufficient to pay their creditors, the amounts paid pursuant to the assessments will be returned to stockholders in final liquidation. Meantime, however, the creditors, the protection of whose interests is the primary object of the statute, will have been paid and, as is right, reimbursement of the stockholders will await possible realization upon assets which the Comptroller believes insufficient to satisfy the creditors.

The decrees are reversed and the causes remanded with instructions to dismiss the bills.

Reversed.

Mr. Justice Cardozo took no part in the consideration or decision of this case.

Counsel for Parties.

LINCOLN ENGINEERING CO. *v.* STEWART-WARNER CORP.

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

No. 608. Argued March 10, 1938.—Decided March 28, 1938.

1. Patent No. 1,593,791, July 27, 1926, to Butler, for the combination of a headed nipple, for receiving lubricant, a grease pump and a coupler having a multi-jawed chuck which is closed over the head of the nipple by the pressure of the grease acting on a piston within the tube of the coupler,—*held* void as claiming more than the applicant invented. P. 548.

   Assuming that the coupler embraced a patentable improvement in the respect that the jaws of the chuck are actuated by the grease pressure, the chuck form of coupling as well as the headed nipple and grease pump are old in the art and perform no new functions in this combination.

2. The improvement of one part of an old combination gives no right to claim that improvement in combination with other old parts which perform no new function in the combination. *Rogers* v. *Alemite Corp.*, 298 U. S. 415. P. 549.

91 F. 2d 757, reversed.

CERTIORARI, 302 U. S. 682, to review the affirmance of a decree, 15 F. Supp. 571; 16 *id.* 778, holding the present petitioner guilty of contributory infringement in selling headed fittings or nipples for lubrication such as are described in the respondent's patent and which are usable, and intended to be used, in connection with the grease gun and coupler of the patent.

Mr. Leonard L. Kalish, with whom *Messrs. Delos G. Haynes* and *Lloyd R. Koenig* were on the brief, for petitioner.

Mr. Lynn A. Williams for respondent.

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MR. JUSTICE ROBERTS delivered the opinion of the Court.

The District Court [1] and the Circuit Court of Appeals [2] have held the petitioner guilty of contributory infringement of the Butler Patent No. 1,593,791. We granted certiorari because of alleged conflict with our decision in *Rogers* v. *Alemite Corporation,* reported with *Bassick Manufacturing Co.* v. *Hollingshead Co.,* 298 U. S. 415. Like that in the *Rogers* case, the patent in suit has to do with apparatus for lubricating bearings, especially those of automobiles, by the use of a nipple or fitting connected with the bearing, a gun consisting of a compressor or pump for propelling the lubricant under high pressure, a hose or conduit to connect the pump with the fitting, and a means of coupling the conduit to the fitting to make a tight joint during the operation of greasing. Both respondent and petitioner market apparatus for pressure lubrication, including fittings and guns. The charge is that the petitioner sells fittings such as are described in the respondent's patent which are usable, and intended to be used, in connection with the gun and coupler of the patent.

What was said in our earlier decision in respect of the prior art need not be repeated. Butler's alleged invention is in the same field and deals with similar apparatus as did Gullborg's patent, considered in the *Rogers* case. As there shown, it was old practice in the lubrication of bearings to use in combination a fitting connected with the bearing through which oil or grease was to be propelled into the bearing, and a gun, which was joined to the fitting by a coupler. In the greasing operation the coupler is fastened to the head of the fitting and the pump is operated to drive the lubricant through the fitting to the bearing. Not only was this combination old but the elements long used in the art varied in design

[1] 15 F. Supp. 571; 16 F. Supp. 778.

[2] 91 F. (2d) 757.

and dimension. Fittings were of different sizes and shapes and had diverse arrangements for their closure when not in actual use for the injection of lubricant. Guns were of many sizes and types. Various forms of coupler had been used for sealing the connection between the pump hose and the fitting. In the *Rogers* case it appeared that fittings with lugs or pins to be engaged by the coupler were old but that Gullborg had obtained a patent for a new form of pin fitting the novel feature of which was means of automatic closure and opening for admittance of the grease in connection with a pin which passed through the bore of the fitting. This was not the patent there in suit. Gullborg also obtained a patent in which the novel feature of certain claims was a bayonet-slotted coupler so designed as to coöperate with a pin fitting (including one of the type covered by his other patent), to permit the building up of very high pressure and, by its operation upon disengagement, to obviate exudation of grease about the head of the fitting. In other claims Gullborg claimed a combination of a pin fitting, of the type covered by his fitting patent, a pump, a discharge conduit secured to the pump, and a hollow coupling member of any type (whether old and unpatented or of the improved construction disclosed in the patent) for receiving the closed end of the fitting. In the *Rogers* case the owner of the patent asserted the sale of any grease gun for use with the patented pin fitting of Gullborg, or the sale of any pin fitting, whether of the Gullborg type or of an old type, susceptible of use with the improved Gullborg coupler, constituted contributory infringement of the patent. We held that as the combination of pump, connecting conduit, coupler, and fitting was old, Gullborg could not, by inventing a new and improved type of coupler or fitting claim either of these in combination with the old forms of the other elements so as to exclude the public from the use and sale of the old

forms of fittings or grease guns even though these might be used respectively with Gullborg's improved coupler or his improved pin fittings, because, in the combinations claimed, an old-type pin fitting, or an old-type coupler had no novel function over those of the prior art. We said that if Gullborg had invented anything he had invented an improved pin fitting and an improved coupler and that to allow him to claim either in combination with old elements which performed no new function, would be to permit him to extend the monopoly of his invention to those old and well known devices.

With this background we turn to the patent in suit. Like that of Gullborg, the claim is for a combination. It is as follows:

"2. The combination with a headed nipple for receiving lubricant, of a lubricant compressor having a coupling member for connecting said compressor and nipple comprising a cylinder, a piston movable within the cylinder, and having an aperture for the discharge of lubricant thereof, an apertured sealing seat carried by said piston for engagement with the end of the nipple, connecting the piston aperture with a passage through the nipple, radially movable locking elements carried by the cylinder coacting with the nipple and actuated by said piston for compressively clutching the elements upon the nipple whereby the pressure of the lubricant on said piston will move the piston to forcibly compress said elements while the lubricant is passing through said connecting parts."

In its petition for certiorari, and in argument upon the merits, the petitioner insisted that the respondent's commercial form of coupler was not that of the Butler patent; that the Circuit Court of Appeals for the Eighth Circuit had so held,[3] and that the courts below erred in not reaching a similar conclusion. In view of the grounds

[3] *Stewart-Warner Corp.* v. *Jiffy Lubricator Co.*, 81 F. (2d) 786.

of our decision we find it unnecessary to pass upon this question.

The petitioner's principal contention is that our decision in the *Rogers* case is controlling.[4] We so hold. As has been said, the combination of elements disclosed is old in the art. As the Circuit Court of Appeals held, a headed nipple or fitting connected with the bearing, and to be coupled to the conduit from the grease gun, is old and unpatentable. A compressor or pump for propelling lubricant is old and unpatentable as such. The invention, if any, which Butler made was an improvement in what he styles in his specifications the "chuck" and in his claim a "coupling member." It is not denied that multi-jawed chucks had been used in industry and as couplers in lubricating apparatus. Butler may have devised a patentable improvement in such a chuck in the respect that the multiple jaws in his device are closed over the nipple by the pressure of the grease, but we think he did no more than this. As we said of Gullborg in the *Rogers* case, having hit upon this improvement he did not patent it as such but attempted to claim it in combination with other old elements which performed no new function in his claimed combination. The patent is therefore void as claiming more than the applicant invented. The mere aggregation of a number of old parts or elements which, in the aggregation, perform or produce no new or different function or operation than that theretofore performed or produced by them, is not patentable invention.[5] And the improvement of one part of an old combination gives no right to claim that improvement in combination with other old

[4] The District Court for Western Pennsylvania has so held: *Stewart-Warner Corp.* v. *Rogers,* 15 F. Supp. 410; and see *Jacques* v. *Universal Lubricating Systems,* 22 F. Supp. 458.

[5] *Pickering* v. *McCullough,* 104 U. S. 310; *Burt* v. *Evory,* 133 U. S. 349; *Brinkerhoff* v. *Aloe,* 146 U. S. 515; *Office Specialty Mfg. Co.* v. *Fenton Metallic Mfg. Co.,* 174 U. S. 492.

parts which perform no new function in the combination.[6] Though the respondent so concedes, it urges that, in the combination of the Butler patent, the headed nipple performs a new and different function from that which it has heretofore performed, in other combinations, in that, when the coupler is withdrawn from the nipple, at the end of the greasing operation, the rounded head of the nipple "cocks" the jaws of the coupler for the next operation. The suggestion seems to be an afterthought. No such function of the nipple is hinted at in the specifications of the patent. If this were so vital an element in the functioning of the apparatus it is strange that all mention of it was omitted.[7] Moreover, the argument is unsound since the old art includes instances where the head of a nipple or fitting performs a similar function when the

[6] *Heald* v. *Rice*, 104 U. S. 737, 754; *Underwood* v. *Gerber*, 149 U. S. 224, 227, 229; *Deering* v. *Winona Harvester Works*, 155 U. S. 286, 302; *Perry* v. *Co-Operative Foundry Co.*, 12 Fed. 436, 438; *Yale Lock Mfg. Co.* v. *Berkshire Nat. Bank*, 17 Fed. 531, 532, 535; *Troy Laundry Machinery Co.* v. *Bunnell*, 27 Fed. 810, 813; *Gates Iron-Works* v. *Fraser*, 42 Fed. 49, affirmed 153 U. S. 332; *Abbott Machine Co.* v. *Bonn*, 51 Fed. 223, 226; *In re McNeill*, 20 App. D. C. 294; *In re Ratican*, 36 App. D. C. 95; *Kursheedt Mfg. Co.* v. *Naday*, 103 Fed. 948; *Langan* v. *Warren Axe & Tool Co.*, 184 Fed. 720, 721; *In re Bliss*, 39 App. D. C. 453; *Robinson* v. *Tubular Woven Fabric Co.*, 248 Fed. 526, 542; *Troy Wagon Works Co.* v. *Ohio Trailer Co.*, 274 Fed. 612, 621; *General Electric Co.* v. *Ohio Brass Co.*, 277 Fed. 917, 924; *Radio Corporation* v. *Lord*, 28 F. (2d) 257, 260; *Schiller* v. *Robertson*, 28 F. (2d) 301, 305; *Fruehauf Trailer Co.* v. *Highway Trailer Co.*, 54 F. (2d) 691, 709; *In re Germantown Trust Co.*, 57 F. (2d) 365, 366; *McGrath Holding Corp.* v. *Anzell*, 58 F. (2d) 205; *Kodel Electric Co.* v. *Warren Clock Co.*, 62 F. (2d) 692, 695; *Alemite Corp.* v. *Lubrair Corp.*, 62 F. (2d) 898, 900; *In re Reed*, 76 F. (2d) 907, 909.

[7] *Union Edge Setter Co.* v. *Keith*, 139 U. S. 530, 539; *Ball & Socket Fastener Co.* v. *Kraetzer*, 150 U. S. 111, 116; *MacColl* v. *Knowles Loom Works*, 95 Fed. 982; *Kursheedt Mfg. Co.* v. *Naday*, 103 Fed. 948, 950.

chuck is disengaged from it. The same argument was unavailing in the *Rogers* case. It was there contended that the pin fitting of the Gullborg patent performed a new function in causing the beneficial operation of the coupler at the moment of disengagement. We commented upon the matter thus: "The design of the bayonet slots is such that, in uncoupling, the coupling member of the gun will at first be moved slightly forward on the pin fitting thus backing up the perforated washer in the bore of the coupler." But there, as in the present case, it was the peculiar and improved mechanism of the coupler which brought about the result and not the form of the fitting. We suppose that a headed nipple has always been so headed in order that the jaws of the chuck may slip over the head in the coupling and uncoupling operation. The weakness of the respondent's position is well illustrated by what developed at argument. When interrogated as to how in the claimed combination the function of the nipple could be thought novel in any different sense than the function of the pump, counsel replied that the pump performed a novel function because the pressure it generated forced forward the piston in the coupler and caused the movable jaws to engage the fitting. If this argument is sound, the respondent may convict every one who sells a grease pump of contributory infringement. The answer is the same as in the case of the headed nipple. The function of a pump has always been to force a fluid or a grease through a conduit. The fact that this function of the pump is utilized in Butler's improved form of coupler not only to convey the lubricant to the bearing but to operate the jaws of the chuck does not alter the function of the pump. The invention, if any, lies in the improvement in the coupling device alone.

The courts below and the respondent rely upon *Leeds & Catlin Co.* v. *Victor Talking Machine Co.*, 213 U. S.

301, 325. In the *Rogers* case we held that authority not controlling. Berliner disclosed an entirely novel principle; he utilized the flat disc having a smooth bottomed groove with spiral waves in its sides not only to agitate the needle connected to the diaphragm, but, in combination with a swinging arm, to propel the needle lengthwise the groove. In his combination, the disc not only performed a new function but performed it in combination with another new element,—the swinging arm which carried the needle.

We conclude that Butler's effort, by the use of a combination claim, to extend the monopoly of his invention of an improved form of chuck or coupler to old parts or elements having no new function when operated in connection with the coupler renders the claim void.

Decree reversed.

MR. CHIEF JUSTICE HUGHES and MR. JUSTICE CARDOZO took no part in the consideration or decision of this case.

NEW NEGRO ALLIANCE *v.* SANITARY GROCERY CO.*

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

No. 511. Argued March 2, 3, 1938.—Decided March 28, 1938.

An association of Negroes, organized for the mutual improvement of its members and the promotion of civic, educational, benevolent, and charitable enterprises, requested a Grocery Company to adopt a policy of employing Negro clerks, in the course of personnel changes, in certain stores of the company patronized largely by colored people but in which no colored clerks were employed. The request was ignored; whereupon the organization caused a picket,

*The opinion herein is reported as amended by Order of April 25, 1938, see 304 U. S.

bearing a placard reading "Do Your Part! Buy Where You Can Work! No Negroes Employed Here!" to patrol in front of one of the stores, on one day, and caused, or threatened to cause, a similar patrol of two other stores. *Held:*

1. That, within the meaning of the Act of Mar. 23, 1932, § 13; 29 U. S. C., § 113—the "Norris-LaGuardia Act"—there was a "labor dispute" in which the Negro organization and its officers were "persons interested." P. 559.

The fact that the dispute was "racial," in that it grew from racial discrimination, does not remove the case from the scope of the Act.

2. Under §§ 4 and 7 of the Act, the District Court was without jurisdiction to issue an injunction in the premises, against the Negro organization and its officers at the suit of the Grocery Company. P. 561.

92 F. 2d 510, reversed.

CERTIORARI, 302 U. S. 679, to review the affirmance of a decree enjoining the present petitioner from picketing, boycotting, etc. the stores of the respondent. The case was decided below on bill and answer.

Messrs. Belford V. Lawson, Jr. and *Thurman L. Dodson,* with whom *Mr. Theodore M. Berry* was on the brief, for petitioners.

Mr. A. Coulter Wells, with whom *Mr. William E. Carey, Jr.* was on the brief, for respondent.

The court below properly held that the matter in controversy herein was not comprehended by the Labor Disputes Act of March 23, 1932, *Green* v. *Samuelson,* 168 Md. 421; *Beck-Hazard Shoe Corp.* v. *Johnson,* 274 N. Y. Supp. 946.

The relationship of employer and employee must exist, or a dispute must grow out of that relationship, before the Labor Disputes Act has application. *United Electric Coal Companies* v. *Rice,* 80 F. 2d 1; *Keith Theatre* v. *Vachon,* 187 A. 692.

Petitioners, having admitted the act of picketing the stores of the respondent, were properly enjoined by the

trial court. *Jonas Glass Co.* v. *Glass Bottle Blowers' Assn.*, 72 N. J. Eq. 653; *Pierce* v. *Stablemen's Union*, 165 Cal. 70; *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184; *Elkind & Sons* v. *Retail Clerks I. Protective Assn.*, 169 A. 494; *Truax* v. *Corrigan*, 257 U. S. 312; *Beck* v. *Teamsters' Protective Union*, 118 Mich. 520.

The proposition is well established that a combination looking towards the domination or ruination of the business of another by fraud, violence or coercion is fundamentally unlawful. *Waitresses Union* v. *Benish Restaurant Co.*, 6 F. 2d 568; *Kinloch Telephone Co.* v. *Local Union No. 2*, 275 F. 241; *Quinlivan* v. *Dail-Overland Co.*, 274 F. 56.

Mr. Justice Roberts delivered the opinion of the Court.

The matter in controversy is whether the case made by the pleadings involves or grows out of a labor dispute within the meaning of § 13 of the Norris-La Guardia Act.[1]

The respondent, by bill filed in the District Court of the District of Columbia, sought an injunction restraining the petitioners and their agents from picketing its stores and engaging in other activities injurious to its business. The petitioners answered, the cause was heard upon bill and answer, and an injunction was awarded. The United States Court of Appeals for the District of Columbia affirmed the decree.[2] The importance of the question presented and asserted conflict with the decisions of this and other federal courts moved us to grant certiorari.

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[1] Act of March 23, 1932, c. 90, 47 Stat. 70, 73, U. S. C. Tit. 29. § 113.

[2] 67 App. D. C. 359; 92 F. (2d) 510.

As the case was heard upon the bill and a verified answer the facts upon which decision must rest are those set forth in the bill and admitted or not denied by the answer and those affirmatively set up in the answer.

The following facts alleged in the bill are admitted by the answer. Respondent, a Delaware corporation, operates 255 retail grocery, meat, and vegetable stores, a warehouse and a bakery in the District of Columbia and employs both white and colored persons. April 3, 1936, it opened a new store at 1936 Eleventh Street, N. W., installing personnel having an acquaintance with the trade in the vicinity. Petitioner, The New Negro Alliance, is a corporation composed of colored persons, organized for the mutual improvement of its members and the promotion of civic, educational, benevolent, and charitable enterprises. The individual petitioners are officers of the corporation. The relation of employer and employes does not exist between the respondent and the petitioners or any of them. The petitioners are not engaged in any business competitive with that of the respondent, and the officers, members, or representatives of the Alliance are not engaged in the same business or occupation as the respondent or its employes.

As to other matters of fact, the state of the pleadings may be briefly summarized. The bill asserts: the petitioners have made arbitrary and summary demands upon the respondent that it engage and employ colored persons in managerial and sales positions in the new store and in various other stores; it is essential to the conduct of the business that respondent employ experienced persons in its stores and compliance with the arbitrary demands of defendants would involve the discharge of white employes and their replacement with colored; it is imperative that respondent be free in the selection and control of persons employed by it without interference by the petitioners

or others; petitioners have written respondent letters threatening boycott and ruination of its business and notices that by means of announcements, meetings and advertising the petitioners will circulate statements that respondent is unfair to colored people and to the colored race and, contrary to fact, that respondent does not employ colored persons; respondent has not acceded to these demands. The answer admits the respondent has not acceded to the petitioners' demands, but denies the other allegations and states that the Alliance and its agents have requested only that respondent, in the regular course of personnel changes in its retail stores, give employment to Negroes as clerks, particularly in stores patronized largely by colored people; that the petitioners have not requested the discharge of white employes nor sought action which would involve their discharge. It denies the making of the threats described and alleges the only representations threatened by the Alliance or its authorized agents are true representations that named stores of the respondent do not employ Negroes as sales persons and that the petitioners have threatened no more than the use of lawful and peaceable persuasion of members of the community to withhold patronage from particular stores after the respondent's refusal to acknowledge petitioner's requests that it adopt a policy of employing Negro clerks in such stores in the regular course of personnel changes.

The bill further alleges that the petitioners and their authorized representatives "have unlawfully conspired with each other to picket, patrol, boycott, and ruin the Plaintiff's business in said stores, and particularly in the store located at 1936 Eleventh Street, Northwest" and, "in an effort to fulfill their threats of coercion and intimidation, actually have caused the said store to be picketed or patrolled during hours of business of the plaintiff, by their members, representatives, officers, agents, servants,

and employees"; the pickets carrying large placards charging respondent with being unfair to Negroes and reading: "Do your Part! Buy Where You Can Work! No Negroes Employed Here!" for the purpose of intimidating and coercing prospective customers from entering the respondent's store until the respondent accedes to the petitioners' demands. "Said defendants, their pickets or patrols or some of them have jostled and collided with persons in front of the said store and have physically hindered, obstructed, interfered with, delayed, molested, and harassed persons desiring to enter the place of business of the Plaintiff Corporation; said pickets, or some of them, have attempted to dissuade and prevent persons from entering plaintiff's place of business; said defendants, their pickets or patrols are disorderly while picketing or patrolling, and attract crowds to gather in front of said store, and encourage the crowds or members thereof to become disorderly, and to harass, and otherwise annoy, interfere with and attempt to dissuade, and to prevent persons from entering the place of business of the plaintiff, the disorder thereby preventing the proper conduct of and operation of the plaintiff's business. Defendants have threatened to use similar tactics of picketing and patrolling as aforesaid in front of the several other stores of the plaintiff." Four photographs alleged to portray the picketing are annexed as exhibits to the bill. One of them shows a man carrying a sandwich placard on the sidewalk and no one else within the range of the camera. In another, two children are seen beside the picket; in another, two adults; in the fourth, one adult entering respondent's store at a distance from the picket and without apparent interference. The answer denies all these allegations save that it admits the petitioners did, during April 4, 1936, and at no other time, cause the store at 1936 Eleventh Street, N. W., to be continuously picketed by a single person carrying a placard exhibiting

the words quoted by the bill; and the petitioners, prior to the acts complained of in the bill, picketed, or expressed the intention of picketing, two other stores. It admits that the photographs correctly represent the picketing of April 4, 1936. The answer avers the information carried on the placards was true, was not intended to, and did not in fact, intimidate customers; there was no physical obstruction, interference or harassment of anyone desiring to enter the store; there was no disorderly conduct, and the picketing did not cause or encourage crowds to gather in front of the store.

The bill states: "As evidence of the widespread and concerted action planned by the Defendants herein, they have caused to be placed or have permitted to appear in the Washington Tribune . . . the following statements . . ." There follow quotations from articles appearing in the newspaper purporting to report meetings of the Alliance and speeches made thereat. There is no statement that the facts reported in the articles are true. The answer denies that any of the petitioners is connected with or exercises any control over the Washington Tribune or caused or permitted that newspaper to publish any article or news item whatsoever or in any way acted in concert with the newspaper in those publications.

The bill asserts that petitioners and their representatives, officers, and agents, unlawfully conspired to picket, boycott, and ruin the respondent's business in its stores, particularly the store at 1936 Eleventh Street. This is denied by the answer.

The bill says that the described conduct of petitioners will continue until respondent complies with petitioners' demands; is and will continue to be dangerous to the life and health of persons on the highway, to property thereon, and to respondent's employes, its property, and business and will cause respondent irreparable injury; the petitioners' acts are unlawful, constitute a conspiracy in

restraint of trade, and, if continued, will ruin the respondent's business. The answer denies these allegations so far as they constitute assertions of fact.

The case, then, as it stood for judgment, was this: The petitioners requested the respondent to adopt a policy of employing Negro clerks in certain of its stores in the course of personnel changes; the respondent ignored the request and the petitioners caused one person to patrol in front of one of the respondent's stores on one day carrying a placard which said: "Do Your Part! Buy Where You Can Work! No Negroes Employed Here!" and caused or threatened a similar patrol of two other stores of respondent. The information borne by the placard was true. The patrolling did not coerce or intimidate respondent's customers; did not physically obstruct, interfere with, or harass persons desiring to enter the store, the picket acted in an orderly manner, and his conduct did not cause crowds to gather in front of the store.

The trial judge was of the view that the laws relating to labor disputes had no application to the case. He entered a decree enjoining the petitioners and their agents and employes from picketing or patrolling any of the respondent's stores, boycotting or urging others to boycott respondent; restraining them, whether by inducements, threats, intimidation or actual or threatened physical force from hindering any person entering respondent's places of business, from destroying or damaging or threatening to destroy or damage respondent's property and from aiding or abetting others in doing any of the prohibited things. The Court of Appeals thought that the dispute was not a labor dispute within the Norris-LaGuardia Act because it did not involve terms and conditions of employment such as wages, hours, unionization or betterment of working conditions, and that the trial court, therefore, had jurisdiction to issue the injunction. We think the conclusion that the dispute was not a labor dispute

within the meaning of the Act, because it did not involve terms and conditions of employment in the sense of wages, hours, unionization or betterment of working conditions is erroneous.

Subsection (a) of § 13 provides: "A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; . . . or when the case involves any conflicting or competing interests in a 'labor dispute' (as hereinafter defined) of 'persons participating or interested' therein (as hereinafter defined)." Subsection (b) characterizes a person or association as participating or interested in a labor dispute "if relief is sought against him or it and if he or it . . . has a direct or indirect interest therein, . . ." Subsection (c) defines the term "labor dispute" as including "any controversy concerning terms or conditions of employment, . . . regardless of whether or not the disputants stand in the proximate relation of employer and employee." These definitions plainly embrace the controversy which gave rise to the instant suit and classify it as one arising out of a dispute defined as a labor dispute. They leave no doubt that The New Negro Alliance and the individual petitioners are, in contemplation of the Act, persons interested in the dispute.[3]

In quoting the clauses of § 13 we have omitted those that deal with disputes between employers and employes and disputes between associations of persons engaged in a particular trade or craft, and employers in the same industry. It is to be noted, however, that the inclusion in the definitions of such disputes, and the persons interested in them, serves to emphasize the fact that the quoted portions were intended to embrace contro-

[3] Compare *Senn* v. *Tile Layers Union*, 301 U. S. 468; *Lauf* v. *Shinner & Co.*, 302 U. S. 323.

versies other than those between employers and employes; between labor unions seeking to represent employes and employers; and between persons seeking employment and employers.

The Act does not concern itself with the background or the motives of the dispute. The desire for fair and equitable conditions of employment on the part of persons of any race, color, or persuasion, and the removal of discriminations against them by reason of their race or religious beliefs is quite as important to those concerned as fairness and equity in terms and conditions of employment can be to trade or craft unions or any form of labor organization or association. Race discrimination by an employer may reasonably be deemed more unfair and less excusable than discrimination against workers on the ground of union affiliation. There is no justification in the apparent purposes or the express terms of the Act for limiting its definition of labor disputes and cases arising therefrom by excluding those which arise with respect to discrimination in terms and conditions of employment based upon differences of race or color.

The purpose and policy of the Act respecting the jurisdiction of the federal courts is set forth in §§ 4 and 7. The former deprives those courts of jurisdiction to issue an injunction against, *inter alia,* giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence; against assembling peaceably to act or to organize to act in promotion of interests in a labor dispute; against advising or notifying any person of an intention to do any of the acts specified; against agreeing with other persons to do any of the acts specified.[4] Section 7 deprives the

[4] U. S. C. Tit. 29, § 104.

courts of jurisdiction to issue an injunction in any case involving or growing out of a labor dispute, except after hearing sworn testimony in open court in support of the allegations of the complaint, and upon findings of fact to the effect (a) that unlawful acts have been threatened and will be committed unless restrained, or have been committed and will be continued, unless restrained, and then only against the person or persons, association or organization making the threat or permitting the unlawful act or authorizing or ratifying it; (b) that substantial and irreparable injury to complainant's property will follow; (c) that, as to each item of relief granted, greater injury will be inflicted upon the complainant by denial of the relief than will be inflicted on the defendant by granting it; (d) that complainant has no adequate remedy at law, and (e) that the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.[5]

The legislative history of the Act demonstrates that it was the purpose of the Congress further to extend the prohibitions of the Clayton Act[6] respecting the exercise of jurisdiction by federal courts and to obviate the results of the judicial construction of that Act.[7] It was intended that peaceful and orderly dissemination of information by those defined as persons interested in a labor dispute concerning "terms and conditions of employment" in an industry or a plant or a place of business should be lawful; that, short of fraud, breach of the

[5] U. S. C. Tit. 29, § 107.

[6] Act of Oct. 15, 1914, c. 323, § 20, 38 Stat. 730, 738, U. S. C. Tit. 29, § 52.

[7] *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443; *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184. Compare House Report No. 669, 72nd Cong., 1st Sess., and Senate Report 1060, 71st Cong., 2nd Sess., and Senate Report 163, 72nd Cong., 1st Sess.

peace, violence, or conduct otherwise unlawful, those having a direct or indirect interest in such terms and conditions of employment should be at liberty to advertise and disseminate facts and information with respect to terms and conditions of employment, and peacefully to persuade others to concur in their views respecting an employer's practices.[8] The District Court erred in not complying with the provisions of the Act.

The decree must be reversed and the cause remanded to the District Court for further proceedings in conformity with this opinion.

Reversed.

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

MR. JUSTICE McREYNOLDS, dissenting.

MR. JUSTICE BUTLER and I cannot accept the view that a "labor dispute" emerges whenever an employer fails to respond to a communication from A, B and C—irrespective of their race, character, reputation, fitness, previous or present employment—suggesting displeasure because of his choice of employes and their expectation that in the future he will not fail to select men of their complexion.

It seems unbelievable that, in all such circumstances, Congress intended to inhibit courts from extending protection long guaranteed by law and thus, in effect, encourage mobbish interference with the individual's liberty of action. Under the tortured meaning now attributed to the words "labor dispute," no employer—merchant, manufacturer, builder, cobbler, housekeeper or what not—who

[8] Compare *Senn* v. *Tile Layers Union,* 301 U. S. 468; *Levering & Garrigues Co.* v. *Morrin,* 71 F. (2d) 284; *Cinderella Theatre Co.* v. *Sign Writers' Local,* 6 F. Supp. 164; *Miller Furniture Co.* v. *Furniture Workers Union,* 8 F. Supp. 209.

prefers helpers of one color or class can find adequate safeguard against intolerable violations of his freedom if members of some other class, religion, race or color demand that he give them precedence.*

Design thus to promote strife, encourage trespass and stimulate intimidation, ought not to be admitted where, as here, not plainly avowed. The ultimate result of the view now approved to the very people whom present petitioners claim to represent, it may be, is prefigured by the grievous plight of minorities in lands where the law has become a mere political instrument.

UNITED STATES *v.* HENDLER, TRANSFEREE.

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

No. 563. Argued March 9, 1938.—Decided March 28, 1938.

A gain resulting to a corporation from the assumption and payment of its bonded indebtedness by another corporation, with which it merged, *held* not exempt from income tax under Revenue Act of 1928, § 112. P. 567.

91 F. 2d 680, reversed.

CERTIORARI, 302 U. S. 680, to review the affirmance of a judgment in favor of the taxpayer, 17 F. Supp. 558, in a suit to recover an alleged overpayment of income taxes.

Mr. J. Louis Monarch, with whom *Acting Solicitor General Bell, Assistant Attorney General Morris* and *Mr. Arnold Raum* were on the brief, for the United States.

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* See—definition of Dispute, Webster's New International Dictionary; 29 U. S. C., § 113 (c); Senate Report No. 163, 72nd Congress, 1st Session, pp. 7, 11, 25; House Report No. 669, 72nd Congress, 1st Session, pp. 3, 7, 8, 10, 11.

Messrs. William R. Semans and *Randolph Barton, Jr.* for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

The Revenue Act of 1928 [1] imposed a tax upon the annual "net income" of corporations. It defined "net income" as "gross income . . . less the deductions allowed . . . ," and "gross income" as including "gains, profits and income derived from . . . trades . . . or sales, or dealings in property, . . . or gains or profits and income . . . from any source whatever." [2]

Section 112 of the Act [3] exempts certain gains which are realized from a "reorganization" similar to, or in the nature of, a corporate merger or consolidation. Under this section, such gains are not taxed if one corporation, pursuant to a "plan of reorganization" exchanges its property "solely for *stock* or *securities,* in another corporation a party to the reorganization." But, when a corporation not only receives "stock or securities" in exchange for its property, but also receives "other property or money" in carrying out a "plan of reorganization,"

"(1) If the corporation receiving such other property or money *distributes* it in pursuance of the plan of reorganization, no gain to the corporation shall be recognized from the exchange, but

"(2) If the corporation receiving such other property or money *does not distribute* it in pursuance of the plan of reorganization, the gain, if any, to the corporation shall be recognized [taxed] . . ."

In this case, there was a merger or "reorganization" of the Borden Company and the Hendler Creamery Company, Inc., resulting in gains of more than six million dollars to the Hendler Company, Inc., a corporation of

[1] Revenue Act of 1928, c. 852, 45 Stat. 791, § 13.

[2] *Id.,* §§ 21–22.

[3] *Id.,* § 112.

which respondent is transferee. The Court of Appeals, believing there was an exemption under § 112, affirmed [4] the judgment of the District Court [5] holding all Hendler gains non-taxable.

This controversy between the government and respondent involves the assumption and payment—pursuant to the plan of reorganization—by the Borden Company of $534,297.40 bonded indebtedness of the Hendler Creamery Co., Inc. We are unable to agree with the conclusion reached by the courts below that the gain to the Hendler Company, realized by the Borden Company's payment, was exempt from taxation under § 112.

It was contended below and it is urged here that since the Hendler Company did not actually receive the money with which the Borden Company discharged the former's indebtedness, the Hendler Company's gain of $534,297.40 is not taxable. The transaction, however, under which the Borden Company assumed and paid the debt and obligation of the Hendler Company is to be regarded in substance as though the $534,297.40 had been paid directly to the Hendler Company. The Hendler Company was the beneficiary of the discharge of its indebtedness. Its gain was as real and substantial as if the money had been paid it and then paid over by it to its creditors. The discharge of liability by the payment of the Hendler Company's indebtedness constituted income to the Hendler Company and is to be treated as such.[6]

Section 112 provides no exemption for gains—resulting from corporate "reorganization"—neither received as "stocks or securities," nor received as "money or other property" and distributed to stockholders under the plan of reorganization. In *Minnesota Tea Co.* v. *Helvering,*

[4] 91 F. (2d) 680.

[5] 17 F. Supp. 558.

[6] *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716, 729 *Douglas* v. *Willcuts,* 296 U. S. 1, 8, 9.

302 U. S. 609, it was said that this exemption "contemplates a distribution to stockholders, and not payment to creditors." The very statute upon which the taxpayer relies provides that "If the corporation receiving such other property or money does not distribute it in pursuance of the plan of reorganization, the gain, if any, to the corporation shall be recognized [taxed] . . ."

Since this gain or income of $534,297.40 of the Hendler Company was neither received as "stock or securities" nor distributed to its stockholders "in pursuance of the plan of reorganization" it was not exempt and is taxable gain as defined in the 1928 Act. This $534,297.40 gain to the taxpayer does not fall within the exemptions of § 112, and the judgment of the court below is

Reversed.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration or decision of this case.

BATES MANUFACTURING CO. *v.* UNITED STATES.

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

No. 647. Argued March 11, 1938.—Decided March 28, 1938.

Where, in a suit against the United States in the District Court under the Tucker Act, for recovery of taxes alleged to have been illegally collected, the verified petition of plaintiff was filed within two years after the disallowance of the claim for refund; and within four days after the filing of the petition, though not within two years after the disallowance of the claim for refund, copies of the petition were served on the United States Attorney and mailed to the Attorney General,—*held* the suit was "begun" in time under Revenue Act of 1926, § 1113. P. 572.

93 F. 2d 721, reversed.

CERTIORARI, *post*, p. 628, to review a judgment affirming the dismissal, 19 F. Supp. 526, of a suit to recover an alleged overpayment of taxes.

Mr. Charles B. Rugg, with whom *Messrs. H. Brian Holland* and *Warren F. Farr* were on the brief, for petitioner.

Mr. Norman D. Keller, with whom *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *F. E. Youngman* were on the brief, for the United States.

By leave of Court, *Messrs. Theodore B. Benson* and *John Jennings, Jr.* filed a brief on behalf of Pinnacle Mills, as *amicus curiae,* in support of petitioner.

MR. JUSTICE BLACK delivered the opinion of the Court.

The Revenue Act of 1926 [1] provides that "No suit . . . shall be maintained *in any court* for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, . . . unless such suit . . . is begun within two years after the disallowance of . . . such claim . . ."

The Tucker Act of March 3, 1887 [2] as amended, gives concurrent jurisdiction to the District Courts and the Court of Claims in suits against the United States including those for recovery of erroneous or illegally collected taxes.[3] Section 5 of the Tucker Act requires a plaintiff bringing suit against the government in the District Court to "file a petition, duly verified with the clerk of the respective court having jurisdiction of the case." Section 6 requires "that the plaintiff . . . cause

[1] c. 27, 44 Stat. 9, § 1113.

[2] c. 359, 24 Stat. 505, 506.

[3] U. S. C. Title 28, § 41 (20), (Judicial Code § 24 (20) as amended).

a copy of his petition . . . to be served upon the district attorney . . ., and . . . mail a copy . . . to the Attorney General . . ., and cause to be filed with the clerk of the court . . . affidavit of such service and . . . mailing . . ."

March 22, 1927, the petitioner's claim for tax refund was disallowed. March 21, 1929, *within two years after the disallowance,* a duly verified petition was filed in the District Court claiming the refund. March 25, 1929, two years and four days after the disallowance, the petition was served on the United States Attorney and mailed to the Attorney General.

The District Court held suit was not "begun" by filing the verified petition and dismissed the cause of action.[4] The Court of Appeals affirmed.[5]

It is conceded that suit in the Court of Claims is "begun" when the petition is filed. Yet, it is insisted that suit is not "begun" in the District Court when the petition is filed although the Court of Claims and the District Courts are given concurrent jurisdiction by the Tucker Act. Consideration of the history and language of the statute leads us to a different conclusion.

Section 10 of the Act of March 3, 1863,[6] provides "That every claim against the United States, cognizable by the Court of Claims, shall be forever barred *unless the petition setting forth a statement of the claim be filed . . . within six years after the claim first accrues . . .*"

When the Tucker Act in 1887 greatly expanded the jurisdiction of the Court of Claims and gave District Courts concurrent jurisdiction in *all* cases involving cer-

[4] 19 F. Supp. 526.

[5] 93 F. (2d) 721.

[6] 12 Stat. 765, 767.

tain amounts, its limitation in *both the Court of Claims and the District Courts* provided:

". . . no suit against the Government of the United States, shall be allowed under this act unless the same *shall have been brought within six years after the right accrued . . .*"

The substantial rights of claimants are to be governed alike whether suit is brought in the Court of Claims or the District Court. The author of the Tucker Act in declaring the statute of limitations applicable alike "to any or all" of the cases arising under the Act drew no distinction between suits brought in the District Court and in the Court of Claims.[7]

The purpose of giving the District Courts concurrent jurisdiction with the Court of Claims was to provide additional opportunity for the consideration and determination of claims that had "long pressed upon the consideration of Congress" [8] and to permit suit to "be brought in the District where the parties reside." [9] After discussing the benefits of previous legislation creating and extending the jurisdiction of the Court of Claims, the Committee on the Judiciary reported to the House:

"The history of this legislation and its results have been given to show how much of benefit has been done in the satisfactory decisions of claims against the Government and in relief of the Congress. But it has long been felt that the benefits could be made much greater by extending the jurisdiction of the Court. . . . It is needless to say more than has already been intimated as to the general policy of this legislation. The large mass of

[7] Congressional Record and Appendix, 49th Cong., 2nd Sess., March 3, p. 2679.

[8] House Report No. 1077, 49th Cong., 1st Sess., by Mr. Tucker on the Tucker Bill.

[9] Congressional Record and Appendix, 49th Cong., 2nd Sess., March 3, p. 2679.

business now before Congress growing out of private claims consumes its time year after year in committee work, rendered useless by the lack of time to consider and pass upon them. Just claims are painfully deferred without interest, and the credit of the Government, so strictly upheld upon its bonded debt, is justly censured in respect to its honest private claims." [10]

In response to the needs disclosed by this report Congress passed the Tucker Act, manifestly intending to provide adequate opportunity for expeditious and orderly determination of claims against the Government. This Act not only expanded the jurisdiction of the Court of Claims, but, for the first time, gave District Courts general authority to hear and determine claims against the Government. Relief of existing claim congestion and prevention of future congestion obviously demanded an integrated jurisdictional plan by which the Court of Claims and District Courts could afford equal opportunities for expeditious and fair trials of like claims within the jurisdictional amount of the District Courts. The erection of barriers to recovery in the District Courts which did not exist in the Court of Claims would have tended to defeat the prime objectives of the Act. Uniformity and equality in substantial rights and privileges—for claimants in both forums—were essential features in the system. Distinctions between the opportunities for recovery afforded in the two forums would have tended to mar the symmetry of the plan and to impair its effective and successful operation. As to substantial rights, Congress evidently meant to give claimants an identical status in both Courts where the amount in controversy was included in the jurisdiction of both. We find no support in the background or objective of the Act for a

[10] House Rep. No. 1077, *supra*, pp. 3–4.

construction under which a claimant's rights would be preserved by filing a petition in the Court of Claims, but would be lost—without additional action—in the District Court.

As said by this Court in *United States* v. *Greathouse*, 166 U. S. 601, 606:

" . . . it was not contemplated that the limitation upon suits against the Government in the District . . . Courts of the United States should be different from that applicable to like suits in the Court of Claims."

As used in this statute the word "begun" should be given its ordinary and accustomed meaning. To begin is to start; to institute; to initiate; to commence. This suit was begun—within two years after the refund claim was disallowed—when the petition was filed in court in good faith. Notice was mailed the Attorney General and the District Attorney was promptly served—both within four days after the verified petition was filed. Under these circumstances, we do not consider what would be the effect of lack of diligence in obtaining service.[11] The judgment in the court below was not in harmony with the views here expressed and is

Reversed.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration or decision of this case.

[11] Compare, *Linn & Lane Timber Co.* v. *United States*, 236 U. S. 574, 578.

NEW YORK RAPID TRANSIT CORP. *v.* CITY OF NEW YORK.*

APPEAL FROM THE SUPREME COURT OF NEW YORK.

No. 435. Argued February 7, 1938.—Decided March 28, 1938.

1. Since carriers or other utilities with the right of eminent domain, the use of public property, special franchises or public contracts, have many points of distinction from other businesses, including relative freedom from competition, they may for purposes of taxation be classed separately. P. 578.
2. Utilities subject to supervision by the New York Department of Public Service—including those engaged in transportation of persons or property, and those furnishing gas, electricity, steam, water, communication by telegraph or telephone—were subjected by local laws of the City of New York to privilege taxes of 3% of their gross incomes. The laws were enacted for short periods under authority from the state legislature, and the proceeds were earmarked for use exclusively in relieving the unemployed in the city. Transit companies operating in the city assailed the levies under the due process and equal protection clauses of the Fourteenth Amendment, and the contract clause, of the Federal Constitution. *Held:*

   (1) It is not a valid objection that the taxpayers are defined by reference to the classification previously established by the New York Public Service Law rather than by specific reference in the taxing law itself to the character of their businesses. P. 579.

   (2) Separate classification of the utilities taxed is justifiable, upon the grounds that they enjoy a special measure of statutory protection from competition; that they are required to make financial reports to public authority which are of administrative convenience in ascertaining and collecting such taxes; and that the revenues of such utilities, furnishing indispensable services, may be subject to relatively little fluctuation, even in times of depression. P. 580.

   (3) The facts that the transit companies have a low margin of net income, and that because of contracts with the city they can not pass-on the added tax burden by increasing their charges, are fortuitous and do not render the taxes arbitrary and unreasonably

* Together with No. 436, *Brooklyn & Queens Transit Corp. v. City of New York,* also on appeal from the Supreme Court of New York.

discriminatory against them as compared with the other utilities or with business in general. P. 581.

The legislature is not required to make meticulous adjustments in an effort to avoid incidental hardships.

(4) Taxes on gross receipts, rather than on net income, are justified upon the ground of convenience in administration and because of the close relation of the volume of transactions in a business to cost of its supervision and protection by government. *Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 550, distinguished. P. 582.

(5) The fact that the tax is levied for the specific purpose of relieving conditions (unemployment) to which the utilities taxed bear no special relation, does not render it unconstitutional. P. 584.

(6) Within the meaning of the rule that classification must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, the 'object' in this case is the raising of the revenue. That an appropriation of the funds for relief is part of the same legislation is not significant; it is not constitutionally necessary that the classification for the tax be related to the appropriation of the proceeds. P. 585.

(7) The laws under consideration do not violate the due process clause of the Fourteenth Amendment. P. 587.

3. To sustain a claim of contractual tax exemption the language must be clear and express. P. 593.
4. In deciding a case under the contract clause, this Court determines for itself the existence and meaning of the contract; but, in so doing, it leans toward agreement with the courts of the State and accepts their judgment unless manifestly wrong. P. 593.
5. In a contract between the City of New York and a transit corporation, the city agreed to construct certain railroads and the company to contribute to their cost and equipment and to reconstruct and build additions to its own railroads. The city leased the railroads it agreed to construct to the company and the company agreed to operate them, in conjunction with its own as one system, for a designated fare. The gross receipts were to be pooled; deductions were to be made, in their order, first to reimburse the company for specified expenses and outlays, including taxes, and then to reimburse the city for certain interest and amortization charges; and the remainder was to be divided equally between the city and the company. The tax deduction included "all taxes . . . of every description (whether on physical property, stock or securities, corporate or other franchises, or otherwise)

assessed or which may hereafter be assessed against the Lessee in connection with . . . the operation of the . . . Railroads." At the time of making the contract, the taxing power of the city was confined to special assessments for public improvements and ad valorem taxes on real estate and on special franchises granted by the city. Later, under new power acquired from the legislature, the city levied a privilege tax of 3% of the gross receipts. *Held:*

(1) That the collection of such tax was not in violation of the contract but in accordance with its express terms. Pp. 588, 591.

(2) The contract may not be construed as limiting the taxes deductible from gross receipts to those which the city was authorized to impose when the contract was made. P. 591.

275 N. Y. 258, 454; 9 N. E. 2d 858; 11 *id.* 293, affirmed.

APPEALS from judgments of the Supreme Court of New York, entered on remittitur from the Court of Appeals. These were actions to recover from the city large sums exacted as taxes. The Special Term of the Supreme Court held the taxes void; the Appellate Division affirmed, 251 App. Div. 710; 296 N. Y. S. 1006, 1012; the Court of Appeals upheld the taxes and reversed the judgments.

Messrs. Harold L. Warner and *Paul D. Miller,* with whom *Messrs. George D. Yeomans, Andrew M. Williams,* and *Arthur A. Ballantine* were on the briefs, for appellants.

Mr. Paxton Blair, with whom *Messrs. William C. Chanler, Oscar S. Cox,* and *Sol Charles Levine* were on the briefs, for appellee.

MR. JUSTICE REED delivered the opinion of the Court.

The question for decision is the constitutional validity of Local Laws of the City of New York (Local Law No. 21 of 1934, as amended by Local Law No. 2 of 1935, and extended by Local Law No. 30 of 1935) which provide, § 2, that "for the privilege of exercising its franchise or franchises, or of holding property, or of doing business in

the City of New York" an excise tax shall be paid by every "utility" doing business in the City of New York during 1935 and the first six months of 1936.

"Utility" is defined, § 1 (e), to include "any person subject to the supervision of either division of the department of public service," and every person, whether or not subject to such supervision, engaged "in the business of furnishing or selling to other persons, gas, electricity, steam, water, refrigeration, telephony and/or telegraphy" or service in these commodities. Each utility is required to pay a tax "equal to three percentum of its gross income" received during the effective period of the Local Laws, with a minor variation not here assailed for utilities not subject to the specified supervision.[1] The Local Laws specify that all revenues from the tax "shall be deposited in a separate bank account or accounts, and shall be available and used solely and exclusively for the purpose of relieving the people of the City of New York from the hardships and suffering caused by unemployment" (§ 14). The Local Laws, admittedly passed under authority granted by the state legislature,[2] are assailed under the United States Constitution. For convenience we shall discuss the contentions of the New York Rapid Transit Corporation alone, as determination of the objections

[1] Utilities subject to the supervision of the department of public service pay three per cent. of their "gross income," as defined by § 1(c); the other utilities pay three per cent. of their "gross operating income," as defined by § 1 (d).

[2] N. Y. Laws 1934, c. 873, authorized any city of a million inhabitants to impose for purposes of unemployment relief any tax within the powers of the state legislature, including a tax on gross income or gross receipts of those doing business in the city. The act specifically provided (§ 2) that the revenues shall be deposited in a separate bank account and used solely for the relief purposes. The authority granted by this statute expired December 31, 1935, but was extended, with certain restrictions not material here, until July 1, 1936, by N. Y. Laws 1935, c. 601.

raised by it is conclusive of those advanced by the Brooklyn and Queens Transit Corporation.

The New York Rapid Transit Corporation operates rapid transit railroads in the City of New York under a contract known as Contract No. 4, dated March 19, 1913, made pursuant to the New York Rapid Transit Act, Laws 1891, c. 4, as amended, between its predecessor (New York Municipal Railway Corporation) and the City. As a common carrier engaged in the operation of rapid transit railroads, the corporation is under the supervision of the transit commission, the head of the metropolitan division of the state department of public service. Accordingly, but under protest, it paid the taxes imposed by the Local Laws set out above, for the months January, 1935, to June, 1936, inclusive. It brought this action against the City of New York to recover the amounts paid, $1,408,697, with interest, on the ground that the Local Laws are unconstitutional. The case arises on the City's motion to dismiss the complaint.

The Supreme Court of New York, Special Term, denied the motion to dismiss the complaint and found that the Local Laws denied equal protection because of gross inequality of burden in comparison with other utilities. This order was affirmed by the Appellate Division of the Supreme Court, without opinion, on a 3–2 vote (251 App. Div. 710; 296 N. Y. S. 1006). The Court of Appeals reversed (275 N. Y. 258; 9 N. E. 2d 858), upheld the Local Laws against all attacks, and ruled that the complaint did not state a cause of action. Appeal was taken to this Court under § 237 (a) of the Judicial Code, 28 U. S. C. § 344 (a).

The Corporation challenges the Local Laws as violative of the equal protection and due process clauses of the 14th Amendment and the contracts clause of Article I, § 10, of the Constitution.

I. Classification. No question is or could be made by the Corporation as to the right of a state, or a municipality with properly delegated powers, to enact laws or ordinances, based on reasonable classification of the objects of the legislation or of the persons whom it affects. "Equal protection" does not prohibit this. Although the wide discretion as to classification retained by a legislature, often results in narrow distinctions, these distinctions, if reasonably related to the object of the legislation, are sufficient to justify the classification. *German Alliance Ins. Co.* v. *Lewis,* 233 U. S. 389, 418; *Atchison, T. & S. F. R. Co.* v. *Matthews,* 174 U. S. 96, 105; *Giozza* v. *Tiernan,* 148 U. S. 657. Indeed, it has long been the law under the 14th Amendment that "a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, . . ." *Rast* v. *Van Deman & Lewis Co.,* 240 U. S. 342, 357; *Borden's Co.* v. *Baldwin,* 293 U. S. 194, 209; *Metropolitan Casualty Ins. Co.* v. *Brownell,* 294 U. S. 580, 584. "The rule of equality permits many practical inequalities." *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283, 296; *Breedlove* v. *Suttles,* 302 U. S. 277, 281; *Carmichael* v. *Southern Coal & Coke Co.,* 301 U. S. 495, 509. "What satisfies this equality has not been and probably never can be precisely defined." *Magoun* v. *Illinois Trust & Savings Bank, supra,* 293.

The power to make distinctions exists with full vigor in the field of taxation, where no "iron rule" of equality has ever been enforced upon the states. *Bell's Gap R. Co.* v. *Pennsylvania,* 134 U. S. 232, 237; *Giozza* v. *Tiernan,* 148 U. S. 657, 662. A state may exercise a wide discretion in selecting the subjects of taxation (*Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283, 294; *Quong Wing* v. *Kirkendall,* 223 U. S. 59, 62; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245, 255) "particularly

as respects occupation taxes," *Oliver Iron Mining Co.* v. *Lord,* 262 U. S. 172, 179; *Brown-Forman Co.* v. *Kentucky,* 217 U. S. 563, 573; *Southwestern Oil Co.* v. *Texas,* 217 U. S. 114, 121, 126; see *Ohio Oil Co.* v. *Conway,* 281 U. S. 146, 159.

Since carriers or other utilities with the right of eminent domain, the use of public property, special franchises or public contracts, have many points of distinction from other businesses, including relative freedom from competition, especially significant with increasing density of population and municipal expansion, these public service organizations have no valid ground by virtue of the equal protection clause to object to separate treatment related to such distinctions. Carriers may be treated as a separate class (compare *Seaboard Air Line* v. *Seegers,* 207 U. S. 73) and, as such, taxed differently or additionally. *Southern R. Co.* v. *Watts,* 260 U. S. 519, 530. This Court has approved the adoption of modes and methods of assessment and administration peculiar to railroads (*Kentucky Railroad Tax Cases,* 115 U. S. 321, 337), and upheld tax rates for railroads differing from those on other property, and as between railroad taxpayers, *Michigan Central R. Co.* v. *Powers,* 201 U. S. 245, 300; *Ohio Tax Cases,* 232 U. S. 576, 590; *Columbus & G. Ry. Co.* v. *Miller,* 283 U. S. 96. Similarly, we have explicitly recognized that a State may subject public service corporations to a special or higher income tax than individuals or other corporations. *Atlantic Coast Line R. Co.* v. *Daughton,* 262 U. S. 413, 424. The Corporation concedes this general right to set apart the utilities in New York for taxation.

The Corporation is brought within the purview of the Local Laws because "utility" is defined to include those "subject to the supervision of the department of public service." § 1 (e). It contends that classification in an

excise tax, however, should be made by specific reference to the character of the business to be taxed, and that it is arbitrary to make taxability depend on whether a person is subject to the supervision of a commission. Valid reason for the definition utilized appears from the fact that the Local Laws merely adopted the classification previously established in the New York Public Service Law (N. Y. Laws 1910, c. 480, as amended) which had selected those offering several kinds of public services, including the transportation of persons and property (§ 25),[3] and made them subject to the supervision of the department of public service.

Several reasons may be suggested for the selection for special tax burdens of the utilities embraced by the Local Laws under discussion. We mention a few. Those subject to the supervision of the department of public service are assured by statute that new private enterprises may not enter into direct competition without a showing of convenience and necessity for the public service[4] (see *New York Steam Corp.* v. *City of New York,* 268 N. Y. 137, 147; 197 N. E. 172). The Corporation suggests that the statute does not curb competition from the City's own rapid transit lines and from taxicabs. Freedom from unlimited, direct, private competition is of itself a sufficient advantage over ordinary businesses to warrant the imposition of a heavier tax burden. Reports which must be filed with the department of public service on the basis of approved systems of accounting suggest an administrative convenience in the collection and verification of the

[3] Others are the production and/or furnishing of gas, electricity, steam, and water, communication by telegraph or telephone, omnibus transportation. New York Public Service Law, §§ 64, 78, 89-a, 90, 60.

[4] New York Public Service Law (Laws 1910, c. 480), as amended: § 53 (railroad; street railroad); § 63-d (omnibus); § 68 (gas; electricity); § 81 (steam); § 89-e (water); § 99 (1) (telephone and telegraph).

tax [5] which might properly have been taken into account by the City's legislature. See *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 511, and cases cited. The legislature may reasonably have conceived that the revenues of utilities furnishing indispensable services are subject to relatively little fluctuation, even in depression times, and reasonably have shaped its tax system accordingly.

II. Discrimination. The Corporation urges here, as the lower state courts held, that these general principles of classification are not effective to validate legislation where, as in these Local Laws, arbitrary, unreasonable and hostile discrimination against certain railroad companies is shown. This unlawful discrimination appears, because "they are," as the Corporation sees it, "in a far poorer position to bear the burden of unemployment relief than is business in general." Business may pass on taxes. Other utilities may apply to the commission and perhaps to the courts for an adequate rate increase. This Corporation cannot do so as by Contract No. 4 with the City it is bound to furnish transportation for a five-cent fare, which by City Charter provision cannot be changed without the approval of the proposal by a majority of the qualified voters, on referendum.[6] It is alleged in the complaint that rapid transit corporations are less able to pay a gross receipts tax than other utilities, whose

[5] Operating revenues are reported by railroads. See, e. g., Transit Commission, Summary of Reports of Rapid Transit, Street Surface Railway and Bus Companies operating in the City of New York for the Quarter April–June, 1935, and for the Fiscal Year Ended June 30, 1935; *Id.*, Quarter, April–June, 1936, and for the Fiscal Year Ended June 30, 1936.

[6] City of New York, Local Law No. 16 of 1925.

The argument is applicable in No. 436. There the limitation on fare exists in a franchise, alleged in the complaint to be beyond the regulatory power of the transit commission.

gross income yields a higher percentage of profit, that the operation and maintenance expenses of these corporations are higher in relation to gross receipts than those of other utilities, the ratio of net income to gross receipts, lower. It is said to be highly discriminatory to classify these railroads apart from other businesses, or in the same group as other utilities. The differences from business are not enough and from other utilities too great to justify this attempted classification, which sets them apart from business as a whole, and yokes them with other utilities.

The disadvantages complained of, as to fare limitations, are applicable only to the Corporation, a single member of a class of utilities. It is quite fortuitous that this particular corporation must seek adjustments in fare in a peculiar way. "The legislature is not required to make meticulous adjustments in an effort to avoid incidental hardships," see *Great Atlantic & Pac. Tea Co.* v. *Grosjean,* 301 U. S. 412, 424. "If the accidents of trade lead to inequality or hardship, the consequences must be accepted as inherent in government by law instead of government by edict." *Fox* v. *Standard Oil Co.,* 294 U. S. 87, 102.

In comparing its burdens with those of other utilities, the Corporation, by its argument, suggests that a gross receipts tax is invalid while a net income tax is valid. In taxing utilities as a class the legislature is not required to make "meticulous adjustments" for a particular sub-class of utility, see *Great Atlantic & Pac. Tea Co.* v. *Grosjean,* 301 U. S. at 424, *supra.* Moreover, while taxation of net income is apportioned to ability to pay, and is therefore "an equitable method of distributing the burdens of government," see *New York ex rel. Cohn* v. *Graves,* 300 U. S. 308, 313, it is not a compulsory method. There are other justifications for the gross receipts tax. Unconcerned

with disputes about permissible deductions, it has greater certitude and facility of administration than the net income tax, an important consideration to taxpayer and tax gatherer alike. And the volume of transactions indicated on the taxpayer's books may bear a closer relation to the cost of governmental supervision and protection than the annual profit and loss statement. In *Clark* v. *Titusville*, 184 U. S. 329, we rejected an equal protection objection to a license tax on merchants, which we said (p. 334) was "a tax on the privilege of doing business regulated by the amount of sales, and . . . not repugnant to the Constitution of the United States." And we have heretofore had occasion to remark that gross receipts from an occupation constitutes an "appropriate measure of the privilege" of engaging in that occupation, *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250; *American Manufacturing Co.* v. *St. Louis*, 250 U. S. 459, 463; *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217, 228.

Reliance is placed upon certain language of the opinion in *Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 550. But the tax on retailers held invalid in that case increased in rate with increasing volume. The Court said that the excise was laid upon the making of a sale, and that the statute "exacts from two persons different amounts for the privilege of doing exactly similar acts because the one has performed the act oftener than the other" (p. 566). For that reason it was thought necessary to inquire whether the tax could be justified as related to ability to pay, an inquiry we need not here pursue. The Court did not condemn a fixed-rate gross receipts tax, such as is involved in the present case. Indeed it suggested that the "desired end" might have been secured by the widely adopted "flat tax on sales" (p. 563), and indicated by way of contrast that though such a tax "would impose a heavier burden on the taxpayer having the greater volume

of sales" the graduated tax under consideration exacted not only a larger gross amount but one "larger in proportion to sales" (p. 564).

III. Relation to Object of Legislation. As a further ground for the invalidity of the Local Laws the Corporation urges that "the classification must rest upon some ground of difference, having a fair and substantial relation to the object of the legislation." It is asserted, and correctly so, that the Local Laws in question, as well as the state enabling statutes, show by their titles and content that the proceeds of the challenged taxes were for the relief of unemployment.[7] Violation of the rule invoked, it is asserted, occurs from the discrimination shown by the legislation in raising "a special fund for the particular purpose" from taxpayers no more responsible than others for the conditions. The Corporation seems to be of the opinion that no "state or city can, without conflict with the Constitution, adopt a tax statute, which states a specific object sought to be accomplished thereby and which at the same time puts the entire burden of the tax

[7] N. Y. Laws 1934, c. 873 (the enabling act):

"An Act to enable, temporarily, any city of the state having a population of one million inhabitants or more to adopt and amend local laws, imposing in any such city any tax and/or taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unemployment and to limit the application of such local laws. . . .

"§ 2. Revenues resulting from the imposition of taxes authorized by this act shall be paid into the treasury of any such city and shall not be credited or deposited in the general fund of any such city, but shall be deposited in a separate bank account or accounts and shall be available and used solely and exclusively for paying the principal amount of any installment of principal and of interest due during the aforesaid period on account of the ten-year serial bonds sold to obtain moneys to pay for home relief and work relief in any such city in the month of November, nineteen hundred thirty-three, and for the relief purposes for which the said taxes have been imposed under the provisions of this act."

upon one particular class of business, even though that class is in no different position in relation to the object sought to be accomplished than business in general." The brief states the point to be "that there is a distinction between the ordinary excise tax with no specific purpose attached thereto, and a tax which is a part of a plan for the accomplishment of a specified object." The "object of the legislation," to the taxpayer, is apparently the relief of unemployment.

While, of course, the object of this legislation is in a sense to relieve unemployment, this is the object of the appropriation of the proceeds of the tax. The "object," as used in the rule and cases referred to by the Corporation, is the object of the taxing provisions, i. e., the raising of the money. If the designation of utilities as the only taxpayers under the legislation in question does not deny to them the equal protection of the laws, the fact that an appropriation of the funds for relief is a part of the legislation is not significant. "A tax is not an assessment of benefits." *Carmichael v. Southern Coal & Coke*

Local Law No. 21 of 1934, as amended by Local Law No. 2 of 1935:

"A local law to relieve the people of the city of New York from the hardships and suffering caused by unemployment and the effects thereof on the public health and welfare, by imposing an excise tax on the gross income of every person doing business within such city and subject to supervision of either division of the department of public service, and of any and all other utilities doing business within such city to enable such city to defray the cost of granting unemployment, work and home relief.

"§ 14. Disposition of Revenues.—All revenues and moneys resulting from the imposition of the taxes imposed by this local law shall be paid into the treasury of the city of New York and shall not be credited or deposited in the general fund of the city of New York but shall be deposited in a separate bank account or acccunts, and shall be available and used solely and exclusively for the purpose of relieving the people of the city of New York from the hardships and suffering caused by unemployment, including the repayment of moneys borrowed for such purpose."

Co., 301 U. S. 495, 522. Taxes are repeatedly imposed on a group or class without regard to responsibility for the creation or relief of the conditions to be remedied. *Idem*, note 14, p. 522. The *Carmichael* case involved a state act which levied a tax on employers of eight or more to provide unemployment benefits for workers employed by this class of employers. It was urged that the classification should have been based on the unemployment record of the employer, i. e., should have borne a relation to the object of unemployment relief. Against this contention, that there was no relation between the class of taxpayers and the purpose for which the fund was raised, this Court held that it is not necessary that there be "such a relationship between the subject of the tax (the exercise of the right to employ) and the evil to be met by the appropriation of the proceeds (unemployment)" p. 522. See also *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308, 313. The Corporation suggests that in the *Carmichael* case there was a special relationship between the class taxed and the purpose for which the proceeds were spent, but the Court expressly said that this was something "the Constitution does not require" (p. 523). There need be no relation between the class of taxpayers and the purpose of the appropriation.

The cases cited by the Corporation to sustain its contention that classification must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, do not support the conclusion that the "object" referred to is the purpose for which the proceeds are to be spent. These authorities rather support the view that the "object" is the revenue to be raised by the acts. In *Colgate* v. *Harvey*, 296 U. S. 404, it was recognized that the classification "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation" (p. 423) but it

was said (p. 424) that "the object of the act . . . simply is to secure revenue." In *Stebbins* v. *Riley,* 268 U. S. 137, *Royster Guano Co.* v. *Virginia,* 253 U. S. 412, and *Air Way Appliance Corp.* v. *Day,* 266 U. S. 71, the rule contended for by the Corporation was recognized but with no intimation that the "object" was considered to be the purpose for which the proceeds of the tax were spent. The "object" of the Local Laws under consideration, as in the case with most tax statutes, was obviously to secure revenue. In some cases a classification of taxpayers may be upheld as having a fair and substantial relation to a constitutional non-fiscal object (*Alaska Fish Co.* v. *Smith,* 255 U. S. 44, 48; *Quong Wing* v. *Kirkendall,* 223 U. S. 59, 62, 63; *Aero Mayflower Transit Co.* v. *Georgia Public Service Comm'n,* 295 U. S. 285, 291), but it is not constitutionally necessary that the classification be related to the appropriation. In *United States* v. *Butler,* 297 U. S. 1, also relied upon by the Corporation, the attack on the federal statute was successful because the tax was said to be a part of an unconstitutional scheme to regulate production through expenditures. It was not held invalid because there was no relation between the taxpayer and the appropriation. See *Cincinnati Soap Co.* v. *United States, supra.* We conclude, therefore, that the provisions of the legislation earmarking the funds collected are not of importance in determining whether or not the classification of the challenged acts is discriminatory.

What we have said in showing that the Local Laws do not deny the equal protection of the laws also disposes of the Corporation's contention that the Local Laws constitute a deprivation of due process, as being measured without regard to the net income of or ruinous effect on the taxpayers, and as laying on a particular class a burden which should be borne by all.

IV. Contracts Clause.[8] The Corporation contends that, in contravention of the Constitution, Article 1, § 10, the Local Laws impair the obligation of the contract known as Contract No. 4, entered into March 19, 1913, between its predecessor and the City, under which it operates its owned and leased properties in New York.

By the terms of the contract, as summarized in the Corporation's complaint, the City agreed to construct certain rapid transit railroads, and the New York Municipal Railway Corporation, appellant's predecessor, agreed to contribute a portion of the cost of construction and to equip the railroads for operation. The latter further agreed to reconstruct and build additions to certain existing railroads, which it then had the right and duty to operate, so as to adapt them for operation in conjunction with the railroads to be constructed by the City. Under the terms of Contract No. 4, the City leased the railroads which it agreed to construct, and their equipment, which was to be furnished by the lessee, to the New York Municipal Railway Corporation, its successors and assigns, for a term of forty-nine years commencing on or about the first day of January, 1917, and the lessee agreed to operate said railroads to be constructed by the City in conjunction with the existing railroads as one system, and for a single fare not exceeding five cents.

The gross receipts of all the railroads combined from whatever source derived, directly or indirectly, were to be pooled. The City and its lessee were to share the receipts equally after the deduction of certain items provided in Article XLIX of Contract No. 4. It will suffice here if we summarize the provisions for deductions in

[8] In No. 436, the legislation is not challenged as an impairment of an obligation of contract. The Brooklyn and Queens Transit Corporation "does not operate under Contract 4, but under street railroad franchise from the City."

the language of appellant. The deductions were for the following purposes and in the following order:

"1. Rentals actually paid by Lessee under leases approved by the Commission;

"2. Taxes [The full provision as to 'taxes' is set forth later];

"3. Operating expenses exclusive of maintenance;

"4. Charges for maintenance of both the Railroad and the Existing Railroads [Railroad refers to the system to be constructed by the City; Existing Railroads refers to the company-owned lines as they existed at the time of execution of the contract];

"5. Charges for depreciation of the Railroad, the equipment, and the Existing Railroads;

"6. To be retained by the Lessee: ¼th of $3,500,000, representing the average income from operation of the Existing Railroads;

"7. To be retained by the Lessee: ¼th of 6% per annum on (a) the Lessee's contribution to cost of construction of the Railroad, (b) cost of equipment furnished by the Lessee, (c) cost of extensions and additional tracks constructed by the Lessee, and (d) cost of reconstruction of Existing Railroads (out of which quarterly payments the Lessee is required to amortize such costs);

"8. To be retained by the Lessee: ¼th of the actual annual interest payable by Lessee upon the cost of additional equipment, plus an amortization charge;

"9. To be paid to the City: ¼th of the annual interest payable by it upon its share of the cost of construction of the Railroad plus an amortization charge;

"10. To be paid to the City: ¼th of the annual interest payable by the City upon cost of construction of additions to the Railroad plus an amortization charge;

"11. 1% of the gross receipts, to be paid into a contingent reserve fund.

"In connection with the above allocation provisions, Contract No. 4 provided (Art. LI, p. 66) that if in any quarter the gross receipts should be insufficient to meet the various obligations and deductions above recited, the deficits should be cumulative, and payment thereof should be made in the order of priority above set forth."

The Corporation does not claim that Contract No. 4 exempts it or its property from taxation generally. It does assert that the City "may not, in the exercise of its governmental power, subject appellant to the payment of a tax on or measured by the gross receipts of the combined system of railroads," and that "by providing in specific terms for the disposition and allocation of the entire gross receipts, the parties necessarily precluded any kind of tax or charge by the City which would directly and specifically alter such disposition and allocation, to appellant's prejudice, except in so far as any such tax or charge may clearly be said to have been provided for in the contract provisions as to the disposition of gross receipts."

The Corporation further complains that the tax payments deprive it of "a substantial part of the interest and sinking fund allowance to which it was entitled" under deductions Nos. 7 and 8 set out above. The loss thus suffered was alleged to total more than $600,000.

We search in vain for any provision in the contract which expressly exempts the Corporation from payment of this tax, or indeed of any tax. Yet this is what is required before support can be obtained from the contracts clause. More than a hundred years ago it was stated by Chief Justice Marshall, in *Providence Bank* v. *Billings*, 4 Pet. 514, 563, that the taxing power is of such "vital importance" that "We must look for the exemption in the language of the instrument; and if we do not find it there, it would be going very far to insert it by construction." In *Erie Ry. Co.* v. *Pennsylvania*, 21 Wall. 492, 499, this Court said that "the language in which the sur-

render is made must be clear and unmistakable." At the present term, the Court has reiterated that contracts of tax exemption are "to be read narrowly and strictly," *Hale* v. *State Board,* 302 U. S. 95, 109. See also *Pacific Co.* v. *Johnson,* 285 U. S. 480, 491; *Puget Sound Power & Light Co.* v. *Seattle,* 291 U. S. 619, 627.

Not only is the Corporation unable to point to an unmistakable exemption, but the contract itself contains an express provision permitting the deduction of taxes from the gross receipts.[9] Its language is broad. It refers to "all taxes . . . of every description (whether on physical property, stock or securities, corporate or other franchises, or otherwise) assessed or which may hereafter be assessed against the Lessee in connection with . . . the operation of the . . . Railroads." The taxes under discussion clearly come within its terms.

It is alleged that at the time of the execution of the contracts, and prior to the passage of the state enabling acts,[10] the tax power of the City was confined to special assessments for public improvements, and ad valorem taxes on real estate and special franchises issued by the City. The Corporation insists that it was contemplated that no other type of tax would be assessed, and that it was not necessary to make provision for exemption since the Corporation was merely accepting the tax burden common to all owners of property. It is urged that the contract be interpreted from this point of view, and the

[9] The clause reads as follows: "Taxes, if any, upon property actually and necessarily used by the Lessee in the operation of the Railroad and the Existing Railroads, together with all taxes or other governmental charges of every description (whether on physical property, stock or securities, corporate or other franchises, or otherwise) assessed or which may hereafter be assessed against the Lessee in connection with or incident to the operation of the Railroad and the Existing Railroads. Also such assessments for benefits as are not properly chargeable to cost of construction or cost of equipment."

[10] See *supra* note 2.

provision limited to taxes of the type which the City could have imposed in 1913.

There is no reason to limit the ordinary meaning of words used in a contract by men prepared to invest under its terms. " . . . a business proposition involving the outlay of very large sums cannot be and is not taken by the parties concerned according to offhand impressions; it is scrutinized phrase by phrase and word by word." *New York* v. *Sohmer,* 237 U. S. 276, 284; cf. *Ohio Ins. Co.* v. *Debolt,* 16 How. 416, 435.

Where the intention was to prevent the imposition of new taxes, adequate language was available. The court below adverted to its opinion in *Brooklyn Bus Corp.* v. *City of New York,* 274 N. Y. 140; 8 N. E. 2d 309, where the contract entitled the corporation to a broader tax exemption because it provided that "any new form of tax or additional charge that may be imposed by any ordinance of the city or resolution of the Board upon or in respect of the franchise . . . shall be deducted from the compensation payable to the City hereunder . . . "

A similar suggestion that the contract be limited to the taxes known at the time of its making was urged upon us, and discarded, in *J. W. Perry Co.* v. *Norfolk,* 220 U. S. 472. Under a lease made by Norfolk in 1792, when Norfolk was a borough without power to tax, the lessee agreed to pay, in addition to rent, "the public taxes which shall become due on said land." The lessee sought to enjoin the collection of taxes in 1906 by the City of Norfolk, on the ground that the parties contemplated only taxes imposed by Virginia or the United States. This Court held that the language was broad enough to cover the city tax, saying (p. 480), that "the provision that the lessee was to 'pay public taxes' was sufficiently comprehensive to embrace municipal taxes whenever they could thereafter be lawfully assessed on land or the improve-

ments which were a part of the land. Where one relies upon an exemption from taxation, both the power to exempt and the contract of exemption must be clear. Any doubt or ambiguity must be resolved in favor of the public."

Admitting that with respect to a franchise contract silent as to taxes the city may validly impose a license tax on the privilege of doing business, since "surrender of the state's power to tax the privilege is not to be implied from the grant of it," *Puget Sound Power & Light Co.* v. *Seattle,* 291 U. S. 619, 627, it is urged by the Corporation that here the City is violating the affirmative covenants of a contract, namely, the provisions for allocation of revenue. The contention is made that these provisions preclude an "alteration" by virtue of a gross receipts tax.

This Court, in construing a contract to determine whether or not legislation is violative of its provisions within the meaning of the contract clause of the Constitution, will examine for itself the existence and meaning of the contract as well as the relation of the parties and the circumstances of its execution. *Appleby* v. *City of New York,* 271 U. S. 364, 379–380; *Funkhouser* v. *Preston Co.,* 290 U. S. 163, 167; *Violet Trapping Co.* v. *Grace,* 297 U. S. 119, 120. But of course in so doing we "lean toward agreement with the courts of the state, and accept their judgments as to such matters unless manifestly wrong," *Hale* v. *State Board,* 302 U. S. 95, 101; *Tampa Water Works Co.* v. *Tampa,* 199 U. S. 241, 243–244; *Southern Wisconsin Ry. Co.* v. *Madison,* 240 U. S. 457, 461. In this case the Court of Appeals of New York, 275 N. Y. 258, 268; 9 N. E. 2d 858, has determined that "the right to tax cannot be lost by such tenuous implication," i. e., on the theory that the tax enables the City to secure a portion of the gross income in contravention of the con-

tract. We see no reason for disagreeing with the conclusion of the Court of Appeals of New York upon this point.

In effect, the Corporation is urging that a constructive condition restricting the City's power of taxation should be incorporated in the contract, by speculation as to what the parties must necessarily have intended, despite the long standing rule that exemptions must be "clear and unmistakable." *Erie Ry. Co.* v. *Pennsylvania,* 21 Wall. 492, and other cases, all cited *supra.*

The Corporation professes to dread an interpretation of the contract and the legislation, which will put it "wholly at the mercy" of the City; under which the Corporation's gross receipts would be disposed of, not as Contract No. 4 provides, but as the City may from time to time in its wisdom determine." The Corporation is not deprived of its right to resist on constitutional or legal grounds whatever tax or assessment may be imposed upon it or its property. The City can not lay a gross receipts tax on the Corporation unless it selects a class of taxpayers which meets the requirement of the equal protection of the laws. The provisions of the contract as to taxes are certainly not sufficiently explicit to justify us in denying to the City the right to collect such taxes as those involved in this litigation. The danger which the Corporation sees from what it considers to be a violation by legislation of its contract rights is a danger which every utility, with a franchise which does not protect its property from additional taxation, must endure.

Convincing precedent for the contention of the City is found in *North Missouri R. Co.* v. *Maguire,* 20 Wall. 46, where this Court considered a statute of Missouri which provided that the railroad could issue bonds having priority over the State's mortgage. The Act made specific provision for the allocation of the earnings of the Railroad Company in much the same manner as Contract No. 4

does in the present case. The Act established a "fund commissioner" and provided that the railroad company should pay over to this commissioner "all the gross earnings and daily receipts." It was provided that the commissioner should first pay amounts required for "actual current expenditures"; should then make other specified deductions, and lastly, should apply any excess to certain first mortgage bonds and then against the railroad's debt to the State.

Subsequently the State Constitution was amended to provide that an annual tax of 10% of the gross receipts should be levied on the North Missouri Railroad Company and two other named corporations. The state court held that the earlier statute constituted a contract but considered the payment of taxes to fall within "current expenditures for carrying on the ordinary business." In this Court, the company argued that the tax constituted a violation of this contract, since it overturned the allocation of receipts and had the effect of converting the State from a junior creditor to a first mortgagee.

This Court agreed that "serious difficulty" would arise if "the ordinance was a mere change of the order of disbursing the receipts and earnings," instead of "an expression of the sovereign will of the people of the State levying taxes to pay and discharge the indebtedness of the State," but concluded that the tax actually imposed was proper. Of the provisions for allocation of the gross receipts, the Court said (p. 63):

"Further examination of those provisions is certainly unnecessary, as it is too plain for argument that they do not afford the slightest support to the views of the plaintiffs. On the contrary, they are entirely silent upon the subject of taxation, and fully justify the remarks of the State court when they say that the subject of taxation forms no part of the contract contained in the act under consideration.

"Nothing is said about taxation, and it does not seem to have entered into the contract between the parties, but was obviously left where the law had placed it before the act was passed, nor was any provision made for the payment of taxes unless it may be held that the disbursements for that purpose may fairly be included in such as are required to pay the current expenditures in carrying on the ordinary business of the corporation."

In our opinion, as the contract does not prohibit this tax, the legislation does not violate the contracts clause.

Affirmed.

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

SHANNAHAN ET AL., TRUSTEES, *v.* UNITED STATES ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF INDIANA.

No. 502. Argued February 28, March 1, 1938.—Decided April 4, 1938.

The Railway Labor Act confers upon the National Mediation Board certain duties respecting mediation or arbitration of labor controversies on railroad carriers subject to the Interstate Commerce Act, with the proviso that the term "carrier" shall not include any street, interurban, or suburban electric railway not operating as a part of a general steam-railroad system of transportation, etc., and directs the Interstate Commerce Commission upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the proviso. *Held:*

1. That a decision of the Commission finding a railway not to be a street, interurban, or suburban electric railway within the meaning of the proviso was not an "order," either in form or in substance, but a determination of fact, negative in character, and not enforceable by the Commission or by the Board. Therefore it was not reviewable under the Urgent Deficiencies Act of 1913. P. 599.

2. The argument that the decision is reviewable as an "order" under the Urgent Deficiencies Act, because it fixes the status of the carrier as subject to obligations of the Railway Labor Act wilful failure to comply with which is made a misdemeanor,—is considered and rejected. P. 601.

20 F. Supp. 1002, affirmed.

APPEAL from a decree of a three-judge District Court dismissing for want of jurisdiction a bill to set aside an alleged order of the Interstate Commerce Commission.

Mr. John C. Lawyer, with whom *Mr. R. Stanley Anderson* was on the brief, for appellants.

Mr. Leo F. Tierney, with whom *Acting Solicitor General Bell, Assistant Attorney General Jackson,* and *Messrs. Wendell Berge, Robert L. Stern, Nelson Thomas,* and *Daniel W. Knowlton* were on the brief, for appellees.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The sole question for decision is whether the District Court had jurisdiction of this controversy under the Urgent Deficiencies Act of October 22, 1913.[1]

The Chicago South Shore and South Bend Railroad is an interstate electric railway subject to the Interstate Commerce Act. On August 9, 1934, the National Mediation Board requested the Commission to determine whether that carrier fell within the exemption from the scope of the Railway Labor Act, as amended June 21, 1934, 48 Stat. 1185, c. 691 (45 U. S. C. § 151). That Act confers upon the National Mediation Board certain duties in respect to carriers by railroad subject to the Interstate Commerce Act, with the following exception:

"*Provided, however,* That the term 'carrier' shall not include any street, interurban, or suburban electric rail-

[1] c. 32, 38 Stat. 208, 219, 220, 28 U. S. C. §§ 41(28), 46, 47.

way, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso."

After due hearing had, at which the South Shore introduced evidence and filed its brief, the matter was argued orally before the Commission, which, on February 14, 1936, made its Report and the following determination (214 I. C. C. 167, 173):

"We find that the line of the Chicago, South Shore and South Bend Railroad is not a street, interurban, or suburban electric railway within the meaning of the exemption proviso in the first paragraph of Section 1 of the Railway Labor Act, as amended June 21, 1934, and it is therefore subject to the provisions of that act."

No order was entered thereon by the Commission.

Shannahan and Jackson, who had been appointed Trustees of the South Shore by the federal court for northern Indiana, and had filed their appearance in the proceeding, applied for a rehearing. An order was entered denying the same. Thereupon, the Trustees filed this suit against the United States, invoking the jurisdiction of the court under the Urgent Deficiencies Act of October 22, 1913, to set aside the alleged order. They do not deny that the South Shore is an interstate carrier subject to the jurisdiction of the Commission; and that the Act is constitutional. Their contention is that:

"A correct application of the law to the undisputed facts leads to the conclusion that the lines of the railroad of appellants are an electric interurban railway under the

exemption proviso of the first division of Section 1 of the Railway Labor Act and that there is no substantial evidence to support the conclusion and determination of the Commission."

The Commission intervened. Its answer, and that of the United States, challenged the jurisdiction of the court on the ground that the determination of the Commission was not an "order" within the meaning of the Urgent Deficiencies Act. The case was heard before three judges on the pleadings and evidence; and a decree was entered dismissing the bill for want of jurisdiction, one judge dissenting. 20 F. Supp. 1002. The Trustees appealed.

First. The function of the Commission is limited to the determination of a fact. Its decision is not even in form an order. It "had no characteristic of an order, affirmative or negative." *United States* v. *Illinois Cent. R. Co.*, 244 U. S. 82, 89; *United States* v. *Atlanta, B. & C. R. Co.*, 282 U. S. 522, 527–28. Compare *Lehigh Valley R. Co.* v. *United States*, 243 U. S. 412, 414. But even if this difficulty is overlooked, others are insuperable. The decision neither commands nor directs anything to be done. "It was merely preparation for possible action in some proceeding which may be instituted in the future." *United States* v. *Los Angeles & S. L. R. Co.*, 273 U. S. 299, 310. The determination is thus not enforceable by the Commission; the only action which could ever be taken on it would be by some other body. It is as clearly "negative" as orders by which the Commission refuses to take requested action. *United States* v. *Griffin, ante*, p. 226.[2] As such, it is not reviewable under the Urgent Deficiencies Act.

[2] See also *Procter & Gamble Co.* v. *United States*, 225 U. S. 282; *Hooker* v. *Knapp*, 225 U. S. 302; *Lehigh Valley R. Co.* v. *United States*, 243 U. S. 412, 414; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 482–83; *Atchison, T. & S. F. Ry. Co.* v. *United States*,

Second. Moreover, the determination of the Commission is not even a decision which the Mediation Board, by whom it was sought, is empowered to enforce. The Act confers upon the Board no power over any carrier. It merely imposes upon the Board possible duties in respect to interstate carriers by railroad not exempted by the proviso. The Board's duties, in case of dispute between carrier and employees, require it:

(1) to "promptly put itself in communication with the parties to [the] controversy, and . . . use its best efforts, by mediation, to bring them to agreement." When a dispute is settled through these efforts a mediation agreement is signed, and should any question arise subsequently regarding the meaning or application of such an agreement, the Board is required upon request of either party "and after a hearing of both sides [to] give its interpretation within thirty days."

(2) If the mediating efforts prove unsuccessful, it is the Board's duty to "at once endeavor as its final required action . . . to induce the parties to submit their controversy to arbitration, in accordance with the provisions of" the Act. If arbitration is agreed upon it may become the Board's duty to name a third arbitrator if the two named by the parties fail to select him.

(3) If arbitration is refused and the dispute threatens "substantially to interrupt commerce to a degree such as to deprive any section of the country of essential transportation service," then the Board is required to notify the President.

(4) If, in selecting representatives to deal with the carriers, disputes arise among employees as to what organization they desire to represent them, it is the duty of the Board, on request of either party, to investigate

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279 U. S. 768, 781; *Piedmont & Northern Ry. Co.* v. *United States,* 280 U. S. 469, 475–77; *Standard Oil Co.* v. *United States,* 283 U. S. 235, 238; *United States* v. *Corrick,* 298 U. S. 435, 438.

and to certify in writing to the parties and to the carrier the names of the individuals or organizations that have been designated and authorized to represent the employees.

(5) If the National Railroad Adjustment Board undertakes arbitration, and it fails to select a referee, the Mediation Board has the duty of doing so.

In order not to fail in the performance of these duties the Mediation Board had to satisfy itself whether the South Shore was a railroad within the exemption proviso. To that end, it applied to the Commission for its determination. If it had omitted to do so, the application might have been made "upon complaint of any party interested." The determination, whether applied for by the Board, by a carrier, or by employees, is clearly not an order enforceable within the meaning of the cases construing and applying the Urgent Deficiencies Act. It is a decision on a controverted matter, comparable to those considered in *United States* v. *Los Angeles & Salt Lake R. Co,* 273 U. S. 299, in *Great Northern Ry. Co.* v. *United States,* 277 U. S. 172, in *United States* v. *Atlanta, B. & C. R. Co.,* 282 U. S. 522, and in *United States* v. *Griffin, ante,* p. 226, which were held not to be subject to review under the Urgent Deficiencies Act.

Third. The Trustees argue that the determination of the Commission is an affirmative "order, because it fixed for the first time, by the only body authorized by law to do so, the status of the carrier"; that by fixing the status, the obligations of the Railway Labor Act are fixed upon the carrier; and that wilful failure or refusal of any carrier to comply with certain of the obligations is made a misdemeanor.[3]

[3] 45 U. S. C. § 152(10). That declares: "The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh or eighth paragraph of this section shall be a misdemeanor. . . ." The third paragraph prohibits inter-

Lehigh Valley R. Co. v. *United States, supra,* shows that the determination of a status or similar matter is not action subject to review under the Urgent Deficiencies Act even if disregard of the determination may subject the carrier to criminal prosecution.[4] The Panama Canal Act, 37 Stat. 560, prohibited, after July 1, 1914, any ownership by a railroad in any common carrier by water where the railroad might compete with the water carrier; prescribed a heavy penalty for any violation of the prohibition; and conferred upon the Commission jurisdiction:

"to determine questions of fact as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier. Such application may be filed for the purpose of determining whether any existing service is in violation of this section and pray for an order permitting the continuance of any vessel or vessels already in operation . . ."

Thereupon in January, 1914, the Lehigh Valley filed with the Commission a petition for a hearing on the question whether the services of a steamboat line owned by it would be in violation of the above section and for an extension of time. The Commission held that, by vir-

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ference, influence or coercion in the designation of representatives. The fourth assures the right of employees to bargain collectively through representatives of their own choosing, and forbids carriers to maintain or financially assist any labor organization. The fifth prohibits carriers from requiring any person seeking employment to sign any contract to join or not to join a labor union. The seventh prohibits carriers from changing rates of pay, rules or working conditions of employees as a class except as prescribed in § 156. The eighth requires carriers to notify its employees by printed notices in such form as shall be specified by the Mediation Board that all disputes will be handled in accordance with the requirements of the Act.

[4] For details, see opinion of the District Court for Eastern Pennsylvania, 234 Fed. 682.

tue of the arrangements found to exist, the railroad did or might compete with its boat line; and dismissed the petition. This Court held that the risk to which the railroad was left subject did not come from the order, but from the statute which contained the prohibition and provided a penalty; that, therefore, it was not an affirmative order; and that the District Court was without jurisdiction under the Urgent Deficiencies Act. Compare also *Piedmont & Northern Ry. Co.* v. *United States,* 280 U. S. 469, 476–77.

Fourth. Whether the determination of the Commission is reviewable in a district court by some judicial procedure other than that of the Urgent Deficiencies Act we have no occasion to consider. Compare *United States* v. *Griffin, supra,* and *Lehigh Valley Ry. Co.* v. *United States, supra.*[5]

Affirmed.

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

[5] In *Utah-Idaho Cent. Ry.* v. *Shields* (unreported), D. Utah, Oct. 15, 1936, and in *Hudson & Manhattan Ry.* v. *Hardy,* S. D. N. Y., Feb. 21, 1938, 22 F. Supp. 105 (where jurisdiction under the Urgent Deficiencies Act was specifically denied), the electric railways involved were declared in proceedings before single judges to be within the proviso excluding them from the application of the Act, and final injunctions against prosecution for penalties were granted, although the Interstate Commerce Commission, in 214 I. C. C. 707 and 216 I. C. C. 745, respectively, had reached the opposite conclusion. In *Texas Electric Ry.* v. *Eastus* (unreported), N. D. Tex., June 4, 1936, a preliminary injunction was likewise granted in spite of the Commission's decision in 208 I. C. C. 193. From informal sources it has been learned that similar proceedings have been instituted in other cases. *Chicago Warehouse & Term. Co.* v. *Igoe,* N. D. Ill., and *Chicago Tunnel Co.* v. *Igoe,* N. D. Ill., to review 214 I. C. C. 81; *Hudson & Manhattan Ry.* v. *Quinn,* D. N. J., to review 216 I. C. C. 745; *New York, W. & B. R. Co.* v. *Hardy,* S. D. N. Y., to review 218 I. C. C. 253.

COVERDALE, SHERIFF AND EX-OFFICIO TAX COLLECTOR, *v.* ARKANSAS-LOUISIANA PIPE LINE CO.

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

No. 458. Argued February 28, 1938.—Decided April 4, 1938.

A corporation produced and purchased natural gas in Louisiana, piped it from the wells to the Louisiana terminus of its interstate pipeline, and introduced it into that line under increased pressure induced by the power of gas engines operating gas compressors. Nearly all of the gas was transported and disposed of in interstate commerce, and the increase of pressure was essential to its movement through the pipeline. As a complement to taxation of the generation and sale of electricity, Louisiana laid a privilege tax on operation of machines for production of mechanical power used by the operator in his business within the State, the tax being measured on the horsepower capacity of such machines. *Held:*

1. That, applied to the operation of the corporation's gas engines, the tax was not invalid as a burden on the interstate commerce. P. 609.

2. Taxation by the States of the business of interstate commerce is forbidden only because it is deemed an interference with that commerce, the uniform regulation of which is necessarily reserved to the Congress. P. 610.

3. Exemption of those engaged in interstate commerce from the taxation others bear should not be extended beyond the necessity of keeping that commerce free from interference. P. 610.

4. Privileges closely connected with interstate commerce may be regarded as distinct for purposes of taxation. P. 610.

5. While the engine and compressor units are connected directly, on a common bed plate, their functions are as completely separate as if they operated through belting. While the use of the engine for the production of power synchronizes with the transmission of that power to the compressor, production occurs prior to transmission. Cf. *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165. P. 611.

6. The tax is without discrimination in form or application as between interstate and intrastate commerce and is not such as can be imposed by more than one State. It obviously adds to the

cost of the interstate commerce. But increased cost alone is not sufficient to invalidate the tax as an interference with that commerce. Cf. *Western Live Stock* v. *Bureau of Revenue, ante,* p. 250. P. 612.

20 F. Supp. 676, reversed.

APPEAL from a decree of the three-judge District Court which permanently enjoined the sheriff from enforcing a state tax found to be unconstitutional. See also 17 F. Supp. 34, 36.

Messrs. E. Leland Richardson and *F. A. Blanche,* Assistant Attorneys General, with whom *Messrs. Gaston L. Porterie,* Attorney General, and *J. C. Daspit,* Assistant Attorney General, of Louisiana, were on the brief, for appellant.

Mr. Leon O'Quin, with whom *Mr. H. C. Walker, Jr.* was on the brief, for appellee.

MR. JUSTICE REED delivered the opinion of the Court.

The question is whether a state statute imposing a privilege tax on the production of mechanical power contravenes the interstate commerce clause in so far as it is applied to an engine used to supply mechanical power to a compressor which increases the pressure of natural gas and thus permits it to be transported to purchasers in other states.

Act No. 6 of the Regular Session of 1932 of the Louisiana Legislature, with certain qualifications and exceptions not material here, provides for a license tax to be paid by everyone engaged within the State in the business of manufacturing or generating electricity for heat, light or power, § 1, or of selling electricity not manufactured or generated by him or it, § 2. Section 3 provides that every person, firm, corporation, or association, engaged within the State in any business, which uses in the conduct of

that business electrical or mechanical power of more than ten horsepower and does not procure all the power from a taxpayer subject to § 1 or § 2, "shall be subject to the payment of an excise, license, or privilege tax of One Dollar ($1.00) per annum for each horsepower of capacity of the machinery or apparatus, known as the 'prime mover' or 'prime movers,' operated by such person, firm, corporation or association of persons, for the purpose of producing power for use in the conduct of such business or occupation; . . ."

Appellee is engaged within Louisiana, Arkansas, and Texas, in the business of producing and buying, transporting and selling natural gas. The gas is obtained from the Monroe and Richland fields in Louisiana, and transported through appellee's 20-inch pipe line, one of the largest in the Southwest, which extends from Sterlington, Louisiana, to Blanchard, Louisiana, where one branch goes west into Texas, and the other north into Texas and Arkansas up to Little Rock. Ninety-six and 6/10 per cent. (96.6%) of the gas transported through this line during the fiscal year ended July 31, 1933, was delivered outside the State of Louisiana.

The natural gas cannot be transmitted through this pipe line for these distances in amounts sufficient to meet the needs of appellee's customers, unless it is delivered into the pipe line at a pressure higher than that at which it comes from the wells. Accordingly, appellee maintains in Louisiana, at the point of intake into the line, its "Munce Compressor Station" where are located ten pumps, or natural gas compressors, which operate to increase the pressure of the gas to the required extent. These compressors are directly connected to ten four-cylinder 1,000 horsepower Cooper Bessemer internal combustion gas burning engines. There are also two 250 horsepower gas burning engines for general power service at the station. The tax is laid on the privilege

of operating these twelve gas engines, known as "prime movers,"[1] and is imposed at the rate of $1 per horsepower capacity of the engine—i. e., a total tax of $10,500.

Appellee's complaint, setting forth these facts, was filed in the District Court for Western Louisiana. It prayed that the tax be declared invalid and that the appellant, sheriff, be enjoined from selling appellee's property to enforce payment of $7,316, plus certain penalties and attorney fees, as the balance of the "prime mover tax" due for the year ending July 31, 1933.[2] An *ex parte* temporary restraining order was issued. A statutory three-judge court was convened, and a preliminary injunction granted, 17 F. Supp. 34. The statute was held invalid for the reason, among others, that as applied to this case it imposed an unconstitutional burden on interstate commerce. On a rehearing, the court, with one dissent, determined again that it was invalid, with the violation of the commerce clause as the sole basis of decision, 17 F. Supp. 36.[3] After answer and submission of affidavits

[1] This term, used in § 3, *supra,* is not defined elsewhere in the statute. Webster's New International Dictionary (2d ed. unabridged, 1936) p. 1964, contains the following: "**prime mover.** *Mech.* . . . **b** An initial source of motive power, as an engine, or machine, the object of which is to receive and modify force and motion as supplied by some natural source, and apply them to drive other machinery, as a water wheel, a water-pressure engine, a wind-mill, a turbine, a tidal motor, a steam engine or other heat engine, etc." As explained by expert witnesses for the appellant, the internal combustion gas engine is a prime mover which converts heat energy, contained in the natural gas as fuel, into mechanical energy, then supplied to and used by the compressor unit.

[2] Appellee alleged that it had paid part of the tax imposed by the statute in order to avoid a forced sale.

[3] The first opinion also held the statute invalid in its entirety (on the authority of *Union Sulphur Co.* v. *Reid,* 17 F. Supp. 27), as a property tax laid at a rate prohibited by the state constitution, and as a denial of due process in providing for collection without any review of the action of the state supervisor of public accounts. After

by both parties, the court granted a permanent injunction, 20 F. Supp. 676. The case was brought here on direct appeal. Judicial Code, §§ 238 (3), 266, 28 U. S. C. §§ 345 (3) 380.

First. The character of the tax act under consideration is clear. It is a revenue measure obtaining funds by levying a privilege tax on those generating or selling electricity in Louisiana. §§ 1 and 2. Presumably to protect this source of revenue against tax-free competition, § 3,[4] with

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the decision in *State* v. *H. L. Hunt, Inc.*, 182 La. 1073; 162 So. 177, holding the tax a license rather than a property tax, consonant with both the state constitution and Fourteenth Amendment, the District Court granted a rehearing. The second opinion conceded the general validity of the act, but held it an undue burden on interstate commerce as applied to appellee.

[4] "Section 3. In addition to all other taxes of every kind imposed by law, every person, firm, corporation or association of persons engaged in the State of Louisiana in any business or occupation, which person, firm, corporation or association of persons uses in the conduct of such business or occupation, at any time, electrical or mechanical power of more than ten horsepower and does not procure all the power required in the conduct of such business or occupation from a person, firm, corporation or association of persons subject to the tax imposed by Section 1 or Section 2 of this act, shall be subject to the payment of an excise, license or privilege tax of One Dollar ($1.00) per annum for each horsepower of capacity of the machinery or apparatus, known as the 'prime mover' or 'prime movers', operated by such person, firm, corporation or association of persons, for the purpose of producing power for use in the conduct of such business or occupation; provided that any user of power securing all or any part of the power required in the conduct of the business or occupation of such user from a person, firm, corporation or association of persons subject to the tax imposed by Section 1 or Section 2 of this act, shall not be liable for the tax imposed by this Section 3, or for a greater tax under this Section 3, as the case may be, because of the employment of stand-by power facilities by such user during periods of failure of the supply of purchased power; and provided further that any person, firm, corporation or association of persons the principal use of whose electric facilities is the generation of electricity for sale, shall not be subject to an additional tax under

broad exemptions not assailed here, subjects the users of electrical or mechanical power, not procured from those subject to § 1 or § 2, to a tax of one dollar per annum for each horsepower of capacity of the machinery operated by the taxpayer for the purpose of producing this power. The state court has held that section three, here in question, does not lay a tax on those who own the machines but on those who use them in the conduct of their business, *State* v. *H. L. Hunt, Inc.,* 182 La. 1075, 1079-1080; 162 So. 777, a decision accepted, so far as the incidence of the tax is concerned, as a matter of local law conclusive on us. *St. Louis & S. W. R. Co.* v. *Arkansas,* 235 U. S. 350, 362; *Storaasli* v. *Minnesota,* 283 U. S. 57, 62. We regard the tax as one upon the privilege of producing the power.

Second. The language of the state statute makes it quite certain that this privilege tax falls alike on those engaged in interstate or in intrastate commerce, or in both. While a privilege tax by a state for engaging in interstate business has frequently met the condemnation of this Court as a regulation of commerce,[5] privilege taxes

this Section 3 on the horsepower capacity of any machinery or apparatus used in the generation of electricity; and provided further that in computing the tax imposed by this Section 3, there shall be excluded from the horsepower capacity of all machinery and apparatus operated, that part of such capacity used in a mechanical, agricultural or horticultural pursuit, or any other occupation exempt from a license tax under Section 8 of Article X of the Constitution of Louisiana, or in operating a sawmill or a mill for grinding sugarcane or producing raw sugar, or in conducting any business of selling electricity or any business conducted under any franchise or permit granted by the State of Louisiana or any subdivision thereof, or in propelling or motivating any automobile, truck, tug, vessel, or other self-propelled vehicle, on land, water or air."

[5] *Cooney* v. *Mountain States Tel. Co.,* 294 U. S. 384, 392, and cases cited in note four; *Puget Sound Stevedoring Co.* v. *State Tax Comm'n,* 302 U. S. 90; *Fisher's Blend Station* v. *State Tax Comm'n,* 297 U. S. 650; *Sprout* v. *South Bend,* 277 U. S. 163, 170, 175.

for "carrying on a local business," even though measured by interstate business, have been sustained. *American Mfg. Co.* v. *St. Louis,* 250 U. S. 459; *Ficklen* v. *Shelby County Taxing District,* 145 U. S. 1; [6] cf. *Western Live Stock* v. *Bureau of Revenue, ante,* p. 250. The present case falls well within the line of state tax authority.

Taxation by the states of the business of interstate commerce is forbidden only because it is deemed an interference with that commerce, the uniform regulation of which is necessarily reserved to the Congress. *Minnesota Rate Cases,* 230 U. S. 352, 400. As this source of revenue, even if treated in a non-discriminatory manner, is withdrawn from local reach by inference from the delegated grant, the exemption of those engaged in interstate commerce from the taxation others bear should not be extended beyond the necessity of keeping that commerce free from interference. Consequently, property taxes on the instrumentalities or net income taxes on the proceeds of interstate commerce are upheld. *Cudahy Packing Co.* v. *Minnesota,* 246 U. S. 450; *United States Glue Co.* v. *Oak Creek,* 247 U. S. 321.

Privileges closely connected with the commerce may be regarded as distinct for purposes of taxation. So, local privilege taxes on storage in transit, compressing or dealing in cotton, already moving in its interstate journey from plantation to mill, are validated as imposed upon operations in connection with a commodity withdrawn from the transportation movement. *Federal Compress Co.* v. *McLean,* 291 U. S. 17, 21; *Chassaniol* v. *Greenwood,* 291 U. S. 584; cf. *Minnesota* v. *Blasius,* 290 U. S. 1. And similar taxes are upheld for the privilege of mining ores or producing gas, notwithstanding the "practical continuity" of the taxed productive operation and the interstate movement. *Oliver Iron Min. Co.* v. *Lord,*

[6] But see *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292, 296.

262 U. S. 172; *Hope Natural Gas Co.* v. *Hall,* 274 U. S. 284. In *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165, an Idaho statute taxing the generation of electricity at so much a kilowatt hour was upheld because a difference was perceived between the conversion of the mechanical energy of falling water into electrical energy and the transportation of the latter. The tax here imposed on the operation of the machinery is of the same type.

The power used by the appellee is obtained from internal combustion engines which transform the potential energy of natural gas into mechanical power, transmitted by piston and piston-rod from the combustion chamber of the engine to the compression chamber of the compressor. While the engine and compressor units are assembled on a common bed plate, their functions are thus seen to be as completely separate as if they operated through belting. The engine is the "prime mover" of the tax act, producing power to drive the compressor. While the use of the engine for the production of power synchronizes with the transmission of that power to the compressor, production occurs prior to transmission. It is just as much local as the generation of electrical power.

Helson v. *Kentucky,* 279 U. S. 245, *State Tax Commission* v. *Interstate Natural Gas Co.,* 284 U. S. 41, and *Cooney* v. *Mountain States Tel. Co.,* 294 U. S. 384, are pressed upon us as controlling authorities for the invalidation of the tax. We think they belong to the category of cases which construe the state tax acts involved as taxes on interstate commerce and its instrumentalities rather than on operations closely connected with but distinct from that commerce. In the *Interstate* case and the *Cooney* case taxes levied on the business of engaging in interstate commerce were held invalid. Likewise, in the *Helson* case, this Court concluded that the tax on gasoline brought into the state and used on an interstate ferry was analogous to a tax on the use of the ferry itself

in transit and therefore within the rule prohibiting state taxes on commerce. A narrow distinction in fact exists between the tax held invalid in the *Helson* case and the valid tax considered in *Nashville, C. & St. L. Ry. Co.* v. *Wallace,* 288 U. S. 249, where a tax on gasoline brought into the state, stored and then used to drive engines in interstate transportation, was held valid. The storage and withdrawal was an intrastate, taxable event. See also *Edelman* v. *Boeing Air Transport,* 289 U. S. 249, 252; *Gregg Dyeing Co.* v. *Query,* 286 U. S. 472, 479.

Third. To determine whether this challenged state tax enactment is invalid as an interference with interstate commerce under the decisions of this Court, the connection of the privilege taxed with interstate commerce has been considered. Other factors also show that the tax here does not interfere with interstate commerce. The tax is without discrimination in form or application as between inter- and intra-state commerce and it cannot be imposed by more than one state. The course of interstate commerce is clogged by taxes designed or applied so as to hamper its free flow. Section three, however, bearing equally on all use, is only complementary to the taxes of sections one and two. *Henneford* v. *Silas Mason Co.,* 300 U. S. 577, 584. It bears generally on all use of power and is not discriminatory. It obviously adds to the cost of the interstate commerce. But increased cost alone is not sufficient to invalidate the tax as an interference with that commerce. *Western Live Stock* v. *Bureau of Revenue, ante,* p. 254.

It was held by the District Court that this is a tax which may be levied by other states and so is invalid, and that a state's desire to save gas for its citizens may induce it to raise the privilege tax to prohibitory rates. It is true that each state through which a pipe line passes could lay a tax on the use of engines for the production of power, but that would not be multiple taxation

"merely because interstate commerce is being done," as discussed in *Western Live Stock* v. *Bureau of Revenue, ante,* p. 255, and the authorities there cited. It would not be a tax on the same activity, either in form or in substance. Like a property tax on the pipes or equipment in different states, it would be a different tax, on a different and wholly separate subject matter, with no cumulative effect caused by the interstate character of the business. It would not be multiple taxation for each state to tax the "booster station" *ad valorem* as property. Neither is it prohibited multiple taxation to have the possibility of other privilege taxes on the production of power. It is length of line, not interstate commerce, which makes another tax possible.

The decree of the District Court is

Reversed.

MR. JUSTICE MCREYNOLDS is of the opinion the decree should be affirmed.

MR. JUSTICE CARDOZO took no part in the consideration or determination of this case.

HALE *v.* KENTUCKY.

CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

No. 680. Argued March 29, 1938.—Decided April 11, 1938.

Proofs *held* sufficient to show a systematic and arbitrary exclusion of Negroes from jury lists because of their race or color, constituting a denial of the equal protection of the laws, and entitling the petitioner, a Negro convicted of murder, to a new trial. P. 616.

269 Ky. 743; 108 S. W. 2d 716, reversed.

CERTIORARI, *post,* p. 629, to review a judgment affirming a sentence for murder.

Messrs. Charles H. Houston and *Leon A. Ransom* for petitioner.

Mr. A. E. Funk, Assistant Attorney General, with whom *Hubert Meredith,* Attorney General, of Kentucky, was on the brief, for respondent.

PER CURIAM.

Petitioner, a Negro, was indicted in 1936 for murder in McCracken County, Kentucky. He moved to set aside the indictment upon the ground that the jury commissioners had excluded from the list from which the grand jury was drawn all persons of African descent because of their race and color and thus denied to him the equal protection of the laws in violation of the Constitution of the United States. In support of his motion, he presented an affidavit showing that the population of McCracken County was approximately 48,000 of which 8,000 were Negroes; that the assessor's books for the county contained the names of approximately 6,000 white persons and 700 Negroes who were qualified for jury service in accordance with the Kentucky Statutes, § 2241; that the jury commissioners filled the wheel for jury service for 1936 with between 500 and 600 names exclusively of white citizens and that no Negro was excluded "because he was not an intelligent, sober, discreet and impartial citizen, resident housekeeper" of the county or not of the requisite age; that the failure to draw any Negro for service was not due to any of the disqualifications mentioned in the Kentucky Statutes, § 2248. The affidavit further stated that petitioner could prove by sheriffs of McCracken County, serving respectively from 1906 to 1936, that during their terms no Negroes had been summoned for service on any grand or petit jury in the county nor was the name of any Negro placed in the hands of the sheriff to be so summoned; also that petitioner could prove by federal officials that for many years prior to 1936 Negro citizens of the county had served on juries in the federal court at Paducah; also that petitioner could

prove by many named citizens of standing in the community that for a long period of years there were Negroes who were citizens of the county and qualified for service on juries in the state court. Petitioner alleged that the proof would show "a long continued, unvarying and wholesale exclusion of Negroes from jury service in this County on account of their race and color," and that this practice had been "systematic and arbitrary" on the part of the officers and commissioners selecting names for jury service for a period of fifty years or longer.

Petitioner filed a supplemental affidavit stating that he had learned that in one case in the state court in 1921 the trial judge had directed a Negro jury to be summoned from bystanders, but that those Negro jurors were not on the jury panel.

The attorney for the State stipulated that the original and supplemental affidavits should be considered as evidence and that the witnesses named would testify as therein set forth. No evidence to the contrary was introduced by the State. The motion to set aside the indictment was overruled. Petitioner then moved to discharge the entire panel of the jury for cause, upon the same facts, and the motion was denied.

Petitioner, having reserved his exceptions, pleaded not guilty and the trial proceeded. He was convicted and sentenced to death. The judgment was affirmed by the Court of Appeals of the State. 269 Ky. 743; 108 S. W. 2d 716. It appears from an affidavit of the clerk of the circuit court of McCracken County that by inadvertence a copy of the motion to set aside the indictment was omitted from the record before the Court of Appeals. That court, after a summary of the facts shown by the record said that the case was one "where the proof might be regarded as sufficient to sustain the ground upon which the motion was evidently made, but there is wanting in the record a sufficient statement of those grounds to per-

mit the introduction of that proof. The failure so pointed out is analogous," the court said, "to a case where there is proof without pleading, and the rule is that 'pleading without proof or proof without pleading' are each unavailable."

On petition for rehearing, the motion which had been omitted from the record was brought to the attention of the Court of Appeals. Rehearing was denied. On petition to this Court for certiorari the parties stipulated that the motion to set aside the indictment as filed by petitioner in the trial court might be read and considered as a proper part of the record. Certiorari was granted.

On argument at this bar, the Attorney General of the State expressly disclaimed reliance upon the omission from the original record on appeal of the motion to set aside the indictment, as the fact of the motion had been brought to the attention of the Court of Appeals upon the application for rehearing, and conceded that if the facts set forth in the affidavits submitted upon that motion were sufficient to show a denial of constitutional right, the judgment should be reversed.

We are of the opinion that the affidavits, which by the stipulation of the State were to be taken as proof, and were uncontroverted, sufficed to show a systematic and arbitrary exclusion of Negroes from the jury lists solely because of their race or color, constituting a denial of the equal protection of the laws guaranteed to petitioner by the Fourteenth Amendment. *Neal* v. *Delaware,* 103 U. S. 370, 397; *Carter* v. *Texas,* 177 U. S. 442, 447; *Norris* v. *Alabama,* 294 U. S. 587.

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

Reversed.

Mr. Justice Cardozo took no part in the consideration and decision of this case.

DECISIONS PER CURIAM, ETC., FROM JANUARY 18, 1938, THROUGH APRIL 11, 1938.*

No. —, original. Ex parte E. R. Lindsey. January 31, 1938. The motion for leave to file petition for writ of mandamus is denied.

No. —, original. Ex parte Albert B. Bleecker. January 31, 1938. Motion for leave to file petition for writ of habeas corpus denied.

No. —, original. Ex parte Peter Gibbons. January 31, 1938. Motion for leave to file petition for writ of habeas corpus denied.

No. 636. Electric Bond & Share Co. et al. *v.* Securities and Exchange Commission et al. January 31, 1938. Jerome N. Frank and John W. Hanes, members of the Securities and Exchange Commission, substituted as parties respondent in the place of James M. Landis and James D. Ross, resigned, on motion of *Assistant Solicitor General Bell* in that behalf. Reported below: 92 F. 2d 580.

No. 730. Cosman *v.* United States. On petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit. Decided February 7, 1938. *Per Curiam:* The motion for leave to proceed *in forma pauperis* is

* Mr. Justice Cardozo was absent from the bench, on account of illness, during the period covered by this volume.

For decisions on applications for certiorari, see *post,* pp. 628, 634; for rehearing, *post,* p. 665.

granted. The petition for writ of certiorari is also granted, and the judgment is reversed. *Frad* v. *Kelly,* 302 U. S. 312. *Mr. Myron G. Ehrlich* for petitioner. No appearance for the United States. Reported below: 94 F. 2d 1020.

No. 346. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* BOWERS, ADMINISTRATRIX. Certiorari, 302 U. S. 670, to the Circuit Court of Appeals for the Seventh Circuit. Argued February 1, 2, 1938. Decided February 7, 1938. *Per Curiam:* The judgment is reversed upon the authority of *Tyler* v. *United States,* 281 U. S. 497. MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration or decision of this case. *Mr. Andrew D. Sharpe,* with whom *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Morton K. Rothschild* were on the brief, for petitioner. *Mr. Jay E. Darlington,* with whom *Mr. William N. Haddad* was on the brief, for respondent. By leave of Court, *Mr. John E. Hughes* filed a brief as *amicus curiae,* in support of respondent. Reported below: 90 F. 2d 790.

No. 469. FOSTER, EXECUTRIX, *v.* COMMISSIONER OF INTERNAL REVENUE. Certiorari, 302 U. S. 678, to the Circuit Court of Appeals for the Ninth Circuit. Argued February 2, 1938. Decided February 7, 1938. *Per Curiam:* The judgment is affirmed. *Tyler* v. *United States,* 281 U. S. 497; *Gwinn* v. *Commissioner,* 287 U. S. 224. MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration or decision of this case. *Mr. Philip G. Sheehy* for petitioner. *Mr. Andrew D. Sharpe,* with whom *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key, Norman D. Keller,* and *Lee A. Jackson* were on the brief, for respondent. By

leave of Court, *Mr. W. H. Morrissey* filed a brief on behalf of the San Mateo County Title Co., as *amicus curiae*, in support of petitioner. Reported below: 90 F. 2d 486.

No. —, original. Ex parte Bryant McQuillen et al. February 7, 1938. Motions for leave to file petitions for writs of mandamus and prohibition denied. The Chief Justice and Mr. Justice Stone took no part in the consideration or decision of these applications.

No. —, original. Ex parte Charles E. Phillips. February 7, 1938. Motion for leave to file petition for writ of habeas corpus denied.

No. —, original. Ex parte Andrew B. Young. February 7, 1938. Motion for leave to file petition for declaratory judgment denied.

No. 748. Poole *v.* Florida. Appeal from the Supreme Court of Florida. Decided February 14, 1938. *Per Curiam:* The appeal herein is dismissed for the reason that the judgment sought to be reviewed is based upon a non-federal ground adequate to support it. *Quong Ham Wah Co.* v. *Industrial Commission,* 255 U. S. 445, 448, 449; *Hebert* v. *Louisiana,* 272 U. S. 312, 316, 317; *Susquehanna Co.* v. *Tax Commission* (No. 2) 283 U. S. 297, 299, 300; *Liggett & Myers Tobacco Co.* v. *South Carolina,* 291 U. S. 652. The motion for leave to proceed further *in forma pauperis* is denied. *Mr. W. D. Bell* for appellant. No appearance for appellee. Reported below: 129 Fla. 841; 177 So. 195.

No. —, original. Ex parte Elbert Elwood Cogg. February 14, 1938. Motion for leave to file petition for writ of habeas corpus denied.

No. 123. Adams, Receiver, *v.* Nagle et al.; and

No. 124. Same *v.* Tobias et al. February 14, 1938. Restored to the docket and assigned for reargument. *Messrs. Brice Clagett, Charles E. Wainwright, Charles W. Matten* and *George P. Barse* for petitioner. *Messrs. Edward W. Madeira, Lemuel B. Schofield* and *W. Bradley Ward* for respondents. Reported below: 88 F. 2d 936.

No. 738. Mooney *v.* Smith, Warden. Petition for writ of certiorari to the Supreme Court of California. February 14, 1938. The petitioner having withdrawn the motion for leave to proceed on a printed abstract of the record and having moved for time to present a brief in support of a petition for certiorari, the latter motion is granted, and it is ordered that petitioner have thirty days from this date in which to file with this Court and serve upon respondent a brief in support of the petition for certiorari, and that respondent have thirty days after such filing and service to file with the Court and serve upon petitioner an opposing brief. The parties may refer to the typewritten record in the respective briefs above mentioned. Questions in relation to the preparation and printing of the record or abstracts thereof will be reserved until the coming in of such briefs. *Messrs. Frank P. Walsh, John F. Finerty* and *George T. Davis* for petitioner. *Messrs. U. S. Webb,* Attorney General, and *William F. Cleary,* Deputy Attorney General, of California, for respondent. Reported below: 73 F. 2d 554.

No. 768. RUST *v.* PRATT, SHERIFF, ET AL.;
No. 769. JENNINGS *v.* SAME;
No. 770. ABBOTT *v.* SAME; and
No. 771. TIGERT *v.* SAME. Appeals from the Supreme Court of Oregon. Decided February 28, 1938. *Per Curiam:* The appeals herein are dismissed (1) for the reason that the judgments sought to be reviewed are based upon a non-federal ground adequate to support them, *Doyle* v. *Atwell,* 261 U. S. 590; *Cox* v. *Colorado,* 282 U. S. 807; *Woolsey* v. *Best,* 299 U. S. 1; (2) for the want of a substantial federal question, *Twining* v. *New Jersey,* 211 U. S. 78, 106, 111–114; *Snyder* v. *Massachusetts,* 291 U. S. 97, 105; *Brown* v. *Mississippi,* 297 U. S. 278, 285; *Palko* v. *Connecticut,* 302 U. S. 319. *Mr. Mortimer Riemer* for appellants. No appearance for appellees. Reported below: 157 Ore. 505; 72 P. 2d 533.

No. 792. WILLIAMS ET AL. *v.* QUILL, PRESIDENT OF THE TRANSPORT WORKERS UNION OF AMERICA, ET AL. Appeal from the Supreme Court of New York. Decided February 28, 1938. *Per Curiam:* The motion of the appellants for leave to file supplemental statement as to jurisdiction is granted. The motion of the appellees to dismiss the appeal is granted, and the appeal is dismissed for the want of a final judgment. *Verden* v. *Coleman,* 18 How. 86; *Reddall* v. *Bryan,* 24 How. 420, 422; *Brannan* v. *Harrison,* 284 U. S. 579. *Mr. Nathan W. Math* for appellants. *Messrs. Harold Sacher* and *George D. Yeomans* for appellees. Reported below: 277 N. Y. 1; 12 N. E. 547; 1 N. Y. S. 2d 507.

No. —, original. EX PARTE WALTER GROSS. February 28, 1938. Motion for leave to file petition for writ of habeas corpus denied.

No. 897, October Term 1936. McDONALD *v.* UNITED STATES. February 28, 1938. The petition for a writ of error coram nobis is denied. MR. JUSTICE REED took no part in the consideration or decision of this application. See 301 U. S. 697; 302 U. S. 773.

No. 753. GROVES ET AL. *v.* BOARD OF EDUCATION OF CHICAGO. Appeal from the Supreme Court of Illinois. Decided March 7, 1938. *Per Curiam:* The motion of the appellee to dismiss the appeal is granted and the appeal is dismissed (1) for the want of a final judgment, *Bostwick* v. *Brinkerhoff,* 106 U. S. 3; *Cotton* v. *Hawaii,* 211 U. S. 162, 170; *Georgia Ry. Co.* v. *Decatur,* 262 U. S. 432, 437; (2) for the want of a substantial federal question, *Phelps* v. *Board of Education,* 300 U. S. 319; *Dodge* v. *Board of Education,* 302 U. S. 74. *Mr. John E. Groves* and *Mary E. Stanton, pro se. Messrs. Richard S. Folsom, Frank S. Righeimer, Ralph W. Condes,* and *Frank R. Schneberger* for appellee. Reported below: 367 Ill. 91; 10 N. E. 2d 403.

No. 778. ADLER ET AL. *v.* CINCINNATI ET AL. Appeal from the Supreme Court of Ohio. Decided March 7, 1938. *Per Curiam:* The motion of the appellees to dismiss the appeal is granted and the appeal is dismissed for the want of a substantial federal question. *Bellingham Bay & B. C. R. Co.* v. *New Whatcom,* 172 U. S. 314, 320; *Ballard* v. *Hunter,* 204 U. S. 241, 262; *North Laramie Land Co.* v. *Hoffman,* 268 U. S. 276, 283; *Witzelberg* v. *Cincinnati,* 302 U. S. 635. *Mr. Edward M. Ballard* for appellants. *Mr. John D. Ellis* for appellees. Reported below: 133 Ohio St. 129; 12 N. E. 2d 288.

No. 366. KANSAS FARMERS UNION ROYALTY CO. ET AL. *v.* SHAFFER, EXECUTOR, ET AL. Appeal from the Supreme Court of Kansas. Argued February 2, 1938. Decided March 7, 1938. *Per Curiam:* As it appears, after hearing argument, that there is no properly presented federal question, the motion of the appellants to reinstate the case for further consideration is denied and the appeal is dismissed. *Clarke* v. *McDade,* 165 U. S. 168, 172; *Chesapeake & Ohio Ry. Co.* v. *McDonald,* 214 U. S. 191, 193; *Hiawassee Power Co.* v. *Carolina-Tenn. Co.,* 252 U. S. 341, 343; *Witzelberg* v. *Cincinnati,* 302 U. S. 635. *Mr. L. E. Clevenger,* with whom *Messrs. B. I. Litowich* and *S. H. King* were on the brief, for appellants. *Mr. D. M. McCarthy, Kathryn O'Loughlin McCarthy,* and *Mr. Oscar Ostrum* were on the brief for appellees. Reported below: 146 Kan. 84; 69 P. 2d 4.

No. 427. SZOLD *v.* OUTLET EMBROIDERY SUPPLY CO. Appeal from the Supreme Court of New York. Argued February 28, 1938. Decided March 7, 1938. *Per Curiam:* As it appears, after hearing argument, that no substantial federal question is involved, the appeal is dismissed. (1) *Dent* v. *West Virginia,* 129 U. S. 114, 122, 123; *Watson* v. *Maryland,* 218 U. S. 173, 176, 177; *Semler* v. *Dental Examiners,* 294 U. S. 608, 611, 612; (2) *Second Employers' Liability Cases,* 223 U. S. 1, 52; *New York Central R. Co.* v. *White,* 243 U. S. 188, 207; (3) *Liebermann* v. *Van De Carr,* 199 U. S. 552, 562; *Douglas* v. *Noble,* 261 U. S. 165, 168, 169; *Highland Farms Dairy* v. *Agnew,* 300 U. S. 608, 612. *Messrs. Eugene L. Garey* and *Earl J. Garey* submitted the cause on brief for appellant. *Mr. Henry Epstein,* Solicitor General, with whom *Mr. John J. Bennett, Jr.,* Attorney General, of New York, was on the brief, for appellee. Reported below: 274 N. Y. 271; 248 App. Div. 865; 8 N. E. 2d 858; 291 N. Y. S. 395.

No. —, original. Ex parte Howard Lee. March 7, 1938. The motion for leave to file a petition for writ of habeas corpus is denied without prejudice to appropriate application for review of the judgment of the Supreme Court of California on writ of certiorari or appeal. *Urquhart* v. *Brown,* 205 U. S. 179, 182, 183.

No. 817. Kansas Gas & Electric Co. *v.* McPherson et al. Appeal from the Supreme Court of Kansas. Decided March 14, 1938. *Per Curiam:* The motion of the appellees to dismiss the appeal is granted and the appeal is dismissed for the want of a substantial federal question. *Springfield Gas Co.* v. *Springfield,* 257 U. S. 66; *Puget Sound Co.* v. *Seattle,* 291 U. S. 619, 624, 625. *Messrs. Henry L. McCune* and *Blatchford Downing* for appellant. *Messrs. William Drennan, J. Rodney Rhoades,* and *Claude I. Depew* for appellees. Reported below: 146 Kan. 614; 72 P. 2d 985.

No. 822. Hering et al. *v.* State Board of Education. Appeal from the Court of Errors and Appeals of New Jersey. Decided March 14, 1938. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. *Hamilton* v. *Regents,* 293 U. S. 245, 261, 262; *Coale* v. *Pearson,* 290 U. S. 597; *Leoles* v. *Landers,* 302 U. S. 656. *Messrs. Abraham J. Isserman, Martin Conboy, Osmond K. Fraenkel, Carol King,* and *Olin R. Moyle* for appellants. No appearance for appellee. Reported below: 118 N. J. L. 566; 117 N. J. L. 455; 194 A. 177; 189 A. 629.

No. 558. Sharp et al. *v.* Commissioner of Internal Revenue. Certiorari, 302 U. S. 680, to the Circuit Court of Appeals for the Third Circuit. Argued March 9, 1938.

Decided March 14, 1938. *Per Curiam:* The judgment is reversed. *Freuler* v. *Helvering,* 291 U. S. 35, 43, 45; *Blair* v. *Commissioner,* 300 U. S. 5, 9, 10. *Mr. William Barclay Lex,* with whom *Mr. Charles C. Norris, Jr.* was on the brief, for petitioners. *Mr. A. F. Prescott* argued the cause, and *Acting Solicitor General Bell* was on a memorandum, for respondent. Reported below: 91 F. 2d 802.

No. —, original. Ex parte Jesse C. Duke. March 14, 1938. Motion for leave to file petition for writ of habeas corpus denied.

No. —, original. Ex parte Nat J. Humphries. March 14, 1938. Motion for leave to file petition for writ of habeas corpus denied.

No. 13. United Gas Public Service Co. *v.* Texas et al. March 14, 1938. It is ordered that the opinion in this cause be amended by striking out the period after the words "and return" in line 3, on page 14, and inserting the words "for the period to which the evidence before the Court appropriately related and not simply for the years 1932 and 1933." The petition for rehearing is denied. Reported as amended, *ante,* p. 123.

No. 161. South Carolina State Highway Dept. et al. *v.* Barnwell Brothers, Inc., et al. March 14, 1938. It is ordered that the opinion in this cause be amended by substituting for the words "But as the district court held," in the last sentence of the last full paragraph on page 4 of the opinion, the following words: "But appellees do not challenge here the ruling of the district court that." The petition for rehearing is denied. Reported as amended, *ante,* p. 177.

ORDER. March 14, 1938. In view of pending legislation General Order No. LIII in Bankruptcy is hereby suspended until further order of the Court.

No. 840. EDGAR BROTHERS CO. *v.* STATE REVENUE COMMISSION ET AL. Appeal from the Supreme Court of Georgia. Decided March 28, 1938. *Per Curiam:* The motion of the appellees to dismiss the appeal is granted and the appeal is dismissed for the want of a final judgment. *California National Bank* v. *Stateler,* 171 U. S. 447, 449; *Haseltine* v. *Central Bank of Springfield (No. 1),* 183 U. S. 130, 131; *Bruce* v. *Tobin,* 245 U. S. 18; *Mississippi Central R. Co.* v. *Smith,* 295 U. S. 718. *Mr. Orville A. Park* for appellant. *Messrs. M. J. Yeomans* and *O. H. Dukes* for appellees. Reported below: 185 Ga. 216; 194 S. E. 505.

No. 857. KIRKPATRICK *v.* HARDT. On petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. Decided March 28, 1938. *Per Curiam:* The motion for leave to proceed further herein *in forma pauperis* is denied for the reason that the Court, upon examination of the papers herein submitted, finds that the application for writ of certiorari was not made within the time provided by law. Act of February 13, 1925, sec. 8 (a) (43 Stat. 936, 940). *Finn* v. *Railroad Commission,* 286 U. S. 559; *Cresswell &c.* v. *Tillinghast,* 286 U. S. 560. The petition for writ of certiorari is therefore also denied. *Mr. James Martin Kirkpatrick, pro se.* No appearance for respondent. Reported below: 91 F. 2d 857.

No. —, original. EX PARTE ALBERT R. HOUSE. March 28, 1938. The rule to show cause herein is discharged and the motion for leave to file petition for writ of habeas corpus is denied.

No. —. THE SILVERSHIRT LEGION OF AMERICA, INC. ET AL. *v.* COMMITTEE ON EDUCATION AND LABOR OF THE UNITED STATES SENATE ET AL. March 28, 1938. The application for preliminary injunction pending application for writ of certiorari is denied.

No. 847. POPE *v.* UNITED STATES. March 28, 1938. Motion to remand to the Court of Claims for further findings denied.

No. 871. HELLER *v.* CONNECTICUT. Appeal from the Supreme Court of Errors of Connecticut. Decided April 4, 1938. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Mugler* v. *Kansas,* 123 U. S. 623, 668–669; *Reduction Company* v. *Sanitary Works,* 199 U. S. 306, 324–325; *Hudson Water Co.* v. *McCarter,* 209 U. S. 349, 356; *Perley* v. *North Carolina,* 249 U. S. 510; *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365, 388, 389; *West Brothers Brick Co.* v. *Alexandria,* 302 U. S. 658. *Mr. Nathan April* for appellant. No appearance for appellee. Reported below: 123 Conn. 492; 196 A. 337.

No. 892. ALLBRITTON ET AL. *v.* WINONA. Appeal from the Supreme Court of Mississippi. Decided April 4, 1938. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Jones* v. *Portland,* 245 U. S. 217; *Green* v. *Frazier,* 253 U. S. 233; *Milheim* v. *Moffat Tunnel Dist.,* 262 U. S. 710, 717; *Carmichael* v. *Southern Coal Co.,* 301 U. S. 495, 514, 515. *Mr. W. E. Morse* for appellants. No appearance for respondent. Reported below: 181 Miss. 75; 178 So. 799.

No. —, original. EX PARTE MIKE J. LINDWAY. April 4, 1938. Motion for leave to file petition for writ of habeas corpus denied.

No. —, original. Ex parte J. R. Palmer. April 4, 1938. Motion for leave to file petition for writ of habeas corpus denied.

No. 16, original. Missouri *v.* Iowa. April 4, 1938. The answer of the defendant is received and ordered filed.

No. 805. Indiana ex rel. Valentine *v.* Marker, Trustee. On petition for writ of certiorari to the Supreme Court of Indiana. Decided April 11, 1938. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed upon the authority of *Indiana ex rel. Anderson* v. *Brand, ante,* p. 95. Mr. Justice Black dissents. *Messrs. Paul R. Shafer* and *Thomas F. O'Mara* for petitioner. No appearance for respondent. Reported below: 213 Ind. —; 8 N. E. 2d 231.

No. —. Palka *v.* Walker, Warden. April 11, 1938. The application for stay of execution pending filing of petition for writ of certiorari is denied.

DECISIONS GRANTING CERTIORARI, FROM JANUARY 18, 1938, THROUGH APRIL 11, 1938.

No. 647. Bates Manufacturing Co. *v.* United States. January 31, 1938. Petiton for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Messrs. Charles B. Rugg, F. Brian Holland,* and *Warren F. Farr* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *F. E. Youngman* for the United States. By leave of Court, *Messrs. Theodore B. Benson* and *John Jennings, Jr.* filed a brief on behalf of Pinnacle Mills, as *amicus curiae,* in support of petitioner. Reported below: 93 F. 2d 721.

No. 680. HALE *v.* KENTUCKY. January 31, 1938. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Court of Appeals of Kentucky also granted. *Messrs. Charles H. Houston* and *Leon A. Ransom* for petitioner. No appearance for respondent. Reported below: 269 Ky. 743; 108 S. W. 2d 716.

No. 730. COSMAN *v.* UNITED STATES. See *ante*, p. 617.

No. 699. JOHNSON *v.* ZERBST, WARDEN. February 14, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Elbert P. Tuttle* for petitioner. *Acting Solicitor General Bell, Assistant Attorney General McMahon,* and *Messrs. William W. Barron, Bates Booth,* and *W. Marvin Smith* for respondent. Reported below: 92 F. 2d 748.

No. 667. UNITED STATES *v.* KAPLAN. February 14, 1938. Petition for writ of certiorari to the Court of Claims granted. MR. JUSTICE REED took no part in the consideration or decision of this application. *Solicitor General Reed* for the United States. *Mr. Llewellyn A. Luce* for respondent. Reported below: 85 Ct. Cls. 158; 18 F. Supp. 965.

No. 668. UNITED STATES *v.* SHOSHONE TRIBE OF INDIANS. February 14, 1938. Petition for writ of certiorari to the Court of Claims granted. MR. JUSTICE STONE and MR. JUSTICE REED took no part in the consideration or decision of this application. *Solicitor General Reed* for the United States. *Messrs. George M. Tunison, Charles J. Kappler* and *Albert W. Jefferis* for respondent. Reported below: 85 Ct. Cls. 331.

Nos. 715 and 716. WRIGHT *v.* UNION CENTRAL LIFE INS. Co. February 28, 1938. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Samuel E. Cook, Wm. Lemke, Elmer McClain* and *Ray M. Foreman* for petitioner. *Messrs. Arthur S. Lytton, Louis M. Mantynband, Stanley K. Henshaw,* and *Virgil D. Parish* for respondent. Reported below: 91 F. 2d 894.

No. 706. NATIONAL LABOR RELATIONS BOARD *v.* MACKAY RADIO & TELEGRAPH CO. February 28, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. MR. JUSTICE REED took no part in the consideration or decision of this application. *Solicitor General Reed* and *Mr. Charles Fahy* for petitioner. *Messrs. H. W. O'Melveny* and *Howard L. Kern* for respondent. Reported below: 87 F. 2d 611; 92 F. 2d 761.

No. 723. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* NATIONAL GROCERY CO. February 28, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. MR. JUSTICE REED took no part in the consideration or decision of this application. *Solicitor General Reed* for petitioner. *Messrs. Edwin F. Smith* and *James D. Carpenter, Jr.* for respondent. Reported below: 92 F. 2d 931.

No. 779. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* GERHARDT;

No. 780. SAME *v.* WILSON; and

No. 781. SAME *v.* MULCAHY. February 28, 1938. Petition for writs of certiorari to the Circuit Court of Ap-

peals for the Second Circuit granted. The CHIEF JUSTICE took no part in the consideration or decision of this application. *Acting Solicitor General Bell* for petitioner. *Messrs. Julius Henry Cohen* and *Austin J. Tobin* for respondents. Reported below: 92 F. 2d 999.

No. 746. TAFT, EXECUTOR, *v.* COMMISSIONER OF INTERNAL REVENUE. March 7, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Robert A. Taft* for petitioner. *Acting Solicitor General Bell, Assistant Attorney General Morris,* and *Mr. J. Louis Monarch* and *Louise Foster* for respondent. Reported below: 92 F. 2d 667.

No. 756. FEDERAL TRADE COMMISSION *v.* GOODYEAR TIRE & RUBBER CO. March 7, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. MR. JUSTICE STONE and MR. JUSTICE REED took no part in the consideration or decision of this application. *Acting Solicitor General Bell* for petitioner. *Mr. William B. Cockley* for respondent. Reported below: 92 F. 2d 677.

No. 773. AETNA INSURANCE CO. *v.* UNITED FRUIT CO.;

No. 774. UNION MARINE & GENERAL INS. CO. *v.* SAME; and

No. 775. BOSTON INSURANCE CO. *v.* SAME. March 14, 1938. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. D. Roger Englar, T. Catesby Jones, Oscar R. Houston,* and *Martin Detels* for petitioners. *Messrs. Cletus Keating* and *Richard Sullivan* for respondent. Reported below: 92 F. 2d 576.

No. 796. COLEMAN ET AL. *v.* MILLER, SECRETARY, ET AL. March 28, 1938. Petition for writ of certiorari to the Supreme Court of Kansas granted. *Mr. Robert Stone* for petitioners. By leave of Court, *Attorney General Cummings* filed a memorandum on behalf of the United States as *amicus curiae,* in support of the decision below. Reported below: 146 Kan. 390; 71 P. 2d 518.

No. 802. GREAT NORTHERN RAILWAY CO. ET AL. *v.* LEONIDAS. March 28, 1938. Petition for writ of certiorari to the Supreme Court of Montana granted. *Messrs. R. E. L. Smith* and *Taylor B. Weir* for petitioners. *Mr. Lester H. Loble* for respondent. Reported below: 105 Mont. 302; 72 P. 2d 1007.

No. 811. GUARANTY TRUST CO., EXECUTOR, *v.* VIRGINIA. March 28, 1938. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia granted. *Mr. Jas. R. Caskie* for petitioner. *Messrs. Abram P. Staples, W. W. Martin,* and *Henry R. Miller, Jr.* for respondent. Reported below: 169 Va. 414; 193 S. E. 534.

No. 814. VALLI ET AL. *v.* UNITED STATES. March 28, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. Essex S. Abbott* for petitioners. *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Messrs. William W. Barron* and *W. Marvin Smith* for the United States. Reported below: 94 F. 2d 687.

No. 782. ZERBST, WARDEN, *v.* KIDWELL;
No. 783. SAME *v.* SMITH;
No. 784. SAME *v.* COLLINS;

No. 785. SAME *v.* OWENS;
No. 786. SAME *v.* PEEL;
No. 787. SAME *v.* JONES;
No. 788. SAME *v.* STONE; and
No. 789. SAME *v.* SULLIVAN. March 28, 1938. Petition for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. MR. JUSTICE REED took no part in the consideration or decision of this application. *Acting Solicitor General Bell* for petitioner. *Mr. J. F. Kemp* for respondents. Reported below: 92 F. 2d 756.

No. 815. UNITED STATES *v.* ONE 1936 MODEL FORD. April 4, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. MR. JUSTICE BUTLER and MR. JUSTICE STONE took no part in the consideration or decision of this application. *Acting Solicitor General Bell* for the United States. *Messrs. Duane R. Dills* and *Eugene E. Heaton* for respondent. Reported below: 93 F. 2d 771.

No. 805. INDIANA EX REL. VALENTINE *v.* MARKER, TRUSTEE. See *ante*, p. 628.

No. 860. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* WINMILL. April 11, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Jackson* for petitioner. *Mr. Thomas M. Wilkins* for respondent. Reported below: 93 F. 2d 494.

No. 864. LOWE BROTHERS CO. *v.* UNITED STATES. April 11, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted.

Messrs. William Cogger and *John E. Hughes* for petitioner. *Solicitor General Jackson* for the United States. Reported below: 92 F. 2d 905.

No. 882. ALLEN, COLLECTOR OF INTERNAL REVENUE, *v.* REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA. April 11, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Solicitor General Jackson* for petitioner. *Messrs. M. J. Yeomans, Marion Smith, M. E. Kilpatrick,* and *Hamilton Lokey* for respondents. Reported below: 93 F. 2d 887.

No. 902. CHANDLER ET AL. *v.* WISE ET AL. April 11, 1938. Petition for writ of certiorari to the Court of Appeals of Kentucky granted. *Mr. J. W. Jones* for petitioners. *Messrs. Lafon Allen* and *Oldham Clarke* for respondents. Reported below: 270 Ky. 1; 108 S. W. 2d 1024.

DECISIONS DENYING CERTIORARI, FROM JANUARY 18, 1938, THROUGH APRIL 11, 1938.

No. 684. POLLITT *v.* COX; and

No. 736. SAME *v.* WHEAT. January 31, 1938. Petitions for writs of certiorari to the Court of Appeals for the District of Columbia, and motions for leave to proceed further *in forma pauperis,* denied. *Basil H. Pollitt, pro se.* Reported below: See 68 App. D. C. 90; 93 F. 2d 249.

No. 711. HILL *v.* RAILROAD INDUSTRIAL FINANCE CO. ET AL. January 31, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Robert L. Hill, pro se.* Reported below: 93 F. 2d 973.

No. 725. Bostic *v.* United States. January 31, 1938. Petition for writ of certiorari to the Court of Appeals for the District of Columbia, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Sol M. Alpher* for petitioner. No appearance for the United States. Reported below: 94 F. 2d 636.

No. 649. Harding *v.* Kentucky Title Trust Co. January 31, 1938. Motion for supersedeas denied. Petition for writ of certiorari to the Court of Appeals of Kentucky also denied. *Mr. Colescott P. Harding, pro se. Mr. Shackelford Miller, Jr.* for respondent. Reported below: 269 Ky. 622; 108 S. W. 2d 539.

No. 634. Van Riper *v.* United States. January 31, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John S. Wise, Jr.* for petitioner. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Messrs. William W. Barron* and *W. Marvin Smith* for the United States. Reported below: 92 F. 2d 1020.

No. 635. Clarke, Trustee *v.* Chicago, B. & Q. R. Co. January 31, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Samuel Meyers* for petitioner. *Mr. J. C. James* for respondent. Reported below: 91 F. 2d 635.

No. 637. President of the United States ex rel. Caputo *v.* Kelly, U. S. Marshal, et al. January 31, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Lewis Landes* and *Julius I. Puente* for petitioner. *Messrs. John W. Davis, Theodore Kiendl* and *A. S. Edmonds* for respondents. Reported below: 92 F. 2d 603.

No. 642. FIDELITY-PHENIX FIRE INS. CO. ET AL. *v.* CORTEZ CIGAR CO.; and

No. 650. CORTEZ CIGAR CO. *v.* FIDELITY-PHENIX FIRE INS. CO. ET AL. January 31, 1938. Petitions for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Dan MacDougald* and *Anton P. Wright* for petitioners in No. 642, and respondents in No. 650. *Messrs. A. R. Lawton, Jr.* and *T. M. Cunningham* for the Cortez Cigar Co. Reported below: 92 F. 2d 882.

No. 644. ISACKSON *v.* SCHOOL DISTRICT No. 37. January 31, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John Lichty* for petitioner. *Mr. K. C. Tanner* for respondent. Reported below: 92 F. 2d 768.

No. 648. GOLDBERG *v.* MCCAULEY, WARDEN. January 31, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Samuel B. Bassett* for petitioner. No appearance for respondent. Reported below: 91 F. 2d 1016.

No. 656. LOGAN, TRUSTEE IN BANKRUPTCY, *v.* STANOLIND OIL & GAS CO. ET AL. January 31, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John T. Pearson* for petitioner. No appearance for respondents. Reported below: 92 F. 2d 28.

No. 661. COCHRANE *v.* UNITED STATES; and

No. 662. FELLOWS *v.* UNITED STATES. January 31, 1938. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs.*

Leslie G. Pefferle and *Roswell B. O'Harra* for petitioners. *Acting Solicitor General Bell, Assistant Attorney General McMahon,* and *Messrs. William W. Barron* and *W. Marvin Smith* for the United States. By leave of Court, briefs of *amici curiae* were filed by *Mr. Gurney E. Newlin,* on behalf of the Cerritos Gun Club et al., and by *Mr. Bennett Sanderson,* on behalf of the Massachusetts Waterfowlers' Assn., in support of petitioners. Reported below: 92 F. 2d 623.

No. 665. J. A. Livingston, Inc., *v.* Pocono Rubber Cloth Co. January 31, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Abraham Shamos* and *Milton E. Mermelstein* for petitioner. *Mr. T. Hart Anderson* for respondent. Reported below: 92 F. 2d 290.

No. 669. Hipp, Trustee in Bankruptcy, *v.* Boyle, Treasurer. January 31, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Merritt A. Vickery* for petitioner. *Mr. Frederick W. Green* for respondent. Reported below: 92 F. 2d 338.

No. 722. Keller *v.* Zerbst, Warden. February 7, 1938. 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. *John Keller, pro se.* No appearance for respondent. 97 F. 2d 257.

No. 654. McQuillen et al. *v.* Coleman, Judge. February 7, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. The

CHIEF JUSTICE and MR. JUSTICE STONE took no part in the consideration or decision of this application. *Mr. Samuel Gottlieb* for petitioners. *Mr. James Piper* for respondent. Reported below: 93 F. 2d 1009.

No. 681. MOULDING-BROWNELL CORP. *v.* SULLIVAN ET AL. February 7, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Employers Corporation* v. *Bryant*, 299 U. S. 374. *Mr. James J. Magner* for petitioner. *Mr. Harold R. Schradzke* for respondents. Reported below: 92 F. 2d 646.

No. 657. SECURITY-FIRST NATIONAL BANK, TRUSTEE, *v.* WELCH, FORMER COLLECTOR OF INTERNAL REVENUE. February 7, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Dana Latham* and *George Bouchard* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Harry Marselli* for respondent. Reported below: 92 F. 2d 357.

No. 666. ABBOTT, ADMINISTRATRIX, *v.* MORGENTHAU, SECRETARY OF THE TREASURY, ET AL. February 7, 1938. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. F. Eberhart Haynes* and *Thomas E. Rhodes* for petitioner. *Acting Solicitor General Bell, Assistant Attorney General Whitaker,* and *Mr. Henry A. Julicher* for respondents. Reported below: 68 App. D. C. 83; 93 F. 2d 242.

No. 677. DIP *v.* UNITED STATES. February 7, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Raymond T.*

Coughlin for petitioner. *Acting Solicitor General Bell, Assistant Attorney General McMahon,* and *Mr. William W. Barron* for the United States. Reported below: 92 F. 2d 802.

No. 686. CUDAHY PACKING CO. *v.* MCBRIDE. February 7, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. J. A. C. Kennedy* and *Ralph E. Svoboda* for petitioner. *Messrs. Wymer Dressler* and *Robert D. Neely* for respondent. Reported below: 92 F. 2d 737.

No. 745. NEW YORK EX REL. GEISELMAN *v.* HUNT, WARDEN. February 14, 1938. Petition for writ of certiorari to the Wyoming County Court, of New York, and motion for leave to proceed further *in forma pauperis,* denied. *Samuel L. Geiselman, pro se.* No appearance for respondent. Reported below: 275 N. Y. 612; 11 N. E. 2d 781.

No. 672. LEVEY *v.* UNITED STATES. February 14, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John F. Garvin* for petitioner. *Acting Solicitor General Bell, Assistant Attorney General McMahon,* and *Mr. William W. Barron* for the United States. Reported below: 92 F. 2d 688.

No. 674. SCHRIBER-SCHROTH CO. *v.* CLEVELAND TRUST CO. ET AL.;

No. 675. ABERDEEN MOTOR SUPPLY CO. *v.* SAME; and

No. 676. F. E. ROWE SALES CO. *v.* SAME. February 14, 1938. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs.*

Thomas G. Haight, George L. Wilkinson, John H. Bruninga, and *John H. Sutherland* for petitioners. *Messrs. A. C. Denison, F. O. Richey* and *Wm. C. McCoy* for respondents. Reported below: 92 F. 2d 330.

No. 679. CARTER *v.* MARVEL CARBURETOR CO. February 14, 1938. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Mr. William C. Carter, pro se. Mr. Wilbur M. Brucker* for respondent. Reported below: 281 Mich. 121; 274 N. W. 733.

No. 682. DUTCHESS UNDERWEAR CORP. *v.* INDUSTRIAL RAYON CORP. February 14, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Asher Blum* for petitioner. *Mr. Inzer B. Wyatt, Jr.* for respondent. Reported below: 92 F. 2d 33.

No. 700. PACIFIC GAS & ELECTRIC CO. *v.* SACRAMENTO MUNICIPAL UTILITY DISTRICT ET AL. February 14, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Warren Olney Jr.* and *J. M. Mannon, Jr.* for petitioner. *Mr. Stephen W. Downey* for respondents. Reported below: 92 F. 2d 365.

No. 704. CHICAGO, B. & Q. R. CO. *v.* GOODMAN, ADMINISTRATRIX. February 14, 1938. Petition for writ of certiorari to the Appellate Court, 1st District, of Illinois, denied. *Mr. J. C. James* for petitioner. *Mr. Samuel Cohen* for respondent. Reported below: 289 Ill. App. 320; 7 N. E. 2d 393.

No. 708. DANISH, TRUSTEE, *v.* SOFRANSKI ET AL. February 14, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Samuel C. Duberstein* for petitioner. *Mr. Louis J. Vorhaus* for respondents. Reported below: 93 F. 2d 424.

No. 712. WABASH APPLIANCE CORP. ET AL. *v.* GENERAL ELECTRIC CO. February 14, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Samuel E. Darby, Jr.* and *Paul Kolisch* for petitioners. *Messrs. Hubert Howson* and *Merrell E. Clark* for respondent. Reported below: 93 F. 2d 671.

No. 721. PEERLESS EQUIPMENT CO. *v.* W. H. MINER, INC. February 14, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Otto Raymond Barnett, George L. Wilkinson,* and *Rodney Bedell* for petitioner. *Mr. George I. Haight* for respondent. Reported below: 93 F. 2d 98.

No. 762. BELK *v.* MASSMAN CONSTRUCTION CO. February 28, 1938. Petition for writ of certiorari to the Supreme Court of Nebraska, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Carl F. Belk, pro se.* No appearance for respondent. Reported below: 133 Neb. 303; 275 N. W. 76.

No. 777. POLLITT *v.* HALL, ACTING SUPERINTENDENT. February 28, 1938. Petition for writ of certiorari to the Court of Appeals for the District of Columbia, and motion for leave to proceed further *in forma pauperis,* denied. *Basil H. Pollitt, pro se.* No appearance for respondent. Reported below: 68 App. D. C. 90; 93 F. 2d 249.

No. 791. SIMPSON ET AL. *v.* DYER ET AL. February 28, 1938. 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. *George T. Simpson, pro se.* No appearance for respondents. Reported below: 92 F. 2d 1016.

No. 719. PRATT *v.* UNITED STATES. February 28, 1938. Petition for writ of certiorari to the Court of Appeals for the District of Columbia, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. James J. Laughlin* for petitioner. No appearance for the United States. Reported below: 68 App. D. C. 106; 93 F. 2d 652.

No. 799. BROWN *v.* BROWN. February 28, 1938. Petition for writ of certiorari to the Superior Court of Pennsylvania, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. James Yearsley* for petitioner. No appearance for respondent. Reported below: 124 Pa. Super. 237; 188 A. 389; 189 A. 711.

No. 727. UNITED STATES *v.* BAKER ET AL. February 28, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. MR. JUSTICE REED took no part in the consideration or decision of this application. *Acting Solicitor General Bell* for the United States. *Mr. A. G. Bush* for respondents. Reported below: 93 F. 2d 332.

No. 655. PINK, SUPERINTENDENT OF INSURANCE, *v.* UNITED STATES. February 28, 1938. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Alfred C. Bennett* and *Benjamin Potoker* for petitioner. *Acting*

Solicitor General Bell, Assistant Attorney General Whitaker, and *Mr. Paul A. Sweeney* for the United States. Reported below: 85 Ct. Cls. 121.

No. 660. MORAN, RECEIVER, *v.* UNITED STATES. February 28, 1938. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Meredith M. Daubin* and *H. L. McCormick* for petitioner. *Acting Solicitor General Bell, Assistant Attorney General Morris,* and *Mr. Sewall Key* for the United States. Reported below: 85 Ct. Cls. 492; 19 F. Supp. 557.

No. 664. WILKINSON *v.* UNITED STATES. February 28, 1938. Petition for writ of certiorari to the Court of Claims denied. *Mr. Rees B. Gillespie* for petitioner. *Acting Solicitor General Bell, Assistant Attorney General Whitaker,* and *Messrs. Henry A. Julicher* and *Paul A. Sweeney* for the United States. Reported below: 85 Ct. Cls. 329.

No. 683. UNITED STATES EX REL. PANNONE *v.* MARTINEAU, U. S. IMMIGRATION INSPECTOR. February 28, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Thomas R. Robinson* for petitioner. *Acting Solicitor General Bell, Assistant Attorney General McMahon,* and *Messrs. William W. Barron* and *Bart W. Butler* for respondent. Reported below: 93 F. 2d 1021.

No. 685. TAYLOR *v.* CALMAR STEAMSHIP CORP. February 28, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Howard M. Long* for petitioner. *Messrs. Frank A. Bull, O. D. Duncan,* and *Russell T. Mount* for respondent. Reported below: 92 F. 2d 84.

No. 687. WALKER *v.* UNITED STATES;
No. 688. DRUMMOND *v.* SAME;
No. 689. LUTERAN *v.* SAME;
No. 690. ADAMS *v.* SAME;
No. 691. LORNE E. WELLS *v.* SAME;
No. 692. JOE R. WELLS, JR. *v.* SAME;
No. 693. ROACH *v.* SAME;
No. 694. LITTLE *v.* SAME;
No. 695. STEVENS *v.* SAME;
No. 696. HOLMAN *v.* SAME;
No. 697. NEEPER *v.* SAME; and
No. 698. DITSCH *v.* SAME. February 28, 1938. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. I. J. Ringolsky, Harry L. Jacobs, Ludwick Graves, Irvin Fane, James Dalio* and *Wm. G. Boatright* for petitioners. *Acting Solicitor General Bell, Assistant Attorney General McMahon, William W. Barron, Mathew F. McGuire,* and *W. Marvin Smith* for the United States. Reported below: 93 F. 2d 383, 395, 401, 409.

No. 702. ASSOCIATED INDEMNITY CORP. ET AL. *v.* GEORGE F. GETTY OIL CO. February 28, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Frank A. Leffingwell* for petitioners. No appearance for respondent. Reported below: 92 F. 2d 255.

No. 717. ATLANTA BEER DISTRIBUTING CO. *v.* ALEXANDER, ADMINISTRATOR, FEDERAL ALCOHOL ADMINISTRATION. February 28, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. James F. Kemp* for petitioner. *Acting Solicitor General Bell, Assistant Attorney General McMahon,* and *Messrs. William W. Barron* and *W. Marvin Smith* for respondent. Reported below: 93 F. 2d 11.

No. 729. HARRISS ET AL. *v.* INDEMNITY INSURANCE CO. ET AL. February 28, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Warner Pyne* for petitioners. *Mr. James I. Cuff* for respondents. Reported below: 93 F. 2d 459.

No. 658. MIDDLE STATES PETROLEUM CORP. *v.* UNITED STATES. February 28, 1938. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Thaddeus G. Benton* and *Conrad E. Cooper* for petitioner. *Acting Solicitor General Bell, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Guy Patten* for the United States. Reported below: 85 Ct. Cls. 232; 18 F. Supp. 945; 21 F. Supp. 128.

No. 663. BOTHWELL ET AL., RECEIVERS, *v.* UNITED STATES. February 28, 1938. Petition for writ of certiorari to the Court of Claims denied. *Mr. Walter J. Carrico* for petitioners. *Acting Solicitor General Bell, Assistant Attorney General Morris,* and *Messrs. J. Louis Monarch* and *Guy Patten* for the United States. Reported below: 85 Ct. Cls. 150; 18 F. Supp. 1011.

No. 701. HYLAND *v.* MILLERS NATIONAL INSURANCE CO. ET AL. February 28, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. William S. Graham* for petitioner. *Messrs. Jewel Alexander, Percy V. Long* and *Wm. H. Orrick* for respondents. Reported below: 91 F. 2d 735; 92 F. 2d 462.

No. 703. BULL, EXECUTOR *v.* UNITED STATES. February 28, 1938. Petition for writ of certiorari to the Court of Claims denied. *Mr. David A. Buckley, Jr.* for peti-

tioner. *Acting Solicitor General Bell, Assistant Attorney General Morris,* and *Mr. J. Louis Monarch* for the United States. Reported below: 84 Ct. Cls. 632.

No. 713. DUBRIN ET AL. *v.* UNITED STATES; and

No. 714. WEINSTEIN *v.* SAME. February 28, 1938. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. George H. Combs, Jr.* for petitioners in No. 713. *Mr. C. Dickerman Williams* for petitioner in No. 714. *Acting Solicitor General Bell, Assistant Attorney General McMahon,* and *Messrs. William W. Barron* and *W. Marvin Smith* for the United States. Reported below: 93 F. 2d 499.

No. 718. TOMLINSON *v.* UNITED STATES. February 28, 1938. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. James A. O'Shea, John H. Burnett,* and *Alfred Goldstein* for petitioner. *Acting Solicitor General Bell, Assistant Attorney General McMahon,* and *Mr. William W. Barron* for the United States. Reported below: 68 App. D. C. 106; 93 F. 2d 652.

No. 720. MACKENZIE-KENNEDY *v.* UNITED STATES. February 28, 1938. Petition for writ of certiorari to the Court of Claims denied. *Mr. Herman J. Galloway* for petitioner. *Acting Solicitor General Bell, Assistant Attorney General Whitaker,* and *Messrs. Henry A. Julicher* and *Paul P. Stoutenburgh* for the United States. Reported below: 85 Ct. Cls. 405.

No. 724. LUPO *v.* ZERBST, WARDEN. February 28, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William*

Schley Howard for petitioner. *Acting Solicitor General Bell, Assistant Attorney General McMahon,* and *Messrs. William W. Barron* and *Bates Booth* for respondent. Reported below: 92 F. 2d 362.

No. 728. BYRD-FROST, INC. *v.* ELDER. February 28, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Webster Atwell* for petitioner. *Mr. P. G. McElwee* for respondent. Reported below: 93 F. 2d 30.

No. 731. YVETTE COMPANY *v.* UNITED STATES. February 28, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Robert T. Tedrow* for petitioner. *Acting Solicitor General Bell, Assistant Attorney General Morris,* and *Messrs. J. Louis Monarch, William H. Boyd, Earl C. Crouter,* and *Joseph W. Burns* for the United States. Reported below: 93 F. 2d 1019.

No. 732. CORBETT *v.* EQUITABLE LIFE INSURANCE SOCIETY. February 28, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Thomas F. O'Mara* for petitioner. *Mr. Henry I. Green* for respondent.

Nos. 733, 734, and 735. WILLCOX, TRUSTEE IN BANKRUPTCY, *v.* GOESS, RECEIVER. February 28, 1938. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Morris Ehrlich* for petitioner. *Messrs. Martin Conboy, Bernard Sobol, George P. Barse,* and *John F. Anderson* for respondent. Reported below: 92 F. 2d 8.

No. 739. AMERICAN SURETY CO. *v.* TOWN OF HAMDEN. February 28, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles D. Lockwood* for petitioner. *Mr. Curtiss K. Thompson* for respondent. Reported below: 93 F. 2d 482.

No. 743. MAYNARD ET AL. *v.* FINNEY ET AL. February 28, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. A. C. Wheeler* and *Robert L. Russell* for petitioners. No appearance for respondents. Reported below: 92 F. 2d 454.

No. 749. BALTIMORE & OHIO R. CO. *v.* LOVE, ADMINISTRATRIX. February 28, 1938. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. William C. Combs* for petitioner. *Mr. Eugene Van Voorhis* for respondent. Reported below: 276 N. Y. 513; 251 App. Div. 783; 12 N. E. 454; 298 N. Y. S. 175.

No. 737. KLIPSTEIN, TRUSTEE, *v.* DAVIDOWICZ ET AL. March 7, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Harold H. Levin* for petitioner. *Messrs. John J. Bennett, Jr.,* Attorney General, *Henry Epstein,* Solicitor General, and *Mr. Joseph A. McLaughlin,* Assistant Attorney General, of New York, for the Industrial Board, respondent. Reported below: 92 F. 2d 417.

No. 741. PINK, SUPERINTENDENT OF INSURANCE, *v.* DEMPSEY; and

No. 767. DEMPSEY *v.* PINK, SUPERINTENDENT OF INSURANCE. March 7, 1938. Petitions for writs of certio-

rari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Alfred C. Bennett* for Pink. *Messrs. Bruce Fuller* and *S. Wallace Dempsey* for Dempsey. Reported below: 92 F. 2d 572.

No. 742. UNION STOCK YARDS CO. *v.* INGHRAM ET AL. March 7, 1938. Petition for writ of certiorari to the Supreme Court of Nebraska denied. *Mr. Norris Brown* for petitioner. No appearance for respondent. Reported below: 133 Neb. 105; 274 N. W. 185.

No. 747. RABINOVITZ *v.* OUGHTON, TRUSTEE. March 7, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Thomas F. Gain* and *Sigmund H. Steinberg* for petitioner. No appearance for respondent. Reported below: 92 F. 2d 297.

No. 750. PHILLIPS *v.* UNITED STATES. March 7, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Edward H. S. Martin* for petitioner. *Acting Solicitor General Bell,* and *Messrs. Julius C. Martin, Wilbur C. Pickett, W. Marvin Smith,* and *Young M. Smith* for the United States. Reported below: 92 F. 2d 849.

No. 751. NASHVILLE, C. & ST. L. RY. *v.* RAILWAY EMPLOYEES' DEPT. OF A. F. OF L. ET AL. March 7, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Wm. H. Swiggart* for petitioner. *Mr. Frank L. Mulholland* for respondents. Reported below: 93 F. 2d 340.

No. 754. AWOTIN *v.* HEALY ET AL. March 7, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Irving H. Flamm* for petitioner. *Messrs. Emmett J. McCarthy, Robert F. Carey,* and *Daniel M. Healy* for respondents. Reported below: 92 F. 2d 615.

No. 755. ANNETT *v.* NEW YORK, N. H. & H. R. Co. March 7, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Curtiss K. Thompson* for petitioner. *Messrs. Edward R. Brumley, Jesse E. Waid,* and *Frederick H. Wiggin* for respondent. Reported below: 92 F. 2d 428.

No. 433. HARMAN *v.* COMMISSIONER OF INTERNAL REVENUE. March 7, 1938. 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 *Mr. Sewall Key* for respondent. Reported below: 90 F. 2d 622.

No. 827. DOWLING *v.* WESTERN UNION TELEGRAPH Co. March 14, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. James H. Duffy* for petitioner. No appearance for respondent. Reported below: 92 F. 2d 864.

No. 726. MURPHY *v.* ZERBST, WARDEN. March 14, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. E. Harold Sheats* for petitioner. *Acting Solicitor General Bell, As-*

sistant Attorney General McMahon, and *Messrs. William W. Barron,* and *W. Marvin Smith* for respondent. *Solicitor General Jackson* was on a brief for the respondent. Reported below: 92 F. 2d 671.

No. 740. INTERNATIONAL MANUFACTURERS SALES CO. *v.* UNITED STATES. March 14, 1938. Petition for writ of certiorari to the Court of Claims denied. *Mr. Loring M. Black* for petitioner. *Acting Solicitor General Bell, Assistant Attorney General Whitaker,* and *Mr. Paul A. Sweeney* for the United States. Reported below: 85 Ct. Cls. 683.

No. 744. WASHINGTON *v.* MCGRATH, EXECUTRIX. March 14, 1938. Petition for writ of certiorari to the Supreme Court of Washington denied. *Mr. William H. Pemberton* for petitioner. No appearance for respondent. Reported below: 191 Wash. 496; 71 P. 2d 395.

No. 752. ATLANTIC COAST LINE R. CO. *v.* BATTON. March 14, 1938. Petition for writ of certiorari to the Supreme Court of North Carolina denied. *Messrs. Thomas W. Davis, F. S. Spruill,* and *V. E. Phelps* for petitioner. *Mr. W. Frank Taylor* for respondent. Reported below: 212 N. C. 256; 193 S. E. 674.

No. 758. CAPONE *v.* UNITED STATES. March 14, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Abraham Teitelbaum* for petitioner. *Acting Solicitor General Bell, Assistant Attorney General Morris,* and *Messrs. J. Louis Monarch, William H. Boyd, Earl C. Crouter,* and *W. Marvin Smith* for the United States. Reported below: 93 F. 2d 840.

No. 759. SMITH ET AL. *v.* UNITED STATES. March 14, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Richard E. Westbrooks* for petitioner. *Acting Solicitor General Bell, Assistant Attorney General McMahon,* and *Messrs. William W. Barron,* and *W. Marvin Smith* for the United States. Reported below: 93 F. 2d 1019.

No. 763. LONDON & PROVINCIAL MARINE & GENERAL INS. CO. *v.* KENTUCKY MACARONI CO.; and

No. 764. ROYAL INSURANCE CO. *v.* SAME. March 14, 1938. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Frank M. Drake* for petitioners. *Mr. Robert S. Marx* for respondent. Reported below: 92 F. 2d 1009.

No. 765. SALT LAKE COUNTY *v.* UTAH COPPER CO. March 14, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Mahlon E. Wilson* and *Harold E. Wallace* for petitioner. *Messrs. A. C. Ellis* and *C. C. Parsons* for respondent. Reported below: 93 F. 2d 127.

No. 766. STEIN, TRUSTEE IN BANKRUPTCY, *v.* LEIBOWITT ET AL. March 14, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. David Goldstein* for petitioner. *Mr. Louis Rudner* for respondents. Reported below: 93 F. 2d 333.

No. 776. PICKETT *v.* TRIXLER, RECEIVER, ET AL. March 14, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. U. S. Lesh* for petitioner. No appearance for respondents. Reported below: 93 F. 2d 178.

No. 793. MARSHALL COUNTY BANK *v.* CROWTHER. March 14, 1938. Petition for writ of certiorari to the Supreme Court of Appeals of West Virginia denied. *Mr. Martin Brown* for petitioner. No appearance for respondent. Reported below: 119 W. Va. —; 193 S. E. 915.

No. 794. ST. PAUL FIRE & MARINE INS. CO. *v.* KAUFMAN COMPRESS CO. March 14, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Lloyd E. Elliott* for petitioner. *Mr. Dan MacDougald* for respondent. Reported below: 93 F. 2d 156.

No. 795. AMERICAN CONCRETE EXPANSION JOINT CO. ET AL. *v.* HIGHWAY APPLIANCES CO. March 14, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Samuel W. Banning* for petitioners. *Mr. Albert G. McCaleb* for respondent. Reported below: 93 F. 2d 113.

No. 804. LIVERMORE *v.* MANDEVILLE & THOMPSON, INC. March 14, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Del W. Harrington* for petitioner. *Mr. Frank M. Bailey* for respondent. Reported below: 93 F. 2d 563.

No. 819. GAGE ET AL., RECEIVERS, *v.* LEONARD, RECEIVER, ET AL. March 14, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Christie Benet* and *Edward W. Mullins* for petitioners. *Mr. George P. Barse* for respondents. Reported below: 94 F. 2d 19.

No. 857. KIRKPATRICK *v.* HARDT. See *ante*, p. 626.

No. 847. POPE *v.* UNITED STATES. March 28, 1938. Petition for writ of certiorari to the Court of Claims, and motion for leave to proceed further *in forma pauperis*, denied. *Mr. Allen Pope, pro se.* No appearance for the United States. Reported below: 86 Ct. Cls. 18.

No. 853. LINDSEY ET AL. *v.* WASHINGTON. March 28, 1938. Petition for writ of certiorari to the Supreme Court of Washington, and motion for leave to proceed further *in forma pauperis*, denied. *E. R. Lindsey, pro se.* No appearance for respondent. Reported below: 192 Wash. 356; 73 P. 2d 738.

No. 875. JORDON *v.* UNITED STATES. March 28, 1938. Petition for writ of certiorari to the Court of Appeals for the District of Columbia, and motion for leave to proceed further *in forma pauperis*, denied. *Mr. James J. Laughlin* for petitioner. No appearance for the United States. Reported below: 66 App. D. C. 309; 87 F. 2d 64.

No. 678. NEW YORK EX REL. KURZYNSKI *v.* HUNT, WARDEN. March 28, 1938. Petition for writ of certiorari to the Supreme Court of New York denied. *Paul Kurzynski, pro se. Mr. Henry Epstein*, Solicitor General of New York, for respondent. Reported below: 250 App. Div. 378; 294 N. Y. S. 276.

No. 797. BANKERS LIFE CO. *v.* CITY OF LITTLEFIELD ET AL. March 28, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied.

Messrs. J. P. Lorentzen and *A. E. Coker* for petitioner. *Messrs. James G. Martin* and *C. C. Crenshaw* for respondents. Reported below: 93 F. 2d 152.

No. 800. CENTURY PRODUCTIONS, INC., ET AL. *v.* PATTERSON. March 28, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Henry Pearlman* for petitioners. *Mr. Edward A. Sargoy* for respondent. Reported below: 93 F. 2d 489.

No. 803. MECHANICAL MANUFACTURING CO. *v.* MACANDREWS & FORBES CO. March 28, 1938. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Messrs. Samuel A. Ettelson* and *Erwin M. Treusch* for petitioner. *Messrs. Loy N. McIntosh* and *Frederick Secord* for respondent. Reported below: 367 Ill. 288; 11 N. E. 2d 382.

No. 807. PHILLIPS *v.* TARRIER COMPANY. March 28, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. H. M. Voorhis* for petitioner. *Mr. Robert A. Littleton* for respondent. Reported below: 93 F. 2d 674.

No. 808. MISSOURI BROADCASTING CORP. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. March 28, 1938. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. Louis G. Caldwell* and *Donald C. Beelar* for petitioner. *Solicitor General Jackson, Acting Assistant Attorney General Berge,* and *Messrs. Charles H. Weston* and *Hampson Gary* for the Federal Communications Commission. *Mr. Paul D. P. Spearman* for the Star-Times Publishing Co. Reported below: 94 F. 2d 623.

No. 806. ROYAL INSURANCE CO. *v.* SMITH. March 28, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Percy V. Long* for petitioner. *Messrs. A. B. Bianchi* and *James M. Hanley* for respondent. Reported below: 93 F. 2d 143.

No. 809. MCGOLDRICK, COMPTROLLER, *v.* NATIONAL CASH REGISTER CO.; and

No. 810. SAME *v.* WEST PUBLISHING CO. March 28, 1938. Petitions for writs of certiorari to the Supreme Court of New York denied. *Messrs. Wm. C. Chanler, Oscar S. Cox, Paxton Blair,* and *Meyer Bernstein* for petitioner. *Mr. Philip A. Carroll* for respondent in No. 809. *Messrs. Chester Bordeau* and *Francis L. Casey* for respondent in No. 810. Reported below: No. 809, 267 N. Y. 208; 252 App. Div. 90; 11 N. E. 2d 881; 297 N. Y. S. 169; No. 810, 276 N. Y. 535; 251 App. Div. 883; 12 N. E. 2d 565; 297 N. Y. S. 174.

Nos. 812 and 813. MERCANTILE-COMMERCE BANK & TRUST CO. ET AL. *v.* DEPARTMENT OF FINANCIAL INSTITUTIONS OF INDIANA ET AL. March 28, 1938. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Truman Post Young* for petitioners. *Mr. Isador Kahn* for respondents. Reported below: 92 F. 2d 639.

No. 816. TERMINAL RAILROAD ASSN. *v.* MRAZEK. March 28, 1938. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. Thomas M. Pierce, Joseph L. Howell,* and *Walter N. Davis* for petitioner. *Messrs. Harry S. Rooks* and *Oscar Habenicht* for respondent. Reported below: 341 Mo. 1054; 111 S. W. 2d 26.

No. 830. TOUHY *v.* RAGEN, WARDEN. March 28, 1938. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Thomas Marshall* for petitioner. *Mr. Otto Kerner* for respondent.

No. 836. EAST OHIO GAS CO. *v.* CLEVELAND. March 28, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. William B. Cockley* for petitioner. *Mr. Alfred Clum* for respondent. Reported below: 94 F. 2d 443.

No. 790. PARIDY *v.* CATERPILLAR TRACTOR CO. March 28, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. MR. JUSTICE BUTLER took no part in the consideration or decision of this application. *Mr. Frank C. Smith* for petitioner. No appearance for respondent. Reported below: 94 F. 2d 292.

No. 599. GLENN, COLLECTOR, *v.* SMITH. March 28, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. MR. JUSTICE REED took no part in the consideration or decision of this application. *Solicitor General Reed* for petitioner. No appearance for respondent. Reported below: 91 F. 2d 447.

No. 17, original. EX PARTE ARTHUR DEAN RICHMOND. April 4, 1938. Motion for leave to file petition for writ of certiorari is granted, and the petition for writ of certiorari is denied. *Mr. William Lemke* for petitioner.

No. 896. LEE *v.* PLUMMER, WARDEN. April 4, 1938. Petition for writ of certiorari to the Supreme Court of California, and motion for leave to proceed further *in forma pauperis,* denied. *Howard Lee, pro se.* No appearance for respondent.

No. 838. ATLANTIC REFINING CO. *v.* SMITH ET AL. April 4, 1938. 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. *Mr. Otto Wolff, Jr.* for petitioner. *Mr. Walter B. Gibbons* for respondents. Reported below: 94 F. 2d 377.

No. 818. DOHERTY *v.* UNITED STATES. April 4, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. W. V. Hoagland* for petitioner. *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Messrs. William W. Barron, W. Marvin Smith,* and *L. E. Birdzell* for the United States. Reported below: 94 F. 2d 495.

No. 820. BROOKLYN TRUST CO. *v.* SHERMAN SQUARE APARTMENTS, INC., ET AL. April 4, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Jacob A. Freedman* and *Ralph W. Crolly* for petitioner. *Messrs. Whitney North Seymour, John Ross Delafield,* and *Emanuel Celler* for respondents. Reported below: 93 F. 2d 1015.

No. 821. WOLK *v.* UNITED STATES. April 4, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. William C.*

Green and *George B. Edgerton* for petitioner. *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Messrs. William W. Barron* and *W. Marvin Smith* for the United States. Reported below: 94 F. 2d 310.

No. 823. LaBudde, Collector of Internal Revenue, *v.* Cudahy Brothers Co. April 4, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Acting Solicitor General Bell* for petitioner. *Mr. William F. Hannan* for respondent. Reported below: 92 F. 2d 937.

No. 824. Williams, Trustee in Bankruptcy, *v.* Corden Corporation et al. April 4, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. James M. Naylor* for petitioner. *Messrs. Ernest J. Torregano* and *Charles M. Stark* for respondents. Reported below: 93 F. 2d 758.

No. 825. Fort Pitt Bridge Works *v.* Commissioner of Internal Revenue. April 4, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Robert T. McCracken* and *Leonard K. Guiler* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *F. E. Youngman* for respondent. Reported below: 92 F. 2d 825.

No. 826. Kosolapoff *v.* Petrogradsky Mejdunarodny Kommerchesky Bank. April 4, 1938. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Harmon S. Graves* for petitioner. *Messrs.*

Paul C. Whipp and *Lounsbury D. Bates* for respondent. Reported below: 276 N. Y. 499; 248 App. Div. 864; 12 N. E. 2d 449; 291 N. Y. S. 388.

No. 828. Golding Brothers Co. *v.* Dumaine et al., Trustees. April 4, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Israel Gorovitz* for petitioner. *Mr. Charles P. Curtis, Jr.* for respondents. Reported below: 93 F. 2d 162.

No. 833. Boston Machine Works Co. *v.* Prime Manufacturing Co. April 4, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Melville F. Weston* for petitioner. *Messrs. George P. Dike* and *Cedric W. Porter* for respondent. Reported below: 93 F. 2d 594.

No. 837. Roberts et al. *v.* Metropolitan Life Ins. Co. et al. April 4, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Jay E. Darlington* for petitioners. *Mr. S. Ashley Guthrie* for respondents. Reported below: 94 F. 2d 277.

No. 843. Cohen *v.* Maryland. April 4, 1938. Petition for writ of certiorari to the Court of Appeals of Maryland denied. *Messrs. Harry O. Levin* and *Isaac Lobe Straus* for petitioner. No appearance for respondent. Reported below: 173 Md. 216; 195 A. 532.

No. 844. Robert Jacob, Inc., *v.* Gunnarson, Administratrix, et al. April 4, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second

Circuit denied. *Mr. George S. Brengle* for petitioner. *Mr. Forrest E. Single* for respondents. Reported below: 94 F. 2d 170.

No. 845. UNITED STATES *v.* WHARTON GREEN & Co. April 4, 1938. Petition for writ of certiorari to the Court of Claims denied. *Acting Solicitor General Bell* for the United States. *Messrs. George A. King, George R. Shields,* and *Herman J. Galloway* for respondent. Reported below: 86 Ct. Cls. 100.

No. 856. QUICK ACTION IGNITION CO. *v.* BRIGGS & STRATTON CORP. April 4, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. N. S. Arnstutz* for petitioner. *Messrs. Ira Milton* and *Richard Spencer* for respondent. Reported below: 93 F. 2d 207.

No. 873. BURKE GRAIN CO. *v.* SAINT PAUL MERCURY-INDEMNITY CO. April 4, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Tom Kirby* for petitioner. *Mr. G. J. Danforth* for respondent. Reported below: 94 F. 2d 458.

No. 876. HOOD, SUCCESSOR RECEIVER, *v.* HARDESTY, RECEIVER. April 4, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. James M. Guiher* for petitioner. *Mr. George P. Barse* for respondent. Reported below: 94 F. 2d 26.

No. 846. STANDARD MARINE INS. CO. *v.* WESTCHESTER FIRE INS. CO. April 11, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second

Circuit denied. MR. JUSTICE STONE took no part in the consideration or decision of this application. *Messrs. Hartwell Cabell, Milton B. Ignatius,* and *Wendell P. Barker* for petitioner. *Messrs. Oscar R. Houston* and *D. Roger Englar* for respondent. Reported below: 93 F. 2d 286.

No. 849. AMERICAN SNUFF CO. *v.* COMMISSIONER OF INTERNAL REVENUE. April 11, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. MR. JUSTICE STONE took no part in the consideration or decision of this application. *Mr. L. A. Luce* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *L. W. Post* for respondent. Reported below: 93 F. 2d 201.

No. 831. BONET, TREASURER OF PUERTO RICO, *v.* QUILES. April 11, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. William Cattron Rigby* and *Nathan R. Margold* for petitioner. No appearance for respondent. Reported below: 93 F. 2d 331.

No. 832. BONET, TREASURER OF PUERTO RICO, *v.* VALIENTE & Co. April 11, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. William Cattron Rigby* and *Nathan R. Margold* for petitioner. *Mr. Edelmiro Martinez Rivera* for respondent. Reported below: 93 F. 2d 327.

No. 834. DI SANTO *v.* UNITED STATES. April 11, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. William*

J. Dawley for petitioner. *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Messrs. Fred E. Strine* and *W. Marvin Smith* for the United States. Reported below: 93 F. 2d 948.

No. 835. M. McDONOUGH CO. *v.* WALDORF SYSTEM, INC. April 11, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. A. G. Gould* for petitioner. *Mr. Frank H. Stewart* for respondent. Reported below: 93 F. 2d 363.

No. 839. STERLING *v.* COMMISSIONER OF INTERNAL REVENUE. April 11, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Edward Holloway* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Morton K. Rothschild* for respondent. Reported below: 93 F. 2d 304.

No. 851. GRUNWALD ET AL. *v.* UNITED STATES; and

No. 852. LUBITZKY *v.* SAME. April 11, 1938. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Frederic M. P. Pearse* for petitioners. *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Messrs. Mahlon D. Kiefer* and *W. Marvin Smith* for the United States. Reported below: 94 F. 2d 952.

No. 854. UNITED STATES *v.* MOOR. April 11, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Solictor General Jackson* for petitioner. No appearance for respondent. Reported below: 93 F. 2d 422.

No. 855. TOWNSEND *v.* UNITED STATES. April 11, 1938. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. Elisha Hanson* and *Joseph A. Cantrel* for petitioner. *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Messrs. William W. Barron* and *W. Marvin Smith* for the United States. Reported below: 95 F. 2d 352.

No. 862. WYMAN *v.* NEWHOUSE. April 11, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. C. C. Daniels* for petitioner. *Mr. Max D. Steuer* for respondent. Reported below: 93 F. 2d 313.

No. 867. BROWN-CRUMMER INVESTMENT CO., TRUSTEE, *v.* CITY OF HAMLIN ET AL. April 11, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. David M. Wood* and *James G. Martin* for petitioner. *Messrs. J. McAllister Stevenson* and *W. Edward Lee* for respondents. Reported below: 93 F. 2d 680.

No. 868. BLAIR *v.* T. W. WARNER CO. April 11, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Eli J. Blair* for petitioner. *Mr. Abbot P. Mills* for respondent. Reported below: 94 F. 2d 13.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM JANUARY 18, 1938, THROUGH APRIL 11, 1938.

No. 633. BRAINARD *v.* COMMISSIONER OF INTERNAL REVENUE. Certiorari, 302 U. S. 682, to the Circuit Court of Appeals for the Seventh Circuit. Argued March 9, 1938. Dismissed March 14, 1938, on motion of counsel for the petitioner. *Mr. John E. Hughes* for petitioner. *Mr. A. F. Prescott,* with whom *Acting Solicitor General Bell, Assistant Attorney General Morris, Mr. J. Louis Monarch* and also *Solicitor General Jackson* were on the briefs, for respondent. Reported below: 91 F. 2d 880.

Nos. 841 and 842. MASSEY *v.* FARMERS & MERCHANTS NATIONAL BANK & TRUST CO. ET AL. On petition for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit. March 28, 1938. Dismissed on motion of counsel for the petitioner. *Messrs. Robert H. McNeill, William Lemke,* and *John W. Cleaton* for petitioner. *Mr. R. Gray Williams* for respondents. Reported below: 94 F. 2d 526.

PETITIONS FOR REHEARING DENIED, FROM JANUARY 18, 1938, THROUGH APRIL 11, 1938.*

No. 146. UNITED STATES *v.* RAYNOR. January 31, 1938. 302 U. S. 540.

No. 147. UNITED STATES *v.* FOWLER. January 31, 1938. 302 U. S. 540.

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* See Table of Cases Reported in this volume for earlier decisions in these cases, unless otherwise indicated.

No. 304. KELLEY ET AL. *v.* ATLANTIC CITY ET AL. January 31, 1938. 302 U. S. 722.

No. 626. ALSOP *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. January 31, 1938. 302 U. S. 767.

No. 321. JOHNSON, TREASURER OF CALIFORNIA, ET AL. *v.* M. G. WEST CO. February 7, 1938. The motion for leave to file petition for rehearing is granted. The petition for rehearing is denied. 302 U. S. 638.

No. 30. UNITED STATES EX REL. WILLOUGHBY, TRUSTEE, ET AL. *v.* HOWARD ET AL. February 7, 1938. 302 U. S. 445.

No. 613. ALMOURS SECURITIES, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. February 7, 1938. 302 U. S. 765.

No. 651. SPRUILL *v.* SERVEN; and

No. 652. SPRUILL *v.* BALLARD ET AL. February 7, 1938. 302 U. S. 764.

No. 10. OCEAN BEACH HEIGHTS, INC., ET AL. *v.* BROWN-CRUMMER INVESTMENT CO. ET AL. February 14, 1938. 302 U. S. 614.

No. 671. SCHULTZ *v.* LIVE STOCK NATIONAL BANK ET AL. February 14, 1938. 302 U. S. 766.

No. 197. ADAM *v.* SAENGER ET AL. February 28, 1938. *Ante*, p. 59.

No. 256. INDIANA EX REL. ANDERSON *v.* BRAND, TRUSTEE. February 28, 1938. *Ante*, p. 95.

No. 346. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* BOWERS, ADMINISTRATRIX. February 28, 1938.

No. 13. UNITED GAS PUBLIC SERVICE CO. *v.* TEXAS ET AL. See *ante*, p. 625.

No. 161. SOUTH CAROLINA STATE HIGHWAY DEPT. ET AL. *v.* BARNWELL BROS., INC., ET AL. See *ante*, p. 625.

No. 712. WABASH APPLIANCE CORP. ET AL. *v.* GENERAL ELECTRIC CO. March 14, 1938.

No. 469. FOSTER, EXECUTRIX, *v.* COMMISSIONER OF INTERNAL REVENUE. March 14, 1938.

No. 674. SCHRIBER-SCHROTH CO. *v.* CLEVELAND TRUST CO. ET AL. March 14, 1938.

No. 675. ABERDEEN MOTOR SUPPLY CO. *v.* CLEVELAND TRUST CO. ET AL. March 14, 1938.

No. 676. F. E. ROWE SALES CO. *v.* CLEVELAND TRUST CO. ET AL. March 14, 1938.

No. 434, October Term, 1936. ABEL ET AL. *v.* KENNEDY ET AL. March 28, 1938. 299 U. S. 580, 622.

No. 635. CLARKE, TRUSTEE, *v.* CHICAGO, B. & Q. R. Co. March 28, 1938.

No. 687. WALKER *v.* UNITED STATES. March 28, 1938.

No. 688. DRUMMOND *v.* UNITED STATES. March 28, 1938.

No. 689. LUTERAN *v.* UNITED STATES. March 28, 1938.

No. 690. ADAMS *v.* UNITED STATES. March 28, 1938.

No. 691. WELLS *v.* UNITED STATES. March 28, 1938.

No. 692. WELLS *v.* UNITED STATES. March 28, 1938.

No. 693. ROACH *v.* UNITED STATES. March 28, 1938.

No. 694. LITTLE *v.* UNITED STATES. March 28, 1938.

No. 695. STEVENS *v.* UNITED STATES. March 28, 1938.

No. 696. HOLMAN *v.* UNITED STATES. March 28, 1938.

No. 697. NEEPER *v.* UNITED STATES. March 28, 1938.

No. 698. DITSCH *v.* UNITED STATES. March 28, 1938.

No. 791. SIMPSON ET AL. *v.* DYER ET AL. March 28, 1938.

No. 406. HELVERING, COMMISSIONER OF INTERNAL REVENUE *v.* O'DONNELL. April 4, 1938. *Ante,* p. 370.

No. 446. HELVERING, COMMISSIONER OF INTERNAL REVENUE *v.* ELBE OIL LAND DEVELOPMENT CO. April 4, 1938. *Ante,* p. 372.

No. 753. GROVES ET AL. *v.* BOARD OF EDUCATION OF CHICAGO. April 4, 1938.

No. 660. MORAN, RECEIVER, *v.* UNITED STATES. April 11, 1938.

No. 853. LINDSEY ET AL. *v.* WASHINGTON. April 11, 1938.

AMENDMENT OF BANKRUPTCY RULES.

ORDER OF FEBRUARY 7, 1938.

IT IS ORDERED that Rule LIII of the General Orders in Bankruptcy be, and the same hereby is, amended, effective immediately, to read as follows:

LIII

BOND OF DESIGNATED DEPOSITORY UNDER SEC. 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 with different sureties, it shall 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) Whether any of the individual sureties on its bond has ceased to be a resident of that judicial district, or has died; and

(b) Whether the financial worth of any of its individual sureties has become materially impaired.

4. As one means of bringing before the bankruptcy court information respecting occasions for requiring a depository to give a new bond in an increased amount, it shall be the duty of any depository, when its total of bankruptcy deposits equals ninety-five per centum of the amount of its current depository bond, forthwith to file a written statement with the bankruptcy court, setting forth the total amount of such deposits and the amount of its current bond.

5. No trustee or receiver shall deposit with any one depository funds committed to his custody as such receiver or trustee in excess of the amount of the bond of such depository then in force.

6. 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.

7. 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.

8. 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 with-

out injury to any party in interest, the court shall require the depository to give a new bond.

9. 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.

10. 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 depository.

[General Order LIII suspended, March 14, 1938, see p. 626.]

53383°—38——43

INDEX

CONSTITUTIONAL LAW.

I. **Miscellaneous.**

1. *Powers of Congress.* Validity of Home Owners' Loan Act. *Kay* v. *U. S.*, 1.

2. *Id.* Powers of National Labor Relations Board. *Myers* v. *Bethlehem Shipbuilding Corp.*, 41; *Newport News Co.* v. *Schauffler*, 54.

3. *Id.* Scope of bankruptcy powers. *Adair* v. *Bank of America Assn.*, 350.

4. *Id.* Public utility holding companies as within regulatory power. *Electric Bond Co.* v. *Securities Comm'n*, 419.

5. *Delegation of Legislative Power.* *Kay* v. *U. S.*, 1.

6. *Federal and State Relations.* Territorial jurisdiction. *Atkinson* v. *State Tax Comm'n*, 20.

7. *Id.* *Judicial Power.* Validity of state court decree of escheat of funds in control of federal court. *U. S.* v. *Klein*, 276.

8. *Id.* *State Taxation* of income derived from contract with United States for construction. *Id.*

9. *Id.* *Federal Taxation* of profits of lessee of oil lands owned by State. *Helvering* v. *Bankline Oil Co.*, 362.

10. *Id.* *Federal Taxation* of income received by lessee (or by cestui que trust under deed from lessee) of school lands granted to State by United States. *Helvering* v. *Mountain Producers Corp.*, 376.

11. *Id.* *Federal Taxation* of compensation for services in connection with liquidation of insolvent corporation by state officer. *Helvering* v. *Therrell*, 218.

12. *Full Faith and Credit Clause.* Legal effect of judgment of court of other State; how determined. *Adam* v. *Saenger*, 59.

13. *State Regulation.* Test of constitutionality. *S. C. Highway Dept.* v. *Barnwell Bros.*, 177.

53383°—38——44

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