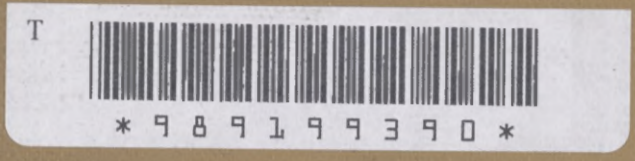

UNITED STATES REPORTS

VOLUME 305

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1938

FROM OCTOBER 3, 1938, TO AND INCLUDING JANUARY 16, 1939

ERNEST KNAEBEL
REPORTER

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1939

For sale by the Superintendent of Documents, Washington, D. C. - Price $2.00 (Buckram)

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.
HUGO L. BLACK, Associate Justice.
STANLEY REED, Associate Justice.

RETIRED

WILLIS VAN DEVANTER, Associate Justice.
GEORGE SUTHERLAND, Associate Justice.

HOMER S. CUMMINGS, Attorney General.[2]
FRANK MURPHY, Attorney General.[2]
ROBERT H. JACKSON, Solicitor General.
CHARLES ELMORE CROPLEY, Clerk.
THOMAS ENNALLS WAGGAMAN, Marshal.

---

[1] Mr. Justice Cardozo died July 9, 1938, see *post*, pp. v *et seq.*

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

[2] Mr. Cummings resigned effective January 2, 1939. Mr. Frank Murphy, of Michigan, was appointed by President Roosevelt on January 2, 1939, during a recess of Congress; he was nominated January 5th, confirmed by the Senate January 17th, took the oath January 18th, and was commissioned January 20th.

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.

It is ordered that the present allotment of the Chief Justice and Associate Justices of this Court among the circuits, be amended by making the following allotment, which shall be entered of record, viz:

For the District of Columbia, Charles Evans Hughes, Chief Justice.

December 19, 1938.

PROCEEDINGS IN MEMORY OF MR. JUSTICE CARDOZO.

SUPREME COURT OF THE UNITED STATES.

Monday, October 3, 1938.

Present: The CHIEF JUSTICE, MR. JUSTICE BRANDEIS, MR. JUSTICE BUTLER, MR. JUSTICE STONE, MR. JUSTICE ROBERTS, MR. JUSTICE BLACK, and MR. JUSTICE REED.

The CHIEF JUSTICE said:

"Since our last session, we have suffered an irreparable loss in the death of our brother, Justice Cardozo. At a time when he should have enjoyed the full exercise of his remarkable powers he was fatally stricken and we are inexpressibly saddened by this tragic termination of his judicial service and the breaking of our cherished ties of personal association. Admitted to the Bar of New York at the age of twenty-one, Benjamin Nathan Cardozo rapidly won the esteem of lawyers and judges and his special qualifications for judicial work were early recognized. He was elected a Justice of the Supreme Court of New York in 1913 and was almost at once designated for service on the Court of Appeals of that State. This was followed in a few years by his election as Associate Judge of that Court and in 1926 he was made Chief Judge. On the retirement of Mr. Justice Holmes, and in response to a widespread appreciation of the fitness of the succession, Judge Cardozo was appointed Associate Justice of this Court in February, 1932. His service on the Bench thus spanned nearly twenty-five years, and his contributions to the development of our jurisprudence made his judicial career one of the most illustrious in American annals. His erudition, acumen, and technical skill, combined with a philosophic outlook and a passion for justice, made him

an ideal Judge, and the wide range of his cultural interests, his modesty and personal charm, made fellowship with him a most precious privilege. With deep sorrow at our loss, we turn to our work with a fresh inspiration as we contemplate his devotion to the highest standards of the Bench. At an appropriate time, the Court will receive the resolutions of the Bar in tribute to his memory."

Members of the Bar and Officers of the Court met in the Court Room on Saturday, November 26, 1938, at 11 o'clock a. m.[1]

The meeting was called to order by Mr. Solicitor General JACKSON.

Mr. JACKSON said:

A custom of this Bar bids us to meet in commemoration of a Justice of the Supreme Court who quits his life and his service together.

Even in the absence of such a custom, the death of Mr. Justice Cardozo would result in this outward and visible sign of our affection and respect.

He answered the Nation-wide call to the Bench of this great Court with characteristic humility. As he left the New York Court of Appeals to accept promotion, he wrote these words to me:

"Whether the new field of usefulness is greater, I don't know. Perhaps the larger opportunity was where I have been. But there was an inevitableness about the matter in the end that left little room for choice."

These words revealed the man underneath the Judge. This Court, to Cardozo, was just that—a "field for usefulness" where his lot had been cast by a fate that had asked no sign from him.

---

[1] The members of the Committee on Arrangements for this meeting were: Mr. Solicitor General Jackson, *Chairman,* and Messrs. Henry L. Stimson, of New York; and J. Harry Covington, Charles Warren, and John Spalding Flannery, of Washington, D. C.

He was passionately devoted to the law and to the Court's function of giving judicial answers to our groping for order and peace and justice. But he was too humble to regard his own solutions as final ones, however useful in their own day. Constant growth and renewal of life was a basic article of his legal faith.

Even if he thought the answer tentative, he spared no pains to clothe it in living and vigorous words. None has matched him in the beauty and perfection of his craftsmanship.

He had laid all sources of knowledge under tribute, and mastered the subtleties of all schools of thought without becoming the vassal of any. He stood apart from the passions of our time and the pettiness of our lives, yet no one better knew our problems and our aspirations. Few men ever so dwelt in the clear spiritual atmosphere of another world, without losing touch with the realities of this one. The range of his wisdom and the sweep of his sympathy partook of timelessness and universality, like those of the Prophets.

Our generation is contributing many a statute and decision to the mosaic which we call "Jurisprudence." Some of its most delicate and deftly executed patterns are concepts of the mind and work of the hand of this master craftsman.

So I have called the members of this Bar to meet and, in the name of our profession, confess and record the debt of our times to Mr. Justice Cardozo.

On motion of Mr. Solicitor General JACKSON, Mr. JOHN LORD O'BRIAN was elected Chairman and Mr. CHARLES ELMORE CROPLEY, Secretary.

On taking the Chair, Mr. O'BRIAN said:

As the Solicitor General has said, we, members of the Bar of this great Court, are met here, pursuant to ancient custom, to commemorate briefly and all too inadequately the life and achievement of Justice Cardozo, whose whole life service was devoted to the law. In the interest of

orderly procedure the Solicitor General and the Committee on Arrangements have requested some half dozen of your members to speak of his life and his achievement. Speaking with discrimination, and appreciation, they will deal with the characteristics of his mental powers, his purposes and the far reaching influence of his achievements. Before calling upon these members of the Bar may your Chairman comment briefly upon one broader aspect implicit in this occasion?

We are met here in a time of grave anxieties—a time in which all men who love liberty find themselves confronted by world events and intangible forces of unmistakably evil portent. At this time when a great part of the world called civilized seems surely passing into eclipse—under the shadow of the increasing power of brute force—and multitudes of men are suffering from new and unheard of horrors—it is significant that we should be meeting here in the quiet of these surroundings to commemorate the service of the one man of all of our profession who has been in our time the truest exemplar of faith in the power of persuasion in the never ending conflict of rule by compulsion with rule of persuasion. To him the one element of certainty in human affairs was the paramount supremacy of reason. To that conception and to his abiding confidence in the power of ideas his efforts throughout his whole life were consciously dedicated. He saw the age-long struggle for individual freedom in Lord Acton's description of it as the ceaseless effort to deliver man from the power of man. As we now see more clearly in retrospect, the chastening effect of that concept was ever present in his unceasing labors to convince men by persuasion and to demonstrate that the ways of the law were reasonable ways. Disillusionment, disappointment and grief have always beset those who placed their confidence in the reasonableness of men. To Justice Cardozo these experiences brought no handicap. His infinite patience seems always to have served as a protection for his faith.

If there is, as the philosophers say, a quality of beauty in clearness of thinking, in clearness of expression, these qualities with this man were merely the outward symptoms of a kind of immanent grace—the expression of a disciplined mind; the expression of a spirit habitually imbued with the idea that his own life was in a sense a ministry to be spent in making truth in the law conform to the truths that animated men's lives in changing generations.

Many have written of the meaning of his work. In times now distant, many others will reinterpret his work with meaning ever fresh for new generations of lawyers and philosophers. But nearly all of the present day commentators miss, and perforce all who come hereafter will miss, one element of which all of us who knew him were deeply aware—the strangely compelling power of that reticent, sensitive and almost mystical personality. There are in this gathering some of those men who knew him in intimacy and with whom he shared his inmost beliefs. They will best understand what I mean. His unfailing courtesy and kindliness toward those who stood but upon the threshold of his friendship, or in the outer range of his acquaintance, were symbols of the depth of his feeling and constant solicitude for those who were his nearest friends. All men, strangers and friends alike, could see that his all-pervasive toleration and even sympathy for points of view other than his own were not born of doctrine or formula, but were the result of an extraordinary breadth of understanding of mankind and patience with their weaknesses and their prejudices.

It was these qualities, sometimes only dimly perceived by strangers, that brought to him something more than respect—a rare quality of regard akin to affection—in the hearts of many who never saw him. Even they, upon analysis of his writings, would, I feel sure, realize that over and beyond the extraordinary intellectual powers of this man there was another element equally important which made his influence unique—the appealing and

utterly sincere human personality which above all other qualities endeared him to his friends and gave to his utterances as Judge a power of influence and persuasiveness quite beyond ordinary human experience. It was for this that we who were privileged to know him, even in casual intercourse, loved the man.

Innate dignity, intellectual genius are not enough to explain his power. But the word majesty—which he avoided—belonged to him, because the ennobling power of his personal character gave that quality to all that he did.

Mr. WILLIAM D. MITCHELL, acting on behalf of a Committee,[2] presented the following

RESOLUTIONS

The members of the Bar assembled in the Supreme Court Building on Saturday, the 26th day of November, 1938, speak for the legal profession of the country in expressing their sorrow at the untimely death of Mr. Justice Cardozo, and resolve to keep in vivid memory the preeminent judicial labors of the Justice as well as the rare

[2] The gentlemen composing the Committee were: Mr. John Lord O'Brian, of New York, Chairman; Messrs. Henry F. Ashurst, of Arizona; Warren Olney, Jr., Alfred Sutro, and Golden W. Bell, of California; Morrison Shafroth, of Colorado; Charles E. Clark, of Connecticut; Frank J. Wideman, Donald Richberg, Frank J. Hogan, and Mrs. Mabel Walker Willebrandt, of the District of Columbia; William A. Sutherland, of Georgia; Luther M. Walter and Barnet Hodes, of Illinois; John G. Gamble, of Iowa; William Marshall Bullitt, of Kentucky; Isaac Lobe Straus, of Maryland; Felix Frankfurter and Edward F. McClennen, of Massachusetts; John B. Gage, of Missouri; C. C. Burlingham, George H. Engelhard, William D. Mitchell, Benjamin V. Cohen, Thomas D. Thacher, and Charles Evans Hughes, Jr., of New York; J. Crawford Biggs, of North Carolina; Arthur C. Denison, of Ohio; Henry W. Bikle, Francis Biddle, and David A. Reed, of Pennsylvania; William L. Frierson, of Tennessee; Hatton W. Sumners, of Texas; William W. Ray, of Utah; B. H. Kizer, of Washington; and Harold A. Ritz, of West Virginia.

qualities of mind and character of which his achievements were the fruit. A formal memorial cannot convey the depth and elevation of his mind, nor catch adequate glimpses of his spiritual qualities. Only the barest outline of his career and of its significance can be attempted.

Benjamin Nathan Cardozo was born in New York City on May 24, 1870, and died at the house of his intimate friend, Judge Irving Lehman, in Port Chester, New York, on July 9, 1938. He was the younger son of Albert and Rebecca Nathan Cardozo, both of whom were descended from Sephardic Jews who had been connected with the Spanish and Portuguese Synagogue in New York from before the Revolution. His precocity was revealed early, but his was the precocity of accelerated maturity. He graduated from Columbia College at the age of nineteen, taking his master's degree at the same college in the following year. He then attended the Law School of Columbia University for two years, and was admitted to the New York Bar in 1891. For twenty-two years he pursued what was essentially the calling of a barrister, unknown to the general public but quickly attaining the universal esteem of the Bar and Bench of New York. He paid the debt which every lawyer owes to his profession, not merely by proving in daily practice that law is a learned profession but also by his illuminating book, "The Jurisdiction of the New York Court of Appeals."

His election, in 1913, to the Supreme Court of New York was a striking manifestation of the democratic process. He was not destined to enjoy experience at *nisi prius* for which he was eager. Just as he was a lawyers' lawyer, so at once he became a judges' judge.

At the request of the Court of Appeals, Governor Glynn promptly designated him to serve as a temporary member of that Court; and in 1917, Governor Whitman appointed Judge Cardozo to a vacancy in one of the permanent places on the Court. In the autumn of that year he was selected by both parties for the full term of four-

teen years, and in the autumn of 1927 became with universal acclaim, the Chief Judge of that great Court. For eighteen years his learning, conveyed with great felicity, gave unusual distinction to the New York Reports, and exerted a dominant influence in making his court the second most distinguished tribunal in the land. In addition, his philosophic temper expressed itself, more systematically than legal opinions permit, in four volumes, slender in size but full of imaginative insight, upon the relations of law to life. These are: The Nature of the Judicial Process, The Growth of the Law, The Paradoxes of Legal Science, and Law and Literature.

The New York Court of Appeals, with its wide range of predominantly common law litigation, was most congenial for Judge Cardozo. No judge in our time was more deeply versed in the history of the common law, nor more resourceful in applying the living principles by which it has unfolded. His mastery of the common law was matched by his love for it. It was, therefore, a severe wrench for him to be taken from Albany to Washington. Probably no man ever ascended the Supreme Bench so reluctantly. But, when Mr. Justice Holmes resigned in 1932, President Hoover's nomination of Chief Judge Cardozo was in the nature of a national call. In selecting him, President Hoover reflected the informed sentiment of the country that, of all judges and lawyers, Chief Judge Cardozo was most worthy to succeed Mr. Justice Holmes.

It was a grievous loss to the Court and the Nation that fate should have granted him less than six full terms on the Supreme Bench. That in so short a time he was able to leave so enduring an impress on the constitutional history of the United States is a measure of his greatness. To say that Mr. Justice Cardozo has joined the Court's roll of great men is to anticipate the assured verdict of history. His juridical immortality is not due to the great causes that came before the Court during his membership; it is attributable to his own genius. With astonish-

ing rapidity he made the adjustment from preoccupation with the restricted, however novel, problems of private litigation to the most exacting demands of judicial statesmanship. Massive learning, wide culture, critical detachment, intellectual courage, and exquisite disinterestedness combined to reinforce native humility and imagination, and gave him in rare measure, those qualities which are the special requisites for the work of the Court in whose keeping lies the destiny of a great nation.

It is accordingly *Resolved* that we express our profound sorrow at the untimely passing of Mr. Justice Cardozo, and our gratitude for the contributions of his life and labors, the significance of which will endure so long as the record of a consecrated spirit has power to move the lives of men, and Law will continue to be the ruling authority of our Nation.

It is further *Resolved* that the Attorney General be asked to present these resolutions to the Court, and to request that they be inscribed upon its permanent records.

Addresses were delivered by Messrs. Irving Lehman, Associate Judge of the Court of Appeals of New York; George Wharton Pepper, of Philadelphia; Monte M. Lemann, of New Orleans; and Dean G. Acheson, of Washington, D. C.

The Chairman read a letter from Mr. John W. Davis, of New York.

The Resolutions were then adopted and the meeting adjourned.[3]

[3] The proceedings at this meeting were fully reported in a pamphlet entitled "Benjamin Nathan Cardozo," which was edited by the Committee and printed and distributed by the Clerk of the Court, acting as the Committee's Secretary. This publication gives all of the addresses *in extenso;* includes a eulogy by Frederick E. Crane, Chief Judge of the Court of Appeals of New York, delivered at the opening of that court on October 3, 1938; and also the eulogies attending the presentation of the Resolutions to the Court. (See *post,* p. XIV.) It is adorned by a striking likeness of the departed Justice.

SUPREME COURT OF THE UNITED STATES

Monday, December 19, 1938.

Present: The CHIEF JUSTICE, MR. JUSTICE BRANDEIS, MR. JUSTICE BUTLER, MR. JUSTICE STONE, MR. JUSTICE ROBERTS, MR. JUSTICE BLACK, and MR. JUSTICE REED.

MR. ATTORNEY GENERAL CUMMINGS addressed the Court as follows:

May it please the Court: The members of the Bar of this Court on November 26, 1938, met in this room to express their sorrow at the death of Mr. Justice Cardozo. At that meeting moving tributes were paid to his memory; and the following resolutions were adopted:

[Mr. Cummings read the Resolutions, which are set forth *ante,* p. X *et seq.,* and proceeded:]

It is my privilege to present these resolutions and to ask that they be entered in the permanent records of this Court.

In discussing the judicial work of Mr. Justice Cardozo, I speak, however haltingly, for the Bar of the Nation; I feel that in a measure I speak also for the Nation itself. A great judge leaves his mark not only on the law which he serves but also on the life of the people. Not until future generations of scholars have traced the course of the law in its constant search for justice will the full scope of his great service be revealed. But we can today with all certainty say that he opened ways along which a free people may confidently tread.

For eighteen years Judge Cardozo sat on the Court of Appeals of New York State. It was an eminent court when he came to it; when he left, it was the greatest common law court in the land. Throughout this long

period, as its members have been quick to say, the court drew heavily upon the inexhaustible learning, the clarity of analysis, and the boldness of thought of their gentle brother. The peculiar influence of Cardozo, however, spread far beyond the conference room. To lawyers and to courts his opinions were more than a record of the judgment. They spoke with the majestic authority of an analysis which reached to the bedrock of the learning of the past and yet was attuned to the needs of the living. And always the opinions spoke in tones of rare beauty. They might deal with things prosaic, but the language, lambent and rich, was that of a poet.

Opinions in the New York court are assigned by rotation, yet during the years of his service there an exceptionally large number of its great opinions were those of Judge Cardozo. There were few branches of the law that were not quickened by his touch. Significantly, his most notable contributions to the common law are found in fields which had long before settled into fixed forms. No other judge of his time was so deft in weaving the precedents of centuries into a new shape to govern a new society. This is the heart of the common law process, but only a master can fashion a new rule and yet preserve the essential truth of the older decisions.

To Judge Cardozo the law was meant to serve and not to rule the institutions which it sheltered. No one saw more clearly than he that the imperfect rules of today may stir equities that become the law of tomorrow. In the law of torts, one need only mention on the one side *MacPherson* v. *Buick Motor Co.*,[1] where the law as to negligent manufacture was at last brought abreast of modern methods of distribution, and, on the other side, the *Palsgraf* case,[2] where the notion of "negligence in the air" received its classic castigation. The impact of Judge Cardozo on contract law is typified by the *Duff-Gordon*

[1] *MacPherson* v. *Buick Motor Co.*, 217 N. Y. 382.

[2] *Palsgraf* v. *Long Island Railroad Co.*, 248 N. Y. 339.

case,[3] where a contract was enforced because the obligations although not express were fairly to be implied. "The law," he said, "has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal." Minor and unintentional defaults in a complicated construction contract, Judge Cardozo held in another case,[4] are not to be subjected to a syllogistic rule whose premises are found in the far simpler contracts of another age. There must be no sacrifice of justice, the opinion reads, whatever may be the doubts of "those who think more of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a just result . . ."

Throughout these opinions one traces their animating current, the one passion of this gentle and retiring man, that the courts should never fail to use the law to promote justice. While few judges have been so ready to adapt the law to the changing organization of the business world, he steadfastly refused to sanction any relaxation in the morals of the market place. It is likely that most real estate operators would not consider that their duty to their joint-venturers extended so far as to share the opportunity to start anew at the conclusion of the venture. But, in the case of *Meinhard,*[5] Chief Judge Cardozo refused to sanction even so slight a deviation from "an honor the most sensitive." As he writes, the ease of the philosopher changes into the inner fire of the prophet. "Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court."

[3] *Wood* v. *Duff-Gordon,* 222 N. Y. 88, 91.

[4] *Jacob & Youngs* v. *Kent,* 230 N. Y. 239, 242.

[5] *Meinhard* v. *Salmon,* 249 N. Y. 458, 464.

In 1932 Chief Judge Cardozo was at the head of the foremost common law court of the land. His court was but rarely forced to plunge into the elusive statesmanship of constitutional law; it was a court of legal craftsmen. He was warmed by the deep friendship of his colleagues. Neither he nor any student of the common law could have wanted more than that he fill out his days in such a fruitful serenity.

But in that year Justice Holmes resigned. For thirty years, he had enriched the work of this great Court and, by the same token, the legal thought of the Nation. To succeed Justice Holmes there could be but one man. President Hoover spoke for the whole people when he offered the nomination to Chief Judge Cardozo. With reluctance, and through a selfless obedience to the higher duty, Judge Cardozo accepted the call and took his seat on this Court on March 14, 1932.

His first opinion for the Court appears in the 286th volume and his last opinion in the 302nd volume of the reports.[6] The span is tragically short. But in these brief years Justice Cardozo has notably enriched the history of jurisprudence. To this Court he brought his deep learning in the law and to the solution of its vexing problems he lent a tolerance and a generous understanding which have rarely been equalled.

He made the transition from New York to this Court with an ease which seemed effortless. The large questions of constitutional law, the unexplored vistas of administrative law, and the complexities of federal taxation, were each beyond the ordinary range of litigation in the Court of Appeals. Yet, from the very beginning, his touch was as sure and his vision as far-ranging as it had been in the familiar rooms at Albany.

To the specialized fields which provide much of the work of this Court, Mr. Justice Cardozo brought rare

[6] In these six years, Mr. Justice Cardozo wrote 128 majority opinions, 2 concurring opinions and 24 dissenting opinions; in addition, he collaborated in 7 concurring and 10 dissenting opinions.

skill with the technical tools of the lawyer and an insistent belief that the law failed when it offered reward to chicanery or greed. A complicated question of tax limitation [7] was solved by "the principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong." He differed with the majority of this Court in the *Securities and Exchange Commission* case,[8] perhaps less because of his analysis of the statute than for fear that it would "become the sport of clever knaves." If the registration procedure is not to "invite the cunning and unscrupulous to gamble with detection," he continued, "when wrongs such as these have been committed or attempted, they must be dragged to light and pilloried."

But it is in the larger reaches of public law that the broad vision of Mr. Justice Cardozo found full scope. The commentators may dispute as to whether the judge who decides these questions must be more the statesman or the lawyer. But none has doubted that Mr. Justice Cardozo was rarely gifted with both qualities.

The novel problems presented by administrative law received from him a sympathetic and discerning treatment. He never forgot that administrative agencies were born of a need for developing a technique which differed from judicial litigation. He has written, for the Court, that "the structure of a rate schedule calls in peculiar measure for the use of that enlightened judgment which the Commission by training and experience is qualified to form. . . . It is not the province of a court to absorb this function to itself." [9] He saw, too, that these agencies act in a field where substantial accuracy is immeasurably preferable to the complete frustration which would result were an absolute precision sought. The Interstate Commerce Commission, faced with the task of

[7] *Stearns Co.* v. *United States,* 291 U. S. 54, 61–62.

[8] *Jones* v. *Securities & Exchange Comm'n,* 298 U. S. 1, 32.

[9] *Mississippi Valley Barge Co.* v. *United States,* 292 U. S. 282, 286.

valuing railroads, he said, may recognize that "in any work so vast and intricate, what is to be looked for is not absolute accuracy, but an accuracy that will mark an advance upon previous uncertainty." [10] For him the respect to be paid the findings of the administrative tribunal was an imperative rule of decision, not to be satisfied by verbal recognition. He has placed a decision of the Court on the ground that the lower court, "though professing adherence to this mandate, honored it, we think, with lip service only." [11]

The same quality appears when he considers the validity of state legislation. There could be no tolerance for state regulation which, as he said in the *Seelig* case,[12] by setting "a barrier to traffic between one state and another," "would neutralize the economic consequences of free trade among the states." But, so long as the state action contained no threat to national solidarity, it could not properly, Mr. Justice Cardozo felt, be nullified by this Court unless the Constitution spoke to the contrary with unmistakable clarity. When this Court held invalid a state sales tax, graduated according to volume, in the *Stewart Dry Goods* case,[13] Mr. Justice Cardozo entered eloquent protest. The legislation, he said, was "a pursuit of legitimate ends by methods honestly conceived and rationally chosen. More will not be asked by those who have learned from experience and history that government is at best a makeshift, that the attainment of one good may involve the sacrifice of others, and that compromise will be inevitable until the coming of Utopia."

Few men have, with such wholehearted humility, practiced that tolerance for human experimentation which many feel must be the hallmark of a great constitutional jurist. But none knew better than Mr. Jus-

[10] *I. C. C.* v. *New York, N. H. & H. R. Co.*, 287 U. S. 178, 205.
[11] *Federal Trade Comm'n* v. *Algoma Co.*, 291 U. S. 67, 73.
[12] *Baldwin* v. *G. A. F. Seelig*, 294 U. S. 511, 521, 526.
[13] *Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 550, 577.

tice Cardozo that, when the question was one of personal liberty rather than the economic judgment of the legislature, vigilance rather than obeisance must be the order of decision. Of freedom of thought and speech, he wrote in one of his last opinions for the Court,[14] "one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom." He has elsewhere said:[15] "Only in one field is compromise to be excluded, or kept within the narrowest limits. There shall be no compromise of the freedom to think one's thoughts and speak them, except at those extreme borders where thought merges into action." And then follow these majestic words: "We may not squander the thought that will be the inheritance of the ages."

Perhaps the most nearly ultimate field upon which a Justice of this Court must venture is that of measuring an Act of the Congress against the requirements of the Constitution. Mr. Justice Cardozo sat during six of the most momentous years in the history of this Court. Throughout these years the familiar rules which forbid the Court from passing judgment on the wisdom of the Congress were to him not aphorisms but burning truths. He found, in his own words,[16] a "salutary rule of caution" in that "wise and ancient doctrine that a court will not adjudge the invalidity of a statute except for manifest necessity. Every reasonable doubt must have been explored and extinguished before moving to that grave conclusion." Mr. Justice Cardozo viewed the Constitution as directed to the great end of preserving a democratic government for a free people. This high purpose is defeated if the courts view the Constitution as dictating choice, as he has stated it, in "a situation where thoughtful and honest men might see their duty differently." [17]

---

[14] *Palko* v. *Connecticut*, 302 U. S. 319, 327.

[15] "Mr. Justice Holmes," 44 Harv. Law Rev. 682, 688.

[16] Dissenting in *United States* v. *Constantine*, 296 U. S. 287, 299.

[17] *Mayflower Farms* v. *Ten Eyck*, 297 U. S. 266, 276.

His consistent deference to the judgment of the legislature came not merely from the humility of his nature. It arose also from his profound conviction that, as he put it,[18] "one kind of liberty may cancel and destroy another," and that "many an appeal to freedom is the masquerade of privilege or inequality seeking to entrench itself behind the catchword of a principle." Thus, where an industry was so glutted by ruthless overproduction that its survival was threatened, Mr. Justice Cardozo saw nothing in the Constitution which forbade the Congress to act, for, as he said in the *Carter* case,[19] "The liberty protected by the Fifth Amendment does not include the right to persist in . . . anarchic riot."

Mr. Justice Cardozo found no constitutional barrier to prevent the enactment of legislation which was compelled by the urgent needs of an ever-changing society. "The Constitution of the United States," he wrote in his dissent in the *Panama Refining* case,[20] "is not a code of civil practice." The commerce power, he has said, "is as broad as the need that evokes it." [21] The basic constitutional doctrine of separation of powers was for him not "a doctrinaire concept to be made use of with pedantic rigor. There must be sensible approximation, there must be elasticity of adjustment, in response to the practical necessities of government, which cannot foresee today the developments of tomorrow in their nearly infinite variety." [22]

Thus far I have spoken of our friend as a lawyer and a judge. This imperfect tribute leaves untouched the far reaches of his mind and character. I have not trusted myself to speak of these things. They are so intimate and so beautiful that they quite transcend the limits of

[18] "Mr. Justice Holmes," 44 Harv. Law Rev. 682, 687–688.

[19] Dissenting in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 331.

[20] *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 447.

[21] Dissenting in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 328.

[22] *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 440.

our common speech. It is better, I think, to rest upon the words of Justice Holmes who, in tenderness and affection, said that Judge Cardozo was "a great and beautiful spirit." [23]

It was eminently fitting that Mr. Justice Cardozo should have been chosen to deliver the opinion of the Court in the *Social Security* cases. The governmental process must have seemed noblest to him when it was directed to the relief of the aged, the infirm, and the destitute. His words seem to have sprung from the heart of one who felt with intensity that government succeeds only as it serves the needs of its people: "Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the Nation. What is critical or urgent changes with the times. . . . The hope behind this statute is to save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near." [24]

Mr. Justice Cardozo has reached the end of his journey. It has been a journey of loving service to the law and to those who live under the law. I venture to predict that, so long as our common law and our Constitution persist, men will pay tribute to the memory of this shy and gentle scholar, whose heart was so pure and whose mind was so bold.

THE CHIEF JUSTICE responded:

Mr. Attorney General: The tribute in the resolutions you present comes most fittingly from the members of the Bar who find the ideals of their profession realized in a career of extraordinary worth. It is of special significance at this time that these sentiments of lawyers will find a warm response in the hearts of millions of our

[23] Letter to Dr. John C. H. Wu, printed in Holmes, *Book Notices, Uncollected Papers, Letters* (Shriver), p. 202.

[24] *Helvering* v. *Davis,* 301 U. S. 619, 641.

fellow countrymen who, without learning in the law, have a keen sense of the public benefit that has come from the quiet, unselfish and humane labors of a great jurist working in the public interest with a consuming zeal. We, his brethren of the Court—still awestruck by the fate which brought his career to such an untimely and tragic end—receive this tribute with hearts burdened by the sense of loss of that personal association which was to us a priceless privilege.

Benjamin Nathan Cardozo was city-born and bred. He was reared not in the wide open spaces but within the narrow confines of the great metropolis. But his horizon knew no urban bounds and his vision took in all the circumstances and needs of our country with complete understanding. His urban training made him familiar with some of the most serious problems of our democracy and gave him special alertness to detect every sort of wrong, however cunningly disguised by conventional or tolerated forms. The passion for justice which characterized his work had its roots in what he early perceived in his metropolitan environment and never forgot.

It would be difficult to find a life so completely and uninterruptedly devoted to pursuits congenial to talent. While enjoying the resources and interests of a cultivated taste, it was to the study of the law—its learning, its processes, and its adjustments—that he bent his energies and he reaped the hard-won rewards of the most distinguished scholarship. He was singularly immune from either the enticements or the demands of activities foreign to strictly professional labors. He did not seek public office. He stood aloof from politics. He did not engage in public controversies or aspire to leadership in organized social efforts. He did not crusade for social reforms. His zeal for human betterment took a direction better suited to his temperament and intellectual interests. He shrank from promiscuous contacts, finding a safe refuge in his books.

Even at the Bar, he was spared the stormy conflicts of jury trials and the contests which evoked passion and animosities. Early distinguished for his ability in analysis and his force and felicity of expression, his professional opportunities lay in briefs and arguments in cases in equity and in appellate courts,—in cases requiring particular skill in the illumination and solution of legal problems, where advocacy needed the resources of the industrious scholar. During his twenty or more years at the Bar he neither sought nor had public acclaim. But he deeply impressed his brethren of the profession and on that solid reputation his future was built.

It was evident to all who knew him that he would be an ideal judge; and in truth it was his friends of the Bar who procured his nomination and made sure his election as a judge of the Supreme Court of New York, the highest court of original jurisdiction in that State. It was equally plain that his best service would be in an appellate court, and almost immediately he was designated to serve in the highest court of the State, and there by subsequent choice of the electorate as Associate Judge and Chief Judge he remained for about eighteen years. His work in the Court of Appeals of New York made him renowned throughout the country. It was service of the highest judicial quality in learning, in skill in exposition, in outstanding contributions to the development of the law. In the field of the common law, his learning gave him the freedom which comes with mastery, as he utilized its processes to secure its intelligent adaptation to the needs of his time. Modest, sensitive and retiring, he was still a mighty warrior for his convictions and in his expert hands the pen became a sword wielded with devastating power.

When Mr. Justice Holmes retired in 1932, the country, led by the Bar, with one voice urged his appointment to this Court. And here he sat for over five eventful years. In the proceedings which led to the adoption of the resolutions you have presented, Mr. Attorney General, the opinions of Mr. Justice Cardozo—those which he wrote

and those in which he concurred—have largely been considered. This is not a fitting occasion for a critique. It is sufficient to say that no judge ever came to this Court more fully equipped by learning, acumen, dialectical skill, and disinterested purpose. He came to us in the full maturity of his extraordinary intellectual power, and no one on this bench has ever served with more untiring industry or more enlightened outlook. The memory of that service and its brilliant achievements will ever be one of the most prized traditions of this tribunal. Mr. Justice Cardozo in one of his penetrating discussions observed: "If I consult my own experience, and ask what judges do in building law from day to day, I find that for the average run of cases what our predecessors have *said* is a generative force quite as much as what they have done." He meant what had been said, not by way of mere *dictum,* but what had been said "as the professed and declared principle dictating the conclusion." With the same thought he emphasized the "exceptional cases" when "the creative function is at its highest." And I have no doubt it is not so much the specific rulings in the opinions of Mr. Justice Cardozo but what he said in arriving at the rulings that will be found to be a constantly active generative force in working out the decisions of the future. He has left a great arsenal of forensic weapons.

Mr. Justice Cardozo was devoted to our form of government and to him our constitutional guarantees of essential liberties constituted a heritage to be defended at all costs. With rare insight into our social problems and with vivid imagination, what he thought and sought to enforce was built upon the foundation of profound study. The idea that "sentiment or benevolence or some vague notion of social welfare becomes the only equipment needed" was an illusion. "Nothing," he said, "can take the place of rigorous and accurate and profound study of the law as already developed by the wisdom of the past." "This," he added, "is the raw material which we are to mould."

That process of "moulding" he not only brilliantly illustrated in his judicial opinions, but he subjected it to the most rigorous analysis. The function of the judge in the shaping of the law was for him a subject of perennial fascination, to which he ever returned with a clarity and comprehensiveness of exposition which placed him in the front rank of writers on the philosophy of law,—its nature and its growth. In his view the competing demands of stability and progress pointed to an essential compromise,—"a compromise between paradoxes, between certainty and uncertainty, between the literalism that is exaltation of the written word and the nihilism that is destructive of regularity and order." "The victory," he said, "is not for the partisans of an inflexible logic, nor yet for the levelers of all rule and all precedent, but the victory is for those who shall know how to fuse these two tendencies together in adaptation to an end as yet imperfectly discerned." For Justice Cardozo, the distrust of a concept was the beginning of wisdom and he was constantly on guard against the "tyranny of labels." With characteristic detachment, he was aware of the snares of "universals," as well in his study of the "theory of juristic method" as in other matters. "The snares that are thus set may catch the heedless feet of thinkers who have been loud even as they stumbled in cries of danger unto others." And thus he recognized that "Generalizations about the ways in which the judicial process works are quite as likely to be incomplete, and to stand in need of supplement or revision, as the generalizations yielded by the process when in action, the output of its workings."

On the one hand, Justice Cardozo dissented from the "depreciation of order and certainty and rational coherence" as merely negligible goods, and, on the other, he was "wholly one" with the insistence "that the virtues of symmetry and coherence" can be purchased at too

high a price and that law is "a means to an end and not an end in itself." He summed up his teaching and his practice in his heed to the warning that principles and rules and concepts are in many instances but "glimpses of reality" and that there is the need, as he put it, of "reformulating them or at times abandoning them altogether when they stand condemned as mischievous in the social consciousness of the hour."

Success in such an effort at interpretation of the social consciousness manifestly would demand a rare equipment of learning, experience and wisdom,—a balance of judgment which imperfect knowledge or narrowness of understanding would at once upset. That necessary equipment Mr. Justice Cardozo possessed in a remarkable degree and with his keen awareness he was able to escape the pitfalls into which a lesser mind might easily have stumbled. Justice Cardozo fully recognized the disagreements among those who had studied the juristic method, whether they prosecuted their studies as detached philosophers or with the aid of experience in the exercise of the judicial function, and in summarizing the conflicting contentions he disclosed his own attitude in these words: "I do not know how it will all end. I know that it has been an interesting time to live in, an interesting time in which to do my little share in translating into law the social and economic forces that throb and clamor for expression. Like any other era of unrest, it has had its pangs of uncertainty, its doubts and hesitation." And referring to a saying of Bacon, he concluded: "The 'wayes' we have to travel nowadays are not flat and plane, if indeed they ever were. They are uphill and downhill with many a signpost that is false and many another that has fallen. . . . If I have not lost the road altogether, if my feet have not sunk in a quagmire of uncoordinated precedents, I owe it not a little to the signposts and the warnings, the barriers and the bridges, which my study of

the judicial process has built along the way."[1] It was under the sway of the convictions produced by that special study that he wrought out the judicial opinions which constitute his monument.

Judge Irving Lehman, of the Court of Appeals of New York, has spoken out of his intimate knowledge of the strong influence exerted by Cardozo as Chief Judge of that court. Judge Lehman referred to his vast store of learning, his unflagging industry and his command of the gentle art of persuasion, but far above those he placed the "integrity of his mind," "his complete absorption in his work, his selflessness, his independence restrained by his respect for the opinion of others." These qualities were also outstanding in his work in this Court. In conference, while generally reserved and reticent until it was his duty to speak, he then responded with an unsurpassed clearness and precision in statement. His gentleness and self-restraint, his ineffable charm, combined with his alertness and mental strength, made him a unique personality. With us who had the privilege of daily association there will ever abide the precious memory not only of the work of a great jurist but of companionship with a beautiful spirit, an extraordinary combination of grace and power.

[1] Address before New York State Bar Association, 1932. Association Report, Vol. 55.

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, 1938

GREAT NORTHERN RAILWAY CO. ET AL. *v.* LEONIDAS.

CERTIORARI TO THE SUPREME COURT OF MONTANA.

No. 8. Argued October 11, 1938.—Decided November 7, 1938.

1. Section 54 of the Federal Employers' Liability Act, providing that an employee of a common carrier shall not be held to have assumed the risks of his employment "in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee," relates to statutes subjecting carriers in interstate commerce to particular obligations for the safety of their employees, such as the Safety Appliance Acts, not to the Federal Employers' Liability Act itself. P. 2.

   Where such violations are not involved, the defense of assumption of risk is available in actions under the Federal Employers' Liability Act. P. 2.

2. The defense of assumption of risk is for the jury, under proper instructions, where there is evidence tending to support it. P. 3.

105 Mont. 302; 72 P. 2d 1007, affirmed in part.

CERTIORARI, 303 U. S. 632, to review the affirmance of a judgment against the Railway Company and one of its employees in an action for personal injuries. The writ of certiorari is dismissed as to the employee for want of a properly presented federal question.

Mr. William L. Clift, with whom *Mr. T. B. Weir* was on the brief, for petitioners.

Mr. Hugh R. Adair, with whom *Mr. Lester H. Loble* was on the brief, for respondent.

105537°—39——1

PER CURIAM.

This action was brought by George Leonidas, an employee of the Great Northern Railway Company, against that Company and George Pappas, another of its employees, to recover damages for personal injuries alleged to have been caused by defendants' negligence. The complaint set forth two causes of action but at the trial plaintiff elected to stand upon the second cause of action, which was based upon the Federal Employers' Liability Act. 45 U. S. C. 51–59. Defendants' motion for the direction of a verdict in their favor was denied and the jury found for the plaintiff. The Supreme Court of the State affirmed the judgment. 105 Mont. 302; 72 P. 2d 1007.

After ruling that upon the evidence the question of plaintiff's assumption of risk was one for the jury, the court stated as a further ground for affirming the judgment that the defense of assumption of risk was not available under the federal statute. The court pointed to the provision (§ 54) that an employee of the common carrier shall not be held to have assumed the risks of his employment "in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." The court ruled that the Federal Employers' Liability Act was one intended to promote the safety of employees and hence that the defense of assumption of risk was barred.

This ruling was error. The provision of § 54 relates to such statutes as the Safety Appliance Acts (March 2, 1893, c. 196, 27 Stat. 531; March 2, 1903, c. 976, 32 Stat. 943; April 14, 1910, c. 160, 36 Stat. 298; February 17, 1911, c. 103, 36 Stat. 913); the Hours of Service Act (March 4, 1907, c. 2939, 34 Stat. 1415); and other statutes subjecting carriers in interstate commerce to particular obligations for the safety of their employees. *Seaboard Air Line Ry.* v. *Horton,* 233 U. S. 492, 503; *Jacobs* v.

Southern Railway Co., 241 U. S. 229, 235, 236. Where such violations are not involved, the defense of assumption of risk is available in actions under the Federal Employers' Liability Act. *Seaboard Air Line Ry.* v. *Horton, supra; Jacobs* v. *Southern Railway Co., supra; Atchison, T. & S. F. Ry. Co.* v. *Swearingen,* 239 U. S. 339, 344; *Baugham* v. *New York, P. & N. R. Co.*, 241 U. S. 237, 241; *Chicago, R. I. & P. Ry. Co.* v. *Ward,* 252 U. S. 18, 21.

Despite this erroneous ruling, we are of the opinion that the judgment should be affirmed upon the first ground taken by the state court, that is, that the question of assumption of risk was for the jury. It is not contended that the instructions of the trial court upon that defense were erroneous. The contention is that there was no evidence to go to the jury. We think that there was.

The judgment is affirmed with respect to the petitioner Great Northern Railway Company. As to the petitioner George Pappas, the writ of certiorari is dismissed upon the ground that the federal question as to the right of recovery under the Act against him individually, as distinguished from the Railway Company, was not properly presented.

Affirmed in part; dismissed in part.

MR. JUSTICE BLACK is of the opinion that the writ of certiorari should be dismissed as to both petitioners.

TEXAS CONSOLIDATED THEATRES, INC. *v.* PITTMAN.

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

No. 26. Submitted October 19, 1938.—Decided November 7, 1938.

CERTIORARI, 304 U. S. 556, to review a judgment of the Circuit Court of Appeals, 93 F. 2d 21; 94 *id.* 203, affirming a judgment for damages against petitioner, *dismissed,*

with costs, in view of subsequent settlement in the District Court &c.

Mr. W. B. Handley submitted for petitioner.

No appearance for respondent.

PER CURIAM.

Respondent recovered judgment for damages in an action for injuries suffered by his wife. After appeal had been argued and while it was under advisement in the Circuit Court of Appeals, the parties entered into a stipulation for settlement on payment of a sum less than the judgment and providing that the judgment should be reversed and judgment entered in the District Court for costs only. The Circuit Court of Appeals affirmed the judgment. 93 F. 2d 21. Alleging that the court had been informed of the compromise and stipulation, petitioner sought a rehearing, which was denied. 94 F. 2d 203. We granted certiorari.

Upon the case being called for argument in this Court, respondent did not appear. Petitioner submitted a statement showing that, since the issue of the writ, an order upon hearing had been entered in the District Court whereby the judgment involved was decreed to be satisfied and discharged in full and the issue of execution thereon was prohibited; that respondent excepted to the order and gave notice of appeal but that the appeal had not been prosecuted.

Petitioner submitted the case for such order as the Court may deem proper and suggested that the costs of this proceeding may be taxed against it.

The writ of certiorari is dismissed with costs against petitioner.

Dismissed.

Syllabus.

POLK COMPANY ET AL. *v.* GLOVER, COUNTY SOLICITOR, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

No. 29. Argued October 20, 1938.—Decided November 7, 1938.

1. In deciding a motion to dismiss a bill upon the ground that it fails to state a cause of action, the court is not at liberty to consider affidavits or other evidence produced in support of an accompanying application for an interlocutory injunction, but must decide upon the facts set up in the bill. P. 9.

   The motion was accompanied also by answers; but plaintiffs did not submit the case to be decided upon the merits upon the bill, answers and affidavits.

2. Before deciding grave constitutional questions, the essential facts upon which they depend should be determined after a hearing in due course upon the issues raised by the pleadings. P. 9.

   A Florida statute required that the labels upon containers of canned citrus fruit or fruit juice name the State or country where the contents were produced, and, if produced in Florida, that the name "Florida" be in or embossed upon the substance of each container. Violation was made punishable as a crime and by confiscation. Canners of citrus products grown in Florida attacked the statute upon the ground that its present enforcement would inflict immediate and irreparable injury because of the cost of sorting, classifying and overprinting large stocks of labels on hand; and because the tinned containers on hand, of great value, could not be embossed as required without impairing the protective coating of tin, so that subsequent use would result in spoilage of contents and much loss to the plaintiffs' business. It is *held,* without intimating any opinion on constitutional issues, that the facts alleged in the bill were such as to entitle plaintiffs to an opportunity to prove their case, and that the court below should not have undertaken to dispose of those issues in denial of that opportunity. The allegations as to trade conditions and practices, and as to the effect of the required embossing of cans, raised particular questions which could hardly be said to lie within the range of judicial notice.

22 F. Supp. 575, reversed.

APPEAL from a decree of a District Court of three judges, denying an interlocutory injunction and dismissing the bill, in a suit to enjoin enforcement of a statute relating to the labeling &c. of canned citrus products.

Messrs. H. Thomas Austern and *John B. Sutton* for appellants.

Messrs. Wm. C. Pierce and *John L. Graham,* Assistant Attorney General of Florida, with whom *Messrs. George Couper Gibbs,* Attorney General, and *E. Glenn Grimes* were on the brief, for appellees.

PER CURIAM.

Plaintiffs, engaged in the business of canning citrus products grown in the State of Florida, challenged by this suit the validity of Chapter 17,783 of the Acts of 1937 of that State upon the ground that the statute violated the state constitution and also the commerce clause, and the due process and equal protection clauses of the Fourteenth Amendment, of the Federal Constitution. An interlocutory injunction was sought and a court of three judges was convened.

Reciting that certain persons are engaged in importing into Florida citrus fruit and citrus juice produced and canned elsewhere, and in labeling the same in Florida whence it is sold, with the result that dealers are deceived and producers and canners in Florida are injured, the statute provides that every label upon any container of canned citrus fruit or juice shall show accurately the name of the State or country in which the fruit or juice was produced, and that every container used for such fruit or juice produced in Florida "shall have stamped into or embossed upon the tin, glass or other substance of which such container is made" the word "Florida," and it is made unlawful for anyone to use any container

bearing the name "Florida" for any canned citrus fruit or juice produced elsewhere. The Florida Citrus Commission is authorized to prescribe the method of marking the labels and embossing the containers. Violation of the Act is punishable by imprisonment or fine, or both, and by confiscation of all goods misbranded.

The Act was approved June 10, 1937, and provided that it should take effect immediately. On September 4, 1937, the Commission resolved that "for the present" it felt that "an educational and adjustment period" was necessary before the labeling provisions were enforced. On October 4, 1937, the Commission adopted regulations prescribing the method of stamping or embossing the cans.

The bill of complaint set forth facts relating to the character of the trade, the process of canning and the trade practices as to labeling. It alleged that plaintiffs were without knowledge as to the authority of the Commission to postpone the enforcement of the labeling provisions of the Act and had no assurance from any enforcement officer that failure to comply therewith would not result in criminal prosecution or in the confiscation of products packed; that the "classification, sorting and overprinting of both packer and private brand labels now on hand" would result in immediate increased cost to each of the plaintiffs in an amount in excess of $3,000; that as to the required embossing, the statute made no provision for the use of the tin containers not so embossed which the plaintiffs had on hand in a value in excess of $33,000; that these containers would no longer be usable in the packing of canned citrus products if the statute were enforced; that the embossing of the tin plate of the can would cause what is known as "hydrogen flippers" due to action of the acid in the fruit upon the sheet steel underlying the tin plate through the weakening or penetration of the tin covering; that this would result in "un-

told spoilage, swelling of cans, unmarketability and loss of products, loss of consumers' good will, and other damage," in an amount not presently calculable; and that the requirement of embossing would cause each of the plaintiffs a loss in excess of $3,000 because of the refusal of distributors to purchase and handle cans so embossed. The effect of the Act upon plaintiffs' trade was described in support of the claim that the enforcement of its provisions would inflict immediate and irreparable injury.

Defendants, including the Florida Citrus Commission (which intervened) and other officials, filed answers putting in issue the allegations as to the injurious operation of the statute. They also moved to dismiss the bill of complaint upon the ground that it failed to state a cause of action. On the application for interlocutory injunction, the parties submitted affidavits setting forth facts in support of their respective contentions. At the same time the court heard the motions to dismiss. Injunction was denied, the motions to dismiss were granted, and a final decree was entered accordingly. 22 F. Supp. 575. This is a direct appeal from the decree of dismissal. 28 U. S. C. 380.

The District Court made findings. After reciting the statements in the preamble of the statute, the court found that no sufficient facts had been shown by affidavits or otherwise to overcome the findings of fact so made by the legislature; that the statute was enacted in pursuance of the police power of the State and that all citrus fruit canners in Florida were affected by its provisions, without exceptions; that plaintiffs had on hand unembossed containers of a value in excess of $33,000 which would no longer be usable if the Act were enforced, but that "such containers could be used for packing of vegetables or commodities other than citrus products" and that there was no showing "that they could not be exchanged with the manufacturer for properly embossed

cans at little or no extra expense"; that if the practices and abuses as found by the legislature were not stopped "the price which the producer of citrus fruit grown in Florida receives for his product will be greatly reduced" and he will "ultimately be forced out of business"; that it did not sufficiently appear that the embossing of cans would be injurious or harmful to the citrus contents; that, "apart from the conflicting affidavits, numerous embossed cans were produced before the court, some of which were used for canning citrus products and there was no showing that the contents of such cans had been injuriously affected by the embossing."

At the same time the court made an order restraining the enforcement of the statute pending this appeal, upon the plaintiffs giving a bond. That order recited that the court was of the opinion "that the questions involved are novel and of great importance" and further that the plaintiffs "will suffer irreparable loss and damage during said appeal" if the Florida statute is enforced and this Court should reverse the decree.

We are of the opinion that the District Court erred in dismissing the bill of complaint. Plaintiffs did not submit the case to be decided upon the merits upon the bill, answers and affidavits. Defendants' motion to dismiss, like the demurrer for which it is a substitute (Equity Rule 29) was addressed to the sufficiency of the allegations of the bill. For the purpose of that motion, the facts set forth in the bill stood admitted. For the purpose of that motion, the court was confined to the bill and was not at liberty to consider the affidavits or the other evidence produced upon the application for an interlocutory injunction. But the findings of the court indicate that that evidence, in part at least, underlay the final decree it entered.

We think that the facts alleged in the bill were sufficient to entitle the plaintiffs to an opportunity to prove

their case, if they could, and that the court should not have undertaken to dispose of the constitutional issues (as to which we intimate no opinion) in advance of that opportunity. The allegations of the bill as to trade conditions and practices, and as to the effect of the required embossing of cans, raise particular questions which can hardly be said to lie within the range of judicial notice. The salutary principle that the essential facts should be determined before passing upon grave constitutional questions is applicable. See *Borden's Farm Products Co.* v. *Baldwin,* 293 U. S. 194, 211–213, and cases cited. And that determination requires a hearing in due course upon the issues raised by the pleadings.

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

Reversed.

MR. JUSTICE BLACK, dissenting.

A Florida law designed to prevent fraud, requires that citrus products grown and canned in Florida carry the label "Made in Florida," and that containers of these products be embossed with the single word, "Florida." The majority do not decide that this state law violates the Federal Constitution. Nor do they decide that proof of the allegations of petitioners' bill of complaint will show that the Florida law violates the Constitution. While petitioners are held entitled to produce evidence, they are not held entitled to relief if they prove their entire bill. If on remand petitioners prove every allegation in their complaint, still—after time and state funds have been spent in taking evidence—either the District Court or this Court may decide that the complaint did not allege facts sufficient to invalidate the law. In the meantime, the State of Florida is forced to litigate the validity of its duly enacted law, with no decision on its

substantial defense that petitioners' bill is wholly defective because of "insufficiency of fact to constitute a valid cause of action" [1] or "failure to state a claim upon which relief can be granted." [2]

The important consequences of this remand raise far more than mere questions of procedure. State laws are continually subjected to constitutional attacks by those who do not wish to obey them. Accordingly, it becomes increasingly important to protect state governments from needless expensive burdens and suspensions of their laws incident to federal court injunctions issued on allegations that show no right to relief. The operation of this Florida law has been suspended. Complaints seeking to invalidate and suspend the operation of state laws by invoking the "vague contours" of due process [3] can irreparably injure state governments if we accept as a "salutary principle" the rule that all such complaints—though failing to state a cause of action—raise "grave constitutional questions" which require that "the essential facts shall be determined." Under this declared "salutary principle" specially applying to bills attacking the constitutionality of legislative acts, such bills must be defended against even though they fail to state a cause of action. This is contrary to the traditional general rule that fatally defective bills are dismissed on motion (formerly demurrer) in order to prevent needless litigation, delay and expense.[4] The application of this special prin-

[1] Rule 29, Rules of Practice for the Courts of Equity of the United States, effective February 1, 1913.

[2] Rule 12 (b), "Federal Rules of Civil Procedure."

[3] Cf. Mr. Justice Holmes dissenting in *Adkins* v. *Children's Hospital*, 261 U. S. 525, 568.

[4] Story's Equity Pleadings (10th ed.) §§ 446, 447, 526. The ". . . proper rule of pleading would seem to be, that, when the case stated by the bill appears to be one in which a court of equity will refuse its aid, the defendant should be permitted to resist it by demurrer. . . . 'If the case of the plaintiff as stated in the bill will not entitle

ciple to bills attacking State legislation seriously undermines the historical presumption of the validity of state acts.[5] A refusal to determine whether or not the allegations of the bill are sufficient to strike down an Act until evidence has been heard adds a special burden to the defense of state legislation, as though legislation were to be presumed invalid. I do not believe this principle leads to salutary results and I am of the opinion that we should now determine whether the allegations of the bill, if proven, would entitle petitioners to relief.

The bill alleges that the Florida statute violates the Commerce Clause of the Constitution[6] and the Due

---

him to a decree, the judgment of the court may be required on demurrer whether the defendant ought to be compelled to answer the bill' . . ." This principle is calculated "to save the parties from useless expense and trouble in bringing it [a suit] to issue. . . ." *Maxwell* v. *Kennedy,* 8 How. 210, 222, 223; cf. *Southern Pacific Co.* v. *Campbell,* 189 F. 182, aff'd 230 U. S. 537; *Missouri Pacific R. Co.* v. *Norwood,* 42 F. 2d 765, aff'd 283 U. S. 249; *Pacific States Co.* v. *White,* 9 F. Supp. 341, aff'd 296 U. S. 176; *Isbrandtsen-Moller Co.* v. *United States,* 14 F. Supp. 407, aff'd 300 U. S. 139.

[5] See *Ogden* v. *Saunders,* 12 Wheat. 213, 270.

"The complaint contains much by way of argument, assertions as to questions of law together with inferences and conclusions of the pleader as to matters of fact. These are not deemed to be admitted by motion to dismiss. . . . The state laws [regulating train crews and assailed as violative of the Federal Constitution] are presumed valid. . . . The burden is on the plaintiff by candid and direct allegations to set forth in its complaint facts sufficient plainly to show the asserted invalidity." *Missouri Pacific R. Co.* v. *Norwood,* 283 U. S. 249, 254, 255. "Every exertion of the police power, either by the legislature or by an administrative body, is an exercise of delegated power. . . ." Where "the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies." *Pacific States Co.* v. *White,* 296 U. S. 176, 185, 186.

[6] The asserted conflict with the Commerce Clause does not rest upon proof of fact. It must be decided by a comparison of the Florida law and the Federal Pure Food and Drug Act and regulations

Process Clause of the Fourteenth Amendment. The court below held in the alternative that petitioners failed to make "sufficient showing either by affidavit or by the allegations of the bill to uphold the contention that the Act deprives the plaintiffs of their property without due process of law."

Even according to the presently prevailing interpretation of the Due Process Clause of the Fourteenth Amendment, I do not believe that the averments of petitioners' bill can sustain invalidation of this duly enacted Florida statute. The statute contains a legislative finding that "certain persons, firms and corporations in the State of Florida" had engaged "in the practice" of deceiving customers into the belief that non-Florida canned citrus products had been produced in Florida. The legislature further found that this practice operated to "the injury and detriment of the producers and canners of citrus fruit and citrus juices in the State of Florida; . . ." and concluded that an effective method to prevent this fraudulent practice was to require the publication of the truth upon labels and containers. Averments of petitioners' bill, in their strongest light, go no further than to deny this legislative finding. They say to require publication of the truth in this manner on the cans and labels is burdensome [7] and violates the Due Process Clause of the Fourteenth Amendment. They further charge here that this finding of the legislature is a "feigned" assumption and that "the facts alleged [in petitioners' bill] not only show the nonexistence of any basis for such assumption but demonstrate that the law will cause serious injury to

---

thereunder. That question can—and should—be decided now on the allegations of the bill. The court below found no conflict and I agree with its findings. See, *Savage* v. *Jones,* 225 U. S. 501, 533.

[7] "We may not test in the balances of judicial review the weight and sufficiency of the facts to sustain the conclusion of the legislative body, nor may we set aside the ordinance because compliance with it is burdensome." *Standard Oil Co.* v. *Marysville,* 279 U. S. 582, 586.

the packer and marked curtailment of the sale of citrus products grown and canned in Florida." Petitioners' argument for reversal largely involves "this disputed question as to the existence of facts concerning the basis for the law, and . . . the preamble statement of the alleged evil which gave rise to its enactment. . . ."

Because, it is said, the embossing and labeling requirements raise grave constitutional issues, the State of Florida will be required to defend against two issues raised by petitioners' bill. The State must answer the charges: first, that—contrary to the legislative finding—there was no fraudulent practice under which the dealers in canned citrus products were led to believe that they were buying Florida products when in fact the canned goods were produced outside that State; second, that truthful labeling and embossing as required by the statute would financially injure citrus growers, producers, canners and the people of Florida rather than benefit them as found by the legislature.

In attacking the legislative finding that the Act would bestow benefits on the State of Florida, petitioners allege that the law would require petitioners to spend extra money for labels; might cause them to lose some business; would afford the opportunity for spoiling and swelling of some cans on the theory that embossing without spoiling is difficult and could weaken the tin of containers thereby permitting acid to corrode the steel underneath the tin; that petitioners will suffer loss because they have on their hands cans that have not been embossed; and that Florida already has laws adequate to protect itself from fraudulent sales.

With reference to a state law regulating containers (for lard) this Court has already said: [8]

"This may involve a change of packing by the company and the cost of that change, but this is a sacrifice

[8] *Armour & Co.* v. *North Dakota*, 240 U. S. 510, 516.

the law can require to protect from the deception of the old method."

The real issue raised by petitioners' bill is not the cost incident to changing from the old method of labeling and embossing, but whether the Florida legislature—convinced that fraud existed—had the constitutional right to determine the policy which it believed would protect the people of Florida from that fraud. The cause is now sent back to a federal District Court to review the facts underlying the policy enacted into law by the legislature.

Under our constitutional plan of government, the exclusive power of determining the wisdom of this policy rested with the legislature of Florida subject to the veto power of Florida's governor.[9] This Court has taken judicial notice of the fact that citrus fruits support one of the great industries of the State of Florida, and held that it "was competent for the legislature [of Florida] to find that it was essential for the success of that industry that its reputation be preserved in other States wherein such fruits find their most extensive market." [10] The legislators of Florida are peculiarly qualified to determine the

[9] "The power of a State to prescribe standard containers in order to facilitate trading, to preserve the condition of the merchandise, to protect buyers from deception, or to prevent unfair competition is conceded. Such regulation of trade is a part of the inspection laws; was among the earliest exertions of the police power in America; has been persistent; and has been widely applied to merchandise commonly sold in containers.

"Different types of commodities require different types of containers; and as to each commodity there may be reasonable difference of opinion as to the type best adapted to the protection of the public. Whether it was necessary in Oregon [Florida?] to provide a standard container for raspberries and strawberries [citrus products?]; and, if so, whether that adopted should have been made mandatory, involve questions of fact and of policy, the determination of which rests in the legislative branch of the state government."

Pacific States Co. v. *White*, 296 U. S. 176, 181, 182.

[10] *Sligh* v. *Kirkwood*, 237 U. S. 52, 61.

policies relating to one of their State's greatest industries. Legislatures, under our system, determine the necessity for regulatory laws, considering both the evil and the benefits that may result. Unless prohibited by constitutional limitations, their decisions as to policy are final. In weighing conflicting arguments on the wisdom of legislation they are not confined within the narrow boundaries of a particular controversy between litigants. Their inquiries are not subject to the strict rules of evidence which have been found essential in proceedings before courts. Legislators may personally survey the field and obtain data and a broad perspective which the necessary limitations of court litigation make impossible.

The legislative history of the Florida statute under review indicates that it was given the careful and cautious consideration which regulation of one of the State's major industries deserved.[11] Companion measures were offered in the Florida House and Senate on the same day—April 28, 1937. In the House the measure was referred to the Committee on Citrus Fruits. The existence of such a standing committee is itself indicative of a legislative procedure designed to give careful consideration to legislation concerning this important industry. May 4, 1937, the House Committee voted to report the bill favorably, sixteen ayes, no nays, six members absent. June 1, the bill was made the special order of business and on June 2, the companion Senate bill previously passed by that body by a vote of twenty-four to one was substituted for the House measure and passed by a vote of seventy to nothing.[12]

---

[11] As to an "added reason for applying the presumption of validity" where a statute has been carefully enacted, compare, *Pacific States Co.* v. *White*, *supra*, p. 186.

[12] Journal of the Senate of Florida, Reg. Sess. 1937, 508; Journal of the House of Florida, Reg. Sess. 1937, 837.

In the face of this history, petitioners insist that this statute duly passed by the legislature and signed by the Governor of Florida violates the Due Process Clause as an unreasonable, capricious, unjust, harsh and arbitrary measure. Therefore, if petitioners are to obtain relief on this theory it must be found that this statute was "fixed or arrived at through an exercise of will, or by caprice, without consideration or adjustment with reference to principles, circumstances or significance"; or that it was "despotic, autocratic [or] high-handed"; or that it is "irrational, senseless" or passed by those "not endowed with reasoning ability; non-conformable to reason"; or that it is capricious or freakish which "denotes an impulsive seemingly causeless change of mind, like that of a child or a lunatic." [13]

The cause is remanded for the court below to determine whether the legislative requirement that cans and labels be truthfully marked is arbitrary, unreasonable, capricious, unjust or harsh. This makes it necessary for the court to weigh and pass upon the relative judgment, poise and reasoning ability of the one legislator who voted against the law, as contrasted with the ninety-four legislators and the governor who favored it. I do not believe that obedience to this carefully considered legislative enactment would violate any of petitioners' property rights without due process of law or that—even under prevailing doctrine—the averments of the complaint indicate that no known or supposed facts could sustain it.[14] The allegations of the complaint in this cause raise no more than questions of policy for legislative determination, which the Florida legislature has already considered and which can be presented to other legislatures in the future.

[13] See, Webster's New International Dictionary, 2nd ed., 1939.

[14] Cf., *Standard Oil Co.* v. *Marysville,* 279 U. S. 582; *Hebe Co.* v. *Shaw,* 248 U. S. 297, 304.

This case offers an appropriate opportunity to return to the wholesome principle stated by this Court in 1888, in *Powell* v. *Pennsylvania,* 127 U. S. 678, 686, in the following language:

"If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine, as an article of food, their appeal must be to the legislature, or to the ballot-box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government."

The majority opinion apparently does not decide that Florida has no power to require that the origin of citrus products canned in Florida shall be truthfully shown.[15] Petitioners' bill insists that Florida exercised its power so unwisely as to violate rights of property without due process, because, as alleged, canning frauds did not exist, and could be prevented by a wiser statute, less expensive and burdensome to petitioners. Thus they challenge the wisdom of the Florida legislation. On remand of petitioners' bill which fails to show that the Florida law is invalid, may the Court, on evidence outside the bill, hold that the law violates due process because the court is convinced that the legislature might have chosen a

[15] "Recognized elements of inspection laws have always been quality of the article, form, capacity, dimensions, and weight of package, mode of putting up, and marking and branding of various kinds, . . ."

In "the exercise of . . . [legislative] discretion, and of . . . [a State's] power to prescribe the method in which its products shall be fitted for exportation, it may direct that a certain product, while it remains 'in the bosom of the country' and before it has become an article 'of foreign commerce or of commerce between the States,' shall be encased in such a package as appears best fitted to secure the safety of the package and to identify its contents as the growth of the State, and may direct that the weight of the package, and the name of the owner of its contents, shall be plainly marked on the package, . . ." *Turner* v. *Maryland,* 107 U. S. 38, 55, 57.

wiser, less expensive and less burdensome regulation? If a court in this case and under this bill has this power, the final determination of the wisdom and choice of legislative policy has passed from legislatures—elected by and responsible to the people—to the courts.[16] I believe, in the language of the *Powell* case, *supra,* that since all that has been "said of this legislation is that it is unwise, or unnecessarily oppressive to those" canning citrus products, that petitioners' "appeal must be to the legislature, . . . not to the judiciary." I would affirm.

GUARANTY TRUST CO., EXECUTOR, *v.* VIRGINIA.

CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 9. Argued October 11, 12, 1938.—Decided November 7, 1938.

1. The question whether a state statute providing for taxation of trust income to the trustees when distribution by them is discretionary, and to the beneficiary when it is not, would operate to deny equal protection if income of a discretionary trust were to be taxed under it first to the trustee and again to the beneficiary while income from ordinary trusts was taxed only once, does not arise in a case where there has been but one tax imposed under the statute,—the tax on the beneficiary—and when there is no ground to suppose that the statute will be so construed and applied by the state authorities as to result in double taxation. P. 23.
2. Virginia and New York both have laws taxing trust income to the trustee when distribution is discretionary, but to the beneficiary when it is not. *Held* that taxation of a citizen and resident of Virginia upon income received there from a trust established and

---

[16] With reference to a state law regulating labels and containers for condensed milk, this Court said, "If the character or effect of the article as intended to be used 'be debatable, the legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury,' or, we may add, by the personal opinion of judges, 'upon the issue which the legislature has decided.'" *Hebe Co.* v. *Shaw,* 248 U. S. 297, 303.

administered in New York was not violative of the due process clause of the Fourteenth Amendment, although such income came from income of the trust which was taxed to the trustees by New York. P. 23.

169 Va. 414; 193 S. E. 534, affirmed.

CERTIORARI, 303 U. S. 632, to review the affirmance of a judgment denying relief in an action to set aside income tax assessments and to recover the taxes, theretofore paid under protest.

Mr. James R. Caskie for petitioner.

Mr. Abram P. Staples, Attorney General of Virginia, with whom *Mr. W. W. Martin,* Assistant Attorney General, was on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Mrs. Mary T. Ryan, while resident and citizen of Virginia in 1930, 1931 and 1932, was beneficiary of a trust set up under the will of her husband, Thomas F. Ryan, who died when a citizen of New York in 1928. The will was probated in New York; the trustees qualified there, took over the assets and have kept them there. The trust has been administered and accounts settled under the laws of that state.

The will divided the estate into fifty-four parts and directed payment of the income therefrom to designated beneficiaries. These are the provisions presently important—

> "Twelve (12) of said equal parts to said Trustees in trust to receive the income therefrom, and to pay over such part of said income to my dear wife, Mary T. Ryan, as they in their sole discretion may determine to be necessary and proper for her care, support and comfort during her life, in such installments and at such intervals as they in their sole discretion may determine."

> The will further provided that the trustees should "divide any surplus income from said twelve parts not paid to my wife as aforesaid, into forty-two equal portions, and to pay such surplus income in equal quarterly payments as near as may be" to certain distributees as designated in said will, and that upon the death of the said wife the principal amount of the said twelve equal parts should be divided and distributed to certain designated distributees, as set out in said will.

The New York and Virginia statutes laying taxes upon incomes from trusts are substantially alike. They require trustees to report income received and where the trust is discretionary to pay the amount assessed upon the entire income; if the trust is an ordinary one each beneficiary is assessed upon the amount received by him.

For 1930, 1931 and 1932, New York in one or both of these ways received taxes upon the entire income of the trust set up under the will. Exercising their discretion, after satisfying the taxes, the trustees paid to Mrs. Ryan considerable sums out of the income, from twelve fifty-fourths of the estate—in all approximately $300,000. For the same years, Virginia assessed ordinary state income taxes against her on account of the sums so received. They were paid; and this proceeding was begun in the circuit court of Nelson County to recover them. It sustained the tax, and the highest court of the state affirmed the judgment. The matter comes here by certiorari granted upon the following statement—

> This petition presents the issue as to whether the State of Virginia has the right, under the provisions of the Fourteenth Amendment to the Constitution of the United States, to assess an income tax on income received by the said Mary T. Ryan for the years in question, when the identical income in the hands of her Trustees had been assessed with income taxes by the State of New York, and which said taxes had

been paid there, thus imposing two State taxes on the same income.

Counsel for petitioner submits—

The same income was subjected to taxation by two states. New York unquestionably had the right to exact the tax upon the income of the trust, and thereby Virginia was inhibited. The provisions of the Fourteenth Amendment protect against such taxation by two states on the same income. Here, both the Equal Protection and the Due Process clauses forbid the challenged exactment.

The claim that equal protection has been denied seems to rest upon an assumed literal construction of the Virginia statute which would require income from discretionary trusts to be taxed against both trustee and beneficiary, while only one tax (against the beneficiary) would fall upon income from ordinary trusts.

We must, of course, deal with rights here actually involved. The state has made one assessment against a resident beneficiary because of income received within her jurisdiction and her courts have approved. They have not interpreted her statutes according to the petitioner's assumption.

The right to recognize a distinction between ordinary and discretionary trusts and thus insure collection of taxes upon the entire income actually received from the latter seems clear enough.

Has there been denial of Due Process—

The insistence is that the challenged assessment was upon the identical income already rightly taxed by New York; that, under numerous decisions by us, two or more states may not tax the same subject; this would amount to double taxation and infringe the Due Process clause. To support this proposition the cases noted in the margin [1] are cited.

[1] *Union Refrigerator Co.* v. *Kentucky*, 199 U. S. 194, *Frick* v. *Pennsylvania*, 268 U. S. 473, *Safe Deposit & Trust Co.* v. *Virginia*, 280 U. S.

Those cases go upon the theory that the taxing power of a state is restricted to her confines and may not be exercised in respect of subjects beyond them. Here, the thing taxed was receipt of income within Virginia by a citizen residing there. The mere fact that another state lawfully taxed funds from which the payments were made did not necessarily destroy Virginia's right to tax something done within her borders. After much discussion the applicable doctrine was expounded and applied in *Lawrence* v. *State Tax Comm'n,* 286 U. S. 276, and *New York ex rel. Cohn* v. *Graves,* 300 U. S. 308. The attempt to draw a controlling distinction between them and the present cause, we think, has not been successful.

The challenged judgment must be

Affirmed.

COLORADO NATIONAL BANK ET AL., EXECUTORS, *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 30. Argued October 21, 1938.—Decided November 7, 1938.

1. Whether a transfer was in contemplation of death *held* a question of fact as to which the decision of the Board of Tax Appeals, supported by substantial evidence, was conclusive. P. 29.

   There was evidence that the purpose of the transfer was to enable the donor to speculate upon the stock market for the remainder of his life more actively than he had in the past without fear that the part of his fortune transferred might be lost.

2. As to the meaning of the term "in contemplation of death," the Court adheres to what was said in *United States* v. *Wells,* 283 U. S. 102. P. 30.

83, *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204, *Baldwin* v. *Missouri,* 281 U. S. 586, *Beidler* v. *South Carolina Tax Comm'n,* 282 U. S. 1, *First National Bank* v. *Maine,* 284 U. S. 312, *Senior* v. *Braden,* 295 U. S. 422.

The mere purpose to make provision for children after a donor's death is not enough conclusively to establish that action to that end was "in contemplation of death." Broadly speaking, thoughtful men habitually act with regard to ultimate death, but something more than this is required in order to show that a conveyance comes within the ambit of the statute, Rev. Act of 1926, § 302 (c).

95 F. 2d 160, reversed.

CERTIORARI, 304 U. S. 556, to review a judgment upholding an estate tax assessment, and therein reversing a contrary decision of the Board of Tax Appeals.

Mr. Morrison Shafroth, with whom *Messrs. W. W. Grant* and *Henry W. Toll* were on the brief, for petitioners.

Mr. Carlton Fox, with whom *Solicitor General Jackson, Assistant Attorney General Morris,* and *Mr. Sewall Key* were on the brief, for respondent.

By leave of Court, brief of *amici curiae* was filed by *Messrs. C. Alexander Capron, Charles Angulo,* and *Philip M. Payne,* in support of petitioners.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Edwin B. Hendrie of Denver, Colorado, January 26, 1925, executed a will wherein he gave his property, with relatively small exceptions, to trustees to be held for the benefit of his daughter, Gertrude Hendrie Grant, and her children. January 7, 1927, when eighty years old and in good health, he irrevocably conveyed in trust to the Colorado National Bank, securities of large value—perhaps $800,000. The deed among other things provided that the income should be accumulated during the donor's life; after his death and during the life of his daughter Gertrude so much thereof as she asked should be paid to

her and the remainder added to the principal; upon her death the corpus should be distributed to her descendants, etc.

Hendrie died July 15, 1932. His 1925 will was duly probated and under it property worth some $900,000 passed. The Commissioner ruled that the 1927 trust was set up in contemplation of death within the meaning of § 302 (c), Revenue Act of 1926, as amended,[1] treated the property in the trustee's hands as part of the gross estate, and assessed taxes thereon accordingly.

The Board of Tax Appeals considered the relevant facts and held the conveyance of 1927 "was not made in contemplation of death within the meaning of the statute as explained in United States *v.* Wells, 283 U. S. 102."

The Circuit Court of Appeals ruled that the transfer was in contemplation of death, and reversed the Board's decision. We think this was error. The decision of the Board should have been approved.

The court declared—"Each case must be determined by its own facts and circumstances. . . . It is settled law that a finding of fact made by the Board of Tax Appeals will not be disturbed on review if it is supported by substantial evidence. But whether there is substantial evidence to support a finding is a question of law. . . . And a finding not thus supported will be set aside." These statements are in accord with our holdings.

---

[1] Revenue Act of 1926, c. 27, 44 Stat. 9:

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

"(a) To the extent of the interest therein of the decedent at the time of his death;

. . . . . .

"(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, . . ." (U. S. C., Title 26, § 411.)

Also it said—"The test lies in the motive for the transfer. If the generating source of the motive is associated with life, the transfer is not made in contemplation of death. But if the generating inducement is associated with death, either immediate or distant, the transfer is made in such contemplation. A gift is made in contemplation of death where the dominant motive of the donor is to make proper provision for the object of his bounty after the death of the donor."

Following a review of the evidence it said—"The dominant purpose was to make provision for his descendants after his death, in the event his speculations proved tragic. It was to place that substantial amount of property in an asylum of immunity from adverse consequences of speculation, in order to make certain that it would be used for his daughter and her children after his death. . . . The purpose was a commendable one, but the generating motive for a transfer made in such circumstances is associated with death."

In the light of the views so stated the court concluded there was no substantial evidence to establish that the transfer was not made in contemplation of death. One judge, dissenting, declared—"It seems clear from the uncontradicted testimony that Mr. Hendrie's gift to his daughter and her children was not made in contemplation of death but in order that he might speculate upon the stock market for the remainder of his life more actively than he had in the past without fear that the part of his fortune thus given might be lost. He manifested no other intent and purpose in that respect."

There was evidence which the Board thought adequate, and which we deem substantial, to support its conclusion. Dominant purpose was a question of fact for determination by the Board.

The court's opinion seems to rest upon an erroneous interpretation of the term "in contemplation of death."

The meaning of this was much discussed in *United States* v. *Wells, supra.* We adhere to what was there said. The mere purpose to make provision for children after a donor's death is not enough conclusively to establish that action to that end was "in contemplation of death." Broadly speaking, thoughtful men habitually act with regard to ultimate death, but something more than this is required in order to show that a conveyance comes within the ambit of the statute.

Here, the Board having before it all the circumstances, including the provisions of the will, concluded that they disclosed an effective motive not directly springing from apprehension of death. And as pointed out by the dissenting judge there was substantial basis for that view. Its action is in accord with principles accepted by us in *Shukert* v. *Allen,* 273 U. S. 545, *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, *May* v. *Heiner,* 281 U. S. 238, *McCormick* v. *Burnet,* 283 U. S. 784, *Becker* v. *St. Louis Union Trust Co.,* 296 U. S. 48.

The judgment of the Circuit Court of Appeals must be reversed. The decision of the Board of Tax Appeals is approved.

Reversed.

MR. JUSTICE REED concurs on the ground that the conclusion of the Board that the transfer was not made in contemplation of death was justified. There was substantial evidence of a life motive and the Board did not find an effective motive in contemplation of death.

MR. JUSTICE BLACK, dissenting.

The purpose of Congress in providing that property transferred to a trust should be included in the transferor's gross estate when transferred in contemplation of death [1] was to prevent evasion of the progressively grad-

[1] Sec. 302 (c), Revenue Act, 1926, 44 Stat. 9.

uated estate tax through the use of trust devices which actually operated as substitutes for testamentary disposition of property.[2] The will made by Mr. Hendrie at the age of seventy-eight in 1925 and the trust agreement substituted for it at eighty (as to a large part of his property) two years later in 1927 were substantially identical as to parties, recipients of his property, amounts, terms and conditions. Neither the will nor the trust agreement permitted any payments to the beneficiaries until the death of Mr. Hendrie.

The stipulated evidence as to expressions by the donor of his motive for making the trust agreement showed that:

He "wanted to transfer about one third of his assets in the interest of his daughter and her heirs so that whatever might happen to his own financial affairs in the future, those persons would be provided for. He said he desired to retain for himself his more speculative securities and to feel free to speculate with that property *during the rest of his life,* but to put the other one-third beyond his own reach and risk. He said he desired and intended to 'play on the market' to a greater extent and in a more speculative way *for the remainder of his life.*" (Italics supplied.)

At "one time he stated . . . that his daughter and his grandchildren would be adequately provided for in the event of his, the said Hendrie's death, through the medium of a trust which he had created, regardless of his operations on the Stock Exchange."

In reaching the conclusion that the stipulated facts in this case showed as a matter of law that the trust gift was made in contemplation of the donor's death within the meaning of the congressional act, the court below said in part:

---

[2] *Milliken* v. *United States,* 283 U. S. 15; *United States* v. *Wells,* 283 U. S. 102, 116–17; cf. *Tyler* v. *United States,* 281 U. S. 497, 505.

"The trust was not designed to make provision for the beneficiaries during his life. None of the property or the increment thereto was to reach them until after his death. Neither was it designed to enable him to engage in speculation. He could have done that unfettered and unrestrained without the establishment of the trust. But in its absence the property transferred would have been subject to the hazards of speculation. It would have been within reach of creditors if he lost all. The dominant purpose was to make provision for his descendants after his death, in the event his speculations proved tragic. It was to place that substantial amount of property in an asylum of immunity from adverse consequences of speculation, in order to make certain that it would be used for his daughter and her children after his death. It was to make assurance doubly sure that provision was made for them, not during his life, but after his death." [3]

The Board of Tax Appeals did not pass upon conflicting evidence. And there is no indication that the Board believed that any conflicting inferences could be drawn from the stipulated facts. Stating that "the Commissioner relies upon the fact that the income was to be accumulated and added to corpus during the life of the donor and, consequently, the beneficiaries were to receive nothing until after the death of the decedent," the Board did no more than say that they thought "the transfer was not made in contemplation of death within the meaning of the statute as explained in *United States* v. *Wells,* 283 U. S. 102," and that "Therefore, on this point, we hold for the petitioners." That the Board reached its conclusion on this single principle is clearly indicated by its statement that "Principles announced in the cases above listed control this case which is not distinguishable from one or more of those cases where, as here, *income was to*

[3] 95 F. 2d 163.

be accumulated until after the death of the donor." (Italics supplied.)

The decision in *United States* v. *Wells, supra,* is not controlling on the present facts. There the Court pointed out that, in effect, the findings of the lower court showed that the gift involved " 'was the carrying out of a policy long followed by decedent in dealing with his children of making liberal gifts to them during his lifetime. He had consistently followed that policy for nearly thirty years and the three transfers in question were a continuation and final consummation of such policy. In the last transfer such amounts were given to his children as would even them up one with another, in the gifts and advancements made to them.

" 'That this was the motive which actuated the decedent in making these transfers seems unquestioned.' "

Here, the donor had never followed any such policy. His will indicated that he was motivated not by a desire to give his children and grandchildren property while he was yet living, but to provide for them after his death. In the *Wells* case, *supra,* 117, this Court said that "the motive which induces the transfer must be of the sort which leads to testamentary disposition." That the motive of the donor in this case was of the kind "which leads to testamentary disposition" is conclusively shown by the facts that the trust agreement was an actual substitute for a previous will; that the sole motive shown in *all* of the evidence was to provide for the donor's children and grandchildren after his death so he would be "free for the rest of his life to speculate in whatever securities he might wish" without subjecting the property intended for his children and grandchildren to "the vicissitudes of his speculations." [4]

[4] The statute alternatively taxes two types of trust transfers *inter vivos* which may be substituted for wills. If a trust was intended

Congress has provided that upon review of a judgment of the Board of Tax Appeals the "courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require." [5] Although this statute indicates an intent on the part of Congress to make the findings of fact of the Board conclusive, this Court holds that such findings are not conclusive unless supported by substantial evidence.[6] This Court has also said that the ultimate finding by the Board of Tax Appeals is a "conclusion of law or at least a determination of a mixed question of law and fact" which is "subject to judicial review and, on such review, the court may substitute its judgment for that of the board." [7] Under this rule—with which I am not in accord—but which governed the Court of Appeals, I believe that Court correctly decided that the Board had no substantial evidence to justify its erroneous ultimate determination of the mixed question of law and fact here. For that reason I think the judgment should be affirmed.

---

to take effect at death *or* if a trust was created in contemplation of death, *either* contingency invokes the imposition of the tax. Holdings where the tax has been assessed on the theory that a trust shifted such economic interests at a transferor's death—and not when the trust was set up—that the transfer was intended to take effect at death (*Shukert* v. *Allen*, 273 U. S. 545; *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339; *May* v. *Heiner*, 281 U. S. 238; *McCormick* v. *Burnet*, 283 U. S. 784; *Becker* v. *St. Louis Union Trust Co.*, 296 U. S. 48) are not determinative of this case involving an alleged motive in contemplation of death.

[5] 44 Stat. 110, 26 U. S. C., c. 5, § 641 (c).

[6] *Helvering* v. *Tex-Penn Co.*, 300 U. S. 481, 490; *Helvering* v. *Rankin*, 295 U. S. 123, 131; *Phillips* v. *Commissioner*, 283 U. S. 589, 600.

[7] *Helvering* v. *Tex-Penn Co.*, *supra*, at 491; *Helvering* v. *Rankin*, *supra*.

DAVIS *v.* DAVIS.

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

No. 16. Argued October 14, 1938.—Decided November 7, 1938.

1. Under Art. IV, § 1, of the Constitution and R. S. § 905, a decree of a court of Virginia is entitled to the same faith and credit in the courts of the District of Columbia as it has by law or usage in the courts of Virginia. P. 39.
2. Whether the matrimonial domicil is the domicil of the husband depends upon the facts and circumstances of the case. P. 41.
3. A husband obtained, on the ground of cruelty, a decree of separation from his wife in the District of Columbia, where both resided. The decree gave her custody of one child and monthly alimony. Some years later, the husband established his residence in Virginia and sued in a Virginia court for absolute divorce on the ground of desertion. Notice was served personally on the wife in the District of Columbia, where she continued to reside, and she filed in the Virginia court a plea stating that she appeared there "specially and for no other purpose than to file this plea to the jurisdiction of the court." The plea alleged that neither she nor the husband had been a resident of Virginia for a year before commencement of the suit and asserted that he was not then a bona fide resident there, but that the residence he was attempting to establish was for the sole purpose of creating jurisdiction in the court to hear and determine the suit for divorce and was therefore a fraud upon the court and not residence in contemplation of law. It prayed judgment whether the court "can or will take any further cognizance of the action aforesaid." There was a decree of reference to a commissioner to ascertain and report whether the court had jurisdiction and whether a divorce should be granted, the decree reciting, *inter alia*, that counsel had been heard in argument. The commissioner reported that by stipulation of counsel, he had limited his inquiry to the jurisdiction; that he had taken all the testimony submitted by the parties, and that in his opinion the husband was a bona fide resident of Virginia and that the court had jurisdiction to hear and determine the cause. There was a hearing upon the wife's exceptions to the report, after which the court found that the husband had been a resident of the Virginia county for the requisite time and that it had jurisdiction of the subject-

matter and of the parties; and confirmed the report. The court granted the wife further time in which to appeal or to answer, but she did neither. The cause proceeded and there was a final decree of absolute divorce upon the ground of wilful desertion, with an allowance for support of the child but no alimony for the wife, the decree reciting that there had been a hearing upon specified papers and depositions taken before a commissioner pursuant to notice served in the county, on counsel who had entered special appearance for respondent, and upon her personally in the District of Columbia. *Held:*

(a) Construing the wife's appearance as special, she was nevertheless bound by the finding of the Virginia court on residence and jurisdiction, and the decree was enforceable in the courts of the District of Columbia. *Haddock* v. *Haddock,* 201 U. S. 562, distinguished. P. 40.

(b) The wife's participation in the Virginia litigation was such as to amount to a general appearance. P. 42.

No question is presented in this case as to the power of the District of Columbia court over alimony.

96 F. 2d 512, reversed.

ON CERTIORARI, 304 U. S. 552, to review a decree refusing recognition to a Virginia decree of absolute divorce secured by a husband who changed his residence to that State from the District of Columbia.

Mr. Joseph T. Sherier for petitioner.

Refusal to recognize the decree of the Virginia court violates Article IV, § 1, of the Constitution, and R. S. § 905. *Cheeley* v. *Clayton,* 110 U. S. 701, 705; *Thompson* v. *Thompson,* 226 U. S. 551; 35 App. D. C. 14; *Atherton* v. *Atherton,* 181 U. S. 155; *Bloedorn* v. *Bloedorn,* 64 App. D. C. 199, 201.

The appearance and participation of the wife in the hearing in the Virginia court gave that court full jurisdiction. *Baldwin* v. *Iowa State Traveling Men's Assn.,* 283 U. S. 522; *American Surety Co.* v. *Baldwin,* 287 U. S. 166.

The ruling below that the petitioner, subsequently to the judicial separation granted him, could not acquire a

new domicile which would support an action for divorce, is in conflict with *Barber* v. *Barber,* 21 How. 582, 594; *Cheever* v. *Wilson,* 9 Wall. 108, 124; *Haddock* v. *Haddock,* 201 U. S. 562; *Williamson* v. *Osenton,* 232 U. S. 619. See *Hunt* v. *Hunt,* 72 N. Y. 217, 243. It is also in conflict with *Rollins* v. *Rollins,* 60 App. D. C. 305, 307, and *Marcum* v. *Marcum,* 61 App. D. C. 332, 334.

Where one spouse has justifiably left the other, or the parties are living apart by virtue of a judicial separation, there is no matrimonial domicile, and the innocent party may acquire another, with jurisdiction in the courts of the latter to decree a divorce of binding validity everywhere.

The decision of the court below was by three judges only, and not by the full court of five required by the statute, although hearing by the full court was requested.

Mr. Crandal Mackey for respondent.

When a husband goes to a State solely for divorce purposes, he does not carry the marital *res* with him, and the courts of the State to which he has gone have no jurisdiction to entertain his divorce suit.

Recitals of the decrees entered in divorce cases in one State are not binding on the court of another State; they may be contradicted.

The *bona fides* of the residence of a party who obtains a divorce in one State may be inquired into by the courts of another State. *Bell* v. *Bell,* 181 U. S. 175; *Streitwolf* v. *Streitwolf,* 181 U. S. 179; *Andrews* v. *Andrews,* 188 U. S. 14; *Haddock* v. *Haddock,* 201 U. S. 502; *Simmons* v. *Simmons,* 57 App. D. C. 216; *Cheeley* v. *Clayton,* 110 U. S. 701; *Frey* v. *Frey,* 61 App. D. C. 232.

There was nothing in the Act of February 9, 1893, 27 Stat. 434, establishing the Court of Appeals for the District of Columbia, to require a full court to constitute a quorum. The Act of June 19, 1930, increased the number

of Justices to five, and provided that they "shall have the same tenure of office, pay and emoluments, powers and duties, as provided by law, for the Justices of said court." There was nothing in the Act requiring more than three judges to decide a case, just as there was nothing in the Act of 1893 requiring more than two judges to decide a case.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The lower court held a decree of the circuit court of Arlington County, Virginia, entered June 26, 1929, granting petitioner an absolute divorce from respondent upon the ground of desertion, not entitled to recognition in the supreme (now district) court of the District of Columbia. The question arose upon his application to that court to set aside or modify a decree it entered October 29, 1925, granting him divorce *a mensa et thoro* from respondent on the ground of cruelty.

In the District of Columbia, absolute divorce was not then permitted for desertion or cruelty.[1] In Virginia, absolute divorce was authorized where either party willfully deserted or abandoned the other for three years.[2] The circuit courts there have jurisdiction over suits for divorce and alimony. No suit for divorce is maintainable unless one of the parties has been domiciled in the State for at least a year preceding its commencement.[3]

Petitioner and respondent married in 1909 and, until about the time he brought the suit for limited divorce, lived together in the District of Columbia. They had a son and daughter. The decree of separation awarded to him custody of the son; to her, custody of the daughter; and

[1] D. C. Code, Tit. 14, § 63.
[2] Va. Code, 1924, § 5103.
[3] Va. Code, 1936, § 5105.

directed him to pay $300 a month for support of wife and daughter.

Petitioner's complaint in the Virginia court alleged that he was a resident of that State for the requisite time, showed that respondent was a resident of the District of Columbia, fully disclosed the proceedings and decree in the District court, and alleged continuous desertion commencing before and extending for more than three years after entry of that decree. Process of the Virginia court was served personally upon the respondent in the District of Columbia. She filed a plea stating that she appeared "specially and for no other purpose than to file this plea to the jurisdiction of the court." In that document she alleged that neither she nor petitioner had been a resident of Virginia for a year before commencement of the suit; and asserted that he was not then a bona fide resident there, but that the residence he was attempting to establish was for the sole purpose of creating jurisdiction in the court to hear and determine the suit for divorce, and was therefore a fraud upon the court and not residence in contemplation of law. The plea prayed judgment whether the court "can or will take any further cognizance of the action aforesaid."

The court entered a decree reciting that the cause came on for hearing upon the complaint, exhibits, other papers, and "argument of counsel," and referring the cause to a commissioner in chancery to ascertain and report whether the court had jurisdiction to hear and determine it and whether a decree of divorce should be entered. The commissioner reported that "by stipulation of counsel it was agreed," that he should only ascertain the facts raised in the plea to the jurisdiction and that no other matter should be inquired into or reported; that he had taken all the testimony submitted by the parties; that in his opinion petitioner was a bona fide resident of Arling-

ton County, Virginia, and that the court had jurisdiction to hear and determine the cause.

Respondent filed exceptions, reiterating the allegations of her plea and asserting that the commissioner's findings were contrary to the evidence. There was a hearing upon the report and exceptions. After argument of counsel for the parties and upon consideration of the evidence, the court found that petitioner was a resident of Arlington County, Virginia, for the requisite time; that it had jurisdiction of the "subject matter and of the parties"; overruled the exceptions, and confirmed the report. Respondent having signified her desire to apply for an appeal, the court ordered operation of the decree suspended for a period of thirty days. It also granted respondent ten days "within which to file such answer or other pleadings in this cause as she may wish." She did not appeal or file answer or other pleading.

The final decree states that the case came on for hearing upon specified papers and depositions of five named persons, taken before a commissioner pursuant to notice served in Arlington County, on counsel who had entered special appearance for respondent, and upon her personally in the District of Columbia. It found: Respondent willfully deserted petitioner February 24, 1925; the desertion continued from that date; three years had elapsed since the entry of the decree *a mensa et thoro*; there has been no reconciliation, and none is probable. It granted petitioner absolute divorce, divested respondent of all rights in his property, and required him to pay $150 per month for support of the daughter. No alimony was allowed respondent.

December 30, 1929, petitioner applied to the District court to have its decree set aside or modified so as not to require him to pay any amount for maintenance of respondent but to provide for the payment of a reason-

able sum for the support of their daughter. The application was based solely upon the Virginia decree. Respondent appeared and opposed the application but raised no question as to the jurisdiction of the Virginia court. It was denied. The court of appeals affirmed on the grounds that the lower court, having entered the decree, retained jurisdiction to enforce or modify its order for maintenance of the wife and daughter; that petitioner's removal to Virginia did not invest the courts of that State with authority to annul or supersede that jurisdiction; and that, the District court having first acquired jurisdiction of the subject matter, its authority continues until the matter is finally disposed of. 61 App. D. C. 48; 57 F. 2d 414. In passing upon that application, neither court considered or decided any question as to jurisdiction of the Virginia court.

April 16, 1935, petitioner filed in the District court another application to have its decree set aside or modified as before prayed. He then sought relief on three grounds: The decree of the Virginia court, the fact that his daughter had married and was no longer living with respondent, and diminution of his income. Respondent answered, alleging that petitioner never was a resident of Virginia and denying the desertion found by the Virginia court. There was a hearing, at which petitioner offered evidence showing the proceedings and decree in the Virginia court, the marriage of the daughter, and that she was living with her husband. Then counsel for respondent applied for time to secure her attendance and that of witnesses who, as he said, would give testimony that petitioner went to Virginia for the sole purpose of getting a divorce, and that he never became a bona fide resident there. Petitioner's counsel admitted that, if present, respondent and the witnesses referred to would so testify, but insisted that the testimony would be incompetent. Respondent offered no other evidence. The trial court denied the application.

The court of appeals, in an unreported opinion, held its earlier decision established the law of the case. Declaring petitioner not responsible for maintenance of his daughter after her marriage, it held that fact should be taken into account, and remanded the case for further consideration as to the amount of alimony to be allowed respondent. Petitioner applied for and the court granted rehearing. It heard argument and filed an opinion, in which it adhered to its ruling that its earlier decision was the law of the case, and held that the decision of the lower court refusing to enforce petitioner's decree of absolute divorce should stand. It said: "The Virginia court did not have full jurisdiction of the parties and the subject matter, and, hence, the decree was not entitled to full faith and credit. . . . It was necessary . . . under . . . *Haddock* v. *Haddock* [201 U. S. 562] . . . that Virginia be the last matrimonial domicil of the parties, or, if not, that the wife be subjected to the jurisdiction of the court [below] either by personal service within the State, or by voluntary appearance and participation in the suit." It held that the matrimonial domicil was not in Virginia; that respondent's special appearance did not give the Virginia court full jurisdiction, or constitute waiver of her objection to jurisdiction. It held petitioner's application one addressed to the discretion of the lower court and that its omission to consider the marriage of the daughter constituted failure to exercise discretion. Accordingly, it reversed and remanded for further proceedings in accordance with the opinion. 96 F. 2d 512.

Art. IV, § 1, requires that judicial proceedings in each State shall be given full faith and credit in the courts of every other State.[4] The Act of May 26, 1790, 1 Stat.

[4] "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

122, as amended, R. S. § 905, 28 U. S. C. § 687, declares that judicial proceedings authenticated as there provided shall have such faith and credit given to them in every "court within the United States as they have by law or usage in the courts of the State from which they are taken." [5] Thus Congress rightly interpreted the clause to mean, not some, but full credit. *Haddock* v. *Haddock, supra,* 567. The Act extended the rule of the Constitution to all courts, federal as well as state. *Mills* v. *Duryee,* 7 Cr. 481, 485.

As to petitioner's domicil for divorce and his standing to invoke jurisdiction of the Virginia court, its finding that he was a bona fide resident of that State for the required time is binding upon respondent in the courts of the District. She may not say that he was not entitled to sue for divorce in the state court, for she appeared there and by plea put in issue his allegation as to domicil, introduced evidence to show it false, took exceptions to the commissioner's report, and sought to have the court sustain them and uphold her plea. Plainly, the determination of the decree upon that point is effective for all purposes in this litigation. *Baldwin* v. *Traveling Men's Assn.,* 283 U. S. 522, 525–526.

[5] "The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory, or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

Nor can it be said that the domicil was not adequate to support, in virtue of the rule of full faith and credit established by Congress, a decree enforceable in the courts of the District of Columbia. Depending on the connection in which used, various meanings have been attributed to the phrase matrimonial domicil. See *Atherton* v. *Atherton,* 181 U. S. 155, 171; *Andrews* v. *Andrews,* 188 U. S. 14, 40; *Haddock* v. *Haddock, supra,* 572; *Thompson* v. *Thompson,* 226 U. S. 551, 562. Definition, inclusive and exclusive, is not to be found; it need not be attempted here. It is enough to say that care should always be taken to determine upon the facts and circumstances of each case whether, in accordance with the general rule, it is the domicil of the husband. See *Cheely* v. *Clayton,* 110 U. S. 701, 705; *Thompson* v. *Thompson, supra.* Cf. *Barber* v. *Barber,* 21 How. 582, 592, 594; *Cheever* v. *Wilson,* 9 Wall. 108, 124. In this case, the wife has been adjudged by the decree *a mensa et thoro,* on which she relies, to have disrupted the marital relation. And by the decree of the Virginia court, the enforcement of which she opposes, she is adjudged to have persisted in desertion of petitioner for a period more than sufficient to entitle him under the laws of that State to dissolution of the bonds. Cf. *Harding* v. *Harding,* 198 U. S. 317, 338–339. While in that State litigating the question of his standing to sue, she chose not to answer charges of willful desertion.

This case differs essentially from *Haddock* v. *Haddock, supra,* relied on by the lower court. There the husband, immediately after marriage in New York, fled to escape his marital obligations and never returned to discharge any of them. The wife remained in that State. He acquired domicil in Connecticut and there obtained absolute divorce. She did not appear in the Connecticut court for any purpose. There was no suggestion that she was at fault or did anything to disrupt the marital relation.

In this case, there exists none of the reasons on which we held the New York court not bound by the full faith and credit clause to enforce in that State the husband's Connecticut divorce. Petitioner frankly presented to the Virginia court the grounds on which he sought release. He gave respondent actual notice of the suit. She appeared, specially as she maintains, and raised and tried the question whether he had standing to sue. In view of these facts, and of her conduct, adjudged repugnant to the marital relation, it would be unreasonable to hold that his domicil in Virginia was not sufficient to entitle him to obtain a divorce having the same force in the District as in that State.

As to respondent's appearance in the Virginia court.—The assertion in her plea that it was special and made for the sole purpose of challenging jurisdiction is of no consequence if in fact it was not so limited. *Sugg* v. *Thornton,* 132 U. S. 524, 530. *Sterling Tire Corp.* v. *Sullivan,* 279 F. 336, 339. If the plea alone may not be held to amount to a general appearance, there arises the question whether, by her participation in the litigation and acquiescence in the orders of the court relating to merits, she submitted herself to its jurisdiction for all purposes. Her plea and conduct are to be considered together.

There had been no claim of jurisdiction over her person. The plea did not challenge jurisdiction over petitioner or the court's authority, if appropriately invoked, to grant the decree petitioner sought. It merely asserted that he lacked domicil required by Virginia law. Her allegations and prayer show that the sole purpose of the plea was to join issue with petitioner's allegation of domicil in Virginia, to secure a finding against him on that point, to obtain decree that he had no standing to bring the suit and so put an end to his efforts to obtain divorce in that State.

The recital in the decree of reference, that the cause came on for hearing upon, *inter alia,* argument of counsel, suggests that both parties were heard. The stipulation of counsel that the commissioner should only ascertain the facts raised by her plea shows action by both parties relating to merits, at least to the extent that it withdrew the case from the commissioner. The record discloses no challenge by respondent to the statement, in the decree overruling her exceptions, that the court had jurisdiction of the subject matter and of the parties. The grant of time within which to answer implies application to that end. A motion for such an order relates to merits. *Hupfeld* v. *Automaton Piano Co.,* 66 F. 788, 789. The service of notice of taking depositions upon respondent in the District of Columbia and upon her counsel in Virginia implies that petitioner's counsel understood that respondent had standing to appear and cross-examine. Plainly her plea and conduct in the Virginia court cannot be regarded as special appearance merely to challenge jurisdiction. Considered in its entirety, the record shows that she submitted herself to the jurisdiction of the Virginia court and is bound by its determination that it had jurisdiction of the subject matter and of the parties. Cf. *Andrews* v. *Andrews, supra,* 40.

No question is here presented as to the effect of the Virginia decree on the power of the District of Columbia court over alimony.

Petitioner is entitled as a matter of right to have the Virginia decree given effect in the courts of the District of Columbia. The decree of the court of appeals must be reversed; the case will be remanded to the district court for proceedings in conformity with this opinion.

Reversed.

DAVIDSON *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 18. Argued October 14, 1938.—Decided November 7, 1938.

The taxpayer directed his brokers to sell certain shares bought by him in the then current year, and directed his bank, which held the certificates, to deliver them to the broker. By mistake, the bank delivered and the broker sold other shares of the same stock which the bank held for the taxpayer and which he had bought in an earlier year for a lower price. *Held* that the taxable gain was properly computed on the basis of the cost of the shares so actually sold, rather than the higher cost of the shares which the taxpayer intended to sell. P. 45.

94 F. 2d 300, affirmed.

CERTIORARI, 304 U. S. 554, to review a judgment affirming an order of the Board of Tax Appeals, 34 B. T. A. 555, which sustained a deficiency income tax assessment.

Mr. Edward J. Svoboda, with whom *Messrs. J. A. C. Kennedy* and *Ralph E. Svoboda* were on the brief, for petitioner.

Mr. Edward J. Ennis, with whom *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Harry Marselli* were on the brief, for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Upon petitioner's insistence and respondent's admission, that the decision below conflicts with that of the circuit court of appeals for the second circuit in *Miller* v. *Commissioner,* 80 F. 2d 219, we granted a writ of certiorari. The question presented is whether petitioner's

taxable gain from sale in 1929 of 1,000 shares of stock is to be determined upon the basis of the cost of stock petitioner bought in that year, or upon the basis of lower cost of like shares earlier bought by him.

The details found by the board of tax appeals may be given briefly. March 27, 1929, at cost of $49.90 each, petitioner bought 1,000 shares for which he received 10 separately numbered certificates covering 100 shares each and delivered them to a bank to be held as security for a loan. Some years earlier he had bought, at cost of $4.42 each, 1,000 shares of like stock for which he obtained certificates that he delivered to the same bank as collateral security, where they were held until the sales here involved. June 19, 1929 petitioner instructed his broker to sell 500 shares of the stock he bought March 27, and, to enable the broker to deliver, petitioner instructed the bank to give the broker certificates covering shares bought in that year. By mistake the bank delivered him certificates of shares included in the lot earlier purchased by petitioner. July 1, 1929 petitioner instructed the broker to sell the rest of the lot bought in that year and directed the bank to deliver the broker certificates of the stock petitioner intended to have sold. Again failing to follow instructions, the bank delivered the broker certificates of stock in the other lot. It may be taken as granted that, when he made his return, petitioner excusably assumed that the bank had followed his directions.

He reported gain on the basis of cost of the stock purchased in that year. The commissioner calculated gain on the basis of cost of the stock earlier purchased and gave notice of deficiency. The board of tax appeals sustained his determination. 34 B. T. A. 555. The circuit court of appeals affirmed. 94 F. 2d 300.

Petitioner contends that by his reference to amounts and dates of purchases, he adequately designated to the

broker the shares to be sold; that in fact the shares so identified were sold and that the bank's delivery of certificates of other stock to the broker did not affect petitioner's order. Undoubtedly, petitioner sufficiently indicated to the broker and to the bank the shares he intended to sell. He plainly allocated the lots to be sold to the 1,000 shares he bought in 1929. But it does not follow that they were the shares sold. His intention to sell, even when coupled with his order to the broker and direction to the bank, cannot be held to constitute sale. *Snyder* v. *Commissioner,* 295 U. S. 134, 137. Notwithstanding his order to the broker to sell shares in the 1929 lot, petitioner was free later to direct that shares from the other lot be used for final consummation of the sale. And so, when the bank delivered him certificates of stock not designated in his order to sell, the broker may well have assumed that petitioner's final purpose was to sell the shares covered by the certificates that the bank sent him. He had no reason to suppose that the bank did not act in accordance with instructions given it by petitioner. The case is not different from what it would have been if petitioner himself had delivered to the broker the certificates sent by the bank. Plainly, petitioner's contention that the certificates used to complete the sale did not cover the shares sold cannot be upheld. *Commissioner* v. *Rankin,* 295 U. S. 123, 128. The commissioner rightly computed gain on the basis of what was done rather than on what petitioner intended to do. *United States* v. *Phellis,* 257 U. S. 156, 172; *Bonham* v. *Commissioner,* 89 F. 2d 725, 728; *Curtis* v. *Commissioner,* 89 F. 2d 736, 738; *Remington Rand, Inc.* v. *Commissioner,* 33 F. 2d 77, 78.

Affirmed.

SCHRIBER-SCHROTH CO. *v.* CLEVELAND TRUST CO. ET AL.*

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

No. 3. Argued October 18, 19, 1938.—Decided November 7, 1938.

1. Where it is improbable, notwithstanding the doubtful validity of a patent, that conflict of decision respecting its validity will arise in different circuits, because of the concentration in one circuit of the industry in which the patented devices are used, there is reason for granting certiorari to review a decision in that circuit sustaining it. P. 50.
2. A patent does not extend beyond the invention described and explained as the statute requires; it can not be enlarged by claims in the patent not supported by the description. P. 57.
3. The application for a patent can not be broadened by amendment so as to embrace an invention not described in the application as filed, at least when adverse rights have intervened. *Powers-Kennedy Co.* v. *Concrete Co.*, 282 U. S. 175; *Permutit Co.* v. *Graver Corporation*, 284 U. S. 52. *Id.*
4. Amendments to Patent No. 1,815,733, to Gulick, for a combination in the structure of pistons of internal combustion engines for automobiles, designed to prevent undue thermal expansion of the pistons when in operation, were unlawfully added. P. 51.
5. In this combination, the head and skirt of the piston, separated by an air space, are connected and held in proper relation to each other by two webs which extend longitudinally within the skirt and which, pierced at right angles for wrist-pin bearings, support the piston pin bosses. The skirt is longitudinally split in order to minimize the effects of thermal expansion. The Circuit Court of Appeals regarded lateral flexibility of the webs as an essential element of the invention. The original application, however, contained no reference in terms to laterally flexible webs or to the function of the webs in securing flexibility of the skirt, but described the webs as "extremely rigid" and stated that an object of the invention was "to rigidly support the piston pin bosses from

---

*Together with No. 4, *Aberdeen Motor Supply Co.* v. *Cleveland Trust Co. et al.*, and No. 5, *F. E. Rowe Sales Co.* v. *Cleveland Trust Co. et al.*, also on writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit.

the piston walls," and that the arrangement provided "a particularly strong support for the bosses." The webs, as shown by the drawings, conformed to these specifications, and neither drawings nor specifications gave dimensions showing thickness or other proportions of the webs which might suggest a flexible structure. *Held:*

(1) That, after a similar piston with the element of flexible webs had come into commercial use and another had been described in an application for patent, the patentee could not add that element to his application by amendment. P. 55.

(2) Amendments to that end could not be supported as being but clarifications of the application as filed. P. 57.

The contention that lateral flexibility was implied in the original description as an inherent property of the metal composing the web, and was disclosed by the drawings, is rejected.

Inherent flexibility of the web in coöperation with the slit skirt can not be depended upon to produce the desired effect in rendering the skirt yieldable in response to cylinder wall pressure. That depends upon design of the web, with correct proportioning of the different parts as to location and thickness to produce lateral flexibility. Inherent rigidity, made more effective by design of the webs, would correspondingly curtail the desired effect.

6. Decisions of the Court of Appeals for the District of Columbia and the Court of Customs and Patent Appeals sustaining the Gulick amendments are accorded weight but are not controlling in this Court when the validity of the amendments is involved in an infringement case. P. 59.
7. As flexible webs are neither described in the specifications nor mentioned in the claims of the patent for a like combination to Maynard, No. 1,655,968, they can be imported into them only by reference to the drawings or by inference from the inherent flexibility of the structure, which, as in the case of Gulick, are insufficient to accomplish the result. P. 60.

92 F. 2d 330, reversed.

CERTIORARI, 304 U. S. 587, to review the reversal of a decree holding certain patent claims invalid in suits for infringement. Other patents, held invalid by the District Court, but not passed upon by the court below, were not involved in this review.

Messrs. Thomas G. Haight and *John H. Bruninga,* with whom *Mr. John H. Sutherland* was on the brief, for petitioners.

Messrs. Arthur C. Denison and *F. O. Richey,* with whom *Mr. Wm. C. McCoy* was on the brief, for respondents.

MR. JUSTICE STONE delivered the opinion of the Court.*

The principal question for decision is whether the court below rightly sustained the validity of two patents by including in the combination constituting the alleged invention of each an element which was not in terms described in one, and the description of which in the other was added only by amendment to the application after it was filed.

Respondent, the Cleveland Trust Company, is the assignee in trust of some eighty patents relating to pistons of the type employed in internal combustion engines for automobiles, under a pooling agreement to which an automobile manufacturer and a number of manufacturers of pistons are parties. It brought the present suits in the District Court for Northern Ohio to enjoin infringement of five of the assigned patents. The case was tried before a special master who, upon the basis of elaborate findings, held that the Gulick patent, No. 1,815,733, applied for November 30, 1917 and allowed July 31, 1931, was invalid for want of invention and because of the addition to the application by amendment in 1922 of a new element of the alleged invention. In reaching this conclusion he relied on this Court's decisions in *Powers-Kennedy Corp.* v. *Concrete Co.,* 282

* Opinion reported as amended by Order of December 12, 1938, *post,* p. 573.

U. S. 175 and *Permutit Co.* v. *Graver Corporation,* 284 U. S. 52, as inconsistent with the result of interference proceedings in which Gulick's amendments were sustained, *Long* v. *Gulick,* 17 F. 2d 686, *Hartog* v. *Long,* 47 F. 2d 369. The master also held that the Maynard patent No. 1,655,968, applied for January 3, 1921 and allowed January 10, 1928, was invalid for want of invention and for failure to describe and claim the alleged invention. He held invalid upon various grounds the other patents, which are not presently involved.

The District Court adopted the findings and conclusions of the master and gave its decree for petitioners. The Court of Appeals for the Sixth Circuit reversed, as to the Gulick and Maynard patents only, holding that they were valid and infringed. 92 F. 2d 330.[1] As the court regarded the claims which it sustained as basic and thought that a full recovery could be had by respondent under them, it did not pass upon the validity of the other patents or decide other questions involved in the appeal.

Petition for certiorari raising the question, among others, whether the Court of Appeals had erred in holding patentable a combination including one element not described in the original application for the Gulick patent and later added to it by amendment, and not described at all in the Maynard patent, was at first denied, there being no conflict of decision. 303 U. S. 639. We later granted certiorari, 304 U. S. 587, on a petition for rehearing showing that, notwithstanding the doubtful validity of the patents, litigation elsewhere with a resulting conflict of decision was improbable because of the concentration of the automobile industry in the sixth circuit. Cf. *Paramount Publix Corp.* v. *American Tri-Ergon Corp.,* 294 U. S. 464; *Altoona Publix Theatres* v. *American Tri-Ergon Corp.,* 294 U. S. 477.

---

[1] The decree sustained Gulick's claims numbered 1, 11, 12, 13, 15, 18, 30 and 33, and Maynard's claims numbered 1, 6 and 8.

It is important for the proper functioning of the piston in a gas engine that it should fit the explosion chamber closely so as to conserve power, prevent the passage of lubricating oil around the piston into the chamber, and insure the smooth and noiseless movement of the piston within the cylinder. In designing gas engines for automobiles and other purposes requiring a high speed piston reciprocation with the accompanying development of high temperature in the explosion chamber, it is desirable to avoid thermal expansion of the close fitting piston, which will result in loss of power and possible injury to the mechanism through increased friction, which may cause the piston to seize or stick. The danger of undue expansion is increased when, as is advantageous in automobile engines, the piston is of aluminum, which has a higher coefficient of expansion than the iron or steel chamber within which the piston moves.

Both the Gulick and Maynard patents are for combinations in the structure of a piston for gas engines designed to prevent or restrict undue expansion of the piston when in operation. The Gulick patent exhibits a piston in which the ring-carrying head is separated by an air space at its periphery from the cylindrically shaped skirt or guide wall, whose surface engages the inner surface of the cylinder. The piston head and skirt are connected by two "webs" or walls extending longitudinally through the interior of the skirt. The webs are pierced at right angles for wrist pin bearings, and support, at the bearings, piston pin bosses formed with integral flanges extending laterally from their respective bosses to form the webs, which in turn are integrally connected on either side with the interior wall of the lower part of the skirt and at their ends with the piston head. The skirt is longitudinally split on one side at a point in its circumference approximately midway between the pin bosses, with the edges of the skirt formed by the split separated so as

to admit of the free movement of the edges toward each other.

The structure is thus designed to minimize the expansion resulting from high temperatures developed in the chamber and to avoid the effects of thermal expansion of the skirt. The webs, which afford at the wrist pin bearings the means for connecting the piston-rod with the piston, serve to hold the head and skirt in proper relation to each other so that the air space between them retards flow of heat from the head to the skirt, undue expansion of the skirt, and the consequent increase of friction between piston and enveloping cylinder. Undue expansion of the piston is said by the patent's specifications to be avoided by the separation of the skirt by the longitudinal split in order to admit of unrestrained movement of the edges of the skirt toward each other. Elsewhere they state that "when the longitudinal split is used, as shown, the web structure has sufficient lateral flexibility to permit the split to close more or less under the action of the expansion forces incident to the heating of the piston."

The elements of the combination as enumerated in Claim 39 are: "A piston for an engine cylinder comprising a skirt, a head separated from the skirt wall around its entire periphery, said skirt being longitudinally split to render the skirt wall yieldable on every diameter in response to cylinder wall pressure, wrist pin bosses, and means rigidly connecting said bosses to the head and yieldingly connecting said bosses to the skirt whereby said skirt is yieldable in response to cylinder wall pressure." Reference to a combination including, with other elements, web connections, "whereby said piston skirt is rendered yieldable during operation in response to cylinder wall pressure," appears in Claim 18.

The combination of piston head separated from a slitted skirt by an air space, the two being connected by

webs supporting wrist pin bearings with bosses which do not come directly in contact with the walls of the skirt, was plainly foreshadowed by the prior art as a practicable means of minimizing the flow of heat from head to skirt and of securing lateral flexibility in the skirt. The expired Spillman and Mooers patent No. 1,092,870, of April 14, 1914, pooled with the patents in suit, showed a piston with head separated by an air space from the skirt, the two being connected by a web separated from the skirt except at the point of integral connection with it at the lower end of the piston, and providing bearings for a wrist pin connection with bosses not in direct contact with the wall of the skirt.

Flexibility of the skirt attained by longitudinal slits was old, as shown by the Ebbs patent No. 700,309 of 1902, and Van Bever, No. 1,031,212 of 1912. The Franquist piston, patent No. 1,153,902 of 1915, another of the pooled patents, which showed piston head partially separated from skirt by air spaces, attained flexibility of the piston wall by longitudinal grooves in the skirt which interrupted its outer periphery though connected at the inner edges of the groove by a fold of the metal on the accordion principle. The Long piston, patent No. 1,872,772 of 1932, which the master and the district court found was in commercial use from 1917 on, and before the amendment of the Gulick application, presently to be discussed, showed longitudinal slits cut through the skirt, which was separated by air spaces from the piston head, the two being connected by parallel webs pierced for wrist pin bearings.

The court below found invention in the Gulick disclosure in a combination of elements, of which one was webs "laterally flexible," which were not specifically so described in the Gulick application until the amendment of 1922. Conceding that the deceleration of the flow of heat from head to skirt by an air gap might be an obvious

expedient of the art, and that to slit the skirt vertically so as to compensate for thermal expansion might not be beyond the skill of the art, the court added: "But to combine insulation of head from skirt, retraction of the bosses from the skirt periphery, connection of such bosses to the skirt with webs laterally flexible and yet so carried from the head as to support the load upon the wrist pin with sufficient strength and rigidity, and to utilize the mechanical force of the cylinder wall upon the skirt and the thermal expansion of the bosses so as to compensate evenly and fully for head expansion and to secure a balanced flexibility of the skirt with no bending concentration at any point therein, discloses, we think, a meritorious concept beyond the reach of those skilled in the art." 92 F. 2d, at 334.

We can find no support in the opinion for the contention of respondent that the Circuit Court of Appeals did not consider the flexible web an essential element in Gulick's invention. Its enumeration, among other named elements, of the connection of head and skirt by webs laterally flexible as embodying a meritorious concept must be taken to indicate that the court regarded the flexible webs as a part of the invention, the more so since it indicates that lateral flexibility of the webs is the only feature mentioned not within the prior art or within the expected skill of the art. It rejected, on the authority of *Long* v. *Gulick, supra,* and *Hartog* v. *Long, supra,* the contention made below and pressed here that Gulick's application as filed did not disclose "webs laterally flexible" and the resultant "balanced flexibility of the skirt," and that those features were added to specifications and claims after the use of the Long piston and after they had appeared in Hartog.

The Gulick application, which was filed November 30, 1917, contained no reference in terms to laterally flexible webs or to the function of the webs in securing flexibility

of the skirt. The specifications pointed to no inadequacy in the structure or function of webs of the prior art which would be remedied by the webs specified and to no function to be performed by them other than as a means of connecting and holding head and skirt so as to maintain the air gap between them and to support the wrist pin bearings and their bosses as both were shown in Spillman and Mooers. On the contrary, Gulick's application described the webs as "extremely rigid" and stated that an object of the invention was "to rigidly support the piston pin bosses of a piston from the piston walls." The only description of the web structure was as follows:

"It will be seen that in addition to providing a piston with a split skirt the above described construction also provides an extremely rigid connection between the piston pin bosses and the skirt of the piston, which construction may be used either with or without the split skirt and separated head. The arrangement of the supporting flanges 17 between the ends of the piston pin bosses and the connection of those flanges with the piston skirt provide a particularly strong support for the bosses."

The webs as shown by the drawings conform to the specifications of an "extremely rigid connection" between piston pin bosses and skirt and "a particularly strong support for the bosses." They form chords subtending the arc of the circle of the skirt, with flanges depending from the head to the bosses at right angles to the webs, and the skirt as shown is provided with interior corrugations and with an inturned flange at the bottom, all familiar devices for securing rigidity of structure. Neither drawings nor specifications give dimensions showing thickness or other proportions which might suggest a flexible structure.

In 1922, after the Long piston, whose webs concededly were laterally flexible, was in commercial use, and Hartog, to the knowledge of Gulick's assignee, had specified and

claimed a yieldable web, Gulick copied the Hartog claim and amended his specifications so as to state that one of the objects of his invention was "to rigidly support the piston pin bosses of a piston from the piston wall against mechanical load thrust from the connecting rod without interfering with the yielding characteristics of the skirt in response to cylinder wall pressure." And he amended his description of the web structure to read:

"The arrangement of the supporting flanges 17 between the ends of the piston pin bosses and the connections of those flanges with both the piston guide portion and the head provide a particularly strong construction, and at the same time, when the longitudinal split is used, as shown, the web structure has sufficient lateral flexibility to permit the split to close more or less under the action of the expansion forces incident to the heating of the piston."

Petitioners insist that the flexible web element of the Gulick combination, as found and sustained by the court below, is excluded from the Gulick patent by reason of his failure to describe that element in his application as filed, and that he could not cure the omission and secure a patent embodying that feature by substituting by way of amendment "webs laterally flexible" for "extremely rigid webs" in the description of his invention. The statute, R. S. § 4888, provides that the application which the inventor must file as a prerequisite to a patent shall contain "a written description of [his invention] . . . and of the manner and process of making, constructing . . . and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art . . . to . . . construct . . . and use the same; and in case of a machine, he shall explain the principle thereof, and the best mode in which he has contemplated applying that principle, so as to distinguish it from other inventions; . . ."

The object of the statute is to require the patentee to describe his invention so that others may construct and use it after the expiration of the patent and "to inform the public during the life of the patent of the limits of the monopoly asserted, so that it may be known which features may be safely used or manufactured without a license and which may not." *Permutit Co.* v. *Graver Corporation,* 284 U. S. 52, 60. It follows that the patent monopoly does not extend beyond the invention described and explained as the statute requires, *Permutit Co.* v. *Graver Corporation, supra,* at 57; that it cannot be enlarged by claims in the patent not supported by the description, *Snow* v. *Lake Shore & M. S. Ry. Co.,* 121 U. S. 617; cf. *Smith* v. *Snow,* 294 U. S. 1; and that the application for a patent cannot be broadened by amendment so as to embrace an invention not described in the application as filed, at least when adverse rights of the public have intervened. *Railway Co.* v. *Sayles,* 97 U. S. 554, 563, 564; *Powers-Kennedy Corp.* v. *Concrete Co.,* 282 U. S. 175, 185–186; cf. *Webster Electric Co.* v. *Splitdorf Electrical Co.,* 264 U. S. 463; *Permutit Co.* v. *Graver Corporation, supra; Crown Cork & Seal Co.* v. *Gutmann Co.,* 304 U. S. 159.

Respondent earnestly argues, as both courts held in the interference proceedings, *Long* v. *Gulick, supra,* and *Hartog* v. *Long, supra,* that the changes in Gulick's application were not alterations in the description of his invention but were at most a permissible clarification of its description of the flexible web element which was present, or at least plainly suggested, in the specifications and drawings of the Gulick application. Flexibility, it is said, as is well known to those skilled in the art, is an inherent property of the metal out of which the webs are made, and in consequence reference to the webs in the application as filed was sufficient to import into it as a part of the description of the invention their known quality of

flexibility, a description which was made more specific, but not altered, by the amendments. The argument suggests that it was but the skill of the art, and not invention, to substitute a flexible for a rigid means of connecting head and skirt in a known combination of piston head separated from a slitted skirt by an air space and connected by webs. But in any case we think it falls short of establishing that the Gulick amendments were not new matter beyond the scope of the device described in the application as filed.

The properties of any given material are many and diverse. The antithetical qualities of rigidity and flexibility of a structure are not absolute but relative; it may be more rigid than some and more flexible than others; too rigid for some purposes and too flexible for others. The one quality may be increased and the other diminished by choice of materials from which the structure is made and by variation in its proportions. If invention depends on emphasis of one quality over the other, as the court below found was the case with the laterally flexible webs in the Gulick device, the statute requires that emphasis to be revealed to the members of the public, who are entitled to know what invention is claimed. That is not accomplished either by naming a member having inherent antithetical properties or by ascribing to it one property when the other is meant. Since rigidity is a relative term, the characterization of the structure as rigid must be taken as emphasizing rigidity rather than its opposite, flexibility, with special reference to the conditions to be encountered in the operation of the piston. Even if those skilled in the art would have known that a piston with webs which would yield enough laterally to accommodate the constriction of the split skirt under the pressure developed by thermal expansion would work most effectively if the webs were laterally flexible rather than

rigid, that was not the invention which Gulick described by his references to an extremely rigid web.

Gulick also failed to explain the principle of his machine so as to distinguish it from the prior art. Webs having the inherent properties both of rigidity and flexibility were familiar elements in piston structure. The court below, after pointing out that the slots of the Franquist skirt rendered it capable of limited constriction, found a distinguishing feature of Gulick's piston to be a web relatively flexible laterally, so as to accommodate the constriction of skirt to thermal expansion, the combination operating to secure a "balanced flexibility" of the skirt. But that principle—facilitating skirt constriction rather than obstructing it—was first explained and its embodiment in the flexible-webbed device was first claimed by the amendments to the application.

As already indicated, the omission from the specifications was not supplied by the drawings, which failed to disclose by dimensions the proportions of the webs. Inherent flexibility of the web in coöperation with the slit skirt cannot be depended upon to produce the desired effect in rendering the skirt yieldable in response to cylinder wall pressure. As respondent's own expert testified, that depends upon design of the web, with correct proportioning of the different parts as to location and thickness to produce lateral flexibility. Inherent rigidity, made more effective by design of the webs, would correspondingly curtail the desired effect.

We recognize the weight to be attached to the determinations in the interference proceedings in which the Court of Appeals of the District of Columbia and the Court of Customs and Patent Appeals sustained the Gulick amendments. Cf. *Radio Corporation* v. *Radio Laboratories,* 293 U. S. 1, 7. But the decisions in those cases are not controlling here. So far as the courts relied on

the inherent flexibility of the webs to supply the feature of lateral flexibility omitted from the Gulick description they ignored the principle recognized in *Permutit Co.* v. *Graver Corporation, supra,* and *Powers-Kennedy Corp.* v. *Concrete Co., supra.* So far as they relied on the drawings to supply the omission they disregarded the fact shown both by inspection and by the evidence presented here that the drawings do no more to point to Gulick's invention than does the fact of inherent flexibility. We conclude that respondent can take no benefit from the flexible web element added by amendment to the Gulick application.

In sustaining the claims of the Maynard patent the court below said that "Maynard . . . embodies the Gulick combination of skirt insulation, skirt flexibility by means of vertical slotting cooperating with longitudinal slotting, and flexible webs in the region of the wrist pin bosses. He also follows Jardine's simplified design to permit economical manufacture and Jardine's boss relief," and after enumerating certain mechanical features of the Maynard construction differing from Gulick and Jardine, concluded: "It is clear that Maynard, while not departing from the teaching of Gulick in basic combination of elements, discloses a piston lighter and more economical of manufacture than Gulick and one more rugged and durable than Jardine." 92 F. 2d, at 337.

Invention over Gulick and Jardine was apparently found in the details of construction but, as we are without other indication of the character of the invention, we construe the court's opinion as including the laterally flexible webs as an essential element in the patented combination. As flexible webs are neither described in Maynard's specifications nor mentioned in his claims, they can be imported into them only by reference to the drawings or by inference from the inherent flexibility of the structure, which, for reasons already given in our considera-

tion of the Gulick amendments, are insufficient to accomplish that result. We conclude that the court below erred in giving any effect to so much of the Gulick patent as by amendment describes or claims the flexible webs, and in treating any of the specifications or claims in Gulick and Maynard as referring to such webs. We assume that it sustained Claim 1 of the Gulick patent, which makes no mention of web flexibility, only by reading into it that element, which the court regarded as an essential part of the invention.

As the Court of Appeals did not pass upon other questions in the case, the causes will be reversed and remanded to it for further proceedings, in conformity with this opinion, with respect to such claims of the patents in suit as appellant below submitted to that court for adjudication.

Reversed.

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

STAHMANN ET AL., DOING BUSINESS AS STAHMANN FARMS CO., *v.* VIDAL, COLLECTOR OF INTERNAL REVENUE.

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

No. 12. Argued October 12, 13, 1938.—Decided November 7, 1938.

1. The purpose of the Bankhead Cotton Act (April 21, 1934; repealed by Act of Feb. 10, 1936) was to restrict the production of cotton and, to that end, to levy a heavy tax in respect of that produced in excess of the farmer's quota. The burden was to fall upon the producer. The assessment of the tax against the ginner was intended to immobilize the cotton in his possession until the producer should liquidate the tax. P. 65.

2. Where a collector, as required by this Act, assessed a tax on excess cotton against the ginner; and the producer, in order to possess himself of the cotton, paid the tax to the collector, *held* that he had standing, under R. S. § 3226, as amended by the Act of June 6, 1932, § 1103, to maintain an action against the collector, for recovery of the amount plus interest, based upon the claim that the Bankhead Act was unconstitutional. P. 63.

93 F. 2d 902, reversed.

CERTIORARI, 304 U. S. 552, to review the reversal of a judgment for a tax, recovered by the taxpayer in the District Court, in a case tried without a jury.

Mr. Thornton Hardie for petitioners.

Assistant Solicitor General Bell, with whom *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key, F. E. Youngman,* and *Warner W. Gardner* were on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

We are to decide whether the petitioners may maintain an action to recover from a collector of internal revenue sums paid by them as taxes assessed under the Bankhead Cotton Act.[1]

During the crop year 1934-1935 the petitioners were engaged in growing cotton and produced a quantity in excess of the allotment for which, under the terms of the Act, they were entitled to obtain tax exemption certificates. Petitioners delivered the excess cotton to Santo Tomas Gin Company, which ginned it and filed returns with the respondent, as collector, showing a tax of some $13,000 due on the ginning. The respondent, as directed by the Act, assessed the tax against the gin company. The latter refused to deliver the cotton to the petitioners until

[1] Act of April 21, 1934, c. 157, 48 Stat. 598.

the tax was paid, and to obtain their cotton the petitioners, in November 1934 and January 1935, paid the tax to the respondent. March 6, 1935 they presented a claim for refund, which was rejected by the Commissioner of Internal Revenue August 22, 1935. Suit was brought against the respondent May 5, 1936, to recover the amount paid with interest, the petitioners alleging that the Bankhead Act was unconstitutional. This the answer denied, and set up the further defense that, under the Act, the petitioners were not liable for the tax, any payment they had made was in discharge of a liability imposed by the Act on the gin company, and, consequently, they were not entitled to maintain the action.

The District Court, a jury having been waived, held that the Act was unconstitutional, that the petitioners could maintain the action, and gave judgment for them. The Circuit Court of Appeals refused to pass upon the constitutional question, as it was of opinion that the trial court erred in sustaining the petitioners' standing, and reversed the judgment.[2] On account of the importance of the case we granted certiorari, limited, however, to the question whether the petitioners were the proper parties to maintain the action.

Section 20 (b) of the Bankhead Act[3] stated the conditions upon which a proceeding might be maintained for the recovery of any sum alleged to have been erroneously or illegally assessed or collected under its terms. The Act was repealed February 10, 1936,[4] prior to the institution of the instant action. The petitioners were therefore remitted for recovery of the sum demanded to R. S. 3226, as amended by the Act of June 6, 1932, § 1103.[5] As thereby required, they timely filed a claim for refund,

[2] 93 F. 2d 902.

[3] 48 Stat. 606.

[4] 49 Stat. 1106.

[5] 47 Stat. 169, 286; U. S. C. Tit. 26, §§ 1672–1673.

which was denied, and timely brought their action. Under this section it is unnecessary to plead or prove that the tax was paid under protest or its collection was accomplished by duress.

The sole question for decision is whether the petitioners voluntarily paid someone's else tax. If they did they may not maintain the action.[6]

The respondent insists that, by the terms of the Act, the tax is imposed upon the ginner and not upon the producer. The petitioners, on the other hand, point to the provisions of the Act which make the levy of the tax dependent upon the vote of cotton producers and not upon any act of the ginners; which base exemptions from the tax upon the time, manner, and character of production and not upon the time, manner, or character of ginning; which grant exemptions to producers, not to ginners; which condition exemptions upon the producers meeting certain conditions and limitations; and which fix quotas for exemptions to producers. They say Congress never intended the ginner should bear the tax, since the Act provides that he is to be reimbursed up to twenty-five cents per bale for additional expense incurred by him in connection with the administration of the Act. They assert that the respondent's contention that the tax is upon the ginning of the cotton is negatived by the fact that it is not assessed upon all cotton ginned regardless of the amount produced by the owner of the particular farm, and that it amounts per bale to approximately five times the amount of the customary charge for ginning. They call especial attention to those sections of the Act which impose a lien for the tax upon the

[6] Compare *Wourdack* v. *Becker,* 55 F. 2d 840; *Clift & Goodrich* v. *United States,* 56 F. 2d 751; *Ohio Locomotive Crane Co.* v. *Denman,* 73 F. 2d 408; *Central Aguirre Sugar Co.* v. *United States,* 2 F. Supp. 538; *Combined Industries, Inc.* v. *United States,* 15 F. Supp. 349.

cotton if it is removed from the gin, forbid transportation of the cotton,—the producers' property,—beyond the county where produced, except for storage, and prohibit opening of the bale or sale of the cotton until the tax shall have been paid. They say it is obvious the statute made the ginner a convenient collecting agent to enforce payment of the tax and that the purpose was to force the farmer to pay by prohibiting his use of his excess cotton unless and until he paid; and the latter is, therefore, entitled to maintain an action for the refund of the tax if it was illegally collected.

We hold that the petitioners are entitled to maintain the action. The purpose of the Bankhead Act was to restrict the production of cotton and, to that end, to levy a heavy tax in respect of that produced in excess of the farmer's quota. The tax bore no relation to the ginning of cotton. On the contrary, it was intended to fall, and the Act attempted to make it fall, upon the producers. The assessment of the tax against the ginner was intended to immobilize the cotton in his possession until the producer should liquidate the tax. This is evident from the provisions which impose a lien upon the cotton for the amount of the tax upon removal of it from the gin without payment of the tax, and, while permitting it to be stored by the producer, forbid the opening of a bale or the sale of it until the tax liability shall have been discharged. Plainly the purpose was that if the ginner should release the cotton to the producer while the tax remained unpaid the lien upon it would insure payment by the producer.

The scheme of the Act sets the case apart from any to which our attention has been called arising under other taxing acts. The collector was part of the machinery for compelling the farmer to pay the tax, for immobilizing the cotton and making it unusable until the assess-

ment he had made against the ginner was satisfied by payment of the tax. Whether or not the tax was imposed upon the petitioners, they are, according to accepted principles, entitled to recover unless they were volunteers, which they plainly were not because they paid the tax under duress of goods.

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

Reversed.

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

SOVEREIGN CAMP OF THE WOODMEN OF THE WORLD *v.* BOLIN ET AL.

CERTIORARI TO THE KANSAS CITY COURT OF APPEALS OF MISSOURI.

No. 31. Argued October 21, 1938.—Decided November 7, 1938.

1. A fraternal beneficiary association of Nebraska issued and delivered in Missouri a certificate of membership requiring the member to pay dues and assessments and providing for benefits to accrue upon his death. Pursuant to a by-law of the association, the certificate purported to exempt the member from further dues and assessments after twenty years; but this exemption was afterwards adjudged by the Supreme Court of Nebraska, in a class suit brought by the holder of a similar certificate, to be *ultra vires* and void. In an action in Missouri by beneficiaries named in the certificate first-mentioned, *held:*

(1) That the certificate was not a mere contract to be construed and enforced according to the laws of the State where it was delivered. Entry into the society was entry into a complex and abiding relation and the rights of membership are governed by the law of the State of incorporation. Another State, wherein the certificate of membership was issued, can not attach to membership, rights against the society which are refused by the law of the domicil. P. 75.

(2) The question whether the association was estopped to plead *ultra vires* was not to be determined by the Missouri law of old line insurance companies. P. 76.

(3) The judgment of the Nebraska court, in the class suit, determined that the association lacked power to issue certificates exempt from dues and assessments after twenty years, and that it was not estopped to plead *ultra vires* in that regard. P. 78.

(4) The Missouri court, by enforcing the certificate, failed to give full faith and credit to the association's charter embodied in the statutes of Nebraska as interpreted by its highest court. P. 79.

2. In a class suit by a member of a beneficiary association to determine the power of the association to issue beneficial membership certificates exempt from dues and assessments after twenty years, the association represents all its members and stands in judgment for them, and the judgment is conclusive upon all the members of the association with respect to all rights, questions, or facts therein determined. P. 78.

112 S. W. 2d 582, 592, reversed.

CERTIORARI, 304 U. S. 557, to review the affirmance of a judgment against the present petitioner in an action on a fraternal beneficial certificate. The Supreme Court of the State would not entertain an appeal.

Mr. John T. Harding, with whom *Messrs. Rainey T. Wells* and *David A. Murphy* were on the brief, for petitioner.

(a) The relative rights and duties of petitioner and respondents under the beneficiary certificate must be determined by application of the laws of the State of Nebraska, notwithstanding the fact that the certificate was issued and accepted and the dues were paid in the State of Missouri.

(b) The judgment of the Supreme Court of Nebraska was a final, valid adjudication that, under petitioner's charter, the by-law and the limited payment provisions of the beneficiary certificates issued pursuant to said by-law were *ultra vires* of petitioner and invalid, and

that petitioner is not estopped to assert their invalidity in a suit based upon said by-law to enforce the limited payment features of the beneficiary certificate. *Trapp* v. *Sovereign Camp of the Woodmen of the World,* 102 Neb. 562; *Haner* v. *Grand Lodge, A. O. U. W.,* 102 Neb. 563.

(c) The judgment of the Supreme Court of Nebraska having been rendered in a suit brought for the benefit of a class to which Pleasant Bolin belonged, and being a final adjudication of a controversy as to which petitioner could stand in judgment for its members, is *res judicata* and binding upon respondents, and should have been accorded full faith and credit in the court below. *Smith* v. *Swormstedt,* 16 How. 288; *Bernheimer* v. *Converse,* 206 U. S. 516; *Converse* v. *Hamilton,* 224 U. S. 243; *Selig* v. *Hamilton,* 234 U. S. 652; *Broderick* v. *Rosner,* 294 U. S. 629; *Parker* v. *Luehrmann,* 126 Neb. 1; *Supreme Council of the Royal Arcanum* v. *Green,* 237 U. S. 531; *Hartford Life Ins. Co.* v. *Ibs,* 237 U. S. 662; *Hartford Life Ins. Co.* v. *Barber,* 245 U. S. 146.

(d) If the Nebraska judgment is not considered *res judicata* and binding upon respondents in a personal sense, it nevertheless announces the legal significance of petitioner's charter under the laws of Nebraska; and the charter, as thus interpreted, was entitled to full faith and credit in the court below.

(e) The decision of the court below on the question of estoppel was, of itself, a denial of full faith and credit to petitioner's charter and the Nebraska judgment because (1) the decision was reached by application of the laws of Missouri instead of the laws of Nebraska; and (2) the issue of estoppel was finally adjudicated by the Nebraska judgment in favor of petitioner.

(f) The opinion of the Supreme Court of Nebraska was the construction of a fraternal charter. It held that under said charter the by-law and the "payments to cease" clause were *ultra vires* and void. It also held that

the plea of estoppel was not available. It is, therefore, wholly immaterial whether under the Missouri law the certificate is labeled fraternal or "old line." If the constitutional question is present, the plea of estoppel, under the Missouri law, must be absent. The fact that no license was required of the association in Missouri at the time when the certificate was written in no sense affects the constitutional mandate. *Canada Southern Railroad* v. *Gebhard,* 109 U. S. 527, 537.

(g) Application of the Missouri insurance laws by the court below changed and impaired the substantive rights of petitioner established by the laws of Nebraska, and its charter; and they and the Nebraska judgment were denied the credit, validity and effect to which they were entitled under the full faith and credit provision of the Constitution.

Mr. Miles Elliott, with whom *Messrs. Ray Weightman, E. H. Gamble,* and *A. F. Harvey* were on the brief, for respondents.

The judgment of the state court rests upon at least four independent grounds not involving a federal question and each of which is adequate to support the judgment. Therefore, this Court is without jurisdiction and the writ of certiorari should be dismissed.

(a) A decision of the state court based upon an estoppel does not present a federal question.

(b) The proposition that the certificate was subject to the general insurance laws of Missouri, for the reason that when it was issued, the corporation was not licensed in Missouri, not having complied with the fraternal beneficiary laws, was a question of local law adequate to support the judgment, because the power of a State over foreign corporations doing business therein is equal to its power over domestic corporations.

(c) The certificate was delivered to and accepted by the insured in the State of Missouri. He paid all of the

dues and assessments in Missouri. This makes it a Missouri contract to which the laws of Missouri apply and by the laws of which it is governed; and the issues concerning it are to be adjudicated in accordance with the laws of Missouri. *New York Life Ins. Co.* v. *Cravens,* 178 U. S. 389; *Mutual Life Ins. Co.* v. *Johnson,* 293 U. S. 335; *Northwestern Mutual Life Ins. Co.* v. *McCue,* 223 U. S. 234; *Equitable Life Assurance Society* v. *Pettus,* 140 U. S. 226; *Ragsdale* v. *Brotherhood of Railroad Trainmen,* 229 Mo. App. 545; 80 S. W. 2d 272; *Johnson* v. *American Central Life Ins. Co.,* 212 Mo. App. 290; 249 S. W. 115; *Grant* v. *North American Benefit Corp.,* 223 Mo. App. 104; 8 S. W. 2d 1043; *Weed* v. *Bank Savings Life Ins. Co.,* 24 S. W. 2d 653; *Crohn* v. *United Commercial Travelers,* 170 Mo. App. 273.

(d) The certificate, being a Missouri contract, the contract rights therein provided could not be materially changed by so-called by-laws subsequently enacted by the company, or by the laws of Missouri or any other State.

The *Trapp* case, relied on by petitioner, was not binding on the courts of Missouri in the instant case.

Under the Missouri rules of pleading, the defense of *res judicata* must be pleaded in order to be available.

The Trapp suit was not binding as a class case on the rights of Bolin and his beneficiaries.

(a) When it was filed, no right of action existed on the Bolin policy, payments thereon not having been made for twenty years.

(b) While the petition in the *Trapp* case stated that Trapp brought the suit for himself and others similarly situated, the petition did not ask for relief for anyone except Trapp; and the judgment did not purport to apply to any other person.

(c) Trapp did not plead or assert his rights under the laws of Missouri, thus segregating himself from the class to which Bolin belonged.

(d) In the *Trapp* case there was no plea sufficient, under the Nebraska law, to raise the issue of estoppel.

(e) The *Trapp* case was based merely on a resolution of petitioner's executive council, providing for paid-up certificates, and the fraternal insurance laws of Nebraska, whereas the Bolin suit is based on a certificate or policy of insurance issued in Missouri, governed by the laws of Missouri and protected by the contract clause of the Federal Constitution.

There was no showing that Bolin acquiesced in the *Trapp* case, knew anything about it or had anything to do with it, and there is no showing that the rights upon which he relied were in any way represented or adjudicated in the *Trapp* case.

(f) There was no showing in the record of the *Trapp* case that the rights or interests of any holder of a policy or certificate, under the Missouri laws, were fairly represented or protected; that any such certificate holder had any knowledge of the suit or any opportunity to have his interests fairly protected or represented, or knew anything about the Trapp suit or in any manner acquiesced therein. Therefore, the *Trapp* case did not meet the requirements of a class suit. *Old Wayne Mutual Life Assn.* v. *McDonough,* 204 U. S. 8; *American Surety Co.* v. *Baldwin,* 287 U. S. 156.

If the decision in the *Trapp* case were applicable, it is in violation of § 10, Art. I, the contract clause, of the Constitution of the United States in that it holds a substantial provision of an insurance contract, to-wit, a provision that payments thereon should cease in twenty years, to have been invalidated by a subsequently enacted statute of the State of Nebraska.

The authorities cited by petitioner involve only questions of internal affairs or business management of the society or corporation, and questions arising in corporate receiverships or similar proceedings. None of them in-

volves the construction or effect of a contract between the corporation itself and another party. None of them involves the issue of estoppel under the law of the forum.

Mr. Justice Roberts delivered the opinion of the Court.

We granted certiorari because of the claim that the judgment of the court below failed to accord full faith and credit to the public acts, records, and judicial proceedings of the State of Nebraska as required by Article IV, § 1 of the Constitution.

The petitioner is a fraternal beneficiary association organized under the laws of Nebraska, having a lodge system, a ritualistic form of work, and a representative form of government. It has no capital stock, and transacts its affairs without profit and solely for the mutual benefit of its members and their beneficiaries. It makes provision for the payment of death benefits by assessments upon its members and issues to members certificates assuring payment of such benefits.

In 1895 the petitioner adopted a by-law authorizing the issue of life membership certificates. Under this by-law a member entering the order at an age greater than 43 years was entitled to life membership without the payment of further dues and assessments when the certificate had been outstanding 20 years. In June 1896, while the by-law remained unrepealed, Pleasant Bolin, who was over 43 years of age, joined a Missouri lodge of the petitioner and received a certificate of membership which recited that while in good standing he would be entitled to participate in the beneficial fund to the amount of $1,000 payable to his beneficiaries and to the sum of $100 for placing a monument at his grave. The certificate recited that it was issued subject to all the conditions named in the constitution and laws of the fra-

ternity and was endorsed with the words "Payments to cease after 20 years."

After Bolin's death, the respondents, as beneficiaries, brought action to recover upon the certificate. The petitioner's answer set up that Bolin had ceased to pay the required dues and assessments in July 1916, and his certificate had therefore become void; that the by-law making the certificate fully paid after twenty years was *ultra vires* of the association and had been so declared by the Supreme Court of Nebraska in a class suit brought by one Trapp, the holder of a certificate similar to that of Bolin; that, under Article IV, § 1, of the Constitution, full faith and credit must be given by the courts of Missouri to this decision of the Supreme Court of Nebraska. The respondents replied that the contract was made and delivered in Missouri and was to be construed and enforced according to Missouri law; that, at the date of its consummation, the petitioner had no license or authority to transact business in Missouri as a corporation or otherwise, and the certificate was therefore to be considered as issued pursuant to, and governed by, the general insurance laws of Missouri; that Bolin having fully performed in accordance with the terms of the certificate, the petitioner was estopped to plead *ultra vires;* and that in truth the contract was not *ultra vires* of the petitioner.

A jury was waived and the case was tried to the court. The respondents proved the issue of the certificate and Bolin's payments for twenty years thereafter. The petitioner proved the adoption of the by-law purporting to authorize the issue of "payments to cease" certificates; and put in evidence an exemplified copy of the record in *Trapp* v. *Sovereign Camp of the Woodmen of the World,* 102 Neb. 562; 168 N. W. 191, wherein it was decided that petitioner never had power under the law of Nebraska to issue such a certificate. Judgment went for the re-

spondents. The petitioner appealed to the Supreme Court of Missouri, which remanded the cause to the Kansas City Court of Appeals [1] on the ground that it involved no constitutional question. The latter affirmed the judgment [2] and adhered to its decision on rehearing.[3]

The court below based its decision on the following grounds:

> Under the law of Missouri the certificate was a Missouri contract because it was delivered to Bolin in Missouri and he made his payments there; all issues respecting rights arising out of the contract must, therefore, be adjudicated according to the decisions of the Missouri courts. The question then arises what system of local law is applicable,—that relating to fraternal beneficiary societies or that applicable to old line insurance companies. At the time the contract was made there was no local statute providing for the licensing of foreign fraternal beneficiary societies. Under the decisions of the Missouri courts the petitioner must, therefore, be denied the immunities extended by statute to domestic fraternal beneficiary associations and must be taken to have been doing business in Missouri under the State's general insurance laws, and the certificate must be regarded as a contract of general or old line insurance. This conclusion is not altered by the nature of the society granting the insurance because the character of the insurance, so far as Missouri is concerned, depends on the terms of the contract only. Whatever may be the character of the petitioner in the eye of the Nebraska law it need not have the same character in Missouri. Whether it is a fraternal beneficiary society when sued in Missouri is a question of local law. Even

[1] *Bolin* v. *Sovereign Camp, W. O. W.*, 339 Mo. 618; 98 S. W. 2d 681.

[2] *Bolin et al.* v *Sovereign Camp, W. O. W.*, — Mo. App. —; 112 S. W. 2d 582.

[3] *Bolin et al.* v. *Sovereign Camp, W. O. W.*, — Mo. App. —; 112 S. W. 2d 592.

> if the issue of the certificate be an *ultra vires* act under the law of Nebraska it does not follow that it is such under the law of Missouri. The contract is not *ultra vires* under the law of Missouri or, if so, the petitioner may not plead *ultra vires* because, in the light of Missouri law, the contract is an insurance contract with an old line insurance company and the petitioner, under Missouri decisions, cannot, in the circumstances disclosed, avail itself of the fact that the contract was in excess of its charter powers.

The court refused to give force or effect to the decision of the Supreme Court of Nebraska in *Trapp* v. *Woodmen, supra,* saying that case did not hold the issue of such a certificate *ultra vires* in the sense that it was prohibited by positive statute; that the contract being a Missouri contract its *ultra vires* character must be adjudged by the local law irrespective of what the courts of the domicile had held; that the respondents in the present case relied on an estoppel of the petitioner to plead *ultra vires,* whereas no such issue was presented or decided in the *Trapp* case.

We hold that the judgment denied full faith and credit to the public acts, records, and judicial proceedings of the State of Nebraska.

First. The beneficiary certificate was not a mere contract to be construed and enforced according to the laws of the State where it was delivered. Entry into membership of an incorporated beneficiary society is more than a contract; it is entering into a complex and abiding relation and the rights of membership are governed by the law of the State of incorporation. Another State, wherein the certificate of membership was issued, cannot attach to membership rights against the society which are refused by the law of the domicile.[4]

[4] *Modern Woodmen* v. *Mixer,* 267 U. S. 544, 551; *Royal Arcanum* v. *Green,* 237 U. S. 531, 542.

Second. The circumstance that at the time the certificate was issued domestic fraternal societies were exempted from the operation of the general insurance law of the State, and no similar exemption was extended to foreign societies, cannot enlarge the statutory and charter powers of such a foreign society. The fundamental error of the court below springs from a misapprehension of the effect to be given to the absence of provisions exempting foreign beneficiary associations from the statutes applicable generally to old line life insurance companies. Missouri has statutes affecting the validity and enforcibility of stipulations inserted in life insurance policies and other statutes dealing with procedure in actions upon such policies. In 1879 a statute was passed authorizing the incorporation of fraternal beneficiary societies and exempting them from the operation of the general laws of the State in respect of insurance companies.[5] An act of 1881 exempted both domestic and foreign societies from the operation of the general insurance laws.[6] This act did not require the registration of foreign associations but accorded them the same exemption as domestic associations. In 1889 the legislature adopted an act revising the statutes dealing with private corporations and therein provided that domestic beneficial societies should not be subject to the general insurance laws of the State, but omitted any reference to foreign associations.[7] It was not until 1897 that foreign beneficiary associations were required, as a condition of doing business within the State, to register and to file annual reports and to designate the Superintendent of the Insurance Department as the person upon whom process might be served. If they

[5] Act of March 8, 1879; Laws 1879; R. S. 1879, §§ 972, 973.

[6] Act of March 8, 1881; Laws of 1881, p. 87.

[7] Act of May 7, 1889; R. S. 1889, §§ 2823, 2824.

complied with the provisions of this statute they were exempted from the operation of the general insurance laws.[8] This act has been carried forward in later revisions and, with changes immaterial to our inquiry, remains in force. From this hiatus in the statutes governing foreign beneficiary associations it resulted that while foreign associations were not forbidden from organizing lodges, obtaining members, and issuing benefit certificates in Missouri, and their certificates so issued were not deemed to be void,[9] certificates issued in the interim between 1889 and 1897 were construed in accordance with, and actions thereon were governed by, the provisions of the general insurance laws.[10] The Missouri courts, however, were apparently not called upon in any of the cases affected by this rule of decision to pass upon the question of the power of such a society, under the law of the State of its incorporation, to write a particular sort of beneficiary certificate; [11] but this court reversed a judgment of the Supreme Court of Missouri which, without reference to the distinction between the rule applicable to domestic and foreign societies, reëxamined and refused to give effect to a judgment of the Supreme Court of Connecti-

---

[8] Act of March 16, 1897; R. S. 1899, c. 12, Art. 11, §§ 1408, 1409, 1410.

[9] *Schmidt* v. *Foresters,* 228 Mo. 675, 686; 129 S. W. 653.

[10] *Kern* v. *Legion of Honor,* 167 Mo. 471, 479, 484; 67 S. W. 252; *Schmidt* v. *Foresters, supra; Mathews* v. *Modern Woodmen,* 236 Mo. 326; 139 S. W. 151; *Brassfield* v. *Maccabees,* 92 Mo. App. 102; *Gruwell* v. *Knights and Ladies,* 126 Mo. App. 496; 104 S. W. 884.

[11] In *Kern* v. *Legion of Honor, supra,* the court said, p. 485: "The contention that the plaintiff as husband could not be the beneficiary under the laws of Massachusetts or under its charter and by-laws, is not open to discussion or adjudication. No such issue was raised in the pleadings or asserted upon the trial in the circuit court. . . . The defendant chose its grounds of defense, none others are open in this court."

cut, the court of the domicile, with respect to the powers of a Connecticut association.[12]

The court below was not at liberty to disregard the fundamental law of the petitioner and turn a membership beneficiary certificate into an old line policy to be construed and enforced according to the law of the forum. The decision that the principle of *ultra vires* contracts was to be applied as if the petitioner were a Missouri old line life insurance company was erroneous in the light of the decisions of this court which have uniformly held that the rights of members of such associations are governed by the definition of the society's powers by the courts of its domicile.[13]

Third. The doctrine of estoppel was erroneously invoked to avoid the force and effect of the Nebraska judgment. The court below was of the opinion that, as the petitioner had issued a "payments to cease after 20 years" certificate, and as Bolin had fully performed on his part by paying all dues and assessments over the named period, the petitioner was estopped to plead its lack of power to issue such a certificate. This again was on the theory that whatever might be the nature of the petitioner's organization in Nebraska, for the purposes of this action it must be treated as an old line insurance company in Missouri. It was further held that no question of estoppel was decided in the *Trapp* case.

As to the first of these positions, it need only be said that the *Trapp* case was a class suit in which it was determined that the petitioner lacked power, under the law of Nebraska, to issue such certificates. In such a suit the

---

[12] *Barber* v. *Hartford Life Ins. Co.*, 269 Mo. 21; 187 S. W. 867, reversed *Hartford Life Ins. Co.* v. *Barber*, 245 U. S. 146; see, also, *Johnson* v. *Hartford Life Ins. Co.*, 166 Mo. App. 261.

[13] *Hartford Life Ins. Co.* v. *Ibs*, 237 U. S. 662; *Hartford Life Ins. Co.* v. *Barber*, 245 U. S. 146; *Royal Arcanum* v. *Green*, 237 U. S. 531; *Modern Woodmen* v. *Mixer*, 267 U. S. 544.

association represents all its members and stands in judgment for them, and even though the suit had a different object than the instant one it is conclusive upon all the members of the association with respect to all rights, questions, or facts therein determined.[14]

With respect to the second position, it appears from the record that Trapp, in the suit in Nebraska, pleaded that the association was estopped to deny its power to issue the form of certificate in question, and the opinion of the Nebraska court, by reference to a case decided on the same day, clearly indicates that the issue of estoppel was considered and determined adversely to the plaintiff.

Fourth. Under our uniform holdings the court below failed to give full faith and credit to the petitioner's charter embodied in the statutes of Nebraska as interpreted by its highest court.[15]

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

Reversed.

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

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

No. 11. Argued October 12, 1938.—Decided November 7, 1938.

1. Brokerage commissions paid or incurred in purchasing securities during the taxable year by a taxpayer engaged in buying and selling securities as a business, are not deductible as "compensation for personal services," under § 23 (a), Revenue Act of 1932, but are expenditures properly chargeable to capital account as constituting part of the cost of the securities purchased, deduction of

---

[14] *Hartford Life Ins. Co.* v. *Ibs, supra,* p. 673.

[15] *Royal Arcanum* v. *Green, supra,* pp. 540, 543, 546; *Hartford Life Ins. Co.* v. *Ibs, supra,* p. 669; *Hartford Life Ins. Co.* v. *Barber, supra,* p. 151; *Modern Woodmen* v. *Mixer, supra,* p. 551.

which, in case of loss from sales, is limited by §§ 111 and 23 (r) of the Act; T. R. 77, Art. 282. P. 81.

2. Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law. P. 82.
3. The general provision of T. R. 77, Art. 121, that "Among the items included in business expenses are . . . commissions," is limited by the special provision of *id.* Art. 282, designating security purchase commissions as a "part of the cost price of such securities." P. 83.
4. The addition of § 23 (r) of the Revenue Act of 1932 did not indicate a purpose to alter or repeal the administrative interpretation under which brokers' commissions have uniformly been construed as a part of the cost of the securities purchased, and not as current business expenses. P. 84.
5. Congress has power to limit or deny deductions from gross income, in the computation of income taxes. P. 84.

93 F. 2d 494, reversed.

CERTIORARI, 303 U. S. 633, to review a judgment which reversed a decision of the Board of Tax Appeals, 35 B. T. A. 804, sustaining an income tax assessment.

Mr. Arnold Raum, with whom *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key, J. Louis Monarch, Ellis N. Slack,* and *Charles A. Horsky* were on the brief, for petitioner.

Mr. Thomas M. Wilkins for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

Respondent, in his 1932 income tax return, deducted from his gross income brokerage commissions paid and incurred in purchasing securities during that taxable year. Section 23 (a) of the Revenue Act of 1932 allows as deductions "All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; . . ." Respondent contends that he was

engaged in the "business" of buying and selling securities and that the brokerage commissions amounted to "compensation for personal services actually rendered" within the meaning of § 23 (a).

The Government insists that brokers' commissions in security purchases are "expenditures, . . . properly chargeable to capital account" constituting "a part of the cost" of such property and serving only to increase respondent's loss from sales of stock under §§ 111 and 23 (r) which control allowable losses on disposal of stocks.[1] Section 23 (r) allows losses on stock sales to be deducted only to the extent of gains realized from such sales.[2] If respond-

---

[1] Revenue Act of 1932, c. 209, 47 Stat. 169, § 111. Determination of Amount of Gain or Loss.

"(a) Computation of Gain or Loss.—Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113 (b), and the loss shall be the excess of such basis over the amount realized.

. . . . . .

"Sec. 113. Adjusted Basis for Determining Gain or Loss.

"(b) Adjusted Basis.—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

"(1) General Rule.—Proper adjustment in respect of the property shall in all cases be made—

"(A) for expenditures, receipts, losses, or other items, properly chargeable to capital account, including taxes and other carrying charges on unimproved and unproductive real property, but no such adjustment shall be made for taxes or other carrying charges for which deductions have been taken by the taxpayer in determining net income for the taxable year or prior taxable years; . . ."

[2] Revenue Act of 1932, c. 209, 47 Stat. 169.

"Sec. 23. Deductions from Gross Income. In computing net income there shall be allowed as deductions:

. . . . . .

"(r) Limitation on Stock Losses.

"(1) Losses from sales or exchanges of stocks and bonds (as defined in subsection (t) of this section) which are not capital assets (as

ent was engaged in the "business" of buying and selling securities, and the brokers' commissions were not a "part of the cost" of the securities purchased, but were ordinary business expenses, as defined in § 23 (a), respondent was justified in deducting the brokers' commissions from his gross income for the taxable year. However, if these commissions represent a part of the cost of the securities, respondent's right to deduct is limited by § 23 (r).

The Commissioner refused to permit the deductions beyond the extent of stock losses. His action was affirmed by the Board of Tax Appeals.[3] The Court of Appeals held the commissions deductible if respondent was engaged in the business of buying and selling securities, and remanded for a finding as to the nature of his business.[4]

Article 282, Treasury Regulation 77, issued under the 1932 Act, provides that "Commissions paid in purchasing securities are a part of the cost price of such securities." If this regulation governs, the respondent's contention cannot be sustained.

Regulations promulgated under the 1916 income tax law treated commissions in security purchases as a part of the securities' cost and not as ordinary expense deductions.[5] This interpretation has consistently reappeared in all regulations under succeeding tax statutes.[6] In the period since 1916 statutes have from time to time altered allowable deductions, but it is significant that Congress

---

defined in section 101) shall be allowed only to the extent of the gains from such sales or exchanges (including gains which may be derived by a taxpayer from the retirement of his own obligations)."

[3] 35 B. T. A. 804.

[4] 93 F. 2d 494.

[5] See, Art. 8, Paragraph 108, T. R. 33 (Revised 1918).

[6] Art. 293 of T. R. 45 (1918), 62 (1921); Art. 292 of T. R. 65 (1924), 69 (1926); Art. 282 of T. R. 74 (1928), 77 (1932); Art. 24-2 of T. R. 86 (1934), 94 (1936).

substantially retained the original taxing provisions on which these regulations have rested.

Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reënacted statutes, are deemed to have received congressional approval and have the effect of law.[7]

There has been tacit, if not express, judicial approval for the administrative treatment of commissions as an element of the cost of securities. In *Hutton* v. *Commissioner,* 39 F. 2d 459, 460, the Court of Appeals recognized that " It has been a settled rule of the Treasury Department that commissions paid in purchasing securities are a capital expenditure as part of the cost price of the securities."

In recognition of this administrative regulation, it has been said here that ". . . commissions [paid for marketing bonds] do not differ from brokerage commissions paid upon the purchase or sale of property. The regulations have consistently treated such commissions, not as items of current expense, but as additions to the cost of property or deductions from the proceeds of sale, in arriving at net capital profit or loss for purposes of computing the tax." [8]

Respondent points to an apparent inconsistency between the general provision in Treasury Regulation 77, Article 121, that "Among the items included in business expenses are . . . commissions," and Article 282 which specifically and particularly declares that "Commissions paid in purchasing securities are a part of the cost price of such securities." Special provisions limit the application of those of a broad and general nature relating to the same subject. The special designation of security

[7] *United States* v. *Dakota-Montana Oil Co.,* 288 U. S. 459, 466; *Old Mission Co.* v. *Helvering,* 293 U. S. 289, 293, 294.

[8] *Helvering* v. *Union Pacific R. Co.,* 293 U. S. 282, 286.

purchase commissions as a "part of the cost price of such securities" contained in Article 282 evinces the clear intent to withdraw that special type of commission from the general classification of Article 121.[9]

Nor can it be inferred that the addition of § 23 (r) to the 1932 Act indicated any congressional purpose to alter or repeal the long existing administrative interpretation of non-deductible capital expenditures under which brokers' purchase commissions have been uniformly considered as a part of the cost of securities and not as current business expenses. This new statutory restriction of the allowance for losses from sales of stock bears no such relationship to the definition of cost price of securities as to lead to the conclusion that Congress intended to overthrow and abandon a settled practice of determining the elements of cost.

The brokers' purchase commissions here constituted a part of the acquisition cost of the securities involved, and are not allowable to the taxpayer as a deduction from gross income under § 23 (a) of the Revenue Act of 1932. Congress, in the exercise of its power to deny or limit deductions from gross income,[10] has—by § 23 (r)—limited this taxpayer's allowable deduction. He has a right to a deduction "only to the extent of . . . gains from . . . sales or exchanges" of stocks and bonds as therein provided. The fact—if it be a fact—that respondent was engaged in the business of buying and selling securities does not entitle him to take a deduction contrary to this provision.

The cause is reversed and remanded to the Court of Appeals for action in harmony with this opinion.

Reversed.

---

[9] Similarly, if the specific provisions of Article 282 are valid and have the present effect of law, respondent's contention that the commissions are uncompensated losses within the meaning of the general provisions of § 23 (e) (1) of the 1932 Act is unavailing.

[10] See, *Helvering* v. *Independent Life Ins. Co.*, 292 U. S. 371, 381.

HINES, ADMINISTRATOR OF VETERANS' AFFAIRS, *v.* LOWREY, COMMITTEE OF THE PERSON AND ESTATE OF GARMES.

CERTIORARI TO THE SUPREME COURT OF NEW YORK.

No. 24. Argued October 19, 1938.—Decided November 7, 1938.

1. Section 500 of the World War Veterans' Act limits to $10 the fee of any attorney or agent for services in the preparation and execution of necessary papers in any application to the Bureau, except where a judgment or decree shall be rendered in an action under § 1, Tit. 19 of the Act. *Held,* the limitation was binding upon a state court in respect of an allowance for services rendered in connection with a claim on a War Risk Insurance contract by an attorney engaged by the guardian of an incompetent veteran. *Hines* v. *Stein,* 298 U. S. 94, distinguished. P. 87.
2. Section 500 of the World War Veterans' Act, limiting the amount of the fee payable to attorneys for services rendered in connection with claims before the Bureau, is a valid exercise of the power of Congress. P. 91.

252 App. Div. 779; 300 N. Y. S. 603, reversed.

CERTIORARI, 304 U. S. 555, to review the affirmance of an order allowing a fee of $1500 for legal services rendered the estate of an incompetent veteran. The Administrator of Veterans' Affairs had intervened in opposition.

Mr. Edward E. Odom, with whom *Messrs. James T. Brady* and *Y. D. Mathes* were on the brief, for petitioner.

Mr. William Dike Reed for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

Section 500 of the World War Veterans' Act [1] (as applicable here) prohibits the recognition of attorneys or

[1] "Amount permitted to be paid agents or attorneys; solicitation, etc., of unauthorized fees or compensation; punishment. Except in the event of legal proceedings under section 19, Title I of this Act, no claim agent or attorney except the recognized representatives of the American Red Cross, the American Legion, the Disabled

claim agents in the presentation or adjudication of veterans' War Risk Insurance claims; limits to ten dollars the payment for assisting in the preparation and execution of an application to the Veterans' Bureau; permits a court—rendering a favorable judgment or decree on a veteran's claim—to allow the veteran's attorney a fee not to exceed ten per cent of the amount recovered; and makes soliciting or obtaining any fee greater than the statute provides a crime subject to a maximum punishment of a $500 fine and two years imprisonment.

A committee (guardian appointed by a New York state court) for an insane veteran retained an attorney to prosecute the rights of the incompetent on a War Risk Insurance contract. The New York court was petitioned for an attorney's fee of $3,000. Upon hearing, it appeared that the attorney had performed services of an investiga-

---

American Veterans, and Veterans of Foreign Wars, and such other organizations as shall be approved by the director shall be recognized in the presentation or adjudication of claims under Parts II, III, and IV, of this Act, and payment to any attorney or agent for such assistance as may be required in the preparation and execution of the necessary papers in any application to the bureau shall not exceed $10 in any one case: *Provided, however,* That wherever a judgment or decree shall be rendered in an action brought pursuant to section 19 of Title I of this Act, the court, as a part of its judgment or decree, shall determine and allow reasonable fees for the attorneys of the successful party or parties and apportion same if proper, said fees not to exceed 10 per centum of the amount recovered, and to be paid by the bureau out of the payments to be made under the judgment or decree at a rate not exceeding one-tenth of each of such payments until paid. Any person who shall, directly or indirectly, solicit, contract for, charge, or receive, or who shall attempt to solicit, contract for, charge, or receive any fee or compensation, except as herein provided, shall be guilty of a misdemeanor, and for each and every offense shall be punishable by a fine of not more than $500 or by imprisonment at hard labor for not more than two years, or by both such fine and imprisonment." 43 Stat. 628, as amended 43 Stat. 1311, c. 10, 38 U. S. C. 551.

tional and preparatory nature in the prosecution of the veteran's claim; that contrary to § 500, he had been recognized by the Bureau and permitted to join with a representative of the Disabled War Veterans in presenting the claim to the Bureau; and that subsequently, but without litigation, judicial decree or judgment against the Government, the Government paid the guardian an amount in excess of $10,000 on the claim. The New York court allowed a fee of $1,500 for the attorney's services, over the objection of the Administrator of Veterans' Affairs, who intervened and insisted that § 500 prohibited any fee in excess of $10 in this case.[2] We can assume, in the consideration of questions here presented, that valuable services were rendered by the attorney.

Respondent seeks to sustain the $1,500 fee upon the theory that the general power of the New York court to fix fees for services rendered an incompetent under that court's jurisdiction is not subject to the limitation of $10 for fees as provided in § 500. He urges that the present case is controlled by the decision in *Hines* v. *Stein,* 298 U. S. 94, 98. In that case the Court said, "Nothing brought to our attention would justify the view that Congress intended to deprive state courts of their usual authority over fiduciaries, or to sanction the promulgation of rules to that end by executive officers or bureaus." This language did not refer to § 500, which we now consider, but was a construction and interpretation of rules promulgated by the Administrator of Veterans' Affairs under authority of §§ 4 and 7 of an Act of March 20, 1933, c. 3, 48 Stat. 9, which rules were traceable to §§ 111, 114 and 115, Title 38, U. S. C. These Code sections are based upon an Act passed in 1884.

[2] The Administrator appealed and the Appellate Division affirmed. 252 App. Div. 779; 300 N. Y. S. 603. The Court of Appeals of New York denied the Administrator's motion for leave to appeal. 13 N. E. 2d 478. This Court granted certiorari.

Obviously, the interpretation given rules promulgated in furtherance of a line of legislation dating from 1884 cannot be accepted as controlling in determining the intent and effect of a separate and distinct Act (§ 500) differing in form, substance and historical background. The rules and statutes construed in *Hines* v. *Stein, supra,* have no bearing on this case, which must be determined by the application of § 500.

Section 500 is one in a series of congressional efforts to limit fees of claim agents and attorneys in the prosecution of veterans' insurance and related claims. Shortly after the United States entered the World War, Congress provided a comprehensive statutory plan of War Risk Insurance for soldiers and sailors.[3] Section 13 of that statute contained this provision: "The Director shall adopt reasonable and proper rules . . ., to regulate the matter of the compensation, if any, but in no case to exceed ten per centum, to be paid to claim agents and attorneys for services in connection with" collection of soldiers' and sailors' benefits.

May 20, 1918, Congress amended § 13 of the 1917 Act.[4] The House report shows that this amendment was strongly urged by the Secretary of the Treasury, then administering the World War Veterans' Act.[5] The 1918

---

[3] c. 105, 40 Stat. 398 (October, 1917).

[4] c. 77, 40 Stat. 555.

[5] House Report No. 471 from the Committee on Interstate and Foreign Commerce, 65th Cong., 2nd Session. A part of the letter of the Secretary of the Treasury contained in the Report was as follows: "The evils of the situation are pressing. Unscrupulous attorneys and claim agents are circularizing prospective claimants . . . The heartlessness and rapacity of these persons knows no bounds. In some instances their break-neck rush for employment has led them to the length of crucifying the wives and mothers of those in the service by false announcements that their husbands or sons have already fallen, and in almost all cases they are seeking to mulct the unwary out of hundreds of dollars for services that are either

amendment is substantially the same as § 500, and in a case involving the meaning of that amendment this Court said, "Petitioner claims that the inhibition against receiving any sum greater than three dollars [ten dollars under § 500] relates solely to the clerical work of filling out the form or affidavit of claim, and *does not apply to useful investigation and preparatory work such as he did.* . . .

"We find no reason which would justify disregard of the plain language of the section under consideration. It declares that any person who receives a fee or compensation in respect of a claim under the Act except as therein provided shall be deemed guilty of a misdemeanor. *The only compensation which it permits a claim agent or attorney to receive where no legal proceeding has been commenced is three dollars for assistance in preparation and execution of necessary papers.* And the history of the enactment indicates plainly enough that Congress did not fail to choose apt language to express its purpose." [6] (Italics supplied.)

In 1926, Congress enacted additional legislation for the specific protection of incompetent veterans from illegal or excessive fees where guardians had been appointed by any court—state or federal.[7] Congress declared that "whenever it appears that any guardian, curator, conservator or other person, in the opinion of the Administrator, is not properly executing or has not properly executed the duties of his trust or has collected or paid, or is attempting to collect or pay, fees, commissions or allowances that are inequitable or *in excess of those allowed by law for the duties performed* . . ., then and in

---

entirely unnecessary or would be amply remunerated by a nominal fee." The discussions of the amendment in the House by those in charge of the bill were of the same tenor. Congressional Record, Vol. 56, Part 5, 5220–5226.

[6] *Margolin* v. *United States*, 269 U. S. 93, 101, 102.

[7] c. 723, 44 Stat. 792; c. 10, 38 U. S. C. 450.

that event the Administrator is hereby empowered by his duly authorized attorney to appear *in the court which has appointed such fiduciary,* . . . and make proper presentation of such matters. . . ." [8] (Italics supplied.)

The history of § 500 manifests beyond doubt the clear establishment of a public policy against the payment of fees for prosecution of veterans' claims in excess of those fixed by statute. Collection of a greater fee than that fixed in the statute is made a crime, and this Court has sustained a conviction under the statute.[9] Contracts for the collection of fees in excess of valid statutory limitations and for services validly prohibited by statute cannot stand, whether made with a competent veteran or the guardian of an incompetent veteran. Nor can any court having jurisdiction over an incompetent award a fee in violation of a valid statute. Congress clearly intended to protect all veterans, competent and incompetent, in all courts, state and federal, against the imposition or payment of fees in excess of the amount fixed by statute. In furtherance of this policy the Administrator of Veterans' Affairs was charged with the express duty of appearing in all courts where it appears that "any guardian . . . or other person . . . is attempting to collect fees . . . in excess of those allowed by law." The progressive strengthening of this particular legislative policy precludes any probability that Congress intended to exempt mental incompetents from its protection, and Congress alone is vested with constitutional power to determine the wisdom of this policy.

---

[8] In 1935, Congress added the proviso that " . . . the Administrator is hereby authorized and empowered to appear or intervene by his duly authorized attorney in any court as an interested party in any litigation instituted by himself or otherwise, directly affecting money paid to such fiduciary [guardian] under this section." c. 510, 49 Stat. 607, 608.

[9] *Margolin* v. *United States, supra.*

Congressional enactments in pursuance of constitutional authority are the supreme law of the land. Section 500 is a valid exercise of congressional power.[10] "The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are." [11]

No court has rendered a judgment or decree in favor of the incompetent veteran and against the Government, in which the court as a part of its decree determined and allowed a reasonable fee for the attorney of the veteran. In the absence of such a judgment and decree an attorney's fee of more than $10 is contrary to the controlling congressional enactment. The judgment below being for more than this amount is unauthorized and the cause is

Reversed.

WAIALUA AGRICULTURAL CO. *v.* CHRISTIAN ET AL.*

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

No. 15. Argued October 13, 14, 1938.—Decided November 7, 1938.

1. The rule that a federal court will pay deference to decisions of territorial courts on matters of local concern is applicable to decisions of the Supreme Court of the Territory of Hawaii. P. 107.
2. This rule applies where the questions decided concern the interpretation and validity of contracts of incompetent persons, and the rights of a grantee in respect of improvements on the land after the incompetent's deed has been canceled. P. 108.

---

[10] *Margolin* v. *United States, supra; Calhoun* v. *Massie,* 253 U. S. 170.

[11] *Claflin* v. *Houseman,* 93 U. S. 130, 136.

*Together with No. 17, *Christian* v. *Waialua Agricultural Co.,* also on writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit.

3. Although the 34th section of the Judiciary Act is not applicable to the territories, the reasons supporting the policy of having the state courts declare the state law likewise support the view that the territorial courts should be free to declare the law of the territories. P. 109.
4. The power of the Circuit Court of Appeals upon review to reverse rulings of the Supreme Court of Hawaii on the law or the facts should be exercised only in cases of manifest error. P. 109.
5. Decisions of the Supreme Court of Hawaii which are in conformity with the Constitution and applicable statutes of the United States, and are not manifestly erroneous in their statement or application of governing principles, are to be accepted as stating the law of the Territory. P. 109.
6. In a suit in equity involving questions as to the validity and construction of particular contracts of an incompetent person—*viz.*, a deed, a lease, and a contract for maintenance,—and a question as to rights in improvements made upon the land by a grantee under a deed subsequently canceled, the Supreme Court of Hawaii ruled that the contracts of an incompetent person made prior to an adjudication of incompetency are voidable, and that in determining whether relief should be granted the equities on both sides should be weighed. The court concluded upon the facts of this case (a) that the deed should be canceled, but that the lease and the contract for maintenance should be sustained; (b) that the contract for maintenance should be construed as assigning rents and profits accruing to the incompetent not only during the term of an existing lease, but thereafter as well; (c) that an assignee of the rents and profits had made a valid transfer of them by deed; and (d) that, in respect of the improvements on the land, these should be reserved to the grantee and rights of use as between the grantor and grantee adjusted as provided in the decree.

   Held, the Supreme Court of Hawaii's decisions of the questions involved were not manifestly erroneous, and should not have been disturbed on review by the Circuit Court of Appeals. Pp. 109–111.

93 F. 2d 603; 94 *id.* 806, reversed.

Cross writs of certiorari, 304 U. S. 553, to review the reversal of a decree of the Supreme Court of Hawaii in a suit brought by the guardian of an incompetent person to set aside certain contracts and to recover the rental value of certain lands of the incompetent.

Mr. M. C. Sloss, with whom *Messrs. Charles M. Hite* and *E. D. Turner, Jr.* for Christian et al.

Mr. Herman Phleger, with whom *Mr. Maurice E. Harrison* was on the brief, for the Waialua Agricultural Co.

Mr. Justice Reed delivered the opinion of the Court.

These cases concern the validity of a lease, a contract for maintenance, and a deed conveying or assigning rights of Eliza R. P. Christian, an incompetent, to a one-third undivided interest in land on the Island of Oahu, Territory of Hawaii.

The Supreme Court of the Territory of Hawaii in two opinions on separate appeals set aside the deed and refused to set aside the contract or lease. A decree was entered directing the reconveyance to the incompetent of her previously conveyed interest in the tract with adjustments for improvements.[1] The Circuit Court of Appeals for the Ninth Circuit refused to review the first decree on the ground that no final order had been entered.[2] Appeals were taken from the second decree by the incompetent and, after severance, by the Waialua Agricultural Company, Limited. The Circuit Court of Appeals reversed the Supreme Court of Hawaii and remanded the cause to that court with directions to remand to the trial court, with instructions to grant relief against the deed upon restitution of the consideration and to take further proceedings in respect to the issues concerning the validity of the lease and contract.[3] The petition for rehearing was denied. 94 F. 2d 806. Certiorari and cross-certiorari were sought by the respective parties and granted by this Court to review the ques-

[1] *Christian* v. *Waialua Agricultural Co.,* 31 Haw. 817; 33 Haw. 34.

[2] *Waialua Agricultural Co.* v. *Christian,* 52 F. 2d 847.

[3] *Christian* v. *Waialua Agricultural Co.,* 93 F. 2d 603.

tions presented because of the action of the Circuit Court of Appeals in reversing conclusions of the Supreme Court of Hawaii as to applicable principles of law.[4]

The incompetent, Mrs. Christian, was born at Makaha in the Hawaiian Islands on December 30, 1885. She was brought to Honolulu by her father in the early 1890's. By 1901 they had gone to live with Mrs. Annie Holt Kentwell, a cousin and one of the nine children of Owen J. Holt. Except for short periods when the incompetent was in boarding school, they lived with her continuously thereafter. The incompetent's grandfather, R. W. Holt, had died in 1862, leaving a will which devised an equal undivided portion of the real estate involved in these cases to each of his three sons for life and then to the heirs of each in fee simple. One of these sons was John Dominis Holt, the father of the incompetent. The father was living at the time of the execution of the documents here questioned, dying in 1922.

That portion of the grandfather's estate involved in these cases consisted of approximately fourteen thousand acres of land. At the time of the first transactions here considered, one of the sons, Owen J. Holt, had died leaving nine children, each entitled to a one-twenty-seventh interest in fee simple in the tracts. A second son, James R. Holt, was living but had conveyed his life estate to his son, James Lawrence Holt. This son had also purchased the contingent remainder of his brother, Robert Holt, and the life estate of the incompetent's father, John Dominis Holt. Subject to whatever risk there was that his father, James R. Holt, born in 1838, would have other children after 1905, James Lawrence Holt was, in the year last mentioned, the owner of a one-third interest in the property, plus the life estate of his uncle, John Dominis Holt, in another third. James Lawrence Holt had transferred

[4] *Matos* v. *Alonso Hermanos,* 300 U. S. 429.

all these interests to John F. Colburn as Trustee. The property in 1905 was "wholly uncultivated and covered with noxious weeds, including such well-known pests as lantana and *klu*. The taxes at that time were four years in arrears."

On March 17, 1905, the administrator *de bonis non* with-the-will-annexed of R. W. Holt, several of the heirs of his son, Owen J. Holt, and the Hawaiian Realty and Maturity Company, Limited, executed a lease to the Waialua Agricultural Company, Limited, for twenty-five years at an annual rental of $9,000. The administrator was treated in this lease as having title to two-thirds of the whole. The owners of the contingent remainders, one of whom was the incompetent, joined with the lessors in covenanting that the lessee while paying said rent "shall peaceably and quietly hold and enjoy the use and possession of said demised premises . . ."

On the 31st day of August, 1906, the incompetent entered into a contract for maintenance with her cousin, Annie Holt Kentwell. This instrument evidenced an assignment of her title and interest in and to any and all rents, issues and profits due or payable under the above lease or "by virtue of being the only child of John Dominis Holt, the elder, and devisee under the will of R. W. Holt, deceased, together with all and every her right to demand, receive, collect and receipt for all such rents, issues, and profits from whomsoever due during the term of" her natural life. The consideration for the contract was the assumption by Mrs. Kentwell of the support and maintenance of the incompetent. The instrument appears in a footnote.[5]

---

[5] "THIS INDENTURE—made this 31st day of August A. D. 1906; by and between—ELIZA R. P. CHRISTIAN—(the only child and heir of John Dominis Holt, the elder) of Honolulu, Island and County of

A deed was executed on May 2, 1910, in which the incompetent and her husband, Albert Christian, her father, John D. Holt, and Annie Holt Kentwell, and her husband, were parties grantor and James Lawrence Holt was grantee. This deed in consideration of $35,000 con-

---

Oahu, Territory of Hawaii, of the first part, and—ANNIE HOLT KENTWELL—of the same place, party of the second part.

"WITNESSETH—Whereas the party of the first part has for many years last past been supported and maintained at the home of the party of the second part, and at the cost and expense of the said party of the second part, and

"WHEREAS—the said first party is the only child and heir of John Dominis Holt, the elder, being also a devisee under the Will of R. W. Holt, deceased, and is entitled in expectancy to a certain undivided interest or moiety in certain lands situate at Waialua, Oahu, now leased to the Waialua Agricultural Company, Limited, by lease dated the 17th day of March, 1905, and recorded in the Hawaiian Registry of Deeds in Liber , Folio, and

"WHEREAS—by virtue of being such heir of John Dominis Holt, the elder, and such devisee under the will of R. W. Holt, deceased, aforesaid, she, the said party of the first part, shall upon the death of him, the said John Dominis Holt, the elder, be entitled to her share of the rents reserved in said lease aforesaid, which share of said rents aforesaid is now enjoyed by her father, the said John Dominis Holt, the elder, and

"WHEREAS—the party of the second part has agreed to support and to maintain the party of the first part for and during the period of the natural life of her, the said party of the first part,

"NOW THEREFORE THIS INDENTURE WITNESSETH—That the said—ELIZA R. P. CHRISTIAN—in consideration of the premises and of One Dollar to her in hand paid by—ANNIE HOLT KENTWELL—of Honolulu aforesaid, the receipt whereof is hereby duly confessed and acknowledged and for other and valuable consideration to the said—ELIZA R. P. CHRISTIAN—moving from said—ANNIE HOLT KENTWELL—, she, the said—ELIZA R. P. CHRISTIAN—, does hereby give, sell, assign, release, transfer and set over unto the said—ANNIE HOLT KENTWELL—, her heirs, executors and administrators, all her title and interest in and to any and all rents, issues and profits to which she may hereafter be entitled or which may be due and payable to her by, through or under the lease to the

veyed "one undivided third part of interest" subject to the grantee's interest and to the lease of 1905. The deed evidenced the intention "to convey all the interest of the said Grantors, whether present, prospective or in remainder, vested or contingent, of every name and description in and to said lands or which they or either of them may hereafter acquire in and to the said lands." The deed further declared that the grantors assigned and set over to the grantee "all claims and demands which they may have arising out of either said instruments [i. e., the ones dealing with James Lawrence Holt's interests and the lease] or in any other way against the said James Lawrence Holt, the said Waialua Agricultural Company, Limited, or the said John F. Colburn, said Trustee," with exceptions not material here. The grantors further agreed to warrant the property conveyed against the claims and demands of all persons.

Waialua Agricultural Company, Limited, dated the 17th day of March, 1905, and recorded in said Liber Folio or by virtue of being the only child of John Dominis Holt, the elder, and devisee under the will of R. W. Holt, deceased, together with all and every her right to demand, receive, collect and receipt for all such rents, issues and profits from whomsoever due during the term of the natural life of her, the said—ELIZA R. P. CHRISTIAN—.

"AND—it is expressly agreed and understood between and by the parties hereto that the party of the second part shall support and maintain her, the party of the first part, for and during the natural life of said first part.

"AND—it is further agreed and understood by and between the parties hereto that in case the party of the first part shall survive the party of the second part, the heirs of said second party shall be entitled to perform the covenant of this agreement on the part of said second party to be kept and performed, and they shall during the life of said first party be entitled to the benefit or benefits thereof.

"IN WITNESS WHEREOF—the said—ELIZA R. P. CHRISTIAN—and—ANNIE HOLT KENTWELL—have hereunto set their hands and seals the day and year first above written.

ELIZA R. P. CHRISTIAN
ANNIE HOLT KENTWELL"

The grantee, James Lawrence Holt, and his trustee, John F. Colburn, conveyed the interest and rights acquired by this deed together with the other one-third undivided interest then belonging to James Lawrence Holt to other grantees. By successive conveyances the incompetent's property, covered by the deed of 1910, came into the ownership of the Waialua Agricultural Company, Limited, a defendant in the trial court.

Beginning at about the time when the tract came into the possession of Waialua under the lease, Waialua acquired, through various conveyances, fee simple interests of seven of the nine children of Owen J. Holt. When this action began in 1928, Waialua held in fee simple by color of title twenty-five twenty-sevenths of the property. Under the lease of 1905 it began to improve the property. The lease provided that the improvements would revert to the lessors. After the conveyances in 1910 of the life and remainder interests, covering two-thirds of the fee, Waialua made further important installations. Besides the fourteen thousand acres of the Holt lands, the Waialua plantation includes an additional thirty-six thousand acres. The properties are developed and operated as a unit,—9,904 acres in sugar cane, 11,625 acres in pineapple, the balance uncultivated or used for servicing the crop lands. The record shows a total expenditure of $630,722.12 for improvements on the Holt lands between April 1, 1905, and April 5, 1928, when Waialua was notified the deed was questioned. In addition, reservoirs, ditches and other improvements, off the Holt lands but necessary for their use, have cost Waialua $514,594.94. No description is necessary other than to say that the improvements consist of reservoirs and ditches, roads, pumps, communication systems, camps, overseers' houses, and the other usual fixtures and appurtenances necessary for the operation of a large irrigated plantation.

After the lease had been in operation for a few years, it was found that some 6,500 acres of the Holt lands were suitable for the growing of pineapples. After trying multiple subtenancy, an agreement was made in 1922 with the Hawaiian Pineapple Company giving it an option to lease all the Waialua pineapple lands at $15 per acre. Under the option Waialua invested over three million dollars in the Pineapple Company stock and the Pineapple Company leased 6,475 acres of the Holt lands for seventeen and one-half years from January 1, 1923, to June 30, 1940, with optional extension, at a paid-up rental, reached by a 5% discount, of about two million dollars.

The mechanized scientific farming of the sugar cane and pineapple lands was profitable. The trial court found that $14 per acre was a reasonable ground rent for the Holt land used for sugar production and that $15 per acre was a reasonable ground rent for the pineapple lands after the lease to the Hawaiian Pineapple Company of January 1, 1923. A less sum per acre was found as a reasonable ground rent for the pineapple lands prior to that time.

In 1926 the ward was for the first time declared incompetent, and Annie Holt Kentwell was appointed her guardian in England. In 1927 Mrs. Kentwell's brother, George H. Holt, became guardian of the estate of the ward in Honolulu. The present guardian, Herman V. VonHolt, succeeded him *pendente lite*. On May 9, 1928, a petition was filed against Waialua and James Lawrence Holt in the Circuit Court of the Territory by the guardian alleging the incompetency of the ward on the date of the execution of the deed; and that the purported consideration was inadequate and was never received by the ward. No complaint was made of the execution of the lease or the contract for maintenance. It was alleged that Waialua induced James Lawrence Holt, the grantee

in the deed, to secure the conveyance of the property through Holt's connection with Annie Holt Kentwell, the dominating influence over the incompetent. The guardian prayed for the cancellation of the deed and an accounting for the rental value of the undivided one-third interest from April 10, 1922, the date of the death of the ward's father. James Lawrence Holt appeared and admitted the facts relating to his part in the transaction.

The trial court on adequate evidence found that Eliza Christian was incompetent at the time of the execution of the deed of 1910; that her incompetence had not been adjudicated by a proper protective proceeding, was not "clearly self-evident to an entire stranger" but "was known to James L. Holt, to her father, John Dominis Holt, to the Kentwells and to others who were familiar with her dependency upon the Kentwells." The court found the price inadequate and that it was not clearly shown that Waialua Company had actual notice of the incompetency of Eliza. The decree set aside the deed and entered an award for $540,906.07 in rentals, after deducting the purchase price of $30,000 and interest.

On appeal the Supreme Court of Hawaii sustained the determination of the trial court as to the capacity of the incompetent at the date of the execution of the deed, finding that "she was a congenital imbecile." It assumed that the Waialua Company "had no knowledge of Eliza Christian's incompetency." It held that the consideration was adequate; that there was no laches; and that limitation did not bar the proceeding. It affirmed the action of the trial court in setting aside the deed of May 2, 1910, upon a repayment to Waialua by the incompetent of the purchase price, with interest from May 2, 1910, on a balance of equities, a consideration of the advantages to the incompetent and a suggestion that the consideration did not reach the grantor. The decree of the trial court as to the recovery of the rentals was re-

versed on the ground that Waialua had succeeded to Annie Kentwell's rights under the contract of 1906 to receive and keep the incompetent's rentals during the term of the lease. Rentals beyond the termination of the lease were not involved in the first appeal. The case was therefore remanded to the trial court to determine the validity of the lease of 1905 and the contract of 1906.

On the remand the trial court found that Eliza was incompetent at the time of the execution of the contract, that Mrs. Kentwell knew of the incompetency and that Waialua was not an innocent purchaser from Mrs. Kentwell, since it knew of a secret profit, received by James Lawrence Holt and John F. Colburn in connection with the various conveyances by which Mrs. Kentwell's interests passed to Waialua, "while these two, at the same time, knew of the mental condition of Eliza Christian." In considering the lease of March 17, 1905, the court found that Eliza was incompetent when she gave her assent; but that while the "Waialua Company, . . . is not shown to have had any knowledge of this incompetency," a balance of equities required a conclusion against the validity of the lease. The decree again set aside the deed of May 2, 1910; awarded rentals in the total sum of $606,-785.75; annulled the lease of March 17, 1905, in so far as it affected the incompetent; annulled the contract for support and maintenance of August 31, 1906, and gave to Waialua the right to continue in the exclusive use and occupation of reservoirs, pumping stations, irrigation ditches and other improvements until partition or other arrangements were agreed upon. Appeal was taken from this decree.

In its second hearing, the Supreme Court of Hawaii maintained its finding as to the incompetency of Eliza at the time of the execution of the deed of May 2, 1910. It assumed that the trial court was correct in finding Eliza incompetent at the time of the execution of the lease of

1905 and the contract for maintenance of 1906, and accepted the finding of the trial court that Waialua was not shown to have any knowledge of Eliza's incompetency at the time it took the lease of 1905. It determined that the deed of May 2, 1910, passed the contract rights assigned to Annie by Eliza and that Waialua succeeded to these rights as an innocent purchaser for value. It further held that the incompetent received an adequate consideration for the lease of 1905. In effect it held that the assignment of 1906 was also for an adequate consideration already largely received. The contract "was beneficial to Eliza." "Eliza had no income or other means of support." "In entering into this contract (1906) neither of the parties knew or could know how long a period of time would elapse before Eliza would become entitled to a share of the rents under the lease . . ." [6]

In the final decree the deed of May 2, 1910, was set aside; the lease of 1905 and the contract of 1906 were sustained; the incompetent was required to pay or secure the payment to Waialua of the purchase price; Waialua was required to convey to the incompetent the one-third interest in fee simple which passed by the deed, with reservations by Waialua of certain portions occupied by its improvements and certain lands and rights of way for ditches, pipes, service, and roads necessary to maintain and distribute water and operate the plantation, and with provisions to insure to the incompetent rights of way for the operation of her properties, if and when the same were partitioned and set off.

We might summarize the factual situation arising from the two trials in the lower court and the two reviews in the Supreme Court of Hawaii as follows: Eliza Christian was found or assumed to have been incompetent at the time of the execution of the lease of 1905, the contract of 1906 and the deed of 1910. Waialua was not found to

[6] *Christian* v. *Waialua Agricultural Co.*, 33 Haw. 34, 51.

have known of this incompetency at the time it received any rights flowing from any of the instruments. It was determined that the status quo was restored in so far as the deed was concerned by the repayment of the purchase price with interest and that the Holt land could be separated from the rest of the plantation with proper adjustment for improvements.

Upon these facts the Supreme Court of Hawaii determined applicable principles of law. Those considered by the Circuit Court of Appeals were the following:

I. The rule of law in Hawaii is that the deed, lease or contract of an incompetent executed prior to a judicial declaration of incompetency is voidable. A mere showing of incompetency will not avoid it. In determining whether it should be canceled, "all of the equities must be considered, including those in favor of the grantee or lessee as well as those in favor of the grantor or lessor." [7]

"It is our view of the law that a lease made by an incompetent, who has not been judicially declared insane, to a lessee without knowledge of the incompetency, for an adequate rental and upon other terms that are reasonable and fair, which is beneficial to the incompetent and is in effect a provision in favor of the incompetent for necessaries for his sustenance and comfort,—a lease which has been fully performed and is accompanied by no fraud or other circumstances of inequity to the incompetent,—should not be canceled,—even though the lessee can be restored to the *status quo ante*." [8]

In its first opinion the court had said: "When the grantee can be restored to the position it occupied immediately prior to the conveyance, the deed of the incompetent should be canceled even though it was taken in

[7] *Christian* v. *Waialua Agricultural Co.*, 33 Haw. 34, 40.

[8] *Christian* v. *Waialua Agricultural Co.*, 33 Haw. 34, 43.

ignorance of the incompetency and even though the consideration paid was adequate." [9]

It did not refer in the second opinion to any conflict between the statements but found the distinction between the canceled deed and the confirmed lease and contract, in the relative advantages to the incompetent.[10]

II. The construction of the contract for maintenance of 1906 [11] was that it covered rents, issues and profits, payable to the incompetent not only from the lessee under the 1905 lease but also "the rents accruing thereafter from whatever source." [12] This ruling was embodied in the language of the final decree set out in the note below.[13]

"By the deed of May 2, 1910, Annie Kentwell, a mentally competent person, transferred all of her rights under the instrument of 1906 to" Waialua.[14]

III. A court of equity may permit a grantee without notice of the incompetency, who has placed improvements on the land of an incompetent in reliance on a conveyance subsequently canceled, to reserve the improvements together with such land and rights of way over the incom-

---

[9] *Christian* v. *Waialua Agricultural Co.*, 31 Haw. 817, 888.

[10] *Christian* v. *Waialua Agricultural Co.*, 33 Haw. 34, 53.

[11] Footnote 5.

[12] *Christian* v. *Waialua Agricultural Co.*, 33 Haw. 34, 52.

[13] "That said instrument dated August 31, 1906, referred to in Paragraph VII hereof, conveyed all rents, issues and profits from the land described in the deed of May 2, 1910 . . . , which have accrued or will accrue to Eliza R. P. Christian, whether under the lease dated March 17, 1905, . . . or otherwise, and from whomsoever due, from August 31, 1906, the date of said instrument, until the end of the natural life of her, the said Eliza R. P. Christian, and that the respondent-appellant, Waialua Agricultural Company, Limited, is the owner of all said rents, issues and profits so conveyed; provided, however, Waialua Agricultural Company, Limited, shall pay all taxes and lawful assessments upon or against said land during the lifetime of the said Eliza R. P. Christian."

[14] *Christian* v. *Waialua Agricultural Co.*, 33 Haw. 34, 52.

petent's lands as may be necessary for their proper use under suitable conditions to be prescribed by the court.[15]

While the Circuit Court of Appeals accepted the findings of fact in the trial and appellate courts of Hawaii,[16] it took direct issue with some of the legal conclusions of the Supreme Court of the Territory and held as follows:

I. The general rule of law is that the deed, lease or indenture [17] of an incompetent, executed prior to a judicial declaration to that effect, is void. "Relief against such a contract should not be granted, however, on proof of incompetency only." "So, in the case of a contract made by an incompetent, after proof of the incompetency, relief will be granted against the contract, or refused, depending upon the situation of the parties at the time relief is asked; in other words, the situation of the parties is the controlling factor." [18] "This . . . does not mean that the court should balance all equities of the parties, as was done by the trial court." [19] "The rule as stated means that if the parties can be placed in statu quo, the relief will be granted." [20] This rule was held applicable to Hawaii.

Apparently in reliance on this rule, the lower court determined relief should be granted against the lease as to the lessor, Eliza Christian, or against the contract or against both, if she were incompetent at the time of the execution.[21] The territorial supreme court had denied relief "irrespective of the subject of status quo" and of competency.[22]

---

[15] *Christian* v. *Waialua Agricultural Co.*, 33 Haw. 34, 57.

[16] *Christian* v. *Waialua Agricultural Co.*, 93 F. 2d 603, 609, 612; 94 F. 2d 806, 807.

[17] *Christian* v. *Waialua Agricultural Co.*, 93 F. 2d 603, 611.

[18] *Christian* v. *Waialua Agricultural Co.*, 93 F. 2d 603, 610.

[19] *Christian* v. *Waialua Agricultural Co.*, 93 F. 2d 603, 611.

[20] *Christian* v. *Waialua Agricultural Co.*, 93 F. 2d 603, 612.

[21] *Christian* v. *Waialua Agricultural Co.*, 93 F. 2d 603, 613.

[22] *Christian* v. *Waialua Agricultural Co.*, 33 Haw. 34, 63.

II. The construction of the contract of maintenance of 1906 is that the incompetent assigned to Mrs. Kentwell her rents, issues and profits under the lease of 1905 only; that later rents, issues and profits were retained.[23]

III. The action of the territorial supreme court, in adjusting equities as to improvements by cross conveyances between the incompetent and the subsequent grantees, is incorrect.

"Here, if the company is entitled to an allowance for improvements at all, it is entitled to an allowance of one-third of the enhanced value of the land, due solely to the addition of improvements since May 2, 1910. That amount may be made a lien against the land, or may be set-off against the rentals, if any, which are found due to the ward." [24]

Status of the Supreme Court of Hawaii.—The lower court acquired jurisdiction of the appeals under Judicial Code, § 128.[25] When the Hawaiian Organic Act was passed in 1900, no provision was made for appeals from the territorial supreme court. In 1905, for matters involving more than $5,000, a direct appeal to this Court was provided.[26] In 1911 review of the territorial supreme court was placed upon the same basis as review of the highest court of a State, with a continued right of review, generally, where the amount involved $5,000.[27] Certiorari from this Court was provided by the Act of January 28, 1915, and for the first time review by circuit

[23] *Christian* v. *Waialua Agricultural Co.*, 93 F. 2d 603, 615.

[24] *Christian* v. *Waialua Agricultural Co.*, 93 F. 2d 603, 617.

[25] "Fourth. In the Supreme Courts of the Territory of Hawaii and of Porto Rico, in all civil cases, civil or criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; in all other civil cases wherein the value in controversy, exclusive of interest and costs, exceeds $5,000, and in all habeas corpus proceedings." 43 Stat. 936.

[26] 33 Stat. 1035.

[27] 36 Stat. 1158.

courts of appeals for cases involving $5,000 or over.[28] In each of these successive enactments the Congress has recognized, to some degree, the autonomous position of the Supreme Court of the Territory.

This recognition is natural. The territorial court has general appellate jurisdiction of cases involving the mores and statutes of an archipelago, the first known compilation of whose laws appeared in 1842.[29] Isolated until the day of electrical communication and aerial transportation from continuous contact with other peoples, and inhabited by diverse stocks of Oceanica, Asia, Europe and America, it developed, as an independent kingdom, a jurisprudence adapted to its needs. The constitution of Kamehameha III established a Supreme Court of the Kingdom in 1840 and defined its jurisdiction.[30] The common law and the civil law were sources of information but not of authority.[31] Until 1892,[32] lacunae were filled by the judges.[33] The laws developed were largely

---

[28] 38 Stat. 804.

[29] Preface to the Translation of the Constitution and Laws of the Hawaiian Islands.

[30] "Their business shall be to settle all cases of difficulty which are left unsettled by the tax officers and common judges. They shall give a new trial according to the conditions of the law. They shall give previous notice of the time for holding courts, in order that those who are in difficulty may appeal. The decision of these shall be final. There shall be no further trial after theirs. Life, death, confinement, fine, and freedom from it, are all in their hands, and their decisions are final." Translation of the Constitution and Laws of the Hawaiian Islands, 1842, p. 20.

[31] "The reasonings and analogies of the common law, and of the civil law, may in like manner be cited and adopted by any such court, so far as they are deemed to be founded in justice, and not at conflict with the laws and usages of this kingdom." Statute Laws of the Hawaiian Islands, 1845–47, Vol. II, p. 5.

[32] *Hall* v. *Kennedy,* 27 Haw. 626, 629.

[33] "Section 14. The Judges have equitable as well as legal jurisdiction, and in all civil matters, where there is no express law, they are

left in force by the Organic Act.[34] These now include a declaratory statute on the source of Hawaiian law.[35] This judicial tradition gives present substance to the rule of this Court that deference will be paid the understanding of territorial courts on matters of local concern.[36]

Review of its Decisions.—While the determinations made by the territorial court upon the validity of instruments executed by incompetents, the interpretation of the contract of an incompetent, and the adjustments of equities concerning improvements after cancellation of a

---

bound to proceed and decide according to equity, applying necessary remedies to evils that are not specifically contemplated by law, and conserving the cause of morals and good conscience. To decide equitably, an appeal is to be made to natural law and reason, or to received usage, and resort may also be had to the laws and usages of other countries." Hawaii Civil Code, 1859, p. 7.

[34] "Sec. 1. That the phrase 'the laws of Hawaii,' as used in this Act without qualifying words, shall mean the constitution and laws of the Republic of Hawaii, in force on the twelfth day of August, eighteen hundred and ninety-eight, at the time of the transfer of the sovereignty of the Hawaiian Islands to the United States of America." 31 Stat. 141.

"Sec. 6. That the laws of Hawaii not inconsistent with the Constitution or laws of the United States or the provisions of this Act shall continue in force, subject to repeal or amendment by the legislature of Hawaii or the Congress of the United States." 31 Stat. 142.

[35] "*Common law applies except when.* The common law of England, as ascertained by English and American decisions, is declared to be the common law of the Territory of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the Territory, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; *provided*, however, that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the Territory." Revised Laws of Hawaii, 1935, Ch. 1, § 1, p. 73.

Cf. *Kake* v. *Horton*, 2 Haw. 209; *Rex* v. *Tin Ah Chin*, 3 Haw. 90, 95.

[36] *Matos* v. *Alonso Hermanos*, 300 U. S. 429, 430, 432; *Kealoha* v. *Castle*, 210 U. S. 149, 154; *Lewers & Cooke* v. *Atcherly*, 222 U. S. 285, 293; *Ewa Plantation Co.* v. *Wilder*, 289 F. 664, 669.

conveyance, partake of general law, as well as of local law,[37] we see no reason for not applying the rule as to local matters to these circumstances. While the 34th section of the Judiciary Act is not applicable to territories, the arguments of policy in favor of having the state courts declare the law of the state are applicable to the question of whether or not territorial courts should declare the law of the territories with the least possible interference.[38] It is true that under the appeal statute the lower court had complete power to reverse any ruling of the territorial court on law or fact; [39] but we are of the opinion that this power should be exercised only in cases of manifest error. The differentiations, implicit and explicit, in the opinions of the Supreme Court of Hawaii, as to the rules of law applicable to the proceedings to set aside the deed of 1910 and those applicable to similar proceedings as to the lease of 1905 and the contract for maintenance of 1906, do not furnish occasion for reversal by the lower court.[40] In so far as the decisions of the Supreme Court of Hawaii are in conformity with the Constitution and applicable statutes of the United States and are not manifestly erroneous in their statement or application of governing principles, they are to be accepted as stating the law of the Territory. Unless there is clear departure from ordinary legal principles, the preference of a federal court as to the correct rule of general or local law should not be imposed upon Hawaii.

Decision of the Supreme Court of Hawaii.—To adopt the legal principles applied by the territorial supreme

---

[37] *Black & White Taxi Co.* v. *Brown & Yellow Taxi Co.*, 276 U. S. 518, 526, 530.

[38] Cf. *Swift* v. *Tyson*, 16 Pet. 1; *Erie R. Co.* v. *Tompkins*, 304 U. S. 64; *Lewers & Cooke* v. *Atcherly*, 222 U. S. 285, 294.

[39] Cf. *Philippine Sugar Co.* v. *Philippine Islands*, 247 U. S. 385, 390.

[40] Cf. *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197, 201; *Fidelity & Columbia Trust Co.* v. *Louisville*, 245 U. S. 54, 59.

court in these cases as rules of decision in that jurisdiction, or to construe instruments as it interpreted them, is not manifest error.

Whatever may be the better rule as to the voidableness of the transfer documents of an incompetent, it is not clearly wrong to select the one here chosen.[41]

The construction of the contract of maintenance by the territorial court of last resort is likewise defensible. The lower court, itself, said the assignment of rents due to the incompetent "by virtue of being . . . devisee under the will . . . during the term of the natural life of her" the incompetent (see note 5, *supra*), might mean "that the ward assigned all rents including those to which she might be entitled under the lease to the company and any other lease." [42] The minority opinion reached this conclusion.[43] Although on consideration of the entire contract the majority reached a different answer, the interpretation of the Supreme Court of Hawaii is not manifestly erroneous. Nor do we see any occasion to reëxamine the interpretation that the deed of May 2, 1910 (the relevant portions of which are set out above, *ante*, p. 96), conveyed the rents, issues and profits, assigned to Mrs. Kentwell.

---

[41] 2 Black, Rescission and Cancellation (2d ed.), §§ 255–258; 1 Williston, Contracts (Rev. ed., 1936–38), § 254; *Imperial Loan Co.* v. *Stone*, (1892) 1 Q. B. 599; *Casebier* v. *Casebier*, 193 Ky. 490; 236 S. W. 966.

[42] *Christian* v. *Waialua Agricultural Co.*, 93 F. 2d 603, 614, 615.

[43] "In my opinion the agreement of August 31, 1906, from Eliza Christian to Annie Kentwell, in consideration of her support and maintenance during the balance of her life, purported to convey not only all the rents accruing to Eliza Christian under the lease of 1905 after the contingent remainder of Eliza Christian became vested in 1922 upon the death of her father, as held by the majority opinion, but also all the rents, issues, and profits after the expiration of the lease and until her death." *Christian* v. *Waialua Agricultural Co.*, 93 F. 2d 603, 618.

The lower court considered it necessary to apply here the rule that the occupant of the land of another was entitled to be paid, as compensation for improvements, a sum equal to the amount by which the improvements increased the value of the property, not exceeding the cost. It is not always necessary so to penalize an innocent improver. If he is a tenant in common, partition may be made so as to set apart to him the portion improved.[44] Under the circumstances here disclosed, the action of the Hawaiian court in awarding to Waialua the realty and improvements described in the decree need not be set aside.

Decree of the lower court reversed and decree of the Supreme Court of Hawaii affirmed.

Reversed.

KELLOGG COMPANY *v.* NATIONAL BISCUIT COMPANY.

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

Nos. 2 and 56. Argued October 10, 1938.—Decided November 14, 1938.

1. The term "shredded wheat" is generic, and no exclusive right to its use may be acquired. P. 116.
2. Moreover, "shredded wheat" was the general designation of the product made under the product and process patents issued to Perky, upon the expiration whereof there passed to the public not only the right to make the article as it was made during the patent period, but also the right to apply thereto the name by which it had become known. P. 117.
3. To establish, by application of the doctrine of secondary meaning, the exclusive right to "shredded wheat" as a trade name, the claimant must show that the primary significance of the term in

---

[44] See *Highland Park Mfg. Co.* v. *Steele*, 232 F. 10, 34, modified 235 F. 465; *Cochran* v. *Shoenberger*, 33 F. 397, 398; *Ford* v. *Knapp*, 102 N. Y. 135, 140; 6 N. E. 283.

the minds of the consuming public is not the product but the producer. P. 118.

4. The right of a competitor, upon expiration of the patents, to make the patented product and call it by its generic name, could not be lost by delay, even though the earlier manufacturer, in the period between the expiration of the patents and the time when the competitor became a factor, had spent large sums in advertising the product. The only obligation of the competitor was to identify its own product lest it be mistaken for that of the earlier producer. P. 119.
5. Inasmuch as the pillow-shaped biscuit was the form in which shredded wheat was made under the patents and in which the article became generally known, the form was dedicated to the public upon expiration of the patents. P. 119.
6. Upon the facts of this case, *held* that the Kellogg Company, in making and selling "shredded wheat" biscuits under that name, in pillow-shape form, in competition with a similar product of the National Biscuit Company (successor to the Shredded Wheat Company), was not doing so unfairly. The obligation resting upon the Kellogg Company was not to insure that every purchaser would know it to be the maker of the biscuits sold by it, but to use every reasonable means to prevent confusion. P. 120.

   There was no evidence in this case of "passing off" or deception on the part of the Kellogg Company.
7. The Kellogg Company is not obliged to refrain from using the name "shredded wheat" and to make its biscuit in some other than the pillow-shape form. It is entitled to share in the goodwill of an article unprotected by patent or trade-mark. Furthermore, the evidence is persuasive that the pillow-shape form must be used, because it is functional. P. 121.
8. The question whether the Kellogg Company's use upon its packages of a picture of two shredded wheat biscuits in a bowl was a violation of a trade-mark of the National Biscuit Company, *held* not before this Court on the present record. P. 122.

91 F. 2d 150; 96 *id.* 873, reversed.

CERTIORARI, 304 U. S. 586, to review a decree of injunction against the petitioner and a later order clarifying the decree. A petition for certiorari to review the first decree had previously been denied, 302 U. S. 733. Juris-

diction of the federal court was based upon diversity of citizenship.

Mr. Thomas D. Thacher, with whom *Messrs. W. H. Crichton Clarke, Edward S. Rogers, Robert T. McCracken, Richard H. Demuth,* and *E. Ennalls Berl* were on the brief, for petitioner.

Mr. David A. Reed, with whom *Messrs. Charles A. Vilas, Thomas G. Haight,* and *Drury W. Cooper* were on the brief, for respondent.

Mr. Justice Brandeis delivered the opinion of the Court.

This suit was brought in the federal court for Delaware [1] by National Biscuit Company against Kellogg Company to enjoin alleged unfair competition by the manufacture and sale of the breakfast food commonly known as shredded wheat. The competition was alleged to be unfair mainly because Kellogg Company uses, like the plaintiff, the name shredded wheat and, like the plaintiff, produces its biscuit in pillow-shaped form.

Shredded wheat is a product composed of whole wheat which has been boiled, partially dried, then drawn or pressed out into thin shreds and baked. The shredded wheat biscuit generally known is pillow-shaped in form. It was introduced in 1893 by Henry D. Perky, of Colo-

[1] The federal jurisdiction rests on diversity of citizenship—National Biscuit Company being a New Jersey corporation and Kellogg Company a Delaware corporation. Most of the issues in the case involve questions of common law and hence are within the scope of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64 (1938). But no claim has been made that the local law is any different from the general law on the subject, and both parties have relied almost entirely on federal precedents.

rado; and he was connected until his death in 1908 with companies formed to make and market the article. Commercial success was not attained until the Natural Food Company built, in 1901, a large factory at Niagara Falls, New York. In 1908, its corporate name was changed to "The Shredded Wheat Company"; and in 1930 its business and goodwill were acquired by National Biscuit Company.

Kellogg Company has been in the business of manufacturing breakfast food cereals since its organization in 1905. For a period commencing in 1912 and ending in 1919 it made a product whose form was somewhat like the product in question, but whose manufacture was different, the wheat being reduced to a dough before being pressed into shreds. For a short period in 1922 it manufactured the article in question. In 1927, it resumed manufacturing the product. In 1928, the plaintiff sued for alleged unfair competition two dealers in Kellogg shredded wheat biscuits. That suit was discontinued by stipulation in 1930. On June 11, 1932, the present suit was brought. Much evidence was introduced; but the determinative facts are relatively few; and as to most of these there is no conflict.

In 1935, the District Court dismissed the bill. It found that the name "Shredded Wheat" is a term describing alike the product of the plaintiff and of the defendant; and that no passing off or deception had been shown. It held that upon the expiration of the Perky patent No. 548,086 issued October 15, 1895, the name of the patented article passed into the public domain. In 1936, the Circuit Court of Appeals affirmed that decree. Upon rehearing, it vacated, in 1937, its own decree and reversed that of the District Court, with direction "to enter a decree enjoining the defendant from the use of the name 'Shredded Wheat' as its trade-name and from advertising or offering for sale its product in the form

and shape of plaintiff's biscuit in violation of its trade-mark; and with further directions to order an accounting for damages and profits." In its opinion the court described the trade-mark as "consisting of a dish, containing two biscuits submerged in milk." 91 F. 2d 150, 152. We denied Kellogg Company's petition for a writ of certiorari, 302 U. S. 733; and denied rehearing, 302 U. S. 777.

On January 5, 1938, the District Court entered its mandate in the exact language of the order of the Circuit Court of Appeals, and issued a permanent injunction. Shortly thereafter National Biscuit Company petitioned the Circuit Court of Appeals to recall its mandate "for purposes of clarification." It alleged that Kellogg Company was insisting, contrary to the court's intention, that the effect of the mandate and writ of injunction was to forbid it from selling its product only when the trade name "Shredded Wheat" is applied to a biscuit in the form and shape of the plaintiff's biscuit and is accompanied by a representation of a dish with biscuits in it; and that it was not enjoined from making its biscuit in the form and shape of the plaintiff's biscuit, nor from calling it "Shredded Wheat," unless at the same time it uses upon its cartons plaintiff's trade-mark consisting of a dish with two biscuits in it. On May 5, 1938, the Circuit Court of Appeals granted the petition for clarification and directed the District Court to enter a decree enjoining Kellogg Company (96 F. 2d 873):

"(1) from the use of the name 'SHREDDED WHEAT' as its trade name, (2) from advertising or offering for sale its product in the form and shape of plaintiff's biscuit, and (3) from doing either."

Kellogg Company then filed a petition for a writ of certiorari to review the decree as so clarified, and also sought reconsideration of our denial of its petition for certiorari to review the decree as entered in its original form. In support of these petitions it called to our attention the

decision of the British Privy Council in *Canadian Shredded Wheat Co.* v. *Kellogg Co. of Canada,* 55 R. P. C. 125, rendered after our denial of the petition for certiorari earlier in the term. We granted both petitions for certiorari.[2]

The plaintiff concedes that it does not possess the exclusive right to make shredded wheat. But it claims the exclusive right to the trade name "Shredded Wheat" and the exclusive right to make shredded wheat biscuits pillow-shaped. It charges that the defendant, by using the name and shape, and otherwise, is passing off, or enabling others to pass off, Kellogg goods for those of the plaintiff. Kellogg Company denies that the plaintiff is entitled to the exclusive use of the name or of the pillow-shape; denies any passing off; asserts that it has used every reasonable effort to distinguish its product from that of the plaintiff; and contends that in honestly competing for a part of the market for shredded wheat it is exercising the common right freely to manufacture and sell an article of commerce unprotected by patent.

First. The plaintiff has no exclusive right to the use of the term "Shredded Wheat" as a trade name. For that is the generic term of the article, which describes it with a fair degree of accuracy; and is the term by which the biscuit in pillow-shaped form is generally known by the public. Since the term is generic, the original maker of the product acquired no exclusive right to use it. As

[2] Rights here claimed by plaintiff have been involved in much other litigation. See *Natural Food Co.* v. *Williams,* 30 App. D. C. 348; *Shredded Wheat Co.* v. *Humphrey Cornell Co.,* 250 F. 960 (C. C. A. 2d); *Kellogg Co.* v. *National Biscuit Co.,* 71 F. 2d 662 (C. C. A. 2d); *Canadian Shredded Wheat Co.* v. *Kellogg Co. of Canada,* 55 R. P. C. 125; *In re* Trade Mark No. 500761, Registered in the Name of the Shredded Wheat Co., Ltd., in Class 42 (1938) Supreme Court of Judicature, Court of Appeal; also *Natural Food Co.* v. *Buckley,* No. 28,530, U. S. Dist. Ct., N. Dist. Ill., East. Div. (1908).

Kellogg Company had the right to make the article, it had, also, the right to use the term by which the public knows it. Compare *Saxlehner* v. *Wagner,* 216 U. S. 375; *Holzapfel's Compositions Co.* v. *Rahtjen's American Composition Co.,* 183 U. S. 1. Ever since 1894 the article has been known to the public as shredded wheat. For many years, there was no attempt to use the term "Shredded Wheat" as a trade-mark. When in 1905 plaintiff's predecessor, Natural Food Company, applied for registration of the words "Shredded Whole Wheat" as a trade-mark under the so-called "ten year clause" of the Act of February 20, 1905, c. 592, § 5, 33 Stat. 725, William E. Williams gave notice of opposition. Upon the hearing it appeared that Williams had, as early as 1894, built a machine for making shredded wheat, and that he made and sold its product as "Shredded Whole Wheat." The Commissioner of Patents refused registration. The Court of Appeals of the District of Columbia affirmed his decision, holding that "these words accurately and aptly describe an article of food which . . . has been produced . . . for more than ten years . . ." *Natural Food Co.* v. *Williams,* 30 App. D. C. 348.[3]

Moreover, the name "Shredded Wheat," as well as the product, the process and the machinery employed in making it, has been dedicated to the public. The basic patent for the product and for the process of making it, and many other patents for special machinery to be used in making the article, issued to Perky. In those patents the term "shredded" is repeatedly used as descriptive of the product. The basic patent expired October 15, 1912; the

[3] The trade-marks are registered under the Act of 1920. 41 Stat. 533, 15 U. S. C. §§ 121–28 (1934). But it is well settled that registration under it has no effect on the domestic common-law rights of the person whose trade-mark is registered. *Charles Broadway Rouss, Inc.* v. *Winchester Co.,* 300 F. 706, 713, 714 (C. C. A. 2d); *Kellogg Co.* v. *National Biscuit Co.,* 71 F. 2d 662, 666 (C. C. A. 2d).

others soon after. Since during the life of the patents "Shredded Wheat" was the general designation of the patented product, there passed to the public upon the expiration of the patent, not only the right to make the article as it was made during the patent period, but also the right to apply thereto the name by which it had become known. As was said in *Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U. S. 169, 185:

"It equally follows from the cessation of the monopoly and the falling of the patented device into the domain of things public, that along with the public ownership of the device there must also necessarily pass to the public the generic designation of the thing which has arisen during the monopoly. . . . To say otherwise would be to hold that, although the public had acquired the device covered by the patent, yet the owner of the patent or the manufacturer of the patented thing had retained the designated name which was essentially necessary to vest the public with the full enjoyment of that which had become theirs by the disappearance of the monopoly."

It is contended that the plaintiff has the exclusive right to the name "Shredded Wheat," because those words acquired the "secondary meaning" of shredded wheat made at Niagara Falls by the plaintiff's predecessor. There is no basis here for applying the doctrine of secondary meaning. The evidence shows only that due to the long period in which the plaintiff or its predecessor was the only manufacturer of the product, many people have come to associate the product, and as a consequence the name by which the product is generally known, with the plaintiff's factory at Niagara Falls. But to establish a trade name in the term "shredded wheat" the plaintiff must show more than a subordinate meaning which applies to it. It must show that the primary significance of the term in the minds of the consuming public is not the product but the producer. This it has not done. The

showing which it has made does not entitle it to the exclusive use of the term shredded wheat but merely entitles it to require that the defendant use reasonable care to inform the public of the source of its product.

The plaintiff seems to contend that even if Kellogg Company acquired upon the expiration of the patents the right to use the name shredded wheat, the right was lost by delay. The argument is that Kellogg Company, although the largest producer of breakfast cereals in the country, did not seriously attempt to make shredded wheat, or to challenge plaintiff's right to that name until 1927, and that meanwhile plaintiff's predecessor had expended more than $17,000,000 in making the name a household word and identifying the product with its manufacture. Those facts are without legal significance. Kellogg Company's right was not one dependent upon diligent exercise. Like every other member of the public, it was, and remained, free to make shredded wheat when it chose to do so; and to call the product by its generic name. The only obligation resting upon Kellogg Company was to identify its own product lest it be mistaken for that of the plaintiff.

Second. The plaintiff has not the exclusive right to sell shredded wheat in the form of a pillow-shaped biscuit—the form in which the article became known to the public. That is the form in which shredded wheat was made under the basic patent. The patented machines used were designed to produce only the pillow-shaped biscuits. And a design patent was taken out to cover the pillow-shaped form.[4] Hence, upon expiration of the patents

[4] The design patent would have expired by limitations in 1909. In 1908 it was declared invalid by a district judge on the ground that the design had been in public use for more than two years prior to the application for the patent and theretofore had already been dedicated to the public. *Natural Foods Co.* v. *Bulkley,* No. 28,530, U. S. Dist. Ct., N. Dist. Ill., East. Div. (1908).

the form, as well as the name, was dedicated to the public. As was said in *Singer Mfg. Co.* v. *June Mfg. Co., supra,* p. 185:

"It is self evident that on the expiration of a patent the monopoly granted by it ceases to exist, and the right to make the thing formerly covered by the patent becomes public property. It is upon this condition that the patent is granted. It follows, as a matter of course, that on the termination of the patent there passes to the public the right to make the machine in the form in which it was constructed during the patent. We may, therefore, dismiss without further comment the complaint, as to the form in which the defendant made his machines."

Where an article may be manufactured by all, a particular manufacturer can no more assert exclusive rights in a form in which the public has become accustomed to see the article and which, in the minds of the public, is primarily associated with the article rather than a particular producer, than it can in the case of a name with similar connections in the public mind. Kellogg Company was free to use the pillow-shaped form, subject only to the obligation to identify its product lest it be mistaken for that of the plaintiff.

Third. The question remains whether Kellogg Company in exercising its right to use the name "Shredded Wheat" and the pillow-shaped biscuit, is doing so fairly. Fairness requires that it be done in a manner which reasonably distinguishes its product from that of plaintiff.

Each company sells its biscuits only in cartons. The standard Kellogg carton contains fifteen biscuits; the plaintiff's twelve. The Kellogg cartons are distinctive. They do not resemble those used by the plaintiff either in size, form, or color. And the difference in the labels is striking. The Kellogg cartons bear in bold script the names "Kellogg's Whole Wheat Biscuit" or "Kellogg's

Shredded Whole Wheat Biscuit" so sized and spaced as to strike the eye as being a Kellogg product. It is true that on some of its cartons it had a picture of two shredded wheat biscuits in a bowl of milk which was quite similar to one of the plaintiff's registered trademarks. But the name Kellogg was so prominent on all of the defendant's cartons as to minimize the possibility of confusion.

Some hotels, restaurants, and lunchrooms serve biscuits not in cartons and guests so served may conceivably suppose that a Kellogg biscuit served is one of the plaintiff's make. But no person familiar with plaintiff's product would be misled. The Kellogg biscuit is about two-thirds the size of plaintiff's; and differs from it in appearance. Moreover, the field in which deception could be practiced is negligibly small. Only 2½ per cent of the Kellogg biscuits are sold to hotels, restaurants and lunchrooms. Of those so sold 98 per cent are sold in individual cartons containing two biscuits. These cartons are distinctive and bear prominently the Kellogg name. To put upon the individual biscuit some mark which would identify it as the Kellogg product is not commercially possible. Relatively few biscuits will be removed from the individual cartons before they reach the consumer. The obligation resting upon Kellogg Company is not to insure that every purchaser will know it to be the maker but to use every reasonable means to prevent confusion.

It is urged that all possibility of deception or confusion would be removed if Kellogg Company should refrain from using the name "Shredded Wheat" and adopt some form other than the pillow-shape. But the name and form are integral parts of the goodwill of the article. To share fully in the goodwill, it must use the name and the pillow-shape. And in the goodwill Kellogg Company is as free to share as the plaintiff. Compare *William R. Warner & Co.* v. *Eli Lilly & Co.*, 265 U. S. 526, 528, 530.

Moreover, the pillow-shape must be used for another reason. The evidence is persuasive that this form is functional—that the cost of the biscuit would be increased and its high quality lessened if some other form were substituted for the pillow-shape.

Kellogg Company is undoubtedly sharing in the goodwill of the article known as "Shredded Wheat"; and thus is sharing in a market which was created by the skill and judgment of plaintiff's predecessor and has been widely extended by vast expenditures in advertising persistently made. But that is not unfair. Sharing in the goodwill of an article unprotected by patent or trade-mark is the exercise of a right possessed by all—and in the free exercise of which the consuming public is deeply interested. There is no evidence of passing off or deception on the part of the Kellogg Company;[5] and it has taken every reasonable precaution to prevent confusion or the practice of deception in the sale of its product.

Fourth. By its "clarifying" decree, the Circuit Court of Appeals enjoined Kellogg Company from using the picture of the two shredded wheat biscuits in the bowl only in connection with an injunction against manufacturing the pillow-shaped biscuits and the use of the term shredded wheat, on the grounds of unfair competition.[6]

---

[5] Attention is called to the fact that the label on these Kellogg cartons bears, in small letters, the words: "The original has this [W. K. Kellogg's] signature." Objection to their use was not charged in the bill; no such issue was raised at the trial; and the use was not enjoined. Counsel for the Company admitted in the argument before us that its use, common as applied to other Kellogg products, should not have been made on cartons of shredded wheat; and stated that the use had been discontinued long before entry of the "clarifying" decree.

[6] In its opinion clarifying the mandate, the Circuit Court of Appeals, after considering the provisions concerning the name and the form of the biscuit, said (96 F. 2d 873, 875):

"The only remaining question is whether, in view of the fact that the order of April 12, 1937, did not specifically provide for an injunc-

The use of this picture was not enjoined on the independent ground of trade-mark infringement. Since the National Biscuit Company did not petition for certiorari, the question whether use of the picture is a violation of that trade-mark although Kellogg Company is free to use the name and the pillow-shaped biscuit is not here for review.

Decrees reversed with direction to dismiss the bill.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER are of opinion that the decree of the Circuit Court of Appeals is correct and should be affirmed. To them it seems sufficiently clear that the Kellogg Company is fraudulently seeking to appropriate to itself the benefits of a goodwill built up at great cost by the respondent and its predecessors.

---

tion against the violation of the two-biscuit-in-a-dish trade-mark (although it was intended to do so) we have any jurisdiction to amend the mandate so as to include specifically such a provision. As there may be some doubt on this question, we will not amend the mandate so as to provide a specific injunction against the use of the two-biscuit-in-a-dish trade-mark. Its use on a carton or in advertising matter, when the defendant is not permitted to use the word 'Shredded Wheat' as a trade-name or to advertise or sell biscuits in the pillow-shape form, would manifestly be so improper and so likely to mislead that we will assume that the appellee will not use it."

GENERAL TALKING PICTURES CORPORATION *v.* WESTERN ELECTRIC CO. ET AL.

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

No. 1. Reargued October 19, 20, 1938.—Decided November 21, 1938.

1. The owner of a patent may lawfully restrict his licensee to manufacture and sale of the patented invention for use in only one or some of several distinct fields in which it is useful, excluding him from the others. P. 125.
2. Where a licensee, so restricted, makes and sells the patented article for a use outside the scope of his license, he is an infringer; and his vendee, buying with knowledge of the facts, is likewise an infringer. P. 127.
3. In this case, the Court has no occasion to consider (a) what the rights of the parties would have been if the articles embodying the patented invention had been manufactured under the patent and had passed into the hands of a purchaser in the ordinary channels of trade; or (b) the effect of a notice attached to articles lawfully made and sold under license of the patent-owner, and which purports to restrict their use. *Id.*

91 F. 2d 922, affirmed.

In this case there were several suits for infringements of patents relating to vacuum tube amplifiers. The court below was affirmed at the last term; but a rehearing was granted on some of the questions said to be involved. 304 U. S. 175, 546, 587.

Messrs. Samuel E. Darby, Jr. and *Ephraim Berliner,* with whom *Mr. Joseph J. Zeiger* was on the brief, for petitioner.

Mr. Merrell E. Clark, with whom *Mr. Henry R. Ashton* was on the brief, for respondents.

By leave of Court, *Solicitor General Jackson, Assistant Attorney General Arnold* and *Mr. Charles E. Clark* filed a brief on behalf of the United States as *amicus curiae,*

contending that the two questions upon which the rehearing was granted should be answered in the negative.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

In this case, we affirmed on May 2, 1938, 304 U. S. 175, the judgment of the Circuit Court of Appeals, 91 F. 2d 922, which held that petitioner had infringed certain patents relating to vacuum tube amplifiers. On May 31st, we granted a rehearing, 304 U. S. 587, upon the following questions which had been presented by the petition for certiorari.

1. Can the owner of a patent, by means thereof, restrict the use made of a device manufactured under the patent, after the device has passed into the hands of a purchaser in the ordinary channels of trade, and full consideration paid therefor?

2. Can a patent owner, merely by a "license notice" attached to a device made under the patent, and sold in the ordinary channels of trade, place an enforceable restriction on the purchaser thereof as to the use to which the purchaser may put the device?

Upon further hearing we are of opinion that neither question should be answered. For we find that, while the devices embody the inventions of the patents in suit, they were not manufactured or sold "under the patent[s]" and did not "pass into the hands of a purchaser in the ordinary channels of trade."

These are the relevant facts. Amplifiers embodying the invention here involved are useful in several distinct fields. Among these is (a) the commercial field of sound recording and reproducing, which embraces talking picture equipment for theatres, and (b) the private or home field, which embraces radio broadcast reception, radio amateur reception and radio experimental reception. For the commercial field exclusive licenses had been granted by the patent pool to Western Electric

Company and Electrical Research Products, Inc. For the private or home field the patent pool granted non-exclusive licenses to about fifty manufacturers. Among these was American Transformer Company. It was licensed

"solely and only to the extent and for the uses hereinafter specified and defined . . . to manufacture . . ., and to sell only for radio amateur reception, radio experimental reception and radio broadcast reception . . . licensed apparatus so manufactured by the Licensee. . . ."

The license provided further:

"Nothing herein contained shall be regarded as conferring upon the Licensee either expressly or by estoppel, implication, or otherwise, a license to manufacture or sell any apparatus except such as may be manufactured by the Licensee in accordance with the express provisions of this Agreement."

Transformer Company, knowing that it had not been licensed to manufacture or to sell amplifiers for use in theatres as part of talking picture equipment, made for that commercial use the amplifiers in controversy and sold them to Pictures Corporation for that commercial use. Pictures Corporation ordered the amplifiers and purchased them knowing that Transformer Company had not been licensed to make or sell them for such use in theatres. Any use beyond the valid terms of a license is, of course, an infringement of a patent. Robinson on Patents, § 916. If where a patented invention is applicable to different uses, the owner of the patent may legally restrict a licensee to a particular field and exclude him from others, Transformer Company was guilty of an infringement when it made the amplifiers for, and sold them to, Pictures Corporation. And as Pictures Corporation ordered, purchased and leased them knowing the facts, it also was an infringer.

The question of law requiring decision is whether the restriction in the license is to be given effect. That a restrictive license is legal seems clear. *Mitchell* v. *Hawley,* 16 Wall. 544. As was said in *United States* v. *General Electric Co.,* 272 U. S. 476, 489, the patentee may grant a license "upon any condition the performance of which is reasonably within the reward which the patentee by the grant of the patent is entitled to secure." The restriction here imposed is of that character. The practice of granting licenses for a restricted use is an old one, see *Rubber Company* v. *Goodyear,* 9 Wall. 788, 799, 800; *Gamewell Fire-Alarm Telegraph Co.* v. *Brooklyn,* 14 F. 255. So far as appears, its legality has never been questioned. The parties stipulated that

"it is common practice where a patented invention is applicable to different uses, to grant written licenses to manufacture under United States Letters Patents restricted to one or more of the several fields of use permitting the exclusive or non-exclusive use of the invention by the licensee in one field and excluding it in another field."

As the restriction was legal and the amplifiers were made and sold outside the scope of the license the effect is precisely the same as if no license whatsoever had been granted to Transformer Company. And as Pictures Corporation knew the facts, it is in no better position than if it had manufactured the amplifiers itself without a license. It is liable because it has used the invention without license to do so.

We have consequently no occasion to consider what the rights of the parties would have been if the amplifier had been manufactured "under the patent" and "had passed into the hands of a purchaser in the ordinary channels of trade." Nor have we occasion to consider the effect of a "licensee's notice" which purports to restrict the use of articles lawfully sold.

Affirmed.

[Over.]

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

MR. JUSTICE BLACK, dissenting.

Almost a century ago, this Court asserted, and time after time thereafter it has reasserted, that when an article described in a patent is sold and "passes to the hands of a purchaser, it is no longer within the limits of the monopoly. It passes outside of it, and is no longer under the protection of the act of Congress. . . . Contracts in relation to it are regulated by the laws of the State, and are subject to State jurisdiction." [1]

[1] *Bloomer* v. *McQuewan,* 14 How. 539, 549–50; see, *Chaffee* v. *Boston Belting Co.,* 22 How. 217, 223; *Mitchell* v. *Hawley,* 16 Wall. 544, 547; *Adams* v. *Burke,* 17 Wall. 453; *Wade* v. *Metcalf,* 129 U. S. 202, 205; *Boesch* v. *Graff,* 133 U. S. 697, 702; *Hobbie* v. *Jennison,* 149 U. S. 355; *Morgan Envelope Co.* v. *Albany Paper Co.,* 152 U. S. 425; *Keeler* v. *Standard Folding Bed Co.,* 157 U. S. 659; *Bauer & Cie* v. *O'Donnell,* 229 U. S. 1; *Straus* v. *Victor Talking Machine Co.,* 243 U. S. 490; *Motion Picture Patents Co.* v. *Universal Film Co.,* 243 U. S. 502; *Boston Store* v. *American Graphophone Co.,* 246 U. S. 8. The rule asserted in these cases is in accord with the views of Thomas Jefferson who served as a member of the first Patent Board established by the first Patent Act of 1790 (1 Stat. 109) and who also drafted the comprehensive Patent Law of 1793 (1 Stat. 318). See, "The Jeffersonian Cyclopedia," p. 680 (Funk and Wagnalls, 1900). The Acts of 1790 and 1793 granted patentees for fourteen years the exclusive right "of making, constructing, using and vending to others to be used." Mr. Jefferson, referring to the general rules adopted by the first Patent Board, said: "One of these [rules] was, that a machine *of which we were possessed, might be applied by every man to any use of which it is susceptible,* and that this right ought not to be taken from him and given to a monopolist, because the first perhaps had occasion so to apply it. Thus a screw for crushing plaster might be employed for crushing corn-cobs. And a chain-pump for raising water might be used for raising wheat: this being merely a change of application." "The Writings of Thomas Jefferson," Vol. VI, H. A. Washington, Editor, p. 181 (Published by Order of the Joint Committee of Congress on the Library, 1861). After the Patent Board's duties devolved upon the courts, Mr. Jefferson suggested that

A single departure from this judicial interpretation of the patent statute [2] was expressly overruled within five years, and this Court again reasserted that commodities—once sold—were not thereafter "subject to conditions as to use" imposed by patent owners.[3] In result, the judgment here is a second departure from the traditional judicial interpretation of the patent laws.

As a consequence of the return to the interpretation of the patent statutes previously repudiated and expressly overruled, petitioner is enjoined from making full use of, and must account in triple damages for using

---

the rule be "adopted by the judges" that *"the purchaser of the right to use the invention should be free to apply it to every purpose of which it is susceptible." Id.*, p. 372. (Italics supplied.)

United States v. *General Electric Co.*, 272 U. S. 476, relied on by the majority here, was not a suit for infringement of a patent, but was an action by the United States under the anti-trust laws. The opinion was written by Chief Justice Taft and applied some of the reasoning of the *Button-Fastener* case, 77 F. 288, in which he had agreed as Circuit Judge to the opinion of Circuit Judge Lurton. Later, this Court in *Henry* v. *Dick Co.*, 224 U. S. 1, with the then Justice Lurton writing the opinion, followed the *Button-Fastener* case. *Motion Picture Patents Co.* v. *Universal Film Co., supra,* expressly overruled and repudiated the doctrine of the *Dick* case. In effect, the judgment here once more revives the doctrine of the *Button-Fastener* case.

The majority opinion also relies upon *Mitchell* v. *Hawley, supra.* It is significant that in the *Hawley* case the patentee never licensed or transferred his exclusive right to sell; and the license conveyed only "the exclusive right to make and use *'and to license to others the right to use . . .'*" 16 Wall., at 548. That case, therefore, does not justify the judgment here where the patentee's power to vend was both transferred and exercised.

[2] *Henry* v. *Dick Co.*, 224 U. S. 1, decided March 11, 1912.

[3] *Motion Picture Patents Co.* v. *Universal Film Co., supra,* 516, Similarly, the exercise of the right to vend exhausts the right under a patent to control the price at which an article claimed in the patent may subsequently be sold. *Bauer & Cie* v. *O'Donnell; Straus* v. *Victor Talking Machine Co.; Boston Store* v. *American Graphophone Co., supra.*

tubes and amplifiers which he owns. He became the owner of the tubes by purchase from various retailers authorized by respondents to sell in the open market. He became the owner of the amplifiers by purchase from a manufacturer who—having the complete right to make them—had contracted to sell only for limited uses.[4] The departure here permits the patentee—by virtue of his contract with the manufacturer—to restrict the uses to which this purchaser and owner may put his tubes and amplifiers.

Transformer Company was authorized by the patentee to make and to sell amplifiers. It did make such amplifiers—of a standard type usable in many fields,[5] they

[4] License Agreement. ". . . That Whereas the Licensors represent that they severally own and/or have the right to grant licenses under various United States Letters Patent relating to Power Supply and to Power Amplifier Units, hereinafter termed Licensed Apparatus, . . .

"1. Each of the Licensors hereby grants under all of the United States Patent useful in the Licensed Apparatus, owned by it and/or with respect to which it has the right to grant licenses, . . . solely and only to the extent and for the uses hereinafter specified and defined, a personal, indivisible, non-transferable and non-exclusive license to the Licensee to *manufacture* at its factory . . .; and not elsewhere without previous written permission obtained from the Radio Corporation, and *to sell only for radio amateur reception, radio experimental reception, and radio broadcast reception* throughout the United States and its territories or dependencies, Licensed Apparatus so manufactured by the Licensee, . . ." (Italics supplied.) Reasonably interpreted, this contract grants the right to make everything described in the patents; the sole limitation on the right to *make* relates to the place of manufacture. The contract grants the right to *sell* the manufactured articles with an attempt by notice to restrict their use in the hands of owners to whom they are sold.

[5] One of respondents' officials testified: "These things, these vacuum tubes and the circuits on which we have patents, are useful in various of these fields and applicable to many fields. And if we granted licenses not restricted to any particular field, the same things could be used in these other fields." The injunction sustained here was decreed by the District Judge on the basis of his conclusion that the

became its property when made, were *sold* to and became the property of petitioner. The prior opinion in this case, both courts below and the opinion on this rehearing, *all* refer to the transaction between Transformer Company and petitioner as a *sale*. Even the very contract authorizing the Transformer Company to make and sell the amplifiers provided "That for the purpose of this agreement all Licensed Apparatus shall be considered as 'sold' when the Licensed Apparatus has been billed out, or if not billed out, when it has been delivered, shipped, or mailed."

Notice to the purchaser in any form could not—under the patent law—limit or restrict the use of the amplifiers after they were sold [6] and knowledge by both vendor and purchaser that the articles were purchased for use outside the "field" for which the vendor had been given the right to sell, made the transaction between them no less a sale.[7] Had petitioner—after making the purchase—decided *not* to use these amplifiers in the forbidden fields, or had they been destroyed prior to such use, certainly the mere state of mind of the parties at the time of sale would not have made them both infringers.

Indeed, petitioner could use the amplifiers at all only in combination with tubes which it purchased on the open market from retailers authorized by respondents to sell. Therefore, even if the state of mind of vendor and purchaser were material, Transformer Company could

---

amplifiers put to commercial use by petitioner could also be used "for experimental or radio amateur use" as the patentee had desired. 16 F. Supp. 293, 303. Thus, it appears that the very amplifiers made and sold to petitioner were suitable for all "fields."

[6] "The statutes relating to patents do not provide for any such notice and it can derive no aid from them." *Motion Picture Patents Co.* case, *supra,* 509; *Bauer & Cie* v. *O'Donnell, supra; Straus* case, *supra; Boston Store* case, *supra; Carbice Corporation* v. *American Patents Corp.,* 283 U. S. 27.

[7] *Hobbie* v. *Jennison, supra; Keeler* case, *supra; Straus* case, *supra.*

be considered an infringer only because it sold a commodity which might—depending on possible events after the sale—be used in infringing combination with another lawfully purchased commodity. The patent law was not intended to accomplish such result.[8]

Petitioner has persistently contended throughout this litigation that no existing trade practice permits a patentee—under guise of a "license"—to extend his monopoly to commodities after sale, and has not stipulated otherwise.[9] Neither stipulation nor practice could justify

[8] Cf., *Morgan Envelope Co.* v. *Albany Paper Co., supra.*

[9] The negotiations for stipulation were as follows:

"Mr. Neave: Mr. Darby, will you agree that it is common practice where a patented invention is applicable to different uses, to grant written licenses under United States patents restricted to one or more of the several fields of use, permitting exclusive or non-exclusive use of the invention by the licensee in one field and excluding its use in another field?

"Mr. Darby: I do not agree. As a matter of fact I believe that just the opposite or the contrary is true."

. . . . . .

"Mr. Darby: . . . Mr. Ashton called me up and told me that Mr. W. H. Davis had entered into such a stipulation in the Independent Wireless Case, and asked me if I would do the same thing. I told him I could not conscientiously, because not only could I not agree that that was the common practice, but I know I thoroughly disagree with [it] whether it was or not. In other words I was confident that was not the common practice. In my own case, I know I would not allow my own clients to do it, because I did not think it was legal."

. . . . . .

"Mr. Darby: I am willing to stipulate it, if it will be of any assistance to Mr. Ashton, that it is, if he tells me it is, the common practice of the Western Electric Company and the Radio Corporation to do that."

. . . . . .

"Mr. Darby: It is stipulated that it is common practice where a patented invention is applicable to different uses, to grant written licenses to manufacturers under United States Letters Patents restricted to one or more of the several fields of use permitting the

extension of patent monopoly beyond the limits of legality fixed by Congress and recognized by this Court for over three-quarters of a century. "The statutory authority to grant the exclusive right to 'use' a patented machine . . . is precisely the same, as the authority to grant the exclusive right to 'vend,' . . ." [10] A widespread practice of restricting the resale price of articles described in patents [11] did not prevent this Court from holding that once the statutory right to vend has been exercised "the added restriction is beyond the protection and purpose of the act." [12] Similarly, a "common practice . . . to grant written licenses . . . restricted to one or more . . . fields of use" cannot prevent the application of "that line of cases in which this court from the beginning has held that a patentee who has parted with a patented machine by passing title to a purchaser has placed the article beyond the limits of the monopoly secured by the patent act." [13]

MR. JUSTICE REED joins in this dissent.

---

exclusive or non-exclusive use of the invention by the licensee in one field and excluding its use in another field. I stipulate that and I urge, however, objection to its receipt for any evidential purpose, as irrelevant and immaterial what the common practice is, on the issue of law as to whether or not it is legal."

[10] *Motion Picture Patents Co.* case, *supra,* 516.

[11] See, "Emancipation of Patented Articles," Walter H. Chamberlin, 6 Ill. Law Review, 357.

[12] *Bauer & Cie* case, *supra,* 17.

[13] *Id.*

WELCH *v.* HENRY ET AL.

APPEAL FROM THE SUPREME COURT OF WISCONSIN.

No. 13. Argued October 13, 1938.—Decided November 21, 1938.

1. Under the income tax law of Wisconsin in force in 1933 and since, the amount of dividends received by a taxpayer from corporations whose "principal business" is "attributable to Wisconsin," i. e., corporations which themselves have paid a Wisconsin income tax upon 50% or more of their total net income, may be deducted from gross income along with other deductions, in computing his taxable net income. A taxpayer, in his return for the year 1933, filed in March, 1935, made these deductions, the aggregate of which was such that he had no taxable income for that year. A year later, a statute was passed laying a tax on all dividends received in 1933 which, when received, were deductible from gross income. The taxpayer was thus required to pay a tax of $545 on his dividend income in 1933. *Held* consistent with equal protection and due process under the Fourteenth Amendment. Pp. 142, 146.
2. The fact that the dividends were taxed at a different rate from that applied to other income in 1933 and were given the benefit of but a single deduction of $750, while recipients of other types of income in that year were permitted to deduct specified items of interest, taxes, business losses and donations, did not render the dividend tax repugnant to the equal protection clause. P. 142.

   The dividends constituted a class of untaxed income, received from a specified category of corporations; and the legislature could have concluded that a substantial part of this income had borne no tax burden at its source in the earnings of the corporations, since corporations were not required to pay a tax on that part of their income allocable to business carried on or property located without the State. The selection of such income for taxation at rates and with deductions not shown to be unrelated to an equitable distribution of the tax burden is not a denial of the equal protection commanded by the Fourteenth Amendment. P. 143.
3. The distribution of a tax burden by placing it in part on a special class which, by reason of the taxing policy of the State, has escaped all taxation during the taxable period is not a denial of equal protection; nor is the tax any more a denial of equal protection because retroactive. P. 144.
4. So far as equal protection is concerned, the validity of retroactive alteration of a tax scheme must be determined, as in the case of any other tax, by ascertaining whether the thing taxed falls within

a distinct class which may rationally be treated differently from other classes. P. 145.

5. In the absence of facts tending to show that the taxing act is a hostile or oppressive discrimination against the recipients of dividends who have hitherto escaped all taxation of them, it does not deny equal protection. P. 146.

6. A tax is not necessarily in violation of the due process clause because retroactive. In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation. P. 146.

Cases *distinguished* in which this Court has held invalid the taxation of gifts made and completely vested before the enactment of the taxing statute, decision there having been rested upon the ground that the nature or amount of the tax could not reasonably have been anticipated by the taxpayer at the time of the particular voluntary act which the statute later made the taxable event. Unlike the case of gifts which the donor might have refrained from making had he anticipated the tax, it cannot be assumed that stockholders would refuse to receive dividends even if they knew that the receipt would later be subjected to a new tax or to the increase of an old one, and the objection to the present tax is addressed only to the particular inconvenience of the taxpayer in being called upon, after the customary time for levy and payment of the tax has passed, to bear a governmental burden of which it is said he had no warning and which he did not anticipate.

7. Taxpayers can not justly assert surprise or complain of arbitrary action in the retroactive apportionment of tax burdens to income when this is done by the legislature at the first opportunity after knowledge of the nature and amount of the income is available. P. 149.

In the present case the returns of income received in 1933 were filed and became available in March, 1934. The next succeeding session of the legislature at which tax legislation could be considered was in 1935, when the challenged statute was passed. P. 150.

226 Wis. 595; 277 N. W. 183, affirmed.

APPEAL from a judgment sustaining an income tax, the amount of which the present appellant paid under protest and sued to recover. The trial court had at first overruled a demurrer to the complaint. The ruling was reversed by the Supreme Court of Wisconsin on a first appeal. The trial court then sustained a demurrer to an

amended complaint. Judgment of the Supreme Court affirming this action is the subject of the present appeal to this Court.

Mr. John M. Campbell for appellant.

There was no reasonable ground for classifying the recipients of dividends separately and subjecting them to a separate and distinct tax.

If this so-called "exemption" from normal tax can be made the basis of a classification at all, there should be some relation between the amount of taxes exacted from this class and the benefits which have accrued to them by reason of having been allowed the deduction for purposes of normal tax, particularly when the exemption is the only basis for the classification.

The tax here involved is measured by nothing except the amount of dividends received and bears not the slightest relation to the net income of the taxpayer from all sources, which is the subject of the normal tax, or to the amount of tax he would have been required to pay had dividends been included in the determination of his income subject to normal tax. Whatever may be said in favor of this classification for purposes of a tax measured by including dividends in taxable income during 1933, there is gross discrimination in subjecting that class to a tax measured only by the amount of dividends regardless of the effect of other transactions of the taxpayer upon his taxable income, or upon the amount of normal tax which he would have been required to pay had the dividends been included in his income subject to such normal tax. This manifestly results in great discrepancies between the amount of dividend tax and the normal tax upon a like amount of net income. The appellant, who received dividends of $12,156.10, was called upon for a tax of $556.84. Normal income tax and surtax upon that same amount of net income would have been $468.42 less his exemption.

It is true, as was pointed out by the Supreme Court of Wisconsin, that this is not necessarily a fair comparison, because the taxpayer's dividends might come in on top of other income and, if subjected to normal tax, result in a higher tax than the tax actually imposed. Here, however, and in the case of many other taxpayers, the existence of business losses, the payment of taxes and interest, and other deductions, give the taxpayer a net loss for purposes of normal tax, no part of which is allowed to be set off against the tax now imposed.

The true nature of the tax, as a property tax, or an excise, makes it arbitrary and discriminatory because of the graduated rates.

The tax is not one measured by a balancing of the net results of all the taxpayer's business transactions for the year. It is not a tax upon income, meaning thereby the gain or profit to the taxpayer from all of his business transactions as that term is used, for instance, in connection with federal income tax or the Wisconsin normal income tax. It is not laid upon what remains when "all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses." *Peck & Co.* v. *Lowe,* 247 U. S. 165, 175; *Redfield* v. *Fisher,* 135 Ore. 180; *Shaffer* v. *Carter,* 252 U. S. 37, 51; *New York ex rel. Cohn* v. *Graves,* 300 U. S. 308, 313.

Even if it is true that the gross income from dividends may be considered as net income, the fact remains that when you measure the tax by receipts, whether gross or net, from some particular source, you are taxing something other than the net income of the taxpayer from all his activities during the taxable year. *United States* v. *Hudson,* 299 U. S. 498, distinguished.

When the real nature and effect of the tax are considered, it is to all practical intents and purposes a property tax. There is only one measure of it, the amount of dividends received by the taxpayer from stock. To

pick out this one source of receipts and levy a tax upon them is to directly tax the property from which the receipts are secured.

It is assumed that there may be a valid classification of property for purposes of taxation, but the application to the property in that class of varying rates results in an indefensible discrimination. The taxpayer who owns a thousand shares of stock and receives the dividends thereon, by that fact alone is required to pay a greater number of dollars per share owned than another taxpayer who owns but a hundred shares of that same stock. *Stewart Dry-Goods Co.* v. *Lewis,* 294 U. S. 550.

The case for the constitutionality of this tax is not improved by considering it as an excise tax. It is a tax which bears no relation to the ability of the taxpayer to pay or to his net income from all sources. It is a tax upon the receipts, whether gross or net, from a particular source. *Schuster* v. *Henry,* 218 Wisc. 506.

The retroactive effect of the tax renders it arbitrary and discriminatory.

It purports to assess a tax based upon something that happened in the second preceding year and goes much farther in that regard than any such taxing measures that have come to our attention. Distinguishing: *Florida Central R. Co.* v. *Reynolds,* 183 U. S. 471; *Hecht* v. *Malley,* 265 U. S. 144; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107. It is simply a tax authorized and levied during 1935 upon dividends which under the long existing policy of the State had not been subjected to tax at all at the time they were received.

Its retrospective operation accentuates the discriminatory nature of the tax. Even if it were entirely proper to classify recipients of dividends in a separate class and subject them to a separate and distinct tax, it would not follow that it would likewise be proper to constitute a

separate class composed of those who had received dividends in the past.

The present tax was imposed in 1935 upon dividends received in 1933. During 1933, the taxpayer had no intimation that he would be called upon for a tax out of them. He filed his return in March of 1934 reporting the receipt of these dividends and still no tax was demanded from him on account thereof. The entire year 1934 went by and still no tax was demanded. In the meantime his ability to pay had been subjected to the results of whatever business transactions he had during 1934. In March of 1935 the State changed its mind and taxed these 1933 dividends: "If income from dividends received in 1933 were properly subject to taxation why not those of 1932 or 1931? Why not go back to 1929 when dividends were many and large, instead of 1933, when they were few and small?" (Fowler, J., dissenting, 223 Wisc. 319, 332.)

Distinguishing: *Milliken* v. *United States,* 283 U. S. 15; *United States* v. *Hudson,* 299 U. S. 498. Retroactivity of the taxing statute to that extent and over that period of time is in itself enough to violate the Federal Constitution. *Nichols* v. *Coolidge,* 274 U. S. 531, 542; *Blodgett* v. *Holden,* 275 U. S. 142; *Untermyer* v. *Anderson,* 276 U. S. 440; *Helvering* v. *Helmholz,* 296 U. S. 93; *White* v. *Poor,* 296 U. S. 98; *Coolidge* v. *Long,* 282 U. S. 582.

In setting up as a test, that the legislature can go back "to the most recent year for which they have returns furnishing a basis upon which to estimate the total return of the tax to the State," the court below has substituted the convenience of the State for the rights of the taxpayer as the standard to be complied with. The returns referred to were apparently the returns for the purpose of determining normal income tax which all Wisconsin taxpayers are required to file on the 15th day of March in each year. The returns covering income for

1934 were due on March 15, 1935. Wisconsin Statutes, § 71.09 (4). Section 6 of Ch. 15 of the Laws of 1935 was approved on the 14th day of March, 1935, the day before the returns covering income for 1934 were due. It was published and became effective March 27th, twelve days after the returns were due. Under the rule fixed by the court this tax, merely because of its retroactive features, would have been invalid had it been passed the day after it was approved.

It is apparent that if you go back far enough with a retroactive tax, you must come to a point where there is so little relation between the income during the period involved and the taxpayer's ability to pay, or any other reasonable ground for demanding a tax, that the effect is an arbitrary imposition which is beyond the legislature's power. That point has been reached when the legislature purports to impose a tax upon receipts for the second preceding year, a period for which taxes have already been levied and paid.

It is difficult to see how the tax is anything but a property tax upon the receipts themselves. When the dividends reached the taxpayer's hands by transactions upon which the State was not then claiming any tax, they became so much property in his possession and no different from other dollars in the hands of other taxpayers that had come in some other manner. The singling out of this property in the hands of the appellant for taxation when other dollars were not taxed is an arbitrary discrimination.

Messrs. Leo E. Vaudreuil, Deputy Attorney General of Wisconsin, and *Harold H. Persons,* Assistant Attorney General, with whom *Messrs. Orland S. Loomis,* Attorney General, and *Joseph E. Messerschmidt,* Assistant Attorney General, were on the brief, for appellees.

MR. JUSTICE STONE delivered the opinion of the Court.

This appeal presents the question whether the Act of the Wisconsin Legislature of March 27, 1935, which imposed a tax on corporate dividends received by appellant in 1933 at rates different from those applicable in that year to other types of income and without deductions which were allowed in computing the tax on other income, infringes the equal protection and due process clauses of the Fourteenth Amendment.

The statute of Wisconsin in force in 1933 and since imposes a tax on net income at graduated rates. Wisconsin Stat. 1933, c. 71. Appellant, a resident of Wisconsin, received in 1933 gross income of $13,383.26, of which $12,156.10 was dividends received from corporations whose "principal business" was "attributable to Wisconsin" within the meaning of the taxing statute. By § 71.04 (4), Wisconsin Stat. 1933,[1] such dividends were deductible from gross income in computing net taxable income, together with other items, including taxes, interest paid, business expenses, losses from the sale of securities, and donations, aggregating, in the case of appellant, $11,161.97, so that he had no taxable net income for the year 1933.

Petitioner's income tax return was due and filed March 15, 1934. A year later c. 15 of the Laws of Wisconsin for 1935, effective March 27, 1935, laid new taxes for the years 1933 and 1934 upon various taxable subjects. Sec-

[1] Sec. 71.04(4) permits the deduction from gross income of dividends received from corporations whose principal business is attributable to Wisconsin; ". . . any corporation shall be considered as having its principal business attributable to Wisconsin if fifty per cent or more of the entire net income or loss of such corporation . . . (for the year preceding the payment of such dividends) was used in computing the average taxable income provided by chapter 71. . . ."

tion 6, with which we are alone concerned, imposed a graduated tax, with no deduction except the sum of $750, on all dividends received in 1933 which, when received, were deductible from gross income under § 71.04(4). The statute declared that the levy was an emergency tax to provide revenue for relief purposes and directed that the proceeds should be paid into the state treasury to be used for "unemployment relief purposes." Appellant paid the tax, amounting to $545.71, under protest, on May 13, 1935, and brought the present suit to compel its restitution as exacted in violation of the state constitution and the equal protection and due process clauses of the Fourteenth Amendment. From the judgment of the Supreme Court of Wisconsin sustaining the tax, 226 Wis. 595; 277 N. W. 183, the case comes here on appeal. § 237 of the Judicial Code, 28 U. S. C. § 344.

First. Appellant assails the statute as a denial of equal protection because the dividends which it selected for taxation as a special class were subjected ratably to a tax burden different from that borne by other types of income for the same year by reason of the fact that the dividends were taxed at a different rate from that applied to other income and were given the benefit of but a single deduction of $750, while recipients of other types of income in that year were permitted to deduct specified items of interest, taxes, business losses and donations. It is not contended that the receipt of dividends from corporations is not subject to tax, or that apart from the retroactive application of the tax they could not be included in gross income for the purpose of arriving at net taxable income, but it is insisted that disparities in the tax burdens which may result from the different rates and deductions infringe the constitutional immunity.

Wisconsin income tax legislation has from the beginning treated dividends received from corporations deriv-

ing a substantial part of their income from business carried on within the State, on which the corporations have paid a tax to the State, as a distinct class of income for tax purposes. At first complete tax immunity was granted to them. § 1, c. 658, Laws of Wisconsin, 1911. Later the immunity was allowed ratably in the same proportion that the income of the corporation had been subjected to state income tax. § 1, c. 318, Laws of Wisconsin, 1923. And, finally, by amendment adopted in 1927 [2] and in force in 1933 complete immunity of dividends from income tax was allowed if 50% or more of the total net income of the corporation paying them was included in the computation of the Wisconsin tax on corporate income.[3]

When in 1935 the State was confronted with the necessity of raising revenue to meet the demand for unemployment relief, and of distributing the cost among its taxpayers, the legislature found one class of untaxed income, dividends received from a specified category of corporations. It also could have concluded that a substantial part of this income had borne no tax burden at its source in the earnings of the corporations, since, by § 71.02 (3) (d), corporations are not required to pay a tax on that part of their income allocable to business carried on or property located without the State.

We think that the selection of such income for taxation at rates and with deductions not shown to be unrelated to an equitable distribution of the tax burden is not a denial of the equal protection commanded by the Fourteenth Amendment. It cannot be doubted that the receipt of dividends from a corporation is an event which may constitutionally be taxed either with or without deductions, *Lynch* v. *Hornby,* 247 U. S. 339; see *Helvering* v. *Inde-*

[2] c. 539, § 4, Laws of Wisconsin of 1927.

[3] See Note 1, *supra.*

pendent Life Ins. Co., 292 U. S. 371, 381, even though the corporate income which is their source has also been taxed. See *Tennessee* v. *Whitworth,* 117 U. S. 129, 136; *Klein* v. *Board of Tax Supervisors,* 282 U. S. 19, 23; *Colgate* v. *Harvey,* 296 U. S. 404, 420. The fact that the dividends of corporations which have to some extent borne the burden of state taxation constitute a distinct class for purposes of tax exemption, *Colgate* v. *Harvey, supra;* compare *Travellers' Insurance Co.* v. *Connecticut,* 185 U. S. 364, 367; *Kidd* v. *Alabama,* 188 U. S. 730; *Darnell* v. *Indiana,* 226 U. S. 390, 398, and that in consequence such dividends have borne no tax burden, is equally a basis for their selection for taxation. *Watson* v. *State Comptroller,* 254 U. S. 122, 124, 125; *Klein* v. *Board of Tax Supervisors, supra.* Any classification of taxation is permissible which has reasonable relation to a legitimate end of governmental action. Taxation is but the means by which government distributes the burdens of its cost among those who enjoy its benefits. And the distribution of a tax burden by placing it in part on a special class which by reason of the taxing policy of the State has escaped all tax during the taxable period is not a denial of equal protection. See *Watson* v. *Comptroller, supra,* 125. Nor is the tax any more a denial of equal protection because retroactive. If the 1933 dividends differed sufficiently from other classes of income to admit of the taxation, in that year, of one without the other, lapse of time did not remove that difference so as to compel equality of treatment when the income was taxed at a later date. Selection then of the dividends for the new taxation can hardly be thought to be hostile or invidious when the basis of selection is the fact that the taxed income is of the class which has borne no tax burden. The equal protection clause does not preclude the legislature from changing its mind in making an otherwise permissible choice of subjects of taxation. The very fact that

the dividends were relieved of tax, when the need for revenue was less, is basis for the legislative judgment that they should bear some of the added burden when the need is greater.

Numerous retroactive revisions of the federal and Wisconsin revenue laws, presently to be discussed, have imposed taxes on subjects previously untaxed and shifted the burden of old taxes by changes in rates, exemptions and deductions. It has never been thought that such changes involve a denial of equal protection if the new taxes could have been included in the earlier act when adopted. If some retroactive alteration in the scheme of a tax act is permissible, as is conceded, it seems plain that validity, so far as equal protection is concerned, must be determined, as in the case of any other tax, by ascertaining whether the thing taxed falls within a distinct class which may rationally be treated differently from other classes. If such changes are forbidden in the name of equal protection, legislatures in laying new taxes would be left powerless to rectify to any extent a previous distribution of tax burdens which experience had shown to be inequitable, even though constitutional.

The bare fact that the present tax is imposed at different rates and with different deductions from those applied to other types of income does not establish unconstitutionality. It is a commonplace that the equal protection clause does not require a State to maintain rigid rules of equal taxation, to resort to close distinctions, or to maintain a precise scientific uniformity. Possible differences in tax burdens, not shown to be substantial, or which are based on discrimination not shown to be arbitrary or capricious, do not fall within the constitutional prohibition. *Lawrence* v. *State Tax Comm'n,* 286 U. S. 276, 284, 285, and cases cited.

Just what the differences are in the tax burdens cast upon the two types of income by the divergence in rates

and deductions applied to them does not appear. The burden placed on dividends by the taxing act might have been greater if they had been included in gross income and taxed on the same basis as other income since, in that case, the resulting increase in net income would be taxed at the rates applicable to the higher brackets. When the challenged statute was enacted there were available to the legislature the returns for the taxable year showing the different classes of income, the application to them of the existing law, and the effect of existing rates and deductions. There were also data to be derived from the corporation tax returns showing what part of the exempted dividends had their source in corporate income which had been taxed to the corporation and what part was attributable to corporate income not similarly taxed. The legislature was free to take into account all these factors in prescribing rates and deductions to be applied to the newly taxed dividends so as to arrive at an equitable distribution of the added tax burden. In the absence of any facts tending to show that the taxing act, in its purpose or effect, is a hostile or oppressive discrimination against the recipients of dividends who have been hitherto fortunate enough to escape all taxation we cannot say the taxing statute denies equal protection.

Second. The objection chiefly urged to the taxing statute is that it is a denial of due process of law because in 1935 it imposed a tax on income received in 1933. But a tax is not necessarily unconstitutional because retroactive. *Milliken* v. *United States,* 283 U. S. 15, 21; and cases cited. Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens.

Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process, and to challenge the present tax it is not enough to point out that the taxable event, the receipt of income, antedated the statute.

In the cases in which this Court has held invalid the taxation of gifts made and completely vested before the enactment of the taxing statute, decision was rested on the ground that the nature or amount of the tax could not reasonably have been anticipated by the taxpayer at the time of the particular voluntary act which the statute later made the taxable event. *Nichols* v. *Coolidge,* 274 U. S. 531, 542; *Untermeyer* v. *Anderson,* 276 U. S. 440, 445 (citing *Blodgett* v. *Holden,* 275 U. S. 142, 147); *Coolidge* v. *Long,* 282 U. S. 582. Since, in each of these cases, the donor might freely have chosen to give or not to give, the taxation, after the choice was made, of a gift which he might well have refrained from making had he anticipated the tax, was thought to be so arbitrary and oppressive as to be a denial of due process. But there are other forms of taxation whose retroactive imposition cannot be said to be similarly offensive, because their incidence is not on the voluntary act of the taxpayer. And even a retroactive gift tax has been held valid where the donor was forewarned by the statute books of the possibility of such a levy, *Milliken* v. *United States, supra.* In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation.

Property taxes and benefit assessments of real estate, retroactively applied, are not open to the objection successfully urged in the gift cases. See *Wagner* v. *Baltimore,* 239 U. S. 207; *Seattle* v. *Kelleher,* 195 U. S. 351;

compare *Citizens National Bank* v. *Kentucky,* 217 U. S. 443, 454; *Billings* v. *United States,* 232 U. S. 261, 282. Similarly, a tax on the receipt of income is not comparable to a gift tax. We can not assume that stockholders would refuse to receive corporate dividends even if they knew that their receipt would later be subjected to a new tax or to the increase of an old one. The objection to the present tax is of a different character and is addressed only to the particular inconvenience of the taxpayer in being called upon, after the customary time for levy and payment of the tax has passed, to bear a governmental burden of which it is said he had no warning and which he did not anticipate.

Assuming that a tax may attempt to reach events so far in the past as to render that objection valid, we think that no such case is presented here. For more than seventy-five years it has been the familiar legislative practice of Congress in the enactment of revenue laws to tax retroactively income or profits received during the year of the session in which the taxing statute is enacted, and in some instances during the year of the preceding session. See *Untermeyer* v. *Anderson, supra,* footnote 1. These statutes not only increased the tax burden by laying new taxes and increasing the rates of old ones or both, but they redistributed retroactively the tax burdens imposed by preëxisting laws. This was notably the case with the "Revenue Act of 1918," enacted February 24, 1919, 40 Stat. 1057, and made applicable to the calendar year 1918, which cut down exemptions and deductions, increased, in varying degrees, income, excess profits and capital stock taxes, altered the basis of surtaxes, and increased in progressive ratio the rates applicable to the higher brackets. Similarly the special munition manufacturer's tax, imposed on profits derived from sales of munitions, Act of September 8, 1916, c. 463, 39 Stat. 756, 780, was applied to the twelve months ending December 31,

1916. Cf. *Carbon Steel Co.* v. *Lewellyn,* 251 U. S. 501; *United States* v. *Anderson,* 269 U. S. 422, 435. The contention that the retroactive application of the Revenue Acts is a denial of the due process guaranteed by the Fifth Amendment has been uniformly rejected. *Stockdale* v. *Insurance Companies,* 20 Wall. 323, 331; *Railroad Co.* v. *Rose,* 95 U. S. 78, 80; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107; *Billings* v. *United States,* 232 U. S. 261, 282; *Brushaber* v. *Union Pacific R. Co.,* 240 U. S. 1, 20; *Lynch* v. *Hornby,* 247 U. S. 339, 343; *LaBelle Iron Works* v. *United States,* 256 U. S. 377. The like practice of the legislature of Wisconsin has been approved by its courts.[4]

The equitable distribution of the costs of government through the medium of an income tax is a delicate and difficult task. In its performance experience has shown the importance of reasonable opportunity for the legislative body, in the revision of tax laws, to distribute increased costs of government among its taxpayers in the light of present need for revenue and with knowledge of the sources and amounts of the various classes of taxable income during the taxable period preceding revision. Without that opportunity accommodation of the legislative purpose to the need may be seriously obstructed if not defeated. We cannot say that the due process which the Constitution exacts denies that opportunity to legislatures; that it withholds from them, more than in the case of a prospective tax, authority to distribute the increased tax burden in the light of experience and in conformity with accepted notions of the requirements of equal protection; or that in view of well established

[4] *Income Tax Cases* (1912), 148 Wis. 456, 514; 134 N. W. 673; 135 N. W. 164; *State ex rel. Globe Tubes Co.* v. *Lyons* (1924), 183 Wis. 107, 124; 197 N. W. 578; *Cliffs Chemical Co.* v. *Wisconsin Tax Comm'n* (1927), 193 Wis. 295, 302; 214 N. W. 447; *West* v. *Tax Comm'n* (1932), 207 Wis. 557, 562; 242 N. W. 165; *Van Dyke* v. *Tax Comm'n* (1935), 217 Wis. 528; 295 N. W. 700.

legislative practice, both state and national, taxpayers can justly assert surprise or complain of arbitrary action in the retroactive apportionment of tax burdens to income at the first opportunity after knowledge of the nature and amount of the income is available. And we think that the "recent transactions" to which this Court has declared a tax law may be retroactively applied, *Cooper* v. *United States,* 280 U. S. 409, 411, must be taken to include the receipt of income during the year of the legislative session preceding that of its enactment.

The Joint Resolution of Congress of July 4, 1864, No. 77, 13 Stat. 417, imposed an additional tax on incomes earned during the calendar year 1863, this tax being imposed after the taxes for the year had been paid. In *Stockdale* v. *Insurance Companies, supra,* 331, Mr. Justice Miller said of it: "The right of Congress to have imposed this tax by a new statute, although the measure of it was governed by the income of the past year, cannot be doubted. . . . no one doubted the validity of the tax or attempted to resist it." The Act of February 24, 1919, c. 18, Tit. 2, 40 Stat. 1057, 1058–1088, which taxed incomes for the calendar year 1918, was applied without question as to its constitutionality in *United States* v. *Robbins,* 269 U. S. 315, and in other cases.

In the present case the returns of income received in 1933 were filed and became available in March, 1934. Wisconsin Stat. 1933, § 71.09 (4). The next succeeding session of the legislature at which tax legislation could be considered was in 1935, when the challenged statute was passed. By § 11, Art. IV; § 4, Art. V, of the Wisconsin constitution, and § 13.02 Wisconsin Statutes, 1935, regular sessions of the legislature are held in each odd-numbered year. Special sessions of the legislature may be held on call of the governor, at which no business can be transacted "except as shall be necessary to accomplish

the special purposes for which it was convened." A special session was called by the governor in 1934, but for purposes unrelated to taxation. Proclamations of the Governor of Wisconsin December 2, 28, 1933, January 18, 22, 30, 1934. Thus the legislature in 1935, at the first opportunity after the tax year in which the income was received, made its revision of the tax laws applicable to 1933 income, as did Congress in the Joint Resolution of July 4, 1864, commented on in *Stockdale* v. *Insurance Companies, supra.*

While the Supreme Court of Wisconsin thought that the present tax might "approach or reach the limit of permissible retroactivity," we cannot say that it exceeds it.

Affirmed.

MR. JUSTICE ROBERTS, dissenting.

The Constitution of Wisconsin, Article VIII, § 1, provides: "Taxes may also be imposed on incomes, privileges and occupations, which taxes may be graduated and progressive, and reasonable exemptions may be provided." Pursuant to this grant, the State, since 1911,[1] has had a statute levying a general income tax on corporations and individuals at a graduated rate. The system, which is analogous to that with which we are familiar in the federal field, has, like the latter, been amended from time to time in detail. The law as it stood in 1933 is found in the 1933 edition of the Wisconsin statutes as chapter 71. The tax is imposed for annual periods. The gross income of a given year includes rents, dividends, wages, and salaries, profits from the transaction of business or sale of property and all other gains, profits, or income derived from any source except such as are specifically exempted. In ascertaining taxable income each tax-

[1] Laws of Wisconsin 1911, c. 658, p. 984.

payer is entitled to deduct from gross receipts wages, salaries, and other expenses of conducting a business, occupation, or profession, depreciation, also cost of property sold. In addition each is permitted to deduct certain losses incurred within the year not compensated by insurance, interest paid on indebtedness, state and federal taxes, contributions to the State or its subdivisions or to charitable objects and amounts paid to an unemployment reserve.[2] Pensions are exempted, and a specified amount may be deducted from the tax, when ascertained, as a personal exemption.[3] Dividends (with exceptions not material) received from certain corporations filing income tax returns under the law, and paying income tax to the State, are deductible from gross income.[4] We were told at the bar that this deduction had been authorized for many years prior to 1933.

The appellant, a resident of Wisconsin, on or about March 15, 1934, as by law required, made a return of his income for 1933 showing his gross income and took deductions for interest paid, for losses on the sale of securities, for business expenses, for charitable contributions, and for dividends received from certain corporations, with the result that no net taxable income remained. Without the deduction of the dividends his net income would have been $2,221.39.

When the Wisconsin legislature met in its regular biennial session in January 1935 it was confronted by a need for additional revenue to meet the State's obligations. The condition is referred to as an emergency because the need for additional funds grew out of the then current relief load, but the emergency was no different than if the State had found itself short of funds for the

[2] § 71.04.
[3] § 71.05.
[4] § 71.04(4).

payment of official salaries. As the Supreme Court of Wisconsin has said: "Expense for relief of the unemployed is on no different footing than any other governmental expense." [5] And it goes without saying that an emergency does not create power but is merely the occasion for the exercise of existing powers in conformity to constitutional principles.[6]

What then did the legislature do to meet the demand for public revenue? It adopted a statute effective March 27, 1935.[7] By § 2 this Act laid an income tax additional to and separate from the general income tax at a graduated rate on the income of all individuals, for the year 1934, which was to be "assessed, collected, and paid in the same manner, upon the same income and subject to the same regulations," as provided "by law for the assessment, collection and payment of the normal income tax," with certain variations. One of the variations was that no deduction was to be allowed for those corporate dividends which were deductible under subsection (4) of § 71.04 of the general law.

Section 3 imposed an additional tax on transfers of property made up to July 1, 1937. Section 4 placed additional license fees for the year 1934 on telephone companies. Section 5 imposed an additional license fee for 1934 upon electric, gas and similar utility companies.

Section 6 imposed on the 1933 dividends, which had been deductible under the general law, a graduated tax of one per cent. on the first two thousand dollars of net dividend income, three per cent. on the next $3,000, and seven per cent. on all above $5,000. Net dividend income is defined as gross dividend income less $750. The tax

[5] *Scobie* v. *Tax Commission,* 225 Wis. 529, 538; 275 N. W. 531.

[6] *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 425, 436; *Wilson* v. *New,* 243 U. S. 332, 348.

[7] Laws of Wisconsin 1935, c. 15, p. 19.

is to be assessed, collected and paid in the same manner as the normal income tax for 1934. Under this section the appellant was required to make return and pay on some $12,000 of the dividends which he had been permitted to deduct from gross income in calculating and paying his income tax for 1933 and was assessed thereon $545.71, which he paid under protest and brought this action to recover.

The question is whether § 6 transgresses the prohibition of the Fourteenth Amendment. The Supreme Court of Wisconsin, although stating that "While the present tax may approach or reach the limit of permissible retroactivity, it does not exceed it," sustained the statute as against challenge under the equal protection and due process clauses of the amendment.[8] I think the statute is violative of the guarantees of equal protection and due process.

One must ignore the realities of the situation if he approaches a decision of the case in the light of the equal protection clause as if the statute under attack were prospective in operation; or, in the light of the due process clause, as if the statute were a revision of an existing general income tax system theretofore in force. The illegal discrimination and the arbitrary character of the Act condemn it under the equal protection clause not because it selects a particular class of citizens for the imposition of the tax but because, in so doing, it reaches back and singles out for a new and wholly different sort of income tax those few only to whom a specific deduction was allowed in the general computation of their taxable income for the year 1933. It will not do to examine the classifi-

[8] The judges who heard the cause were equally divided in opinion. Four justices of the Supreme Court voted to sustain the Act. The trial judge and three justices of the Supreme Court were of the opinion that it was unconstitutional.

cation as if it were the declaration of a new policy of taxation to be operative in the future. No more will it do to separate the retroactive feature of the law and consider it as if it were a mere amendment of a general income tax system as such applicable to all income of all taxpayers subject to the law as it stood at the date of the amendment. The reason for allowing the deduction is plain. As has been said in this court: "The purpose of the Legislature was solely to prevent double taxation by the State of Wisconsin, of the income received by individuals in the form of dividends." [9] The same thing may be said as to the reason for other allowable deductions, as, for instance, of taxes paid. Reasons of fairness and public policy moved the State to allow the permitted deductions from gross income.

It readily may be conceded that Wisconsin is, and always has been, free in the imposition of an income tax, for good and sufficient reason, to treat the recipients of dividends on a basis different from the recipients of other sorts of income. The State also was free to revoke, alter, and amend the provisions for deductions as its views of fairness and policy might dictate. This case presents no such situation. After the taxpayers had returned and paid their tax under the existing system and according to the long established public policy of the State, the State sought additional revenues. Instead of levying an exaction upon the citizens generally or certain classes of citizens, the State went back and sought to tax a small class of income tax payers by reason of the purely arbitrary and adventitious fact that they had been allowed a particular deduction in a past year. It chose as the base of the tax a part of the income of the taxpayer under the law as previously in force. The previously granted deduction was not withdrawn but, on the contrary, the income rep-

[9] *Miller* v. *Milwaukee,* 272 U. S. 713, 717.

resented by that deduction was picked out from all others, was classified by itself and taxed in a manner wholly unrelated to the income and the taxes of the recipient of these dividends under the general law under which he had computed and paid his tax. If the State was at liberty to do this it was equally free to tax at a new rate and upon a new scheme income of the taxpayers who in 1933 deducted losses sustained or those who deducted interest paid or taxes paid or charitable contributions made. It was equally at liberty to form a taxable class of those who were granted personal exemptions, to wrest out of their setting, as part of the general income of a taxpayer, rents received, royalties received, or professional income accrued in 1933 and to impose a special income tax on one or all of those items. As the trial judge well said:

"In the equitable distribution of taxation persons receiving dividends in the year 1933 should not be classified less favorably than persons receiving other kinds of income that year. For the purpose of taxation the income was not materially different than the following kinds: Salaries paid officers of private corporations; salaries paid to public officials; interest; rents; profit and income of all kinds received by individuals and corporations generally, unless some good reason appeared for some legislative exception.

"The statute is also discriminatory against the class of persons receiving dividends in the year 1933 when compared with other classes of persons when such other classes are assessed at all. It discriminates in being more drastic in limiting deductions for losses, expenses and exemptions. It is more drastic in the rapid increase of the graduated rate. For some reason one class only was selected to bear the entire burden of the emergency tax in question. This class was subjected to an unusually inequitable burden."

Decisions sustaining the power of a State prospectively to classify, to grant exemptions, or otherwise to inter-

relate the tax burdens of different classes of taxpayers are of no aid and lend no support to the present statute. In no case heretofore to which attention has been called have the courts sustained a law which after the fact reaches back two years and selects for a special form of income taxation at a new rate a group of the taxpayers who, in accordance with preëxisting law, had paid that share of the general income tax which the legislature had adjudged to be its equal and proportionate share of the burden of government. To attempt this was, in my judgment, arbitrary and discriminatory classification.

From what has been said I think it apparent that the retroactivity of the challenged statute taken alone is not the element which condemns it any more than the attempted classification alone would condemn it if the Act were prospective in operation. The cases relied upon to support the statute, viewed in its retroactive aspect, do not meet the present case. In one of the cited cases,—*United States* v. *Hudson,* 299 U. S. 498, 500,—earlier decisions were thus summarized: "As respects income tax statutes it long has been the practice of Congress to make them retroactive for relatively short periods so as to include profits from transactions consummated while the statute was in process of enactment, or within so much of the calendar year as preceded the enactment; and repeated decisions of this Court have recognized this practice and sustained it. . . ." That was a case which fell squarely within this statement of the scope of permissible retroactivity. All enactments sustained that amended the tax system of a prior year were continuations of that existing system, and the taxpayers had knowledge, before the expiration of the year of receipt of the income by which the tax was measured, that amendment of the system was under consideration. To this class belongs the provision of the Wisconsin Act of 1935 imposing an additional tax on income received in 1934. This feature of the Act is

not here under attack. A very different course was adopted with respect to the income of 1933. For that year the statute imposed a special income tax on a class selected because the law in force when they paid their taxes had permitted them to deduct certain items, and ignored all others to whom similar deductions had been granted. Thus the whole scheme of the general income tax was unbalanced and a peculiar and specific burden laid upon a selected few who had theretofore been relieved of the unjust burden of double taxation. What was said in *Milliken* v. *United States,* 283 U. S. 15, 21, is peculiarly apposite to the facts here disclosed. There, referring to earlier decisions, condemning, under the due process clause, retroactive taxes, it was stated: "In both the point was stressed, as the basis of decision, that the nature and amount of the tax burden imposed could not have been understood and foreseen by the taxpayer at the time of the particular voluntary act which was made the occasion of the tax." Here the nature and amount of this special and peculiar tax could not have been understood and foreseen when the petitioner paid his 1933 income tax.

It is to be remembered that the Act in question is not a curative statute for the collection of taxes assessed in a prior year and uncollected [10] nor one intended to make available taxes which, by reason of illegality in their imposition, were not paid in the year in which they were assessed.[11] The Act is not a remedial measure to confirm or ratify a doubtful administrative interpretation of prior legislation.[12] It does not lay an excise or a privilege measured by the income of a prior year,[13] nor is it a statute to settle doubts as to whether an earlier taxing Act had expired by limitation.[14]

---

[10] *Florida Central & P. R. Co.* v. *Reynolds,* 183 U. S. 471.

[11] *Citizens National Bank* v. *Kentucky,* 217 U. S. 443.

[12] *Hecht* v. *Malley,* 265 U. S. 144.

[13] *Flint* v. *Stone Tracy Co.,* 220 U. S. 107.

[14] *Stockdale* v. *Insurance Companies,* 20 Wall. 323.

It was suggested at the bar that the exaction is a property tax and bad as such because retroactively imposed. The reply was that retroactive property taxes have been upheld. The cases cited do not touch the validity of an *ad valorem* property tax retroactively imposed. Some of them involved special assessments for benefits assessed after the completion of the improvement.[15] Another cited to the proposition dealt with an excise for the use, for pleasure, of foreign built yachts either owned or chartered by the user for more than six months during the taxable year. The exaction was held an excise on the privilege of use and not a tax upon ownership, and, moreover, the tax was not retroactive in operation but was assessed upon the taxpayer at a date during which the taxpayer's use of the yacht continued.[16] Still another dealt with a curative act passed to reach property illegally assessed.[17] But whether viewed as a property or an income tax the exaction is bad. Most, if not all, the States have long maintained the policy of exempting places of religious worship from annual tax levies. Will it be contended that if the State were now to impose a tax on the value of such exempt property for some past year, the action would not be an arbitrary taking of property as well as a hostile discrimination?

If, as this court has repeatedly said, an income tax is an equitable method of distributing the necessary burdens of government, certainly no such discrimination as is evidenced by the challenged Act can properly fall within the description. The Act evidences purposeful and arbitrary discrimination and thus violates the guarantee of equal protection.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER join in this opinion.

[15] *Seattle* v. *Kelleher,* 195 U. S. 351; *Wagner* v. *Baltimore,* 239 U. S. 207.

[16] *Billings* v. *United States,* 232 U. S. 261.

[17] *Citizens National Bank* v. *Kentucky, supra.*

HARRIS ET AL. *v.* AVERY BRUNDAGE CO. ET AL.

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

No. 53. Argued November 8, 1938.—Decided November 21, 1938.

1. A court of bankruptcy has jurisdiction to determine controversies relating to property in the hands of the debtor's agent at the time of the filing of a petition in bankruptcy. P. 163.
2. A court of bankruptcy has power, in the first instance, to determine whether it has that actual or constructive possession which is essential to its jurisdiction to proceed. *Id.*
3. Concurrent finding of two courts below that respondents in the case held custody and control of an escrow fund in controversy as agent of a bankrupt corporation, is *accepted* by this Court. *Id.*
4. In the absence of a substantial adverse claim, the bankruptcy court acquired jurisdiction, when the petition in bankruptcy was filed, to determine controversies relating to an escrow fund in control of the bankrupt's agents, and had power by summary proceedings to compel its surrender. *Id.*
5. Parties having only a procedural right to have issues tried in a plenary suit may waive it by consenting to summary trial in bankruptcy. P. 164.

95 F. 2d 373, affirmed.

CERTIORARI, 304 U. S. 557, to review the affirmance of orders of the bankruptcy court requiring the present petitioners to make a payment from an escrow fund, and ordering that pleadings of the petitioners challenging its jurisdiction over the fund be stricken.

Messrs. Benjamin F. J. Odell and *Kenart M. Rahn* for petitioners.

Mr. Sigmund W. David for respondents.

MR. JUSTICE BLACK delivered the opinion of the Court.

Did the bankruptcy court in this involuntary proceeding have jurisdiction to order the disposition of property in the possession of persons found by the court to be holding as agents of the alleged bankrupt?

Respondents engaged the Tax Service Association of Illinois to seek exemption for respondents from an Illinois tax. The contract entitled the Association to $1,500 cash, and an additional $20,000 should the Supreme Court of Illinois find respondents exempt. The contract authorized the Association to retain petitioner Odell as attorney to prosecute the claimed exemption without cost to respondents for his services. Odell endorsed the contract between respondents and the Association with the statement: "I hereby consent to retention under the terms of this agreement." Under the contract respondents made payments—corresponding to their possible tax liabilities—into an Escrow Fund. Petitioners Odell and Harris, employed by the Association, and one Craig, deposited these payments pursuant to a letter [1] to the Bank which declared that the funds deposited were not the property of either Odell, Harris or Craig, but were in their custody.

The Supreme Court of Illinois decided respondents were liable for the tax,[2] and thereafter an involuntary petition in bankruptcy was filed against the Association. Craig was willing but Odell and Harris refused to comply with respondents' request for the return of the payments

[1] "National Builders Bank of Chicago.

"Gentlemen:

"There has been opened with you a certain account entitled Sales Tax Escrow Fund. There will be delivered to you from time to time hereafter for deposit to the credit of said account certain checks for various amounts issued by sundry contractors.

"You are hereby instructed that *the funds from time to time on deposit in said account are not the funds of the undersigned, but are under the custody and control of the undersigned* pending the outcome of proposed negotiations with the Department of Finance of the State of Illinois. Withdrawals from the account are to be made only on written order of the undersigned, three of whom must act together as indicated. Each check must bear the signature of either: Benjamin F. J. Odell or Ruth V. Willner; and R. G. Harris or P. N. Weaver, together with E. M. Craig or R. D. Steel." (Italics supplied.)

[2] *Blome Co.* v. *Ames*, 365 Ill. 456; 6 N. E. 2d 841.

they had made into the Fund, and respondents filed a petition for their recovery in the bankruptcy court. Petitioners consented and agreed in open court to an order of the bankruptcy court which required them to pay seventy-five per cent of the Fund ($242,000) to the State of Illinois in discharge of respondents' tax liability, and which also provided that "the balance in said . . . Fund . . . shall remain and be held . . . subject to the further order" of the bankruptcy court. It recited that petitioners "agreed that [the bankruptcy court] had jurisdiction to enter this order."

Respondents then filed a second petition to recover an additional $48,580.40 from the Fund, with $20,000 to remain "subject to the further order of" the court. In answer to respondents' claim, the Bank and Craig disclaimed any interest in the Fund. The sole claim adverse to respondents was asserted by the receiver of the Association, for $20,000. Neither Odell nor Harris claimed any interest in the Fund. In response to the court's requests to answer, petitioners alleged that the court had no jurisdiction to determine rights relating to the Fund. After a hearing, the court found that it had jurisdiction and ordered petitioners to pay $48,580.40 from the Fund to respondents, the balance to remain "subject to the further order of [the] . . . Court . . ." The following day the court ordered that petitioners' pleadings which challenged its jurisdiction over the $20,000 balance in the Fund be struck, and that petitioners answer within twenty days to the merits on respondents' claim to this balance.

Petitioners did not answer, but appealed from both orders. The Circuit Court of Appeals affirmed.[3]

A court of bankruptcy has jurisdiction to "bring in and substitute additional persons or parties in proceedings in

[3] 95 F. 2d 373.

bankruptcy when necessary for the complete determination of a matter in controversy; [and to] cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto," with exceptions not here material.[4] This jurisdiction of the bankruptcy court extends to the determination of controversies relating to all property in the debtor's physical possession *or* in the hands of the debtor's agent at the time of the filing of a petition in bankruptcy.[5] In every case the bankruptcy court has power, in the first instance, to determine whether it has that actual or constructive possession which is essential to its jurisdiction to proceed.[6]

Here, both courts below found that Harris and Odell were agents of the debtor (the Association) and had custody of the Escrow Fund as such agents at the time the petition in bankruptcy was filed and thereafter. We accept this finding,[7] and proceed to a consideration of the jurisdictional question.[8]

Petitioners controlled and had custody of this Fund as agents of the Association and did not assert any adverse interest in themselves. In the absence of a substantial adverse claim, the bankruptcy court acquired jurisdiction—when the petition in bankruptcy was filed—to de-

---

[4] Bankruptcy Act, c. 2, 11 U. S. C., § 11 (6, 7). As to exceptions, see *Bryan* v. *Bernheimer,* 181 U. S. 188, 194.

[5] *Mueller* v. *Nugent,* 184 U. S. 1; see *Whitney* v. *Wenman,* 198 U. S. 539, 552; *Taubel-Scott-Kitzmiller Co.* v. *Fox,* 264 U. S. 426, 432, 433 and notes; *May* v. *Henderson,* 268 U. S. 111, 115.

[6] *Taubel-Scott-Kitzmiller Co.* v. *Fox, supra,* 433; *May* v. *Henderson, supra,* 116. See, *Harrison* v. *Chamberlain,* 271 U. S. 191, 194.

[7] "In this case, however, respondent [petitioners] asserted no right or title to the property before the referee, and the circumstances under which he [they] held possession must be accepted as found by the referee and the District Court." *Mueller* v. *Nugent, supra,* 15.

[8] Cf. *Page* v. *Arkansas Gas Corp.,* 286 U. S. 269, 271.

termine controversies relating to the Fund,[9] and had power by summary proceedings to compel its surrender.[10] Furthermore, petitioners consented and agreed in open court and respondents assented to the court's disposition of the Fund in a summary proceeding. Jurisdiction to try the issues was vested in the District Court sitting as a court of bankruptcy. Since the parties had only a procedural right to have these issues tried in a plenary suit, they were at liberty to waive this right.[11] Petitioners approved the first order which disposed of part of the Fund, and specifically provided that the balance remain "subject to the further orders of" the District Court.

All persons who created or had any possible interest in that portion of the Fund ordered distributed were parties and present in the bankruptcy court. No one of them—including petitioners—asserted or in any way indicated to the bankruptcy court that there could be any interest in the money distributed adverse to respondents. The sole claim adverse to respondents was that of the receiver of the Association, for $20,000. This amount was not distributed and the court retained jurisdiction to determine controversies relating to it.

Petitioners having consented that the Fund be subject to the orders of the bankruptcy court, and that court having determined that petitioners held the Fund as agents of the Association, there was jurisdiction to enter the orders in question.

Affirmed.

---

[9] *Taubel-Scott-Kitzmiller Co.* v. *Fox, supra,* 433; see Note 5, *supra.*

[10] Cf. *Mueller* v. *Nugent, supra,* 14.

[11] *MacDonald* v. *Plymouth Trust Co.,* 286 U. S. 263; *Bryan* v. *Bernheimer, supra,* 197; see *Taubel-Scott-Kitzmiller Co.* v. *Fox, supra,* 437; *Page* v. *Arkansas Gas Corp., supra,* 271; cf. *Schumacher* v. *Beeler,* 293 U. S. 367, 369.

STOLL *v.* GOTTLIEB.

CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

No. 20. Argued October 14, 1938.—Decided November 21, 1938.

1. A contention that a ruling of a state supreme court disregarded decrees of a court of the United States, raised a federal question reviewable under § 237b of the Judicial Code. P. 167.
2. An order of a federal District Court, which, in a proceeding to reorganize a corporation under § 77B of the Bankruptcy Act, approved a plan of reorganization providing *inter alia* for discharge of the debtor's bonds and cancellation of a personal guaranty thereof, *held res judicata*, and proof against collateral attack, in an action in a state court, brought against the guarantor (who had appeared and approved the reorganization as proposed), by one of the holders of the guaranteed bonds, who had received notice of the hearing in the District Court upon the proposed reorganization, but did not there appear, and who, after bringing his action on the guaranty, had unsuccessfully petitioned that court to set aside or modify its order upon the ground that it had no jurisdiction to extinguish the guaranty. P. 170.

   In reaching this conclusion, the Court assumes that the bankruptcy court did not have jurisdiction of the subject matter of its order—the release, in reorganization, of a guarantor from his guaranty. The decision here is based on the fact that in an actual controversy the question of the jurisdiction over the subject matter was raised and determined adversely to the respondent. That determination is *res judicata* of that issue in this action, whether or not power to deal with the particular subject matter was strictly or quasi jurisdictional.

   Vallely v. *Northern Fire Ins. Co.*, 254 U. S. 348, distinguished.

   Cases dealing with status and transfer of title to real estate are outside the scope of the present inquiry.

368 Ill. 88; 12 N. E. 2d 881, reversed.

CERTIORARI, 304 U. S. 554, to review a judgment affirming a judgment recovered in the Municipal Court of Chicago, in an action upon a guaranty of bonds of a corporation, and reversing a judgment of the appellate court of Illinois, 289 Ill. App. 595, which had held to the contrary.

Mr. Albert W. Froehde, with whom *Mr. Russell F. Locke* was on the brief, for petitioner.

Mr. David Shipman submitted for respondent.

Under the "full faith and credit" clause of the Constitution, the jurisdiction of the federal court to cancel the guaranty was properly inquired into by the Supreme Court of Illinois.

The proceedings in the federal court did not constitute an estoppel or *res judicata.*

Motion of respondent in the federal court to vacate the decree and orders cancelling the guaranty entered almost two years earlier, for the reason that that court had no jurisdiction to cancel the guaranty, did not confer validity upon that part of the decree, otherwise void.

The Bankruptcy Act prohibits the cancellation of a guaranty, and there is no authority in § 77B or elsewhere giving the federal court that power.

If § 77B were construed to empower the District Court to cancel the guaranty, it would violate the Fifth Amendment.

Under the decisions in *In re Diversey Building Corp.,* 86 F. 2d 456, wherein this Court denied certiorari, 300 U. S. 662, and *In re Nine North Church St., Inc.,* 82 F. 2d 186, 188, the federal court was wholly without jurisdiction of the subject matter of this guaranty, and its orders and decree pertaining to the cancellation of the guaranty are absolutely void and subject to collateral attack. See *In re Utilities Power & Light Corp.,* 91 F. 2d 598; *In re Prudence Bonds Corp.,* 79 F. 2d 212, 215; *In re 1775 Broadway Corp.,* 79 F. 2d 108, 110; *Brumley* v. *Jones,* 141 F. 318; *Holm* v. *Jamieson,* 173 Ill. 295, 300; *Union Trust Co.* v. *Willsea,* 275 N. Y. 164; *In re Madison Mortgage Corp.,* 22 F. Supp. 99; *Chauncey* v. *Dykes Bros.,* 119 F. 1, 3; *In re Pyrocolor Corp.,* 46 F. 2d 554; *Johnson* v. *Finn,* 14 N. E. 2d 240; Collier Supp. § 77B; Am. B. R. Digest, § 1279–a; *Armstrong* v. *Obucino,* 306 Ill. 140;

Standard Oil Co. v. *Missouri,* 224 U. S. 270, 281; *In re Sawyer,* 124 U. S. 200, 220; *United States* v. *Walker,* 109 U. S. 258; *Windsor* v. *McVeigh,* 93 U. S. 274; *Adams* v. *Terrell,* 4 F. 796, 800; *Novak* v. *Kruse,* 211 Ill. App. 274; *Great Western Tel. Co.* v. *Barker,* 56 Ill. App. 402; *Risley* v. *Phenix Bank,* 83 N. Y. 318, 337; *Ex parte Wisner,* 203 U. S. 449; *Hovey* v. *Elliott,* 167 U. S. 409, 444; *Reynolds* v. *Stockton,* 140 U. S. 254; *Guaranty Trust Co.* v. *Green Cove R. Co.,* 139 U. S. 137; *In re Southern States Finance Co.,* 19 F. 2d 959; *The Confiscation Cases,* 20 Wall. 92; *Sharon* v. *Terry,* 36 F. 337, 346; *Rabbit* v. *Weber & Co.,* 297 Ill. 491, 495; *Demilly* v. *Grosrenaud,* 201 Ill. 272, 273; *Kenney* v. *Greer,* 13 Ill. 432; *Ashlock* v. *Ashlock,* 360 Ill. 115, 122.

Mr. Justice Reed delivered the opinion of the Court.

This certiorari was allowed to review a judgment of the Supreme Court of Illinois. That court had denied effect to a plea of *res judicata* arising from orders of a district court in bankruptcy. Provisions declaring the supremacy of the Constitution and the extent of the judicial power and authorizing necessary and proper legislation to make the grants effective confer jurisdiction upon this Court to determine the effect to be given decrees of a court of the United States in state courts.[1] As the contention is that the ruling below disregarded decrees of a court of the United States, it raised a federal question reviewable under § 237b of the Judicial Code.[2]

[1] *Crescent City Live Stock Co.* v. *Butchers' Union,* 120 U. S. 141, 146; *Embry* v. *Palmer,* 107 U. S. 3, 9; *Metcalf* v. *Watertown,* 153 U. S. 671, 676; *Atchison, T. & S. F. Ry. Co.* v. *Sowers,* 213 U. S. 55, 65.

[2] *Dupasseur* v. *Rochereau,* 21 Wall. 130, 134; *Crescent City Live Stock Co.* v. *Butchers' Union,* 120 U. S. 141, 142; *Des Moines Nav. Co.* v. *Iowa Homestead Co.,* 123 U. S. 552, 559; *Pittsburgh, C., C. & St. L. Ry. Co.* v. *Long Island Loan & Trust Co.,* 172 U. S. 493, 507; *Motlow* v. *State ex rel. Koeln,* 295 U. S. 97, 98.

The admission of facts, and uncontroverted allegations of the pleadings, show that Ten Fifteen North Clark Building Corporation filed a petition for reorganization on June 20, 1934, under § 77B of the Bankruptcy Act in the United States District Court for the Northern District of Illinois; that the petition was approved as properly filed shortly thereafter, and that notice of the proceedings was given to the creditors, one of whom was respondent William Gottlieb. A proposed plan of reorganization was filed by the debtor which provided for the substitution of one share of common stock in the Olympic Hotel Building Corporation for each $100 principal amount of the outstanding first mortgage, 6½% gold bonds of the debtor corporation, the discharge of the bonds and the cancellation of a guaranty endorsed on them. The guaranty was one of J. O. Stoll, petitioner here, and S. A. Crowe, Jr., to pay the bond. Its material provisions are stated below.[3] The extinction of the personal guaranty was in consideration "for the transfer of all the assets of said Debtor [i. e., the Building Corpora-

[3] "GUARANTY.

"For Value Received, the undersigned, Do Hereby Guarantee the payment of the within bond and the interest thereon, at the maturity thereof either by the terms of said bond or of any agreement extending the time of payment thereof, or by anticipation of maturity at the election of the legal holder or owner thereof, in accordance with any provision of said bond or of the trust deed given to secure the same, or of any extension agreement; and do hereby absolutely guarantee the payment of the respective interest coupons, given to evidence the interest on said bond, and all extension coupons, at their respective dates of maturity, and all interest on said coupons, and do hereby absolutely guarantee the full and complete performance by the maker of the trust deed given to secure the said bonds and coupons, and its successors and assigns, of all of the terms, provisions, covenants and agreements of the said trust deed and of any such extension agreement."

tion] to the Olympic Hotel Building Corporation and the surrender of the said Common Stock of the Debtor." Crowe and Stoll, together with other stockholders of the debtor, "filed their acceptances in writing" of the plan.

On notice to respondent and a hearing at which he did not appear the proposed plan of reorganization with the provision for the extinction of the guaranty was confirmed over the objections of creditors of the same class as respondent. The confirmation provided that all creditors of the debtor should be bound. It also appears that, in accordance with the plan, the guarantors caused the assets of the debtor to be transferred to the new corporation and surrendered the capital stock of the debtor. After the institution of the present action in the state court Gottlieb filed a petition in the proceedings for reorganization of the Ten Fifteen North Clark Building Corporation praying that an order be entered vacating or modifying the decrees and orders entered in the proceedings confirming the plan of reorganization, on the ground that the district court in proceedings for reorganization did not have power or jurisdiction to cancel the guaranty. An order was entered denying this petition. No appeal was taken from any of the bankruptcy orders.

Subsequent to the confirmation of the plan of reorganization but before the petition to vacate these orders Gottlieb began an action in the Municipal Court of Chicago against the guarantors Crowe and Stoll to recover upon their guaranty of three of the $500 bonds of Ten Fifteen North Clark Building Corporation. Crowe was not served with summons. Stoll defended on the ground that the order of the bankruptcy court confirming the plan of reorganization with release of his guaranty and its further order, denying Gottlieb's petition to set aside the decree providing for the release of the guaranty, were *res judicata.*

The Municipal Court granted the relief sought by the bondholder, the appellate court reversed and its judgment was in turn reversed by the Supreme Court of Illinois, which affirmed the judgment of the Municipal Court.[4] Two justices dissented.

The Congress enacted, as one of the earlier statutes, provisions for giving effect to the judicial proceedings of the courts. This has long had its present form.[5] This statute is broader than the authority granted by Article Four, section one, of the Constitution to prescribe the manner of proof and the effect of the judicial proceedings of states. Under it the judgments and decrees of the federal courts in a state are declared to have the same dignity in the courts of that state as those of its own courts in a like case and under similar circumstances.[6] But where the judgment or decree of the federal court determines a right under a federal statute, that decision is "final until reversed in an appellate court, or modified or set aside in the court of its rendition." [7] As this plea was based upon an adjudication under the reorganization pro-

[4] 368 Ill. 88; 12 N. E. 2d 881.

[5] Rev. Stat. § 905. "The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory, or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

[6] *Dupasseur* v. *Rochereau,* 21 Wall. 130; *Embry* v. *Palmer,* 107 U. S. 3, 9; cf. *Metcalf* v. *Watertown,* 153 U. S. 671.

[7] *Deposit Bank* v. *Frankfort,* 191 U. S. 499, 520.

visions of the Bankruptcy Act, effect as *res judicata* is to be given the federal order, if it is concluded it was an effective judgment in the court of its rendition. The problem before the Supreme Court of Illinois was not one of full faith and credit but of *res judicata*. In this particular case, a federal question was involved. This was the power of the federal courts to protect those who come before them relying upon constitutional rights or rights given, as in this case, through a statute enacted pursuant to constitutional grants of power.

The inquiry is to be directed at the conclusiveness of the order releasing the guarantor from his obligation, assuming the Bankruptcy Court did not have jurisdiction of the subject matter of the order, the release in reorganization of a guarantor from his guaranty of the debtor's obligations.[8]

A court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted to it by its creators. There must be admitted, however, a power to interpret the language of the jurisdictional instrument and its application to an issue before the court.[9] Where adversary parties appear, a court must have the power to determine whether or not it has jurisdiction of the person of a litigant,[10] or whether its geographical jurisdiction covers the place of the occurrence under consideration.[11] Every court in rendering a judgment, tacitly, if not expressly, determines its juris-

[8] We express no opinion as to whether the Bankruptcy Court did or did not have jurisdiction of the subject matter. Cf. *In re Diversey Building Corp.*, 86 F. 2d 456; *In re Nine North Church Street, Inc.*, 82 F. 2d 186; *Union Trust Co.* v. *Willsea*, 275 N. Y. 164, 167; 9 N. E. 2d 820.

[9] As illustrations of the exercise of this power, see *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266, 274; *Matter of Gregory*, 219 U. S. 210, 217.

[10] *Baldwin* v. *Traveling Men's Assn.*, 283 U. S. 522.

[11] *Jones* v. *United States*, 137 U. S. 202.

diction over the parties and the subject matter.[12] An erroneous affirmative conclusion as to the jurisdiction does not in any proper sense enlarge the jurisdiction of the court until passed upon by the court of last resort, and even then the jurisdiction becomes enlarged only from the necessity of having a judicial determination of the jurisdiction over the subject matter. When an erroneous judgment, whether from the court of first instance or from the court of final resort, is pleaded in another court or another jurisdiction the question is whether the former judgment is *res judicata*. After a federal court has decided the question of the jurisdiction over the parties as a contested issue, the court in which the plea of *res judicata* is made has not the power to inquire again into that jurisdictional fact.[13] We see no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court[14] making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation. In this case the order upon the petition to vacate the confirmation settled the contest over jurisdiction.

Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first.

---

[12] *Chicago Life Ins. Co.* v. *Cherry*, 244 U. S. 25, 29.

[13] *Chicago Life Ins. Co.* v. *Cherry*, 244 U. S. 25, 30; *Baldwin* v. *Traveling Men's Assn.*, 283 U. S. 522, 525; *Davis* v. *Davis*, *ante*, p. 32.

[14] The Bankruptcy Court is one of general jurisdiction. *Fairbanks Shovel Co.* v. *Wills*, 240 U. S. 642, 649.

That a former judgment in a state court is conclusive between the parties and their privies in a federal court when entered upon an actually contested issue as to the jurisdiction of the court over the subject matter of the litigation, has been determined by this Court in *Forsyth* v. *Hammond*.[15] The petitioner, Caroline M. Forsyth, sought by injunction in the federal court to forbid the City of Hammond from collecting taxes on certain lands, annexed to the city by an earlier state court decree. The city contended that the earlier decree was decisive, the petitioner that it was void because the enlargement of a city was a matter of legislative, not judicial, cognizance. Without determining the issue whether annexation itself is a function solely of the legislature, this Court upheld the contention of the city on the ground that the petitioner had taken an appeal to the Supreme Court of Indiana from the earlier decree of the trial court against her in the annexation proceedings, and had in that appeal attacked the validity of the decree on the ground of lack of jurisdiction. "Having litigated a question in one competent tribunal and been defeated, can she litigate the same question in another tribunal, acting independently, and having no appellate jurisdiction? The question is not whether the judgment of the Supreme Court would be conclusive as to the question involved in another action between other parties, but whether it is not binding between the same parties in that or any other forum." [16]

Other instances closely approaching the line of this case may be examined.

In *Des Moines Navigation & Railroad Co.* v. *Iowa Homestead Co.*,[17] this Court was called upon to resolve a controversy over the effect of a judgment of the federal

[15] 166 U. S. 506, 515.

[16] *Id.* 517.

[17] 123 U. S. 552.

courts in a matter beyond their jurisdiction. The suit was brought by the Homestead Company in the state court to recover certain taxes which were the subject of litigation between the same parties in *Homestead Company* v. *Valley Railroad,* 17 Wall. 153. In the earlier case the decision had been adverse to the Homestead Company. When the Navigation Company pleaded the earlier decree in bar to the later action, it was met with the reply that the courts of the United States, which had rendered the earlier decree "had no jurisdiction of said suit and no legal power or authority to render said decree or judgment." The reason for this assertion was that the earlier suit had been instituted in a state court by the Homestead Company, an Iowa corporation, against various non-resident defendants and the Navigation Company, also an Iowa corporation. The individual defendants caused a removal to the federal court and all defendants, including the Navigation Company, appeared, filed answers and defended the action. The Homestead Company likewise appeared and actually contested issues in dispute with the Navigation Company. The litigation eventually reached this Court and was decided without reference to the lack of jurisdiction. In the later case this Court assumed that the exercise of jurisdiction by the United States Circuit Court over the controversy between the two Iowa corporations was improper. It was held, however, that the earlier decree was a "prior adjudication of the matters in controversy" and a bar to the later action.

A few years later this Court had occasion to examine again the question of the effect of a former adjudication by a United States Circuit Court in a case where this Court assumed the Circuit Court had jurisdiction of the parties but not of the subject matter. The earlier adjudication was pleaded in bar to a suit to quiet title in a state court sitting in the same state as the Circuit Court.

The state courts denied effect to the Circuit Court decree. On writ of error to the Supreme Court of Oregon this Court answered the contention that the ground upon which "the Federal court assumed jurisdiction was insufficient in law to make this case one arising under the laws of the United States" in these words:

"But that was a question which the Circuit Court of the United States was competent to determine in the first instance. Its determination of it was the exercise of jurisdiction. Even if that court erred in entertaining jurisdiction, its determination of that matter was conclusive upon the parties before it, and could not be questioned by them or either of them collaterally, or otherwise than on writ of error or appeal to this court." [18]

The decision in the *Des Moines* case is not precisely parallel with the circumstances of the present case because the determination was based upon diversity of citizenship between other parties to the controversy [19] and *Dowell* v. *Applegate* may likewise be seen to deviate slightly since there was color of jurisdiction in the federal court by reason of certain allegations as to violation of Acts of Congress in the stamping of the deeds.

A case likewise closely approaching the circumstances of the present controversy is *Vallely* v. *Northern Fire & M. Ins. Co.*[20] A corporation alleged to be engaged in the insurance business was adjudicated an involuntary bankrupt in the teeth of the Bankruptcy Act, § 4-*b*, that "any moneyed . . . corporation, except [an] . . . insurance . . . corporation, . . . may be adjudged an involuntary bankrupt." There was a default, acquiescence and aid to the trustee by the bankrupt. After the time for review of the adjudication had expired, the bankrupt filed a motion to vacate the adjudication as null and void. This Court

[18] *Dowell* v. *Applegate*, 152 U. S. 327, 340.

[19] *Vallely* v. *Northern Fire & M. Ins. Co.*, 254 U. S. 348, 354.

[20] 254 U. S. 348.

upheld the motion. It was pointed out that a determination of a jurisdictional fact such as whether an alleged bankrupt is a farmer, binds,[21] but that where there was no statute of bankruptcy applicable "necessarily there is no power in the District Court to include," the excepted corporation. It was thought that to recognize the binding effect of the judgment would be to extend the jurisdiction. This decision is inapplicable here because there was not an actually contested issue and order as to jurisdiction. The case is also distinguishable because the motion to vacate was made in the same bankruptcy proceeding as the order. We do not comment upon the significance of this variable.

To appraise the cases dealing with status and transfer of title to real estate seems outside the scope of the present inquiry. The rule applied here may or may not be applicable in instances where the courts with jurisdiction of the later controversy are passing upon matters of status and real estate titles.[22]

It is frequently said that there are certain strictly jurisdictional facts, the existence of which is essential to the validity of proceedings and the absence of which renders the act of the court a nullity. Examples with citations are listed in *Noble* v. *Union River Logging R. Co.*[23] For instance, service of process in a common law action within a state, publication of notice in strict form in proceedings *in rem* against absent defendants, the appointment of an administrator for a living person, a court martial of a civilian. Upon the other hand there are quasi-jurisdictional facts, diversity of citizenship, majority of litigants, and jurisdiction of parties, a mere finding of which,

[21] *Denver First Nat. Bank* v. *Klug*, 186 U. S. 202.

[22] Cf. *Andrews* v. *Andrews*, 188 U. S. 14; s. c. 176 Mass. 92; 57 N. E. 333; *Fall* v. *Eastin*, 215 U. S. 1; *Carpenter* v. *Strange*, 141 U. S. 87, 105.

[23] 147 U. S. 165.

regardless of actual existence, is sufficient. As to the first group it is said an adjudication may be collaterally attacked, as to the second it may not. We do not review these cases as we base our conclusion here on the fact that in an actual controversy the question of the jurisdiction over the subject matter was raised and determined adversely to the respondent. That determination is *res adjudicata* of that issue in this action, whether or not power to deal with the particular subject matter was strictly or quasi-jurisdictional.

Judgment reversed.

MR. JUSTICE MCREYNOLDS concurs in the result.

SHIELDS ET AL. *v.* UTAH IDAHO CENTRAL RAILROAD CO.

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

No. 28. Argued October 19, 1938.—Decided December 5, 1938.

1. Congress, having power to subject interstate railways to the requirements of the Railway Labor Act relating to labor relations, was empowered also to except interurban electric railways not operating as part of a general steam-railroad system, and to confide the question of fact whether a particular railroad falls within the excepted category to determination, after hearing and upon evidence, by the Interstate Commerce Commission. P. 170.
2. The conferring of authority, by the Railway Labor Act, upon the Interstate Commerce Commission to determine whether a particular electric railway is an interurban one is not an unconstitutional delegation of power. P. 181.
3. Under § 1 of the Railway Labor Act, it is the function of the Interstate Commerce Commission to determine as matters of fact, not only whether an electric railway line is operated as part of a general steam-railroad system of transportation, but also whether it is an "interurban" line. P. 181.
4. The purpose of the Act in requiring a hearing on these matters by the Commission—a hearing of evidence and argument—, is to comply with the requirements of due process. P. 182.

105537°—39——12

5. The Commission's determination, made at the request of the Mediation Board, is binding on the Board and on the carrier. P. 182.
6. A determination of the Interstate Commerce Commission, under the Railway Labor Act, that an electric line is not "interurban," though not in itself an "order," *Shannahan* v. *United States,* 303 U. S. 596, subjects the carrier to regulation by the Mediation Board and to criminal punishment if its orders are disobeyed, and its validity is subject to judicial review in a suit in equity brought by the carrier against the United States Attorney to restrain prosecutions. P. 182.
7. Upon review of such determination of the Interstate Commerce Commission the question is whether the Commission acted within its statutory authority; and, where the requirement as to hearing was satisfied, the sole remaining question would be whether the Commission in arriving at its determination departed from the applicable rules of law and whether its finding had a basis in substantial evidence or was arbitrary and capricious. P. 184.
8. In this case, the determination of the Commission that complainant was not an "interurban" electric line finds support in evidence before the Commission, and was not arbitrary or capricious; nor did it depart from applicable principles of law. P. 185.

95 F. 2d 911, reversed.

CERTIORARI, 304 U. S. 556, to review the affirmance of a decree permanently enjoining a United States Attorney from instituting prosecutions under the Railway Labor Act. The Interstate Commerce Commission intervened as a party defendant. For the opinion of the Commission, see 214 I. C. C. 707.

Solicitor General Jackson, with whom *Assistant Attorney General Arnold,* and *Messrs. Hugh B. Cox, Robert L. Stern,* and *Daniel W. Knowlton* were on the brief, for petitioners.

Messrs. J. A. Howell and *Robert E. Quirk* for the respondents. *Messrs. J. H. DeVine* and *Neil R. Olmstead* were with *Mr. Howell* on the brief.

By leave of Court, briefs of *amici curiae* were filed by *Mr. Wm. D. Whitney* on behalf of the Hudson & Man-

hattan Railroad Co., and by *Messrs. Robert E. Quirk* and *Claude D. Cass* on behalf of the American Transit Assn., in support of the respondent.

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

This case presents the questions of the effect of a determination by the Interstate Commerce Commission, for the purposes of the Railway Labor Act, that the respondent is not an interurban electric railway, and of the scope of judicial review of that determination.

The Railway Labor Act, which applies to railroads engaged in interstate commerce, excepts any "interurban" electric railway unless it is operating as a part of a general steam-railroad system of transportation.[1] The Interstate Commerce Commission is "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 exception. At the request of the Mediation Board, the Interstate Commerce Commission after hearing determined that the lines of respondent, the Utah Idaho Central Railroad Company, do not constitute an interurban electric railway. 214 I. C. C. 707. The Mediation Board ordered respondent to post the formal notice prescribed by § 2, Eighth, of the Railway Labor Act.[2] Respondent did not comply. Failure to publish the notice subjects "the carrier, officer or agent offending" to criminal penalties.[3] Respondent, insisting that its line is an interurban electric railway and thus excepted from the Railway Labor Act, and alleging the invalidity of the Act, brought this suit against the United States Attorney for the District of

[1] 48 Stat. 1185; 45 U. S. C. 151

[2] 45 U. S. C. 152, Eighth.

[3] 45 U. S. C. 152, Tenth.

Utah to restrain him from prosecuting any proceeding based upon an alleged violation of the Act.

The District Court took jurisdiction, permitted respondent to try the question *de novo,* decided that respondent was an interurban electric railway, and granted a permanent injunction. The Circuit Court of Appeals affirmed. 95 F. 2d 911. We granted certiorari.

As respondent, however characterized, is engaged in interstate transportation, the question whether it should be subjected to the requirements of the Railway Labor Act relating to the adjustment of labor disputes, was one for the decision of Congress. These requirements were prescribed in the exercise by Congress of its constitutional control over interstate commerce. *Texas & New Orleans R. Co.* v. *Railway Clerks,* 281 U. S. 548; *Virginian Railway Co.* v. *System Federation No. 40,* 300 U. S. 515. As Congress was free to establish the categories which should be excepted, Congress could bring to its aid an administrative agency to determine the question of fact whether a particular railroad fell within the exception, and Congress could make that factual determination, after hearing and upon evidence, conclusive. *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 51. For that purpose Congress could create a new administrative agency or use one already existing. And as the questions of fact involved would relate to methods of railroad transportation, and thus to a field in which the Interstate Commerce Commission had peculiar expertness, Congress could fittingly commit the determination to that body.

Congress did not define the term "interurban." Despite the desirability of such a definition [4] and the diffi-

[4] Annual Reports of Interstate Commerce Commission, 1921, p. 21; 1923, p. 70; 1924, p. 78; 1925, p. 72; 1928, p. 83; 1929, p. 80; to which reference is made in *United States* v. *Chicago North Shore & M. R. Co.,* 288 U. S. 1, 11, 12.

culties occasioned by its absence, the term is not so destitute of meaning that it can be denied effect as a valid description. Respondent, standing upon the exception, necessarily treats it as valid and hence as susceptible of application. That view presupposes that the term "interurban" denotes distinguishing factual characteristics which on appropriate inquiry may be ascertained. We have so treated the term in other relations. *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Comm'n,* 286 U. S. 299; *United States* v. *Chicago North Shore & M. R. Co.,* 288 U. S. 1. The conferring of authority upon the Interstate Commerce Commission to determine whether a particular electric railway is an interurban one cannot be regarded as an unconstitutional delegation of power. See *United States* v. *Chicago North Shore & M. R. Co., supra,* at pp. 13, 14.

In the instant case, the Interstate Commerce Commission has made the determination contemplated by the statute and we are not concerned with the questions which might arise in its absence. The Commission's determination was one of fact. *Shannahan* v. *United States,* 303 U. S. 596, 599. What effect shall be ascribed to it? The argument is pressed that the determination is at best persuasive and not in any wise binding upon the courts. It is urged that the Commission was restricted to determining whether respondent was operated as a part of a general steam-railroad system of transportation, which concededly it was not; that the determination of the Commission was not an "order"; that Congress has not manifested an intention that the determination should be binding in judicial proceedings and that in the nature of things it could not be made binding in criminal prosecutions.

We are unable to agree with the view expressed in the court below that the Commission was confined to determining whether respondent was operated as a part of a

general steam-railroad system of transportation. Before reaching that point—as to which there was no question—the Commission had to determine whether respondent was an "interurban" line. That has been the administrative construction of the statutory provision [5] and we see no reason to doubt its correctness.

In considering the effect of the Commission's determination, the fundamental question is the intent of Congress. The language of the provision points to definitive action. The Commission is to *"determine."* The Commission must determine *"after hearing."* The requirement of a "hearing" has obvious reference "to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts." The "hearing" is "the hearing of evidence and argument." *Morgan* v. *United States,* 298 U. S. 468, 480. And the manifest purpose in requiring a hearing is to comply with the requirements of due process upon which the parties affected by the determination of an administrative body are entitled to insist. *Interstate Commerce Comm'n* v. *Louisville & Nashville R. Co.,* 227 U. S. 88, 91. The Commission is not only authorized but "directed" to give the hearing and make the determination when requested. We cannot think that a determination so prescribed and safeguarded was intended to have no legal effect. On the contrary, in view of the nature and purpose of the proceeding, we must regard the determination as binding on both the carrier and the Mediation Board. The latter having obtained the determination could not ignore it; neither could the carrier.

We have held that the determination of the Commission is not an *"order"* reviewable under the Urgent De-

[5] See Texas Electric Railway, 208 I. C. C. 193; Chicago South Shore & South Bend Railroad, 214 I. C. C. 167; Utah Idaho Central Railroad Co., 214 I. C. C. 707.

ficiencies Act of October 22, 1913.[6] *Shannahan* v. *United States, supra.* But we have not held that the determination of the Commission was not subject to judicial review by other procedure, a question which, as we said in the *Shannahan* case, we had no occasion there to consider. *Id.,* at p. 603. The nature of the determination points to the propriety of judicial review. For, while the determination is made by the Interstate Commerce Commission for the purposes of the Railway Labor Act and not for further proceedings by the Commission itself, it is none the less a part of a regulatory scheme. It has the effect, if validly made, of subjecting the respondent to the requirements of the Railway Labor Act, which was enacted to regulate the activities of transportation companies engaged in interstate commerce.[7] The Mediation Board has ordered the posting of the prescribed notice that disputes between the carrier and its employees will be handled under the Railway Labor Act. Disobedience is immediately punishable and it is made the duty of the United States Attorney to institute proceedings against violators. Respondent has invoked the equity jurisdiction to restrain such prosecution and the Government does not challenge the propriety of that procedure. Equity jurisdiction may be invoked when it is essential to the protection of the rights asserted, even though the complainant seeks to enjoin the bringing of criminal actions. *Philadelphia Company* v. *Stimson,* 223 U. S. 605, 621, 622; *Truax* v. *Raich,* 239 U. S. 33, 37, 38; *Terrace* v. *Thompson,* 263 U. S. 197, 214. To support its contention that equitable relief is appropriate, respondent points to the peculiar difficulties which confront it

[6] 38 Stat. 208, 219, 220; 28 U. S. C. 41, 46, 47.

[7] Compare *Great Northern Ry. Co.* v. *United States,* 277 U. S. 172, 180; *Butte, Anaconda & Pacific Ry. Co.* v. *United States,* 290 U. S. 127.

under the congressional legislation. Congress has enacted two sets of statutes which involve the application of the same criterion. If respondent is subject to the Railway Labor Act, it is excluded from the application of the National Labor Relations Act; [8] otherwise not. The Railroad Retirement Act of 1937 [9] has a like proviso excepting interurban electric railways and authorizing the Interstate Commerce Commission to determine whether a particular electric railway falls within the exception. A similar provision is found in the Carriers Taxing Act of 1937 [10] and in the Railroad Unemployment Insurance Act of 1938.[11] In these circumstances we think respondent was entitled to resort to equity in order to obtain a judicial review of the questions of the validity and effect of the Commission's determination purporting to fix its status.

What is the scope of the judicial review to which respondent is entitled? As Congress had constitutional authority to enact the requirements of the Railway Labor Act looking to the settlement of industrial disputes between carriers engaged in interstate commerce and their employees,[12] and could include or except interurban carriers as it saw fit, no constitutional question is presented calling for the application of our decisions [13] with respect

[8] 49 Stat. 449, § 2 (2).

[9] 50 Stat. 307.

[10] 50 Stat. 435.

[11] 52 Stat. 1094. See, also, the provision of § 9 (a) of the Carriers Taxing Act of 1937, 50 Stat. 439, with respect to the application of the term "employment" as defined in Title VIII of the Social Security Act, § 811 (b).

[12] *Texas & New Orleans R. Co.* v. *Railway Clerks,* 281 U. S. 548; *Virginian Railway Co.* v. *System Federation No. 40,* 300 U. S. 515.

[13] *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287, 289; *Prendergast* v. *New York Telephone Co.,* 262 U. S. 43, 50; *Bluefield Water Works Co.* v. *Public Service Comm'n,* 262 U. S. 679, 689; *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, 443, 444; *Phillips*

to a trial *de novo* so far as the character of the respondent is concerned. With respect to that question, unlike the case presented in *United States* v. *Idaho,* 298 U. S. 105, where the Interstate Commerce Commission was denied the authority to determine the character of the trackage in question (*Id.,* p. 107), the Commission in this instance was expressly directed to make the determination. As this authority was validly conferred upon the Commission,[14] the question on judicial review would be simply whether the Commission had acted within its authority. *Interstate Commerce Comm'n* v. *Union Pacific R. Co.,* 222 U. S. 541, 547; *Interstate Commerce Comm'n* v. *Louisville & Nashville R. Co.,* 227 U. S. 88, 91; *Virginian Railway Co.* v. *United States,* 272 U. S. 658, 663; *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, 444; *Florida* v. *United States,* 292 U. S. 1, 12; *St. Joseph Stock Yards Co.* v. *United States, supra.*

The condition which Congress imposed was that the Commission should make its determination after hearing. There is no question that the Commission did give a hearing. Respondent appeared and the evidence which it offered was received and considered. The sole remaining question would be whether the Commission in arriving at its determination departed from the applicable rules of law and whether its finding had a basis in substantial evidence or was arbitrary and capricious. *Id.* That question must be determined upon the evidence produced before the Commission.

Taking that position, petitioners unsuccessfully objected in the District Court to the admission of new evidence. But that evidence was substantially the same

---

v. *Commissioner,* 283 U. S. 589, 600; *Crowell* v. *Benson,* 285 U. S. 22, 60; *State Corporation Comm'n* v. *Wichita Gas Co.,* 290 U. S. 561, 569.

[14] See *United States* v. *Chicago North Shore & M. R. Co.,* 288 U. S. 1, 13, 14.

as that produced before the Commission, which was also received. The facts carefully analyzed by the Commission (214 I. C. C. pp. 709–711) are virtually undisputed. Respondent's railway extends from Ogden, Utah, north to Preston, Idaho, a distance of 94.63 miles and has two branch lines of about 7 and 14 miles respectively. About 81.8 per cent. of the line is located on privately owned right-of-way and the remaining 18.2 per cent. on public streets or highways, these being chiefly in fifteen cities and towns. The Government concedes the point stressed by respondent that its line has many of the physical characteristics of an interurban railroad. Thus its tracks on the whole are of lighter weight, its grades slightly steeper, its curves sharper, its stations and sidetracks more frequent, its motive power of less capacity, its sidetracks shorter than is customary on trunk lines, and its passenger business is conducted in the same manner as that of any interurban electric railway. The passenger business, however, yields but a minor part (about 18.1 per cent.) of the total revenues. During the five years from 1930 to 1934, inclusive, the freight revenues amounted to $2,021,724.57 and the revenues from passengers, mail and express were $448,941.62. The railway is predominantly a carrier of freight. The freight traffic consists to a large extent of raw products such as sugar beets, milk, tomatoes and peas moving to factories, canneries or processing plants, and of the manufactured products moving outbound from the plants to connecting railroads. A considerable part of the movement of the raw products requires special service with one-car or two-car trains. A daily package-merchandise train is maintained, with facilities for refrigeration in summer and heating in winter and with pick-up and delivery service at all available points. In 1934 the freight trains averaged 6.2 cars each. In the last half of that year the

carrier handled 6,354 carloads of freight of which 2,226 were local and 4,017 were interchanged with other carriers. The traffic originating on its line moved to points in 31 States and that delivered by it was from points in 26 States. Respondent is a party to practically all the tariffs publishing through rates to or from this territory and its interchange traffic generally moves on joint rates. It does not perform intermediate service between other lines. Practically all the interchange traffic is handled in standard equipment furnished by connecting railroads.

It cannot be said upon this evidence, and the related facts summarized in the Commission's report, that the Commission's determination lacked support or was arbitrary or capricious. Nor is there ground for holding that the Commission in reaching its determination departed from applicable principles of law. There is no principle of law which required such a carrier to be classified as an interurban railway. Failing in its effort to obtain a clarifying definition from Congress, the Commission performed its duty in weighing the evidence and reaching its conclusion in the light of the dominant characteristics of respondent's operations which were fairly comparable to those of standard steam railroads. Compare *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Comm'n, supra,* pp. 308–310; *United States* v. *Chicago North Shore & M. R. Co., supra,* p. 10.

We conclude that the District Court erred in permitting a trial *de novo* of that issue and that the determination of the Commission was within its authority validly exercised. The decree of the Circuit Court of Appeals is reversed and the cause is remanded to the District Court with direction to dismiss the bill of complaint.

Reversed.

MR. JUSTICE BLACK concurs in the result.

LYETH *v.* HOEY, COLLECTOR OF INTERNAL REVENUE.

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

No. 48. Argued November 16, 1938.—Decided December 5, 1938.

1. Property received by an heir under an agreement compromising and settling his contest of the decedent's will, is property acquired by "inheritance," within the meaning of § 22 (b) (3) of the Revenue Act of 1932, which exempts the value of such property from the income tax. P. 191.
2. This question is not determined by the local law, but is a federal question, in deciding which the language of the Revenue Law should be so construed as to give uniform application to a nation-wide scheme of taxation. P. 193.

   Congress establishes its own criteria and the state law may control only when the federal taxing Act by express language or necessary implication makes its operation dependent upon state law.
3. The claimant in this case was concededly an heir contesting the will. The decree of probate admitting the will also required that the estate be distributed in accordance with the compromise agreement. In so far as it provided for distribution to heirs the agreement overrode the will. The portion so obtained by the claimant came not through the will, but because of his heirship. The fact that he received less than the amount of his claim did not alter its nature or the quality of its recognition through the distribution which he did receive. What he got from the estate came to him because he was heir, the compromise serving to remove *pro tanto* the impediment to his inheritance. P. 195.

96 F. 2d 141, reversed; 20 F. Supp. 619, affirmed.

CERTIORARI, 304 U. S. 557, to review the reversal of a judgment recovered from the respondent tax collector for money collected by him from the petitioner as an income tax.

Mr. J. M. Richardson Lyeth, with whom *Messrs. Will R. Gregg* and *Allin H. Pierce* were on the brief, for petitioner.

Assistant Attorney General Morris, with whom *Solicitor General Jackson,* and *Mr. Sewall Key, Mr. J. Louis Monarch,* and *Helen R. Carloss* were on the brief, for respondent.

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

The question presented is whether property received by petitioner from the estate of a decedent in compromise of his claim as an heir is taxable as income under the Revenue Act of 1932.

Petitioner is a grandson of Mary B. Longyear who died in 1931, a resident of Massachusetts, leaving as her heirs four surviving children and the petitioner and his brother, who were sons of a deceased daughter. By her will, the decedent gave to her heirs certain small legacies and the entire residuary estate, amounting to more than $3,000,000, was bequeathed to trustees of a so-called Endowment Trust, created April 5, 1926, the income from which was payable to another set of trustees under another trust described as the Longyear Foundation. The main purpose of the latter trust was to preserve "the records of the earthly life of Mary Baker Eddy," the founder of the Christian Science religion.

When the will was offered for probate in Massachusetts there was objection by the heirs upon the grounds, among others, of lack of testamentary capacity and undue influence. After hearing, at which a statement was made by the respective parties of their proposed evidence, the probate court granted a motion for the framing of issues for trial before a jury. In that situation a compromise agreement was entered into between the heirs, the legatees, the devisees and the executors under the will, and the Attorney General of Massachusetts. This agreement provided that the will should be admitted to probate and letters testamentary issued; that the specific and

pecuniary bequests to individuals should be enforced; that the bequest of the residuary estate to the Endowment Trust should be disregarded; that $200,000 should be paid to the heirs and a like amount to the Endowment Trust, and that the net residue of the estate, as defined, should be equally divided between the trustees of the Endowment Trust and the heirs. The net residue to which the heirs were thus entitled was to be payable in units of stock owned by the decedent in certain corporations, Longyear Estate, Inc., Longyear Corporation and Longyear Realty Corporation, and for that purpose a unit was to consist of three shares, one share of each corporation.

The compromise was approved by the probate court pursuant to a statute of Massachusetts (Mass. Gen. Laws 1932, c. 204, §§ 15–17) and a decree was entered on April 26, 1932, admitting the will to probate, issuing letters testamentary to the executors and directing them "to administer the estate of said deceased in accordance with the terms of said will and said agreement of compromise." Owing to the Depression and the necessity of discharging pecuniary legacies amounting to about $300,000, which were entitled to priority in payment before distribution of the residue, the heirs undertook to finance one-half of these legacies and the residuary legatees the other one-half. For this purpose the heirs formed a corporation known as Longyear Heirs, Inc., to which they assigned their interests in the estate in exchange for common stock. Preferred stock was issued to the pecuniary legatees.

In July, 1933, the executors distributed to Longyear Heirs, Inc., as assignee of the petitioner, his distributable share of the estate consisting of $80.17 in cash and a certificate of deposit for 358 units, each unit representing one share of each of the three corporations mentioned in the compromise agreement. The Commissioner of Internal Revenue valued this distributable share at $141,484.03

and treated the whole amount as income for the year 1933 in which it was received. An additional tax of $56,389.65 was assessed, which petitioner paid in October, 1936, with interest. Claim for refund was then filed and on its rejection this suit was brought against the collector.

On motion of petitioner the District Court entered a summary judgment in his favor, 20 F. Supp. 619, which the Circuit Court of Appeals reversed. 96 F. 2d 141. Because of a conflict with the decision of the Circuit Court of Appeals of the Fourth Circuit in *Magruder* v. *Segebade,* 94 F. 2d 177, certiorari was granted.

The Court of Appeals overruled the contentions of petitioner that the property he received was within the statutory exemption (§ 22 (b) (3) of the Revenue Act of 1932) and, further, that the property was not income either under the statute or under the Sixteenth Amendment of the Federal Constitution. As the view of the Court of Appeals upon these questions determined the rights of the parties, it was found unnecessary to discuss certain affirmative defenses set up by the answer of the respondent and these defenses are not pressed in this court.

First. By § 22 (b) (3) of the Revenue Act of 1932, there is exempted from the income tax—

"The value of property acquired by gift, bequest, devise, or inheritance. . . ."

Whether property received by an heir from the estate of his ancestor is acquired by inheritance, when it is distributed under an agreement settling a contest by the heir of the validity of the decedent's will, is a question upon which state courts have differed. The question has arisen in the application of state laws of taxation. In Massachusetts, the rule is that when a will is admitted to probate under a compromise agreement, the state succession tax is applied to the property "that passes by the terms of the will as written and not as changed by

any agreement for compromise." *Baxter* v. *Treasurer,* 209 Mass. 459, 463; 95 N. E. 854, 856. Although under the Massachusetts statute relating to compromise [1] it is the practice to insert a clause in the court's decree that the estate is to be administered in accordance with the agreement, "yet the rights of the parties so far as they rest upon the agreement are contractual and not testamentary." *Ellis* v. *Hunt,* 228 Mass. 39, 43; 116 N. E. 956. See, also, *Brandeis* v. *Atkins,* 204 Mass. 471, 474; 90 N. E. 861; *Copeland* v. *Wheelwright,* 230 Mass. 131, 136; 119 N. E. 667. Thus, when a contest was withdrawn under a compromise and the residuary estate was divided equally between the legatee and the heirs, it was held that the tax was properly levied upon the entire residuary legacy and that the administrators with the will annexed had no right to pay out of the share transferred to the heirs one-half of the tax thus collectible from the legatee unless the compromise agreement expressly or impliedly so provided. *Brown* v. *McLoughlin,* 287 Mass. 15, 17; 190 N. E. 795. Several States have a similar rule.[2] In other States the amount received by an heir under an agreement compromising a contest of his ancestor's will is considered to be received by virtue of his heirship and is subject to an inheritance tax unless the statute exempts him.[3]

---

[1] Massachusetts General Laws 1932, Chap. 204, §§ 13–18.

[2] See *Matter of Cook,* 187 N. Y. 253; 79 N. E. 991; *English* v. *Crenshaw,* 120 Tenn. 531; 110 S. W. 210; *Estate of Wells,* 142 Iowa 255; 120 N. W. 713; *Estate of Graves,* 242 Ill. 212; 89 N. E. 978; *Estate of Rossi,* 169 Cal. 148; 146 P. 430; *Cochran's Executor* v. *Commonwealth,* 241 Ky. 656; 44 S. W. 2d 603; *MacKenzie* v. *Wright,* 31 Ariz. 272; 252 P. 521; *In re O'Neill,* 111 N. J. Eq. 378; 162 A. 425; *Lynchburg Bank* v. *Commonwealth,* 162 Va. 73; 173 S. E. 548.

[3] See *Pepper's Estate,* 159 Pa. 508; 28 A. 353; *Taber's Estate,* 257 Pa. 81; 101 A. 311; *Taylor* v. *Georgia,* 40 Ga. App. 295; 149 S. E. 321; *People* v. *Rice,* 40 Colo. 508; 91 P. 33; *State ex rel. Hilton* v. *Probate Court,* 143 Minn. 77; 172 N. W. 902; *Estate of Thorson,*

In the instant case, the Court of Appeals applied the Massachusetts rule, holding that whether the property was received by way of inheritance depended "upon the law of the jurisdiction under which this taxpayer received it." We think that this ruling was erroneous. The question as to the construction of the exemption in the federal statute is not determined by local law. We are not concerned with the peculiarities and special incidences of state taxes or with the policies they reflect. Undoubtedly the state law determines what persons are qualified to inherit property within the jurisdiction. *Mager* v. *Grima,* 8 How. 490, 493; *Maxwell* v. *Bugbee,* 250 U. S. 525, 536, 537. The local law determines the right to make a testamentary disposition of such property and the conditions essential to the validity of wills, and the state courts settle their construction. *Uterhart* v. *United States,* 240 U. S. 598, 603. The State establishes the procedure governing the probate of wills and the processes of administration. Petitioner's status as heir was thus determined by the law of Massachusetts. That law also regulated the procedure by which his rights as an heir could be vindicated. The state law authorized its courts to supervise the making of agreements compromising contests by heirs of the validity of an alleged will of their ancestor, in order that such compromises shall be just and reasonable with respect to all persons in interest.[4] But when the contestant is an heir and a valid compromise agreement has been made and there is a distribution to the heir from the decedent's estate accordingly, the question whether what the heir has thus received has been "acquired by inheritance" within the meaning of the federal statute necessarily is a federal question. It is not determined by local characterization.

150 Minn. 464; 185 N. W. 508. Compare *Barber* v. *Westcott,* 21 R. I. 355; 43 A. 844.

[4] See Note 1. Such agreements are "entirely valid outside of the statute." *Ellis* v. *Hunt,* 228 Mass. 39, 44; 116 N. E. 956.

In dealing with the meaning and application of an act of Congress enacted in the exercise of its plenary power under the Constitution to tax income and to grant exemptions from that tax, it is the will of Congress which controls, and the expression of its will, in the absence of language evidencing a different purpose, should be interpreted "so as to give a uniform application to a nationwide scheme of taxation." *Burnet* v. *Harmel,* 287 U. S. 103, 110. Congress establishes its own criteria and the state law may control only when the federal taxing act by express language or necessary implication makes its operation dependent upon state law. *Burnet* v. *Harmel, supra.* See *Burk-Waggoner Oil Assn.* v. *Hopkins,* 269 U. S. 110, 111, 114; *Weiss* v. *Wiener,* 279 U. S. 333, 337; *Morrissey* v. *Commissioner,* 296 U. S. 344, 356. Compare *Crooks* v. *Harrelson,* 282 U. S. 55, 59; *Poe* v. *Seaborn,* 282 U. S. 101, 109, 110; *Blair* v. *Commissioner,* 300 U. S. 5, 9, 10. There is no such expression or necessary implication in this instance. Whether what an heir receives from the estate of his ancestor through the compromise of his contest of his ancestor's will should be regarded as within the exemption from the federal tax should not be decided in one way in the case of an heir in Pennsylvania or Minnesota and in another way in the case of an heir in Massachusetts or New York,[5] according to the differing views of the state courts. We think that it was the intention of Congress in establishing this exemption to provide a uniform rule.

Second. In exempting from the income tax the value of property acquired by "bequest, devise, or inheritance," Congress used comprehensive terms embracing all acquisitions in the devolution of a decedent's estate. For the word "descent," as used in the earlier acts,[6] Congress sub-

[5] See Notes 2 and 3.

[6] See Act of October 3, 1913, c. 16, § II, 38 Stat. 167; Revenue Acts of 1918, 1921 and 1924, § 213 (b) (3).

stituted the word "inheritance" in the 1926 Act and the subsequent revenue acts as "more appropriately including both real and personal property." [7] Thus the acquisition by succession to a decedent's estate whether real or personal was embraced in the exemption. Further, by the "estate tax," Congress has imposed a tax upon the transfer of the entire net estate of every person dying after September 8, 1916,[8] allowing such exemptions as it sees fit in arriving at the net estate. Congress has not indicated any intention to tax again the value of the property which legatees, devisees or heirs receive from the decedent's estate.

Petitioner was concededly an heir of his grandmother under the Massachusetts statute. It was by virtue of that heirship that he opposed probate of her alleged will which constituted an obstacle to the enforcement of his right. Save as heir he had no standing. Seeking to remove that obstacle, he asserted that the will was invalid because of want of testamentary capacity and undue influence. In accordance with local practice, he asked the probate court to frame these issues for a jury trial. It then became necessary for him to satisfy the court that the issues were substantial. Issues are not to be framed unless it appears from statements by counsel of expected evidence or otherwise that there is a "genuine question of fact supported by evidence of such a substantial nature as to afford ground for reasonable expectation of a result favorable to the party requesting the framing of issues." *Briggs* v. *Weston,* — Mass. —; 2 N. E. 2d 466; *Smith* v. *Patterson,* 286 Mass. 356; 190 N. E. 536. Petitioner satisfied that condition and the probate court directed the framing of jury issues. It was in that situation, facing a trial of the issue of the validity of the will, that the

[7] Revenue Act of 1926, § 213 (b) (3); Acts of 1928 and 1932, § 22 (b) (3). Sen. Rep. No. 52, 69th Cong., 1st Sess., p. 20.

[8] Act of September 8, 1916, c. 463, Title II, 39 Stat. 777.

compromise was made by which the heirs, including the petitioner, were to receive certain portions of the decedent's estate.

There is no question that petitioner obtained that portion, upon the value of which he is sought to be taxed, because of his standing as an heir and of his claim in that capacity. It does not seem to be questioned that if the contest had been fought to a finish and petitioner had succeeded, the property which he would have received would have been exempt under the federal act. Nor is it questioned that if in any appropriate proceeding, instituted by him as heir, he had recovered judgment for a part of the estate, that part would have been acquired by inheritance within the meaning of the act. We think that the distinction sought to be made between acquisition through such a judgment and acquisition by a compromise agreement in lieu of such a judgment is too formal to be sound, as it disregards the substance of the statutory exemption. It does so, because it disregards the heirship which underlay the compromise, the status which commanded that agreement and was recognized by it. While the will was admitted to probate, the decree also required the distribution of the estate in accordance with the compromise and, so far as the latter provided for distribution to the heirs, it overrode the will. So far as the will became effective under the agreement it was because of the heirs' consent and release and in consideration of the distribution they received by reason of their being heirs. Respondent agrees that the word "inheritance" as used in the federal statute is not solely applicable to cases of complete intestacy. The portion of the decedent's property which petitioner obtained under the compromise did not come to him through the testator's will. That portion he obtained because of his heirship and to that extent he took in spite of the will and as in case of intestacy. The fact that petitioner received less than

the amount of his claim did not alter its nature or the quality of its recognition through the distribution which he did receive.

We are not convinced by the argument that petitioner had but "the expectations" of an heir and realized on a "bargaining position." He was heir in fact. Whether he would receive any property in that capacity depended upon the validity of his ancestor's will and the extent to which it would dispose of his ancestor's estate. When, by compromise and the decree enforcing it, that disposition was limited, what he got from the estate came to him because he was heir, the compromise serving to remove *pro tanto* the impediment to his inheritance. We are of the opinion that the exemption applies.

In this view we find it unnecessary to consider the other questions that have been discussed at the bar.

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

Reversed.

CONSOLIDATED EDISON CO. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL.*

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

No. 19. Argued October 14, 17, 1938.—Decided December 5, 1938.

1. The power of the Federal Government, and the provisions of the National Labor Relations Act, extend to the labor relations of public utilities engaged in supplying electrical energy, gas and steam, where the business and activities of the utilities are wholly within a State, and where the quantum of service rendered to customers for strictly intrastate uses is vast and greatly preponderant, but where, nevertheless, a part of that service, of much importance in itself, is to railroads, steamships, telegraphs,

*Together with No. 25, *International Brotherhood of Electrical Workers et al.* v. *National Labor Relations Board et al.*, also on writ of certiorari to the Circuit Court of Appeals for the Second Circuit.

telephones, etc., engaged in interstate or foreign commerce, and where that commerce would be seriously affected if such service were cut off by industrial strife between the utilities and their employees resulting from unfair labor practices. P. 219.

Petitioners, an integrated system of public utilities, are engaged in supplying electric energy, gas and steam (and certain by-products) within New York City and adjacent Westchester County. They serve over 3,500,000 customers with electricity and gas, largely for residential and domestic purposes. In 1936 they supplied about 97.5 per cent. of the total electric energy sold in the City and about 100 per cent. of that sold in the County. They do not sell for resale without the State. They have about 42,000 employees, their total payrolls in 1936, with retirement annuities and separation allowances, amounting to nearly $82,000,000. There is also impressive evidence of the dependence of interstate and foreign commerce upon the continuity of the service of the petitioning companies. Upon that service depend: three railroad companies for the lighting and operation of passenger and freight terminals, and for the movement of interstate trains; the Port of New York Authority for the operation of its terminal and a tunnel between New York and New Jersey; a majority of the piers of transatlantic and coastwise steamship companies along the North and East Rivers, within the City of New York, for lighting, freight handling and related uses; two telegraph companies and a telephone company for power for transmitting and receiving messages, local and interstate; also a transatlantic radio service; an airport; and the Federal Government, for operation of lighthouses, beacons and harbor lights, and for light, heat and power in various federal buildings in New York City. In passing upon the status of these petitioners with respect to the federal power of regulation, the Court does not consider supplies of oil, coal, etc., although very large, which come from without the State and are consumed in the generation and distribution of electric energy and gas.

2. The criterion of the federal constitutional power to suppress unfair labor practices, under the National Labor Relations Act, is the injurious effect upon interstate and foreign commerce, rather than the source of the injury. P. 222.

3. Whether or not particular action in the conduct of intrastate enterprises affects interstate or foreign commerce in such a close and intimate fashion as to be subject to federal control, depends upon the particular case. P. 222.

4. The fact that a State has the power, and has enacted a statute, to regulate the labor relations of intrastate enterprises in order

to prevent interruption of their services through industrial disputes can not affect the constitutional power of the Federal Government to regulate those relations, in order to protect interstate and foreign commerce from the injury due to such interruption. P. 222.

5. But where, in such cases, the authority of the National Labor Relations Board is invoked to protect interstate and foreign commerce from interference or injury arising from the employers' intrastate activities, the question whether the alleged unfair labor practices do actually threaten interstate or foreign commerce in a substantial manner is necessarily presented. And in determining that factual question regard should be had to all the existing circumstances, including the bearing and effect of any protective action to the same end already taken under state authority. The justification for the exercise of federal power should clearly appear. But the question in such a case would relate not to the existence of the federal power but to the propriety of its exercise on a given state of facts. P. 223.

   The present proceeding was begun before the New York Labor Relations Act became effective, and there was no exertion of state authority which could be taken to remove the need for the exertion of federal authority to protect interstate and foreign commerce. The exercise of the federal power to protect interstate and foreign commerce from injury does not depend upon a clash with state action and need not await the exercise of state authority.

6. Amendments to the complaint in a proceeding before the National Labor Relations Board,—*held* discretionary rulings affording no ground for challenging the validity of the hearing. P. 224.
7. A refusal by the National Labor Relations Board to permit the respondent employers to adduce certain additional testimony, highly important, which could have been received without undue delay,—*held* unreasonable and arbitrary. P. 225.
8. Where the National Labor Relations Board, in abuse of its discretion, refuses to receive important additional testimony which could have been received without undue delay of the proceeding, the injured party has his remedy by application to the Circuit Court of Appeals, upon review of the order, for leave to adduce the additional evidence, under § 10 (e) (f) of the Act. P. 226.
9. After the taking of the evidence by a trial examiner, in a case under the National Labor Relations Act, the employers filed a brief with him. Several weeks later the case was transferred to the Board. The examiner made no tentative report or findings,

and there was no opportunity for a hearing before the Board itself before the Board made its decision. *Held:*

(1) That it must be assumed that the Board received and considered the brief. P. 226.

(2) Under the rules of the Board, the employers desiring an oral hearing should have requested it, after the transfer to the Board. P. 228.

(3) Though it can not be said on this record that the Board did not consider the evidence or the petitioner's brief or failed to make its own findings in the light of that evidence and argument, it would have been better practice for the Board to have directed the examiner to make a tentative report with an opportunity for exceptions and argument thereon. P. 228.

10. In providing that "the findings of the Board as to the facts, if supported by evidence, shall be conclusive," the Act means supported by substantial evidence—such evidence as a reasonable mind might accept as adequate to support a conclusion. P. 229.

The statute provides that "the rules of evidence prevailing in courts of law and equity shall not be controlling." The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. But this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence.

11. The National Labor Relations Board is authorized to bar the resumption of an unfair labor practice which has lately been abandoned. P. 230.

The Court is satisfied from the evidence in this case that the order of the Board, in so far as it required employer companies to desist from certain discriminating and coercive practices, and to reinstate certain employees, with back pay, and to post notices assuring freedom from discrimination and coercion, rested upon findings sustained by the evidence and that the decree of the Court of Appeals enforcing the order in these respects should be affirmed.

12. In a proceeding in which the National Labor Relations Board found employer companies guilty of unfair labor practices violating § 8 (1) and (3) of the National Labor Relations Act, but exculpated them from alleged violation of § 8 (2), which makes it an

unfair labor practice "to dominate or interfere with the formation or administration of any labor organization or contribute financial support to it," the Board nevertheless attempted, in its order, to set aside agreements which had been made, pending the proceeding, between the companies and a Brotherhood of workers and its local unions, all independent organizations not under the companies' control. These agreements stipulated that the Brotherhood should be the collective bargaining agency of those of the companies' employees who were its members (comprising 80% of all the companies' employees out of 38,000 eligible for membership), and that the Brotherhood and its members would not intimidate or coerce employees into membership in the Brotherhood or solicit membership on the time or property of the employers. They also provided against strikes or lockouts and for the adjustment and arbitration of labor disputes, thus insuring against the disruption of the service of the companies to interstate or foreign commerce through an outbreak of industrial strife. It was conceded that the contracts were fair to both employer and employee. *Held* that so much of the Board's order, as forbade the companies to give effect to such agreements, was beyond its authority. Pp. 231, 238.

(1) The Brotherhood and its locals having valuable and beneficial interests in the contracts were entitled to notice and hearing before they could be set aside. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines,* 303 U. S. 261, distinguished. P. 232.

(2) Notice of the complaint, in which the legality of the companies' "relations" with the Brotherhood was attacked, but not the validity of the contracts, did not place the unions under a duty to intervene before the Board in order to safeguard their interests in the contracts. P. 234.

(3) The rule that due process does not require an opportunity to be heard before judgment if defenses may be presented upon appeal, assumes that the appellate review affords opportunity to present all available defenses including lack of proper notice to justify the judgment or order complained of. P. 234.

(4) The validity of the contracts was not necessarily in issue because of the charges of unfair labor practices in the Board's complaint; and amendment of the companies' answer, stating that the contracts had made the proceeding moot, did not put them in issue before the Board. P. 234.

(5) The Act gives no express authority to the Board to invalidate contracts with independent labor organizations. The authority

granted by § 10 (c) to require that an employer guilty of unfair labor practices desist from such practices, and "take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act," is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act. P. 235.

Here, there is no basis for a finding that the contracts with the Brotherhood and its locals were a consequence of the unfair labor practices found by the Board or that these contracts in themselves thwart any policy of the Act or that their cancellation would in any way make the order to cease the specified practices any more effective.

(6) The contracts were not invalid because made during the pendency of the Board's proceeding. P. 237.

The effect of such pendency extends to the practices of the employers to which the complaint was addressed. It did not suspend the right of the employees to self-organization or preclude the Brotherhood as an independent organization chosen by its members from making fair contracts on their behalf.

(7) The contention of the Board that the contracts were the fruit of the unfair labor practices of the employers,—"a device to consummate and perpetuate" the companies' illegal conduct, and constituted its culmination,—is rejected as entirely too broad and as not within the complaint and proof, but based on mere conjecture. P. 238.

(8) A provision of the Board's order requiring the companies to cease recognizing the Brotherhood "as the exclusive representative of their employees," is *construed* as merely providing that there shall be no interference with an exclusive bargaining agency if one other than the Brotherhood should be established in accordance with the provisions of the Act, and is *sustained* as merely an application of existing law. P. 239.

95 F. 2d 390, affirmed with modification.

CERTIORARI, 304 U. S. 555, to review a judgment enforcing an order of the National Labor Relations Board. See 4 N. L. R. B. 71. The case was before the court below upon a petition to set aside the order, brought by the Consolidated Edison Company of New York and its affiliates, and a like petition by the International Brother-

hood of Electrical Workers and its locals, which intervened in that court, and upon the Board's petition to enforce, supported by the United Electrical and Radio Workers of America which also intervened in that court.

Mr. William L. Ransom for petitioners in No. 19.

I. The Board has not shown that its assumption of jurisdiction was essential or appropriate, or that such jurisdiction has been or could be conferred upon the Board under existing constitutional provisions and concepts.

The petitioners' operations, relations and labor practices are exclusively and entirely intrastate. They are carried on wholly within a single State and traditionally subject to plenary jurisdiction of the State; they are appropriately regulated and supervised as local concerns affected with a local public interest. *Brush* v. *Commissioner,* 300 U. S. 352, 371; *Pacific Gas & Electric Co.* v. *Sacramento Municipal Utility Dist.,* 92 F. 2d 365, 369; 303 U. S. 620; *Southern Natural Gas Corp.* v. *Alabama,* 301 U. S. 148, 154; *Missouri* v. *Kansas Natural Gas Co.,* 265 U. S. 298.

Because of the extent and immediacy of the functional dependence of New York City and Westchester County and the millions of their inhabitants upon the petitioners' services, the local interest in petitioners' uninterrupted supply of their services is predominant and paramount. Petitioners' operations and labor relations are predominantly local rather than National because of the directness and immediacy of their relation to the health, safety, comfort, and convenience and general welfare of the people who reside and do business in the City and State of New York, and because of the dependence of that City and State thereon in exercising their police powers for the maintenance of order and public convenience and the protection of the safety and well-being of their inhabitants. Such National interest as may attend such local operations, relations and labor practices and relate to the

prevention or removal of burdens or obstructions to "commerce," is essentially subordinate and requires no separate identification so as to serve as a basis for federal regulation.

In view of this paramount local interest in petitioners' service and operations, and the all-inclusive measures in effect under the laws of the State of New York, including the New York State Labor Relations Act applicable to petitioners, who are subject fully to the laws of the State, the exercise of federal authority by the Board is not "essential or appropriate," but definitely contrary to the mandate of this Court. *Florida* v. *United States,* 282 U. S. 194, 211, 212; cf. *Pennsylvania* v. *Williams,* 294 U. S. 176; *Hopkins Savings Assn.* v. *Cleary,* 296 U. S. 315.

There has been no burdening or obstruction of commerce by any interruption of petitioners' services because of any labor controversy; there is no evidence that any such interruption is likely from such a cause, or that a labor controversy involving petitioner's employees would be less likely under the Board's jurisdiction, or would not be as effectively dealt with by the State Board, and there is no finding of any inadequacy of the state jurisdiction and regulation of the petitioners' labor practices.

The various rulings of this Court under the Act are not decisive or controlling here, because in those cases the employer was itself engaged actively in interstate commerce, and the employer's business was organized and conducted predominantly as an enterprise in interstate commerce, beyond full control in all aspects by a single State, and the employer was not, as here, a local operating public utility affected predominantly with a local public interest and already subject to plenary jurisdiction by the State and locality, including regulation as to its labor practices, and with a State Labor Relations Act and State Labor Relations Board in existence and functioning.

To uphold the jurisdiction asserted here by the Board would not only disregard the plain admonitions in the decision of *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 30; but also would require substantial modification of the ruling of this Court under the commerce clause, in *Florida* v. *United States*, 282 U. S. 194, 211, 212, and other recent decisions.

Jurisdiction was not conferred because some of the petitioners' supplies are acquired by others who bring them into the State of New York. The facts as to the origins of supplies used by petitioners show that gas-oil is delivered to only one of the petitioners; delivery is made by the seller, within the City of New York; delivery of coal to the storage yards and stations, all within that City or in Yonkers, is made by independent enterprisers; no employee of the petitioners is engaged in interstate transportation of any materials; some of the supplies other than coal and oil originate outside the State.

Purchases are made only from non-affiliated producers or dealers, and purchases extra-state are shipped only through instrumentalities of transportation which are owned and operated by independent carriers. All purchases are made by individual contracts covering the particular transaction. The source of supply may change, depending upon market conditions, or the needs of particular petitioners. Requirements of particular petitioners are supplied from storage; no employee of any petitioner is involved until the supplies have "come to rest" in storage, and only an insignificant number of employees is involved until the supplies are moved into consumption.

The record shows that the petitioners make all of their purchases for their own consumption exclusively. They buy nothing for resale in interstate markets or elsewhere; they sell their by-products entirely within the State of

New York and credit the proceeds against their production costs.

The controlling fact here, as in *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, 554, is that, although coal, oil and other materials originate outside the State, the use of such materials is essentially and only local and intra-state. The interstate transportation that precedes local manufacture and distribution can not be isolated to the exclusion of the local use for which the materials are intended. Since this use is local in its immediacy, it counteracts and outweighs the fact that the materials have an interstate origin; otherwise, every intrastate transaction which involved interstate transportation by others would come within federal control and thereby put an end to our federal system.

This Court has held that even where a utility company buys its supply of gas from interstate distribution (which these petitioners do not do as to gas, electricity, or steam), the state jurisdiction is nevertheless paramount with respect to the operations of the utility company. *Missouri* v. *Kansas Natural Gas Co.,* 265 U. S. 298, 309.

In the *Jones & Laughlin* decision and the others which have followed it, this Court has pointed out that the Act here is not to be construed and applied so as to destroy "the balance of the constitutional grants and limitations," and may not apply to wholly intra-state activities unless "their control is" essential or appropriate to protect commerce from direct burdens and obstructions.

The contentions at one time urged before this Court in behalf of the Board, to the effect that the record must show that there is a reasonable probability that the labor practices will cause strikes with an intent to interfere with commerce, and that if such strikes "do develop they will have a necessary effect of burdening and obstructing commerce," etc., are no longer urged. Emphasis is no

longer placed by the Board on the interstate structure and organization of an industry and the need for a regulation as broad in scope as the scale of the operations. The present position is that if the Board makes a finding that the "stoppage of . . . operations by industrial strife" in a particular enterprise would result in what the Board regards as a substantial interruption or interference with interstate commerce, even though it be commerce carried on wholly by others, the Board has jurisdiction. A few employees belonging to a minority labor organization can file a charge against a purely local employer; the Board need only to find that a strike and stoppage of operations by the employer would obstruct or interfere with commerce, and the Board has thereby given itself jurisdiction to hear and determine the charge. The Board here made a finding couched in the language of the statute "that the activities of the respondents . . . tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce." Cf. § 2 (7) of the Act. By a similar process, virtually any employer can be brought under the Board's jurisdiction at the Board's option.

The true test of jurisdiction is whether or not, in the absence of action by the National Board, the "unfair labor practices" under consideration are sufficiently likely, under the circumstances of the case, to result in a stoppage of operations of these petitioners, so as to establish a clear need and justification for the action of the National Board in taking jurisdiction of the petitioners with respect to those alleged practices, in order to protect the free flow of commerce.

The Board's position ignores altogether the absence of evidence and findings that *its own action* is necessary in order to prevent "industrial strife" and "stoppage of . . . operations," etc. There are no findings, nor evidence, here that any possible hazard of industrial strife

which might result in stoppage of operations would not be adequately and effectively dealt with by the State Board. Indeed, we challenge anyone to read this record open-mindedly and escape the conclusion that the intervention of the National Board not only was wholly unnecessary for preventing industrial strife and averting any stoppage of operations, but also that the intervention and action of the National Board, its abrogation of contracts providing for arbitration, etc., tended rather to foment strife and to interject a danger of stoppage where no such danger existed before.

The "findings" by the Congress in § 1 of the Act were not made in the light of, or with any consideration for, a case like the present one, which involves an all-inclusive State Labor Relations Act lawfully applicable to the employer and protective of the continuity of the petitioners' operations from the consequence of unfair labor practices in every respect as adequately and completely as could be under the National Act. No State Labor Relations Act had been enacted when the National Act became law. This Court warned, in the *Jones & Laughlin* case (page 30) against "superimposing" on the provisions of the Act "inferences from general legislative declarations of an ambiguous character," contained in § 1 of the Act.

It was a purpose of the Congress in enacting the National Act, to exemplify to the States a pattern of desirable state labor relations legislation which could be copied by them to govern the ever-expanding size and complexity of present-day intra-state industrial relations. Indeed, it is a matter of public record that the National Government urged just such exemplary action by the several States, in connection with the enactment of the National Act.

The state Act had become effective long before the Board's findings, decision and order. The availability of

the state forum was known to the Board at the time its hearings started; and the question of the necessity and justification for the National Board's action, notwithstanding the effect of the state Act, became vital long before the Board had taken any important final action.

II. The Board denied to petitioners the full and fair hearing and impartial determination which are prerequisites of judicial enforcement of its order.

Taken together and given cumulative effect, or even if each stands alone, the following incidents should be held to constitute *pro tanto* a withholding of due process of law:

(1) The arbitrary refusal and failure of the Board to give petitioners an opportunity to be heard directly by the Board itself, which rendered the Board's order *ultra vires*. § 10 (b) of the Act. *National Labor Relations Board* v. *Hopwood Retinning Co.*, 98 F. 2d 97, 101; *Interstate Commerce Comm'n* v. *Northern Pacific Ry. Co.*, 216 U. S. 538.

(2) The Board's *ex parte* directions that the Trial Examiner deny to the petitioners an opportunity to present their case, even to the extent of refusing to hear witnesses present in the hearing-room, was both a denial of due process of law and a non-compliance with jurisdictional prerequisites under § 10 (b) of the Act.

(3) A denial of adequate and fair hearing was inherent in the "transfer" of the case away from the Trial Examiner without findings and in the withholding of an opportunity to the petitioners to be heard before the Board which made the findings without hearing the evidence. *National Labor Relations Board* v. *Mackay Radio & Tel. Co.*, 304 U. S. 333, 350, distinguished.

(4) The Board's course of action in repeatedly amending its complaint in substantial respects, down to the last day of the hearings, and in failing to give notice or information of such amendments to the Brotherhood, and

in refusing to give to the petitioners an adequate opportunity to meet and deal with the changed situations produced by such unexpected amendments, should be taken into account, in conjunction with the other facts as to the manner of hearing and determining this case.

(5) Without notice to the petitioners or the Brotherhood and without ever stating an issue as to such contracts, either in the complaint as first served or as from time to time amended or on the hearings, the Board invalidated the petitioners' collective bargaining contracts with the Brotherhood and the 30,000 employees who were members of the Brotherhood. *Morgan* v. *United States,* 304 U. S. 1; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines,* 303 U. S. 261; *Shields* v. *Barrow,* 17 How. 129, 139.

(6) Remote hearsay and mere rumor were permitted to dominate the testimony, to an extent repugnant to due process of law. *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 73; *Morgan* v. *United States,* 298 U. S. 468, 480.

III. The Board's findings disregarded the substantial evidence, and the court below adopted an inadequate standard of review of the Board's findings, thereby sustaining findings not supported by substantial evidence. *Washington Coach Co.* v. *National Labor Relations Board,* 301 U. S. 142, 143; *Pennsylvania Railroad Co.* v. *Chamberlain,* 288 U. S. 333, 339–343; *National Labor Relations Board* v. *Thompson Products,* 97 F. 2d 13, 15; *Appalachian Electric Power Co.* v. *National Labor Relations Board,* 93 F. 2d 985, 989.

Mr. Charles Fahy, with whom *Solicitor General Jackson,* and *Messrs. Robert L. Stern, Charles A. Horsky, Robert B. Watts,* and *Laurence A. Knapp* were on the brief, for the National Labor Relations Board.

The test of permissible application of the National Labor Relations Act to an industrial enterprise is

whether "stoppage of . . . operations by industrial strife" in that enterprise would result in substantial interruption to or interference with the free flow of interstate commerce. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 41. Petitioners' operations are such that their cessation by reason of industrial strife would block interstate transportation to and from New York City on several main interstate railroads; other facilities of transportation in the area, such as automobiles, trucks and buses, as well as ferries and other transportation by water, would be seriously hampered; communications by telegraph, telephone and radio would be seriously affected; and many other enterprises, with large and important interstate operations, would be forced to shut down.

In addition, stoppage of petitioners' operations would interrupt a substantial flow of materials and supplies into the State. Petitioners are themselves engaged in interstate commerce by reason of their purchase in other States of large quantities of coal and oil.

Petitioners' argument that the Act may not constitutionally be applied to them, based upon the lack of a finding that there exists a necessity for Congressional regulation in the present case, is directly contrary to the findings and intention of Congress under the present Act and to the decisions of this Court. *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board*, 303 U. S. 453.

Paragraphs 1 (f) and (g) of the order of the Board, which require petitioners to cease and desist from giving effect to their contracts with the Brotherhood and from recognizing it as the exclusive bargaining representative of its employees, are in all respects valid and proper under the Fifth Amendment.

Petitioners' contention that they were not reasonably apprised that the validity of the contracts was in issue in the proceedings can not be sustained by the record.

Even assuming that petitioners were not in fact adequately informed prior to the entry of the Board's order that the validity of the contracts was in issue, nevertheless they are not prejudiced. They might have applied to the Board for a rehearing, or they might have applied to the court below pursuant to subsections (e) and (f) of § 10 of the Act for leave to adduce additional evidence on the contract issue. They did neither.

Petitioners have no valid ground of complaint based upon the refusal of the Board to hear the proffered testimony of two witnesses on July 6, 1937.

The record shows clearly that petitioners did not request an oral argument, and had no reason to expect one in the absence of a request. Moreover, the Fifth Amendment is fully complied with since petitioners had previously filed a lengthy brief. *Morgan* v. *United States,* 298 U. S. 468, 481.

Petitioners' contention that the evidence does not support the findings is without merit. Nor does the record support petitioners' contention that the findings were based on hearsay evidence. There was direct testimony on each issue. In any event, hearsay evidence was clearly proper. *Spiller* v. *Atchison, T. & S. F. Ry. Co.,* 253 U. S. 117.

Mr. Isaac Lobe Straus, with whom *Mr. Claude A. Hope* was on the brief, for petitioners in No. 25.

Petitioners were indispensable parties to the proceedings before the Trial Examiner and the Board, and were entitled to legal notice thereof, in view of the invalidation of their contracts by the Board's final order. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines,* 303 U. S. 261, distinguished. See *General Investment Co.* v. *Lake Shore R. Co.,* 260 U. S. 261, 285–286.

All persons having a substantial interest of property or liberty in the subject matter or object of a proceeding are

indispensable parties to it. *Mallow* v. *Hinde,* 12 Wheat. 193; *Barney* v. *Baltimore,* 6 Wall. 280; *Russell* v. *Clark,* 7 Cranch 69; *Shields* v. *Barrow,* 17 How. 130; *Gregory* v. *Stetson,* 133 U. S. 579; *Swan Land & Cattle Co.* v. *Frank,* 148 U. S. 603; *Railroad Co.* v. *Orr,* 18 Wall. 471; *Ribon* v. *Railroad Companies,* 16 Wall. 446; *Minnesota* v. *Northern Securities Co.,* 184 U. S. 199, 235; *Garzat* v. *DeRubio,* 209 U. S. 283; *Lee* v. *Lehigh Valley Co.,* 267 U. S. 542; *Commonwealth Trust Co.* v. *Smith,* 266 U. S. 152; *Niles-Bement-Pond Co.* v. *Iron Moulders Union,* 254 U. S. 77; *Employers Reinsurance Corp.* v. *Bryant,* 299 U. S. 374, 381.

The "Intervention" referred to in § 10 (b) of the Act, and Article II, § 19, of the Rules of the Board is so absolutely discretionary and so partial and limited, that, where substantive property and personal rights are involved, it seriously fails to satisfy constitutional requirements. Moreover, in the proceeding herein involved, three days of the hearing had elapsed and fundamental testimony had been introduced before the Trial Examiner prior to the amendment to the complaint of June 14, affecting the petitioners within the Act.

Neither the attempted service upon petitioners of the notice of May 12, nor that of the amended notice of May 25, 1937, was a valid service of notice or process, or compliance with § 11 (4) of the Act, or Article V of the Board's Rules, or with the constitutional requirements of due process of law. And after the amendments of June 14, 1937, by which amendments these petitioners were, for the first time, made the subject of charges in the complaint within the National Labor Relations Act, there was absolutely no pretense of an attempt in any form to give notice to these petitioners, or any of them, of any charge in the complaint against them.

Petitioners were denied due process of law by § 1 (f) and (g) of the Board's order, abrogating their contracts

and directing non-recognition of the Brotherhood as representatives of the employees, when neither the validity of the contracts, nor representation, was in issue, or embraced, in the charge, the complaint or amended complaint, or raised at the hearings or at any other time before the Board's final order, and the Board itself dismissed so much of the complaint as involved company domination or support contrary to § 8 (2) of the Act. *Morgan* v. *United States,* 304 U. S. 1; *United States* v. *Seminole Nation,* 299 U. S. 417, 421–422.

The Act does not authorize the Board to exercise jurisdiction over the Consolidated Edison and its subsidiaries and their labor relations with their employees, or over the subject matter of the complaint or amended complaint, including petitioners' contracts which the order destroyed, because said companies and local unions are not engaged in, and their labor relations do not burden, "commerce" as defined in the National Labor Relations Act, the business of the companies and their employees being wholly within New York, by the statutes of which they are subject to full and complete regulation. The Act, as herein applied by the Board, conflicts with the Fifth and Tenth Amendments to the Federal Constitution. *Carter* v. *Carter Coal Co.,* 298 U. S. 238–341; *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495–550; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1; *National Labor Relations Board,* v. *Fruehauf Trailer Co.,* 301 U. S. 49, 53; *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.,* 301 U. S. 58, 72; *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board,* 303 U. S. 453.

The decision in the *Santa Cruz Fruit Packing Co.* case, decided by this Court March 28, 1938, two weeks after the decision and a week after the judgment rendered herein by the Circuit Court of Appeals, does not dispose of the question of jurisdiction as herein presented, inas-

much as in that case about 37 per cent. of the total output of the employer was shipped in interstate or foreign commerce, wherein "there was a constant stream of loading and shipping of products." Moreover an actual strike had been in progress, with a cessation of the flow of extensive commerce. Furthermore there was no question at all raised as to the adequacy of state regulation, there being no state regulation of the business of the employer or of its labor relations with its employees.

Whenever federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear, *Florida* v. *United States,* 282 U. S. 194, 211; and federal power should be relinquished to state power, where its exercise would involve control of, or interference with, the internal affairs of a domestic corporation of the State. *Pennsylvania* v. *Williams,* 294 U. S. 176, 185; *Hopkins Savings Assn.* v. *Cleary,* 296 U. S. 315.

The order of the Board annulling petitioners' contracts exceeded the power of the Board, and the proceedings leading to the order did not comply with the Act or the Board's Rules, and constituted a denial of a fair and full hearing and of due process of law, in contravention of the Fifth Amendment.

Many substantial parts of the testimony upon which the findings and decision of the Board purport to rest, and its course of proceeding to its final order, violated basic requirements of evidence and procedure essential to due process of law.

Mr. Joseph A. Padway for petitioners in No. 25.

The Board lacked jurisdiction to make an order abrogating the contracts, because of its failure to join the International Brotherhood of Electrical Workers or its affiliates as formal parties, or to notify them of the commencement of proceedings in which action against their contracts was contemplated; and the entry of such order

in the absence of the Brotherhood was a denial of due process of law.

The Brotherhood locals are indispensable parties. The necessity for their joinder is well established at common law and equity.

The failure to join the Brotherhood is a jurisdictional defect.

The Act does not and can not dispense with the necessity of joining the Brotherhood.

The Brotherhood has not waived its rights by filing a petition for review.

The Brotherhood has never been properly served with notices of the proceedings.

In any event, the Brotherhood was denied a hearing because the complaint did not apprise it of any charge involving abrogation of the contracts, and no opportunity was given it to defend its interests.

The Act does not authorize the Board to issue orders invalidating or adversely affecting contracts entered into between the employer and a bona fide labor organization not claiming the right to exclusive representation of all employees where there is no showing that a substantial number of its members have been influenced by the employer into joining the organization, and where the employer has been ordered to take other action fully protecting rights and privileges of its employees under the Act.

The Board had no jurisdiction in this case, because the respondent is not engaged in "interstate commerce" within the purview of the Act. The American Federation of Labor has fostered and is fostering state labor relations Acts, and is vitally interested in protecting the jurisdiction of the state boards against encroachment of the National Board.

The Act does not authorize the Board to condemn expressions of sympathy by an employer or its supervisory

employees with aims and principles of national labor organization affiliates, if there is no actual compulsion to join, or any discriminatory acts threatened or taken.

Mr. Louis B. Boudin for the United Electrical and Radio Workers of America, intervening respondent.

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

The United Electrical and Radio Workers of America, affiliated with the Committee for Industrial Organization, filed a charge, on May 5, 1937, with the National Labor Relations Board that the Consolidated Edison Company of New York and its affiliated companies were interfering with the right of their employees to form, join or assist labor organizations of their own choosing and were contributing financial and other support, in the manner described, to the International Brotherhood of Electrical Workers, an affiliate of the American Federation of Labor. The Board issued its complaint and the employing companies, appearing specially, challenged its jurisdiction. On the denial of their request that this question be determined initially, the companies filed answers reserving their jurisdictional objections. After the taking of evidence before a trial examiner, the proceeding was transferred to the Board, which on November 10, 1937, made its findings and order.

The order directed the companies to desist from labor practices found to be unfair and in violation of § 8 (1) and (3) of the National Labor Relations Act,[1] directed reinstatement of six discharged employees with back pay, and required the posting of notices to the effect that the companies would cease the described practices and that their employees were free to join or assist any labor or-

[1] 49 Stat. 449; 29 U. S. C. §§ 158 (1) (3).

ganization for the purpose of collective bargaining and would not be subject to discharge or to any discrimination by reason of their choice. 4 N. L. R. B. 71.

It appeared that between May 28, 1937, and June 16, 1937, the companies had entered into agreements with the International Brotherhood of Electrical Workers and its local unions, providing for the recognition of the Brotherhood as the collective bargaining agency for those employees who were its members, and containing various stipulations as to hours, working conditions, wages, etc., and for arbitration in the event of disputes. The Board found that these contracts were executed under such circumstances that they were invalid and required the companies to desist from giving them effect. *Id.* At the same time the Board decided that the companies had not engaged in unfair labor practices within the meaning of § 8 (2) of the Act.[2] That clause makes it an unfair labor practice to "dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." Accordingly the order dismissed the complaint, so far as it alleged a violation of § 8 (2), without prejudice. *Id.*

The companies petitioned the Circuit Court of Appeals to set aside the order and a petition for the same purpose was presented by the Brotherhood and its locals. These labor organizations had not been parties to the proceeding before the Board but intervened in the Court of Appeals as parties aggrieved by the invalidation of their contracts. The Board in turn asked the court to enforce the order. The United Electrical and Radio Workers of America appeared in support of the Board. The court granted the Board's petition. 95 F. 2d 390. We issued writs of certiorari upon applications of the companies (No. 19) and of the Brotherhood and its locals (No. 25).

[2] 29 U. S. C. 158 (2).

The questions presented relate (1) to the jurisdiction of the Board; (2) to the fairness of the hearing; (3) to the sufficiency of the evidence to sustain the findings of the Board with respect to coercive practices, discrimination and the discharge of employees; and (4) to the invalidation of the contracts with the Brotherhood and its locals.

The pertinent facts will be considered in connection with our discussion of these questions.

First. The jurisdiction of the Board.—That is, was the proceeding within the scope of its authority validly conferred? The petitioning companies constitute an integrated system. With the exception of one company which maintains underground ducts for electrical conductors in New York City, they are all public utilities engaged in supplying electric energy, gas and steam (and certain by-products) within that City and adjacent Westchester County. The enterprise is one of great magnitude. The companies serve over 3,500,000 electric and gas customers,—a large majority using the service for residential and domestic purposes. In 1936 the companies supplied about 97.5 per cent. of the total electric energy sold in the City of New York and about one hundred per cent. of that sold in Westchester County. They do not sell for resale without the State. They have about 42,000 employees, their total payrolls in 1936, with retirement annuities and separation allowances, amounting to nearly $82,000,000.

Petitioners urge that these predominant intrastate activities, carried on under the plenary control of the State of New York in the exercise of its police power, are not subject to federal authority. It does not follow, however, because these operations of the utilities are of vast concern to the people of the City and State of New York, that they do not also involve the interests of interstate and foreign commerce in such a degree that the Federal

Government was entitled to intervene for their protection. For example, the governance of the intrastate rates of a railroad company may be of great importance to the State and an appropriate object of the exertion of its power, but the Federal Government may still intervene to protect interstate commerce from injury caused by intrastate operations and to that end may override intrastate rates and supply a dominant federal rule. *The Shreveport Case,* 234 U. S. 342; *Wisconsin Railroad Comm'n* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563; *New York* v. *United States,* 257 U. S. 591. See, also, *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 37–41.

In the present instance we may lay on one side, as did the Circuit Court of Appeals, the mere purchases by the utilities of the supplies of oil, coal, etc., although very large, which come from without the State and are consumed in the generation and distribution of electric energy and gas. Apart from those purchases, there is undisputed and impressive evidence of the dependence of interstate and foreign commerce upon the continuity of the service of the petitioning companies. They supply electric energy to the New York Central Railroad Company, the New York, New Haven and Hartford Railroad Company, and the Hudson and Manhattan Railroad Company (operating a tunnel service to New Jersey) for the lighting and operation of passenger and freight terminals, and for the movement of interstate trains. They supply the Port of New York Authority with electric energy for the operation of its terminal and the Holland Tunnel. They supply a majority of the piers of transatlantic and coastwise steamship companies along the North and East Rivers, within the City of New York, for lighting, freight handling and related uses. They serve the Western Union Telegraph Company, the Postal Telegraph Company, and the New York Telephone Com-

pany with power for transmitting and receiving messages, local and interstate. They supply electric energy for the transatlantic radio service of the Radio Corporation of America. They provide electric energy for the Floyd Bennett Air Field in Brooklyn for various purposes, including field illumination, a radio beam and obstruction lighting. Under contracts with the Federal Government they supply electric energy for six lighthouses and eight beacon or harbor lights; also light, heat and power for the general post office and branch post offices, the United States Barge Office, the Customs House, appraisers' warehouse and various federal office buildings.

It cannot be doubted that these activities, while conducted within the State, are matters of federal concern. In their totality they rise to such a degree of importance that the fact that they involve but a small part of the entire service rendered by the utilities in their extensive business is immaterial in the consideration of the existence of the federal protective power. The effect upon interstate and foreign commerce of an interruption through industrial strife of the service of the petitioning companies was vividly described by the Circuit Court of Appeals in these words: "Instantly, the terminals and trains of three great interstate railroads would cease to operate; interstate communication by telegraph, telephone, and radio would stop; lights maintained as aids to navigation would go out; and the business of interstate ferries and of foreign steamships, whose docks are lighted and operated by electric energy, would be greatly impeded. Such effects we cannot regard as indirect and remote." 95 F. 2d 390, 394.

If industrial strife due to unfair labor practices actually brought about such a catastrophe, we suppose that no one would question the authority of the Federal Government to intervene in order to facilitate the settlement of the dispute and the resumption of the essential service to inter-

state and foreign commerce. But it cannot be maintained that the exertion of federal power must await the disruption of that commerce. Congress was entitled to provide reasonable preventive measures and that was the object of the National Labor Relations Act.

Congress did not attempt to deal with particular instances. It created for that purpose the National Labor Relations Board. In conferring authority upon that Board, Congress had regard to the limitations of the constitutional grant of federal power. Thus, the "commerce" contemplated by the Act (aside from that within a Territory or the District of Columbia) is interstate and foreign commerce. The unfair labor practices which the Act purports to reach are those affecting that commerce. § 10 (a).[3] In determining the constitutional bounds of the authority conferred, we have applied the well-settled principle that it is the effect upon interstate or foreign commerce, not the source of the injury, which is the criterion. It is not necessary to repeat what we said upon this point in the review of our decisions in the case of *National Labor Relations Board* v. *Jones & Laughlin Steel Corp., supra.* And whether or not particular action in the conduct of intrastate enterprises does affect that commerce in such a close and intimate fashion as to be subject to federal control, is left to be determined as individual cases arise. *Id.,* see, also, *Santa Cruz Packing Co.* v. *National Labor Relations Board,* 303 U. S. 453, 466, 467.

Petitioners urge that the legislature of New York has enacted comprehensive and adequate measures to protect against the interruption of petitioners' services through labor disputes. Not only has the State long had legislation relating to the operations of public utility companies (Public Service Law) but the legislature has recently enacted the New York State Labor Relations

[3] 29 U. S. C. 160 (a).

Act (Laws of 1937, Chapter 443, effective July 1, 1937; Article 20 of the Labor Law) which provides a complete supervision of labor relations for employers in intrastate enterprises similar to that set up by the National Labor Relations Act with respect to interstate or foreign commerce. The state act, with added details, follows closely the national act. The state act provides for collective bargaining, including the conduct of elections to determine the representation of employees, and empowers the state Labor Relations Board to prevent unfair labor practices. In seeking to avoid a clash with federal authority, the state act is made inapplicable "to the employees of any employer who concedes to and agrees with the board that such employees are subject to and protected by the provisions of the national labor relations act or the federal railway labor act." [4] It is manifest that the enactment of this state law could not override the constitutional authority of the Federal Government. The State could not add to or detract from that authority. But it is also true that where the employers are not themselves engaged in interstate or foreign commerce, and the authority of the National Labor Relations Board is invoked to protect that commerce from interference or injury arising from the employers' intrastate activities, the question whether the alleged unfair labor practices do actually threaten interstate or foreign commerce in a substantial manner is necessarily presented. And in determining that factual question regard should be had to all the existing circumstances, including the bearing and effect of any protective action to the same end already taken under state authority. The justification for the exercise of federal power should clearly appear. *Florida* v. *United States,* 282 U. S. 194, 211, 212. But the question in such a case would relate not to the existence of the federal

[4] New York State Labor Relations Act, § 715.

power but to the propriety of its exercise on a given state of facts.

In the instant case, not only was this proceeding instituted before the New York Labor Relations Act became effective but, so far as appears, no proceedings have been taken under it in relation to the unfair labor practices here alleged. For the present purpose, it is sufficient to say that there has been no exertion of state authority which can be taken to remove the need for the exertion of federal authority to protect interstate and foreign commerce. The exercise of the federal power to protect interstate and foreign commerce from injury does not depend upon a clash with state action and need not await the exercise of state authority.

We conclude that the Board had authority to entertain this proceeding against the petitioning companies.

Second. The fairness of the hearing,—procedural due process.—Apart from the action of the Board with respect to the Brotherhood contracts, which we shall consider separately, the contentions under this head relate (1) to amendments of the complaint, (2) to the refusal to hear certain witnesses, and (3) to the transfer of the proceeding to the Board and its determination without an intermediate report or opportunity for hearing upon proposed findings.

The original complaint related to the discharge of five employees and alleged unfair labor practices in the employment of industrial spies and undercover operatives, in allowing employees to solicit membership in the Brotherhood during working hours and on the property of the companies, in compensating such employees while so engaged and in furnishing them office space and financial assistance while refusing such privileges to the United, and generally in coercion of the employees to join the

Brotherhood. The amendments were made from time to time in the course of the hearing. In particular, they added another employee to those alleged to have been wrongfully discharged and supplied an omitted allegation that the other unfair labor practices affected commerce. At the close of the evidence the trial examiner granted a motion to conform the pleadings to the proof on the statement of the attorney for the Board that no important change was intended and that the amendment was sought merely to make more definite and certain what appeared in the complaint. These were discretionary rulings which afford no ground for challenging the validity of the hearing.

A more serious question grows out of the refusal to receive the testimony of certain witnesses. The taking of evidence began on June 3, 1937, and was continued from time to time until June 23d when the attorney for the Board unexpectedly announced that its case would probably be closed on the following day. At that time the Board completed its proof, with the reservation of one matter, and at the request of the companies' counsel the hearing was adjourned until July 6th in order that Mr. Carlisle, the chairman of the board of trustees of the Consolidated Edison Company, and Mr. Dean, the vice president of one of its affiliates, who were then unavailable, could testify. In response to the examiner's inquiry, the companies' counsel stated that the direct examination of all witnesses on their behalf would not occupy more than a day. On July 6th the testimony of Mr. Carlisle and Mr. Dean was taken and the companies also offered the testimony of two other witnesses (then present in the hearing room) in relation to the discharge of the employee with respect to whom the complaint had been amended as above stated. The examiner refused to receive this testimony following a ruling of the Board (made in the

course of correspondence with the companies' counsel during the adjournment) to the effect that no other testimony than that of Mr. Carlisle and Mr. Dean would be received on the adjourned day. An offer of proof was made which showed the testimony to be highly important with respect to the reasons for the discharge. It was brief and could have been received at once without any undue delay in the closing of the hearing.

We agree with the Court of Appeals that the refusal to receive the testimony was unreasonable and arbitrary. Assuming, as the Board contends, that it had a discretionary control over the conduct of the proceeding, we cannot but regard this action as an abuse of discretion. But the statute did not leave the petitioners without remedy. The court below pointed to that remedy, that is, to apply to the Court of Appeals for leave to adduce the additional evidence; on such an application and a showing of reasonable grounds the court could have ordered it to be taken. § 10 (e) (f).[5] Petitioners did not avail themselves of this appropriate procedure.

Shortly after the evidence was closed, the counsel for the petitioning companies filed a brief with the trial examiner. Several weeks later, on September 29th, the proceeding was transferred to the Board. The examiner made no tentative report or findings and there was no opportunity for a hearing before the Board itself. It must be assumed, however, that the brief for the companies was transmitted to the Board and was considered by it in making its decision. The Board contends that the companies submitted their brief without asking for an oral argument, as contemplated by the Board's rule (Rule 29), or for an intermediate report, and hence that they are not in a position to complain on either score.

[5] 29 U. S. C. 160(e)(f).

The Board also insists that after the transfer of the proceeding, it was within the discretion of the Board to adopt any one of the courses of procedure enumerated in its rule (Rule 38)[6] of which petitioners were informed by the

[6] Rules 37 and 38 are as follows:

"Sec. 37. Whenever the Board deems it necessary in order to effectuate the purposes of the Act, it may permit a charge to be filed with it, in Washington, D. C., or may, at any time after a charge has been filed with a Regional Director pursuant to Section 2 of this Article, order that such charge, and any proceeding which may have been instituted in respect thereto—

"(a) be transferred to and continued before it, for the purpose of consolidation with any proceeding which may have been instituted by the Board, or for any other purpose; or

"(b) be consolidated for the purpose of hearing, or for any other purpose, with any other proceeding which may have been instituted in the same region; or

"(c) be transferred to and continued in any other Region, for the purpose of consolidation with any proceeding which may have been instituted in or transferred to such other Region, or for any other purpose.

"The provisions of Sections 3 to 31, inclusive, of this Article shall, in so far as applicable, apply to proceedings before the Board pursuant to this Section, and the powers granted to Regional Directors in such provisions shall, for the purpose of this Section, be reserved to and exercised by the Board. After the transfer of any charge and any proceeding which may have been instituted in respect thereto from one Region to another pursuant to this Section, the provisions of Sections 3 to 36, inclusive, of this Article, shall apply to such charge and such proceeding as if the charge had originally been filed in the Region to which the transfer is made.

"Sec. 38. After a hearing for the purpose of taking evidence upon the complaint in any proceeding over which the Board has assumed jurisdiction in accordance with Section 37 of this Article, the Board may—

"(a) direct that the Trial Examiner prepare an Intermediate Report, in which case the provisions of Sections 32 to 36, inclusive, of this Article shall in so far as applicable govern subsequent procedure, and the powers granted to Regional Directors in

service of a copy of the Board's rules at the beginning of the proceeding. Petitioners say that at the very outset they had asked, on their special appearance, for a hearing before the Board upon the question of its jurisdiction and that all proceedings be transferred to the Board, and that the rules induced the belief that after the transfer to the Board at the close of the evidence there would be further proceedings at which they would be heard. But we cannot say that the rules justified that expectation or dispensed with the necessity, after the transfer, of a suitable request by the petitioners for such additional hearing as they desired. It does not appear that such request was made.

It cannot be said that the Board did not consider the evidence or the petitioners' brief or failed to make its own findings in the light of that evidence and argument. It would have been better practice for the Board to have directed the examiner to make a tentative report with an opportunity for exceptions and argument thereon. But, aside from the question of the Brotherhood contracts, we find no basis for concluding that the issues and contentions were not clearly defined and that the petitioning companies were not fully advised of them. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 350, 351. The points raised as to the lack

---

such provisions shall for the purpose of this Section be reserved to and exercised by the Board; or

"(b) decide the matter forthwith upon the record, or after the filing of briefs or oral argument; or

"(c) reopen the record and receive further evidence, or require the taking of further evidence before a member of the Board, or other agent or agency; or

"(d) make other disposition of the case.

"The Board shall notify the parties of the time and place of any such submission of briefs, oral argument, or taking of further evidence."

of procedural due process in this relation cannot be sustained.

Third. The sufficiency of the evidence to sustain the findings of the Board with respect to coercive practices, discrimination and discharge of employees.—The companies contend that the Court of Appeals misconceived its power to review the findings and, instead of searching the record to see if they were sustained by "substantial" evidence, merely considered whether the record was "wholly barren of evidence" to support them. We agree that the statute, in providing that "the findings of the Board as to the facts, if supported by evidence, shall be conclusive," means supported by substantial evidence. *Washington, V. & M. Coach Co.* v. *National Labor Relations Board,* 301 U. S. 142, 147. Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Appalachian Electric Power Co.* v. *National Labor Relations Board,* 93 F. 2d 985, 989; *National Labor Relations Board* v. *Thompson Products,* 97 F. 2d 13, 15; *Ballston-Stillwater Co.* v. *National Labor Relations Board,* 98 F. 2d 758, 760. We do not think that the Court of Appeals intended to apply a different test. In saying that the record was not "wholly barren of evidence" to sustain the finding of discrimination, we think that the court referred to substantial evidence. *Ballston-Stillwater Co.* v. *National Labor Relations Board, supra.*

The companies urge that the Board received "remote hearsay" and "mere rumor." The statute provides that "the rules of evidence prevailing in courts of law and equity shall not be controlling."[7] The obvious purpose of this and similar provisions is to free administrative

[7] § 10(b); 29 U. S. C. 160(b).

boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. *Interstate Commerce Comm'n* v. *Baird,* 194 U. S. 25, 44; *Interstate Commerce Comm'n* v. *Louisville & Nashville R. Co.,* 227 U. S. 88, 93; *United States* v. *Abilene & Southern Ry. Co.,* 265 U. S. 274, 288; *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, 442. But this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence.

Applying these principles, we are unable to conclude that the Board's findings in relation to the matters now under consideration did not have the requisite foundation. With respect to industrial espionage, the companies say that the employment of "outside investigating agencies" of any sort had been voluntarily discontinued prior to November, 1936, but the Board rightly urges that it was entitled to bar its resumption. Compare *Federal Trade Comm'n* v. *Goodyear Tire & Rubber Co.,* 304 U. S. 257, 260. In relation to the other charges of unfair labor practices, the companies point to the statement of Mr. Carlisle at a large meeting of the employees in April, 1937, when the recognition of the Brotherhood was under discussion, that the employees were absolutely free to join any labor organization,—that they could do as they pleased. Despite this statement and assuming, as counsel for the companies urges, that where two independent labor organizations seek recognition, it cannot be said to be an unfair labor practice for the employer merely to express preference of one organization over the other, by reason of the former's announced policies, in the absence of any attempts at intimidation or coercion, we think that there was still substantial evidence that such attempts were made in this case.

It would serve no useful purpose to lengthen this opinion by detailing the testimony. We are satisfied that the provisions of the order requiring the companies to desist from the discriminating and coercive practices described in subdivisions (a) to (e) inclusive and in subdivision (h) of paragraph one of its order,[8] and to reinstate the six employees mentioned with back pay, and to post notices assuring freedom from discrimination and coercion as provided in paragraph two of the order, rested upon findings sustained by the evidence and that the decree of the Court of Appeals enforcing the order in these respects should be affirmed.

Fourth. The Brotherhood contracts.—The findings of the Board that the contracts with the Brotherhood and its locals were invalid, and the Board's order requiring the companies to desist from giving effect to these contracts, present questions of major importance. We approach them in the light of three cardinal considerations. One is that the Brotherhood and its locals are labor organi-

[8] These provisions of the order in substance required the companies to desist from discouraging membership in the United or encouraging membership in the Brotherhood, or any other labor organization of their employees, by discharges, or threats of discharge, or refusal of reinstatement, because of membership or activity in connection with any such labor organization; from permitting representatives of the Brotherhood to engage in activities in its behalf during working hours or on the employers' property unless similar privileges were granted to the United and all other labor organizations; from permitting employees who were officials of the Employees' Representation Plans to use the employers' time, property and money in behalf of the Brotherhood or any other labor organization; from employing detectives to investigate the activities of their employees in behalf of the United or other labor organizations, or employing for such purpose any other sort of espionage; and from "in any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join or assist labor organizations" or to bargain collectively or to engage in concerted activities for that purpose or other mutual aid or protection.

zations independently established as affiliates of the American Federation of Labor and are not under the control of the employing companies. So far as there was any charge, under § 8 (2) of the Act, that the employing companies had dominated or interfered with the formation or administration of any labor organization or had contributed financial or other support to it, the charge was dismissed. Another consideration is that the contracts recognize the right of employees to bargain collectively; they recognize the Brotherhood as the collective bargaining agency for the employees who belong to it, and the Brotherhood agrees for itself and its members not to intimidate or coerce employees into membership in the Brotherhood and not to solicit membership on the time or property of the employers. The third consideration is that the contracts contain important provisions with regard to hours, working conditions, wages, sickness, disability, etc., and also provide against strikes or lockouts and for the adjustment and arbitration of labor disputes, thus constituting insurance against the disruption of the service of the companies to interstate or foreign commerce through an outbreak of industrial strife. It is not contended that these provisions are unreasonable or oppressive but on the contrary it was virtually conceded at the bar that they are fair to both the employers and employees. It also appears from the evidence, which was received without objection, that the Brotherhood and its locals comprised over 30,000, or 80 per cent of the companies' employees out of 38,000 eligible for membership.

The Brotherhood and its locals contend that they were indispensable parties and that in the absence of legal notice to them or their appearance, the Board had no authority to invalidate the contracts. The Board contests this position, invoking our decision in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines,* 303

U. S. 261. That case, however, is not apposite as there no question of contract between employer and employee was involved. The Board had found upon evidence that the employer had created and fostered the labor organization in question and dominated its administration in violation of § 8(2). The statement that the "Association" so formed and controlled was not entitled to notice and hearing was made in that relation. *Id.*, pp. 262, 270, 271. It has no application to independent labor unions such as those before us. We think that the Brotherhood and its locals having valuable and beneficial interests in the contracts were entitled to notice and hearing before they could be set aside. *Russell* v. *Clark's Executors,* 7 Cranch, 69, 96; *Mallow* v. *Hinde,* 12 Wheat. 193, 198; *Minnesota* v. *Northern Securities Co.,* 184 U. S. 199, 235; *Garzot* v. *de Rubio,* 209 U. S. 283, 297; *General Investment Co.* v. *Lake Shore & M. S. Co.,* 260 U. S. 261, 285. The rule, which was applied in the cases cited to suits in equity, is not of a technical character but rests upon the plainest principle of justice, equally applicable here. See *Mallow* v. *Hinde, supra.*

The Board urges that the National Labor Relations Act does not contain any provision requiring these unions to be made parties; that § 10(b)[9] authorizes the Board to serve a complaint only upon persons charged with unfair labor practices and that only employers can be so charged. In that view, the question would at once arise whether the Act could be construed as authorizing the Board to invalidate the contracts of independent labor unions not before it and also as to the validity of the Act if so construed. But the Board contends that the Brotherhood had notice, referring to the service of a copy of the complaint and notice of hearing upon a local union of the Brotherhood on May 12, 1937, and of an amended notice of hear-

[9] 29 U. S. C. 160(b).

ing on May 25, 1937. Petitioners rejoin that the service was not upon a local whose rights were affected but upon one whose members were not employees of the companies' system. The Board says, however, that the Brotherhood, and the locals which were involved, had actual notice and hence were entitled to intervene, § 10 (b), and chose not to do so. But neither the original complaint—which antedated the contracts—nor the subsequent amendments contained any mention of them, and the Brotherhood and its locals were not put upon notice that the validity of the contracts was under attack. The Board contends that the complaint challenged the legality of the companies' "relations" with the Brotherhood. But what was thus challenged cannot be regarded as going beyond the particular practices of the employers and the discharges which the complaint described. In these circumstances it cannot be said that the unions were under a duty to intervene before the Board in order to safeguard their interests.

The Board urges further that the unions have availed themselves of the opportunity to petition for review of the Board's order in the Court of Appeals, and that due process does not require an opportunity to be heard before judgment, if defenses may be presented upon appeal. *York* v. *Texas,* 137 U. S. 15, 20, 21; *American Surety Co.* v. *Baldwin,* 287 U. S. 156, 168; *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373, 384. But this rule assumes that the appellate review does afford opportunity to present all available defenses, including lack of proper notice, to justify the judgment or order complained of. *Id.*

Apart from this question of notice to the unions, both the companies and the unions contend that upon the case made before the Board it had no authority to invalidate the contracts. Both insist that that issue was not actually litigated, and the record supports that contention. The argument to the contrary, that the con-

tracts were necessarily in issue because of the charge of unfair labor practices against the companies, is without substance. Not only did the complaint as amended fail to assail the contracts but it was stated by the attorney for the Board upon the hearing that the complaint was not directed against the Brotherhood; that "no issue of representation (was) involved in this proceeding"; and that the Board took the position that the Brotherhood was "a *bona fide* labor organization" whose legality was not attacked. But the Board says that on July 6th (the last of the contracts having been made on June 16th) the companies amended their answer stating that the making of the contracts had rendered the proceeding moot, and that this necessarily put the contracts in issue. We cannot so regard it. We think that the fair construction of the position thus taken on the last day of the hearings was entirely consistent with the view that the validity of the contracts had not been, and was not, in issue. And the counsel for the companies point to their brief before the Board, which they produce, as proceeding on the basis that the validity of the contracts had not been assailed.

Further, the Act gives no express authority to the Board to invalidate contracts with independent labor organizations. That authority, if it exists, must rest upon the provisions of § 10 (c).[10] That section authorizes the Board, when it has found the employer guilty of unfair labor practices, to require him to desist from such practices "and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." We think that this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose

[10] 29 U. S. C. 160 (c).

because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.

The power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act. The continued existence of a company union established by unfair labor practices or of a union dominated by the employer is a consequence of violation of the Act whose continuance thwarts the purposes of the Act and renders ineffective any order restraining the unfair practices. Compare *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, supra.* Here, there is no basis for a finding that the contracts with the Brotherhood and its locals were a consequence of the unfair labor practices found by the Board or that these contracts in themselves thwart any policy of the Act or that their cancellation would in any way make the order to cease the specified practices any more effective.

The Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining. Under § 7 [11] the employees of the companies are entitled to self-organization, to join labor organizations and to bargain collectively through representatives of their own choosing. The 80 per cent. of the employees who were members of the Brotherhood and its locals, had that right. They had the right to choose the Brotherhood as their representative for collective bargaining and to have contracts made as the result of that bargaining. Nothing that the employers had done deprived them of that right. Nor did the contracts make the Brotherhood and its locals exclusive repre-

[11] 29 U. S. C. 157.

sentatives for collective bargaining. On this point the contracts speak for themselves. They simply constitute the Brotherhood the collective bargaining agency for those employees who are its members. The Board by its order did not direct an election to ascertain who should represent the employees for collective bargaining. § 9 (c).[12] Upon this record there is nothing to show that the employees' selection as indicated by the Brotherhood contracts has been superseded by any other selection by a majority of employees of the companies so as to create an exclusive agency for bargaining under the statute, and in the absence of such an exclusive agency the employees represented by the Brotherhood, even if they were a minority, clearly had the right to make their own choice. Moreover, the fundamental purpose of the Act is to protect interstate and foreign commerce from interruptions and obstructions caused by industrial strife. This purpose appears to be served by these contracts in an important degree. Representing such a large percentage of the employees of the companies, and precluding strikes and providing for the arbitration of disputes, these agreements are highly protective to interstate and foreign commerce. They contain no terms which can be said to "affect commerce" in the sense of the Act so as to justify their abrogation by the Board. The disruption of these contracts, even pending proceedings to ascertain by an election the wishes of the majority of employees, would remove that salutary protection during the intervening period.

The Board insists that the contracts are invalid because made during the pendency of the proceeding. But the effect of that pendency would appropriately extend to the practices of the employers to which the complaint was addressed. See *Jones* v. *Securities & Exchange Comm'n,* 298 U. S. 1, 15. It did not reach so far as to suspend

[12] 29 U. S. C. 159 (c).

the right of the employees to self-organization or preclude the Brotherhood as an independent organization chosen by its members from making fair contracts on their behalf.

Apart from this, the main contention of the Board is that the contracts were the fruit of the unfair labor practices of the employers; that they were "simply a device to consummate and perpetuate" the companies' illegal conduct and constituted its culmination. But, as we have said, this conclusion is entirely too broad to be sustained. If the Board intended to make that charge, it should have amended its complaint accordingly, given notice to the Brotherhood, and introduced proof to sustain the charge. Instead it is left as a matter of mere conjecture to what extent membership in the Brotherhood was induced by any illegal conduct on the part of the employers. The Brotherhood was entitled to form its locals and their organization was not assailed. The Brotherhood and its locals were entitled to solicit members and the employees were entitled to join. These rights cannot be brushed aside as immaterial for they are of the very essence of the rights which the Labor Relations Act was passed to protect and the Board could not ignore or override them in professing to effectuate the policies of the Act. To say that of the 30,000 who did join there were not those who joined voluntarily or that the Brotherhood did not have members whom it could properly represent in making these contracts would be to indulge an extravagant and unwarranted assumption. The employers' practices, which were complained of, could be stopped without imperiling the interests of those who for all that appears had exercised freely their right of choice.

We conclude that the Board was without authority to require the petitioning companies to desist from giving effect to the Brotherhood contracts, as provided in subdivision (f) of paragraph one of the Board's order.

Subdivision (g) of that paragraph, requiring the companies to cease recognizing the Brotherhood "as the exclusive representative of their employees" stands on a different footing. The contracts do not claim for the Brotherhood exclusive representation of the companies' employees but only representation of those who are its members, and the continued operation of the contracts is necessarily subject to the provision of the law by which representatives of the employees for the purpose of collective bargaining can be ascertained in case any question of "representation" should arise. § 9.[13] We construe subdivision (g) as having no more effect than to provide that there shall be no interference with an exclusive bargaining agency if one other than the Brotherhood should be established in accordance with the provisions of the Act. So construed, that subdivision merely applies existing law.

The provision of paragraph two of the order as to posting notices should be modified so as to exclude any requirement to post a notice that the existing Brotherhood contracts have been abrogated.

The decree of the Circuit Court of Appeals is modified so as to hold unenforceable the provision of subdivision (f) of paragraph one of the order and the application to that provision of paragraph two subdivision (c), and as so modified the decree enforcing the order of the Board is affirmed.

Modified and affirmed.

Opinion of MR. JUSTICE BUTLER.

I agree with the Court's decision that the Board was without authority to require employers to cease and desist from giving effect to the contracts referred to in

[13] 29 U. S. C. 159.

subdivision (f) of the first paragraph of the order. And I am of opinion that the entire order should be set aside.

The Board was without jurisdiction. The facts on which it assumed to exert power need not be narrated; they are sufficiently stated by the lower court and in the opinion here. Both courts rightly treat the case as one where neither employers nor employees are engaged in interstate or foreign commerce. Here, the employers are engaged solely in intrastate activities. A very small percentage of the products, furnished in that State to others, is by the latter used in interstate commerce. This Court has held that Congress cannot regulate relations between employers and employees engaged exclusively in intrastate activities.

In *Schechter Corp.* v. *United States* (May, 1935), 295 U. S. 495, decided shortly before passage of the National Labor Relations Act, we held that the federal government cannot regulate the wages and hours of labor of persons employed in the internal commerce of the State.

In *Carter* v. *Carter Coal Co.* (May, 1936), 298 U. S. 238, decided shortly after passage of the National Labor Relations Act, we held that provisions of the Bituminous Coal Conservation Act of 1935 looking to the control of wages, hours, and working conditions of persons engaged in producing coal about to move in interstate commerce and seeking to guarantee their right of collective bargaining, were beyond the power of Congress, for the reasons that it has no general power of regulation to promote the general welfare; that the power to regulate commerce does not include the power to control the conditions in which coal is produced; that the effect upon interstate commerce of labor conditions involved in the production of coal, including disputes and strikes over wages and working conditions, is indirect.

In the period, less than a year, intervening between the *Carter* case and *Labor Board* v. *Jones & Laughlin* (April, 1937), 301 U. S. 1, and other Labor Board cases

decided on the same day,[1]—and, as I think, wrongly decided—it was, on the authority of the *Schechter* and *Carter* cases, held by four circuit courts of appeals and six district courts that the power of Congress does not extend to regulations between employers and their employees engaged in local production. Their decisions are cited in the dissenting opinion in the *Labor Board* cases. 301 U. S. 76. In that period the lower courts were bound by our decisions to condemn the National Labor Relations Act, construed to apply to production or intrastate commerce, as not within the power of Congress.

This case is not distinguishable from the *Schechter* case or the *Carter* case. There, as here, the activities of the employers and their employees were exclusively local. It differs from the *Jones & Laughlin* case and all the other Labor Board cases.[2] In each of them, the employer was to an extent engaged in interstate commerce. The opinion just announced points to no distinction between this case and the *Schechter* or *Carter* case. Nor does it refer to the Labor Board cases as controlling here. But, to support this federal advance into local fields, the Court brings forward three railroad rate cases: *Houston & Texas Ry.* v. *United States* (*The Shreveport Case*), 234 U. S. 342; *Wisconsin Railroad Comm'n* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563; and *New York* v. *United States*, 257 U. S. 591.

These cases give no support to the idea that, in absence of conflict between state and federal policy or regula-

[1] *Labor Board* v. *Fruehauf Co.*, 301 U. S. 49. *Labor Board* v. *Clothing Co.*, 301 U. S. 58. *Associated Press* v. *Labor Board*, 301 U. S. 103. *Washington Coach Co.* v. *Labor Board*, 301 U. S. 142.

[2] *Labor Board* v. *Fruehauf Co.*, 301 U. S. 49. *Labor Board* v. *Clothing Co.*, 301 U. S. 58. *Associated Press* v. *Labor Board*, 301 U. S. 103. *Washington Coach Co.* v. *Labor Board*, 301 U. S. 142. *Labor Board* v. *Greyhound Lines*, 303 U. S. 261. *Labor Board* v. *Pacific Lines*, 303 U. S. 272. *Santa Cruz Co.* v. *Labor Board*, 303 U. S. 453. *Labor Board* v. *Mackay Radio & T. Co.*, 304 U. S. 333.

tion, Congress has power to control labor conditions in production or intrastate transportation. In each, the federal interference is shown necessary in order to protect national authority, interstate commerce, and interstate rates established under federal law. Brief reference to the conditions that led up to these cases and the substance of the decisions will be sufficient to show they have no application here.

In 1906 and 1907, Minnesota reduced intrastate rates substantially below lawfully established interstate rates. Suits were brought by their stockholders to restrain the carriers from obeying, and state officers from enforcing, the local rates on the ground, *inter alia,* that they were repugnant to the commerce clause and that enforcement would necessarily interfere with and burden interstate transportation by the carriers. The *Minnesota Rate Cases,* 230 U. S. 352. The controversy was everywhere regarded as important. See p. 395. The facts found by the special master and adopted by the circuit court are stated in its opinion (*Shepard* v. *Northern Pacific Ry. Co.* (1911), 184 F. 765, 775–794) and summarized in the opinion of this Court. pp. 381–395. They show that the intrastate rates discriminated against interstate commerce and made it impossible for the carriers to collect, or for the United States to enforce, valid higher interstate rates. The trial court held the state measures repugnant to the commerce clause and upon that ground, among others, enjoined enforcement of the rates they prescribed.

The cases were argued here in April, 1912, and decided June 9, 1913. This Court upheld the state rates, notwithstanding the commerce clause, the Act to Regulate Commerce, the interstate rates lawfully established in accordance with federal law, and the destructive discrimination. It held that, in the absence of a finding by the Interstate Commerce Commission of unjust dis-

crimination, the intrastate rates were valid. The opinion reserved, p. 419, the question whether the Commission was empowered to make the determination. And that question was decided in the *Shreveport* case, 234 U. S. 342, 357.

That case was pending here before the decision in the *Minnesota Rate Cases,* and was decided in June, 1914. The Interstate Commerce Commission had found that rates prescribed by Texas operated to discriminate against interstate traffic from Shreveport, Louisiana, into Texas moving on lawfully established interstate rates. In order to eliminate the discrimination, the Commission directed the carriers to cease charging higher rates for interstate transportation than those charged for transportation between Texas points. This Court held the carriers free to raise the intrastate rates so as to remove the discrimination.

Wisconsin Railroad Comm'n v. *Chicago, B. & Q. R. Co.* (1922), 257 U. S. 563, upheld § 15a of the Interstate Commerce Act, added by § 422, Transportation Act, 1920, which empowered the Interstate Commerce Commission to remove discrimination resulting from intrastate rates unduly low, as compared with corresponding rates fixed under that section.

New York v. *United States,* 257 U. S. 591, held that intrastate rates so low that they discriminated against interstate commerce within the meaning of the Transportation Act, 1920, may constitutionally be increased under that Act by the Commission to conform with like rates in interstate commerce fixed by it.

The constitutional questions decided in these three cases were essentially different from the one of federal power here presented. The state measures there overborne were repugnant to existing federal regulations of interstate commerce. Application of the lower state rates made it impossible for federal authority to require, or to enable,

carriers to collect interstate rates lawfully established as just and reasonable. The policy and provisions of the New York State Labor Relations Act are in substance precisely the same as the national policy and the National Labor Relations Act. The State's interest, purpose, and ability to safeguard against possible interruption of production and service by labor disputes are not less than those of the federal government. The State's need of continuous service is immediate, while the effect of interruption on interstate or foreign commerce would be mediate, indirect, and relatively remote. The record fails to disclose any condition, existing or threatened, to suggest as necessary federal action to protect interstate commerce, or any other interest of the government against interruption or interference liable to result from controversies between these employers and their employees. The right of the States, consistently with national policy and law, freely to exert the powers safeguarded to them by the Federal Constitution is essential to the preservation of this government. *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 12, 13. *Kidd* v. *Pearson*, 128 U. S. 1, 21. Asseveration of need to uphold our dual form of government and the safeguards set for protection of the States and the liberties of the people against unauthorized exertion of federal power, does not assure adherence to, or conceal failure to discharge, duty to support the Constitution. See *Schechter Corp.* v. *United States, supra*, 548–550. Cf. *Labor Board* v. *Jones & Laughlin, supra*, 29–30.

MR. JUSTICE MCREYNOLDS concurs in this opinion.

MR. JUSTICE REED concurring in part, dissenting in part.

While concurring in general with the conclusions of the Court in this case, I find myself in disagreement with the conclusion that the National Labor Relations Board was "without authority to require the petitioning companies

to desist from giving effect to the Brotherhood contracts, as provided in subdivision (f) of paragraph one of the Board's order." In that paragraph the petitioner companies are ordered to:

"I. Cease and desist from:

. . . . . .

(f) Giving effect to their contracts with the International Brotherhood of Electrical Workers."

It is agreed that the "fundamental purpose of the Act is to protect interstate and foreign commerce from interruptions and obstructions caused by industrial strife." This is to be accomplished by contracts with labor organizations, reached through collective bargaining. The labor organizations in turn are to be created through the self-organization of workers, free from interference, restraint or coercion of the employer.[1] The forbidden interference is an unfair labor practice, which the Board, exclusively, is empowered to prevent by such negative and affirmative action as will effectuate the policies of the act.[2] To interpret the Act to mean that the Board is without power to nullify advantages obtained by the Edison companies through contracts with unions, partly developed by the unlawful interference of the Edison companies with self-organization, is to withdraw from the Board the specific authority granted by the Act to take affirmative action to protect the workers' right of self-organization, the basic privilege guaranteed by the Act. Freedom from employer domination flows from freedom in self-organization.

It is assumed that the terms of these contracts in all respects are consistent with the requirements of the National Labor Relations Act and are in themselves, considered apart from the actions of the Edison companies in securing their execution, advantageous in preserving industrial harmony.

---

[1] *Labor Board Cases*, 301 U. S. 1.

[2] §§ 7, 8, 10, Act of July 5, 1935, 49 Stat. 452–55.

The Board found that the Consolidated Edison Company and its affiliates, the respondents before the Board, "deliberately embarked upon an unlawful course of conduct, as described above, which enabled them to impose the I. B. E. W. upon their employees as their bargaining representative and at the same time discourage and weaken the United which they opposed. From the outset the respondents contemplated the execution of contracts with the I. B. E. W. locals which would consummate and perpetuate their plainly illegal course of conduct in interfering with, restraining, and coercing their employees in the exercise of the rights guaranteed to them under section 7 of the Act. It is clear that the granting of the contracts to the I. B. E. W. by the respondents was a part of the respondents' unlawful course of conduct and as such constituted an interference with the rights of their employees to self-organization. The contracts were executed under such circumstances that they are invalid, notwithstanding that they are in express terms applicable only to members of the I. B. E. W. locals. If the contracts are susceptible of the construction placed upon them by the respondents, namely, that they were exclusive collective bargaining agreements, then, *a fortiori,* they are invalid." [3]

The evidence upon which this finding is based is summarized in detail in 4 N. L. R. B., pages 83 to 94. It shows a consistent effort on the part of the officers and foremen of the Edison Company and its affiliates, as well as other employees of the Edison companies—formerly officers in the recently disestablished "Employees' Representation Plans," actually company unions—to further the development of the I. B. E. W. unions by recognition, contracts for bargaining, openly expressed approval,

[3] 4 N. L. R. B. 71, 94.

establishment of locals, and by permitting solicitation of employees on the time and premises of the Edison companies. By the Wagner Act employees have "the right to self-organization." It is an "unfair labor practice for an employer" to "interfere with, restrain or coerce employees" in the exercise of that right.[4] The Board concluded that the contracts with the I. B. E. W. unions were a part of a systematic violation by the Edison companies of the workers' right to self-organization.

This determination set in motion the authority of the Board to issue an order to cease and desist from the unfair labor practice and to take "such affirmative action . . . as will effectuate the policies of this Act." The evidence was clearly sufficient to support the conclusion of the Board that the Edison companies entered into the contracts as an integral part of a plan for coercion of and interference with the self-organization of their employees. This justified the Board's prohibition against giving effect to the contracts. The "affirmative action" must be connected with the unfair practices but there could be no question as to the materiality of the contracts. As this Court, only recently, said, as to the purpose of the Congress in enacting this Act:

"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." [5]

To this, it is answered that the extent of the coercion is left to "mere conjecture"; that it would be an "extrava-

[4] §§ 7 and 8, Act of July 5, 1935, 49 Stat. 452.

[5] *Labor Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 267.

gant" assumption to say that none of the 30,000 members "joined voluntarily"; and that the "employers' practices, which were complained of, could be stopped without imperiling the interests of those who for all that appears had exercised freely their right of choice." [6] On the question whether or not the Edison companies' activities as to these contracts were a part of a definite plan to interfere with the right of self-organization, these answers are immaterial. It is suggested that the problem of the contracts should be approached with three cardinal considerations in mind: (1) that one contracting party is an "independently established" labor organization, free of domination by the employer; (2) that the contracts grant valuable collective bargaining rights; and (3) that they contain provisions for desirable working privileges. Such considerations should affect discretion in shaping the proper remedy. They are negligible in determining the power of the Board. They would, if given weight, permit paternalism to be substituted for self-organization. The findings of the Board, based on substantial evidence, are conclusive.[7] There was evidence of coercion and interference, and the Board did determine that the policies of the Act would be effectuated by requiring the companies to cease giving effect to these contracts.

The petitioners, however, aside from the merits, raise procedural objections. It is contended that before the Board could have authority to order the Edison companies to cease and desist from giving effect to their contracts with the unions, it was necessary that the unions as well as the Edison companies should have legal notice or should appear; that the unions were indispensable parties. This Court has held to the contrary in *Labor Board* v. *Pennsylvania Greyhound Lines,* 303 U. S. 261.

---

[6] *Ante,* p. 238.

[7] *Washington, V. & M. Coach Co.* v. *Labor Board,* 301 U. S. 142, 146.

This case determined that where an employer has created and fostered a labor organization of employees, thus interfering with their right to self-organization, the employer can be required without notice to the organization, to withdraw all recognition of such organization as the representative of its employees. It is said that this case "is not apposite, as there no question of contract between employer and employee was involved. The Board had found upon evidence that the employer had created and fostered the labor organization in question and dominated its administration in violation of § 8 (2)." [8] In the instant case it was found that no such domination existed. In the *Greyhound* case, the Board found not only domination under § 8 (2) but also, as in this case, an unfair labor practice under § 8 (1). The company's violation of § 8 (1) was predicated on its interference with self-organization.[9] In the *Greyhound* case it was said that the organization was not entitled to notice and hearing because "the order did not run against the Association." [10] Here the unions are affected by the action on the contracts, exactly as the labor organization in the *Greyhound* case was affected by the order to withdraw recognition. It would seem immaterial whether those contracts were violative of one or both or all the prohibited unfair labor practices.

A further procedural objection is found in the failure of the complaint, or any of its amendments, to seek specifically a cease and desist order against continued operation under the contracts. The companies were charged with allowing organization meetings on the company time and on company property, permitting solici-

[8] *Ante*, p. 233.

[9] *Labor Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 263.

[10] *Id.*, 271.

tation of membership during company time, and paying overtime allowances to those engaged in soliciting or coercing workers to join the contracting unions. The complaint said that similar aid was not extended to a competing union and that office assistance was given to the effort to get members for the contracting unions. These charges made it obvious that the contracts were obtained from the unions which were improperly aided by the Edison companies in violation of the prohibitions against interference with self-organization. Contracts so obtained were necessarily at issue in an examination of the acts in question.

Certainly the Edison companies and the contracting unions could have been allowed on a proper showing a further hearing on the question of the companies' continuing recognition of the contracts. By § 10(f) the Edison companies and the unions could obtain a review of the Board's order. In that hearing either or both could show to the court, § 10(e), that additional evidence as to the contracts was material and that it had not been presented because the aggrieved parties had not understood that the contracts were subject to a cease and desist order, or had not known of the proceeding. The court could order the Board to take the additional evidence. This simple practice was not followed. Although all parties were before the lower court on the review, the petitioners chose to rely on the impotency of the Board to enter an order affecting the contracts.

In these circumstances the provision of the order requiring the Edison companies to cease from giving effect to their contracts with the contracting unions is proper. This order prevents the Edison companies from reaping an advantage from those acts of interference found illegal by the Board.

MR. JUSTICE BLACK concurs in this opinion.

SCHER *v.* UNITED STATES.

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

No. 49. Argued November 7, 1938.—Decided December 5, 1938.

1. In a prosecution for possession and transportation of distilled spirits in containers lacking the requisite revenue stamps, in violation of § 201 of the Liquor Taxing Act of 1934, a defense that the distilled spirits involved were not intended for sale and were therefore expressly excepted from the provisions of the Act must be affirmatively proved. P. 254.
2. Under the circumstances disclosed in this case, the search of an automobile and seizure of liquor therefrom, without a warrant, after the car had entered a garage appurtenant to a private dwelling, to which it had been pursued by federal officers, was not an unreasonable search and seizure; and, in a prosecution for violation of § 201 of the Liquor Taxing Act of 1934, a motion to suppress the evidence thereby obtained was properly overruled. P. 255.
3. A federal officer who has made an arrest following a tip as to a violation of a federal law may not in a prosecution for such violation be required to reveal the identity of his informant, where this is not essential to the defense. P. 254.

95 F. 2d 64, affirmed.

CERTIORARI, 304 U. S. 557, to review the affirmance of a conviction for violation of the Liquor Taxing Act of 1934.

Mr. Gerald A. Doyle, with whom *Mr. A. L. Greenspun* was on the brief, for petitioner.

The search was illegal because the federal officers made their way into part of a private dwelling without a warrant, and also because they were trespassers within the curtilage of the defendant's home when they discovered evidence of the crime.

The constitutional prohibition against unreasonable searches and seizures is construed liberally to safeguard the rights of privacy. *United States* v. *Lefkowitz,* 285 U. S. 452; *Go-Bart Importing Co.* v. *United States,* 282

U. S. 344; *Taylor* v. *United States,* 286 U. S. 1; *Sgro* v. *United States,* 287 U. S. 206. See also *United States* v. *Slusser,* 270 F. 818; *United States* v. *DiCorvo,* 37 F. 2d 124; *Elrod* v. *Moss,* 278 F. 123; *Gauske* v. *United States,* 1 F. 2d 620; *United States* v. *Olmstead,* 7 F. 2d 760; *United States* v. *Spallino,* 21 F. 2d 567.

While the automobile was the object that was searched, the search was made in the garage of the defendant, and therefore was a search of the garage itself.

The defendant was entitled to know the source of the agents' information so that the court might determine whether the information was given by a reliable informant and whether a case of probable cause had been established.

Mr. Alexander Holtzoff, with whom *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Messrs. Mahlon D. Kiefer* and *Herbert A. Bergson* were on the brief, for the United States.

Mr. Justice McReynolds delivered the opinion of the Court.

Petitioner Scher was found guilty under two counts of an indictment which charged violations of § 201, Title II, Liquor Taxing Act, January 11, 1934,[1] by possessing

[1] Ch. 1, § 201, 48 Stat. 313, 316 (U. S. C., Title 26, § 1152a, 1152g)—

"No person shall . . . transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal-revenue taxes imposed on such spirits. The provisions of this title shall not apply to—

. . . . . .

"(f) Distilled spirits not intended for sale or for use in the manufacture or production of any article intended for sale; . . ."

Sec. 207—"Any person who violates any provision of this title, . . . shall on conviction be punished by a fine not exceeding $1,000, or by imprisonment at hard labor not exceeding five years, or by both."

and transporting distilled spirits in containers wanting requisite revenue stamps. He was sentenced for a year and a day, etc. The Circuit Court of Appeals affirmed the judgment.

No objection to the judge's charge is urged and the evidence submitted to the jury is adequate to support the verdict.

The material facts are not in serious dispute. A brief summation will suffice for the points to be considered.

Federal officers received confidential information thought to be reliable that about midnight, December 30, 1935, a Dodge automobile with specified license plate would transport "phony" whiskey from a specified dwelling in Cleveland, Ohio. About nine-thirty, officers posted nearby saw the described automobile stop in front of the house and remain there for an hour. A man, with three women and a package, then entered the car and drove away. It returned shortly before midnight, stopped at the rear of the house and remained for half an hour. The headlights were extinguished; the officers heard what seemed to be heavy paper packages passing over wood. Doors slammed; petitioner drove the car away, apparently heavily loaded. The officers followed in another car. After going a few blocks petitioner stopped briefly at a filling station; then he drove towards his own residence two or three blocks further along. The officers followed. He turned into a garage a few feet back of his residence and within the curtilage. One of the pursuing officers left their car and followed. As petitioner was getting out of his car this officer approached, announced his official character, and stated he was informed that the car was hauling bootleg liquor. Petitioner replied, "just a little for a party." Asked whether the liquor was tax paid, he replied that it was Canadian whiskey; also, he said it was in the trunk at the rear of the car. The officer opened the trunk and found eighty-eight bottles of distilled spirits in unstamped containers. He

arrested petitioner and seized both car and liquor. The officer had no search warrant.

At the trial counsel undertook to question the arresting officers relative to the source of the information which led them to observe petitioner's actions. Objections to these questions were sustained and this is now assigned as error.

Before trial petitioner's counsel moved "to suppress all of the evidence obtained by the search made by the Revenue agents in the above entitled cause, together with all information obtained by reason of such search, and to grant an order requiring the agents to return all articles seized by reason of said search. . . ." In support of this he relied upon the facts above stated. Denial of this motion is said to be error.

The exception in respect of transporting liquor not intended for sale found in the statute affords matter for affirmative defense. *Queen* v. *United States,* 64 App. D. C. 301; 77 F. 2d 780.

In the circumstances the source of the information which caused him to be observed was unimportant to petitioner's defense. The legality of the officers' action does not depend upon the credibility of something told but upon what they saw and heard—what took place in their presence. Justification is not sought because of honest belief based upon credible information as in *United States* v. *Blich,* 45 F. 2d 627.

Moreover, as often pointed out, public policy forbids disclosure of an informer's identity unless essential to the defense, as, for example, where this turns upon an officer's good faith. *Segurola* v. *United States,* 16 F. 2d 563, 565; *Shore* v. *United States,* 60 App. D. C. 137; 49 F. 2d 519, 522; *McInes* v. *United States,* 62 F. 2d 180.

Considering the doctrine of *Carroll* v. *United States,* 267 U. S. 132 (see *Husty* v. *United States,* 282 U. S. 694),

and the application of this to the facts there disclosed, it seems plain enough that just before he entered the garage the following officers properly could have stopped petitioner's car, made search and put him under arrest. So much was not seriously controverted at the argument.

Passage of the car into the open garage closely followed by the observing officer did not destroy this right. No search was made of the garage. Examination of the automobile accompanied an arrest, without objection and upon admission of probable guilt. The officers did nothing either unreasonable or oppressive. *Agnello* v. *United States,* 269 U. S. 20, 30; *Wisniewski* v. *United States,* 47 F. 2d 825, 826.

The challenged judgment is

Affirmed.

CALIFORNIA *v.* LATIMER ET AL.

No. 13, Original. Argued November 7, 1938.—Decided December 5, 1938.

A bill filed here by California against the members of the Railroad Retirement Board and the Commissioner of Internal Revenue, to enjoin them from enforcing against the State Belt Railroad—a railroad on the San Francisco water front, owned by the State, and operated by it in interstate commerce—the provisions of the Railroad Retirement Acts of 1935 and 1937 and of the Carriers Taxing Act of 1937, *held* without equity.

1. An alleged threat of the Railroad Retirement Board to require the State Belt Railroad to gather and keep records of its employees, does not expose it to irreparable injury. P. 259.

   (a) A general allegation without supporting detail or specification that compliance with regulations of the Board would subject the State "to great expense" is not an adequate basis for relief on the ground of irreparable injury. P. 260.

   (b) Moreover, the Board is without power to enforce its regulations except by resort to legal proceedings, and therein the State would have ample opportunity to challenge the enforcement of the Acts. P. 260.

(c) The contention that the possible penalty, in case of a prosecution under § 13 of the Retirement Act of 1937, is so serious that the opportunity to defend would not be an adequate remedy, is examined and rejected. P. 261.

2. The threat of the Commissioner of Internal Revenue to require payment of the tax does not sufficiently show danger of irreparable injury. P. 261.

(a) Payment, if not due, could be recovered. P. 261.

(b) Possible delay in recovery of payment—suit could not be instituted until six months after claim for refund was made, if the Commissioner failed earlier to act upon it—is not a special circumstance justifying resort to a suit for an injunction in order that the question of liability may be promptly determined. P. 261.

(c) The contentions of the State that to raise the money with which to pay the State's portion of the tax it would be necessary to readjust the tariffs of the railroad, and that the deduction of the employees' portion from the payroll would result in a multiplicity of suits by employees to fix their rights under the state retirement law, *held* not sufficiently supported in the bill. P. 262.

(d) Mere inconvenience to the State in raising the money to pay the taxes does not entitle it to an injunction to test the validity or applicability of the tax. P. 262.

Bill dismissed.

Bill of complaint filed by California, by leave of Court, in a suit invoking the original jurisdiction of this Court, against members of the Railroad Retirement Board and the Commissioner of Internal Revenue to enjoin enforcement of provisions of the Railroad Retirement Acts of 1935 and 1937 and the Carriers Taxing Act of 1937.

Mr. Lucas E. Kilkenny, Deputy Attorney General of California, with whom *Messrs. U. S. Webb,* Attorney General, *H. H. Linney* and *James J. Arditto,* Deputy Attorneys General, were on the brief, for complainant.

Mr. Warner W. Gardner, with whom *Solicitor General Jackson, Assistant Attorney General Arnold, Assistant Attorney General Morris,* and *Messrs. Sewall Key, John J. Abt, Arnold Raum,* and *Lester P. Schoene* were on the brief, for defendants.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

California owns the railroad along the San Francisco water front known as State Belt Railroad, and operates it in interstate commerce. *Sherman* v. *United States,* 282 U. S. 25; *United States* v. *California,* 297 U. S. 175. On leave granted, the State filed in this Court this bill against the members of the Railroad Retirement Board and the Commissioner of Internal Revenue, individually and in their official capacities, to enjoin them from enforcing against that railroad provisions of the Acts of Congress known as the Railroad Retirement Acts of 1935 and 1937 [1] and of the Carriers Taxing Act of 1937.[2]

The bill recites that California has a State Employees' Retirement system sustained by a fund to which the State and its employees contribute; and that all the persons employed in the operation of State Belt Railroad are members of that retirement system and are entitled to pensions thereunder, unless they are members of a retirement system supported wholly, or in part, by funds of the United States; that the three Acts of Congress named have for their sole purpose the establishment of a pension system of annuities and other benefits for employees of interstate railroads; and that the federal system is sustained by taxes imposed by the Carriers Taxing Act. The bill asserts, apparently, that as a matter of statutory construction, the federal system is not applicable to the employees of State Belt Railroad; and apparently that if construed as applicable to them, the legislation is unconstitutional. The bill charges that the Railroad Retirement Board has threatened to require the complainant to gather and keep records concerning the

[1] Act of August 29, 1935, c. 812, 49 Stat. 967, as amended June 24, 1937, c. 382, Part I, 50 Stat. 307, 45 U. S. C., § 228a-r (1937 Supp.).

[2] Act of June 29, 1937, c. 405, 50 Stat. 435, 45 U. S. C., §§ 261–73 (1937 Supp.).

employees of the State Belt Railroad, which would subject it "to great expense"; and that the Board "will enforce against the complainant, its officers, agents, and employees certain penalties if it refuses" to do so. The bill charges, also, that the Commissioner of Internal Revenue has threatened to enforce taxes, under the Carriers Taxing Act, and will subject it to heavy fines and penalties if it fails to pay the same. The relief prayed is that the three Acts of Congress be declared inapplicable to State Belt Railroad; that the members of the Railroad Retirement Board be enjoined, among other things, from requiring the railroad to assemble and furnish the information requested; and that the Commissioner of Internal Revenue be enjoined from enforcing collection of the taxes claimed.

The defendants moved to dismiss the bill, assigning therefor nine grounds. We need consider only the objection that the bill is without equity.[3] For we are of opin-

[3] This objection was the basis of two of the reasons given in support of the motion to dismiss. The other seven are: (1) The individual citizenship of defendants can form no basis for the original jurisdiction of the Court. The defendants can and will act only as officials of the United States; and as officials they are citizens of no state. (2) The Collector of Internal Revenue for the First District of California and the employees of the State Belt Railroad have not been joined as defendants. They are indispensable parties in whose absence the Court should not proceed. (3) The cause is not maintainable in this Court, since the Collector of Internal Revenue for the First District of California, a citizen of California, should be made a party, and to join him would deprive the Court of original jurisdiction. (4) The cause is not maintainable in this Court, since the employees of the State Belt Railroad, citizens of California, should be made parties, and to join any of them would deprive the Court of original jurisdiction. (5) Maintenance of the suit is prohibited by Section 3224 of the Revised Statutes. (6) The United States is the real party in interest and hence an indispensable party. (7) The issues presented by complainant have been clearly decided against it by previous decisions of this Court, and a re-examination of those contentions would serve no useful purpose.

ion that there was adequate opportunity to test at law the applicability and constitutionality of the Acts of Congress; and that no danger is shown of irreparable injury if that course is pursued.

First. The alleged threat of the Railroad Retirement Board to require State Belt Railroad to gather and keep records of its employees does not expose it to irreparable injury. The Railroad Retirement Act of 1937 provides:

"Sec. 8. Employers shall file with the Board, in such manner and form and at such times as the Board by rules and regulations may prescribe, returns under oath of monthly compensation of employees, and, if the Board shall so require, shall furnish employees with statements of their monthly compensation as reported to the Board. . . .

"Sec. 10 (b) 4. . . . The Board shall have power to require all employers and employees and any officer, board, commission, or other agency of the United States to furnish such information and records as shall be necessary for the administration of such Acts. The several district courts of the United States and the District Court of the United States for the District of Columbia shall have jurisdiction upon suit by the Board to compel obedience to any order of the Board issued pursuant to this section . . ."

"Sec. 13. Any officer or agent of an employer . . . who shall willfully fail or refuse to make any report or furnish any information required, in accordance with the provisions of section 10 (b) 4, by the Board . . . shall be punished by a fine of not more than $10,000 or by imprisonment not exceeding one year."

The only "threats" made against the complainant in connection with these sections is a ruling by the Railroad Retirement Board that the State Belt Railroad is subject to the Railroad Retirement Acts. No specific action in relation to that railroad appears to have been taken

by the Board.[4] Regulations have been prescribed under §§ 8 and 10 which are simple and of a type which can be complied with largely by transcriptions from payrolls.[5] The bill alleges that compliance with the regulations would subject the State "to great expense." No supporting detail or specification is given. Such a general statement is not an adequate basis for relief on the ground of irreparable damages.[6] The trifling expense of temporarily complying with the regulation until the applicability of the Act shall have been judicially determined, like the expense of the administrative hearings complained of in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50, 51, and *Petroleum Exploration, Inc.* v. *Public Service Comm'n*, 304 U. S. 209, 220, 221, is not sufficient to support the claim of irreparable injury indispensable to interposition by injunction. Compare *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89, 95, 96.

Moreover, the Board is without power to enforce its regulations except by resort to legal proceedings, as provided in § 10 (b) 4; and in any suit which it may institute to enforce the regulations[7] ample opportunity is afforded to defend, on the ground that State Belt Railroad is not subject to the Railroad Retirement Acts. It is contended

[4] Compare *Dalton Adding Machine Co.* v. *State Corporation Comm'n*, 236 U. S. 699, 701; *Continental Baking Co.* v. *Woodring*, 286 U. S. 352, 367–68; *State Corporation Comm'n* v. *Wichita Gas Co.*, 290 U. S. 561, 568–69.

[5] 3 Federal Register, p. 22 *et seq.* (promulgated December 31, 1937), 3 Federal Register, p. 218 (promulgated January 17, 1938), in effect at the time leave to file the bill of complaint was granted, May 16, 1938, later superseded by 3 Federal Register, pp. 1478, 1493 *et seq.*, Part 50 (promulgated May 31, 1938).

[6] Compare *Shelton* v. *Platt*, 139 U. S. 591, 596; *Cruickshank* v. *Bidwell*, 176 U. S. 73, 81; *Indiana Mfg. Co.* v. *Koehne*, 188 U. S. 681, 690; *Boise Artesian Water Co.* v. *Boise City*, 213 U. S. 276, 285.

[7] Compare *Cavanaugh* v. *Looney*, 248 U. S. 453; *Fenner* v. *Boykin*, 271 U. S. 240; *Hurley* v. *Kincaid*, 285 U. S. 95.

that the possible penalty, in case of a prosecution under § 13, is so serious as to prevent the opportunity to defend from being an adequate remedy. Compare *Ex parte Young,* 209 U. S. 123, 165. No prosecution has been instituted or threatened. And authority to institute such a proceeding rests not with the Railroad Retirement Board, but with the United States Attorney for the Northern District of California, who is not made defendant in this suit.[8] Furthermore, it may be doubted whether a refusal to comply with the regulation would be deemed willful, if based on an honest belief that the Act is not applicable to a railroad operated by the State. Compare *United States* v. *Murdock,* 290 U. S. 389, 394–396.

Second. The alleged threat of the Commissioner of Internal Revenue to require payment of the tax does not show danger of irreparable injury. The only threat alleged is the ruling that the Carriers Taxing Act is applicable to this railroad—a ruling made in answer to an enquiry by the Attorney General of the State. The tax for the year is $7,862.32 payable by the State Belt Railroad; and an equal amount payable by the employees to be deducted by it from their compensation. Payment of the tax would not expose the State to irreparable injury,[9] since the amount paid with interest could be recovered if not due. Payment followed by proceedings to recover the amount would involve some delay, as an action at law to recover the sum paid could not be instituted until six months after making the claim for refund, if the Commissioner should fail to act earlier upon it.[10] Such possible delay, it is urged, is a special circumstance which justifies resort to a suit for an injunction in order that the ques-

[8] Compare *Federal Trade Comm'n* v. *Claire Furnace Co.,* 274 U. S. 160, 173–74; *Philadelphia Co.* v. *Stimson,* 223 U. S. 605, 620–22.

[9] *Dows* v. *Chicago,* 11 Wall. 108. See also cases in Note 6.

[10] R. S. § 3226, as amended by § 1103, Revenue Act of 1932.

tion of liability may be promptly determined. If the delay incident to such proceedings justified refusal to pay a tax, the federal rule that a suit in equity will not lie to restrain collection on the sole ground that the tax is illegal,[11] could have little application. For possible delay of that character is the common incident of practically every contest over the validity of a federal tax.

It is urged that in order to raise the money with which to pay the State's portion of the tax, it would be necessary to readjust the tariffs of State Belt Railroad; and that the deduction of the employees' portion from the payroll would result in a multiplicity of suits by employees to recover the amounts and to reëstablish their rights and privileges under the laws of the State. The meagre statements of the bill do not convince us that the apprehension alleged is well founded. The State Employees Retirement Act also requires the State Belt Railroad to make deductions from the salaries of its employees. The bill does not show the precise relationship between the amounts required to be deducted by the state and federal acts, or even, if the amount of the federal deduction is greater, that it is impossible for the State Belt Railroad to work out with its employees a way of adjusting its affairs during the period of uncertainty as to which act is applicable. Mere inconvenience to the taxpayer in raising the money with which to pay taxes is not uncommon, and is not a special circumstance which entitles one to resort to a suit for an injunction in order to test the validity or applicability of the tax. For aught that appears prompt payment of the tax and claim of refund would have led to an early determination of the liability here contested.

Bill dismissed.

---

[11] See cases under Note 6.

Counsel for Parties.

McDONALD *v.* THOMPSON ET AL.

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

No. 55. Argued November 8, 9, 1938.—Decided December 5, 1938.

1. Section 206 (a) of the federal Motor Carrier Act, 1935, declares that no common carrier by motor vehicle subject to the provisions of the Act may engage in interstate commerce unless there shall have been issued by the Interstate Commerce Commission a certificate of public convenience and necessity authorizing the operation. A proviso requires that the Commission issue a certificate without further proof as to public convenience and necessity, where the applicant was "in bona fide operation" as a common carrier by motor vehicle on June 1, 1935, and since that time, over routes for which application is made; and the applicant in such case is authorized to continue operation pending the determination of the application. *Held* that, one who had been operating as a common carrier without the authority of the state commission—his application therefor having been denied prior to 1935 by an order subsequently upheld by the state court—had not been "in bona fide operation" within the meaning of the proviso. P. 266.
2. As the Motor Carrier Act is remedial and to be construed liberally, a proviso defining exemptions is to be read in harmony with the purpose of the measure and held to extend only to carriers plainly within its terms. P. 266.

95 F. 2d 937, affirmed.

CERTIORARI, *post*, p. 580, to review a decree which reversed, with directions to dismiss the bill, a decree of injunction restraining enforcement against petitioner of the Motor Truck Law of Texas.

Messrs. Lloyd E. Price and *T. S. Christopher* for petitioner.

Messrs. William McCraw, Attorney General of Texas, and *Albert G. Walker*, Assistant Attorney General, for respondents.

Petitioner in this suit claims "Grandfather Rights" based upon his unlawful operation upon the highways of the State of Texas. His "right-of-way" for his interstate operations has never been secured from the constituted authorities of the State, and all of his operations have been as a trespasser upon the state highways, and unless the state laws have been superseded the mere filing of his application for certificate would confer no new right upon him to continue his unlawful use of these Texas highways. *Town of Conway* v. *Atlantic Coast Line R. Co.*, 20 F. 2d 250, 259.

By leave of Court, briefs of *amici curiae* were filed by *Messrs. Daniel W. Knowlton* and *E. M. Reidy* on behalf of the Interstate Commerce Commission, in support of petitioner; and by *Messrs. John E. Benton* and *Clyde S. Bailey* on behalf of the National Association of Railroad & Utilities Commissioners, in support of respondents.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Petitioner brought this suit in the federal court for the northern district of Texas against the members of the Texas Railroad Commission and its enforcement officers to enjoin them from enforcing against him the state Motor Truck Law.[1] Respondents answered; there was a trial; the court made findings of fact, stated its conclusions of law, and entered a decree permanently enjoining respondents from interfering with petitioner's business in interstate transportation. The circuit court of appeals reversed and remanded with directions to dismiss the bill. 95 F. 2d 937. This Court granted a writ of certiorari.

Section 3 of the state law requires every carrier of property by motor for hire over public highways of the

[1] Acts Reg. Sess., 42d Leg., 1931, c. 277; Vernon's Tex. Ann. Civ. St., Art. 911b.

State to obtain from the Railroad Commission a certificate of convenience and necessity. Section 4 makes it the duty of the commission to regulate the transportation, to prescribe rules for safety of carriers' operations, and to supervise all matters affecting relationships between the carriers and the public.

The federal Motor Carrier Act, 1935,[2] § 206 (a), declares that no common carrier by motor vehicle subject to its provisions shall engage in interstate commerce unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing the operation. A proviso in that section declares that, if any such carrier "was in bona fide operation as a common carrier by motor vehicle on June 1, 1935," over routes for which application is made and has so operated since that time, the commission shall issue the certificate without requiring further proof that public convenience and necessity will be served by the carrier's operation. Pending determination of the application, the applicant is authorized to continue operations.

Since some time before the passage of the Act, petitioner has been continuously using Texas highways in interstate transportation of property by motor vehicle for hire. Claiming to have been in bona fide operation as contemplated by the proviso, he made timely application to the Interstate Commerce Commission for a certificate authorizing him to continue to operate over the highways he has been using. The application is still pending, and petitioner insists that, notwithstanding state law, he is entitled to continue operations under the proviso. The question first to be decided is whether his claim of bona fide operation is well founded.

In May of 1934 he applied to the state commission for a certificate authorizing operation as a common carrier in

[2] Act of August 9, 1935, 49 Stat. 543, 551; 49 U. S. C., § 306 (a).

interstate commerce. July 14, 1934, the commission denied the application on the ground that the proposed operations would subject the highways named in it to excessive burden and endanger and interfere with ordinary use by the public. Petitioner appealed to the district court of Travis county and obtained a decree enjoining the commission from interfering with his operations. The court of civil appeals, January 8, 1936, reversed and dissolved the injunction. 90 S. W. 2d 581. Thus it appears that petitioner's operations have been without authority of the Texas commission and, unless within the proviso of the federal Act, without authority of federal law.

Exact definition of "bona fide operation" is not necessary. As the Act is remedial and to be construed liberally, the proviso defining exemptions is to be read in harmony with the purpose of the measure and held to extend only to carriers plainly within its terms. *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Comm'n,* 286 U. S. 299, 311. To limit the meaning to mere physical operation would be to eliminate "bona fide." That would be contrary to the rule that all words of a statute are to be taken into account and given effect if that can be done consistently with the plainly disclosed legislative intent. *Ginsberg & Sons* v. *Popkin,* 285 U. S. 204, 208. *Ex Parte Public National Bank,* 278 U. S. 101, 104. There is nothing to justify rejection of these qualifying words. The expression, "in bona fide operation," suggests absence of evasion, excludes the idea that mere ability to serve as a common carrier is enough, includes actual rather than potential or simulated service, and in context implies recognition of the power of the State to withhold or condition the use of its highways in the business of transportation for hire. Plainly the proviso does not extend to one operating as a common carrier on public highways of a State in defiance of its laws.

As petitioner is not protected in his operation as a common carrier by the proviso, we need not consider to what extent, if at all, the federal Motor Carrier Act superseded the state Motor Truck Law, or any other question presented by petitioner.

Affirmed.

M. E. BLATT CO. *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 98. Argued November 15, 16, 1938.—Decided December 5, 1938.

1. Special findings of fact made by the Court of Claims are not affected by any statement of fact, reasoning, or conclusion that may be found in its opinion. P. 277.
2. Rent is a fixed sum, or property amounting to a fixed sum. It does not include payments, uncertain as to amount and time, made by the lessee for the cost of improvements. P. 277.
3. Improvements made by the lessee, even when required by the lease, will not be deemed rent unless such intention is plainly disclosed. *Id.*
4. Improved real property was leased for use as a picture theater, for ten years beginning upon completion of improvements made and paid for partly by the lessor and partly by the lessee. The lease provided that improvements made by the lessee should become the property of the lessor, on expiration or earlier termination of the leasehold. The Commissioner of Internal Revenue estimated the depreciated values, at the end of ten years, of the lessee's improvements, omitting some which could then have no value, and added one-tenth of the total estimate to the lessor's income for the tax year next following the commencement of the lease. *Held* erroneous.

(1) The question presented is whether, under this particular lease, one-tenth of this "estimated depreciated value," at the end of the term, was income of the lessor in the first year of the term. There is nothing in the findings to suggest that cost of any improvement made by lessee was rent or an expenditure not properly to be attributed to its capital or maintenance account as distinguished from operating expense. They disclose no basis of value on which to lay an income tax or the time of realization of taxable

gain, if any there was. The figures made by the Commissioner are not defined. The findings do not show whether they are intended to represent value of improvements if removed or the amount attributable to them as a part of the building. The figures themselves repel the suggestion that they were intended to represent amounts obtainable for the items if removed; it is not to be assumed that they were intended as valuations of salvage at the end of the term; and it does not appear that the improvements, if detached, would then have any value, even as junk, over necessary cost of removal. Equally conjectural would be assumption that the figures represent enhancement of value of the leased premises by reason of the improvements when new, or as deteriorated at the end of the term. Present or future value of the premises, however ascertained, is single in substance; it can not be arrived at by mere summation of actual or estimated cost of constituent elements, new or depreciated. Pp. 276, *et seq.*

(2) Granting that the improvements increased the value of the building, the enhancement was not realized income of lessor; it was addition to capital, not income within the meaning of the Revenue Act of 1932, § 22 (a). P. 279.

(3) Assuming that at sometime value of the improvements would be income of lessor, it can not be reasonably assigned to the year in which they were installed. P. 280.

87 Ct. Cls. 413; 23 F. Supp. 461, reversed.

CERTIORARI, *post*, p. 581, to review a judgment rejecting a claim for recovery of money paid as an additional income tax.

Mr. Lawrence Cake for petitioner.

When improvements are made by a lessee, as in this case, there is no realization of gain by the lessor at the time when the improvements are completed.

The tenant agreed to paint and decorate (provided the landlord would pay $1500 of the cost) and to install the latest type of moving picture and talking apparatus, theatre seats, and all other fixtures, furniture, and equipment necessary for the successful operation of a modern up-to-date theatre. That was all. The tenant was not required to spend any certain amount. The amount was

left entirely to his discretion and self-interest. He had a lease for ten years and presumably would spend as much on improvements as would fit the premises for his purpose, but he was not required to spend any amount whatever for the benefit of the lessor. So far as the lease went, his expenditures might well be limited to improvements which would have a life not exceeding the term of the lease. If he spent more and the improvements he made were of such character as would carry over some residual value beyond the term of the lease, any such excess value would be a gift to the lessor. At all events it was not required by the terms of the lease.

The common definition of rent or rental is an agreed fixed payment for the use of property. It need not necessarily be payable in money but it must be agreed upon and it must be fixed in amount or quantity. *Duffy* v. *Central Railroad Co.*, 268 U. S. 55, 63.

It is the fundamental rule of income taxation, laid down in *Eisner* v. *Macomber,* 252 U. S. 189, that to constitute taxable gain or income there must be a realization, either by severance from the source or by conversion of both source and gain into a different form, and that unrealized appreciation in value is not taxable as income. *United States* v. *Safety Car Heating & L. Co.,* 297 U. S. 88, 99. Compare also *Koshland* v. *Helvering,* 298 U. S. 441; *North American Oil Consolidated* v. *Burnet,* 286 U. S. 417; *MacLaughlin* v. *Alliance Insurance Co.,* 286 U. S. 244; *Burnet* v. *Logan,* 283 U. S. 404.

Here the petitioner is the owner of property which it has leased to another for ten years. The lessee of the property has added improvements which the Commissioner has found will have a residual value of $17,423.14 at the end of the term of the lease. The value of petitioner's property, therefore, has been increased and a part of that increased value will presumably still be in the property when it reverts to petitioner upon the ter-

mination of the lease. Has petitioner realized any immediate gain by virtue of all this? Certainly there has been nothing "severed" from the property (petitioner's capital) or "received or drawn" by petitioner for its "separate use, benefit and disposal." There has been no gain or profit in the sense of "something of exchangeable value proceeding from the property." Petitioner has no control over the property, or the improvements, so long as the lease runs. Even when the lease ends, petitioner will have only the possession of real estate bearing improvements which fit it for use as a theatre.

The court below suggests, however, that petitioner has at all times a right to sell the property subject to the lease, and so immediately realize the cash value of the improvements to the extent that they will have value beyond the term of the lease. This does not aid the court's conclusion. On the contrary, it supports petitioner's argument that there was no realization of gain at the time the improvements were added, and that the realization of gain, if any,—and the taxation thereof as income—can only take place upon the sale or other disposition of the property. *Hewitt Realty Co.* v. *Commissioner*, 76 F. 2d 880.

The decision of the court below ignores the practical difficulties and realities of the situation.

It seems fairly obvious that the regulations in question which tax as income to the lessor, either immediately or by spreading it over the term of the lease, the "estimated depreciated value" at the end of the lease of any improvements made by the lessee, are bound to be uncertain and difficult of application in particular cases. See Morphy v. Commissioner, 35 B. T. A. 289, minority opinion; Hart v. Commissioner, 37 B. T. A. 360; Paul & Mertens, Law of Federal Income Taxation, Vol. 1, § 10.12, 1937 Supplement.

If the "income" which the Government has charged to petitioner here, not only for the taxable year actually

involved in this case but likewise for every year of the lease in question, is in fact and in law income to petitioner as the Government contends, it becomes a problem to determine how it can be distributed so as to avoid the tax on undistributed profits.

When improvements are made by a lessee, as in this case, the accession of value to the property is not income but a capital addition. *Edwards* v. *Cuba Railroad Co.,* 268 U. S. 628. See *Taft* v. *Bowers,* 278 U. S. 470.

Mr. J. Louis Monarch, with whom *Solicitor General Jackson* and *Assistant Attorney General Morris* were on the brief, for the United States.

(a) The view that the income is realized upon completion of the improvement.—The legal significance of adding improvements to the lessor's property is precisely equivalent to the payment of advance rentals, and therefore the income is realized when the improvements are complete. The lessor is undoubtedly the owner as soon as the improvements are made, and if title be the test he has then derived income. The cash rentals are allocable in part to the improvements, so that the lessor has the immediate use of the improvement to that extent, just as he has the use and benefit of the rest of the property. The only reason why he is not entirely free to use the property is that he has agreed in advance with the lessee to permit the latter the exclusive use. This circumstance is analogous to the assigned income cases and should not prevent the tax. Moreover, the concept of income does not necessarily require that the respondent have the unrestricted right to enjoy it. *Burnet* v. *Harmel,* 287 U. S. 103; *Poe* v. *Seaborn,* 282 U. S. 101; *Miller* v. *Gearin,* 258 F. 225; 250 U. S. 667; *Cryan* v. *Wardell,* 263 F. 248.

The Treasury Regulations then in effect provided that the depreciated value of improvements erected by a lessee

constituted taxable income to the lessor upon the termination of the lease. Art. 4, par. 50, Reg. 33 (Rev. ed.); Art. 48, Reg. 45. But the cited cases overruled the existing regulations, whereupon the Treasury made changes to conform to the decisions. T. D. 3062, 3 Cumulative Bulletin 109; Mim. 2714, 4 Cumulative Bulletin 90; Art. 48, Regulations 45 (1920 ed.). The Regulations under the later Acts have consistently regarded the income as realized upon the completion of the improvements. The Regulations under the 1921 and subsequent Acts have permitted the gain to be spread over the life of the lease. Art. 48, Regulations 62, 65 and 69; Art. 63, Regulations 74 and 77; Art. 22 (a)–13, Regulations 86 and 94.

Against this view it may be urged that the lessor has not "derived" the income because he is not free to use it. But the lessor derives rent from the improvements and, to that extent at least, it would appear that he does use the improved property. His full right of use is tied up and restricted during the term of the lease by the agreement of the parties made in advance of the improvements. In other situations it has been held that such an assignment does not avoid the tax. *Lucas* v. *Earl,* 281 U. S. 111; *Lonsdale* v. *Commissioner,* 32 F. 2d 537; 280 U. S. 575. Cf. *Burnet* v. *Wells,* 289 U. S. 670; *Poe* v. *Seaborn,* 282 U. S. 101; *Cleveland Ry. Co.* v. *Lucas,* 36 F. 2d 347; 281 U. S. 743; *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716; *United States* v. *Hendler,* 303 U. S. 564; and see *United States* v. *Boston & M. R. Co.,* 279 U. S. 732.

(b) The view that the income is realized upon the termination of the lease.—If the restrictions upon enjoyment prevent the income from being treated as derived when the improvements are made, it should follow that the income is received when the restrictions are removed. The principle is well recognized that the release of a liability is the equivalent of receipt, and where income is

physically received at a time when there is some restriction upon its use, the time of receipt is deemed to be postponed until the restriction is removed. If that theory is applicable, the income is derived at the expiration or earlier termination of the lease. *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376; *United States* v. *Kirby Lumber Co.*, 284 U. S. 1; *Helvering* v. *American Chicle Co.*, 291 U. S. 426; *Maryland Casualty Co.* v. *United States*, 251 U. S. 342; *North American Oil* v. *Burnet*, 286 U. S. 417, 424; cf. *Helvering* v. *Tex-Penn Co.*, 300 U. S. 481.

(c) The view that the income is realized upon disposition of the improved property.—The theory that the income is realized upon the disposition of the property is based upon the view that the increased value which resulted from the improvements is merely appreciation of some character, like an increase resulting from fluctuating conditions. However, there is little similarity between general conditions causing day-to-day fluctuations and a permanent improvement to the particular realty. Furthermore, this theory is based upon the misconception that there must be an actual physical separation of income from capital. We think the cases show that the concept of income is satisfied where the taxpayer's investment produces new property which, in some form, is made available to him. The simplicity of the theory has appealed to some courts, but if the income is lost as a result of unrelated events occurring between the time of its receipt and the disposition of the property, this theory would permit it to escape taxation altogether. In no other situation is a taxpayer excused from accounting for income because of its subsequent loss. *Hewitt Realty Co.* v. *Commissioner*, 76 F. 2d 880; *Marr* v. *United States*, 268 U. S. 536, 540; *Helvering* v. *Midland Ins. Co.*, 300 U. S. 216, 225; *Koshland* v. *Helvering*, 298 U. S. 441.

The case is squarely within the Regulations, and the validity of the tax depends upon the acceptance of the theory which underlies the Regulations.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Petitioner paid, and in this suit seeks to recover, an amount included in a deficiency assessment made by the Commissioner of Internal Revenue as additional income tax for the year ending January 31, 1932. The question is whether petitioner is liable under Revenue Act of 1932, § 22 (a).[1]

The material substance of the findings follows.

For itself and a subsidiary corporation, petitioner made consolidated return. The commissioner added to the income of the subsidiary on account of improvements made to its property by a lessee. He ruled the improvements were income to lessor in that year to the extent of their value at termination of the lease.

Lessor purchased the real estate in 1927, and September 13, 1930, leased it for use as a moving picture theater for a term of ten years, beginning upon completion of improvements to be made. At its own cost and expense, lessor agreed to make alterations in accordance with plans and specifications prepared by an architect selected by the parties. Lessee agreed to install the latest type of moving picture and talking apparatus, theater seats and all other fixtures, furniture and equipment necessary for the

[1] "'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. . . ." 47 Stat. 178. The regulation applied by the commissioner (Reg. 77, Art. 63) has since been changed. See Reg. 94 and 86, Art. 22 (a)–13.

successful operation of a modern theater to become the property of lessor at the expiration or sooner termination of the lease.

Lessor made a contract with the builder to make the contemplated improvements and agreed to pay, up to a specified limit, actual cost, plus builder's profit and architect's fee. Additional work ordered by lessee was to be paid for by it. Lessee consented to the terms of the contract and agreed to pay for work and materials ordered by it. All improvements were completed in January 1931; lessee took possession of the property February 1 of that year.

The total cost of all improvements was $114,468.77; lessor paid $73,794.47; lessee paid the balance, $40,674.30. "The estimated depreciated value at the termination of the lease of the alterations and improvements paid for by the lessee was computed by the Commissioner and was agreed to by the plaintiff [petitioner], as follows:

	Cost	*Depreciated value at end of 10 years*
[1] Ventilating system	$3,959.75	$2,771.83
[2] Glazing, architect's fee and other items	10,366.37	.7,256.46
[3] Painting	760.80	0
[4] Other improvements	185.97	0
[5] Chairs	9,167.24	3,055.75
[6] Booth	5,197.39	0
[7] Draperies	7,075.42	2,358.47
[8] Electric signs and marquee	3,961.36	1,980.63
Total	$40,674.30	$17,423.14"

From these figures it appears that the calculations were based on annual depreciation of items [1] and [2] at 3 per cent., on [5] and [7], at 6⅔ per cent., on [8], at 5 per cent., and on [3], [4], and [6], at 10 per cent.

For the year in question, the Commissioner added to income of lessor $1,742.31, one-tenth of the cost so de-

preciated. The resulting additional tax was $211.61. Petitioner paid it; the commissioner disallowed claim for refund. The lower court held petitioner not entitled to recover; it sustained the tax on the ground that, immediately upon completion of the improvements made by lessee, they became the property of lessor, and constituted compensation paid by lessee as additional rental for the use of the leased premises.

Petitioner insists that where improvements are made by lessee, there is no realization of gain at the time the improvements are completed; that the accession of value to the property is not income but a capital addition. The United States says that, while the case presents the question whether depreciated value of improvements by lessee constitutes income to lessor in the taxable year, the "basic question is whether income is ever realized by the lessor in such cases, and if so, when." Assuming that improvements made by lessee and which will outlast the term constitute income to lessor at some time, its brief discusses the questions whether the income is realized upon (1) completion of the improvements, (2) termination of the lease, or (3) disposition of the improved property. It concludes that the "soundest theory seems to be that such income is taxable at the time the improvements are erected." And, without supporting the lower court's ruling that the estimated depreciated value at the end of the ten-year term constituted additional rent or compensation paid for the use of the premises, it asks that the judgment be upheld.

We are not called on to decide whether under any lease or in any circumstances, income is received by lessor by reason of improvements made by lessee, nor to choose, for general approval or condemnation, any of the theories expounded by the United States. Concretely, the ques-

tion presented is whether, under the lease here involved, one-tenth of what the commissioner and taxpayer call and agree to be "estimated depreciated value," as of the end of the term, was income to petitioner in the first year of the term. And that question is to be decided upon the lower court's special findings unaffected by any statement of fact, reasoning, or conclusion that may be found in its opinion.[2]

There is nothing in the findings to suggest that cost of any improvement made by lessee was rent or an expenditure not properly to be attributed to its capital or maintenance account as distinguished from operating expense. While the lease required it to make improvements necessary for successful operation, no item was specified, nor the time or amount of any expenditure. The requirement was one making for success of the business to be done on the leased premises. It well may have been deemed by lessor essential or appropriate to secure payment of the rent stipulated in the lease. Even when required, improvements by lessee will not be deemed rent unless intention that they shall be is plainly disclosed. Rent is "a fixed sum, or property amounting to a fixed sum, to be paid at stated times for the use of property . . .; . . . it does not include payments, uncertain both as to amount and time, made for the cost of improvements . . ." [3] The facts found are clearly not sufficient to sustain the

[2] *Stone* v. *United States,* 164 U. S. 380, 383. *Crocker* v. *United States,* 240 U. S. 74, 78. *Brothers* v. *United States,* 250 U. S. 88, 93. *United States* v. *Wells,* 283 U. S. 102, 120. *United States* v. *Esnault-Pelterie,* 299 U. S. 201, 206. And see *American Propeller Co.* v. *United States,* 300 U. S. 475, 479–480.

[3] *Duffy* v. *Central Railroad Co.,* 268 U. S. 55, 63. *Dodge* v. *Hogan,* 19 R. I. 4, 11; 31 A. 269, 1059. *Guild* v. *Sampson,* 232 Mass. 509, 513; 122 N. E. 712. *Garner* v. *Hannah,* 6 Duer 262, 266. *Board of Comm'rs* v. *Pure Oil Co.,* 167 La. 801, 811; 120 So. 373. 2 Blackstone, p. 41.

lower court's holding to the effect that the making of improvements by lessee was payment of rent.

It remains to be considered whether the amount in question represented taxable income, other than rent, in the first year of the term.

The findings fail to disclose any basis of value on which to lay an income tax or the time of realization of taxable gain, if any there was. The figures made by the commissioner are not defined. The findings do not show whether they are intended to represent value of improvements if removed or the amount attributable to them as a part of the building.

The figures themselves repel the suggestion that they were intended to represent amounts obtainable for the items if removed. We are not required to assume that the commissioner intended his estimates to represent salvage, at the end of the term, of ventilating system, glazing, architect's fees and the like, draperies, chairs, electric signs, and marquee, the useful lives of which in place have declined from 30 to 66⅔ per cent. It does not appear that if detached from the building they would then have any value, even as junk, over necessary cost of removal. It is clear that, if any value as of that time may be attributed to them, it is included in and not separable from that of the leased premises.

Equally conjectural would be assumption that the figures represent enhancement of value of the leased premises by reason of the improvements when new or as deteriorated at the end of the term. The leased property is capable of inventory and analysis for the purpose of ascertaining original and estimated present costs of its elements and other relevant facts as indications of worth to be taken into account in determining its value; i. e., the money equivalent of the property as a whole.[4] But

[4] *West* v. *Chesapeake & Potomac Tel. Co.*, 295 U. S. 662, 671. *Olson* v. *United States*, 292 U. S. 246, 255. *Standard Oil Co.* v. *Southern Pacific Co.*, 268 U. S. 146, 155.

present or future value, however ascertained, is single in substance; it cannot be arrived at by mere summation of actual or estimated cost of constituent elements, new or depreciated.[5] The addition to value of the leased premises resulting from the lessee's improvements may not be arrived at by formula or arithmetically by merely setting against each item or element its cost less depreciation estimated to accrue during the term of the lease.[6] The amount included in the total value of the structure reasonably to be attributed to the improvements after use for ten years is not ascertainable by the simple calculations employed by the commissioner.

Granting that the improvements increased the value of the building, that enhancement is not realized income of lessor.[7] So far as concerns taxable income, the value of the improvements is not distinguishable from excess, if any there may be, of value over cost of improvements made by lessor. Each was an addition to capital; not income within the meaning of the statute.[8] Treasury Regulations can add nothing to income as defined by Congress.[9]

---

[5] *Denver Stock Yard Co.* v. *United States,* 304 U. S. 470, 479.

[6] *Minnesota Rate Cases,* 230 U. S. 352, 434. *Bluefield Co.* v. *Public Service Comm'n,* 262 U. S. 679, 690. *Standard Oil Co.* v. *Southern Pacific Co.,* 268 U. S. 146, 157, 159. *McCardle* v. *Indianapolis Water Co.,* 272 U. S. 400, 416.

[7] *Hewitt Realty Co.* v. *Commissioner* (CCA 2), 76 F. 2d 880, 884. *Eisner* v. *Macomber,* 252 U. S. 189, 207. *Lucas* v. *Alexander,* 279 U. S. 573, 577. Cf. *Bowers* v. *Kerbaugh-Empire Co,* 271 U. S. 170, 175.

[8] *United States* v. *Phellis,* 257 U. S. 156, 169, 175. *Merchants' Loan & T. Co.* v. *Smietanka,* 255 U. S. 509, 519–520. *Taft* v. *Bowers,* 278 U. S. 470, 480, *et seq.* *Lucas* v. *American Code Co.,* 280 U. S. 445, 449. *Eckert* v. *Burnet,* 283 U. S. 140, 142. *Burnet* v. *Logan,* 283 U. S. 404, 412–413. *United States* v. *Safety Car Heating Co.,* 297 U. S. 88, 99. *Koshland* v. *Helvering,* 298 U. S. 441, 444–445. Cf. *Commissioner* v. *Van Vorst* (CCA 9), 59 F. 2d 677, 680.

[9] *Koshland* v. *Helvering,* 298 U. S. 441, 447.

But, assuming that at some time value of the improvements would be income of lessor, it cannot be reasonably assigned to the year in which they were installed. The commissioner found that at the end of the term some would be worthless and excluded them. He also excluded depreciation of other items. These exclusions imply that elements which will not outlast lessee's right to use are not at any time income of lessor. The inclusion of the remaining value is to hold that petitioner's right to have them as a part of the building at expiration of lease constitutes income in the first year of the term in an amount equal to their estimated value at the end of the term without any deduction to obtain present worth as of date of installation. It may be assumed that, subject to the lease, lessor became owner of the improvements at the time they were made. But it had no right to use or dispose of them during the term. Mere acquisition of that sort did not amount to contemporaneous realization of gain within the meaning of the statute.

Reversed.

MR. JUSTICE STONE.

I acquiesce in that part of the Court's opinion which construes the findings below as failing to establish that the lessee's improvements resulted in an increase in market value of the lessor's land in the taxable year. As it is unnecessary to decide whether such increase, if established, would constitute taxable income of the lessor, I do not join in so much of the opinion as, upon an assumption contrary to the findings, undertakes to discuss that question.

Syllabus.

WHITE ET AL. *v.* UNITED STATES.*

CERTIORARI TO THE COURT OF CLAIMS.

No. 96. Argued November 16, 17, 1938.—Decided December 5, 1938.

1. Under §§ 23 and 101 of the Revenue Act of 1928, upon a complete liquidation of a corporation, stockholders' losses from their investments in its stock held for more than two years are not ordinary losses deductible in full from gross income, but are capital losses 12½% of which is deductible, under § 101, from the tax as computed without regard to such losses. P. 283.
2. Under this Act, stockholders' gains and losses upon liquidation of the corporation are taxed on the same basis as gains or losses upon sales and exchanges of property, with the rate of tax prescribed by § 101. P. 284.

   This conclusion follows from a comparison and analysis of §§ 12, 21–23, 101, 112, 113 and 115, and is supported by judicial construction of § 115 (c), *Hellmich* v. *Hellman,* 276 U. S. 233, as it appeared in the Revenue Act of 1918, § 201 (c), and by the legislative history of §§ 101 and 115, and by reports of congressional committees.
3. Article 625 of Treasury Regulations 74, interpreting §§ 101 and 115 (c) of the 1928 Act, is a clear recognition that §§ 115 and 101, when read with the other sections of the Act, are interdependent and require stockholders' gains upon liquidation to be taxed as are the corresponding gains on sales of property. P. 290.
4. The repeated reënactment of §§ 101 and 115 (c), as they appear in the Revenue Acts of 1924, 1928, and 1932, is upon accepted principles a Congressional adoption of treasury regulations as correctly interpreting those sections, and is Congressional recognition that §§ 101 and 115 (c) are to be read together in order to ascertain the method by which gains and losses upon liquidation are to be taxed. The method, in the case of stock held for more than two years, is that applied by § 101 to capital gains and losses from the sale or exchange of property. P. 291.
5. The argument that doubts must be resolved in favor of the taxpayer, is rejected. P. 292.

---

*Together with No. 97, *White, Executor, v. United States,* also on writ of certiorari to the Court of Claims.

It is a function of courts to resolve doubts; and no reason is perceived why that function should be abdicated in a tax case more than in any other where the rights of suitors turn on the construction of a statute, and it is the duty of a court to decide what that construction fairly should be.

6. Every deduction from gross income is allowed as a matter of legislative grace; and only as there is clear provision therefor can any particular deduction be allowed; and a taxpayer seeking a deduction must be able to point to an applicable statute and show that he comes within its terms. P. 292.

86 Ct. Cls. 125; 21 F. Supp. 361, affirmed.

CERTIORARI, *post,* p. 581, to review judgments rejecting claims for the recovery of money paid under additional income tax assessments. Cf. the next case.

Mr. John P. Ohl for petitioners.

Mr. Edward J. Ennis, with whom *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. J. Louis Monarch* and *A. F. Prescott* were on the brief, for the United States.

MR. JUSTICE STONE delivered the opinion of the Court.

The question decisive of this case is whether, under §§ 23 and 101 of the Revenue Act of 1928, 45 Stat. 791, upon a liquidation of a corporation, stockholders' losses from their investment in its stock held for more than two years are ordinary losses deductible in full from gross income, or capital losses, 12½% of which is deductible under § 101 from the tax as computed without regard to such losses.

The decedent in each of these cases made an investment represented by shares of stock in a corporation. Upon complete liquidation of the corporation, more than two years later, the total liquidating dividends on the stock amounted to less than the cost of the investment. In their income tax returns for 1929 petitioners deducted from gross income the losses of their respective decedents. The commissioner ruled that the losses were capital net

losses of which only 12½% was deductible, as provided by § 101, and he accordingly found deficiencies, which petitioners paid.

In the present suits, brought by petitioners in the Court of Claims to recover the payments of the deficiencies as overpayments of 1929 tax, recovery was denied. 86 Ct. Cls. 125; 21 F. Supp. 361. We granted certiorari, October 10, 1938, to resolve a conflict between the decision below and that of the Court of Appeals for the Ninth Circuit in *Chester N. Weaver Co.* v. *Commissioner*, 97 F. 2d. 31, certiorari granted, October 10, 1938, which arose under related sections of the 1932 Revenue Act. [See next case.]

Section 23 (e) of the 1928 Act declares that "In computing net income there shall be allowed as deductions . . . losses sustained during the taxable year . . . (2) if incurred in any transaction entered into for profit, though not connected with the trade or business; . . ." And sub-section (g) provides: "The basis for determining the amount of deduction for losses sustained . . . shall be the same as is provided in section 113 for determining the gain or loss from the sale or other disposition of property."

These provisions of § 23 are qualified and restricted by § 101, which prescribes rates of tax applicable to capital net gains and the extent to which capital net losses are deductible in arriving at net taxable income. Section 101 (c) (1) and (2) of the Revenue Act of 1928 defines "capital gain" as a "gain from the sale or exchange of capital assets" and "capital loss" as a "deductible loss resulting from the sale or exchange of capital assets." Section 101 (c) (3) and (4) declares: " 'Capital deductions' means such deductions as are allowed by section 23 for the purpose of computing net income, and are properly allocable to or chargeable against capital assets sold or exchanged during the taxable year . . .;" and " 'ordinary

deductions' means the deductions allowed by section 23 other than capital losses and capital deductions." By § 101 (c) (5) and (6) a "capital net gain" or "loss" results from the sale of "capital assets," which are defined by § 101 (c) (8) as "property held by the taxpayer for more than two years," not including "stock in trade . . . or other property" held by the taxpayer "primarily for sale in the course of his trade or business."

Sections 23 and 101 place capital gains and losses as thus defined on a different basis from other types of gains and losses for the purpose of computing the tax. By § 101 (a) a capital net gain as defined by § 101 (c) (5) may, at the option of the taxpayer, be assessed at the rate of 12½% in lieu of all other taxes, and by § 101 (b) a capital net loss, defined by § 101 (6) as "the excess of the sum of the capital losses plus the capital deductions over the total amount of capital gain," may be deducted, only to the extent of 12½%, from the tax as computed without regard to the capital net loss. These sections, read together with §§ 12, 21 and 22, presently to be discussed, thus provide a complete scheme for ascertaining capital gains and losses from the sale or exchange of property and for bringing them into the computation of the tax on net income, a scheme distinct from that applicable to other types of gains and losses resulting in ordinary net income, including those from sales and exchanges of property not capital assets.

The losses here sustained are concededly losses on investments of capital, entitled to recognition in the computation of taxable net income, but petitioners' contention is that as the losses did not result from a sale or exchange of the stock they are not capital losses within the meaning of § 101, which limits the deduction of such losses, and that in consequence they fall into the category of ordinary losses, deductible in full under § 23. The answer to this contention turns upon the meaning and ef-

fect of § 115 (c), which relates to distributions by corporations and appears in Supplement B of the 1928 Act. The section provides in part:

"Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. . . ." Section 111 contains the provisions for computation of gain or loss from the sale or other disposition of property and refers, as does § 23 (g), to § 113 as affording the basis for determining gain or loss upon sales or exchanges of property. By § 112 (a) it is provided that "Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section." [1]

Petitioners concede that the command of § 115 (c) that amounts distributed in complete liquidation of a corporation "shall be treated as in full payment in exchange for the stock" and that the "gain or loss . . . shall be determined under section 111," requires the gain or loss upon liquidation to be determined as are gains or losses upon sale of the stock under §§ 111, 113. The same method is adopted by 101 for determining gains or losses from sales of capital assets.[2] But they insist that the qualifica-

[1] The enumerated exceptions, none of which are applicable in the present case, relate to specified types of gains or losses upon exchange of property, some of which are excluded from the recognition accorded generally by the section to such gains and losses.

[2] The method of computing capital gains under § 101 is in substance that of §§ 111, 112 and 113, which is identified by §§ 22 and 23 with that prescribed for ascertaining the gain to a stockholder upon corporate liquidation by § 115. By § 22 (d) it is provided: "Distributions by corporations shall be taxable to the shareholders as provided in

tion that gain or loss "shall be recognized only to the extent provided in section 112" and the fact that the provisions of § 101 apply only to cases of sales or exchanges exclude the stockholders' gain or loss upon liquidation, which is not a sale or exchange, from the operation of the provisions of § 101 governing the computation of the tax.

Sections 101 and 115 (c) are found in the provisions supplemental to the general provisions of sub-title B of the 1928 Revenue Act, which is concerned with rates of tax and computation of net income. Section 101 appears in Supplement A, relating to rates of tax, and § 115 in Supplement B, concerning computation of net income. Both supplements serve to modify or explain the general provisions. ". . . the Supplemental Provisions are those which apply only to extraordinary classes of taxpayers or which apply only to the extraordinary transactions of ordinary classes of taxpayers." Report, Committee on Ways and Means, No. 2, 70th Cong., 1st Sess., p. 12. From the arrangement and general plan of the Act it is evident that the effect of §§ 101 and 115 upon each other is not to be ascertained alone by the comparison of the two sections or by noting the absence of any reference to either by the other, but by noting and comparing the effect of each upon the general provisions, to which reference must be made in the first instance for all computations of income tax.

---

section 115"; and "(e) In the case of a sale or other disposition of property, the gain or loss shall be computed as provided in sections 111, 112, and 113." Section 101 in terms provides that "'Capital deductions' means such deductions as are allowed by section 23 for the purpose of computing net income, and are properly allocable to or chargeable against capital assets sold or exchanged during the taxable year." And § 23 (g) provides: "The basis for determining the amount of deduction for losses sustained . . . shall be the same as is provided in section 113 for determining the gain or loss from the sale or other disposition of property."

Sections 12, 21, 22 and 23, found in sub-title B, General Provisions, to which §§ 101 and 115 are supplementary, govern computation of net income and of the tax. Subsection (c) of § 12, which fixes the rates of surtax, refers specifically to § 101 for the rate and computation of tax on capital net gains and losses.[3] Section 21 declares that net income means gross income computed under § 22, less the deductions allowed by § 23. As already noted, § 23 (e), (g), providing for deductions of losses on sales or exchanges of property, is restricted in its operation by the provisions of § 101. Otherwise, § 101 would have no application to deductible losses. These general provisions thus incorporate by reference those of § 101 and give to them controlling effect in the computation of the tax in cases of capital gains or losses upon the sale or exchange of capital assets. In addition, § 22 (d) provides that "Distributions by corporations shall be taxable to the shareholders as provided in section 115," which in turn, as already noted, provides in paragraph (c) that liquidating dividends "shall be treated as in full payment in exchange for the stock," and that resulting gains or losses determined, as in the case of sales or exchanges of property, under § 111, are to be "recognized only to the extent provided in section 112," which also deals with sales and exchanges.

Section 115 (c) and §§ 111 and 112, to which it refers, standing alone give no clue to the part which a stockholder's loss on liquidation is to play, in computation of the tax, more than they give in the case of gains and losses

[3] § 12 (c): "Capital net gains and losses.—For rate and computation of tax in lieu of normal and surtax in case of net incomes of not less than $30,000, approximately, or in case of net incomes, excluding items of capital gain, capital loss, and capital deductions, of not less than $30,000, approximately, see section 101."

Only in the case of incomes in excess of $30,000, approximately, do the aggregate of the normal and surtax exceed the 12½% rate provided for in § 101.

upon sales or exchanges of property. In each case they tell how the gain or loss is to be "determined" and declare that it shall be "recognized." But as § 115 says that the gain or loss upon liquidation is to be "recognized" only to the extent to which gains or losses upon sales or exchanges of property are recognized by § 112, it follows that in one case, as in the other, we must turn to the general provisions of the Act to learn what recognition is to be given to the gains or losses under §§ 12, 22 and 23, as supplemented by § 101. Admittedly the recognition accorded by § 112 to gains and losses on sales of capital assets is controlled by § 101, and § 115 (c), with its reference to § 112, is explicit that gains and losses upon liquidations are to receive the recognition accorded to gains and losses upon sales of property. Consequently the recognition required by § 115 (c) of gains and losses on liquidations must, we think, be taken to be the same as that accorded to gains and losses upon sales of property in the computation of the tax under the general provisions to which § 115 and § 112 are supplementary and to be subject to the same restrictions as are imposed upon recognition of gains and losses from sales by the provisions of the supplementary section 101. Stockholders' gains and losses upon liquidation of the corporation are thus taxed on the same basis as gains or losses upon sales and exchanges of property, with the rate of tax and deductions prescribed by § 101.

If this conclusion were doubtful, doubts would be put at rest by the judicial construction of § 115 (c) as it appeared in the 1918 Act and by the legislative history of §§ 101 and 115. The substance of the first sentence of § 115 (c) of the 1928 Act appeared, but without the reference to §§ 111 and 112, in § 201 (c) of the 1918 Act, which provided that "Amounts distributed in the liquidation of a corporation shall be treated as payments in

exchange for stock or shares, . . ."[4] In *Hellmich* v. *Hellman,* 276 U. S. 233, it was held that this clause required a stockholder's gains upon liquidation to be treated as gains from the sale of property and therefore subject to the normal tax, although they were distributions from corporate earnings, and, under §§ 201 (a), (b) and 216 (a) dividends paid from such earnings were free from normal tax. The provisions of § 115 (c) prescribing the treatment of liquidating dividends were thus, from the beginning, taken to refer to the computation of the tax as well as to the determination of the gain or loss.

The addition to the section in the 1924 and later Acts of the direction that gain or loss should be determined under the section corresponding to § 111 of the 1928 Act and recognized only to the extent provided in the section corresponding to § 112 of that Act requires no different result. For reasons already given it supports the conclusion that § 115 (c), like its precursor, § 201 (c) of the 1918 Act, as construed in *Hellmich* v. *Hellman, supra,* placed shareholders' gains and losses from liquidations upon the same basis, for computation of the tax, as gains and losses upon the sale or exchange of property. The reports of the Congressional Committees discussing § 201 (c) of the 1924 Act make it plain that that section, the relevant portion of which is identical with § 115 (c) of the 1928 Act, was intended to require gains upon corporate liquidations to be brought into the computation of

[4] Section 201 (c) of the 1918 Act, omitted from the 1921 Act, was continued, so far as now relevant, in the form in which it later appeared in § 115 (c) of the Act of 1928, as § 201 (c) of the 1924 and 1926 Acts, and as § 115 (c) of the 1932 and 1934 Acts. The provisions of § 101 for computing capital gains or losses upon sales or exchanges and taxing them on a different basis from ordinary income first appeared as § 206 of the Revenue Act of 1921, which was continued as § 208 of the Revenue Acts of 1924 and 1926 and as § 101 of the Revenue Acts of 1928 and 1932.

the tax in the same manner as corresponding gains from sales.[5]

Article 625 of Treasury Regulations 74, interpreting §§ 101 and 115 (c) of the 1928 Act, states in part: "Any gain to the shareholder [from a distribution in liquidation of a corporation] may, at his option, be taxed as a capital net gain in the manner and subject to the conditions prescribed in section 101 . . ." This regulation is a clear recognition that §§ 115 and 101, when read with the other sections of the Act, are interdependent and require stockholders' gains upon liquidation to be taxed as are the corresponding gains on sales of property. The regulation, in identical form, first appeared in Article 1545 of Regulations 65 and 69, applicable to §§ 201 (c) and 208 of the Revenue Acts of 1924 and 1926, corresponding to §§ 115 (c) and 101 of the 1928 Act, and was continued in Article 625 of Regulations 77 with re-

[5] The Report of the Senate Committee on Finance (Report No. 398, 68th Cong., 1st Sess.) states at page 11: ". . . The bill treats a liquidating dividend as a sale of the stock, with the result that the gain to the taxpayer is treated not as a dividend subject only to the surtax but as a gain from the sale of property which may be treated as a capital gain. The treatment of liquidating dividends under the bill is substantially the same as provided for in the revenue act of 1918. A liquidating dividend is, in effect, a sale by the stockholder of his stock to the corporation; he surrenders his interest in the corporation and receives money in place thereof. Treating such a transaction as a sale and within the capital gains provisions is consistent with the entire theory of the act and, furthermore, is the only method of treating such distributions which can be easily administered."

The Report of the House Ways and Means Committee (Report No. 179, 68th Cong., 1st Sess.) states with respect to § 201 (c), at page 11: ". . . the Treasury has construed the existing law as taxing liquidating dividends, not as capital gains, but as dividends subject to the surtax rates. The proposed bill, as did the 1918 act, treats a liquidating dividend as a sale of the stock to the corporation and recognizes the true effect of such a distribution."

lation to the corresponding sections, 115 (c) and 101, of the 1932 Act.

The repeated reënactment of §§ 101 and 115 (c), as they appear in the Revenue Acts of 1924, 1928, and 1932, is upon accepted principles a Congressional adoption of the regulation as correctly interpreting those sections and is Congressional recognition that §§ 101 and 115 (c) are to be read together in order to ascertain the method by which gains and losses upon liquidation are to be taxed. The method, in the case of stock held for more than two years, is that applied by § 101 to capital gains and losses from the sale or exchange of property.

The fact that neither the decision in *Hellmich* v. *Hellman, supra,* nor the regulation deals specifically with losses does not admit of the conclusion that the stockholders' losses on liquidation are to be brought into computation of the tax on a basis different from gains and losses upon sales. Section 115 (c) makes no distinction between the recognition of gains and the recognition of losses, and if one is controlled by the provisions of § 101 the other must be. No adequate basis has been suggested for such a distinction.

We attach no significance to the circumstance that the provisions of § 101 of the 1928 Act first appeared in the 1921 Act, while the controlling provisions of § 115 (c) were enacted in the 1918 Act and in their final form in the 1924 Act. We accept petitioner's contention that all the provisions of § 101 are by its terms restricted to cases of sales or exchanges. But if, as we have said, § 115 (c) requires the tax in case of liquidations to be computed upon the same basis as in case of sales of the stock, alteration in the method of ascertaining the tax could be made more readily by adding § 101 or amending it than by amending § 115 (c), so long as it is the purpose to treat gains and losses on liquidation no dif-

ferently from gains and losses on sales. *Helvering* v. *Chester N. Weaver Co., post,* p. 293.

Petitioner argues that the construction which we think correct leads to the harsh and absurd consequence that a small liquidating dividend is more disadvantageous to the taxpayer than no distribution at all in the case where the stock has become worthless. This is an argument, more properly addressed to Congress, that the statute should have gone further than it did by providing that the loss in the case of worthless securities should be treated as a loss upon their sale, as was later done by § 23 (g) (2) of the 1938 Act. But it is not persuasive that we should disregard the language and history of the pertinent sections, with consequences equally harsh and absurd, to adopt the construction for which petitioners contend. Cf. *Helvering* v. *Twin Bell Oil Syndicate,* 293 U. S. 312, 321.

We are not impressed by the argument that, as the question here decided is doubtful, all doubts should be resolved in favor of the taxpayer. It is the function and duty of courts to resolve doubts. We know of no reason why that function should be abdicated in a tax case more than in any other where the rights of suitors turn on the construction of a statute and it is our duty to decide what that construction fairly should be. Here doubts which may arise upon a cursory examination of §§ 101 and 115 disappear when they are read, as they must be, with every other material part of the statute, *Hellmich* v. *Hellman, supra,* 237, and in the light of their legislative history. Moreover, every deduction from gross income is allowed as a matter of legislative grace, and "only as there is clear provision therefor can any particular deduction be allowed . . . a taxpayer seeking a deduction must be able to point to an applicable statute and show that he comes within its terms." *New Colonial Ice Co.* v. *Helvering,* 292 U. S. 435, 440.

We have considered, but find it unnecessary to discuss, other arguments of petitioners of lesser moment.

Affirmed.

MR. JUSTICE MCREYNOLDS, MR. JUSTICE BUTLER, and MR. JUSTICE ROBERTS dissent.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* CHESTER N. WEAVER CO.

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

No. 304. Argued November 17, 1938.—Decided December 5, 1938.

Payments received by a corporation as a stockholder in another corporation, upon the latter's complete liquidation, are to be treated as payments upon a sale or exchange of the stock under § 23 (r) (1) of the Revenue Act of 1932, which allows the deduction of losses from sales or exchanges of stock, not held for more than two years, only to the extent of the gains from such sales or exchanges. P. 295.

Section 23 (f) provides that losses sustained by corporations during the taxable year shall be allowed as deductions in computing net income, subject to the limitations provided in subsection (r); subsection (r) (1) declares that losses from "sales or exchanges" of stock which are not "capital assets" (as defined in § 101, i. e., property held by the taxpayer for more than two years) shall be allowed only to the extent of the gains from such sales or exchanges. Sections 115 and 112 accord to losses on liquidation the same recognition accorded by § 23 (r) to losses upon sales. Cf. *White* v. *United States, ante,* p. 281. P. 295.

97 F. 2d 31, reversed.

CERTIORARI, *post,* p. 585, to review a judgment reversing an order of the Board of Tax Appeals, 35 B. T. A. 514, sustaining an additional income tax.

Mr. Edward J. Ennis, with whom *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. J. Louis Monarch* and *A. F. Prescott* were on the brief, for petitioner.

Mr. Adolphus E. Graupner, with whom *Mr. Arthur E. Cooley* was on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

The question to be decided is whether payments received by a corporation as a stockholder in another corporation, upon the latter's complete liquidation, are to be treated as payments upon a sale or exchange of the stock under § 23 (r) (1) of the Revenue Act of 1932, 47 Stat. 169, which allows the deduction of losses from sales or exchanges of stock, not held for more than two years, only to the extent of the gains from such sales or exchanges.

On August 9, 1932, respondent, a California corporation, purchased shares of stock in another corporation. In the following year the latter was completely liquidated. The liquidating dividends received by respondent amounted to less than the cost of the stock. In its income tax return for 1933 respondent deducted the full amount of the loss from gross income. The commissioner ruled that, since the loss was sustained upon an exchange of stock held less than two years and the respondent had received no gains against which the loss could be applied, the deduction was forbidden by § 23 (r) (1), and he found a deficiency accordingly. The order of the Board of Tax Appeals sustaining the deficiency was reversed by the Court of Appeals for the Ninth Circuit, 97 F. 2d 31. We granted certiorari, October 10, 1938, to resolve the conflict between the decision of the court below and that of the Court of Claims in *White* v. *United States*, 86 Ct. Cls. 125; 21 F. Supp. 361, this day affirmed on certiorari, *ante*, p. 281.

Section 23 (f) provides that losses sustained by corporations during the taxable year shall be allowed as deductions in computing net income, subject to the limi-

tations provided in sub-section (r). Sub-section (r) (1) declares:

"Losses from sales or exchanges of stocks and bonds . . . which are not capital assets (as defined in section 101) shall be allowed only to the extent of the gains from such sales or exchanges . . ." By § 101 " 'Capital assets' means property held by the taxpayer for more than two years . . ."

Since the loss sustained by respondent was not from the sale or exchange of the stock, it is contended that sub-section (r) has no application and that the loss is deductible in full, as are other losses, under § 23 (f). Whether § 23 (f) or 23 (r) applies must be answered by deciding whether, under § 115 (c), stockholders' losses upon a corporate liquidation are to be treated, for purposes of computation of the tax, in the same manner as losses upon a sale or exchange of the stock.

The scheme of the 1932 Act, as respects the treatment of gains and losses upon the sale or exchange of property on a different basis from other types of gain or loss, is substantially that of the 1928 Act, which we have considered in *White* v. *United States, supra.* The provisions of §§ 12 (c), 22 (d), (e), 23, 101, 111, 112, 113 and 115 (c) of the 1928 Act, discussed in the *White* case, so far as now relevant were reënacted in the same numbered sections of the 1932 Act. The considerations which in that case led us to the conclusion that § 115 (c) of the 1928 Act had placed stockholders' gains and losses from liquidations on the same basis as gains and losses from sales of the stock for purposes of computation of the tax, lead us to the same conclusion with respect to the 1932 Act.

We find nothing in the language or history of § 23 (r) to suggest that Congress, in enacting it, had any purpose

to restrict the operation of § 115 (c) as we have construed it. Section 23 (r), like § 101 in the 1932 and earlier Acts, speaks of losses resulting only from sales or exchanges. But the one does not more than the other restrict the operation of the provisions of §§ 115 and 112, which accord to losses on liquidation the same recognition accorded by § 23 (r) to losses upon sales. Congress, in enacting the 1934 Act, recognized that under that of 1932 ". . . a distribution in liquidation of a corporation is treated in the same manner as a sale of stock." Report of Senate Committee on Finance, No. 558, 73rd Cong., 2nd Sess., p. 37. To prevent avoidance of surtax through liquidation of corporations with large surpluses, Congress found it necessary to place gains on liquidations on a different basis from gains on sales. It accomplished this by amending § 115 (c) to provide: "Despite the provisions of section 117 (a) [corresponding to § 101 in the earlier Acts specially taxing capital gains and losses] 100 per centum of the gain so recognized shall be taken into account in computing net income." 48 Stat. 711.

It follows that the extent to which the taxpayer can deduct the loss is controlled by § 23 (r) (1), and that since the stock was held for less than two years and there were no gains against which the loss could be offset, it can not be deducted from gross income.

Reversed.

MR. JUSTICE MCREYNOLDS, MR. JUSTICE BUTLER and MR. JUSTICE ROBERTS dissent.

Syllabus.

NEBLETT ET AL. *v.* CARPENTER, INSURANCE COMMISSIONER, ET AL.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 21. Argued October 18, 1938.—Decided December 5, 1938.

1. Decisions of the Supreme Court of California, to the effect—
   (1) That a proceeding for rehabilitation of an insurance company, begun before a disqualified judge, could be carried on and a transfer of assets made under his void order be ratified by orders of a qualified judge who took his place;
   (2) That the State Insurance Code authorized the Insurance Commissioner to delegate to a corporation, organized by him, powers and duties in aid of his administration of the assets of an insolvent insurance company;
   (3) That the authority which the Code confers on the Commissioner to enter into rehabilitation or insurance agreements embraces a contract for assumption of the insolvent company's policies by a new company organized by the Commissioner; and
   (4) That action of the Commissioner in this case did not violate certain state statutes concerning fraudulent conveyances—
   held rulings on local law not reviewable by this Court. Pp. 301–302.
2. Whether a state statute delegates legislative functions to the state insurance commissioner in contravention of the state constitution is a question of state law the decision of which by the state's highest court is binding here. P. 302.
3. The provisions of the Insurance Code of California authorizing the Commissioner, as conservator, and with the approval of the court, to "mutualize or reinsure the business" of the company "or enter into rehabilitation agreements," *held* not so vague that a plan of rehabilitation by the formation of a new company would deprive creditors of their property without due process of law. P. 303.
4. A plan and agreement for the rehabilitation of a California insurance company (which became insolvent as a result of unprofitable noncancelable health and accident policies) provided for the formation by the Commissioner of a new company. The assets of the old company would be transferred to the new in exchange for the capital stock of the latter. The new company would assume the policies and obligations of the old company to the extent provided in the agreement. Policyholders were to have the option of taking

insurance from the new company or proving their claims for breach of their contracts, provision for payment being made by covenants of the new company and certain retained assets of the old. The plan and agreement were approved by the state court. Several holders of life and noncancelable health and accident insurance policies challenged the plan and court order approving it as denying them due process of law and impairing the obligation of their contracts. Upon review of a decision of the state court overruling their claims, *held:*

(1) The contention that dissenting policyholders do not have the option of proving their claims for breach of contract because no liquidator has been appointed must be dismissed, since no reason appears why action cannot, consistently with the plan, be taken upon a pending application for the appointment of the Commissioner as liquidator. P. 303.

(2) The record before this Court in this case containing only the judgment roll, it must be presumed that the evidence supported the decree of the state court. P. 304.

(3) The dissenting policyholders have no constitutional right to a particular form of remedy. P. 305.

(4) As far as appears from the record in this case, the method of liquidation provided by the plan adopted was as favorable to dissenting policyholders as would have been a sale of the assets and pro rata distribution to all creditors, and they have therefore failed to show that their property is being taken without due process, or that the obligations of their contracts will be impaired in violation of the contract clause of the Federal Constitution. P. 305.

10 Cal. 2d 307; 74 P. 2d 761, affirmed.

CERTIORARI, 304 U. S. 555, to review a judgment affirming an order of the Superior Court of Los Angeles County which approved a plan of the Insurance Commissioner for the rehabilitation of an insolvent insurance company.

Mr. Wm. H. Neblett, with whom *Messrs. R. Dean Warner* and *Vernon Bettin* were on the brief, for petitioners.

Mr. Wm. Marshall Bullitt and *Miss Hester W. Webb,* with whom *Messrs. U. S. Webb,* Attorney General of

California, and *Perry Price* were on the brief, for respondents.

Messrs. T. B. Cosgrove, John N. Cramer, Josiah E. Brill, George I. Cochran, and *H. S. Dottenheim* were on several briefs for individual respondents.

Mr. Justice Roberts delivered the opinion of the Court.

The questions raised are whether proceedings for the rehabilitation of an insurance company, pursuant to the Insurance Code of California,[1] unconstitutionally deprive policy holders of their property without due process of law, or impair the obligation of their contracts.[2]

For many years the Pacific Mutual Life Insurance Company of California has written life, health, and accident insurance. Since 1918 it has issued noncancelable health and accident policies. The Insurance Commissioner of California determined that, while the life and general health and accident business was in sound condition, there was an over-all deficit in reserves due to the unprofitable nature of outstanding noncancelable health and accident risks, with the result that the company was insolvent within the meaning of the Code. July 22, 1936, the Superior Court of Los Angeles County, on his application, appointed him conservator. On the same day he applied for and obtained an order which appointed him liquidator of the company. On the same day, as conservator, he petitioned for authority to rehabilitate

[1] Statutes 1935, c. 145, pp. 540–553. The sections of the Insurance Code bearing upon the issues in the case are 1011–16, inclusive, 1021, 1024, 1025, 1035, 1037, 1043.

[2] In the court below contentions were made under the equal protection clause of the Fourteenth Amendment but neither the reasons stated in support of the petition nor the assignments of error in this court present any question under that clause.

the company and submitted a plan embodying an agreement, to be executed by the company and himself as Commissioner, with a new corporation, which he would form, all of whose capital stock he would purchase with the assets of the company, and to which he would transfer most of the assets, retaining the stock of the new company and certain other assets of the old. The new company was to assume the policies and obligations of the old company to the extent provided in the agreement. Policy holders were to have the option of taking insurance from the new company or proving their claims for breach of their contracts, provision for payment being made by covenants of the new company and the retained assets of the old. The court approved the plan and authorized the execution and performance of the agreement.

Shortly afterwards it was discovered that the judge who acted in the cause was probably disqualified by ownership of a policy issued by the company. August 11, 1936, another judge entered an order, which, after adverting to the possible disqualification of the judge who made the earlier orders, ratified, approved, and confirmed the order appointing the Commissioner conservator and, on the basis of the petition filed on July 22, independently, and as an original order, appointed the Commissioner conservator, invested him with title to all the company's assets, and authorized him to endeavor to consummate a rehabilitation or reinsurance plan. On September 25 the Commissioner presented a further petition for approval of the rehabilitation and reinsurance agreement, which recited his actions taken pursuant to the court's orders and to the plan of rehabilitation, and asked approval thereof. An order issued which directed all interested persons to show cause why the agreement, and what had been done pursuant to it, should not be approved and all the prior acts of the Commissioner ratified and confirmed, and fixed a hearing. At the hear-

ing, which lasted from October 19 to December 4, many officers, stockholders and policy holders who had intervened, including the petitioners, were heard. Plans of rehabilitation presented by some of them were considered; evidence was taken and argument was had. December 4 an order was entered approving the Commissioner's plan and agreement, ratifying the action he had taken, and authorizing him as conservator, and as liquidator, if he should be appointed as such, to carry out the rehabilitation agreement. The court retained jurisdiction to make further orders for the effectuation of the plan and agreement.

The Supreme Court of California affirmed the order.[3] The action of that court in overruling certain of petitioners' contentions is claimed to have deprived them of their property without due process.

The court declared that the orders of July 22, 1936, were void because of the disqualification of the judge who made them. The petitioners argue that in consequence the Commissioner's transfer of assets to a new company pursuant to the approved plan was void and that its illegality could not be cured by subsequent court action. The Supreme Court held, however, that the court in which the Commissioner's original petition was filed thereby acquired jurisdiction and that the avoidance of the orders made by the disqualification of the judge who entered them did not disenable a qualified judge thereafter from entering valid orders based on the petition. It is further urged that as the old company's assets were transferred to the new pursuant to a void order there was nothing on which any later order could operate. The later order, which is the subject of review, ratified and confirmed the transfer, and the Supreme Court held the order effective under the Insurance Code.

---

[3] *Carpenter* v. *Pacific Mutual Life Ins. Co.*, 10 Cal. 2d 307; 74 P. 2d 761.

It is said that the Code does not authorize the Commissioner to delegate to a corporation organized by him powers and duties in aid of his administration of the assets of an insolvent insurance company. The state court has held such procedure is in accordance with the Code provisions.

It is argued that the authority which the Code confers on the Commissioner to enter into rehabilitation or reinsurance agreements does not embrace a contract for assumption of the insolvent company's policies by a new company organized by the Commissioner. The court below held the provisions of the statute contemplated such action.

It is claimed that the Commissioner's action violated certain state statutes concerning fraudulent conveyances. The state court held the contrary.

All of these holdings concern matters of state law and amount at most to alleged erroneous constructions of the State's statutes by its own court of last resort. Such decisions would not be a denial of the due process guaranteed by the Fourteenth Amendment.[4] We are, therefore, without jurisdiction to review the state court's decision of any of those questions.

It is argued that the Code unconstitutionally delegates legislative functions to the Commissioner, and that the Supreme Court erred in not so holding. This, again, is a question of state law the decision of which by the State's highest court is binding upon us.[5]

The Insurance Code provides: "In any proceeding under this article, the commissioner, as conservator . . .

---

[4] *Arrowsmith* v. *Harmoning*, 118 U. S. 194, 196; *Central Land Co.* v. *Laidley*, 159 U. S. 103, 112; *Iowa Central Ry. Co.* v. *Iowa*, 160 U. S. 389, 393; *West* v. *Louisiana*, 194 U. S. 258, 261; *Standard Oil Co.* v. *Missouri*, 224 U. S. 270, 287; *McDonald* v. *Oregon R. & N. Co.*, 233 U. S. 665, 669; *American Ry. Exp. Co.* v. *Kentucky*, 273 U. S. 269, 273.

[5] *Ohio* v. *Akron Park District*, 281 U. S. 74, 79.

may, subject to the approval of said court, . . . mutualize or reinsure the business of" an insurance company "or enter into rehabilitation agreements." The petitioners assert that this language is so vague that no one can determine what powers are intended to be conferred upon the Commissioner and that the state courts, in construing the Code to authorize the plan and procedure here in question unconstitutionally attempted to read a meaning into the statute of which it is not susceptible, and thus deprived the petitioners of their property without due process. The court below fully considered the contention and overruled it. We think its decision was justified by the criteria approved by this court.[6]

The petitioners unsuccessfully claimed in the Supreme Court that the method of liquidation adopted by the Commissioner and approved by the court, even if authorized by the Insurance Code, denies them due process and impairs the obligation of their policy contracts. Because of these contentions we granted certiorari.

One of the petitioners holds a life policy which, if he assents to the plan, will be replaced by a policy of the new company for the same amount. The others are holders of noncancelable health and accident policies no liability under which has accrued. If they assent to the plan and accept the obligation of the new company, in lieu of that of the old, they will receive insurance for only a percentage of the face value of their old policies. The alternative open to all is to dissent from the plan and to prove their claims for breach of their policy contracts against the liquidator of the old company. They insist this option is not available to them as no liquidator has been appointed. When they took their appeal to the State Supreme Court, there was pending an application for the appointment of the Commissioner as liquidator,

[6] *Connally* v *General Construction Co.*, 269 U. S. 385, 391.

and no reason is assigned why action cannot be taken upon this petition pursuant to the plan. The Supreme Court has said: "The proposal contemplates that in due course the commissioner will be appointed liquidator of the old company, and in that capacity will receive, liquidate, and pay all claims against the old company from the old company's assets not transferred to the new company (including the new company's stock), and from certain moneys furnished to the liquidator by the new company as provided in the agreement." 10 Cal. 2d 307, 322; 74 P. 2d 761, 771. The petitioners assert that the funds provided will be insufficient for the payment of their claims and others of like character, should they dissent from the plan. The order of the Superior Court recites that the plan makes adequate provision for each class of policy holders, for the creditors, and for the stockholders; that the plan is fair and equitable; that it does not discriminate unfairly or illegally in favor of any class of policy holders; that the intangible assets conserved by the plan are worth several million dollars and that if the old company were dissolved and its assets sold their value would be substantially less than the amount which will be realized from them under the plan.

The record upon which the appeal was taken to the Supreme Court of the State, and which has been brought here by our writ, contains only the judgment roll. The evidence is not before us and the court below has held that, under the state law, the judge was not bound to make special findings. We must presume that there was substantial evidence to sustain the court's decree. On account of the state of the record the petitioners are unable to point to any evidence to sustain their contention that if they dissent they will not receive as much in liquidation of their claims for breach of their policy contracts as they would upon a sale of assets and distribution of the proceeds.

The petitioners have no constitutional right to a particular form of remedy.[7] They are not entitled, as against their fellows who prefer to come under the plan and accept its benefits, to force, at their own wish or whim, a liquidation which under the findings will not advantage them and may seriously injure those who accept the benefit of the plan. They are not bound, as were the dissenting creditors in *Doty* v. *Love,* 295 U. S. 64, to accept the obligation of the new company but are afforded an alternative whereby they will receive damages for breach of their contracts. They have failed to show that the plan takes their property without due process.

It is not contended that a statutory scheme for the liquidation of an insolvent domestic corporation is *per se* an impairment of the obligation of the company's contracts. The argument is that the impairment of contract arises from the less favorable terms and conditions of the new noncancelable policies which are to be substituted for the old ones and, in the case of the life policies, by the substitution of a new company as contractor in place of the old, without the consent of the policy holder. This position is bottomed upon the theory that the policy holders are compelled to accept the new company as insurer on the terms set out in the rehabilitation agreement. As has been pointed out, they are not so compelled but are given the option of a liquidation which on this record appears as favorable to them as that which would result from the sale of the assets and pro rata distribution in solution of all resulting claims for breach of outstanding policies.

Judgment affirmed.

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

[7] *Gibbes* v. *Zimmerman,* 290 U. S. 326, 332; *Doty* v. *Love,* 295 U. S. 64, 70.

INTER-ISLAND STEAM NAVIGATION CO. *v.* TERRITORY OF HAWAII.

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

No. 94. Argued November 18, 1938.—Decided December 5, 1938.

1. The conclusion of the Supreme Court of Hawaii that a common carrier of freight and passengers by water between different points in the Territory was a public utility within the meaning of the Hawaii Utilities Act of 1913, is accepted by this Court on review. P. 311.
2. Enactment by Congress of the Shipping Act of 1916 did not oust the Public Utilities Commission of Hawaii of all jurisdiction whatsoever over common carriers by water between ports of the Territory, and did not abrogate the Commission's power to exact fees from such carriers to defray the expense of investigatory services which it still had authority to perform. Pp. 311, 313.
3. An Act of Congress will not be deemed to supersede a territorial law unless that intention is clear. P. 312.
4. The imposition of a tax upon a common carrier by water between ports of the Territory of Hawaii (assumed to be engaged in interstate or foreign commerce), under an Act of the Territory to which Congress had expressly subjected such carrier, does not violate the commerce clause of the Federal Constitution. P. 313.
5. Congress has plenary legislative authority over the people and government of the territories. P. 314.
6. The general tax imposed on public utilities by the Hawaii Utilities Act of 1913, designed to effectuate a plan for control and supervision of the utilities of the Territory, is not void under the Fifth Amendment as applied to a particular utility which may not have directly benefited from the investigatory and supervisory services performed by the Commission under the Act. P. 314.

96 F. 2d 412, affirmed.

CERTIORARI, *post*, p. 580, to review the affirmance of a judgment for the Territory of Hawaii in a suit against the Navigation Company to collect taxes.

Mr. J. Garner Anthony for petitioner.

The Commission has at no time during the nine years in question made any inspection, regulation, or supervi-

sion of petitioner's business, and has incurred no expense on its account. Under these circumstances the inspection fees amounting to more than $4000 per annum levied against petitioner's business indiscriminately (local, interstate, and foreign) are void as a direct burden on interstate and foreign commerce and deny to petitioner due process of law.

Where inspection fees are assessed against a number of unrelated public utilities and are deposited in a common fund to be used by the Commission for the regulation and inspection of utilities generally, the burden is upon the Commission to prove that the fees demanded are no more than necessary to defray the expense of regulation or inspection. *Great Northern Ry. Co.* v. *Washington,* 300 U. S. 154.

Under the proper construction of the Shipping Act of 1916, and the Utility Act, the Commission has no jurisdiction over the petitioner and can not collect the fees demanded.

Mr. Julius Russell Cades, with whom *Mr. Urban Earl Wild* was on the brief, for respondent.

The power of Congress under the Constitution to amend and extend the provisions of Act 135, S. L. Haw. 1913, and to ratify and confirm the applicability of the Public Utility Act of 1913, is indubitable. *France* v. *Connor,* 161 U. S. 65, 72; *Mormon Church* v. *United States,* 136 U. S. 1; *National Bank* v. *Yankton County,* 101 U. S. 129.

The statements made in Congress at the time of the amendment and ratification of the territorial statute, show beyond dispute that Congress intended the Utilities Act of 1913 to apply to all utilities operating within the Territory.

The exaction of territorial utility fees approved by Congress can not impose a burden on interstate and foreign commerce.

The enactment by Congress of the Shipping Act of 1916, did not divest the local commission of its powers of investigation or its duty to collect the fees provided to permit such investigation.

The Shipping Act should be interpreted and applied in analogy to the Interstate Commerce Act.

MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioner, a Hawaiian corporation, is a common carrier of freight and passengers by water between different points in the Territory. A substantial part of its gross income is derived from transporting freight destined for trans-shipment to foreign or mainland ports. In 1913 a statute of the Territory created a Public Utilities Commission, prescribed its duties and levied a uniform semi-annual tax—denominated a fee [1]—upon all public utilities doing business in the Territory, partially to defray the Commission's expenses. Petitioner paid the tax until 1923, when it refused to make further payments, contending the tax could not validly be applied to it. In this suit, the Territory recovered judgment in the territorial court for the taxes assessed for the years 1923 to 1930, inclusive. The Supreme Court of Hawaii and the Circuit Court of Appeals both affirmed.[2]

The Hawaiian "Utilities Act of 1913," [3] under which the challenged taxes have been levied, invested the territorial Commission with broad powers to investigate all public utilities doing business in the Territory, with reference to the safety and accommodation of the public; safety, working hours and wages of employees; rates and fares; valuation; issuance of securities; amount and disposition of

[1] Cf., *New York* v. *Latrobe*, 279 U. S. 421, 423.

[2] 33 Haw. 890; 96 F. 2d 412.

[3] Act 89 S. L. Haw. 1913, as amended by Act 127, S. L. Haw. 1913, c. 132, of the Revised Laws Hawaii, 1925, c. 261, Revised Laws Hawaii, 1935.

income; business relations with others; compliance with territorial and federal laws and provisions of franchises, charters, and articles of association; regulations, practices and service; accidents, in connection with utility operations, believed by the Commission to require investigation and "all matters of every nature affecting the relations and transactions between . . . [such utilities] and the public, or persons, or corporations."

This territorial Commission was empowered to make its investigations "notwithstanding that the same may be within the jurisdiction of the Interstate Commerce Commission, or within the jurisdiction of any court or other body, and when after such examination the [territorial] commission shall be of the opinion that the circumstances warrant, it shall be its duty to effect the necessary relief or remedy by the institution and prosecution of appropriate proceedings or otherwise before the Interstate Commerce Commission, or such court, or other body, in its own name or the name of the Territory, . . ."

The taxes in question accrued under § 17 of the Act of 1913, providing that "There shall . . . be paid to the commission in each of the months of March and September in each year by each public utility which is subject to investigation by the commission a fee which will be equal to one-twentieth of one per centum of the gross income from the public utility business carried on by such public utility in the Territory during the preceding year, plus one-fiftieth of one per centum of the par value of the stock issued by such public utility and outstanding on December 31 of the preceding year, . . ." After collection, the taxes "shall be deposited in the treasury of the Territory to the credit of a special fund to be called the 'Public Utilities Commission Fund'" to be used—with any appropriations made available by the territorial legislature—to pay necessary expenses of the Commission in the performance of its duties under the Act.

The Organic Act granting legislative power to the territorial government of Hawaii provides that "the legislature shall not grant to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise without the approval of Congress; . . ." [4] Pursuant to the Organic Act, and prior to the effective date of the Utilities Act of 1913, the territorial legislature passed Act 135 S. L. Haw. 1913—to take effect upon the approval by Congress—providing that all public utilities previously granted franchises should "be subject as to reasonableness of rates, prices, and charges and in all other respects to the provisions of . . . [the Utilities Act of 1913] and all amendments thereof for the regulation of public utilities in said Territory; . . . " March 28, 1916,[5] Congress expressly ratified, approved and confirmed this Hawaiian Act 135.

Act 135 as enacted by the Territory applied only to Hawaiian utilities specially described in the Act. However, Congress in ratifying and approving, broadened the Act by amendment so as to include not only the described utilities but "all public utilities and public-utilities companies organized or operating within the Territory of Hawaii." By further amendment Congress provided that nothing in Act 135 should "limit the jurisdiction or powers of the Interstate Commerce Commission" and that all actions of the Hawaiian Public Utility Commission should "be subject to review by the courts of the . . . Territory."

September 7, 1916, Congress enacted the "Shipping Act of 1916." [6] For the purposes of the Shipping Act, "The term 'common carrier by water in interstate commerce' " was given a statutory definition to include

---

[4] Act of Cong., April 30, 1900, c. 339, § 55, 31 Stat. 150; U. S. C., Title 48, § 562.

[5] 39 Stat. 38, c. 53.

[6] 39 Stat. 728, c. 451, Act of September 7, 1916.

"a common carrier . . . by water of passengers or property . . . on regular routes from port to port between . . ." places in the same "Territory, District or possession." This Act created the United States Shipping Board, with broad powers to investigate and supervise carriers by water in foreign and interstate commerce as defined therein.

We accept the conclusion of the Supreme Court of Hawaii that petitioner is a public utility as defined by the Hawaiian Act.[7] However, petitioner contends that the Territory cannot validly apply this tax to it. We have examined all of the grounds upon which this contention rests. None is sufficient to remove petitioner from the operation of the Utilities Act of 1913 as applied here.

First. Petitioner contends that the passage of the Shipping Act by Congress completely ousted the territorial Commission of all jurisdiction over it in any respect, or for any purpose, and thus withdrew the Commission's power to collect the fees in question.

The Supreme Court of Hawaii held in this case, as heretofore,[8] that the Shipping Act did deprive the territorial Commission of authority, under the Act of 1913, to regulate by its own order the rates of this petitioner. In the present case, however, that court concluded that the Shipping Act did not withdraw the territorial Commission's power to *investigate* water carriers—such as petitioner—as to rates and other matters, either for the exercise of its own permitted supervisory powers or for presentation of the public's case before appropriate governmental bodies.[9] The territorial Act of 1913—to which Congress

---

[7] Cf., *Waialua Agricultural Co.* v. *Christian, ante,* p. 91.

[8] *Re Inter-Island Steam Navigation Co.,* 24 Haw. 136.

[9] Similarly, many states have authorized utility commissions to make investigations and to institute proceedings before the Interstate Commerce Commission. Ala. Code (Michie), 1928, § 9669; Crawford &

in 1916 subjected all utilities doing business in Hawaii—gave the territorial Commission jurisdiction over many matters other than rate regulation. In general, the Commission was empowered to supervise and regulate local properties and activities of utilities and to protect the public interest in relation to rates, operations, and many other phases of the utility business. While, in some instances, the Commission was powerless to enter any final order, nevertheless its authority to investigate and to appear before appropriate governmental agencies was designed as a part of a general plan to safeguard the public interest. The Shipping Act invested the Shipping Board with authority over some of these matters. But no language in that Act indicates that Congress intended to withdraw all of the territorial Commission's jurisdiction over territorial water carriers. While Congress had complete power to repeal the entire territorial Public Utilities Act, "an intention to supersede the local law [of a Territory] is not to be presumed, unless clearly expressed." [10] Petitioner owns, controls, operates and man-

Moses Dig. of Stats. of Ark. 1921, § 1630; Struckmeyer, Revised Code Ariz. 1928, § 691; Gen. Laws of Calif., 1937 (Deering), § 34; Code of Ga., 1933, § 93-314; Code of Iowa, 1931, §§ 7890, 7891; Revised Stat. of Kan. Ann., 1923, § 66-148; Md., 1 Ann. Code—Bagby, p. 835, Art. 23, § 384; 1 Mason's Minn. Stat. (1927), § 4660; Rev. Statutes of Missouri (1929), § 5187; Cons. Laws of N. Y.—Cahill (1930), c. 49, p. 1878; § 59; (North Carolina) Cons. Stat. Ann. (1919), p. 464, § 1075; New Hampshire Public Laws, 1926, Vol. II, p. 923, (22, 23); 2, Olson, Ore. Laws of 1920, p. 2374, § 5872; 66 Purdon's Penna. Stat., § 552; (South Dakota)—Compiled Laws, 1929, Vol. II, p. 3264, § 9577-8; (1935) Wis. Stat., § 195.17.

"In its general scope and purpose, as well as in its terms, [the Shipping Act] . . . closely parallels the Interstate Commerce Act; and we cannot escape the conclusion that Congress intended that the two acts, each in its own field, should have like interpretation, application and effect." *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 481.

[10] *France* v. *Connor*, 161 U. S. 65, 72; see *Davis* v. *Beason*, 133 U. S. 333, *Cope* v. *Cope*, 137 U. S. 682; cf., *Savage* v. *Jones*, 225 U. S. 501, 533; *Gilvary* v. *Cuyahoga Valley Ry. Co.*, 292 U. S. 57, 60

ages numerous steam vessels, wharfs, docks and real and personal property useful in the transportation of passengers and freight between the various ports and islands of Hawaii. Petitioner's gross income between the years 1922 and 1929 from business transacted in the Territory amounted to approximately $18,000,000. This Territory is located far from the mainland of the United States. Only clear and explicit statutory language could justify a holding that Congress intended by the Shipping Act to deprive the territorial government of *all* jurisdiction over activities such as petitioner's, vitally affecting the trade, commerce, safety and welfare of the people of the Territory.

We agree with the Supreme Court of Hawaii that the Shipping Act of 1916 did not wholly supersede the territorial Act of 1913 as applied to water carriers like petitioner, and did not take from the territorial Commission its power to investigate such utilities. A valid legislative power necessarily includes the right to provide funds to be expended in its exercise.

Second. Petitioners contend, however, that the taxes involved constitute a burden on interstate and foreign commerce in violation of the Commerce Clause of the Federal Constitution. But here, Congress, by its Act of 1916, subjected petitioner to the territorial law under which these very taxes were levied.

Under the Constitution, Congress has the power to regulate interstate commerce.[11] Therefore, assuming—but not deciding—that petitioner is engaged in interstate and foreign commerce, Congress has exercised its power in the present case by permitting the Territory to act

[11] For illustrations of the extent of this power, see *Gibbons* v. *Ogden*, 9 Wheat. 1, 196; *In re Rahrer*, 140 U. S. 545; *Second Employers' Liability Cases*, 223 U. S. 1; *Houston, E. & W. T. Ry. Co.* v. *United States* (*Shreveport Case*), 234 U. S. 342; *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311; *Alabama & V. Ry. Co.* v. *Jackson & E. Ry. Co.*, 271 U. S. 244, 250.

upon this commerce by the imposition of the contested taxes. The imposition of these taxes under an Act to which Congress expressly subjected petitioner does not violate the Commerce Clause.

Congress had the power to subject petitioner to this tax by virtue of its authority over the Territory, in addition to its power under the Commerce Clause. "Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments." [12]

Third. Petitioner contends that the challenged tax is prohibited by the Fifth Amendment because "no investigation, supervision, or regulation of petitioner was in fact made by the Commission."

A general tax designed to effectuate a plan for control and supervision of public utilities need not be apportioned among the taxpayers according to the actual services performed directly for each. Such a requirement would seriously impair the effective application and operation of general tax systems. Services performed by the Hawaiian Public Utilities Commission were for the benefit of the public as a whole and are not any the less services beneficial to petitioner because its business has not been given any special assistance.[13] "A tax is not an assessment of benefits." [14]

The judgment is

Affirmed.

---

[12] *Mormon Church* v. *United States,* 136 U. S. 1, 43; cf., *Sere* v. *Pitot,* 6 Cranch 332; *American Ins. Co.* v. *Canter,* 1 Pet. 511; *Door* v. *United States,* 195 U. S. 138; *Cincinnati Soap Co.* v. *United States,* 301 U. S. 308.

[13] Cf. *Clyde Mallory Lines* v. *Alabama,* 296 U. S. 261, 266.

[14] *Carmichael* v. *Southern Coal Co.,* 301 U. S. 495, 522.

Syllabus.

ARMSTRONG PAINT & VARNISH WORKS *v.* NU-ENAMEL CORP. ET AL.

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

No. 51. Argued November 7, 8, 1938.—Decided December 5, 1938.

1. A registrant under the Trade Mark Act of March 19, 1920 of the name Nu-Enamel, for enamels and kindred products, brought suit in the federal district court to enjoin infringement by a competitor who was using in the sale of enamels the name Nu-Beauty Enamel. The bill alleged, *inter alia*, that in the trade the name Nu-Enamel had come to mean the plaintiff and its products exclusively; that the mark distinguished plaintiff's goods from others of the same class; and that Nu-Beauty Enamel was being passed off by merchants as the product of the plaintiff. *Held:*

(1) It being conceded by the answer that the name Nu-Enamel had come to mean plaintiff and its products, and that it distinguished plaintiff's goods from others of the same class, no evidence or finding was needed to establish these facts. P. 322.

(2) By virtue of the adoption of the procedural provisions of the Trade Mark Act of 1905 by the 1920 Act, the district court and the circuit courts of appeals had original and appellate jurisdiction, respectively, of suits at law or in equity respecting trade marks registered in accordance with the provisions of the latter Act and arising under it; and this Court was given jurisdiction by certiorari the same as in patent cases. P. 323.

(3) The allegation of registration under the 1920 Act, unless plainly unsubstantial, is sufficient to give the district court jurisdiction of the merits. P. 324.

(4) The district court having properly acquired jurisdiction of the suit for interference with the exclusive right to use the trade mark, then though the issue of infringement fail because the trade mark was not registrable, the court still has jurisdiction to determine, on substantially the same facts, the issue of unfair competition. *Hurn* v. *Oursler*, 289 U. S. 238. P. 324.

(5) As applied to enamels, the mark Nu-Enamel is descriptive, but registrable nevertheless under paragraph (b) of the Trade Mark Act of 1920. P. 329.

(6) Having in Nu-Enamel a registered mark which had acquired a secondary meaning as indicating its products exclusively, plaintiff was entitled to protection against the unfair use of the words

of the mark by a competitor seeking to palm off its goods as those of the plaintiff, and had a cause of action against such a one either for infringement of the mark or for unfair competition. P. 335.

(7) Upon the record of this case, the competitor's use of the name Nu-Beauty Enamel was unfair and infringed the plaintiff's trade mark Nu-Enamel. P. 336.

2. The federal Trade Mark Act of 1920 does not vest any new substantive rights but it does create remedies in the federal courts for protecting the registrations and authorizes triple damages for infringement. P. 324.
3. Trade marks registered under the 1920 Act may be attacked collaterally. P. 322.
4. The significant distinction between the Acts of 1905 and 1920 is the omission in the latter of the provision in the earlier act making the registration of a trade-mark prima facie evidence of ownership. P. 323.
5. The remedies afforded registrants under the 1920 Act are available only to "owners." Ownership must be established by proof; actual and exclusive use, short of a secondary meaning, is insufficient. P. 335.
6. Section 1 (b) of the Trade Mark Act of 1920 permits registration of marks used for one year in interstate commerce which were not registrable under the Act of 1905, "except those specified in paragraphs (a) and (b) of section 5" of the Act of 1905. *Held* that the phrase "except those specified in paragraphs (a) and (b) of section 5" does not apply to the provisos of paragraph (b) other than the first thereof. P. 331.

   This has been the construction given the subsection by the Patent Office. Moreover, to construe it as barring names, descriptive marks, and merely geographical terms, would make the subsection useless.
7. The legislative history and administrative interpretation of a statute have weight when choice is nicely balanced. P. 330.
8. A construction of a statute which preserves its usefulness is to be preferred to another which does not. P. 333.

95 F. 2d 448, affirmed.

CERTIORARI, *post*, p. 580, to review the reversal of a decree dismissing for want of equity a bill for an injunction and other relief.

Messrs. Moses Levitan and *George I. Haight,* with whom *Mr. George A. Carpenter* was on the brief, for petitioner.

The decision that "Nu-Enamel" is a valid trade-mark is contrary to the trade-mark laws of the United States, under which this suit was brought, and in conflict with applicable decisions of this court and of other Circuit Courts of Appeals.

Descriptive words are not valid as trade-marks under the trade-mark laws of the United States. Trade-Mark Act, 15 U. S. C. §§ 85, par. (b), 121; *In re Chas. R. Long, Jr. Co.,* 280 F. 975, 976; *Standard Paint* v. *Trinidad,* 220 U. S. 446; *Canal* v. *Clark,* 13 Wall. 311; *Elgin Watch* v. *Illinois Watch,* 179 U. S. 665, 673; *Richmond Remedies* v. *Dr. Miles Medical Co.,* 16 F. 2d 598, 601; *Kellogg Co.* v. *National Biscuit Co.,* 71 F. 2d 662, 666; *Charles Broadway Rouss, Inc.* v. *Winchester Co.,* 300 F. 706, 712; Rogers on "Good Will, Trade-Marks and Unfair Tradings," (1914 ed. reprinted 1919), 76.

That a descriptive word or term has acquired a secondary meaning does not render it capable of being appropriated as a valid trade-mark under the trade-mark laws of the United States. *Kay & Ess Co.* v. *Commissioner of Patents,* 92 F. 2d 552, 554; *In re Canada Dry Gingerale, Inc.,* 86 F. 2d 830, 832, 833; *Speaker* v. *Shaler,* 86 F. 2d 985, 987; *Barber* v. *Overhead Door Corp.,* 65 F. 2d 147; *Barton* v. *Rex-Oil Co.,* 2 F. 2d 402; *Hercules Powder* v. *Newton,* 266 F. 169; *Vacuum Oil* v. *Climax Refining,* 120 F. 254.

That "Nu-Enamel" may have acquired a secondary meaning does not prevent others from using such words in their primary descriptive sense as "Nu-Beauty" was used by the petitioner in connection with the product known as enamel. *Warner & Co.* v. *Lilly & Co.,* 265 U. S.

526, 528; *Pepsi-Cola* v. *Krause Bottling Co.*, 92 F. 2d 272, 274; *Hygrade Food Products Corp.* v. *W. H. D. Lee Mercantile Co.*, 46 F. 2d 771, 772; *Fawcett Publications* v. *Popular Mechanics*, 80 F. 2d 194, 197; *O'Cedar Corp.* v. *F. W. Woolworth Co.*, 66 F. 2d 363, 366.

There was no issue of unfair competition and the District Court had no jurisdiction on the ground of unfair competition.

The bill of complaint contains no allegations of facts constituting unfair competition, nor does it pray for relief against unfair competition. *Garrett* v. *Louisville & N. R. Co.*, 235 U. S. 308, 313; *Crocket* v. *Lee*, 7 Wheat. 522, 527.

There was no diversity of citizenship, and, therefore, no federal jurisdiction. *Nu-Enamel Corp.* v. *Armstrong*, 81 F. 2d 1; *Atkins* v. *Gordan*, 86 F. 2d 595; *Leschen Rope Co.* v. *Broderick Co.*, 201 U. S. 166, 172; *Hurn* v. *Oursler*, 289 U. S. 238, 248; *Van Camp Sea Food Co.* v. *Cohn-Hopkins*, 56 F. 2d 797, 799; *Sanders* v. *Paul*, 74 F. 2d 399, 405.

"Nu-Enamel" is not infringed by "Nu-Beauty," or "New Beauty" as used by petitioner in connection with and on the product known as enamel. *Elliott Varnish Co.* v. *Sears, Roebuck Co.*, 232 F. 588, 591.

Mr. Edward S. Rogers, with whom *Mr. William T. Woodson* was on the brief, for respondents. *Mr. Karl D. Loos* entered an appearance for respondents.

There is an exact analogy between the general purposes of the Act of 1920 authorizing the registration of marks used as trade-marks for one year and the ten-year proviso of the 1905 Act (15 U. S. C. § 85) which authorizes the registration of marks used as trade-marks for ten years prior to Oct. 20, 1905.

The "b" register of the 1920 Act, like the ten-year proviso, is designed to afford registration to marks actu-

ally used as trade-marks although they may be descriptive, geographical or personal names. *Thaddeus Davids Co.* v. *Davids,* 233 U. S. 461, 468, 469.

The Nu-Enamel mark now before the Court is not only registered under the 1920 Act, but meets all the tests prescribed by the statute and imposed in Patent Office practice. The record shows that it is susceptible of trade-mark use; that it has actually been so used; is regarded even by petitioner as a trade-mark; and that the trade-mark significance of the word Nu-Enamel is an identification of respondent and its goods is fully recognized by the public. These being the facts, the mark was clearly registrable under the 1920 Act. Being so registered, it is entitled to all the protection afforded by that Act, including, of course, the right of access to the federal courts in cases involving it.

The only prerequisite for federal jurisdiction under either Act is registration, and the district courts have recognized their authority to act on that ground alone. *Recamier* v. *Harriet Hubbard Ayer, Inc.,* 59 F. 2d 802.

When by virtue of the registration, the federal courts have authority to act, they have authority to deal fully with all aspects of the case. *Vogue Co.* v. *Vogue Hat Co.,* 12 F. 2d 991, 992.

It is of no importance whether the acts complained of in this case are called trade-mark infringement or unfair competition. Their characterization is merely epithetical. The act is the same. But even if it should be held that respondents' registration of Nu-Enamel is invalid, still the District Court had jurisdiction to restrain the use of Nu-Beauty Enamel which results in the passing off of petitioner's goods as respondents'. *Waterman Co.* v. *Gordon,* 72 F. 2d 272, 273; *Hurn* v. *Oursler,* 289 U. S. 238, 246.

Petitioner's infringement is established by the evidence.

MR. JUSTICE REED delivered the opinion of the Court.

The Nu-Enamel Corporation of Illinois filed its bill of complaint in a District Court of the United States in Illinois to enjoin the Armstrong Paint and Varnish Works, a corporation of the same State, from using in the sale of paints, varnishes and similar goods the words "Nu-Beauty Enamel" or any name including the words "Nu-Enamel" or other colorable imitation of plaintiff's registered trade-mark Nu-Enamel or otherwise infringing it; to require an accounting of profits, and to recover treble damages. Pending the litigation, the plaintiff sold its assets to the other respondent, Nu-Enamel Corporation of Delaware, but continued its own corporate existence. The purchaser was permitted to intervene.

The bill showed the registration by the plaintiff of Nu-Enamel under the Act of March 19, 1920, Trade-Mark 308,024, for mixed paints, varnishes, paint enamels, prepared shellacs, stains, lacquers, liquid cream furniture polishes and colors ground in oil. It set out that the name "Nu-Enamel" through wide use by plaintiff had come to mean "plaintiff and plaintiff's products only" and the "word 'Nu-Enamel' is a mark by which the goods of the plaintiff are distinguished from other goods of the same class." There were further allegations that defendant had adopted the name "Nu-Beauty Enamel" with full knowledge of prior and extensive use by plaintiff of "Nu-Enamel"; that as a result of defendant's use of the mark "Nu-Beauty Enamel," merchants passed off defendant's products for plaintiff's, and that the products of both manufacturers were sold in interstate commerce. An exhibit showed that plaintiff used its mark with this slogan printed above it: "The coat of enduring beauty."

Defendant admitted "that the name 'Nu-Enamel' has come to mean and is understood to mean, throughout the United States, including the State of Illinois and the City

of Chicago, the plaintiff and plaintiff's products only, and the word 'Nu-Enamel' is a mark by which the goods of the plaintiff are distinguished from other goods of the same class"; denied the validity, but not the fact or extent of the coverage, of the registration; asserted "Nu-Enamel" was a descriptive and generic term and that it had adopted "Nu-Beauty" in connection with enamel and kindred products before it heard of the trade-mark or trade name "Nu-Enamel." Defendant answered specifically that it marketed only enamels under the designation "Nu-Beauty Enamel" and that it did not market paints and varnishes under this name. The jurisdiction of the court over the subject matter was denied.

The District Court made the following material findings of fact:

"1. Plaintiff and defendant at the time of the filing of the bill of complaint herein were and are now both citizens of the State of Illinois. The intervener, Nu-Enamel Corporation, is a corporation of the State of Delaware.

"2. 'Nu' in 'Nu-Enamel', appearing on plaintiff's label, is a phonetic spelling or misspelling of the English word 'new' and means 'new.'

"3. 'Enamel' is a common English word describing a paint which flows out to a smooth coat when applied and which usually dries with a glossy appearance, and has long been known as such in the paint industry and to the public in general.

"4. 'Nu-Enamel' used in connection with paint or enamel sold by plaintiff means 'new enamel' and is a common and generic term descriptive of the product to which it is applied and of its new or recent origin.

"5. 'Nu' was commonly used in the paint and other industries in combination with other words as a misspelling or phonetic spelling of 'new' to designate brands and kinds of enamel, paint and other commodities before plaintiff and its predecessors adopted the name 'Nu-Enamel.'"

It determined that "Nu-Enamel" was not a valid trade-mark under the Trade-Mark Acts or at common law and, having so determined, refused jurisdiction of unfair competition.

The Circuit Court of Appeals reversed.[1] That court held the trade-mark non-descriptive, valid and infringed. It was of the opinion that the mark had acquired a secondary meaning. It found that the petitioner's conduct enabled merchants to palm off the Armstrong product for "Nu-Enamel" and concluded that the District Court had jurisdiction of the issue of unfair competition. We granted certiorari on account of the importance in trade-mark law of the issues of the descriptive character of the mark and the effect of its acquired meaning under the Trade-Mark Act of 1920.

As the petitioner concedes by answer that "Nu-Enamel" has acquired the meaning of respondent and respondent's products only and is a mark which distinguishes respondent's goods from others of the same class, no evidence or finding is needed to establish that fact. It may be noted, also, that the allegation of the use of "Nu-Beauty Enamel" by Armstrong on products other than enamels, fails of proof. Armstrong uses this mark on enamels only. On other products, there is the mark "Nu-Beauty," followed by some descriptive word, such as paint, varnish or brush.

Federal Trade-Mark Act of 1920. The registration of "Nu-Enamel" does not create any substantive rights in the registrant.[2] Trade-marks registered under the 1920

---

[1] 95 F. 2d 448.

[2] *Kellogg Co.* v. *National Biscuit Co., ante,* p. 117, note 3; *Charles Broadway Rouss, Inc.* v. *Winchester Co.,* 300 F. 706, 713, 714; *Sleight Metallic Ink Co.* v. *Marks,* 52 F. 2d 664, on rights it is "as though there had been no registration," p. 665; *Neva-Wet Corp.* v. *Never Wet Processing Corp.,* 277 N. Y. 163; 13 N. E. 2d 755, 759; *Slaymaker Lock Co.* v. *Reese,* 24 F. Supp. 69, 72.

act may be attacked collaterally. *Kellogg Co.* v. *National Biscuit Co.*, 71 F. 2d 662, 666.

The act forbids the unauthorized use of the registered mark in foreign and interstate commerce and adopts the procedural provisions of the Trade-Mark Act of 1905.[3] Through the inclusion of these procedural sections the lower federal courts are given original and appellate jurisdiction of "all suits at law or in equity respecting trade-marks registered in accordance with the provisions of this Act, arising under the present Act" and this Court was given jurisdiction for certiorari "in the same manner as provided for patent cases."[4] Section 19 of the 1905 act vesting power to grant injunctions in trade-mark cases is applicable also to proceedings under the 1920 act. By § 23 former remedies in law and equity are left available. The significant distinction between the two acts is the omission in the 1920 act of the provision of § 16 of the earlier act making the registration of a trade-mark prima facie evidence of ownership.

On its face the act shows it was enacted to enable American and foreign users of trade-marks to register them in accordance with the provisions of the convention for the protection of trade-marks and commercial names, signed at Buenos Aires in 1910. In addition § 1, paragraph (b), provides, without limitation to the export trade, for the registration of marks not registerable under § 5 of the Trade-Mark Act of 1905, after one year's use in interstate or foreign commerce. This enables the (b) marks to be registered abroad.

---

[3] Trade-Mark Act of March 19, 1920, c. 104, § 6, 41 Stat. 535.

[4] Secs. 17 and 18, Fed. Trade-Mark Act of February 20, 1905, 33 Stat. 728–29; §§ 5 and 6, Act of March 3, 1891, 26 Stat. 827–28; § 240a of the Judicial Code confirms this jurisdiction. *Street & Smith* v. *Atlas Mfg. Co.*, 231 U. S. 348, 352. Cf. *Forsyth* v. *Hammond*, 166 U. S. 506, 513.

While the act of 1920 does not vest any new substantive rights, it does create remedies in the federal courts for protecting the registrations and authorizes triple damages for infringement.[5] As a consequence of these remedial provisions, when a suit is begun for infringement, bottomed upon registration under the 1920 act, the district courts of the United States have jurisdiction. Unless plainly unsubstantial, the allegation of registration under the act is sufficient to give jurisdiction of the merits. In this case the trial court concluded that the invalidity of the trade-mark divested it of jurisdiction over unfair competition. This was erroneous.[6] Once properly obtained, jurisdiction of the one cause of action, the alleged infringement of the trade-mark, persists to deal with all grounds supporting it, including unfair competi-

[5] 41 Stat. 534, § 4. "That any person who shall without the consent of the owner thereof reproduce, counterfeit, copy, or colorably imitate any trade-mark on the register provided by this Act, and shall affix the same to merchandise of substantially the same descriptive properties as those set forth in the registration, or to labels, signs, prints, packages, wrappers, or receptacles intended to be used upon or in connection with the sale of merchandise of substantially the same descriptive properties as those set forth in such registration, and shall use, or shall have used, such reproduction, counterfeit, copy, or colorable imitation in commerce among the several States, or with a foreign nation, or with the Indian tribes, shall be liable to an action for damages therefor at the suit of the owner thereof; and whenever in any such action a verdict is rendered for the plaintiff the court may enter judgment therein for any sum above the amount found by the verdict as the actual damages, according to the circumstances of the case, not exceeding three times the amount of such verdict, together with the costs."

[6] Although we determine later that "Nu-Enamel" is registerable under the 1920 act, it seems appropriate to discuss jurisdiction of unfair competition on a different assumption so that the conclusion of the trial court, corrected but not discussed by the appellate court, will not become a precedent on issues of jurisdiction in trade-mark law. Cf. *Hurn* v. *Oursler*, 289 U. S. 238, 240.

tion with the marked article.[7] The cause of action is the interference with the exclusive right to use the mark "Nu-Enamel." If it is a properly registered trade-mark, a ground to support the cause of action is violation of the Trade-Mark Act. If it is not a properly registered trade-mark, the ground is unfair competition at common law. The facts supporting a suit for infringement and one for unfair competition are substantially the same. They constitute and make plain the wrong complained of, the violation of the right to exclusive use.

In the *Oursler* case there was a valid copyright which was held not infringed. Here the trial court determined the trade-mark was invalid. The *Oursler* case held that where the causes of action are different, the determination that the federal cause fails calls for dismissal.[8] But where there is only one cause of action we do not consider that the holding of the invalidity furnishes any basis for a distinction between this and the *Oursler* case. Registration of "Nu-Enamel" furnished a substantial ground for federal jurisdiction. That jurisdiction should be continued to determine, on substantially the same facts, the issue of unfair competition.[9]

---

[7] *Hurn* v. *Oursler*, 289 U. S. 238.

[8] *Hurn* v. *Oursler*, 289 U. S. 238, 248.

[9] Two cases cited in the *Oursler* opinion deal with trade-marks: *Leschen Rope Co.* v. *Broderick Co.*, 201 U. S. 166, and *Elgin Watch Co.* v. *Illinois Watch Co.*, 179 U. S. 665. They are there treated as out of line with the cases holding that facts supporting substantial federal and non-federal questions give jurisdiction to federal courts. Both state categorically that without a lawfully registered trade-mark a federal court loses jurisdiction when the jurisdiction depends on the trade-mark act.

Where diversity of citizenship exists the issue does not arise. *Warner & Co.* v. *Lilly & Co.*, 265 U. S. 526. While the diversity is not made plain in the opinion it appears in the record. No. 32, 1923 Term, Vol. 13, Transcripts of Record 1689.

Registration of Descriptive Mark under 1920 Trade-Mark Act. Even though under the facts alleged and the admission that respondent's mark has acquired a secondary meaning the federal courts have jurisdiction to determine whether petitioner is chargeable with unfair competition, it becomes necessary to determine whether registration of "Nu-Enamel" is permissible or impermissible under the Act of 1920 in order that it may be known whether § 4, the basis of the prayer in the bill for triple damages, is applicable.[10] Section 1 (b) of the 1920 act permits registration of the marks used for one year in interstate commerce which were not registerable under the Act of 1905 "except those specified in paragraphs (a) and (b) of section 5" of the Act of 1905. That section is set out below.[11] The point raised is whether the phrase

---

[10] See Note 5, *supra*.

When the trial court concluded the trade-mark was not registerable under the 1920 Act, it dismissed the bill which also sought damages for unfair competition. When the Circuit Court of Appeals concluded the trade-mark was registerable as non-descriptive, it declared that the issue of unfair competition was cognizable in the trial court. It does not appear whether the reason for this holding was because the mark was registerable or because it had acquired a secondary meaning, through extensive use. The lower court does not consider whether the bill alleges registration under the 1920 Act. If the mark is not descriptive it is registerable under the 1905 Act. A mark registerable under the 1905 Act is not registerable under the 1920 Act. 16 Trade Mark Reporter, 93, 530. The language of the 1920 Act permits registration only of marks communicated by the international bureau and those not registerable under the 1905 Act.

[11] "No mark by which the goods of the owner of the mark may be distinguished from other goods of the same class shall be refused registration as a trade-mark on account of the nature of such mark unless such mark—

"(a) Consists of or comprises immoral or scandalous matter.

"(b) Consists of or comprises the flag or coat of arms or other insignia of the United States or any simulation thereof, or of any State or municipality or of any foreign nation, or of any design or picture that has been or may hereafter be adopted by any fraternal

"except those specified in paragraphs (a) and (b) of section 5" of the 1905 act is effective to bar not only marks, *contra bonos mores,* under (a) and marks, *infra dignitatem,* under (b) but also the following provisos, particularly the one concerned with descriptive words or devices.

---

society as its emblem, or of any name, distinguishing mark, character, emblem, colors, flag, or banner adopted by any institution, organization, club, or society which was incorporated in any State in the United States prior to the date of the adoption and use by the applicant: *Provided,* That said name, distinguishing mark, character, emblem, colors, flag, or banner was adopted and publicly used by said institution, organization, club, or society prior to the date of adoption and use by the applicant: *Provided,* That trade-marks which are identical with a registered or known trade-mark owned and in use by another and appropriated to merchandise of the same descriptive properties, or which so nearly resemble a registered or known trade-mark owned and in use by another and appropriated to merchandise of the same descriptive properties as to be likely to cause confusion or mistake in the mind of the public or to deceive purchasers shall not be registered: *Provided,* That no mark which consists merely in the name of an individual, firm, corporation, or association not written, printed, impressed, or woven in some particular or distinctive manner, or in association with a portrait of the indivdual, or merely in words or devices which are descriptive of the goods with which they are used, or of the character or quality of such goods, or merely a geographical name or term, shall be registered under the terms of this subdivision of this chapter: *Provided further,* That no portrait of a living individual may be registered as a trade-mark except by the consent of such individual, evidenced by an instrument in writing, nor may the portrait of any deceased President of the United States be registered during the life of his widow, if any, except by the consent of the widow evidenced in such manner: *And provided further,* That nothing herein shall prevent the registration of any mark used by the applicant or his predecessors, or by those from whom title to the mark is derived, in commerce with foreign nations or among the several States or with Indian tribes, which was in actual and exclusive use as a trade-mark of the applicant, or his predecessors from whom he derived title for ten years next preceding February 20, 1905: *Provided further,* That nothing herein shall prevent the registration of a trade-mark otherwise registerable because of its being

It seems clear that the mark "Nu-Enamel" is descriptive of a type of paint long familiar to manufacturers,[12] with the addition of the adjective new, phonetically spelled or misspelled. Obviously this slight variation from the orthographic normal is not unusual. Numerous

---

the name of the applicant or a portion thereof. And if any person or corporation shall have so registered a mark upon the ground of said use for ten years preceding February 20, 1905, as to certain articles or classes of articles to which said mark shall have been applied for said period, and shall have thereafter and subsequently extended his business so as to include other articles not manufactured by said applicant for ten years next preceding February 20, 1905, nothing herein shall prevent the registration of said trade-mark in the additional classes to which said new additional articles manufactured by said person or corporation shall apply, after said trade-mark has been used on said article in interstate or foreign commerce or with the Indian tribes for at least one year, provided another person or corporation has not adopted and used previously to its adoption and use by the proposed registrant, and for more than one year such trade-mark or one so similar as to be likely to deceive in such additional class or classes." U. S. C., Title 15, § 85.

[12] "Enamel or Varnish Paint.—These types of paints dry with a brilliant glossy surface. They are made by grinding the selected pigment, or mixture of pigments, in a varnish medium, and their nature and properties depend on the type of varnish used. A quick-drying variety is made by using a cheap rosin varnish as the vehicle, it dries with a high gloss surface in about 2–4 hours, but owing to the brittle and non-durable nature of the varnish used it is only suitable for interior use. High-class durable enamels, suitable for both inside and outside use, are made by using mixtures of heat-treated linseed oil (stand oil) and elastic copal varnishes as the vehicle. They are slow-drying, taking from 12–18 hours, and are very tough under the severest climatic conditions.

"Flat Paint.—This type of paint is really a flat-drying enamel. It is made in much the same way as the high class glossy enamels, except that it contains less varnish and more turpentine than ordinary enamel. Some varieties contain a proportion of wax dissolved in the varnish so as to give a more perfect mat or flat finish. Owing to their pleasing decorative effect they are used for interior decorations, but are not suitable for outside use." 17 Encyclopedia Britannica (14th ed.) 35.

illustrations of such use by paint and varnish manufacturers are given by petitioner in its answer. The trademark is registered by the Nu-Enamel Corporation for a variety of products from enamels through paint brushes to glue, solder and tack rags. It is quite true that the mark is not descriptive as applied to many of respondent's products but the use by petitioner, the Armstrong Company, of which the Nu-Enamel Corporation complains is the use of "Nu-Enamel" or "Nu-Beauty Enamel." This use, Armstrong answers and the evidence supports the assertion, is confined to the enamels. We must therefore consider the case as though the only products of Nu-Enamel Corporation were enamels. As applied to them it is descriptive.

That the mark is descriptive of paint enamels does not bar it from registration as to them under the 1920 act. This has been the construction of the Patent Office.[13] To

---

[13] Wright Co. *v.* Sar-A-Lee Co., 328 Official Gazette 787, 788; Postum Cereal Co. *v.* Cal. Fig Nut Co., 313 O. G. 454; Opinion of Solicitor, Interior Department, July 13, 1920, 277 O. G. 181, 182:

"In my opinion the recent act of March 19, 1920, as applied to register (b) therein provided should be construed as if it more specifically read as follows:

" 'All other marks not registerable under the act of February 20, 1905, as amended, except those specified *as not registerable* in paragraphs or schedules (a) and (b) of section 5 of that act, etc.'

"This is the plain meaning of the law, as it was undoubtedly the intention to continue to deny registration to those marks prohibited registration by paragraphs of schedules (a) and (b) of section 5 of the act of February 20, 1905. In other words, my view is that register (b) provided by the recent act is not intended for any trademark registerable under any part of the act of February 20, 1905, nor for registration of any mark not registerable as specified in paragraphs or schedules (a) and (b) of section 5 of that act. The doubt will be relieved and a rational construction of the law will be subserved by considering the reference in the recent act to 'paragraphs (a) and (b)' of section 5 of the amended act of February 20, 1905, as meaning *schedules a and b* rather than paragraphs strictly and as comprising the following matters specified as not registerable, viz:

construe (b) of the 1920 act to bar names, descriptive marks and merely geographical terms would make the subsection useless. The obvious purpose of its inclusion was to widen the eligibility of marks. A dictum has expressed [14] a view contrary to that of the Patent Office.

This administrative interpretation, contemporary with the legislation, and the legislative history have weight

---

"'(a) Consists of or comprises immoral or scandalous matter.

"'(b) Consists of or comprises the flag or coat-of-arms or other insignia of the United States or any simulation thereof, or of any State or municipality or of any foreign nation, or of any design or picture that has been or may hereafter be adopted by any fraternal society as its emblem, or of any name, distinguishing mark, character, emblem, colors, flag or banner adopted by any institution, organization, club, or society which was incorporated in any State in the United States prior to the date of the adoption and use by the applicant: *Provided,* That said name, distinguishing mark, character, emblem, colors, flag, or banner was adopted and publicly used by said institution, organization, club, or society prior to the date of adoption and use by the applicant.'

"This was the evident intention, as shown by the congressional hearings on the recent act, and with such construction a field will exist for the operation of the new law; otherwise none would remain."

Rule 19 of the Rules of the Patent Office Governing Registration of Trade-marks, issued July 1, 1937, reads as follows:

"A trade-mark must have been actually used in commerce before an application for its registration can be filed in the Patent Office.

"No trade-mark will be registered . . . under the act of February 20, 1905, which consists merely in the name of an individual, firm, corporation, or association, not written, printed, impressed, or woven in some particular or distinctive manner or in association with a portrait of the individual, or merely in words or devices which are descriptive of the goods with which they are used, or of the character or quality of such goods, or merely a geographical name or term . . . No trade-mark will be registered under section 1 (b), act of March 19, 1920, which is registrable under the act of February 20, 1905, as amended, or which has not been in *bona fide* use as a trade-mark for one year in international or interstate commerce or commerce with Indian tribes."

[14] *In re Chas. R. Long, Jr., Co.,* 51 App. D. C. 399; 280 F. 975, 977.

"when choice is nicely balanced." [15] We construe § 1(b) of the 1920 act to be applicable to the categories expressed in § 5 of the act of 1905 under (a) and (b) including the first proviso but not to include the other provisos of (b). This conclusion is fortified by the addi-

---

[15] *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 96.

On January 21 and 22, 1920, the Committee on Patents of the House of Representatives was considering H. R. 7157 of the 66th Congress, 2nd Session, a bill to amend § 5 of the Trade-Mark Act of 1905. The Commissioner of Patents discussed with the Committee an amendment applicable to H. R. 9023 of the 66th Congress entitled "A bill to give effect to certain provisions of the convention for the protection of trade-marks." The applicable language is as follows:

"Mr. Newton. Yes. The amendment we propose is this:

" 'All other marks not registerable under the act of February 20, 1905 (as amended), but which for not less than two years have been bona fide used in interstate or foreign commerce, or commerce with Indian tribes, by the proprietor thereof, upon or in connection with any goods of such proprietor and upon which the fee of $10 has been paid and such formalities as are prescribed by the Commissioner of Patents have been complied with, may be registered.'

"Anything may be registered. That is an amendment to the bill that was passed yesterday. That bill does not give prima facie validity to the mark that is registered, the bill that passed yesterday, and this amendment does not give it. That is the reason we put this proposed amendment into the bill. But Mr. Merritt's bill wants to give them prima facie evidence of ownership, so we put that under the 1905 statute where it naturally belongs." Hearings on H. R. 7157 before the Committee on Patents, 66th Congress, 2d Session, p. 30.

Later in the hearing on the bill which became the act of March 19, 1920, this discussion was continued by Mr. Whitehead, Assistant Commissioner of Patents, who discussed the Commissioner's suggested language quoted above and said:

"One or two slight amendments ought, it seems to me, to be made to the bill. The bill as it stands is broad enough to put any mark on the register. Section 5 of the act of February 20, 1905, outlaws—if I may use that expression—two classes of marks—one, scandalous and immoral marks, and the other marks consisting of the flag or coat of arms of the United States, etc., and it seems as if this Senate amendment ought to be amended to exclude those marks specified

tion of the proviso to § 1 (b) of the 1920 act, relating to identical trade-marks. The proviso in § 5 (b) of the 1905 act refusing registration to identical marks in much the same language was construed in *Thaddeus Davids Co.* v. *Davids Mfg. Co.*, 233 U. S. 461, as not permitting the registration of such marks when used for ten years under the fourth, now fifth, proviso of that section. We think that Congress in adopting the corresponding proviso in subsection (b) of the 1920 act, must be taken to have adopted the accepted construction of the similar proviso of the 1905 act. If the language of the 1920 act had been intended to exclude from registration all the classes excluded by the provisos of § 5 of the 1905 act, it would have been unnecessary to include this proviso.[16]

This Court has had several occasions within the last few years to construe statutes in which conflicts between

---

in paragraphs (a) and (b) of that section. Otherwise there can be put on the register scandalous marks and the flag of the United States. I think it must have been overlooked. I do not think Mr. Merritt or Mr. Newton thought that they were including those two types of marks. It seems as if that could be accomplished by inserting in the amendment, after the words 'all other marks not registerable under the act of February 20, 1905,' the words, 'except those specified in paragraphs (a) and (b) of section 5 of that act,' or words to that effect."

. . . . . .

After discussion of other matters:

"The Chairman. If you will in your brief just make those suggestions, we will be glad to take them up with the conferees.

"Mr. Whitehead. I will be glad to do that. I think the only really important one is to exclude those of paragraphs (a) and (b) of section 5. These others are minor matters." Hearings on H. R. 9023 before the Committee on Patents, 66th Congress, 2nd Session, Part 2, pp. 33–35.

The precise language adopted came from the conference report. Congressional Record, 66th Congress, 2nd Session, p. 4160.

[16] The variations between the two provisos have been treated in practice as immaterial. 277 O. G. 181, 182. Cf. *Thaddeus Davids Co.* v. *Davids Mfg. Co.*, 233 U. S. 461, 467.

reasonable intention and literal meaning occurred. We have refused to nullify statutes, however hard or unexpected the particular effect, where unambiguous language called for a logical and sensible result.[17] Any other course would be properly condemned as judicial legislation. However, to construe statutes so as to avoid results glaringly absurd, has long been a judicial function.[18] Where, as here, the language is susceptible of a construction which preserves the usefulness of the section, the judicial duty rests upon this Court to give expression to the intendment of the law.

Remedies.[19] Registration under the 1920 act conferred no substantive rights in the registered mark but it does permit suits in the federal courts to protect rights otherwise acquired in the marks. The 1905 act, § 1, authorizes the "owner" to obtain registration of eligible trade-marks; § 2 requires the applicant to make oath that he "believes himself . . . to be the owner of the trade-mark"; § 5 refers to the "owner of the mark"; § 16 then declares "that the registration of a trade-mark under the provisions of this act shall be prima facie evidence of ownership"; § 23 reserves all remedies at law or in equity which any party aggrieved by the wrongful use of his trade-mark would have had without the act of 1905.

The 1920 act omits the quoted portion of § 16 as to the effect of registration as prima facie evidence of ownership. Under § 1 the register includes all marks communicated to the Commissioner of Patents by the international bureaus provided for by the Buenos Aires convention of 1910

[17] *Caminetti* v. *United States,* 242 U. S. 470, 485; *Crooks v. Harrelson,* 282 U. S. 55, 58–59; *Taft* v. *Commissioner,* 304 U. S. 351, 359.

[18] *Sorrells* v. *United States,* 287 U. S. 435, 446, *et seq.* and cases cited; *United States* v. *Ryan,* 284 U. S. 167.

[19] Since neither party has relied upon state law, we do not consider any effect it might have on our conclusions. Cf. *Kellogg Co.* v. *National Biscuit Co., ante,* p. 111.

and all other marks not registerable under the Trade-Mark Act of 1905, with the exceptions discussed in the preceding section of this opinion, in bona fide use by the proprietor thereof for one year in commerce other than intrastate. Section 4,[20] which protects the trade-mark, is substantially the same as § 16 of the 1905 act, except for the omission of the prima facie presumption of ownership. It is the owner who has the rights of action under this act, unaided by any presumption from registration. The owner, on the other hand, is not limited in any way by the act, as § 23 of the act of 1905 is made specifically applicable. This section preserves the legal and equitable remedies to an aggrieved owner. The Committee on Patents in the Senate was quite positive that the effect of the act on domestic rights was nil.[21] The registrant acquires by the acceptance of his mark under the 1920 act the right to proceed in the federal courts against infringers and to recover triple damages if he can establish his ownership of the trade-mark at common law.

"Nu-Enamel" is descriptive of the enamels in issue. The use on the numerous other articles of respondent's manufacture, in its advertising, on store window valances, on electric and other displays, and as the name of many stores and the sign of several thousand dealers, justify petitioner's concession that the name means respondent and respondent's products only and the word distinguishes

---

[20] See Note 5, *supra*.

[21] "This legislation has no effect on the domestic rights of anyone. It is simply for the purpose of enabling manufacturers to register their trade-marks in this country for the purpose of complying with legislation in foreign countries, which necessitates registration in the United States as a necessary preliminary for such foreign registration. As the law now stands, it enables trade-mark pirates in foreign countries to register as trade-marks, the names and marks of the American manufacturers, and thus levy blackmail upon them." Senate Report No. 432, 66th Congress, 2nd Session, p. 2. Cf. *Charles Broadway Rouss, Inc.* v. *Winchester Co.*, 300 F. 706, 714.

its goods from others of the same class. But a mark which is descriptive is not a good trade-mark at common law.[22]

It was said in *Thaddeus Davids Co.* v. *Davids Mfg. Co.*[23] that names registered under the last proviso of § 5 of the 1905 act became technical trade-marks upon valid registration under that act. Assuming that descriptive terms in this respect would be analogous to proper names, there are clear distinctions between the acts. The 1920 act does not define "trade-mark" to include any mark registered under its terms, as does § 29 of the 1905 act. Remedies are afforded registrants under the 1920 act but these remedies are for "owners," and actual and exclusive use, short of a secondary meaning,[24] does not qualify a registrant under the 1920 act as an owner. That ownership must be established by proof.[25] Unless this ownership is established, no rights of action under the 1920 act for infringement exist. Here we have a secondary meaning to the descriptive term, "Nu-Enamel." This establishes, entirely apart from any trade-mark act, the common law right of the Nu-Enamel Corporation to be free from the competitive use of these words as a trade-mark or trade name.[26] As was pointed out in the *Davids* case, in considering the ten-year clause of the 1905 act, this right of freedom does not confer a monopoly on the use of the words. It is a mere protection against their unfair use as a trade-mark or trade name by a competitor seeking

---

[22] *Warner & Co.* v. *Lilly & Co.*, 265 U. S. 526, 528; *Standard Paint Co.* v. *Trinidad Asphalt Mfg. Co.*, 220 U. S. 446, 453; *Elgin Nat. Watch Co.* v. *Illinois Watch Co.*, 179 U. S. 665, 673.

[23] 233 U. S. 461, 466, 468, 469, 470.

[24] Cf. *Standard Paint Co.* v. *Trinidad Asphalt Mfg. Co.*, 220 U. S. 446, 461. The language in that case, denying to a descriptive term the effect of a trade-mark, is inapplicable for the reason that the descriptive term had not acquired a secondary meaning.

[25] Cf. *Charles Broadway Rouss, Inc.* v. *Winchester Co.*, 300 F. 706, 713.

[26] *Thaddeus Davids Co.* v. *Davids Mfg. Co.*, 233 U. S. 461, 470, 471.

to palm off his products as those of the original user of the trade name. This right to protection from such use belongs to the user of a mark which has acquired a secondary meaning. He is, in this sense, the owner of the mark. We agree with the conclusion of the Circuit Court of Appeals that infringement is shown.

The rights of Nu-Enamel Corporation to be free of the competitive use of "Nu-Enamel" may be vindicated, also, through the challenge of unfair competition, as set out in the bill. The remedy for unfair competition is that given by the common law. The right arises not from the trademark acts but from the fact that "Nu-Enamel" has come to indicate that the goods in connection with which it is used are the goods manufactured by the respondent. When a name is endowed with this quality, it becomes a mark, entitled to protection. The essence of the wrong from the violation of this right is the sale of the goods of one manufacturer for those of another.[27]

The questions as to damages, profits, and the form of the decree will be passed upon more appropriately by the trial court. The decree of the Circuit Court of Appeals reversing the decree of the District Court is affirmed and this cause is remanded to the District Court with directions to proceed in conformity with the opinion of this Court.

Affirmed.

[27] *Elgin Nat. Watch Co.* v. *Illinois Watch Co.*, 179 U. S. 665, 674.

MISSOURI EX REL. GAINES *v.* CANADA, REGISTRAR OF THE UNIVERSITY OF MISSOURI, ET AL.

CERTIORARI TO THE SUPREME COURT OF MISSOURI.

No. 57. Argued November 9, 1938.—Decided December 12, 1938.

1. The State of Missouri provides separate schools and universities for whites and negroes. At the state university, attended by whites, there is a course in law; at the Lincoln University, attended by negroes, there is as yet none, but it is the duty of the curators of that institution to establish one there whenever in their opinion this shall be necessary and practicable, and pending such development, they are authorized to arrange for legal education of Missouri negroes, and to pay the tuition charges therefor, at law schools in adjacent States where negroes are accepted and where the training is equal to that obtainable at the Missouri State University. Pursuant to the State's policy of separating the races in its educational institutions, the curators of the state university refused to admit a negro as a student in the law school there because of his race; whereupon he sought a mandamus, in the state courts, which was denied. *Held:*

(1) That inasmuch as the curators of the state university represented the State, in carrying out its policy, their action in denying the negro admission to the law school was state action, within the meaning of the Fourteenth Amendment. P. 343.

(2) The action of the State in furnishing legal education within the State to whites while not furnishing legal education within the State to negroes, was a discrimination repugnant to the Fourteenth Amendment. P. 344.

If a State furnishes higher education to white residents, it is bound to furnish substantially equal advantages to negro residents, though not necessarily in the same schools.

(3) The unconstitutional discrimination is not avoided by the purpose of the State to establish a law school for negroes whenever necessary and practicable in the opinion of the curators of the University provided for negroes. P. 346.

(4) Nor are the requirements of the equal protection clause satisfied by the opportunities afforded by Missouri to its negro citizens for legal education in other States. P. 348.

The basic consideration here is not as to what sort of opportunities other States provide, or whether they are as good as those

in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the ground of color. The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State. By the operation of the laws of Missouri a privilege has been created for white law students which is denied to negroes by reason of their race. The white resident is afforded legal education within the State; the negro resident having the same qualifications is refused it there and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up, and the provision for the payment of tuition fees in another State does not remove the discrimination. P. 348.

(5) The obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction. It is there that the equality of legal right must be maintained. That obligation is imposed by the Constitution upon the States severally as governmental entities—each responsible for its own laws establishing the rights and duties of persons within its borders. P. 350.

(6) The fact that there is but a limited demand in Missouri for the legal education of negroes does not excuse the discrimination in favor of whites. P. 350.

(7) Inasmuch as the discrimination may last indefinitely—so long as the curators find it unnecessary and impracticable to provide facilities for the legal education of negroes within the State, the alternative of attendance at law schools in other States being provided meanwhile—it can not be excused as a temporary discrimination. P. 351.

2. The state court decided this case upon the merits of the federal question, and not upon the propriety of remedy by mandamus. P. 352.

342 Mo. 121; 113 S. W. 2d 783, reversed.

CERTIORARI, *post*, p. 580, to review a judgment affirming denial of a writ of mandamus.

Messrs. Charles H. Houston and *Sidney R. Redmond*, with whom *Mr. Leon A. Ransom* was on the brief, for petitioner.

Messrs. William S. Hogsett and *Fred L. Williams,* with whom *Mr. Fred L. English* was on the brief, for respondents.

The Supreme Court of Missouri has held that the laws of Missouri do not entitle the petitioner to be admitted as a student in the University of Missouri, and that those laws provide for the separation of the white and negro races for the purpose of higher education. The second part of the decision, fully recognizing petitioner's constitutional right to equal facilities for legal education, finds as a fact that the State has accorded him equal facilities—which finding of fact, supported as it is by strong and uncontradicted evidence, is binding upon this Court. The absence of a substantial federal question is manifest.

Petitioner refused to avail himself of the facilities for a legal education provided by the State. If he had applied to the Lincoln University curators for a legal education, it is to be presumed that they would have given it to him in accordance with their mandatory duty under the Act. His refusal to avail himself of his legal rights is fatal to his case.

The State of Missouri has not denied petitioner the equal protection of the laws by excluding him from the School of Law of the University of Missouri.

Separation of the white and negro races for purposes of education does not infringe the rights of either race guaranteed by the Fourteenth Amendment.

Social equality is not a legal question and can not be settled by law or by the judgments of courts.

The facilities for legal education available to petitioner under the Lincoln University Act (§§ 9616 to 9624, R. S. Mo., 1929) are substantially equal to the facilities afforded white students in the School of Law of the University of Missouri.

In separating the races, and in determining the particular facilities to be used by the two races, the State is allowed a large measure of discretion; and the courts will not interfere with the exercise of that discretion as unconstitutional, except in case of a very clear and unmistakable disregard of rights secured by the Constitution of the United States.

The Lincoln University board of curators are not merely authorized, but are required, to reorganize the institution so that it shall afford opportunity to negroes equal to that accorded to white students; and, pending the full development of Lincoln University, are required, to arrange for the attendance of negro residents of the State at the university of any adjacent State, to take any course of study provided at the University of Missouri but not at Lincoln University; and they are not merely authorized, but are required, to pay the reasonable tuition fees for such attendance (§ 9622, R. S. Mo., 1929). The duty to do these things is mandatory and peremptory.

The responsibility and duty to carry out this plan has been placed by law—not upon these respondents, the curators of the University of Missouri—but upon the curators of Lincoln University.

If petitioner pursues his legal rights and makes application to the Lincoln University curators for an education in the law, it will then become their mandatory duty (a) to establish a school of law in Lincoln University and to admit petitioner as a student therein; and (b) pending that, and as a temporary matter, to arrange for the attendance of petitioner in one or another of the schools of law already established in the Universities of Kansas, Nebraska, Iowa or Illinois (all of which admit negroes), and to pay his tuition fees while he is attending such school.

Substantial equality and not identity of school facilities is what is guaranteed by the Fourteenth Amendment.

The fact that in order to avail himself of legal education in any one of the four law schools in adjacent states, the petitioner (a grown man) would be put to the necessity of traveling farther from his home in St. Louis than the distance from St. Louis to Columbia (where the University of Missouri is located), is a mere matter of inconvenience, which must necessarily arise as an incident to any classification or any school system; and the court below held that this furnishes no substantial ground of complaint by petitioner. Petitioner's expense of travel to any of these adjacent state universities would be no greater than the traveling expense of students living in various parts of Missouri, who attend the University of Missouri at Columbia.

The question of the constitutionality of the provision for out-of-state instruction is, strictly speaking, not presented for review, since petitioner never made any application to Lincoln University curators for the establishment of a law course in that institution; and, therefore, it is impossible to know whether the curators of Lincoln University, had he knocked at the door, would have immediately established a law course there, rendering it unnecessary for him to go out-of-state for a legal education.

Mandamus against respondents was not a proper remedy, because petitioner must exhaust his administrative remedies before seeking extraordinary relief; and this he failed to do. Petitioner is in no position to appeal to the courts for any remedy, and certainly not for mandamus, to compel the board of curators of Lincoln University to provide him with the opportunity for legal

education which he says he desires, but which he has never requested from the authorities charged with the duty to provide it for him. *A fortiori,* he could not appeal to the courts for mandamus to compel the board of curators of the University of Missouri to provide him with a legal education which he has not requested from the authorities charged with the duty to provide it for him.

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

Petitioner Lloyd Gaines, a negro, was refused admission to the School of Law at the State University of Missouri. Asserting that this refusal constituted a denial by the State of the equal protection of the laws in violation of the Fourteenth Amendment of the Federal Constitution, petitioner brought this action for mandamus to compel the curators of the University to admit him. On final hearing, an alternative writ was quashed and a peremptory writ was denied by the Circuit Court. The Supreme Court of the State affirmed the judgment. 113 S. W. 2d 783. We granted certiorari, October 10, 1938.

Petitioner is a citizen of Missouri. In August, 1935, he was graduated with the degree of Bachelor of Arts at the Lincoln University, an institution maintained by the State of Missouri for the higher education of negroes. That University has no law school. Upon the filing of his application for admission to the law school of the University of Missouri, the registrar advised him to communicate with the president of Lincoln University and the latter directed petitioner's attention to § 9622 of the Revised Statutes of Missouri (1929), providing as follows:

"Sec. 9622. *May arrange for attendance at university of any adjacent state—Tuition fees.*—Pending the full development of the Lincoln university, the board of

curators shall have the authority to arrange for the attendance of negro residents of the state of Missouri at the university of any adjacent state to take any course or to study any subjects provided for at the state university of Missouri, and which are not taught at the Lincoln university and to pay the reasonable tuition fees for such attendance; *provided* that whenever the board of curators deem it advisable they shall have the power to open any necessary school or department. (Laws 1921, p. 86, § 7.)"

Petitioner was advised to apply to the State Superintendent of Schools for aid under that statute. It was admitted on the trial that petitioner's "work and credits at the Lincoln University would qualify him for admission to the School of Law of the University of Missouri if he were found otherwise eligible." He was refused admission upon the ground that it was "contrary to the constitution, laws and public policy of the State to admit a negro as a student in the University of Missouri." It appears that there are schools of law in connection with the state universities of four adjacent States, Kansas, Nebraska, Iowa and Illinois, where nonresident negroes are admitted.

The clear and definite conclusions of the state court in construing the pertinent state legislation narrow the issue. The action of the curators, who are representatives of the State in the management of the state university (R. S. Mo., § 9625), must be regarded as state action.[1] The state constitution provides that separate free public schools shall be established for the education of children of African descent (Art. XI, § 3), and by statute separate high school facilities are supplied for colored students equal to those provided for white students (R. S. Mo.,

[1] *Ex parte Virginia*, 100 U. S. 339, 346, 347; *Neal* v. *Delaware*, 103 U. S. 370, 397; *Carter* v. *Texas*, 177 U. S. 442, 447; *Norris* v. *Alabama*, 294 U. S. 587, 589.

§§ 9346–9349). While there is no express constitutional provision requiring that the white and negro races be separated for the purpose of higher education, the state court on a comprehensive review of the state statutes held that it was intended to separate the white and negro races for that purpose also. Referring in particular to Lincoln University, the court deemed it to be clear "that the Legislature intended to bring the Lincoln University up to the standard of the University of Missouri, and give to the whites and negroes an equal opportunity for higher education—the whites at the University of Missouri, and the negroes at Lincoln University." Further, the court concluded that the provisions of § 9622 (above quoted) to the effect that negro residents "may attend the university of any adjacent State with their tuition paid, pending the full development of Lincoln University," made it evident "that the Legislature did not intend that negroes and whites should attend the same university in this State." In that view it necessarily followed that the curators of the University of Missouri acted in accordance with the policy of the State in denying petitioner admission to its School of Law upon the sole ground of his race.

In answering petitioner's contention that this discrimination constituted a denial of his constitutional right, the state court has fully recognized the obligation of the State to provide negroes with advantages for higher education substantially equal to the advantages afforded to white students. The State has sought to fulfill that obligation by furnishing equal facilities in separate schools, a method the validity of which has been sustained by our decisions. *Plessy* v. *Ferguson,* 163 U. S. 537, 544; *McCabe* v. *Atchison, T. & S. F. Ry. Co.,* 235 U. S. 151, 160; *Gong Lum* v. *Rice,* 275 U. S. 78, 85, 86. Compare *Cumming* v. *Board of Education,* 175 U. S. 528, 544, 545. Respondents' counsel have appropriately emphasized the special

solicitude of the State for the higher education of negroes as shown in the establishment of Lincoln University, a state institution well conducted on a plane with the University of Missouri so far as the offered courses are concerned. It is said that Missouri is a pioneer in that field and is the only State in the Union which has established a separate university for negroes on the same basis as the state university for white students. But, commendable as is that action, the fact remains that instruction in law for negroes is not now afforded by the State, either at Lincoln University or elsewhere within the State, and that the State excludes negroes from the advantages of the law school it has established at the University of Missouri.

It is manifest that this discrimination, if not relieved by the provisions we shall presently discuss, would constitute a denial of equal protection. That was the conclusion of the Court of Appeals of Maryland in circumstances substantially similar in that aspect. *University of Maryland* v. *Murray,* 169 Md. 478; 182 A. 590. It there appeared that the State of Maryland had "undertaken the function of education in the law" but had "omitted students of one race from the only adequate provision made for it, and omitted them solely because of their color"; that if those students were to be offered "equal treatment in the performance of the function, they must, at present, be admitted to the one school provided." *Id.,* p. 489. A provision for scholarships to enable negroes to attend colleges outside the State, mainly for the purpose of professional studies, was found to be inadequate (*Id.,* pp. 485, 486) and the question, "whether with aid in any amount it is sufficient to send the negroes outside the State for legal education," the Court of Appeals found it unnecessary to discuss. Accordingly, a writ of mandamus to admit the applicant was issued to the officers and

regents of the University of Maryland as the agents of the State entrusted with the conduct of that institution.

The Supreme Court of Missouri in the instant case has distinguished the decision in Maryland upon the grounds—(1) that in Missouri, but not in Maryland, there is "a legislative declaration of a purpose to establish a law school for negroes at Lincoln University whenever necessary or practical"; and (2) that, "pending the establishment of such a school, adequate provision has been made for the legal education of negro students in recognized schools outside of this State." 113 S. W. 2d, p. 791.

As to the first ground, it appears that the policy of establishing a law school at Lincoln University has not yet ripened into an actual establishment, and it cannot be said that a mere declaration of purpose, still unfulfilled, is enough. The provision for legal education at Lincoln is at present entirely lacking. Respondents' counsel urge that if, on the date when petitioner applied for admission to the University of Missouri, he had instead applied to the curators of Lincoln University it would have been their duty to establish a law school; that this "agency of the State," to which he should have applied, was "specifically charged with the mandatory duty to furnish him what he seeks." We do not read the opinion of the Supreme Court as construing the state statute to impose such a "mandatory duty" as the argument seems to assert. The state court quoted the language of § 9618, R. S. Mo. 1929, set forth in the margin,[2] making it the mandatory

[2] Section 9618, R. S. Mo. 1929, is as follows:

"Sec. 9618. *Board of curators authorized to reorganize.*—The board of curators of the Lincoln university shall be authorized and required to reorganize said institution so that it shall afford to the negro people of the state opportunity for training up to the standard furnished at the state university of Missouri whenever necessary and practicable in their opinion. To this end the board of curators shall be authorized

duty of the board of curators to establish a law school in Lincoln University "whenever necessary and practicable in their opinion." This qualification of their duty, explicitly stated in the statute, manifestly leaves it to the judgment of the curators to decide when it will be necessary and practicable to establish a law school, and the state court so construed the statute. Emphasizing the discretion of the curators, the court said:

"The statute was enacted in 1921. Since its enactment no negro, not even appellant, has applied to Lincoln University for a law education. This fact demonstrates the wisdom of the legislature in leaving it to the judgment of the board of curators to determine when it would be necessary or practicable to establish a law school for negroes at Lincoln University. Pending that time adequate provision is made for the legal education of negroes in the university of some adjacent State, as heretofore pointed out." 113 S. W. 2d p. 791.

The state court has not held that it would have been the duty of the curators to establish a law school at Lincoln University for the petitioner on his application. Their duty, as the court defined it, would have been either to supply a law school at Lincoln University as provided in § 9618 or to furnish him the opportunity to obtain his legal training in another State as provided in § 9622. Thus the law left the curators free to adopt the latter course. The state court has not ruled or intimated that their failure or refusal to establish a law school for a very few students, still less for one student, would have been an abuse of the discretion with which the curators were entrusted. And, apparently, it was because of that discre-

---

to purchase necessary additional land, erect necessary additional buildings, to provide necessary additional equipment, and to locate, in the county of Cole the respective units of the university where, in their opinion, the various schools will most effectively promote the purposes of this article. (Laws of 1921, p. 86, § 3.)"

tion, and of the postponement which its exercise in accordance with the terms of the statute would entail until necessity and practicability appeared, that the state court considered and upheld as adequate the provision for the legal education of negroes, who were citizens of Missouri, in the universities of adjacent States. We may put on one side respondent's contention that there were funds available at Lincoln University for the creation of a law department and the suggestions with respect to the number of instructors who would be needed for that purpose and the cost of supplying them. The president of Lincoln University did not advert to the existence or prospective use of funds for that purpose when he advised petitioner to apply to the State Superintendent of Schools for aid under § 9622. At best, the evidence to which argument as to available funds is addressed admits of conflicting inferences, and the decision of the state court did not hinge on any such matter. In the light of its ruling we must regard the question whether the provision for the legal education in other States of negroes resident in Missouri is sufficient to satisfy the constitutional requirement of equal protection, as the pivot upon which this case turns.

The state court stresses the advantages that are afforded by the law schools of the adjacent States,—Kansas, Nebraska, Iowa and Illinois,—which admit non-resident negroes. The court considered that these were schools of high standing where one desiring to practice law in Missouri can get "as sound, comprehensive, valuable legal education" as in the University of Missouri; that the system of education in the former is the same as that in the latter and is designed to give the students a basis for the practice of law in any State where the Anglo-American system of law obtains; that the law school of the University of Missouri does not specialize in Missouri law and that the course of study and the case books used

in the five schools are substantially identical. Petitioner insists that for one intending to practice in Missouri there are special advantages in attending a law school there, both in relation to the opportunities for the particular study of Missouri law and for the observation of the local courts,[3] and also in view of the prestige of the Missouri law school among the citizens of the State, his prospective clients. Proceeding with its examination of relative advantages, the state court found that the difference in distances to be traveled afforded no substantial ground of complaint and that there was an adequate appropriation to meet the full tuition fees which petitioner would have to pay.

We think that these matters are beside the point. The basic consideration is not as to what sort of opportunities other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the ground of color. The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State. The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right. By the operation of the laws of Missouri a privilege has been created for white law students which is denied to negroes by reason of their race. The white resident is afforded legal education within the State; the negro resident having the same qualifications is refused it there and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege

[3] See *University of Maryland* v. *Murray*, 169 Md. 478, 486.

which the State has set up, and the provision for the payment of tuition fees in another State does not remove the discrimination.

The equal protection of the laws is "a pledge of the protection of equal laws." *Yick Wo* v. *Hopkins,* 118 U. S. 356, 369. Manifestly, the obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction. It is there that the equality of legal right must be maintained. That obligation is imposed by the Constitution upon the States severally as governmental entities,—each responsible for its own laws establishing the rights and duties of persons within its borders. It is an obligation the burden of which cannot be cast by one State upon another, and no State can be excused from performance by what another State may do or fail to do. That separate responsibility of each State within its own sphere is of the essence of statehood maintained under our dual system. It seems to be implicit in respondents' argument that if other States did not provide courses for legal education, it would nevertheless be the constitutional duty of Missouri when it supplied such courses for white students to make equivalent provision for negroes. But that plain duty would exist because it rested upon the State independently of the action of other States. We find it impossible to conclude that what otherwise would be an unconstitutional discrimination, with respect to the legal right to the enjoyment of opportunities within the State, can be justified by requiring resort to opportunities elsewhere. That resort may mitigate the inconvenience of the discrimination but cannot serve to validate it.

Nor can we regard the fact that there is but a limited demand in Missouri for the legal education of negroes as excusing the discrimination in favor of whites. We had occasion to consider a cognate question in the case

of *McCabe* v. *Atchison, T. & S. F. Ry. Co., supra.* There the argument was advanced, in relation to the provision by a carrier of sleeping cars, dining and chair cars, that the limited demand by negroes justified the State in permitting the furnishing of such accommodations exclusively for white persons. We found that argument to be without merit. It made, we said, the constitutional right "depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. Whether or not particular facilities shall be provided may doubtless be conditioned upon there being a reasonable demand therefor, but, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded." *Id.*, pp. 161, 162.

Here, petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race, whether or not other negroes sought the same opportunity.

It is urged, however, that the provision for tuition outside the State is a temporary one,—that it is intended to operate merely pending the establishment of a law department for negroes at Lincoln University. While in that sense the discrimination may be termed temporary, it may nevertheless continue for an indefinite period by reason of the discretion given to the curators of Lincoln

University and the alternative of arranging for tuition in other States, as permitted by the state law as construed by the state court, so long as the curators find it unnecessary and impracticable to provide facilities for the legal instruction of negroes within the State. In that view, we cannot regard the discrimination as excused by what is called its temporary character.

We do not find that the decision of the state court turns on any procedural question. The action was for mandamus, but it does not appear that the remedy would have been deemed inappropriate if the asserted federal right had been sustained. In that situation the remedy by mandamus was found to be a proper one in *University of Maryland* v. *Murray, supra.* In the instant case, the state court did note that petitioner had not applied to the management of Lincoln University for legal training. But, as we have said, the state court did not rule that it would have been the duty of the curators to grant such an application, but on the contrary took the view, as we understand it, that the curators were entitled under the state law to refuse such an application and in its stead to provide for petitioner's tuition in an adjacent State. That conclusion presented the federal question as to the constitutional adequacy of such a provision while equal opportunity for legal training within the State was not furnished, and this federal question the state court entertained and passed upon. We must conclude that in so doing the court denied the federal right which petitioner set up and the question as to the correctness of that decision is before us. We are of the opinion that the ruling was error, and that petitioner was entitled to be admitted to the law school of the State University in the absence of other and proper provision for his legal training within the State.

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

Reversed.

Separate opinion of MR. JUSTICE MCREYNOLDS.

Considering the disclosures of the record, the Supreme Court of Missouri arrived at a tenable conclusion and its judgment should be affirmed. That court well understood the grave difficulties of the situation and rightly refused to upset the settled legislative policy of the State by directing a mandamus.

In *Cumming* v. *Richmond County Board of Education,* 175 U. S. 528, 545, this Court through Mr. Justice Harlan declared—"The education of the people in schools maintained by state taxation is a matter belonging to the respective States, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land." *Gong Lum* v. *Rice,* 275 U. S. 78, 85—opinion by Mr. Chief Justice Taft—asserts: "The right and power of the state to regulate the method of providing for the education of its youth at public expense is clear."

For a long time Missouri has acted upon the view that the best interest of her people demands separation of whites and negroes in schools. Under the opinion just announced, I presume she may abandon her law school and thereby disadvantage her white citizens without improving petitioner's opportunities for legal instruction; or she may break down the settled practice concerning separate schools and thereby, as indicated by experience, damnify both races. Whether by some other course it may be possible for her to avoid condemnation is matter for conjecture.

The State has offered to provide the negro petitioner opportunity for study of the law—if perchance that is the thing really desired—by paying his tuition at some nearby school of good standing. This is far from unmistakable disregard of his rights and in the circum-

stances is enough to satisfy any reasonable demand for specialized training. It appears that never before has a negro applied for admission to the Law School and none has ever asked that Lincoln University provide legal instruction.

The problem presented obviously is a difficult and highly practical one. A fair effort to solve it has been made by offering adequate opportunity for study when sought in good faith. The State should not be unduly hampered through theorization inadequately restrained by experience.

This proceeding commenced in April, 1936. Petitioner then twenty-four years old asked mandamus to compel his admission to the University in September, 1936, notwithstanding plain legislative inhibition. Mandamus is not a writ of right but is granted only in the court's discretion upon consideration of all the circumstances. *Duncan Townsite Co.* v. *Lane,* 245 U. S. 308, 311; *United States ex rel. Arant* v. *Lane,* 249 U. S. 367, 371.

The Supreme Court of Missouri did not consider the propriety of granting the writ under the theory of the law now accepted here. That, of course, will be matter open for its consideration upon return of the cause.

MR. JUSTICE BUTLER concurs in the above views.

EX PARTE CENTURY INDEMNITY CO.

No. —, Original. Decided December 12, 1938.

1. Upon a rule to show cause why a writ of mandamus should not issue requiring judges of the Circuit Court of Appeals to consider certain assignments of error which that court had declined to consider upon a ground which this Court, upon review, adjudged insufficient, it is an answer that another and sufficient ground for rejecting the assignments is revealed by the record. P. 355.

2. Papers purporting to be proposed findings of fact and conclusions of law, which are contained in the transcript but not in the bill of exceptions, are not properly authenticated. P. 356.

Rule discharged.

Mr. Jewel Alexander was on a brief for petitioner.

Mr. Joe G. Sweet was on a brief for G. Nelson, appellee below.

PER CURIAM.

On an appeal from a judgment for the plaintiff in an action at law, in which a jury was waived, the Circuit Court of Appeals refused to consider certain assignments of error upon the ground that they related to findings requested by the defendant after the trial had been concluded. The judgment was affirmed, 90 F. 2d 644, and certiorari was granted. We were unable to accept the conclusion of the Circuit Court of Appeals that when the trial court ordered "that judgment be entered for plaintiff, with interest and costs, upon findings of fact and conclusions of law to be presented," it was thereafter "too late adequately to present special findings of fact." It was not necessary to treat the first order for judgment as ending "the progress of the trial." 28 U. S. C. 875. The qualifying words in the order were appropriate to suggest a "reservation of opportunity for further action." Accordingly, the judgment of the Circuit Court of Appeals was reversed and the cause was remanded to that court for further proceedings in conformity with the opinion of this Court. *Century Indemnity Co.* v. *Nelson,* 303 U. S. 213.

On the later hearing, the Circuit Court of Appeals found another ground for its action,—a ground not dealt with in its former ruling and not presented by the petition for certiorari. That was that defendant's proposed

findings were "not incorporated in the bill of exceptions, either directly or by reference." The Circuit Court of Appeals refused to consider the assignments of error addressed to the rejection of these findings and again affirmed the judgment. 96 F. 2d 679.

On application of the defendant, this Court issued a rule directing the judges of the Circuit Court of Appeals to show cause why the judgment should not be vacated and the court be required to consider the assignments of error. The judges have made return to the rule.

While it appears from the bill of exceptions that the defendant "served and lodged its proposed findings of fact and conclusions of law," and the transcript contains a paper described as defendant's proposed findings of fact and conclusions of law, that paper is not included in the bill of exceptions and hence is not properly authenticated. 28 U. S. C. 875. *Insurance Company* v. *Folsom,* 18 Wall. 237, 249; *McLeod* v. *United States,* 67 F. 2d 740.

In view of that defect, we cannot direct the Circuit Court of Appeals to consider the assignments of error and the rule to show cause must be discharged.

Rule discharged.

UNITED STATES *v.* PLEASANTS.

CERTIORARI TO THE COURT OF CLAIMS.

No. 169. Argued December 5, 1938.—Decided January 3, 1939.

1. Under the Revenue Act of 1932, which allows deduction from gross income of charitable contributions not to exceed 15% of "net income" as ascertained without such deduction, § 23 (n), the net income intended is that upon which normal tax and surtax are levied, undiminished by the amount of a capital net loss 12½% of which is allowed as an off-set in computing the total tax, under the special provision of § 101 (b). *Helvering* v. *Bliss*, 293 U. S. 144, explained. P. 358.
2. Exemptions from taxation of income devoted to charity are not narrowly construed. P. 363.
3. Administrative construction of a statute, to be persuasive, should be consistent. *Id.*

86 Ct. Cls. 679; 22 F. Supp. 964, affirmed.

CERTIORARI, *post*, p. 582, to review a judgment allowing a recovery of money erroneously collected as part of an income tax.

Mr. Paul A. Freund, with whom *Solicitor General Jackson*, *Assistant Attorney General Morris*, and *Mr. Sewall Key* were on the brief, for the United States.

Mr. Frederick Schwertner, with whom *Mr. George H. Warrington* was on the brief, for respondent.

By leave of Court, briefs of *amici curiae* were filed by *Messrs. Henry S. Drinker, Jr.* and *Frederick E. S. Morrison* on behalf of John E. Zimmermann, and by *Mr. Oscar P. Mast* on behalf of Howard Heinz, in support of respondent.

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

The question is whether the 15 per centum allowed as a deduction for charitable contributions under § 23 (n) of

the Revenue Act of 1932 is to be calculated on the taxpayer's net income computed without regard to a capital net loss as to which special provision is made by § 101 (b).

Section 23 (n) provides that in computing net income there shall be allowed as a deduction from gross income—

"In the case of an individual, contributions or gifts made within the taxable year to or for the use of: . . . to an amount which in all the above cases combined does not exceed 15 per centum of the taxpayer's net income as computed without the benefit of this subsection." 47 Stat. 181–182.

Respondent in 1932 made charitable contributions to the amount of $3496. His net income, irrespective of a capital net loss, was determined by the Commissioner to be $94,963.52. Upon that net income the Commissioner assessed the normal tax and surtax at the rates prescribed by §§ 11 and 12.[1] Respondent contended that this was his net income as described in § 23 (n) and that as his charitable contributions were less than 15 per centum of that amount they were deductible in full in determining his normal tax and surtax. The Commissioner refused to allow the deduction.

The taxpayer had sustained a "capital net loss," as defined in § 101(c)(6), of $154,921.98. The Commissioner ruled that "Since the capital loss of $154,921.98 is in excess of adjusted ordinary net income of $94,963.52

[1] These sections provide:

"Sec. 11. *Normal Tax on Individuals.*—

"There shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax equal to the sum of the following: . . .

"Sec. 12. *Surtax on Individuals.*—

"(a) *Rates of Surtax.*—There shall be levied, collected, and paid for each taxable year upon the net income of every individual a surtax as follows: . . ." 47 Stat. 174.

(without contributions) there is no net income against which to make a deduction for contributions."

Having paid the tax assessed by the Commissioner upon that theory, respondent filed his claim for a refund and on its rejection brought this suit in the Court of Claims. Judgment was rendered in his favor. 22 F. Supp. 964. Because of an asserted conflict with decisions of Circuit Courts of Appeals [2] and with our ruling in *Helvering* v. *Bliss,* 293 U. S. 144, certiorari was granted. October 10, 1938.

"Capital net gains" and "capital net losses" of individual taxpayers are the subject of special treatment under § 101. In the case of a "capital net gain," there is to be levied, at the election of the taxpayer, and in lieu of all other taxes imposed by the income tax title, a tax of 12½ per centum of the capital net gain, to be added to the tax computed upon the basis of the "ordinary net income." § 101(a). In the case of a "capital net loss," § 101(b) provides for a tax to be determined, also in lieu of other income taxes but irrespective of any election by the taxpayer, as follows:

"a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted, and the total tax shall be this amount minus 12½ per centum of the capital net loss; but in no case shall the tax of a taxpayer who has sustained a capital net loss be less than the tax computed without regard to the provisions of this section."

Section 101(c)(6) defines "capital net loss" as "the excess of the sum of the capital losses plus the capital deductions over the total amount of capital gain."

[2] *Avery* v. *Commissioner,* C. C. A. 7th, 84 F. 2d 905; *Lockhart* v. *Commissioner,* C. C. A. 3d, 89 F. 2d 143; *Heinz* v. *Commissioner,* C. C. A. 3d, 94 F. 2d 832.

Section 101(c)(7) defines "ordinary net income" as "the net income, computed in accordance with the provisions of this title, after excluding all items of capital gain, capital loss, and capital deductions."

There is no doubt as to the purpose of this provision as to capital net losses, which was first introduced in the Revenue Act of 1924.[3] Prior to that time, and under the Revenue Act of 1921, capital losses were to be deducted from capital gains in the process of determining the "capital net gain."[4] If capital deductions and capital losses were in excess of the capital gain, or if there were capital losses in the absence of capital gain, such losses were deductible as ordinary losses. We are told that the opportunity to minimize taxes by the practice of taking capital losses to offset ordinary net income constituted a particularly serious problem after the Act of 1921, which reduced the rate of tax on capital net gains. The results to the Treasury of that method of treating capital losses led to the adoption in the Act of 1924 of the plan for subjecting capital net losses to a limited rate in order to protect the revenues,[5] a plan which was continued in the Revenue Acts of 1926, 1928, and 1932.[6]

It will be observed that the provision for the limitation with respect to a capital net loss under § 101 (b) (unlike the provision in § 101 (a) as to a capital net gain) gives no option to the taxpayer.[7] The limitation is explicit and must be followed as written. The limitation applies equally when there is no capital gain and hence nothing to be deducted from capital losses on that score.[8] The

[3] Revenue Act of 1924, § 208 (c).

[4] Revenue Act of 1921, § 206 (a) (4).

[5] *Piper* v. *Willcuts*, 64 F. 2d 813, 815, 816; 65th Cong. Rec. 2428; H. Rep. 179, 68th Cong., 1st Sess., p. 20.

[6] Revenue Act of 1926, § 208 (c); 1928, § 101 (b); 1932, § 101 (b).

[7] Regulations 77, Art. 503.

[8] See *Piper* v. *Willcuts*, 64 F. 2d 813, 816; *Hoffman* v. *Commissioner*, 71 F. 2d 929.

limitation is applicable unless, as stated in the last clause of § 101 (b), a greater tax would result from not applying it.[9] In the instant case there is no question that the limitation does apply and the Commissioner has applied it.

In such a case the statute directs that a partial tax shall be first computed upon the basis of the "ordinary net income" and at the rates and in the manner provided in §§ 11 and 12.[10] The total tax is then arrived at by deducting 12½ per centum of the capital net loss. That loss thus figures in the computation of the total tax only by the allowance of an offset to the specified extent against the tax determined apart from the capital losses. Thus, where the limitation is applicable and the offset of 12½ per centum of the capital net loss is allowed accordingly, capital losses are not deductible in determining the taxpayer's net income for the purpose of the normal tax and surtax. And, as in such case there is no capital gain, the "ordinary net income" under § 101 (b), that is, the net income computed after excluding capital loss and capital deductions, is the only net income upon which a tax is laid.

We have noted that the limitation of § 101(b) is not applicable if the tax, computed without regard to that section, would be greater. The latter method of computation brings out the distinction clearly. For in that method the capital net loss is deducted from the ordinary net income in order to arrive at the total net income for the purpose of applying the normal tax and surtax rates. See illustration in Regulations 77, Article 503. But where the limitation of § 101(b) governs, because the tax as otherwise computed would not be greater, capital losses are not deducted in determining the net income which is

[9] See illustration in Regulations 77, Art. 503.

[10] See Note 1.

to be taxed, but are used only for the purpose of determining the specified offset against the tax on that net income. *Id.*

We are not impressed with the argument based on the provisions of §§ 21, 22 and 23. True, § 21 provides that "net income" means gross income computed under § 22 less the deductions allowed by § 23. Section 22 defines gross income and § 23 provides for deductions, including deductions for losses. But §§ 21, 22 and 23 are not to be construed so as to derogate from the special and explicit provisions of § 101(b). Under the limitation of that section, as we have seen, the taxpayer is not permitted to deduct capital losses so as to reduce the net income subject to tax and his capital losses enter into the computation of his ultimate tax only through the deduction of 12½ per centum of the capital net loss from the tax which is computed upon the net income ascertained irrespective of that loss.

It is in this light that we must decide the particular question here presented as to the meaning of the words "the taxpayer's net income" in § 23(n) providing for a deduction of 15 per centum for charitable contributions. Do these words refer to the taxpayer's net income which under the statutory scheme is actually subject to tax? Or is that net income, although treated as subsisting for the purpose of being taxed, to be regarded as non-existent for the purpose of admitting deductions for contributions? We think that Congress, in the application of the special provision of § 101(b) for an offset in case of a capital net loss, intended to make the taxpayer's net income, ascertained irrespective of that loss, the subject of the tax and that the provision in § 21(n) allowing a deduction for charitable contributions is applicable to that taxable net income.

There is nothing to the contrary in our decision in *Helvering* v. *Bliss, supra.* In that case there was a capi-

tal net gain. The net income of the taxpayer comprehended that net gain as well as his net income otherwise computed. We decided that it was his total net income which was to be regarded as the basis for the allowance under § 23 (n). We found nothing in § 101, which in that application prescribed "merely a method for segregating a portion of that net income for taxation at a special rate," that in any wise altered the right of the taxpayer to take the deduction in accordance with § 23 (n). *Id.*, 150, 151. Here, instead of a capital net gain, we have a capital net loss. There is no gain to be added to the taxpayer's net income otherwise computed, and thus that is the only net income taxable under the statute. To that net income, the provision of § 23 (n) appropriately applies. We observed in the *Bliss* case that the exemption of income devoted to charity and the reduction of the rate of tax on capital gains "were liberalizations of the law in the taxpayer's favor, were begotten from motives of public policy, and are not to be narrowly construed." That observation is equally pertinent here.

The administrative construction invoked by the Government has not been of a sufficiently consistent character to afford adequate support for its contention.[11]

We conclude that the Commissioner erred in refusing to permit the deduction sought by respondent for his charitable contributions and that the judgment of the Court of Claims should be

Affirmed.

---

[11] See I. T. 2104, III–2 Cum. Bull. 152; Elkins *v.* Commissioner, 24 B. T. A. 572; Livingood *v.* Commissioner, 25 B. T. A. 585, 589; XI–1 Cum. Bull. 9, 33; XI–2 Cum. Bull. 3, 6, 29, 268; Straus *v.* Commissioner, 27 B. T. A. 1116; XIII–2 Cum. Bull. 25, 29, 135.

FORD MOTOR CO. *v.* NATIONAL LABOR RELATIONS BOARD.

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

Nos. 182 and 183. Argued December 14, 1938.—Decided January 3, 1939.

1. The authority to modify or set aside its findings and order, conferred on the National Labor Relations Board by § 10 (d) of the National Labor Relations Act, ends with the filing of the transcript of its record in the Circuit Court of Appeals. P. 368.
2. Upon the filing of such transcript in connection with the Board's petition for enforcement of its order, and notice, the Circuit Court of Appeals acquires jurisdiction under § 10 (e). *Id.*
3. Under § 10 (f) of the Act the jurisdiction of the Circuit Court of Appeals is of the same character and scope in a proceeding for review brought by a person aggrieved by an order of the Board as the jurisdiction which the court has in a proceeding instituted by the Board for enforcement. P. 369.
4. Where the Board has petitioned for enforcement under § 10 (e) and the jurisdiction of the court has attached, the respondent is entitled to raise all pertinent questions and to obtain any affirmative relief that is appropriate without seeking independent review under § 10 (f); and permission to the Board to withdraw its petition rests in the sound discretion of the court, to be exercised in the light of the circumstances of the particular case. *Id.*
5. Where the Board sought enforcement of its order under § 10 (e), and the party proceeded against petitioned for review under § 10 (f), seeking affirmative relief and setting up substantially the same grounds in its answer to the Board's petition and in its own petition, *held:*

   (1) That the court had jurisdiction to retain the transcript filed by the Board, while permitting withdrawal of the Board's petition, and to order that the transcript be filed in the proceeding for review. *In re National Labor Relations Board,* 304 U. S. 486, distinguished. P. 370.

   (2) On the petition for review, the Board could seek, not merely a denial of that petition, but also enforcement of its order. P. 371.

   (3) The court acquired exclusive jurisdiction to deal with the order. P. 372.

6. Upon a petition to review an order of the National Labor Relations Board, where it was contended that the order was invalid for want of a full and fair hearing and because the Board had not itself considered the evidence but had adopted as its own a decision prepared by subordinates, without affording the petitioner any opportunity to be heard thereon,—the Circuit Court of Appeals properly granted the Board's motion to remand the cause to the Board for the purpose of setting aside its findings and order, issuing proposed findings, with permission to the parties to file exceptions and present argument, and thereafter making its decision and order upon a reconsideration of the entire case. P. 372.

This purpose, expressed in the Board's motion and specified in the order of remand, qualifies that order and binds the Board. It was not necessary for the court to consider other objections to the Board's conduct of the proceeding, as the setting aside of the findings and order would carry with it the opportunity for reconsideration and the making of a new record. Pp. 372–375.

99 F. 2d 1003, 1009, affirmed.

CERTIORARI, *post,* p. 585, to review orders of the court below, one granting a motion of the above-named Board to withdraw a petition for enforcement under the National Labor Relations Act, the other remanding the cause to the Board on the Board's motion.

Mr. Alfred McCormack, with whom *Messrs. Frederick H. Wood, Louis J. Columbo,* and *Thomas T. Cooke* were on the brief, for petitioner.

Mr. Charles Fahy, with whom *Solicitor General Jackson,* and *Messrs. Charles A. Horsky* and *Robert B. Watts* were on the brief, for respondent.

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

This case presents the question of the propriety of the action of the Circuit Court of Appeals in remanding a cause to the National Labor Relations Board for the purpose of setting aside its findings and order, and issuing

proposed findings, and making its decision and order upon reconsideration.

The National Labor Relations Board, on December 22, 1937, entered an order against petitioner directing it to desist from described practices and to offer reinstatement, with back pay, to certain discharged employees.

On January 7, 1938, the Board filed its petition in No. 182 (called the Board's proceeding) in the Circuit Court of Appeals, seeking the enforcement of its order, and at the same time filed the transcript of the record.

On April 4, 1938, petitioner asked leave to adduce additional evidence. On April 11, 1938, petitioner filed its answer to the Board's petition, alleging that the order was invalid and asking that it be set aside upon the grounds, among others, that the Board had failed to accord petitioner a full and fair hearing, and that the Board had not itself considered the evidence but had adopted as its own a decision prepared by its subordinates without affording petitioner any opportunity to be heard thereon. It was also alleged that the findings were not supported by the evidence. Petitioner moved for a commission to take the depositions of witnesses, and served interrogatories upon the Board.

On May 2, 1938, after our decision in *Morgan* v. *United States* (April 25, 1938), 304 U. S. 1, the Board filed a motion for leave to withdraw its petition for enforcement and the transcript of record, without prejudice. The Board stated that, should its motion be granted, it would set aside its order, would issue proposed findings, with permission to the parties to file exceptions and present argument, and thereafter make its decision and order. On May 5, 1938, the court granted the Board's motion. On May 6, 1938, the Board served notice on petitioner of its intention to vacate its findings and order of December 22, 1937, but later in view of petitioner's objection held that action under advisement. On May 9, 1938, the or-

der of May 5th was amended so far as it permitted the withdrawal of the transcript of record and the court directed that the transcript remain on file. On June 2, 1938, the Board purported to withdraw its petition for enforcement. On June 4, 1938, the petitioner moved to vacate the order of May 5th. That motion was denied on June 10, 1938, with a stay of the withdrawal of the Board's petition pending application here for writ of certiorari.

Meanwhile, on May 4, 1938, the petitioner filed with the Circuit Court of Appeals in No. 183 (called the petitioner's proceeding) its petition asking the court to review and set aside the Board's order of December 22, 1937. On May 9, 1938, the court directed that the transcript of record filed in the Board's proceeding should be deemed to have been filed in the petitioner's proceeding to review as of the date of May 4th. On June 2, 1938, the Board filed a motion to vacate that order of May 9th. At the same time the Board moved that in the event of a denial of that motion the case should be remanded to the Board for further proceedings.

On June 10, 1938, the court entered its order denying certain motions of the petitioner for leave to amend its petition for review, denying the Board's motion to vacate the order of May 9th, and granting the Board's motion of June 2d—

"to remand this cause to the National Labor Relations Board for the purpose of setting aside its findings and order of December 22, 1937, and issuing proposed findings, and making its decision and order upon a reconsideration of the entire case."

Because of the importance of the questions presented in relation to the scope of the court's jurisdiction and its appropriate exercise, certiorari was granted to review the order of May 5th, granting the Board's motion to withdraw its petition for enforcement, and the order of

June 10th, remanding the cause as above stated. October 10, 1938.

First. The authority conferred upon the Board by § 10 (d)[1] of the National Labor Relations Act, to modify or set aside its findings and order, ended with the filing in court of the transcript of record. Upon the filing of the transcript in connection with the Board's petition for enforcement, and notice, the Circuit Court of Appeals had jurisdiction of the proceeding as provided in § 10 (e) of the Act, as follows:

"Upon such filing [of the transcript], the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. . . . The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the

[1] Section 10 (d) provides:

"(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it." 49 Stat. 454.

facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review . . ." 49 Stat. 454, 455.

Under § 10 (f) the jurisdiction of the Circuit Court of Appeals is of the same character and scope in a proceeding for review brought by a person aggrieved by an order of the Board as the jurisdiction which the court has in a proceeding instituted by the Board for enforcement.[2]

While § 10 (f) assures to any aggrieved person opportunity to contest the Board's order, it does not require an unnecessary duplication of proceedings. The aim of the Act is to attain simplicity and directness both in the administrative procedure and on judicial review. Where the Board has petitioned for enforcement under § 10 (e)

[2] Section 10 (f) provides:

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in . . . by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. 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." 49 Stat. 455.

and the jurisdiction of the court has attached, no separate proceeding is needed on the part of the person thus brought into the court. The breadth of the jurisdiction conferred upon the court to set aside or modify in whole or in part the Board's order, or to permit new evidence to be taken, necessarily implies that the party proceeded against is entitled to raise all pertinent questions and to obtain any affirmative relief that is appropriate. Here, petitioner in the Board's proceeding had sought affirmative relief and had taken steps to establish that right. Considering the scope and purpose of the jurisdiction of the court in a proceeding under § 10 (e), and the position and rights of the person proceeded against, we are unable to conclude that the Board has an absolute right to withdraw its petition at its pleasure. We think that permission to withdraw must rest in the sound discretion of the court to be exercised in the light of the circumstances of the particular case.[3]

While in the instant case there are two proceedings, separately carried on the docket, they were essentially one so far as any question as to the legality of the Board's order was concerned. Petitioner's answer in the Board's proceeding presented substantially the same objections as those raised in petitioner's proceeding for review. The present contentions of the parties are largely addressed to procedural distinctions, but if we follow the course of the two proceedings we find that there is really but one ultimate question and that is with respect to the court's

[3] See *Cooper* v. *Lewis*, 2 Phillips, Ch. 177, 181; *Bank* v. *Rose*, 1 Rich Eq., 292, 294; *Stevens* v. *The Railroads*, 4 F. 97, 105; *Chicago & Alton R. Co.* v. *Union Rolling Mill Co.*, 109 U. S. 702, 713–715; *City of Detroit* v. *Detroit City Ry. Co.*, 55 F. 569, 572, 573; *Pullman's Palace Car Co.* v. *Central Transportation Co.*, 171 U. S. 138, 146; *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86, 93, 94; *United Motors Service* v. *Tropic-Aire*, 57 F. 2d 479, 481, 482; *Jones* v. *Securities & Exchange Comm'n*, 298 U. S. 1, 19, 20.

final action in remanding the cause to the Board for further proceedings.

Before the court on May 5th granted the Board's motion to withdraw its petition, the other proceeding had been instituted by the filing of the petition for review on May 4th. That proceeding was taken by petitioner as a person aggrieved by the order of December 22, 1937, and was doubtless prompted by the Board's motion to withdraw its own petition. As the transcript of the record of the administrative proceeding had already been certified and filed, it was within the court's control. The order of May 5th was amended on May 9th so as to preclude the withdrawal of the transcript, and on the same day the court ordered that the transcript be deemed to be filed in the petitioner's proceeding as of May 4th. We see no reason to doubt the power of the court to retain the transcript or to amend its order of May 5th accordingly, and certiorari has not been sought by the Board in relation to the order of May 9th. Our decision in *In re National Labor Relations Board,* 304 U. S. 486, is not apposite. There the transcript had not been filed, the court had not acquired jurisdiction of the subject matter, and the Board still had the authority conferred upon it by § 10 (d). In the circumstances of the present case we think it is clear that the court was possessed of exclusive jurisdiction of the administrative proceeding "and of the question determined therein," and thus of the power of "enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board." § 10 (f). As on the Board's petition the court could grant affirmative relief to the person against whom the Board's order was directed, so on the court's entertaining the petition of that person for review the Board could seek not merely to have the petition denied but to have its order enforced, regardless of any separate proceeding to that end.

It thus appears that neither the order of May 5th, granting the Board permission to withdraw its petition, nor the attempt of the Board on May 6th to reassume control of the administrative proceeding, nor the Board's withdrawal of its petition on June 2d, accomplished anything of substance, as the Board, in the presence of the court's continued and exclusive jurisdiction, remained without authority to deal with its order. And any question as to the propriety of the court's order of May 5th became one of merely academic interest after the court by its order of June 10th remanded the cause to the Board. We turn to the consideration of that order.

Second. The cause was remanded to the Board for the purpose "of setting aside its findings and order of December 22, 1937, and issuing proposed findings, and making its decision and order upon a reconsideration of the entire case." The Board in its application for the remand stated that it would take that course. The specified purpose qualified the court's order. It created a condition which the Board was bound to observe. If the Board within a reasonable time failed to set aside its findings and order, we have no doubt that the court could vacate its order of remand and proceed with its consideration of the petition to review. The propriety of the order of remand must be considered in that aspect.

Third. If the court itself had set aside the findings and order of the Board upon the ground, as asserted by petitioner, that the Board had not considered the evidence and made its own findings, but had adopted as its own a decision proposed by its subordinates without affording petitioner any opportunity to be heard thereon, the court could have remanded the cause for further proceedings in conformity with its opinion. That ground being sufficient for setting aside the order, there is no principle of procedure in relation to the review either of judicial decrees or administrative orders which would require the court to examine other grounds of attack.

It is familiar appellate practice to remand causes for further proceedings without deciding the merits, where justice demands that course in order that some defect in the record may be supplied.[4] Such a remand may be made to permit further evidence to be taken or additional findings to be made upon essential points.[5] So, when a District Court has not made findings in accordance with our controlling rule (Equity Rule 70½) it is our practice to set aside the decree and remand the cause for further proceedings.[6] The jurisdiction to review the orders of the Labor Relations Board is vested in a court with equity powers, and while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action. The purpose of the judicial review is consonant with that of the administrative proceeding itself,—to secure a just result with a minimum of technical requirements. The statute with respect to a judicial review of orders of the Labor Relations Board follows closely the statutory provisions in relation to the orders of the Federal Trade Commission, and as to the latter it is well established that the court may remand the cause to the Commission for further proceedings to the end that valid and essential findings may be made. *Federal Trade Comm'n* v. *Curtis Publishing Co.*, 260 U. S. 568, 580, 583; *International Shoe Co.* v. *Federal Trade Comm'n*, 280 U. S. 291, 297; *Federal Trade Comm'n* v. *Royal Milling Co.*, 288 U. S. 212, 218; *Procter*

[4] *Estho* v. *Lear*, 7 Pet. 130; *Levy* v. *Arredondo*, 12 Pet. 218; *Villa* v. *Van Schaick*, 299 U. S. 152, 155, 156.

[5] *Chicago, M. & St. P. Ry. Co.* v. *Tompkins*, 176 U. S. 167, 179, 180; *United States* v. *Rio Grande Irrigation Co.*, 184 U. S. 416, 424; *Lincoln Gas & Electric Light Co.* v. *Lincoln*, 223 U. S. 349, 361–365.

[6] *Railroad Commission* v. *Maxcy*, 281 U. S. 82; *Interstate Circuit, Inc.* v. *United States*, 304 U. S. 55.

& Gamble Co. v. *Federal Trade Comm'n,* 11 F. 2d 47, 48, 49; *Ohio Leather Co.* v. *Federal Trade Comm'n,* 45 F. 2d 39, 42.[7] Similar action has been taken under the National Labor Relations Act in *Agwilines, Inc.* v. *National Labor Relations Board,* 87 F. 2d 146, 155. See, also, *National Labor Relations Board* v. *Bell Oil & Gas Co.,* 91 F. 2d 509, 515. The "remand" does not encroach upon administrative functions. It means simply that the case is returned to the administrative body in order that it may take further action in accordance with the applicable law. See *Federal Radio Comm'n* v. *Nelson Brothers Co.,* 289 U. S. 266, 278.

Such a remand does not dismiss or terminate the administrative proceeding. If findings are lacking which may properly be made upon the evidence already received, the court does not require the evidence to be reheard. *Federal Trade Comm'n* v. *Curtis Publishing Co., supra; International Shoe Co.* v. *Federal Trade Comm'n, supra.* If further evidence is necessary and available to supply the basis for findings on material points, that evidence may be taken. *Federal Trade Comm'n* v. *Royal Milling Co., supra; Procter & Gamble Co.* v. *Federal Trade Comm'n, supra; Ohio Leather Co.* v. *Federal Trade Comm'n, supra; Agwilines, Inc.* v. *National Labor Relations Board, supra.* Whatever findings or order may subsequently be made will be subject to challenge if not adequately supported or the Board has failed to act in accordance with the statutory requirements.

Fourth. The present controversy thus comes to the narrow point that instead of setting aside the Board's findings and order, the court has allowed the Board itself

---

[7] Compare *Texas & Pacific Ry. Co.* v. *Interstate Commerce Comm'n,* 162 U. S. 197, 238, 239; *Southern Railway Co.* v. *St. Louis Hay & Grain Co.,* 214 U. S. 297, 302; *Florida* v. *United States,* 292 U. S. 1, 9; *Brotherhood of Railroad Trainmen* v. *National Mediation Board,* 66 App. D. C. 375; 88 F. 2d 757, 761.

to set them aside. The contention on that ground is without substance. In either event the findings and order are vacated. Petitioner's objection to the order because of lack of due hearing results in the abandonment of the findings and order and petitioner will thus be completely freed from any determination they contain or any obligation they impose.

Petitioner says that the Board has not confessed error. This is immaterial if the assailed findings and order are set aside. Nor is it important that the court has not held the findings and order to be void. It is elementary that the court is not bound to determine questions which have become academic.

There is nothing in the statute, or in the principles governing judicial review of administrative action, which precludes the court from giving an administrative body an opportunity to meet objections to its order by correcting irregularities in procedure, or supplying deficiencies in its record, or making additional findings where these are necessary, or supplying findings validly made in the place of those attacked as invalid. The application for remand in this instance was not on frivolous grounds or for any purpose that might be considered dilatory or vexatious. Petitioner had raised a serious question as to the validity of the findings and order. The Board properly recognized the gravity of the contention and sought to meet it by voluntarily doing what the court could have compelled. That was in the interest of a prompt disposition, and whatever delay has resulted is due to petitioner's resistance to that course.

Petitioner insists that it had other objections to the Board's conduct of the proceeding. But it was not necessary for the court to consider them, as the setting aside of the findings and order carried with it the opportunity for reconsideration and the making of a new record.

What findings or order would thus be made became a matter of conjecture and in any event these and the manner of arriving at them would be subject to any justified criticism.

As the substantial question is presented by the order of June 10th, the writ of certiorari in No. 182 is *dismissed.* The order of June 10th in No. 183 is affirmed.

Affirmed.

MR. JUSTICE ROBERTS did not hear the argument and took no part in the consideration and decision of this case.

PATTERSON *v.* STANOLIND OIL & GAS CO. ET AL.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA.

No. 113. Argued December 7, 1938.—Decided January 3, 1939.

1. The owner-lessor of the mineral rights in a tract of land on which was a producing oil well was not deprived of property rights in violation of the Fourteenth Amendment, nor were his contractual rights impaired, by an order of the Oklahoma Corporation Commission, made after due hearing and pursuant to c. 59, Oklahoma Session Laws, 1935, whereby part of his land, with the well, was included in the same 10-acre well-spacing and drilling unit with land of other owner-lessors, and whereby he was obliged, under § 4 (c) of the statute, to share with them in one-eighth of the production from the well, in proportion to their respective acreages in such unit—it being assumed, as found by the Commission, that there is a common source of supply, and that establishment of the units will tend to effect proper drainage of the oil pool, result in uniform withdrawal and greatest ultimate recovery of oil, conserve reservoir energy, and protect the relative rights of the leaseholders and royalty-owners in the common source of supply. P. 377.
2. Contention that regulatory provisions of c. 59, Okla. Sess. Laws, 1935, authorizing the State Corporation Commission to fix well-spacing and drilling units are void for indefiniteness—*held* without merit. P. 379.

APPEAL from 182 Okla. 155; 77 P. 2d 83, dismissed for want of a substantial federal question.

Mr. R. J. Roberts, with whom *Messrs. A. S. Norvell* and *W. M. Haulsee* were on the brief, for appellant.

Messrs. Guy H. Woodward, James A. Veasey, and *Ray S. Fellows* were on a brief for appellees.

By leave of Court, *Mr. Earl Foster* filed a brief as *amicus curiae,* on behalf of the Oklahoma Corporation Commission, in support of appellees.

PER CURIAM.

In this suit, brought to recover his share of oil royalties, the plaintiff challenged the validity, under the contract clause and the due process and equal protection clauses of the Fourteenth Amendment of the Federal Constitution, of the Well-Spacing Act of the State of Oklahoma (Chap. 59, Okla. Sess. Laws 1935) and an order made thereunder by the Corporation Commission of that State. The Supreme Court of the State, affirming the judgment of the District Court with a modification immaterial here, sustained the validity of the statute and order. 182 Okla. 155; 77 P. 2d 83. The plaintiff brings this appeal.

The Corporation Commission fixed the boundaries of the common source of oil supply in the North Wellston area in Lincoln County, Oklahoma, so as to include 520 acres, and authorized ten-acre well-spacing units within that area. The well in question is in the approximate center of one of these ten-acre units. That unit consists of 6¼ acres which lie in tract "A" and 3¾ acres in tract "B," these tracts being in separate ownership. The well is located on tract "A." The statute, § 4 (c), provides:

"In the event a producing well, or wells, is completed upon a unit where there are two or more separately owned

tracts, any royalty owner, or group of royalty owners, holding the royalty interest under a separately owned tract, shall share in one-eighth (1/8) of all the production from the well or wells drilled within the unit in the proportion that the acreage of their separately owned tract bears to the entire acreage of the unit."

Under that provision, as construed by the state court, the owners of the mineral rights in the 3¾ acres of the drilling unit are permitted to share with the plaintiff, and his co-owners of the mineral rights in the other 6¼ acres of the unit, the oil and gas produced from the well although it is located entirely upon the surface of the 6¼ acre tract. Plaintiff contends that this distribution among the owners of the 3¾ acres works an unconstitutional deprivation of his property and an impairment of his contractual rights. The Corporation Commission found as follows:

"That the said well as above described is located in the approximate center of a 10-acre tract of land, and that taking into consideration the depth of the well now producing in said common source of supply, the thickness, porosity, and permeability of the producing sand, the nature and character of the reservoir energy, the formations encountered in the drilling of the well, and the history and productive characteristics of wells in other common sources of supply which have similar formations, and from other geological and scientific information and data as shown by the records, the Commission finds that a well-spacing and drilling unit of 10 acres and of uniform size should be established in the said North Wellston pool; that the same would tend to effect the proper drainage of oil from said pool, and would result in uniform withdrawal and in the greatest ultimate recovery of oil, and would best conserve reservoir energy, and would protect the relative rights of the leaseholders and royalty owners in said common source of supply."

It is admitted that the Commission made its findings and order after due hearing. The evidence underlying its findings is not in the record. Accordingly, as the state court said, it must be assumed "that the source of supply of the well in question is common to the land adjoining it and that said pool underlies not only the 6¼ acres of land on which the well is located but that it also extends beneath the 3¾ acre tract." In that view the state court applied well settled principles in denying plaintiff's contention under the Fourteenth Amendment (*Ohio Oil Co.* v. *Indiana,* 177 U. S. 190; *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61; *Walls* v. *Midland Carbon Co.,* 254 U. S. 300; *Bandini Petroleum Co.* v. *Superior Court,* 284 U. S. 8; *Champlin Refining Co.* v. *Corporation Commission,* 286 U. S. 210) and under the contract clause (*Rast* v. *Van Deman & Lewis Co.,* 240 U. S. 342, 362, 363; *Union Dry Goods Co.* v. *Georgia Public Service Corp.,* 248 U. S. 372, 376; *Sproles* v. *Binford,* 286 U. S. 374, 390, 391; *Stephenson* v. *Binford,* 287 U. S. 251, 276; *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 435, 436). The argument, that the regulatory provisions of the statute authorizing the Commission to make its order fixing the drilling unit are void for indefiniteness, is without merit. *Bandini* v. *Superior Court, supra; Champlin Refining Co.* v. *Corporation Commission, supra.*

In the light of our previous decisions, the plaintiff has failed to raise a substantial federal question and the appeal is dismissed for the want of jurisdiction. *Hannis Distilling Co.* v. *Baltimore,* 216 U. S. 285, 288; *Levering & Garrigues Co.* v. *Morrin,* 289 U. S. 103, 105, 106.

Dismissed.

J. BACON & SONS *v.* MARTIN.

APPEAL FROM THE COURT OF APPEALS OF KENTUCKY.

No. 203. Argued December 15, 1938.—Decided January 3, 1939.

The tax imposed by Kentucky on the "receipt" of cosmetics in the State by any Kentucky retailer is not a direct burden on interstate commerce as applied to articles purchased in other States and transported to the retailer at his place of business in Kentucky, since, as construed by the State's highest court, the imposition is not upon the act of receiving but upon subsequent sale and use.

APPEAL from 273 Ky. 389; 116 S. W. 2d 963, dismissed for want of a substantial federal question.

Mr. Charles I. Dawson for appellant.

Messrs. Hubert Meredith, Attorney General of Kentucky, and *M. B. Holifield,* Assistant Attorney General, were on a brief for appellee.

PER CURIAM.

Plaintiff sought judgment declaring invalid a statute imposing a tax on "the receipt of cosmetics in the State by any Kentucky retailer," [1] as applied to articles purchased from manufacturers and dealers in other States and transported to plaintiff at its place of business in Kentucky. Plaintiff contended that the tax was on "the act of receiving" and hence was a direct burden upon interstate commerce. The Court of Appeals of Kentucky thus construed the statute:

"The word 'receipt' is not used in a limited sense, but in the sense that it has already been received by the retailer and is now in his use. . . . That word 'receipt' pre-

[1] Subsection (f) of § 2 of Chapter 3 of the 1936 Special Budget and Special Revenue Session of the Legislature of Kentucky. Carroll's Kentucky Statutes, Baldwin's 1936 Revision, §§ 4281d–1 to 4281d–25.

supposes that the cosmetics were now in use and after the sale had been consummated.

" . . . It, therefore, follows that the imposition of the tax against the retailer is not on the act of receiving the cosmetics, but on the sale and use thereof, after the retailer has received them, that constitutes the excise tax. When we apply the intended and correct meaning of the word 'receipt' as used in the act, it is conclusive to our minds that the tax of the retailer, referred to, is paid when the articles are in his possession and when the merchant has unlimited control and dominion over the cosmetics." *Martin* v. *J. Bacon & Sons*, 268 Ky. 612, 618, 619; 105 S. W. 2d 569, 572.

Adhering to that construction, the state court affirmed the present judgment sustaining the tax. 273 Ky. 389; 116 S. W. 2d 963. The plaintiff appeals.

The construction of the statute by the state court is binding upon us. *Supreme Lodge, Knights of Pythias* v. *Meyer*, 265 U. S. 30, 32, 33; *Hicklin* v. *Coney*, 290 U. S. 169, 172; *Hartford Accident & Indemnity Co.* v. *Nelson Manufacturing Co.*, 291 U. S. 352, 358. And in the light of its construction the state court applied the principles declared in our decisions. *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86, 93; *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472, 478, 479; *Nashville, C. & St. L. Ry. Co.* v. *Wallace*, 288 U. S. 249, 265, 266; *Edelman* v. *Boeing Air Transport, Inc.*, 289 U. S. 249, 252.

The appeal is dismissed for the want of a substantial federal question.

Dismissed.

MINNESOTA *v.* UNITED STATES.

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

No. 73. Argued November 10, 1938.—Decided January 3, 1939.

1. The United States is an indispensable party defendant in a condemnation proceeding brought by a State to acquire a right of way over lands which the United States owns in fee and holds in trust for Indian allottees. P. 386.
2. The exemption of the United States from being sued without its consent extends to a suit by a State. Such a suit can not be maintained unless authorized by Act of Congress. P. 387.
3. The provision of § 3 of the Act of March 3, 1901 that, where Indian allotted lands are condemned under state laws for a public purpose, "the money awarded as damages shall be paid to the allottee," does not require the conclusion that the United States is not an indispensable party to the condemnation proceedings: in view of the restraints on alienation imposed by other Acts of Congress; the interest of the United States as trustee in the outcome of the proceeding (the amount to be paid); and the authority of the Secretary of the Interior in respect of reinvesting the proceeds. P. 387.
4. Where jurisdiction has not been conferred by Congress, no officer of the United States has power to give any court jurisdiction of a suit against the United States. The facts that the United States Attorney petitioned for removal of a suit from the state to the federal court, and stipulated with counsel for plaintiff that the suit could be so removed, are without legal significance in this regard. P. 388.
5. A federal court is without jurisdiction of a suit removed to it from a state court which itself lacked jurisdiction of the subject matter or the parties; even though the federal court might have had jurisdiction had the suit been brought there originally. P. 389.
6. The provision of the second paragraph of § 3 of the Act of March 3, 1901, authorizing "condemnation of" lands allotted in severalty to Indians "in the same manner as land owned in fee," *construed* as not authorizing suit in a state court. P. 389.

   The contention that a long established administrative practice makes for a contrary interpretation is unsupported.

95 F. 2d 468, affirmed.

CERTIORARI, *post,* p. 580, to review a judgment which reversed, with directions to dismiss, a judgment granting the petition of the State for condemnation of a right of way over Indian allotted lands. The suit was brought originally in the state court but was removed to the federal court.

Mr. Ordner T. Bundlie, Assistant Attorney General of Minnesota, with whom *Mr. William S. Ervin,* Attorney General, was on the brief, for petitioner. *Mr. Bert McMullen* entered an appearance for petitioner.

Mr. Mac Asbill, with whom *Solicitor General Jackson, Assistant Attorney General McFarland,* and *Mr. Oscar Provost* were on the brief, for the United States.

By leave of Court, *Mr. John H. Hougen* filed a brief, as *amicus curiae,* on behalf of the Minnesota Chippewa Tribe of Indians et al., in support of petitioner.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Minnesota brought in a court of the State this proceeding to take by condemnation pursuant to its laws a right of way for a highway over nine allotted parcels of land which form parts of the Grand Portage Indian Reservation, granted for the Band of Chippewa Indians of Lake Superior by Treaty of September 30, 1854 (10 Stat. 1109) and the Act of Congress, January 14, 1889, c. 24, 25 Stat. 642. The parcels had been allotted in severalty to individual Indians by trust patents. The highway was located pursuant to requirements of the Constitution of the State. It was not shown that authority had been obtained from the Secretary of the Interior for the construction of the highway over the Indian lands. The petition named as persons interested the owners under

the Indian allotments, the Superintendent of the Consolidated Chippewa Agency, and the United States, as holder of the fee in trust.

The United States was named as a party defendant. The United States Attorney, appearing specially for the United States and generally for the other respondents, filed a petition for the removal of the cause to the federal court. He and counsel for the State stipulated that the cause "may be [so] removed." The state court ordered removal. In the federal court, the United States, appearing specially, moved to dismiss the action on the ground that it had not consented to be sued and that the state court had no jurisdiction of the action or over the United States. The motion to dismiss was denied on the ground that the United States is not a necessary party, since "consent . . . to bring these proceedings against the Indian allottees has been expressly granted and given by the United States to the State of Minnesota, pursuant to 25 United States Code Annotated, Section 357" (Act of March 3, 1901, c. 832, § 3, 31 Stat. 1058, 1083–84), the second paragraph of which provides:

"That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee."

The petition for condemnation was granted.

Upon appeal by the United States, the Circuit Court of Appeals held that the State was without power to condemn the Indian lands unless specifically authorized so to do by the Secretary of the Interior, as provided in § 4 of the Act of 1901, which provides:

"That the Secretary of the Interior is hereby authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper

State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated . . . through any lands which have been allotted in severalty to any individual Indians . . . but which have not been conveyed to the allottees with full power of alienation."

It held, further, that as such authorization had not been shown, the United States had not consented to the maintenance of the condemnation suit against it; that the court was without jurisdiction to proceed; and that the fact that removal from the state court to the federal court had been obtained by the United States Attorney by stipulation had not effected a general appearance. The Circuit Court of Appeals, therefore, reversed the judgment of the District Court with directions to dismiss. 95 F. 2d 468. Certiorari was granted because of alleged conflict with the established administrative practice under the applicable statutes and the importance of the question presented.

The State contends that it had power, and its courts jurisdiction, to condemn the allotted lands without making the United States a party to the proceedings: (1) because authorized so to do by the second paragraph of § 3 of the Act of March 3, 1901, quoted above; (2) because authorized so to do by the Treaty of September 30, 1854, 10 Stat. 1109, 1110, approved by Congress January 14, 1889, which provided in Article 3—

"All necessary roads, highways, and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases."

(3) because the State, in its sovereign capacity and in the exercise of its governmental functions in the location and construction of a constitutional state truck highway

required to be so located and constructed by its constitution and laws, may, without express congressional authority therefor, exercise its inherent power of eminent domain for such purpose over lands so allotted in severalty to individual Indians.

The Minnesota Chippewa Tribe and the Grand Portage-Grand Marais Band thereof filed by the tribal attorney a brief praying that the judgment of the Circuit Court of Appeals be reversed and that of the District Court affirmed.

First. The United States is an indispensable party defendant to the condemnation proceedings. A proceeding against property in which the United States has an interest is a suit against the United States. *The Siren,* 7 Wall. 152, 154; *Carr* v. *United States,* 98 U. S. 433, 437; *Stanley* v. *Schwalby,* 162 U. S. 255. Compare *Utah Power & Light Co.* v. *United States,* 243 U. S. 389. It is confessedly the owner of the fee of the Indian allotted lands and holds the same in trust for the allottees. As the United States owns the fee of these parcels, the right of way cannot be condemned without making it a party.[1]

[1] The fee of the United States is not a dry legal title divorced from substantial powers and responsibilities with relation to the land. *United States* v. *Rickert,* 188 U. S. 432; compare *Tiger* v. *Western Investment Co.,* 221 U. S. 286; *Brader* v. *James,* 246 U. S. 88. In the case of patents in fee with restraints on alienation it is established that an alienation of the Indian's interest in the lands by judicial decision in a suit to which the United States is not a party has no binding effect but that the United States may sue to cancel the judgment and set aside the conveyance made pursuant thereto. *Bowling & Miami Investment Co.* v. *United States,* 233 U. S. 528; *Privett* v. *United States,* 256 U. S. 201; *Sunderland* v. *United States,* 266 U. S. 226. In the stronger case of a trust allotment, it would seem clear that no effective relief can be given in a proceeding to which the United States is not a party and that the United States is therefore an indispensable party to any suit to establish or acquire an interest in the lands. Compare *McKay* v. *Kalyton,* 204 U. S. 458.

The exemption of the United States from being sued without its consent extends to a suit by a State. Compare *Kansas* v. *United States,* 204 U. S. 331, 342; *Arizona* v. *California,* 298 U. S. 558, 568, 571, 572. Compare *Minnesota* v. *Hitchcock,* 185 U. S. 373, 382–387; *Oregon* v. *Hitchcock,* 202 U. S. 60. Hence Minnesota cannot maintain this suit against the United States unless authorized by some act of Congress.

Minnesota contends that the United States is not an indispensable party. It argues that since the second paragraph of § 3 of the Act of March 3, 1901, provides that "the money awarded as damages shall be paid to the allottee," the United States has no interest in the land or its proceeds after the condemnation is begun.[2] Under § 5 of the General Allotment Act, Act of February 8, 1887, c. 119, 24 Stat. 388, 389, U. S. C. Title 25, § 348, the Indians' interest in these allotted lands was subject to restraints on alienation;[3] and by § 2 of the Indian Reorganization Act, Act of June 18, 1934, c. 576, 48 Stat. 984, U. S. C. Title 25, § 462, restraints on alienation were extended. The clause quoted may not be interpreted as freeing the allottee's land from the restraint imposed by

[2] The extent of the restraints on alienation contained in § 5 of the General Allotment Act was clarified and modified to some extent by subsequent legislation. E. g., Act of May 27, 1902, c. 888, § 7, 32 Stat. 245, 275; Act of May 8, 1906, c. 2348, 34 Stat. 182; Act of March 1, 1907, c. 2285, 34 Stat. 1015, 1018; Act of May 29, 1908, c. 216, 35 Stat. 444; Act of June 25, 1910, c. 431, §§ 1–5, 36 Stat. 855–56; Act of May 18, 1916, c. 125, 39 Stat. 123, 127; U. S. C. Title 25, §§ 349, 372, 373, 378, 379, 394, 403, 404, 405, 408. Under § 4 of the Indian Reorganization Act, applicable to all Indian Reservations unless a majority of the adult Indians vote against its application, the transferability of restricted Indian lands is greatly limited. Act of June 18, 1934, c. 576, 48 Stat. 984, U. S. C. Title 25, § 464.

[3] Compare the Act of March 1, 1907, c. 2285, 34 Stat. 1018, U. S. C. Title 25, § 405; Act of June 25, 1910, c. 431, §§ 4, 8, 36 Stat. 856–857; U. S. C. Title 25, §§ 403, 406.

other acts of Congress. As the parcels here in question were restricted lands, the interest of the United States continues throughout the condemnation proceedings. In its capacity as trustee for the Indians it is necessarily interested in the outcome of the suit—in the amount to be paid. That it is interested, also, in what shall be done with the proceeds is illustrated by the Act of June 30, 1932, c. 333, 47 Stat. 474, U. S. C. Title 25, § 409a, under which the Secretary of the Interior may determine that the proceeds of the condemnation of restricted Indian lands shall be reinvested in other lands subject to the same restrictions.[4]

Second. Minnesota contends that Congress has authorized suit against the United States. It is true that authorization to condemn confers by implication permission to sue the United States. But Congress has provided generally for suits against the United States in the federal courts. And it rests with Congress to determine not only whether the United States may be sued, but in what courts the suit may be brought. This suit was begun in a state court. The fact that the removal was effected on petition of the United States and the stipulation of its attorney in relation thereto are facts without legal significance. Where jurisdiction has not been con-

[4] "Whenever any nontaxable land of a restricted Indian of the Five Civilized Tribes or of any other Indian tribe is sold to any State, county, or municipality for public-improvement purposes, or is acquired, under existing law, by any State, county, or municipality by condemnation or other proceedings for such public purposes, or is sold under existing law to any other person or corporation for other purposes, the money received for said land may, in the discretion and with the approval of the Secretary of the Interior, be reinvested in other lands selected by said Indian, and such land so selected and purchased shall be restricted as to alienation, lease or incumbrance, and nontaxable in the same quantity and upon the same terms and conditions as the nontaxable lands from which the reinvested funds were derived, and such restrictions shall appear in the conveyance." See also note 7, *infra*.

ferred by Congress, no officer of the United States has power to give to any court jurisdiction of a suit against the United States. Compare *Case* v. *Terrell,* 11 Wall. 199, 202; *Carr* v. *United States,* 98 U. S. 433, 435–39; *Finn* v. *United States,* 123 U. S. 227, 232–33; *Stanley* v. *Schwalby,* 162 U. S. 255, 270; *United States* v. *Garbutt Oil Co.,* 302 U. S. 528, 533–35. If Congress did not grant permission to bring this condemnation proceeding in a state court, the federal court was without jurisdiction upon its removal. For jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction. Where the state court lacks jurisdiction of the subject matter or of the parties, the federal court acquires none, although in a like suit originally brought in a federal court it would have had jurisdiction. *Lambert Run Coal Co.* v. *Baltimore & Ohio R. Co.,* 258 U. S. 377, 383; *General Investment Co.* v. *Lake Shore & M. S. Ry. Co.,* 260 U. S. 261, 288.

Third. Minnesota contends that Congress authorized suit in a court of the state by providing in the second paragraph of § 3 of the Act of March 3, 1901, quoted above, for "condemnation of" lands allotted in severalty to Indians "in the same manner as land owned in fee." But the paragraph contains no permission to sue in the court of a state. It merely authorizes condemnation for "any public purpose under the laws of the State or Territory where located." There are persuasive reasons why that statute should not be construed as authorizing suit in a state court. It relates to Indian lands under trust allotments—a subject within the exclusive control of the federal government. The judicial determination of controversies concerning such lands has been commonly committed exclusively to federal courts.[5]

[5] Compare *McKay* v. *Kalyton,* 204 U. S. 458; 28 Stat. 305; 31 Stat. 760; U. S. C. Title 25, § 345. The United States argues that a statute granting permission to sue the United States must be construed to apply only to the federal courts unless there is an explicit

Minnesota asserted in support of its interpretation of the paragraph that by long established administrative practice such condemnation proceedings are brought in the state court and without making the United States a party.[6] The assertion was denied by the Government. As the brief of neither counsel furnished adequate data as to the administrative practice, they were requested at the oral argument to furnish the data thereafter. From the report then submitted by the Solicitor General it appears that throughout a long period the Secretary of the Interior has insisted in Minnesota and in other States, that condemnation suits must be brought in a federal court and that the United States must be made a party defendant.[7]

---

reference to the state tribunals, citing *Stanley* v. *Schwalby*, 162 U. S. 255, 270; *United States* v. *Inaba*, 291 F. 416, 418; *United States* v. *Deasy*, 24 F. 2d 108, 110. This is not universally true even as to suits against the United States itself. *United States* v. *Jones*, 109 U. S. 513. And in many instances the state courts have been held to have jurisdiction of suits against the instrumentalities and officers of the United States which directly affect its property interests without such specific statutory authorization. *Missouri Pacific R. Co.* v. *Ault*, 256 U. S. 554; *Sloan Shipyards* v. *United States Shipping Board*, 258 U. S. 549, 568–69; *Olson* v. *United States Spruce Production Corp.*, 267 U. S. 462; *Federal Land Bank* v. *Priddy*, 295 U. S. 229, 235–37. Compare *Davis* v. *L. N. Dantzler Lumber Co.*, 261 U. S. 280.

[6] In 35 Land Decisions 648 the Acting Secretary of the Interior handed down on June 29, 1907, an opinion which recognized, without any discussion, the validity of a condemnation proceeding brought under the second paragraph of the Act of March 3, 1901, in a state court, it not appearing that the United States was joined as a party.

[7] See also Regulation 69½ of the Regulations of the Department of the Interior, "Concerning Rights of Way over Indian Lands," adopted in the general revision of April 7, 1938, which provides: "As the holder of the legal title to allotted Indian lands held in trust, the United States must be made a party to all such condemnation suits and the action must be brought in the appropriate federal district court, the procedure, however, to follow the provisions of the State law on the subject, so far as applicable."

As the lower court had no jurisdiction of this suit, we have no occasion to consider whether, as a matter of substantive law, the lack of assent by the Secretary of the Interior precluded maintenance of the condemnation proceeding.

Affirmed.

INDIANAPOLIS BREWING CO. *v.* LIQUOR CONTROL COMMISSION ET AL.

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

No. 130. Argued December 7, 1938.—Decided January 3, 1939.

1. Since the Twenty-First Amendment, the right of a State to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause. P. 394.
2. Regulation discriminatory between domestic and imported intoxicating liquors, or between imported intoxicating liquors, is not prohibited by the equal protection clause of the Fourteenth Amendment. P. 394.
3. A statute of Michigan prohibits dealers in beer in that State from selling any beer manufactured in a State which by its laws discriminates, in manner described, against beer manufactured in Michigan. Pursuant to the statute, the state Liquor Control Commission designated specifically other States, ten in number, including Indiana, which discriminated against Michigan beer; whereupon Michigan licensees were prohibited from purchasing, receiving, possessing, or selling any beer manufactured in those States. *Held*, as applied to an Indiana manufacturer of beer, who sought to restrain the enforcement of the Michigan statute, it was not void as violating the commerce, due process, or equal protection clauses of the Federal Constitution. Pp. 392, 394.

   It is unnecessary to consider whether the statute is retaliatory or protective in character; it is valid in either aspect.
4. The power of the State to forbid the sale of intoxicating liquor is undoubted. P. 394.

21 F. Supp. 969, affirmed.

APPEAL from a decree of a District Court of three judges, denying a temporary injunction and dismissing the bill, in a suit to enjoin the enforcement of a state liquor law, alleged to be "retaliatory" and unconstitutional.

Messrs. Thomas F. O'Mara and *Herbert J. Patrick* for appellant.

Mr. Raymond W. Starr, Attorney General of Michigan, with whom *Mr. George H. Heideman,* Assistant Attorney General, was on the brief, for appellees.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Indianapolis Brewing Company, Inc., an Indiana corporation, manufactures beer in that State. Under appropriate licenses it has for some years sold and shipped to dealers in Michigan its product in interstate commerce. In July, 1937, the Michigan Liquor Control Act was amended so as to prohibit Michigan dealers in beer from selling any beer manufactured in a state which by its laws discriminates against Michigan beer. By § 40 of the amended Act, the Michigan Commission is directed to declare what states discriminate as that term is defined by the Act.[1] It named ten states.[2] Among these is In-

[1] Amended § 40 of Michigan Act No. 281. Public Acts of 1937, p. 509, provides: ". . . The commission shall forthwith adopt a regulation designating the states, the laws, or the rules or regulations of which are found to require a licensed wholesaler of beer therein to pay an additional fee for the right to purchase, import, or sell beer manufactured in this state; or which deny the issuance of a license authorizing the importation of beer to any duly licensed wholesaler of beer therein who may make application for such license; . . . the regulation adopted shall prohibit all licensees from purchasing, receiving, possessing, or selling any beer manufactured in any state therein designated, said regulation to become effective ninety days after its adoption. Any licensee or person adversely affected shall be entitled to review by certiorari to the proper court the question as to whether the commission has acted illegally or in excess of authority in making its finding with respect to any state."

[2] The regulation of the Liquor Control Commission issued December 14, 1937, is as follows: "Pursuant to Act No. 8, Public Acts, Extra Session of the year 1933 of the State of Michigan, as amended by Act No. 241 of the Public Acts for the year 1935, and Act No.

diana, which by its Liquor Control Act of 1935, as amended in 1937, prohibits licensed Indiana wholesalers from importing any beer which is not their absolute property; and requires that in order to secure the privilege of importing beer from other states each must obtain a "port of entry" permit, of which no fewer than ten and no more than one hundred are to be granted, pay a license fee of $1500 and give a bond of $10,000, in addition to the license fee and bond required of those who sell only Indiana beer.[3]

The Indianapolis Company, suing on behalf of itself and others similarly situated, brought, in the federal court for eastern Michigan, this suit to enjoin the enforcement of that provision of the Michigan law on the ground that it violates the Federal Constitution. The members of the Michigan Liquor Control Commission and other officers of the State were made defendants. As a temporary, as well as a permanent, injunction was sought, a three-judge court was convened to hear the application for a temporary injunction. Defendants moved to dismiss the bill. It was conceded that if the law was unconstitutional the plaintiff was entitled to equitable relief. No question except that of the constitutionality of the law was presented. The court held the law valid; denied the temporary injunction; and dismissed the bill. 21 F. Supp. 969.

---

281 of the Public Acts for the year 1937, particularly Section 40 thereof, the Michigan Liquor Control Commission promulgates the following rule and regulation designating as discriminatory according to Section 40 of said Act the following States: Maine, Maryland, Nevada, Indiana, New Hampshire, North Carolina, Pennsylvania, Tennessee, Vermont, Washington. These designations are made after a careful examination of the laws and rules and regulations of the aforementioned states."

[3] Indiana Alcoholic Beverage Act of 1935, c. 226, amended by Act of 1937, c. 197, §§ 9, 40 (a), 41, Burns Revised Statutes 1933, Supp., §§ 12–508, 12–801, 12–901.

The plaintiff contends that although the Twenty-first Amendment declares:

"The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited"

the Michigan law should be held void as violating the commerce clause and the due process and equal protection clauses of the Fourteenth Amendment. It characterizes the law as "retaliatory"; argues, among other things, that the Amendment may not be interpreted as permitting retaliation; and insists that such interpretation would defeat its purpose, as thereby Michigan would be allowed to punish Indiana for doing what, under the rule applied in *State Board of Equalization* v. *Young's Market Co.*, 299 U. S. 59, 63, is permitted. Whether the Michigan law should not more properly be described as a protective measure, we have no occasion to consider. For whatever its character, the law is valid. Since the Twenty-first Amendment, as held in the *Young* case, the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause; and, as held by that case and *Mahoney* v. *Joseph Triner Corp.*, 304 U. S. 401, discrimination between domestic and imported intoxicating liquors, or between imported intoxicating liquors, is not prohibited by the equal protection clause. The further claim that the law violates the due process clause is also unfounded. The substantive power of the State to prevent the sale of intoxicating liquor is undoubted. *Mugler* v. *Kansas,* 123 U. S. 623.

Affirmed.

JOSEPH S. FINCH & CO. ET AL. *v.* McKITTRICK, ATTORNEY GENERAL, ET AL.*

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

No. 252. Argued December 7, 1938.—Decided January 3, 1939.

A statute of Missouri makes it unlawful to import into that State, or to purchase, receive, sell, or possess therein, any alcoholic liquor manufactured in any State the laws of which discriminate against importation of alcoholic liquor manufactured in Missouri. *Held* not violative of the commerce clause of the Federal Constitution. Following *Indianapolis Brewing Co.* v. *Liquor Control Comm'n, ante,* p. 391. P. 397.

23 F. Supp. 244, affirmed.

APPEALS from decrees of a District Court of three judges denying temporary and permanent injunctions and dismissing the bills in several suits, consolidated for hearing and review, to enjoin the enforcement of a state liquor law.

Mr. Thomas Kiernan, with whom *Messrs. Joseph M. Hartfield, Noel T. Dowling, James P. Aylward,* and *Terence M. O'Brien* were on the brief, for appellants.

Mr. Edward H. Miller, Assistant Attorney General of Missouri, with whom *Mr. Roy McKittrick,* Attorney General, was on the brief, for appellees.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The State of Missouri approved April 8, 1937,[1] an Act, sometimes called the Missouri Anti-Discrimination Act,

*Together with No. 253, *Ben Burk, Inc.* v. *McKittrick et al.;* No. 254, *Joseph E. Seagram & Sons, Inc. et al.* v. *McKittrick et al.;* No. 255, *Hinrichs Distilled Products* v. *McKittrick et al.;* and No. 256, *Arrow Distilleries, Inc.* v. *McKittrick et al.,* all on appeals from the District Court of the United States for the Western District of Missouri.

[1] Laws of Missouri 1937, pp. 536–543.

sometimes the Missouri Retaliation Act. It provides in § 4:

"The transportation or importation into this state, or the purchase, sale, receipt or possession herein, by any licensee, of any alcoholic liquor manufactured in a 'state in which discrimination exists' is hereby prohibited, and it shall be unlawful for any licensee to transport or import into this state, or to purchase, receive, possess or sell in this state, any alcoholic liquor manufactured in any 'state in which discrimination exists' as herein defined."

The statute defines what exactions, prohibitions and restrictions imposed by laws of the several states shall be deemed "discriminations" imposed upon the importation into the several states of alcoholic liquor manufactured in Missouri; requires the Attorney General to determine whether there exists therein any such discrimination; and, if he find any such discriminatory law, to specify the same in a certificate to be filed with the Supervisor of Liquor Control. The Supervisor is directed to publish notice of the certificates and to advise all licensees that it will be unlawful to import into Missouri or to purchase, receive, sell or possess in Missouri any liquor manufactured in a discriminating state. Pursuant to these provisions, the Attorney General filed, in October, 1937, certificates with the Supervisor declaring that the States of Indiana, Pennsylvania, Michigan and Massachusetts are "states in which discriminations existed" as defined by the Missouri statute.

To enjoin enforcement of this provision of the Missouri statute, these five suits were brought, in the federal court for the western district of the state, against the Attorney General and the Supervisor of Liquor Control. Each bill charges that the provision violates the commerce clause of the Federal Constitution and the equal protection

clause of the Fourteenth Amendment.[2] In four of the cases the bill alleges that the plaintiff is a citizen of a state other than Missouri; that it manufactures liquor in one of the states certified as "discriminating"; that it holds a non-resident Missouri permit under which it imports and sells in Missouri a part of its products; and that it would be irreparably injured if the provision of the Missouri statutes were enforced. The fifth case differs only in that the bill alleges that the plaintiff is a citizen of Missouri engaged there in the rectifying and bottling business for which it imports liquor manufactured in a state certified as "discriminating." As both a temporary and a permanent injunction was sought in each case, each was assigned for hearing before a three-judge court. In each the defendants moved to dismiss the bill. Later, the cases were consolidated for hearing and review; and it was agreed that when the court heard the application for the temporary injunction it should finally determine the causes. The District Court denied the applications for a temporary and a permanent injunction and dismissed the bill in each case. 23 F. Supp. 244. But the temporary restraining orders issued upon the filing of the bills were continued until the final determination of the appeals to this Court.

The claim of unconstitutionality is rested, in this Court, substantially on the contention that the statute violates the commerce clause.[3] It is urged that the Missouri law does not relate to protection of the health, safety and morality, or the promotion of their social wel-

[2] The bill also alleged that the provision violated the due process clause of the Fourteenth Amendment, the contract clause and the privileges and immunities clause.

[3] The arguments in appellant's brief are confined to the commerce clause. The statement of points to be relied upon includes all the contentions of the bill.

fare, but is merely an economic weapon of retaliation; and that, hence, the Twenty-first Amendment should not be interpreted as granting power to enact it. Since that amendment, the right of a State to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause. As was said in *State Board of Equalization* v. *Young's Market Co.*, 299 U. S. 59, 62, "The words used are apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes." To limit the power of the states as urged "would involve not a construction of the Amendment, but a rewriting of it." See also *Mahoney* v. *Joseph Triner Corp.*, 304 U. S. 401; *Indianapolis Brewing Co.* v. *Liquor Control Comm'n, ante*, p. 391.

Affirmed.

UNITED STATES *v.* CONTINENTAL NATIONAL BANK & TRUST CO., TRUSTEE, ET AL.

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

No. 22. Argued December 5, 1938.—Decided January 3, 1939.

1. Under the Revenue Act of 1926, suit upon a deficiency assessment must be begun within six years after the assessment. § 278 (d). P. 403.
2. Under the Revenue Act of 1926, the time for bringing suit, in the absence of assessment, to enforce liability of a transferee of the taxpayer's property is limited to six years, made up of five years after return, allowed for assessment against taxpayer, § 277 (a), and one year thereafter for assessment against transferee. § 280 (b) (1). *Id.*
3. A suit against transferees of a transferee of property of a delinquent taxpayer, which is otherwise barred, can not be sustained as timely under §§ 280 and 278 (d) of the Revenue Act of 1926, because brought within six years of the making of an assessment against the first transferee. P. 404.

4. In determining whether an assessment against a taxpayer's transferee was in time under the Revenue Act of 1926, which allows six years after the taxpayer's return, §§ 277 (a), 280 (d), but provides that the running of the limitation shall be suspended while the Commissioner is prohibited from making assessment and for 60 days thereafter, § 280 (d), it is *held* that, the transferee having died while his petition for review was pending undecided before the Board of Tax Appeals, and no application for a substitution having been made, it was error to include in the period of suspension 23 months that elapsed between the death and the date of an attempted assessment, since the Commissioner was not precluded during those months, but could have obtained a dismissal of the Board's proceeding within a reasonable time and made his assessment. P. 405.

94 F. 2d 81, affirmed.

CERTIORARI, 304 U. S. 554, to review the affirmance of a decree dismissing the amended bill in a suit by the Government against beneficiaries and trustees under a will, to impress a trust upon the assets of the estate, for the collection of an income and profits tax, to the extent of assets transferred to the testator by a corporation against which the tax was originally assessed.

Mr. J. Louis Monarch, with whom *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key, F. E. Youngman,* and *Warner W. Gardner* were on the brief, for the United States.

Mr. Herbert Pope for respondents.

MR. JUSTICE BUTLER delivered the opinion of the Court.

May 6, 1932, petitioner sued respondents in the federal court for the northern district of Illinois to enforce a claim for part of income and profits taxes for 1920 assessed against an Illinois corporation dissolved in December, 1921. The question for decision is whether the suit is barred by lapse of time.

The pertinent substance of the complaint, as amended February 14, 1937, follows:

In 1919 and 1920, James Duggan, hereafter called the testator, was the principal stockholder of the Johnson City & Big Muddy Coal & Mining Company, which owned a subsidiary corporation. May 16, 1921, these corporations made consolidated income and profits tax returns for 1920, showing a tax of $5,269.21, which was paid. During 1920 and 1921 the mining company was being dissolved; it converted its assets into cash and securities and transferred $295,331.64 to testator; he appropriated it to his own use. Having determined deficiency of $316,620.61 against the company, the commissioner of internal revenue December 6, 1924 sent notice to it by 60-day letter. The taxpayer having failed to petition the board of tax appeals for redetermination, assessment was made against it for that amount.

April 15, 1926, the commissioner notified testator that there was proposed for assessment against him the amount of $295,331.64, constituting his liability, as transferee of taxpayer's assets, on account of the unpaid balance of its 1920 taxes. June 11, 1926, testator filed with the board of tax appeals his petition for redetermination. In March, 1929, he died. January 27, 1931, the board made an order of redetermination in the amount proposed by the commissioner, with interest from December 6, 1924. The order was not reviewed. February 14, 1931, the commissioner made a jeopardy assessment against the deceased in the amount fixed by the board as his liability as transferee.

His will was admitted to probate; a trust company it named was appointed executor; and, the executor having been dismissed, one Robinson was, on September 15, 1930, appointed administrator. Before settlement of the estate, plaintiff, April 24, 1931, filed its claim with the

administrator. But he paid nothing on account of it and, making distribution in accordance with the will, transferred to defendant Henry Duggan $50,000 and to defendant trustee the rest of the estate, about $1,500,000. Plaintiff alleged that the assets so distributed had become impressed with a trust for the payment of its claim against testator and prayed decree enforcing it against trustee and beneficiaries under the will to the extent of assets transferred by the taxpayer to testator, with interest.

Defendants, June 6, 1933, moved to dismiss the complaint on the ground that the suit was barred by §§ 277, 278, 280, Revenue Act, 1926, as amended, and § 311(b), Revenue Act, 1928. Plaintiff, January 11, 1937, confessed defendants' motion to dismiss. Then, applying for leave to amend the complaint, it represented to the court that amendment was necessary because the allegation that an assessment was made against testator was omitted from the original bill and was an important fact in determining whether the present action was timely brought. Leave having been granted, it immediately amended by adding the allegation that, February 14, 1931, the commissioner made against testator the jeopardy assessment above referred to. The complaint was not otherwise changed. March 22, 1937, the court sustained defendants' motion and entered decree dismissing the amended bill of complaint. The circuit court of appeals affirmed. 94 F. 2d 81. This Court granted a writ of certiorari. 304 U. S. 554.

The question is whether the suit is barred by the statutory provisions on which the motion to dismiss was based. First to be considered are §§ 277, 278 and 280, read in connection with applicable provisions of §§ 274 and 279 of the Revenue Act of 1926.[1]

[1] 44 Stat. 55 *et seq.*

The pertinent substance of these follows:

Within 60 days after notice of the commissioner's determination of deficiency, the taxpayer may file petition with the board of tax appeals for redetermination; no assessment or proceeding in court for collection shall be made or begun until the board's decision has become final. § 274 (a).[2] The amount redetermined by decision that has become final shall be assessed and upon his demand shall be paid to the collector. § 274 (b).

Assessment shall be made within five years after the return; "no proceedings in court without assessment for the collection of taxes shall be begun after the expiration of such period." § 277 (a). The running of the statute of limitations on assessment or proceeding in court for collection of deficiency shall be suspended for the period during which the commissioner is prohibited from making assessment or bringing suit and for 60 days thereafter. § 277 (b). Where the assessment has been made within the period properly applicable thereto, the tax may be collected by distraint or proceeding in court "but only if begun . . . within six years after the assessment of the tax." § 278 (d). If the commissioner believes that assessment or collection of deficiency will be jeopardized by delay he shall immediately assess the deficiency and "notice and demand shall be made by the collector for the payment thereof." § 279 (a). Jeopardy assessment may be made whether or not the taxpayer has filed petition with the board. § 279 (c). If it is made after the board's decision it may be only for the deficiency determined by the decision. § 279 (d). The taxpayer may obtain stay of collection of the jeopardy assessment. § 279 (f)-(h).

[2] The board's decision becomes final upon expiration of the time (six months after it renders decision) allowed for filing petition for review by a circuit court of appeals or the court of appeals of the District of Columbia. §§ 1001, 1005.

The liability at law or in equity of "a transferee of property of a taxpayer in respect of the tax" shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in case of a deficiency in a tax. § 280 (a). Transferee liability must be assessed within one year from expiration of the period of limitation for assessment against the taxpayer. § 280 (b) (1). The running of the period of limitation on transferee liability shall, after notice to transferee under § 274 (a), be suspended for the period during which the commissioner is prohibited from making assessment of that liability and for 60 days thereafter. § 280 (d).

This is not a suit upon assessment of deficiency against the taxpayer on account of the commissioner's determination as shown in his letter of December 6, 1924. The time for such a suit, six years after assessment, expired long before the commencement of this suit. § 278 (d). *United States* v. *Updike,* 281 U. S. 489, 494.

Nor is it a suit authorized to be brought, in absence of assessment, to enforce liability of a transferee of the taxpayer's property. The time for bringing such a suit is six years, made up of five years after return, allowed for assessment against taxpayer, § 277 (a), and one year thereafter for assessment against transferee. § 280 (b) (1). The taxpayer having made its return on May 16, 1921, the six years expired May 16, 1927.

This suit is against transferees under the will of a transferee of the property of the taxpayer; it is based on the jeopardy assessment made against testator.

Plaintiff asserts that it had six years after that assessment, or until February 14, 1937, within which to bring this suit. Its reasoning is that § 280, specifying no period of limitation for collection of liability of a transferee after it has been assessed, and providing that it shall be collected subject to the same limitations as in the case of

deficiency in a tax, makes applicable the period of limitation upon collection defined in § 278 (d).

But no assessment was made against any of the defendants. None of them is a transferee of the property of the taxpayer; all are testamentary transferees of the estate of testator. It is clear that §§ 278 (d) and 280 upon which plaintiff relies are not broad enough to impose on defendants any liability on account of the assessment against the testator.[3] And, as already shown, suit

[3] Cf. § 311, Revenue Act of 1928. It provides:

"(a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title. . . . (1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax . . . imposed upon the taxpayer by this title. . . .

"(b) The period of limitation for assessment of any such liability of a transferee . . . shall be as follows: (1) In the case of the liability of an initial transferee of the property of the taxpayer,—within one year after the expiration of the period of limitation for assessment against the taxpayer; (2) In the case of the liability of a transferee of a transferee of the property of the taxpayer,—within one year after the expiration of the period of limitation for assessment against the preceding transferee, but only if within three years after the expiration of the period of limitation for assessment against the taxpayer;—

except that if before the expiration of the period of limitations for the assessment of the liability of the transferee, a court proceeding for the collection of the tax or liability in respect thereof has been begun against the taxpayer or last preceding transferee, respectively,—then the period of limitation for assessment of the liability of the transferee shall expire one year after the return of execution in the court proceeding."

The report of the Senate Committee on Finance states: "Section 280 of the revenue act of 1926 does not specifically provide any limitation period in the case of a transferee of a transferee of the taxpayer. Section 311 (b) (2) of the House bill provides, with specific exceptions, that the period for assessment in such case shall be one year after the expiration of the period of limitation for assessment against

on assessment against the taxpayer, or suit in absence of assessment of transferee liability, was by the applicable statutes of limitations barred long before this suit was brought.

Moreover, the assessment sued on was out of time. Plaintiff cites § 280 (d) and seeks to apply to the facts of this case the rule that assessment against transferee is required to be made within 6 years after return, §§ 277 (a), 280 (b) (1), as follows: The taxpayer made its return May 16, 1921. When, on April 15, 1926, the commissioner notified testator that he proposed to assess transferee liability against him, there remained 13 months and a day of the period allowed for making that assessment; the commissioner was prohibited from making the proposed assessment for the 60-day period within which testator was permitted to petition for redetermination by the board and until its decision, January 27, 1931, became final, June 27, 1931, and for 60 days thereafter, September 25, 1931. §§ 278 (d), 280 (d). Taking in the 13 months and a day, plaintiff had until October 25, 1932 within which to assess testator.

But that calculation is defective for it fails to take into account any part of the period after appeal to the board that elapsed between the death of testator in March, 1929, and the assessment, more than 23 months later, February 14, 1931. Redetermination is granted to safeguard against erroneous exactions by the commissioner. Suspension of his authority to assess or collect is protection against compulsory payment pending final decision

---

the preceding transferee. It seemed to the committee that this would unduly prolong litigation and that there should be a time when the transferee may know that he is no longer liable to be proceeded against. A committee amendment therefore provides that in all cases the tax must be assessed within three years after the expiration of the period of limitation for assessment against the taxpayer." Senate Report No. 960, 70th Congress, 1st Session, p. 32.

upon objections interposed by petitioner. The proceeding is an adversary one in which the party praying relief by redetermination is petitioner and the commissioner is respondent. The controversy is brought to issue by petition, answer, and reply that are by the board required to be definite and certain. Rules 6, 14, 15.[4] Before its decision either party, for cause shown, may have the proceeding dismissed.[5] Rule 31. And in case of petitioner's death, the board may order substitution of proper parties. Rule 37.

No personal representative of testator nor any other person applied for substitution of a party to carry on the proceeding in the place of the deceased testator, and none was ordered. The commissioner failed to obtain or seek dismissal for lack of a necessary party or want of prosecution. Cf. *Rusk* v. *Commissioner* (CCA 7) 53 F. 2d 428, 430. Plaintiff does not contend that, no substitution having been applied for or made, the commissioner was not entitled to an order of dismissal. Nor does it suggest anything to support the assumption, made in its calculation of time and throughout its argument, that suspension of commissioner's authority to assess continued through the period of more than 23 months between testator's death and the assessment. There is no ground on which it may be held that Congress intended in case of death of petitioner, where no application for or order of substitution is made, indefinitely to continue suspension

[4] Revised to November 1, 1929. Rules 31 and 37 are numbered 21 and 23 in the present edition of the Rules.

[5] Section 906 (c), Revenue Act of 1926, provides: "If a petition for a redetermination of a deficiency has been filed by the taxpayer, a decision of the Board dismissing the proceeding shall . . . be considered as its decision that the deficiency is the amount determined by the Commissioner. An order specifying such amount shall be entered in the records of the Board unless the Board can not determine such amount from the pleadings." 44 Stat. 107.

of the commissioner's authority to assess. Equally unreasonable would it be to hold that suspension of the commissioner's authority to assess the asserted transferee liability continued after testator's death for more than a reasonable time within which, no substitution having been applied for or made, to obtain dismissal. Unquestionably that time and more had expired long before the assessment was made.

As the suit is barred by provisions of the Revenue Act of 1926, we need not consider § 311 (b) of the Revenue Act of 1928, upon which defendants also relied.

Judgment affirmed.

MR. JUSTICE STONE.

I think the judgment should be reversed.

The first transferee was a "taxpayer" within the meaning of § 280 (a) (1), since he was liable under the provisions of the revenue law to pay the tax and, like other taxpayers, was subject to assessment and distraint as well as to a suit for recovery of the tax. *United States* v. *Updike,* 281 U. S. 489, 494. Respondent, the second transferee, was therefore in the words of § 280 (a) (1), "a transferee of property of a taxpayer," and its tax liability was by that section to "be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title . . . including the provisions . . . authorizing distraint and proceedings in court for collection . . ."

Under § 278 (d) the statute of limitations for collection of the tax from the first transferee did not expire until January, 1931, six years after assessment of the tax against the original taxpayer and first transferor. *United States* v. *Updike, supra.* By § 277 (b) the running of the six year statute is suspended, after the beginning of deficiency proceedings under § 274 (a), "for the period during which

the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court." And by § 274 (a) it is provided that during the pendency of deficiency proceedings "no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted . . ." It follows that the running of the statute of limitations in favor of the first transferee was suspended during the pendency of the deficiency proceedings intiated with respect to him April 15, 1926, at least, as the opinion of the Court states, until the death of the first transferee in March, 1929, or for a period of nearly three years. The period of limitations for the collection of the tax from the first transferee was thus extended at least until 1933, within which time the present suit was brought against respondent. By virtue of the transfer, the transferee, to the extent of the property received, becomes subject to the tax liability of the transferor. *Phillips* v. *Commissioner,* 283 U. S. 589, 592, 593, and cases cited in footnote 1. Since the period of limitations and the provisions for its suspension under §§ 274 (a) and 277 (b), applicable to the first transferee and taxpayer, are by § 280 (a) (1) likewise applicable to his transferee, who is also a taxpayer, *United States* v. *Updike, supra,* 494, it follows that the statute of limitations applicable to respondent, the second transferee, had not expired when the present suit was brought in May, 1932.

No distinction was made by the revenue laws between the liability and the period of limitations applicable to a first transferee and those applicable to a second until the enactment of § 311 of the Revenue Act of 1928, which provided in subsection (b) (2) that the liability of a second transferee of the property of the taxpayer should not extend beyond three years after the expiration of the period of limitation for assessment against the original

taxpayer, except that provision was made for an extension of the time if within that period "a court proceeding for collection of the tax or liability" had been begun against the original taxpayer or the last preceding transferee. In recommending these changes the report of the Senate Finance Committee, No. 960, 70th Congress, 1st Sess., p. 32, prepared before our decision in the *Updike* case, pointed out that § 280 of the 1926 Act did not specifically provide any limitation period in the case of a transferee of a transferee, and it stated that the purpose of the new provisions in § 311 (b) (2) was to shorten the period during which proceedings might be had against a second transferee. This legislative history is persuasive that under § 280 of the 1926 Act, as its language indicates, the second transferee is the transferee of a taxpayer and subject to the same period of limitations and provisions for its extension as is his transferor.

As a transferee is subject to the tax liability of his transferor, the second transferee under the 1926 Act is either subject to the same period of limitations as his transferor, or there is no statute of limitations applicable to him. But if the first transferee is a taxpayer, so as to avail himself of the benefit of the six year statute of limitations for collection of the tax, as held in the *Updike* case, his transferee is likewise a taxpayer, as well as the transferee of a taxpayer, so as to be subject to the burden of the provisions extending the period of limitation for collection of the tax. § 280 (a) (1).

MR. JUSTICE BLACK concurs.

JAMES *v.* UNITED ARTISTS CORP.

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

No. 161. Argued December 8, 9, 1938.—Decided January 3, 1939.

Appellee, a foreign corporation engaged in the business of distributing motion picture films for exhibition in theatres in various States, had no office or place of business in West Virginia; it carried on no business there except such as was involved in the solicitation by a traveling representative of exhibition contracts all of which were made outside of the State. To exhibitors there it shipped films from outside of the State and these were returned by the exhibitors likewise to points outside of the State. Other than these films, when temporarily there, it had no property in the State. It had no collection agent in the State, but all sums due under the contracts were required to be paid at offices outside of the State. When the contract was for a percentage of the exhibitor's gross receipts, the exhibitor agreed to set apart such percentage "in trust" to be paid to appellee outside the State. *Held:* appellee was not subject to the tax, measured by gross income, imposed by § 2 (i) of Art. 13, c. 11, of the West Virginia Code, on all engaged within the State "in the business of collecting incomes from the use of real or personal property." P. 414.

So construed in the absence of a state supreme court decision interpreting the section and of any evidence of its legislative history; and in view of the emphasis put by the section and its various subsections on the carrying on of business or other specified activities within the State as the real incidence of the tax, and the fact that the exhibitors' gross receipts are taxed to them under another provision of the statute. Questions as to the power of a State to lay a tax on income derived from sources within it, and as to the validity of a tax upon solicitation within the State of the contracts, are not here involved.

23 F. Supp. 353, affirmed.

APPEAL from a decree of a three-judge District Court, enjoining the collection of a state tax.

Mr. Clarence W. Meadows, Attorney General of West Virginia, with whom *Mr. W. Holt Wooddell,* Assistant Attorney General, was on the brief, for appellant.

Mr. Robert G. Kelly for appellee.

By leave of Court, *Messrs. G. W. Hamilton,* Attorney General of Washington, and *R. G. Sharpe,* Assistant Attorney General, filed a brief, as *amici curiae,* on behalf of the State of Washington, in support of appellant.

Mr. Justice Stone delivered the opinion of the Court.

This appeal requires consideration of but a single question: whether appellee is subject to the provisions of a statute of West Virginia which lays a tax, measured by gross receipts, "Upon every person [including corporations] engaging . . . within this state in the business of collecting incomes from the use of real or personal property. . . ."

Appellee, a Delaware corporation, having an office and its principal place of business in New York City, brought the present suit in the District Court for southern West Virginia against appellant, a West Virginia tax official, to restrain collection of a tax imposed by Article 13 of Chapter 11 of the West Virginia Code, as amended March 9, 1935, by c. 86, West Virginia Laws of 1935, on the ground that the appellee was not, by the terms of the statute, subject to the tax, and that the tax was an unconstitutional burden on interstate commerce.[1]

[1] The suit was begun before the enactment on August 21, 1937, of the amendment to § 24 of the Judicial Code, 50 Stat. 738, providing that "no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State." Section 2 of the Act excludes from its operation suits begun in the district courts before its enactment.

The district court, three judges sitting, adopted as its findings the facts as stipulated. It found that the amount of the tax exceeded $3,000 and that such judicial remedy as there was under West Virginia law for recovery of the tax, if paid, was not enforceable at law in the federal courts, and that by reason of penalties for nonpayment, some of which were cumulative, appellee was without adequate legal remedy. The court concluded that appellee was not doing business in West Virginia or engaged there in the business of collecting income from the use of personal property, within the meaning of the applicable taxing act, and that the attempted tax was an unconstitutional burden on interstate commerce, and decreed that collection of the tax be permanently enjoined. 23 F. Supp. 353. The case comes here on appeal under § 266 of the Judicial Code, 28 U. S. C. § 380.

Section 2 of Article 13, c. 11, of the West Virginia Code, as amended, lays annual privilege taxes upon various businesses and activities carried on within the state. Section 2(g) imposes a tax of one-half of one per cent. of the gross income derived from the business of operating a theatre or moving picture show. Section 2(h) taxes the gross receipts of every person engaging within the state in any business not otherwise specifically taxed, and § 2(i) levies upon "every person engaging . . . within this state in the business of collecting incomes from the use of real or personal property" a tax of one per cent. "of the gross income of any such activity."

Appellee is engaged in the business of distributing motion picture films for exhibition in theatres in various states, including West Virginia. It maintains branch offices in Ohio, Pennsylvania, and the District of Columbia, but has no office or place of business in West Virginia, and has no agents or employees in the state other than a traveling representative who visits the state to solicit from theatre managers or owners contracts for the exhibition

there of films to be supplied by appellee. Appellee owns no property in West Virginia other than the films sent there temporarily for exhibition and afterward returned to it at points without the state.

In the course of its business appellee from time to time makes public announcements of its offering of films. Theatre owners or managers in West Virginia sign written applications in the form of offers for license contracts permitting the exhibition in West Virginia of such films as they desire to show there. The signed applications are transmitted to appellee's New York office, where it accepts or rejects them. When they are accepted, appellee signs a written acceptance attached to the application and returns the executed contract to the exhibitor. The subsequent course of business between appellee and the West Virginia exhibitor conforms to the terms of the contract. It calls for the delivery of the films by shipment from any of appellee's exchanges to the exhibitor in West Virginia, and provides for exhibition of the films for a specified period, for which the exhibitor undertakes to pay a fixed sum or a percentage of the receipts from exhibition, and for the return of the films by the exhibitor after they are shown, by shipping them to another exhibitor or to one of the appellee's exchanges, as appellee may direct.

When the license is upon a percentage basis, the exhibitor undertakes to segregate appellee's percentage of the box office receipts and to hold it "in trust" and pay it over to the appellee daily. But the contract provides that "Any and all payments to be made hereunder shall be payable to the Distributor at the city in which is located the Exchange from which the Exhibitor is served," and all payments due appellee from West Virginia exhibitors are sent by them to appellee at points without the state.

Upon the argument the state conceded that the exhibitors of appellee's films in West Virginia are subject to

and pay the tax imposed on operators of moving picture houses by § 2 (g) and that the tax is measured by the entire gross receipts from exhibiting the films, ascertained without deducting the percentage payable to appellee. The Attorney General of the state disclaimed any contention that appellee was taxable under § 2 (h), see *Pennywitt* v. *Blue,* 73 W. Va. 718; 81 S. E. 399, or under any provisions of the statute other than those of 2 (i) laying a gross receipts tax on every person engaging within the state in the business of collecting incomes from property.

The Supreme Court of West Virginia appears not to have construed this section, and we are without the benefit of any legislative history of the statute indicating that it has any purpose or meaning other than that suggested by its words. We are not here concerned with the question whether a state, by a statute appropriately framed, may lay a tax on income derived from sources within it, or whether the solicitation of the contracts may be taxed. No such taxation is attempted by § 2 (i). The taxing provisions of § 2 are restricted in their application to various enumerated classes of activities within the state, one of which, specified in § 2 (i), is that of engaging there in the business of collecting incomes. The conduct of such a business or activity by appellee requires its presence there, or that of its agent, and the collection of income within the state by the one or the other. As it is stipulated and found that appellee carries on no business within the state, except such as is involved in solicitation of the contracts, and has no collection agent there, and as the exhibitors there are bound to and do pay all sums due under their contracts to appellee at points outside the state, we can find no basis for saying that it is engaged in collecting income within the state, either as a business or otherwise.

The contract requirement that the exhibitor is to set apart the appellee's percentage of the gross receipts "in trust" is a familiar device for securing payment to the appellee in the event of the exhibitor's financial embarrassment. But it does not make the exhibitor appellee's agent, nor does it dispense in law, more than it has in fact, with the performance of the former's obligation to make all payments to appellee without the state. The emphasis placed by § 2 and its various subsections on the carrying on of business or other specified activities within the state as the condition of laying the tax, and the fact that the exhibitors' receipts are taxed in their hands under § 2 (g), lead to the conclusion that there was no legislative purpose in cases like the present to tax gross receipts apart from the business or activity of collecting them, carried on within the state. We cannot say that the court below was wrong in that conclusion.

Affirmed.

UNITED STATES *v.* ALGOMA LUMBER CO.*

CERTIORARI TO THE COURT OF CLAIMS.

No. 245. Argued December 16, 1938.—Decided January 3, 1939.

1. Contracts for the sale to a lumber company of timber on unallotted land of the Klamath Indian Reservation, executed by the Superintendent of the Klamath Indian school for and on behalf of the Klamath Indians, pursuant to § 7 of the Act of June 25, 1910 and under regulations and with the approval of the Secretary of the Interior, the moneys received under the contracts being deposited pursuant to statutory requirement in the United States Treasury, to be held and used by the Secretary for the benefit of the Indians, *held* not contracts of the United States. A suit

* Together with No. 246, *United States* v. *Forest Lumber Co.*, and No. 247, *United States* v. *Lamm Lumber Co.*, also on writs of certiorari to the Court of Claims.

against the United States to recover alleged overpayments made under such contracts was therefore not within the jurisdiction of the Court of Claims. P. 421.

2. Likewise, contracts for the sale on similar terms of timber on restricted allotted lands, entered into by individual allottees as prescribed by § 8 of the Act of 1910, the payments thereunder being deposited by the Superintendent in private state banks and credited on his own books to the allottees according to their respective interests, were not obligations of the United States enforceable in the Court of Claims. P. 423.
3. Exercise of its plenary power to take appropriate measures to safeguard the disposal of property of which the Indians are the substantial owners, does not necessarily involve the assumption of contractual obligations by the Government. Their assumption is not to be presumed in the absence of any action taken by the Government or on its behalf indicating such a purpose. P. 421.
4. Receipt by the Treasury of the United States, of payments made to the Superintendent for the use and benefit of the Indians, even though payment was made under protest, gave rise to no contract for repayment implied in fact on the part of the United States, and did not make suit therefor cognizable in the Court of Claims. P. 423.
5. Infirmities, if any, in the contracts of the lumber companies with the Indians could not impose on the United States a liability which the contracts do not purport to undertake in its behalf. P. 423.
6. By the Treaty with the Klamath Tribe of February 17, 1870, the United States acquired no beneficial ownership in the tribal lands or their proceeds; and whatever the nature of the legal interest acquired by the Government as the implement of its control, substantial ownership remained with the tribe as it existed before the treaty. P. 420.

86 Ct. Cls. 226, 188, 171, reversed.

CERTIORARI, *post*, p. 583, to review judgments of the Court of Claims in three suits against the United States to recover the amount of alleged overpayments made upon contracts for the sale of timber on Indian lands.

Mr. Paul A. Sweeney, with whom *Solicitor General Jackson, Assistant Attorney General Whitaker*, and *Mr.*

James J. Sweeney were on the brief, for the United States.

Messrs. Carl D. Matz and *William S. Bennet,* with whom *Mr. Jesse Andrews* was on the brief, for respondents in Nos. 245 and 246.

Mr. Ralph H. Case for respondent in No. 247.

MR. JUSTICE STONE delivered the opinion of the Court.

Decision of these cases turns on the question whether certain contracts for the sale of timber on land of the Klamath Indian Reservation in Oregon, executed by the Superintendent of the Klamath Indian School by authority of an Act of Congress, are contracts of the United States upon which suits may be maintained in the Court of Claims.

Section 7 of the Act of Congress of June 25, 1910, c. 431, 36 Stat. 855, 857, provides that the "timber on unallotted lands of any Indian reservation may be sold under regulations to be prescribed by the Secretary of the Interior, and the proceeds from such sales shall be used for the benefit of the Indians of the reservation in such manner as he may direct." Section 8 of the Act provides that "the timber on any Indian allotment held under a trust or other patent containing restrictions on alienations, may be sold by the allottee with the consent of the Secretary of the Interior and the proceeds thereof shall be paid to the allottee or disposed of for his benefit under regulations to be prescribed by the Secretary of the Interior."

The present suits were brought in the Court of Claims by respondents against the United States to recover alleged overpayments of amounts due upon contracts for the purchase of timber upon certain unallotted and allotted Indian lands in the Klamath Reservation. The con-

tracts were executed pursuant to §§ 7 and 8 of the Act of 1910 and regulations of the Secretary of the Interior. They provided that the prices fixed for the timber to be cut should be readjusted by the Commissioner of Indian Affairs at intervals of three years, but that permitted increases in price should "not exceed fifty per cent of the increase in the average mill run wholesale net value of lumber . . . during the three years preceding January 1 of the year in which the new prices are fixed."

The Court of Claims in each case found that prices fixed by the Indian Commissioner had exceeded the permitted increases and that in consequence there had been an overpayment of the amounts due under the contracts. It held that they were contracts of the United States and in each case gave judgment against the government for the amount of the overpayments. *Algoma Lumber Co.* v. *United States,* 86 Ct. Cls. 226; *Forest Lumber Co.* v. *United States,* 86 Ct. Cls. 188; *Lamm Lumber Co.* v. *United States,* 86 Ct. Cls. 171. We granted certiorari, October 10, 1938, the questions involved being of public importance in the administration by the United States of Indian lands and in defining the jurisdiction of the Court of Claims.

The petitions for certiorari challenged the jurisdiction of the Court of Claims in terms sufficiently broad to raise the question, not considered below or argued here, whether, assuming the contracts were obligations of the United States, as the court below held, suits to recover the overpayments are upon quasi contracts or contracts "implied in law" not within the jurisdiction conferred on the Court of Claims by § 145(1) of the Judicial Code, 28 U. S. C. § 250(1).[1] *Merritt* v. *United States,* 267 U. S. 338;

[1] " . . . The Court of Claims shall have jurisdiction to hear and determine the following matters:

"First. All claims founded upon . . . any contract, express or implied, with the Government of the United States . . ."

United States v. *Minnesota Investment Co.*, 271 U. S. 212; *Goodyear Co.* v. *United States*, 276 U. S. 287. But the question chiefly discussed in brief and argument before us is whether the contracts in suit are obligations of the United States, so as to give rise to claims founded upon them within the jurisdiction of the Court of Claims. As determination of this question is decisive of the case, we do not consider whether, even if the contracts were obligations of the United States, the claims are for the recovery of unjust enrichment upon contracts "implied in law" not within the jurisdiction of the court.

For purposes of decision the contracts in No. 245, *United States* v. *Algoma Lumber Co.*, may be taken as typical of those in the other cases. Pursuant to §§ 7 and 8 of the Act of 1910 and regulations of the Secretary of the Interior adopted June 29, 1911, timber upon designated lands within the Klamath Reservation was offered for sale. Bids submitted by respondent, Algoma Company, were accepted, and on July 28, 1917, the contract of sale was executed by the company and by the Superintendent of the Klamath Indian School, pursuant to departmental regulations, and was approved by the Assistant Secretary of the Interior on September 14, 1917.

The area designated embraced approximately 15,700 acres, all of which were unallotted except 2,240 acres of allotted lands. The contract provided for the sale of the timber on the unallotted lands upon terms and conditions not now material. It required that the purchase money be paid to the Superintendent "for the use and benefit of the Klamath Tribe," and that the Algoma Company enter into separate contracts with the individual Indian allottees who desired to sell the timber standing on their allotments. In carrying out the provisions of the contract the Algoma Company, with the approval of the Secretary, entered into separate contracts with twenty-one indi-

vidual allottees for purchase of the timber on their allotments upon terms similar to those of the contract for the purchase of timber on the unallotted lands.

As required by the contracts, the purchase payments by the Algoma Company, including the alleged overpayments, were made to the Superintendent for the benefit of the Indians. Pursuant to the Act of March 3, 1883, 22 Stat. 582, 590, as amended May 17, 1926, 44 Stat. 560, all moneys received from the unallotted lands, less expenses, were deposited by the Superintendent in the treasury of the United States in an account designated "Indian Moneys, Proceeds of Labor." Payments for timber on the allotted lands, less expenses, were deposited by the Superintendent in private state banks and credited on his own books to the allottees according to their respective interests. Act of July 1, 1898, 30 Stat. 571, 595; Act of April 30, 1908, 35 Stat. 70, 73; Act of June 25, 1910, 36 Stat. 855, 856. All the proceeds of sale are required to be held and used by the Secretary for the benefit of the Indians. Act of March 2, 1887, 24 Stat. 449, 463; Act of May 18, 1916, 39 Stat. 123, 158; Act of Mar. 2, 1907, 34 Stat. 1221; Act of May 25, 1918, 40 Stat. 561, 591.

The Klamath Reservation was set apart as tribal lands under the Treaty with the Klamath Tribe of February 17, 1870, 16 Stat. 707, from lands immemorially possessed by them. See *United States* v. *Klamath Indians,* 304 U. S. 119, 121. Under the provisions of the treaty and established principles applicable to land reservations created for the benefit of the Indian tribes, the Indians are beneficial owners of the land and the timber standing upon it and of the proceeds of their sale, subject to the plenary power of control by the United States, to be exercised for the benefit and protection of the Indians. *United States* v. *Klamath Indians,* 304 U. S. 119; cf. *United States* v. *Candelaria,* 271 U. S. 432; *Mott* v. *United States,* 283 U. S. 747; *Chippewa Indians* v. *United States,* 301 U. S.

358, 375; *United States* v. *Shoshone Tribe,* 304 U. S. 111, 116. The United States acquired no beneficial ownership in the tribal lands or their proceeds, and however we may define the nature of the legal interest acquired by the government as the implement of its control, substantial ownership remained with the tribe as it existed before the treaty. *United States* v. *Shoshone Tribe, supra,* 116.

The action of Congress in authorizing the sale of the timber, and the contracts prescribed under its authority by departmental regulations and approved by the Secretary, are to be viewed as the means chosen for the exercise of the power of the government to protect the rights and beneficial ownership of the Indians. The means are adapted to that end. Neither the United States nor any officer purporting to act on its behalf is named a party to the contract. By its terms the contract is declared to be entered into "between the Superintendent of the Klamath Indian School, for and on behalf of the Klamath Indians, party of the first part" and the Lumber Company, "party of the second part." It is thus on its face the contract of the Klamath Indians executed by the Superintendent, acting as their agent. The form of the contract and the procedure prescribed for its execution and approval conform to the long-established relationship between the government and the Indians, under which the government has plenary power to take appropriate measures to safeguard the disposal of property of which the Indians are the substantial owners. Exercise of that power does not necessarily involve the assumption of contractual obligations by the government. Their assumption is not to be presumed in the absence of any action taken by the government or on its behalf indicating such a purpose. See *In re Sanborn,* 148 U. S. 222, 227; *Turner* v. *United States,* 248 U. S. 354, 359. In this, as in any other case of a written contract, those who are parties to and bound

by it are to be ascertained by an inspection of the document, and its provisions are controlling in the absence of some positive rule of law or provision of statute requiring them to be disregarded.

Respondents point only to § 7 of the Act of 1910 and the regulations prescribed under it as compelling a different result. They argue that the requirements that the manner of sale be prescribed by the Secretary, that the contracts be executed by the Superintendent and approved by the Secretary, and that the prices of lumber be fixed by the Indian Commissioner, indicate a purpose to make the United States, acting as guardian or trustee of the Indians through the Secretary and Superintendent, the contracting party. But, as we have said, all that was done by the government officials in supervising the execution of the contracts and their performance was consistent with the exercise of its function as protector of the Indians without the assumption by the United States of any obligation to the purchasers of the timber, and no implied obligation on its part arises from the performance of that function.

Before the Act of 1910, the Act of February 16, 1889, 25 Stat. 673, had given the President authority, from year to year, under such regulations as he might prescribe, to authorize the Indians on reservations or allotments to sell dead timber, standing or fallen, on such reservations. The contracts authorized were to be those of the Indians and not of the United States. See *Pine River Logging Co.* v. *United States,* 186 U. S. 279.[2]

The Act of 1910 enlarged the authority conferred by the earlier act so as to permit the sale of living timber on

[2] In some instances Congress has passed special acts conferring jurisdiction on the Court of Claims to entertain suits brought against the Indians on their contracts. 35 Stat. 444; 36 Stat. 287; see *Green* v. *Menominee Tribe,* 233 U. S. 558; cf. 26 Stat. 636; 27 Stat. 86; 35 Stat. 457; 36 Stat. 287.

the reservations under regulations prescribed by the Secretary of the Interior. It did not command departure from the earlier practice of selling the timber by contracts entered into between the Indians and the purchasers, and it seems clear that in prescribing that the contracts be entered into with the Indians the Secretary adhered to this practice, but with the added safeguard that the contracts were to be effected for them through the agency of the Superintendent who, for many purposes, acts as the agent of the Indians. See *United States* v. *Sinnott,* 26 F. 84, 86; cf. *Parks* v. *Ross,* 11 How. 362, 374.

We do not stop to inquire whether the government could confer authority upon him to execute contracts binding upon the Indians, or whether the Act of 1910 dispensed with the formalities required of contracts with the Indians by R. S. § 2103, 25 U. S. C. § 81, omitted in the case of the present contracts. See *Green* v. *Menominee Tribe,* 233 U. S. 558. Infirmities, if any, in respondents' contracts with the Indians could not impose on the United States a liability which the contracts do not purport to undertake in its behalf.

As the Court of Claims found that the contracts for the sale of timber on allotted lands were entered into by individual allottees as prescribed by § 8 of the Act of 1910, they stand on no different footing, as obligations of the United States, from the tribal contract or similar contracts entered into under the Act of 1889.

Since none of the contracts in suit were contracts or obligations of the United States, it is plain that receipt, by the Treasury of the United States, of payments made under them to the Superintendent for "the use and benefit" of the Indians, even though made under protest, gave rise to no contract for repayment implied in fact on the part of the United States, and that the cause of action, if any, is not within the jurisdiction of the Court of Claims. *Merritt* v. *United States, supra; United States*

v. *Minnesota Investment Co., supra; Goodyear Co.* v. *United States, supra.*

Reversed.

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

SOCONY-VACUUM OIL CO. *v.* SMITH.

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

No. 195. Argued December 15, 1938.—Decided January 3, 1939.

1. Assumption of risk is not a defense in a suit brought by a seaman under the Jones Act to recover for injuries resulting from his use, while on duty, of a defective appliance of the ship, when he chose to use the unsafe appliance, knowing it unsafe, instead of a safe method of doing his work, which was known to him. P. 428.
2. In such cases the admiralty rule of comparative negligence applies, in mitigation of damages. P. 431.

96 F. 2d 98, affirmed.

CERTIORARI, *post,* p. 586, to review the affirmance of a judgment recovered by the present respondent, a seaman, in an action for personal injuries brought under the Jones Act.

Mr. Louis Mead Treadwell, with whom *Messrs. Henry B. Potter* and *John J. Manning* were on the brief, for petitioner.

Mr. George J. Engelman for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

The question is whether assumption of risk is a defense in a suit brought by a seaman under the Jones Act to recover for injuries resulting from his use, while on duty,

of a defective appliance of the ship, when he chose to use the unsafe appliance instead of a safe method of doing his work, which was known to him.

Respondent, a seaman, brought the present suit in the District Court for southern New York to recover, under the Jones Act, 41 Stat. 1007, 46 U. S. C. § 688, for an injury received from a fall in the engine room of petitioner's vessel. The fall was caused by a defective step on which respondent stood while on duty, when seeking to learn, by touching with his finger, whether an engine bearing was overheated.

In submitting the case to the jury the trial court applied the admiralty rule of comparative negligence, instructing the jury that negligence of respondent contributing to the accident was not a bar to recovery but was to be considered in mitigation of damages. The court refused petitioner's request for an instruction that if respondent could have performed his duty without use of the defective step, he assumed the risk of injury from it. Instead, the court charged that there was no assumption of risk by the seaman where the shipowner failed in its duty to furnish a safe appliance.

Judgment of the district court, upon a verdict in respondent's favor, was affirmed by the Court of Appeals for the Second Circuit, 96 F. 2d 98, on authority of *The Arizona* v. *Anelich,* 298 U. S. 110, and *Beadle* v. *Spencer,* 298 U. S. 124. The court's decision was predicated upon its conclusion that respondent had free choice of a way to reach and touch the bearing, without standing on the defective step, and it held that in the circumstances, and since the seaman had not used the defective appliance contrary to orders, the trial judge had correctly instructed the jury that assumption of risk was not a bar to re-recovery. We granted certiorari, October 10, 1938, upon a petition asking us to review this ruling in the light of our decisions in *The Arizona* and the *Beadle* cases, *supra,*

the question being one of public importance in the application of the maritime law as supplemented by the Jones Act.

A preliminary point, much discussed in brief and argument here, is whether the question ruled upon below is presented by the record. Respondent insists that there was no evidence from which the jury could conclude that there was a safe method known to him by which he could have reached the bearing without using the defective step and that he chose the unsafe instead of the safe method.

Respondent was employed as an oiler in petitioner's engine room. It was his duty while the vessel was under way to touch with his finger, at intervals of twenty minutes, a bearing of the propeller shaft, in order to ascertain whether it was overheating and in need of additional lubrication. Directly in front of the bearing, as he approached it, was an iron step, located about one foot above the engine room floor and bolted to the bedplate which supported the bearing. Respondent testified that the step was braced on its underside by a bracket or strut, and that about two or three weeks before the accident he had observed that the bracket was loose and out of place and had reported the fact to a superior officer.

Respondent also gave the only account of what occurred at the time of the accident. He testified that in order to reach the bearing it was necessary for him and was his uniform practice to stand with his right foot upon the step with his left advanced and placed upon the bedplate, and with his left hand holding, for support, the upper edge of an adjacent vertical slush pan; that, standing in this position, he placed his right hand in a hole extending downward through the bearing cap a distance of eight or ten inches, where he touched the shaft and the adjoining bearing to discover whether they were overheated and to inspect the oil which stuck to his fingers

and which, if discolored, would indicate that the journal was beginning to gripe because of excessive friction; that as he stepped down his left foot struck the loose bracket, which had projected beyond the edge of the step, causing him to fall and suffer the injuries complained of. There was testimony by petitioner's witnesses, all denied by respondent, from which the jury could have found that it was possible for respondent to have reached the bearing while standing on the floor, without the use of the defective step, by seizing with his right hand a grab iron located on a nearby column and reaching with his left hand to touch the left end of the bearing, which extended through the bedplate; that this was the usual and only appropriate way to examine the bearing, and that respondent had been seen to reach it in that manner. There was also testimony that other oilers had touched the bearing without using the step while standing on the floor, with right hand grasping the upper edge of the vertical crank-pit guard, which was adjacent on the right and nearer to the bearing than the grab iron. There was evidence of the relative localities of the several parts of the structure mentioned and of the distances between them, indicating that respondent could have reached the bearing, either at its left end or through the hole in the bearing cap, while standing on the engine room floor and without using the step.

We must accept the verdict as establishing the negligent failure of petitioner to furnish a safe appliance, the iron step, and that the plaintiff knew that it was defective at the time of the accident, for the only evidence of any breach of duty by petitioner was respondent's testimony that he knew of the defect and had reported it to the first assistant engineer two or three weeks before the accident. Upon all the evidence it was for the jury to say whether respondent was aware that in reaching the bearing with one hand, either at its end or through the hole in the bear-

ing cap, he could avoid the use of the defective step by standing on the engine room floor and steadying himself by seizing with his right hand the grab iron or the crank-pit guard on his right, or by placing his left hand on the edge of the slush pan.

No specific instruction was asked or given as to what the verdict should be if the jury concluded that respondent had knowingly made such an election. Instead, the court charged generally "that the ship owner is under a duty to furnish the seaman with a safe place in which to work" and "There is no contributory negligence or assumption of risk on the part of a plaintiff in so far as the defendant fails in these duties." Consequently, there is no basis for disturbing the judgment unless this charge is erroneous as applied to the evidence taken most favorably to petitioner.

The question whether assumption of risk is a bar to a suit by a seaman to recover under the Jones Act for injuries caused by a defective appliance, when he has a free choice to avoid the use of it, is a novel one in this Court. No such choice was involved in *The Arizona* or *Beadle* cases. There assumption of risk by the seaman, which would have barred recovery at common law, was concededly not a defense under the admiralty rule. The decision was that the Jones Act, in extending to seamen all the rights to recover for injuries resulting from defective appliances given to railway employees by the Federal Employers' Liability Act, 35 Stat. 65, 45 U. S. C. § 51, had left undisturbed the admiralty rule with respect to assumption of risk. In holding that the rule had not been changed, we did not consider the question now presented whether, within that rule, assumption of risk is a defense where the seaman could have avoided the use of the unsafe appliance by the free choice of a safe one.

Before the Jones Act a seaman was entitled to recover, from a vessel or its owner, indemnity for injuries due to an

unseaworthy vessel, or for "failure to supply and to keep in order the proper appliances appurtenant to the ship." *The Osceola,* 189 U. S. 158, 175; *The Arizona* v. *Anelich, supra,* 120 *et seq.* Contributory negligence, then as now, was not a defense in suits brought by seamen to recover for injuries attributable to defective equipment, but was ground only for mitigation of damages. See *The Max Morris,* 137 U. S. 1; *The Arizona* v. *Anelich, supra,* 122, and cases cited. And no American case appears to have recognized assumption of risk as a defense to such a suit. In numerous cases this defense was either denied or ignored in circumstances plainly calling for its application had it been available. *Halverson* v. *Nisen,* Fed. Cas. No. 5,970; 3 Sawy. 562; *The Edith Godden* (D. C.), 23 F. 43; *The Noddleburn* (D. C.), 28 F. 855; *Olson* v. *Flavel* (D. C.), 34 F. 477; *The A. Heaton* (C.C.), 43 F. 592; *The Julia Fowler* (D. C.), 49 F. 277; *Lafourche Packet Co.* v. *Henderson* (C. C. A.), 94 F. 871; *The Fullerton,* 167 F. 1; *Globe S. S. Co.* v. *Moss,* 245 F. 54; *The Colusa* (C. C. A.), 248 F. 21; *Cricket S. S. Co.* v. *Parry,* 263 F. 523; *Storgard* v. *France & Canada S. S. Corp.* 263 F. 545.

In some of these cases the seaman had voluntarily shipped on a vessel which he knew to be unseaworthy, *Cricket S. S. Co.* v. *Parry, supra;* see *Scheffler* v. *Moran Towing & Transportation Co.,* 68 F. 2d 11, 12. In others it was apparent that the seaman had chosen to expose himself to the dangers of unsafe appliances when there was a safe alternative. *The Julia Fowler, supra; Olson* v. *Flavel, supra.*

In some cases arising after the Jones Act where the defense was allowed, the employee was thought to have had the status of a stevedore or shore worker and not that of a seaman. *The Maharajah,* 40 F. 784; *Cunard S. S. Co.* v. *Smith,* 255 F. 846; *Hardie* v. *New York Harbor Dry Dock Corp.,* 9 F. 2d 545; *Skolar* v. *Lehigh Valley R. Co.,* 60 F.

2d 893; *Scheffler* v. *Moran Towing & Transportation Co., supra,* 12; *Yaconi* v. *Brady & Gioe, Inc.,* 246 N. Y. 300, 306; 158 N. E. 876. In *Johnson* v. *United States,* 74 F. 2d 703, the seaman had made his choice in disobedience of orders, and in another where the defense was allowed the seaman, while not on duty, though in the course of his employment, had chosen to go into an unsafe part of the vessel, knowing that there was an alternative. *Holm* v. *Cities Service Co.,* 60 F. 2d 721.[1]

Here respondent was a seaman; he was on duty when injured; and there was no evidence that he acted in disobedience of orders. In the absence of any controlling or persuasive authority we look to the reason of the admiralty rule of assumption of risk in order to ascertain its appropriate limits. Many considerations which apply to the liability of a vessel or its owner to a seaman for the failure to provide safe appliances and a safe place to work are absent or are of little weight in the circumstances which attend shore employment, in relation to which the common law rules of assumption of risk and contributory negligence have been developed.

The seaman, while on his vessel, is subject to the rigorous discipline of the sea and has little opportunity to appeal to the protection from abuse of power which the law makes readily available to the landsman. His complaints to superior officers of unsafe working conditions not infrequently provoke harsh treatment. He cannot leave the vessel while at sea. Abandonment of it in port before his

[1] In *Tampa Interocean S. S. Co.* v. *Jorgensen,* 93 F. 2d 927, 930, the Court of Appeals for the Fifth Circuit, in affirming a judgment in favor of a seaman, took occasion to approve the following instruction by the trial court to the jury: "You are instructed that if the plaintiff was furnished two methods of entering the 'tween deck space, one obviously safe and the other obviously unsafe, and *if the plaintiff knew the safe method* and notwithstanding chose the unsafe method, the defendant is not liable."

discharge, to avoid unnecessary dangers of employment, exposes him to the risk of loss of pay and to the penalties for desertion.[2] In the performance of duty he is often under the necessity of making quick decisions with little opportunity or capacity to appraise the relative safety of alternative courses of action. Withal, seamen are the wards of the admiralty, whose traditional policy it has been to avoid, within reasonable limits, the application of rules of the common law which would affect them harshly because of the special circumstances attending their calling. *The Arizona* v. *Anelich, supra,* 123, and cases cited; *Calmar Steamship Corp.* v. *Taylor,* 303 U. S. 525. It is for this reason that remedial legislation for the benefit and protection of seamen has been liberally construed to attain that end. *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372, 380, 381; *Jamison* v. *Encarnacion,* 281 U. S. 635, 639; *Alpha S. S. Corp.* v. *Cain,* 281 U. S. 642; *Cortes* v. *Baltimore Insular Line,* 287 U. S. 367, 375; *Warner* v. *Goltra,* 293 U. S. 155, 157.

Any rule of assumption of risk in admiralty, whatever its scope, must be applied in conjunction with the established admiralty doctrine of comparative negligence and in harmony with it. Under that doctrine contributory negligence, however gross, is not a bar to recovery but only mitigates damages. There being no defense of assumption of risk where the seaman is without opportunity to use a safe appliance, it seems plain that his choice of a defective instead of a safe one, resulting in injury, does not differ in either the quality of the act or in its injurious consequences, in any practical way, from his correspondingly negligent use of a safe or an unsafe appliance, where its use has contributed to an injury resulting from a breach of duty by the owner. See *The Wanderer,* 20 F. 140; *The Frank and Willie,* 45 F. 494;

[2] See R. S. § 4596, 46 U. S. C. § 701.

John A. Roebling's Sons Co. v. *Erickson,* 261 F. 986, 987; *Storgard* v. *France & Canada S. S. Corp.,* 263 F. 545. In either case the seaman's negligence is a contributing cause of his injury, without which the ship owner would be liable to the full extent of the damage.

The incongruity and practical embarrassments in the application of a rule that the negligence in the one case bars recovery, while that in the other only reduces the recoverable damages, are evident. The common law is consistent in holding that both contributory negligence and assumption of risk are defenses. But other considerations apart, it seems inconsistent, and an impracticable refinement, to apply the rule for which petitioner contends in a system of law which maintains the comparative negligence rule to the fullest extent. This was recognized in *Olson* v. *Flavel, supra,* and *The Julia Fowler, supra,* where the choice by the seaman of an unsafe appliance was held not to bar recovery but to be a proper basis for a substantial reduction of damages because of the negligence of the choice. In *The Julia Fowler, supra,* the eminent admiralty judge, Addison Brown, held that a seaman who had suffered injury through the deliberate use of a halliard known to be defectively spliced when a sound rope was available was entitled to recover, but with diminution of damages because of his negligence in using the unsafe rope.

We think that the consistent development of the maritime law in conformity to its traditional policy of affording adequate protection to seamen through an exaction of a high degree of responsibility of owners for the seaworthiness of vessels and the safety of their appliances will be best served by applying the rule of comparative negligence, rather than that of assumption of risk, to the seaman who makes use of a defective appliance knowing that a safe one is available. The power of the trial judge

to guide and instruct the jury and his control over excessive verdicts afford as adequate a protection to owners as in any other case where the negligence of the seaman, whatever its degree, has contributed to an actionable injury.

Upon the facts of this case, there was no error in the charge of the trial court as to assumption of risk. Its instruction as to the application of the rule of comparative negligence was general and no exception was taken to it. Petitioner would have been entitled to a more specific instruction, if requested, as to the appropriate effect upon the amount of the verdict of the relative degrees of petitioner's and respondent's negligence if the jury should find that respondent had knowingly failed to choose an available safe method of doing his work.

We leave to future cases as they may arise the determination of what rule is to apply in cases where the seaman's election to use an unsafe appliance is in disobedience of orders or made while not on duty.

Affirmed.

MR. JUSTICE MCREYNOLDS thinks the petitioner's request for the charge in respect of assumption of risk should have been granted and that, for that reason, the challenged judgment should be reversed.

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

GWIN, WHITE & PRINCE, INC. *v.* HENNEFORD ET AL.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 75. Argued November 10, 1938.—Decided January 3, 1939.

A state tax measured by the gross receipts of the taxpayer from his business of marketing fruit shipped from the State to the places of sale in other States and foreign countries, *held* a burden on interstate and foreign commerce prohibited by the commerce clause of the Constitution. P. 436.

The business was that of a marketing agent for a federation of fruit growers. The agent, with the aid of numerous representatives without the State, sold the fruit to purchasers in other States and in foreign countries, for prices fixed by the principal, collected and accounted for the proceeds, and was paid at so much per box. The tax, though nominally imposed upon the agent's activities in Washington, is not apportioned to those activities, but is measured, like the compensation taxed, upon the entire interstate commerce service rendered, both within and without the State, and burdens that commerce in direct proportion to its volume. If Washington is free to exact such a tax, other States to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service.

193 Wash. 451; 75 P. 2d 1017, reversed.

APPEAL from a judgment affirming a judgment dismissing on the merits a bill to enjoin members of the State Tax Commission of Washington from collecting a tax on the "business activities" of the plaintiff-appellant.

Mr. Frank S. Bayley, with whom *Messrs. Carl E. Croson* and *Ofell H. Johnson* were on the brief, for appellant.

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

MR. JUSTICE STONE delivered the opinion of the Court.

This appeal raises the single question whether a Washington tax measured by the gross receipts of appellant from its business of marketing fruit shipped from Washington to the places of sale in various states and in foreign countries is a burden on interstate and foreign commerce prohibited by the commerce clause of the Federal Constitution.

Appellant, a Washington corporation licensed to do business there, brought this suit in the State Superior Court to restrain appellees, comprising the State Tax Commission, from collecting the "business activities" tax laid by Chapter 180 of Washington Laws of 1935, amending Chapter 191 of Washington Laws of 1933, on the ground that it infringes the commerce clause. By stipulation after demurrer to the bill of complaint the cause was tried and decided on the merits, upon facts stated in the complaint and certain others specified in the stipulation. Judgment of the trial court for appellees was affirmed by the Supreme Court of Washington, 193 Wash. 451; 75 P. 2d 1017, and the case comes here on appeal under § 237 (a) of the Judicial Code as amended, 28 U. S. C. § 344.

Sections 4(e), 5(g), (m) of Tit. II, c. 180 of Washington Laws of 1935 lay "a tax for the act or privilege of engaging in business activities" upon every person (including corporations) "engaging within this state in any business activity," with exceptions not now material, at the rate of one-half of 1% of the "gross income of the business." As the record discloses, appellant has a place of business in the state of Washington from which it carries on its operations in marketing, in other states and foreign countries, apples and pears grown in Washington and Oregon. Its entire business is that of marketing agent

for fruit growers and growers' coöperative organizations in those states. As such it makes sales and deliveries of the fruit in other states and in foreign countries, collects the sales prices and remits the proceeds to its principals after deducting transportation charges, certain expense allowances and its own compensation. In the course of the business the fruit is shipped from the states of origin—approximately 25% from Oregon—to other states and foreign countries, sometimes directly to the purchasers, but more often it is consigned to appellant at extra-state points from which it is diverted by appellant to purchasers who buy the fruit while in transit, or where it is stored pending sale. Representatives of appellant at numerous points without the state negotiate sales of the fruit on behalf of appellant and on its approval execute written contracts of sale, effect delivery of the shipments to purchasers, collect the purchase price and remit it to appellant in Washington, where it is accounted for to the shippers. In conducting the business appellant sends to its representatives without the state daily bulletins listing the fruit, some of which is in transit interstate and some of which has already been placed in storage without the state, and it expends large amounts for communications by telephone, telegraph and cable between itself in Washington and its representatives outside the state.

The entire Washington business is carried on by appellant under contract with an incorporated federation of twelve state coöperative growers' organizations. By this contract appellant is given exclusive authority to sell all apples and pears coming into the possession and control of the federation as agent for its members and to collect the proceeds of sale. Appellant undertakes to sell these products at prices fixed by the federation, to obtain their widest possible distribution, to attend to all traffic matters pertaining to shipment and transportation of the fruit, to effect delivery to purchasers and to collect and

remit the sales prices. The stipulated compensation for the entire service is at the rate of 8 cents a box for apples sold and 10 cents a box for pears. According to the bill of complaint appellees assert that appellant is subject to the tax upon its entire gross revenue from the business, and they threaten to collect the tax and to impose penalties for its nonpayment. But on the trial it was stipulated that "the state makes no claim" to the tax upon appellant's Oregon business, and we treat the decision and decree of the state court as concerned only with the validity of the tax measured by the amount of fruit shipped from Washington.

The Supreme Court of Washington, conceding that the shipment of the fruit from the state of origin to points outside, and its sale there, involve interstate commerce, held nevertheless that appellant's activities in Washington in promoting the commerce were a local business, subject to state taxation as is other business carried on in the state, and it sustained the present levy, against attack under the commerce clause, as a tax upon those activities, citing *Ficklen* v. *Shelby County Taxing District,* 145 U. S. 1, and *American Manufacturing Co.* v. *St. Louis,* 250 U. S. 459.

We need not stop to consider which, if any, of appellant's activities in carrying on its business are in themselves transportation of the fruit in interstate or foreign commerce. For the entire service for which the compensation is paid is in aid of the shipment and sale of merchandise in that commerce. Such services are within the protection of the commerce clause, *Robbins* v. *Shelby County Taxing District,* 120 U. S. 489; *Caldwell* v. *North Carolina,* 187 U. S. 622; *Real Silk Mills* v. *Portland,* 268 U. S. 325; and the only question is whether the taxation of appellant's gross receipts derived from them is such an interference with interstate commerce as to bring the tax within the constitutional prohibition.

While appellant is engaged in business within the state, and the state courts have sustained the tax as laid on its activities there, the interstate commerce service which it renders and for which the taxed compensation is paid is not wholly performed within the state. A substantial part of it is outside the state where sales are negotiated and written contracts of sale are executed, and where deliveries and collections are made. Both the compensation and the tax laid upon it are measured by the amount of the commerce—the number of boxes of fruit transported from Washington to purchasers elsewhere; so that the tax, though nominally imposed upon appellant's activities in Washington, by the very method of its measurement reaches the entire interstate commerce service rendered both within and without the state and burdens the commerce in direct proportion to its volume.

The constitutional effect of a tax upon gross receipts derived from participation in interstate commerce and measured by the amount or extent of the commerce itself has been so recently and fully considered by this Court that it is unnecessary now to elaborate the applicable principles. *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250; *Adams Manufacturing Co.* v. *Storen,* 304 U. S. 307; cf. *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.,* 303 U. S. 604.

It has often been recognized that "even interstate business must pay its way" by bearing its share of local tax burdens, *Postal Telegraph-Cable Co.* v. *Richmond,* 249 U. S. 252, 259, and that in consequence not every local tax laid upon gross receipts derived from participation in interstate commerce is forbidden. See *Western Live Stock* v. *Bureau of Revenue, supra,* 254 *et seq.,* and cases cited. But it is enough for present purposes that under the commerce clause, in the absence of Congressional action, state taxation, whatever its form, is precluded if it discriminates against interstate commerce or

undertakes to lay a privilege tax measured by gross receipts derived from activities in such commerce which extend beyond the territorial limits of the taxing state. Such a tax, at least when not apportioned to the activities carried on within the state, see *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217; *Wisconsin & M. Ry. Co.* v. *Powers*, 191 U. S. 379; *Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450; *United States Express Co.* v. *Minnesota*, 223 U. S. 335; cf. *Ficklen* v. *Shelby County Taxing District*, *supra*; *American Manufacturing Co.* v. *St. Louis*, *supra*, burdens the commerce in the same manner and to the same extent as if the exaction were for the privilege of engaging in interstate commerce and would, if sustained, expose it to multiple tax burdens, each measured by the entire amount of the commerce, to which local commerce is not subject.

Here the tax, measured by the entire volume of the interstate commerce in which appellant participates, is not apportioned to its activities within the state. If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed. *Adams Manufacturing Co.* v. *Storen*, *supra*, 310, 311; cf. *Fargo* v. *Michigan*, 121 U. S. 230; *Philadelphia & Southern S. S. Co.* v. *Pennsylvania*, 122 U. S. 326; *Galveston, H. & S. A. Ry. Co.* v. *Texas*, 210 U. S. 217, 225, 227; *Meyer* v. *Wells, Fargo & Co.*, 223 U. S. 298; *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292; *Fisher's Blend Station* v. *State Tax Commission*, 297 U. S. 650; see *Western Live Stock* v. *Bureau of*

Revenue, supra, 260. Such a multiplication of state taxes, each measured by the volume of the commerce, would reëstablish the barriers to interstate trade which it was the object of the commerce clause to remove. Unlawfulness of the burden depends upon its nature, measured in terms of its capacity to obstruct interstate commerce, and not on the contingency that some other state may first have subjected the commerce to a like burden.

Ficklen v. *Shelby County Taxing District, supra,* which the Washington Supreme Court thought sustained its decision, upheld a state license tax imposed upon the privilege of doing a brokerage business within the state and measured by the gross receipts of commissions from sales of merchandise shipped into the state for delivery after the sales were made. Although the tax, measured by gross receipts, to some extent burdened the commerce, it was held that the burden did not infringe the commerce clause. Since it was apportioned exactly to the activities taxed, all of which were intrastate, the tax was fairly measured by the value of the local privilege or franchise. *New York, L. E. & W. R. Co.* v. *Pennsylvania,* 158 U. S. 431; *American Manufacturing Co.* v. *St. Louis, supra; Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165; *Coverdale* v. *Arkansas-Louisiana Pipe Line Co., supra.* Neither the tax in the *Ficklen* case nor that upheld in *American Manufacturing Co.* v. *St. Louis, supra,* was open to the objection directed here to the present tax and sustained in *Adams Manufacturing Co.* v. *Storen, supra,* 311, that the tax is measured by gross receipts from activities in interstate commerce conducted both within and without the taxing state and that the exaction is of such a character that if lawful it might be laid to the fullest extent by the states in which the merchandise is sold as well as by those from which it is shipped. See *Western Live Stock* v. *Bureau of Revenue, supra,* 260.

For more than a century, since *Brown* v. *Maryland,* 12 Wheat. 419, 445, it has been recognized that under the commerce clause, Congress not acting, some protection is afforded to interstate commerce against state taxation of the privilege of engaging in it. *Webber* v. *Virginia,* 103 U. S. 344; *Telegraph Co.* v. *Texas,* 105 U. S. 460; *Robbins* v. *Shelby County Taxing District, supra; Leloup* v. *Mobile,* 127 U. S. 640; *Brennan* v. *Titusville,* 153 U. S. 289; *International Text Book Co.* v. *Pigg,* 217 U. S. 91; *Fisher's Blend Station* v. *State Tax Commission, supra; Adams Manufacturing Co.* v. *Storen, supra.* For half a century, following the decision in *Philadelphia & Southern S. S. Co.* v. *Pennsylvania,* 122 U. S. 326, it has not been doubted that state taxation of local participation in interstate commerce, measured by the entire volume of the commerce, is likewise foreclosed. During that period Congress has not seen fit to exercise its constitutional power to alter or abolish the rules thus judicially established. Instead, it has left them undisturbed, doubtless because it has appreciated the destructive consequences to the commerce of the nation if their protection were withdrawn. Meanwhile Congress has accommodated its legislation, as have the states, to these rules as an established feature of our constitutional system. There has been left to the states wide scope for taxation of those engaged in interstate commerce, extending to the instruments of that commerce, to net income derived from it, and to other forms of taxation not destructive of it. See *Western Live Stock* v. *Bureau of Revenue, supra,* 254, *et seq.,* and cases cited.

Reversed.

MR. JUSTICE BUTLER, concurring.

MR. JUSTICE MCREYNOLDS and I concur in the result.

Appellant is engaged exclusively in interstate commerce, a part of which is carried on in the State of Washington.

For the privilege of doing that business the state statute purports to tax its gross earnings at the rate of one-half of one per cent. The exaction is plainly repugnant to the commerce clause. *Philadelphia & Southern S. S. Co.* v. *Pennsylvania,* 122 U. S. 326. *Galveston, H. & S. A. Ry. Co.* v. *Texas,* 210 U. S. 217. *Meyer* v. *Wells, Fargo & Co.,* 223 U. S. 298, 300. *New Jersey Telephone Co.* v. *Tax Board,* 280 U. S. 338, 346. *Fisher's Blend Station* v. *Tax Comm'n,* 297 U. S. 650, 655–656. *Puget Sound Co.* v. *Tax Comm'n,* 302 U. S. 90, 94. See *Matson Navigation Co.* v. *State Board,* 297 U. S. 441, 444. Reversal appropriately may be based on citation of these decisions without more.

MR. JUSTICE BLACK, dissenting.

"Equality is the theme that runs through all the sections of the statute" [1] of the State of Washington here considered. The statute imposes a general, non-discriminatory tax—measured by gross receipts—upon all businesses operating in that State. The intended equality of the statute will become unequality by the judgment of this Court here, because appellant and all other businesses in Washington that receive income for selling Washington products in that and other States, are exempted from the tax. Appellant is exempted from past, present and future payments of this tax. Not so, however, as to past, present, or future payments by Washington businesses selling only to citizens of that State. They must bear the entire burden of the tax. Thus the judgment here, framed to prevent conjectured future, possible—not present and actual—discrimination against interstate commerce, makes of this statute with equality as its theme, an instrument of discrimination against Washington intra-state

[1] *Henneford* v. *Silas Mason Co.,* 300 U. S. 577, 583.

businesses. Appellant, a Washington agent or broker selling Washington products in that State and elsewhere, can now do so freed from this business tax. Washington agents and brokers selling the same products to Washington citizens (and all other local businesses) must pay. Washington's intra-state commerce thus will "pay its way" [2]; interstate commerce need not.

In 1933, Washington's system of taxation failed to supply adequate revenue to support activities essential to the welfare of its people. Mounting delinquencies due to burdensome taxes on property led the state legislature to conclude that property taxes had to be reduced. This reduction was made. Then, forced to seek new sources of revenue,[3] the State turned—as did many other States faced with similar needs [4]—to a general, non-discriminatory excise tax upon business carried on in Washington, measured by gross receipts. This general and non-discriminatory tax enabled "the common schools of the state . . . to operate the full school term." [5] While those engaged in interstate businesses have enjoyed the property tax reduction in common with all Washington businesses, the exemption from taxation here granted appellant forces intra-state businesses to bear the entire burden of the

[2] Cf. *Postal Telegraph-Cable Co.* v. *Richmond,* 249 U. S. 252, 259.

[3] Fifth Biennial Report, Tax Commission of Washington; "The Sales Tax in the American States," Haig & Shoup (1934), p. 309 *et seq.*

[4] At least eleven States—most of them recently—have imposed gross income or gross sales taxes upon the privilege of doing business within their respective borders. See, "Tax Systems of the World," 7th ed. (CCH), pp. 153 to 156. While these laws vary in application, several may be generally characterized as similar to the Washington tax. See, "State Law Index" No. 5, p. 673 (Legislative Reference Service, Library of Congress); Fifth Biennial Report, *supra;* dissent, *Adams Manufacturing Co.* v. *Storen,* 304 U. S. 307, 317, footnote 4.

[5] Fifth Biennial Report, *supra,* p. 8.

excise that replaced the repealed property taxes.[6] Only intra-state business is required to contribute under this excise to the support of the state government that affords protection to both interstate and local business.[7]

Appellant, a Washington corporation, serves—under a contract made in Washington—as sales agent for Washington apple growers. Its agents sell these Washington-grown apples in Washington and other States. The Washington excise tax is measured by appellant's gross income—received in Washington—and earned solely by selling apples grown in and shipped from that State.[8]

No other State in which appellant's agents perform sales services has imposed a similar tax upon appellant measured by any part of its gross receipts. Such an eventuality—if it should occur—is given the title of "multiple taxation." And such conjectured "multiple taxation" would be—it is said—a violation of that Clause of the Constitution which gives Congress power to regulate commerce among the States. Thus far, Congress has not deemed it necessary to prohibit the States from

[6] Cf. *Cudahy Packing Co.* v. *Minnesota,* 246 U. S. 450, 453, 454; *United States Express Co.* v. *Minnesota,* 223 U. S. 335, 345, 347.

[7] *Woodruff* v. *Parham,* 8 Wall. 123, 137.

[8] While about 25% of appellant's business relates to the sale of Oregon-grown apples, the State of Washington made no contention that it could under its statute impose a tax upon appellant's receipts from the sale of Oregon-grown apples. The judgment of the State court from which appeal was taken expressly states: "the court . . . considered . . . the stipulation between the parties that the state makes no claim to the tax upon the Oregon business of . . . [appellant] even though it clears through . . . [appellant's] Seattle office," and was "of the opinion that the business of . . . [appellant], *originating in the State of Washington, is taxable.*" (Italics supplied.) In affirming this judgment the Supreme Court of Washington pointed out that appellant was denying "the state tax commission's claim of a tax liability on the total commission appellant receives *from the growers for Washington-grown food sold and shipped to parts within and without this state . . .*" (Italics supplied.)

levying taxes measured by gross receipts from interstate commerce. While there are strong logical grounds upon which this Court has based its invalidation of state laws actually imposing unjust, unfair, and discriminatory burdens against interstate commerce as such,[9] the same grounds do not support a judicial regulation designed to protect commerce from validly enacted non-discriminatory state taxes which do not—but may sometime—prove burdensome. With reference to the possible invalidity of another phase of this same Washington tax program by reason of conjectured future taxes of other States, this Court has said: [10]

"A state, for many purposes, is to be reckoned as a self-contained unit, which may frame its own system of burdens and exemptions without heeding systems elsewhere. If there are limits to that power, there is no need to mark them now. It will be time enough to mark them when a taxpayer paying in the state of origin is compelled to pay again in the state of destination."

So here, if national regulation to prevent "multiple taxation" is within the constitutional power of this Court, it would seem to be time enough to consider it when appellant or some other taxpayer is actually subjected to "multiple taxation."

Unless we presuppose that the conjectured tax on appellant's gross income by another State would be valid, appellant has not even shown a hypothetical possibility of injury. Certainly, Washington's law, enjoying a strong presumption of constitutionality, would not be invalidated because of apprehension that another State might lay a tax on appellant's income which is invalid and unenforceable. Any other state's tax on appellant which

[9] *Welton* v. *Missouri*, 91 U. S. 275; *Walling* v. *Michigan*, 116 U. S. 446; *Darnell & Son Co.* v. *Memphis*, 208 U. S. 113; cf. *Philadelphia & Southern S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, 342, 344–5.

[10] *Henneford* v. *Silas Mason Co., supra*, at 587.

directly discriminates against interstate commerce, could not (together with Washington's tax) create a "multiple burden." This is so, because such a discriminatory tax law, standing alone, would be held to violate the Commerce Clause.[11] Every State has the right to utilize gross receipts as the measure of taxes which it has the power to impose.[12] Washington—it is admitted—had the power to tax appellant save for the possibility of "multiple taxation." Since "multiple taxation" can only result if another State passes a valid, non-discriminatory tax law, two non-discriminatory state laws when combined become invalid and discriminatory under the Commerce Clause, as a result of the judgment here. This is the consequence of departing from the sound position that state laws are not invalid under the Commerce Clause unless they actually discriminate against interstate commerce or conflict with a regulation enacted by Congress.

Appellant is here specifically exempted from Washington's non-discriminatory "tax for the act or privilege of engaging in business activities" in Washington because of conjectured similar taxation of appellant in other States. However, the principles announced in the first three cases relied on by the majority[13] would constitute authority for exempting appellant's agents from a tax on the privilege of engaging in the business of selling and delivering apples "in other States to which [appellant's] commerce extends." These principles were there applied by this Court to invalidate taxes on the privilege of negotiating interstate sales, levied by States in which the purchasers resided. In one of the cases (*Caldwell* v. *North*

[11] See Note 9, *supra;* cf. *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506, 516; *Pacific Co.* v. *Johnson,* 285 U. S. 480, 493.

[12] *New York Rapid Transit Corp.* v. *New York,* 303 U. S. 573, 582.

[13] *Robbins* v. *Shelby County Taxing District,* 120 U. S. 489; *Caldwell* v. *North Carolina,* 187 U. S. 622; *Real Silk Mills* v. *Portland,* 268 U. S. 325.

Carolina, decided in 1903), this Court observed (pp. 632–3) "that efforts to control commerce of this kind, in the interest of the States *where the purchasers reside,* have been frequently made in the form of statutes and municipal ordinances, but . . . such efforts have been heretofore rendered fruitless by the supervising action of this court." (Italics supplied.) The reasoning of these three cases, however, does not support the judgment here which invalidates a privilege tax levied, not by the State where the apples were purchased, but by the State where the apples were grown, where the appellant does business, and to which all proceeds from sales made by appellant are remitted. This is especially true since the three earlier decisions assumed that a privilege tax imposed by an interstate business's State of residence (such as this Washington tax on appellant) would be valid. In *Robbins* v. *Shelby County Taxing District, supra,* at page 498, the Court—in explaining that the levy by the State of purchase of a tax on the privilege of selling would discriminate against out of state businesses—said: "it is presumable, . . . [that] the merchants and manufacturers of other states in the places where they reside" are taxed for their licensed businesses there. In showing that "the tax . . . [was] discriminative against the merchants and manufacturers of other states" the Court also stated that ". . . it not only operates as a restriction upon interstate commerce, but . . . it is intended to have that effect as one of its principal objects." Appellant's business is exempted here from a privilege tax in its State of residence, and approval is given authorities exempting such business from privilege taxes in other States where appellant's activities are carried on. Thus, these three cases stand between appellant and conjectured "multiple taxation" in other States where its agents sell apples. The exemption of interstate business from the type of state taxation here involved is now made complete.

A business engaging in activities in two or more States should bear its part of the tax burdens of each. If valid, non-discriminatory taxes imposed in these States create "multiple" burdens, such "burdens" result from the political subdivisions created by our form of government. They are the price paid for governmental protection and maintenance in all States where the taxpayer does business. A State's taxes are not discriminatory if the State treats those engaged in interstate and intra-state business with equality and justice. If the combined valid and non-discriminatory taxes of many States raise a problem, only Congress has power to consider that problem and to regulate with respect to it. Neither a State, nor a State with the approval of this Court, has the constitutional power to enact rules to adjust and govern conflicting state interests in interstate commerce.

Legislative inquiry might disclose to Congress that the speculative danger of injury to interstate commerce is more than offset by the certain injury to result from depriving States of a practical method of taxation. It might appear to Congress that the adoption of a rule against state taxes measured by interstate commerce gross receipts would deprive the States of a potent weapon useful in preventing evasion of state taxes.

This Court's rule would permit Washington to tax appellant's net income. But determination and collection of taxes on net incomes are often very difficult because corporate profits and income may be isolated or hidden by accounting methods, holding companies and intercorporate dealings. A substantial portion of the nation's commerce is carried on by corporations with far-flung business activities in many States. Inter-corporate relations may assume "their rather cumbersome and involved nature for the purpose of evading [a State] . . . tax" on income and to "remove income from the state though still creating

it within the state." [14] Even "profits themselves are not susceptible of ascertainment with certainty and precision except as the result of inquiries too minute to be practicable." [15]

Congress might conclude that the States should not be prohibited from utilizing non-discriminatory gross receipts taxes for state revenues, because there are "justifications for the gross receipts tax. . . . 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." [16]

Only a comprehensive survey and investigation of the entire national economy—which Congress alone has power and facilities to make—can indicate the need for, as well as justify, restricting the taxing power of a State so as to provide against conjectured taxation by more than one State on identical income. A broad and deliberate legislative investigation—which no Court can make—may indicate to Congress that a wise policy for the national economy demands that each State in which an interstate business operates be permitted to apply a non-discrimi-

[14] *Palmolive Co.* v. *Conway*, 43 F. 2d 226, 230, cert. den., 287 U. S. 601; see Magill "Allocation of Income by Corporate Contract," 44 Harvard Law Review 935; "Interstate Allocation of Corporate Income for Taxing Purposes" (note) XL Yale Law Review 1273; Huston "Allocation of Corporate Net Income for Purposes of Taxation," XXVI Ill. Law Review 725; Breckenridge, "Tax Escape by Manipulations of Holding Company," 9 No. Car. Law Review 189; Berle and Means, "The Modern Corporation and Private Property" (1934), p. 202 *et seq.*

[15] Cardozo, J., dissenting, *Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 550, 576.

[16] *New York Rapid Transit Corp.* v. *New York, supra*, 582–3.

natory tax to the gross receipts of that business either because of its size and volume or partially to offset the tendency toward centralization of the nation's business.[17] Congress may find that to shelter interstate commerce in a tax exempt refuge—in the manner of the judgment here—is to grant that commerce a privileged status over intrastate business, contrary to the national welfare.

It is indicated, however, that Washington might have validly apportioned its fair share of appellant's gross income for taxation. To say that a single State can—subject to supervision and approval by this Court—enact regulations apportioning its share of the taxable income from interstate commerce, is to transfer the constitutional power to regulate such commerce from Congress to the States and federal courts to which the Constitution gives no such power. The Constitution contemplates that Congress alone shall provide for necessary national uniformity in rules governing foreign and interstate commerce.[18] Rules to further free trade among the States by apportionment or division of taxes on such commerce, are regulations. Both the necessity for such a rule, and the determination and enactment of a regulation to put it into effect, call for facilities and powers possessed neither by a State nor by the courts. A state legislature attempting to put upon interstate business its apportioned share of

[17] Cf. Brandeis, J., dissenting, *Liggett Co.* v. *Lee*, 288 U. S. 517, 574: "Businesses may become as harmful to the community by excessive size, as by monopoly or the commonly recognized restraints of trade. If the State should conclude that bigness in retail merchandising as manifested in corporate chain stores menaces the public welfare, it might prohibit the excessive size or extent of that business . . . It was said in *United States* v. *U. S. Steel Corp.*, 251 U. S. 417, 451, that the Sherman Anti-Trust Act did not forbid large aggregations; but the power of Congress to prohibit corporations of a size deemed excessive from engaging in interstate commerce was not questioned."

[18] *Welton* v. *Missouri, supra*, 279, 280.

the burden of taxation is "faced with the impossibility of allocating specifically the profits earned by the processes conducted within" the borders of the State.[19] If an "apportionment" between States of taxes on interstate business is to be made, it cannot be accomplished without national inquiry and national action.

While some formulas for apportionment devised by States have been approved by this Court,[20] others have been invalidated.[21] A formula applied by Connecticut was held valid,[22] but a similar formula was held invalid when adopted in North Carolina.[23] The litigation which has followed in the wake of state attempts at apportionment has confirmed, in the opinion of many, the wisdom of the Founders in denying to the States and courts, and granting to the Congress, exclusive power over interstate commerce. Departures from this principle have, as here, left intra-state businesses—usually comparatively small—to bear the entire burden of taxes invalidated as to interstate businesses, while interstate businesses—usually conducted on a large scale—have been exempted. Should Washington attempt an apportionment, the fate of its formula would be uncertain until this Court passes upon its fairness. A state's inability to obtain necessary data and information as a basis of a formula for apportionment between itself and the other forty-seven States, indicates in advance that its apportionment might be invalidated. When state statutes of apportionment come

[19] *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, 121.

[20] *Underwood Typewriter Co.* v. *Chamberlain, supra; Bass, Ratcliff & Gretton* v. *Tax Comm'n*, 266 U. S. 271; cf. *National Leather Co.* v. *Massachusetts*, 277 U. S. 413.

[21] *Hans Rees' Sons* v. *North Carolina*, 283 U. S. 123; cf. *Wallace* v. *Hines*, 253 U. S. 66; *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203.

[22] *Underwood* case, *supra*.

[23] *Rees'* case, *supra*.

here this Court is unable to make the broad national inquiry necessary to reach an informed conclusion on this question of economic policy.

But Congress has both the facilities for acquiring the necessary data, and the constitutional power to act upon it. "The power over commerce . . . was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it." [24] The "disastrous experiences under the Confederation when the States vied in discriminatory measures against each other" [25] united the Constitutional Convention in the conviction that some branch of the Federal Government should have exclusive power to regulate commerce among the States and with foreign nations. Our Constitution adopted by that Convention divided the powers of government between three departments, Congress, the Executive and the Judiciary. It allotted to Congress alone the "Power . . . to regulate Commerce with foreign Nations, and among the several States, . . ." Congress is the only department of our government—state or federal—vested with authority to determine whether "multiple taxation" is injurious to the national economy; whether national regulations for division of taxes measured by interstate commerce gross receipts should or should not be adopted; and what regulations, if any, should protect interstate commerce from "multiple taxation." It "is the function of this court to interpret and apply the law already en-

[24] *Gibbons* v. *Ogden,* 9 Wheat. 1, 190.

[25] *The Minnesota Rate Cases,* 230 U. S. 352, 398. See also *Houston, E. & W. T. Ry. Co.* v. *United States, (The Shreveport Case),* 234 U. S. 342, 350. "The power to regulate commerce among the several States was vested in Congress in order to secure equality and freedom in commercial intercourse against discriminating State legislation. . . ." *Railroad Co.* v. *Richmond,* 19 Wall. 584, 589. See also, *County of Mobile* v. *Kimball,* 102 U. S. 691, 697.

acted, but not under the guise of construction to provide a more comprehensive scheme of regulation than Congress has decided upon. Nor, in the absence of Federal action, may we deny effect to the laws of the State enacted within the field which it is entitled to occupy until its authority is limited through the exertion by Congress of its paramount constitutional power." [26]

Until 1936,[27] this Court had never stricken down—as violating the Commerce Clause—a uniform and non-discriminatory state privilege tax measured by gross receipts, and constituting an integral element of a comprehensive state tax program. In *Philadelphia & Southern S. S. Co.* v. *Pennsylvania,* 122 U. S. 326, decided half a century ago and relied upon to support the judgment here, this Court did not determine that such a general business tax—applied to all businesses within a State—could not be measured by interstate commerce gross receipts. On the contrary, the Court pointed out that the invalidated tax was "a tax on transportation only" (p. 345), and that even one engaged in transportation could "like any other citizen, . . . be personally taxed for the amount of his property or estate, without regard to the source from which it was derived, whether from commerce, or banking, or any other employment." That, as the Court made clear, was "an entirely different thing from laying a special tax upon his receipts in a particular employment." (p. 342.) Since the *Philadelphia S. S. Co.* case, this Court has sustained many state taxes measured by receipts both from interstate and intra-state commerce.[28] It was not until the decisions in the cases of *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292, 296, and *United States*

[26] *The Minnesota Rate Cases, supra,* 433.

[27] *Fisher's Blend Station* v. *Tax Comm'n,* 297 U. S. 650, see *Adams Manufacturing Co.* v. *Storen,* 304 U. S. 307.

[28] See notes 17, 18 and 19, dissent, *Adams Manufacturing Co.* v. *Storen, supra,* p. 329.

Glue Co. v. *Oak Creek,* 247 U. S. 321, 329, decided 1917 and 1918, respectively, that this Court first tentatively announced, by way of dicta, a rule condemning state taxes based on gross receipts from interstate commerce. The full-blown rule under which the federal courts strike down generally applied non-discriminatory state taxes measured by gross receipts from interstate commerce ripened into its present expanded form only eight months ago (*Adams Manufacturing Co.* v. *Storen,* May 16, 1938). This recent judicial restriction—still less than a year old—on the power of the States to levy general gross receipts taxes, cannot be justified or validated by claiming prestige from advanced age.

Since the Constitution grants sole and exclusive power to Congress to regulate commerce among the States, repeated assumption of this power by the courts—even over a long period of years—could not make this assumption of power constitutional. April 25, 1938, this Court overruled and renounced an unconstitutional assumption of power by the federal courts based on a doctrine extending back through an unbroken line of authority to 1842.[29] In overruling, it was said: "We merely declare that in applying the doctrine [declared unconstitutional] this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States." (at page 80.) A century old rule had produced "injustice and confusion" and "the unconstitutionality of the course pursued . . . [had become] clear . . ." (pp. 77, 78.) That decision rested upon the sound principle that the rule of stare decisis cannot confer powers upon the courts which the inexorable command of the Constitution says they shall not have. State obedience to an unconstitutional assumption of power by the judicial branch of government,

[29] *Erie R. Co.* v. *Tompkins,* 304 U. S. 64.

and inaction by the Congress, cannot amend the Constitution by creating and establishing a new "feature of our constitutional system." No provision of the Constitution authorizes its amendment in this manner.

It is essential today, as at the time of the adoption of the Constitution, that commerce among the States and with foreign nations be left free from discriminatory and retaliatory burdens imposed by the States. It is of equal importance, however, that the judicial department of our government scrupulously observe its constitutional limitations and that Congress alone should adopt a broad national policy of regulation—if otherwise valid state laws combine to hamper the free flow of commerce. Doubtless, much confusion would be avoided if the courts would refrain from restricting the enforcement of valid, non-discriminatory state tax laws. Any belief that Congress has failed to take cognizance of the problems of conjectured "multiple taxation" or "apportionment" by exerting its exclusive power over interstate commerce, is an inadequate reason for the judicial branch of government—without constitutional power—to attempt to perform the duty constitutionally reposed in Congress. I would return to the rule that—except for state acts designed to impose discriminatory burdens on interstate commerce because it *is* interstate—Congress alone must "determine how far [interstate commerce] . . . shall be free and untrammelled, how far it shall be burdened by duties and imposts, and how far it shall be prohibited." [30]

For these and other reasons set out elsewhere [31] I believe the judgment of the Supreme Court of Washington should be affirmed.

---

[30] *Welton* v. *Missouri, supra,* 280.

[31] See dissent, *Adams Mfg. Co.* v. *Storen,* 304 U. S. 307, 316.

PRINCESS LIDA OF THURN AND TAXIS ET AL. *v.* THOMPSON ET AL., TRUSTEES.

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

No. 118. Argued November 17, 18, 1938.—Decided January 3, 1939.

1. The jurisdiction of the Court of Common Pleas of the State of Pennsylvania under a bill to compel specific performance of an agreement *inter partes* creating a trust ceased when the court's decree requiring such performance was complied with and satisfied. P. 461.
2. Two surviving trustees of a voluntary trust filed an account, for themselves and for a deceased trustee, in a Court of Common Pleas of Pennsylvania. Thereafter, two of the five *cestuis que trustent* sued the surviving trustees and the administrator of the deceased one, in a federal court in Pennsylvania, charging mismanagement and praying for an accounting and restitution, for removal of the defendant trustees, and that all trustees under the agreement be required to give bond, and for general relief. One of the other beneficiaries appeared in the Common Pleas proceeding and excepted to the trustees' account. *Held:*

   (1) That under Pennsylvania statutes, the state court, upon the filing of the account, gained jurisdiction over the trust *quasi in rem*. *Shelby v. Bacon*, 10 How. 56, limited. P. 462.

   (2) That the federal court was without jurisdiction in the suit before it, involving as it did control of the trust *res* and administration, already within the exclusive jurisdiction of the state court, and was without power to enjoin parties from prosecuting the state proceeding. P. 465.

   (3) That the state court properly enjoined parties from further proceeding in the federal court. P. 467.
3. Where the judgment sought is strictly *in personam*, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as *res judicata* in the other. P. 466.
4. But if the two suits are *in rem*, or *quasi in rem*, so that the court, or its officer, has possession or must have control of the property which is the subject of the litigation in order to proceed with the cause and grant the relief sought, the jurisdiction of the one court must yield to that of the other. *Id.*

The principle applicable to both federal and state courts that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted, but applies as well where suits are brought to marshal assets, administer trusts, or liquidate estates, and in suits of a similar nature where, to give effect to its jurisdiction, the court must control the property. *Id.*

An action in the federal court to establish the validity or the amount of a claim, in respect of a trust, constitutes no interference with the state court's possession or control of a *res*. *Id.*

329 Pa. 497; 198 A. 58, affirmed.

CERTIORARI, *post*, p. 582, to review a decree which affirmed an order of a Court of Common Pleas of Pennsylvania enjoining the petitioners here from prosecuting a suit in a federal court.

Mr. Charles H. Tuttle, with whom *Mr. Gerald J. Craugh* was on the brief, for petitioners.

Messrs. Dean D. Sturgis and *W. Brown Higbee* for respondents.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This case presents the question whether the exercise of jurisdiction by a state court over the administration of a trust deprives a federal court of jurisdiction of a later suit involving the same subject matter.

December 6, 1906, Gerald P. Fitzgerald, a citizen of Ireland, and his wife Lida, entered into an agreement with each other and with Josiah V. Thompson, Charles E. Lenhart, and Fitzgerald, as trustees, which recited the marriage of the two first named, that they had three sons, and that, on December 5, 1906, Lida had obtained a decree of divorce in Ireland. The agreement provided

for payments of alimony by Gerald to Lida pending an absolute divorce (which was eventually granted), and for payments thereafter by Gerald to the trustees for the benefit of Lida and the children, to be made out of his share of the profits of two partnerships of which he was a member. From these profits Gerald was to pay the trustees for Lida's benefit an annuity of $15,000 for the first three years and $20,000 thereafter. He was further to pay any difference between the amount of the annuity and one-third of his share of the profits annually until a fund should be established in the hands of the trustees amounting to $300,000, in which Lida, the sons, and Gerald were given interests, either of income or principal or both. In the event of death, resignation, or disability of a trustee, or a successor trustee, the vacancy was to be filled by appointment by the two remaining trustees, or, on their failure to appoint, by the Court of Common Pleas of Fayette County, Pennsylvania, on the petition of a remaining trustee or of Lida.

Lida and the three sons are living. Gerald has assigned his interest in the trust to the Second National Bank of Uniontown, Pennsylvania.

Gerald performed the agreement until June, 1910, when he repudiated it. Thompson, one of the trustees, Lida and her sons, brought suit in equity in the Common Pleas Court of Fayette County, Pennsylvania, seeking performance of the agreement by Gerald and other relief. Gerald answered praying a declaration that the agreement was void. After a hearing the court entered a decree sustaining the agreement; ordering Gerald to account and to pay what might be shown to be due; removing him as a trustee; fixing a lien upon his partnership interests; and restraining him from encumbering or conveying them until the $300,000 fund contemplated by the agreement should be accumulated in the hands of the trustees.

In March, 1915, the trustees then in office petitioned for leave to amend the agreement and for modification of the earlier decree to provide that Gerald should pay and secure to the trustees the payment of sums sufficient to create two funds, one of $400,000 for Lida's benefit and the other of $300,000 principally for the sons' benefit. The court approved the petition and modified its former decree accordingly. May 25, 1925, the trustees then in office acknowledged receipt of all the sums due under the decree of the court as modified and directed that satisfaction of the decree be entered of record. This was done June 3, 1925.

October 9, 1925, the three acting trustees filed an account in the Common Pleas Court, which, in the absence of exceptions, was confirmed. July 7, 1930, a second and partial account was filed in the same court by two surviving trustees on behalf of themselves and a deceased trustee.

On the next day Lida and her son John brought suit in equity in the United States District Court for the Western District of Pennsylvania against the two trustees and the administrators of the deceased trustee, alleging mismanagement of the trust funds and praying that the trustees be removed and all the defendants be made to account and repay the losses of the estate. Thereafter the Court of Common Pleas extended the time for filing exceptions to the second account and, on February 16, 1931, exceptions were filed by Gerald P. Fitzgerald, Jr. Meantime the trustees moved to dismiss the bill in the federal court for lack of indispensable parties and because the state court had exclusive jurisdiction of the controversy. May 12, 1931, the federal court refused the motion to dismiss and required the defendants to answer, declaring that it would not decide the question of jurisdiction until after answers had been filed. May 18, 1931, the defendants

answered setting up that the controversy was within the exclusive jurisdiction of the state court. Nothing further was done in the federal suit until April 17, 1937, when the plaintiffs amended their bill. May 5, 1937, the trustees answered the amendment. Meantime, on May 1, 1937, the trustees had presented a petition in the state court for a rule upon the plaintiffs in the District Court, the petitioners herein, to show cause why they should not be restrained from prosecuting their suit in the federal court. After an answer by Lida denying that the Common Pleas Court had control or possession of the trust funds or that any controversy was therein pending when suit was instituted in the federal court, the rule was made absolute June 17, 1937. July 6, 1937, John Fitzgerald, one of the petitioners, applied to the federal court for an injunction to restrain the defendants in the case there pending, the respondents herein, from further prosecution of the proceedings in the state court. On the same day the petitioners took an appeal from the order of the Common Pleas Court to the Supreme Court of Pennsylvania. July 19, 1937, the trustees filed in the Common Pleas Court a third and partial account of the trust to which exceptions were filed. Testimony was thereafter taken on the exceptions to the second account. September 18, 1937, the federal court temporarily enjoined the defendants in that court, the respondents herein, from further prosecution of the proceedings in the state court to enjoin the plaintiffs, the petitioners herein, from having the jurisdictional issue tried in the District Court, and set November 8, 1937, for a trial of that issue. Trial was accordingly had.

March 21, 1938, the Supreme Court of Pennsylvania affirmed the order of the Common Pleas Court enjoining the petitioners from prosecuting their suit in the District Court,[1] and, on the same day, the District Court rendered

[1] *Thompson* v. *FitzGerald,* 329 Pa. 497; 198 Atl. 58.

an opinion holding it had jurisdiction notwithstanding the proceedings in the Common Pleas Court. The District Judge entered no decree but stated that requests for findings of fact, conclusions of law, and a form of decree, might be submitted, and that he would proceed thereafter to try the merits of the cause.

We are thus confronted with a situation where each of the courts claiming jurisdiction has restrained the parties before it from proceeding in the other. In view of this unusual state of affairs, of the importance of the question involved, and of the claim that the action of the Supreme Court of Pennsylvania is in conflict with our decisions, we granted the writ of certiorari.

First. The suit brought in Common Pleas Court in 1910 was for the specific performance of the agreement of December 6, 1906. The decree in that suit declared the agreement valid and commanded performance in accordance with its terms. As the agreement called for a continuing performance, and the decree was for enforcement of that performance, the court retained jurisdiction to render the granted relief effective. It exercised this retained jurisdiction in 1915, when, by consent of the parties, it modified its decree to comport with amendments of the agreement. But the court's jurisdiction under the bill ceased when Fitzgerald had completely performed in accordance with the amended decree of 1915, as evidenced by the trustees' acknowledgment filed of record in the court on June 3, 1925, that the terms of the decree had been satisfied. The trust was created by agreement inter partes, one of whom repudiated and failed to perform it. When performance had been obtained the equity proceeding was at an end; the trust res in the hands of the trustees, who were the creatures of the agreement, then had the same status as if the court had never been called upon to act.

Second. Although the agreement provided that vacancies occurring by death, resignation, or incapacity of a

trustee should be filled by the remaining trustees, and that application to the Court of Common Pleas to appoint a new trustee should only be made in the event the trustees in office could not agree on the appointment of a successor, it appears that from time to time trustees presented their resignations to that court and the court purported to accept them. And when the remaining trustees appointed new trustees to fill vacancies they reported their action to the court which sometimes purported to confirm and ratify that action. The record does not disclose that the first method provided in the agreement for filling vacancies ever was impracticable, or that there was occasion for resort to the court. The petitioners contend that in the circumstances, the court's approval was unnecessary and did not amount to an assumption of jurisdiction. We find it unnecessary to pass upon the contention.

Third. The important questions are whether the filing of the trustees' account on July 7, 1930, gave the Common Pleas Court jurisdiction, and, if so, what was the nature and extent of that jurisdiction. The Court of Common Pleas is given "the jurisdiction and powers of a court of chancery, so far as relates to: . . . The control, removal and discharge of trustees, and the appointment of trustees, and the settlement of their accounts." [2] Respecting the character of the jurisdiction conferred by a statutory grant so phrased the Supreme Court of Pennsylvania has said: "The scope of supervisory control of necessity includes any matter which concerns the integrity of the trust res—its administration, its preservation and its disposition and any other matter wherein its officers [trustees] are affected in the discharge of their duties." [3] This jurisdiction is vested

[2] Act of June 16, 1836, P. L. 784, § 13; 17 P. S. § 281.

[3] *Wilson* v. *Board of Directors of City Trusts,* 324 Pa. 545, 551; 188 A. 588, 592.

in the court of common pleas of the county in which "any such trustee shall have resided at the commencement of the trust." [4] Two of the original trustees named in the agreement were residents of Fayette County. Two methods are provided for invoking the jurisdiction with respect to the administration of the trust. The court may cite the trustee on the application of any person in interest "to exhibit an account of the management of the trust estate." [5] The trustee may, on the other hand, obtain an adjudication of his management of the trust by filing his account in the office of the prothonotary of the court and, upon such filing, proceedings are to be had in the same manner as if he had filed the account under compulsion.[6] The trustee is permitted to have an adjudication of his stewardship in this manner every three years.[7]

It thus appears that whether an account be filed pursuant to citation or as the voluntary act of the trustee the jurisdiction of the court attaches and may be exercised over all the matters which fall within its supervisory control of the administration of the estate. The

---

[4] Act of June 14, 1836, P. L. 628, § 15; 20 P. S. § 2741; § 16, 20 P. S. § 2872; § 23, 20 P. S. § 2767; Act of May 1, 1861, P. L. 680, § 1; 20 P. S. § 2871.

[5] Act of June 14, 1836, P. L. 628, § 19; 20 P. S. § 2833.

[6] Act of June 14, 1836, P. L. 628 § 14; 20 P. S. § 2925.

[7] "All trustees of estates . . . may hereafter, triennially, from the date of their appointment, file their accounts in the appropriate courts, which shall be duly audited, and confirmed absolutely to that date: . . . provided further, That due and actual notice shall have been given, where the acount shall be filed by a trustee, to all persons interested in the estate, under the terms and provisions of the trust; . . . and that advertisement shall have been duly made of the filing of said account; and that such persons, actually notified, are legally competent and qualified, either personally or by their guardians, to appear in court and object to said account if they so desire." Act of May 3, 1909, P. L. 391, § 1; 20 P. S. § 2853.

court has the power to fix the compensation of the trustee,[8] to require him to take over from the trust investments improperly made and to restore the amount expended for them to the trust estate,[9] to surcharge him with losses incurred, to allow him his proper expenses, to find against him a balance due the estate, and to make the balance found due a lien upon his real estate.[10] In the case of a continuing trust such as that here in question, after adjudication, the corpus is reawarded to the trustee for further administration in accordance with the terms of the trust. In the case of an account filed at the close of administration the court has power to decree distribution to the parties entitled. Under the equity powers conferred upon it the court may enforce its orders against a trustee by attachment for contempt.[11] The jurisdiction extends to a trust like the present created by deed or voluntary agreement.[12] The audit and confirmation of the account is to be had after advertisement and other forms of notice and is binding on all those anywise interested in the estate who have had the required statutory notice of the audit.[13] The parties in in-

[8] Act of June 14, 1836, P. L. 628, § 29; 20 P. S. 3271.

[9] See the opinion below, 329 Pa. 512; 198 A. 58.

[10] Act of April 30, 1855, P. L. 386, § 1; 20 P. S. § 2854.

[11] *Chew's Appeal,* 44 Pa. 247; *Scott* v. *Jailer,* 1 Grant 237; *Morrison* v. *Blake* (No. 1) 33 Pa. Super. Ct. 290, 297; *Commonwealth* v. *Heston,* 292 Pa. 63, 68; 146 A. 533.

[12] See *Baskin's Appeal,* 34 Pa. 272; *Jones' Estate,* 15 Pa. Dist. Rep. 30; *In re Weiser Trust,* 23 York 80; *Ball's Estate,* 220 Pa. 399; 69 A. 817.

[13] The petitioners lay stress on an averment in the answer filed in the Common Pleas Court to the trustees' petition for a rule to show cause why the petitioners should not be restrained from prosecuting their suit in the federal court. This is to the effect that the trustees' accounts had been "filed without notice to the" petitioners. No notice of the intention to file is required. Notice is to be given to the parties in interest that the account has been filed and will be audited. There is no averment that the beneficiaries of the trust did not receive such notice.

terest are permitted by exception and objection to the account to raise all pertinent questions respecting the management of the trust, and to invoke the powers of the court over the subjects above mentioned.[14] The audit will further disclose whether there be probable ground for the removal of the trustee and the appointment of another in his place and if that be done the court has jurisdiction to compel the removed trustee to transfer the trust assets to his successor.

It is obvious that the filing of their account on July 7, 1930, subjected the respondents, as the trustees then in office, to the exercise of the powers thus conferred upon the Court of Common Pleas.

We turn to the suit instituted in the District Court to ascertain what relief was there sought. In the bill as originally filed sundry investments made by the trustees were attacked and they were charged with mismanagement of the estate. The prayers were that they be cited to file an account of the trust; that they be removed; that all trustees under the agreement be required to give bond for the faithful performance of their duties; and for general relief. By the amended bill additional trust investments were attacked. New prayers were substituted asking that the defendants be required to answer, to restore to the trust funds the moneys lost by their illegal and negligent conduct; that they be removed; that all trustees be required to give bond; and for general relief.

The plaintiffs in the District Court were but two of the five cestuis. One of the others has appeared in the Common Pleas proceeding and excepted to the trustees' accounts. Certain it is, therefore, that if both courts were to proceed they would be required to cover the same ground. This of itself is not conclusive of the question

[14] Compare *Moore's Appeal,* 10 Pa. 435; *McLellan's Appeal* (No. 1), 76 Pa. 231; *Commonwealth* v. *Trout,* 76 Pa. 379.

of the District Court's jurisdiction, for it is settled that where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other.[15] On the other hand, if the two suits are in rem, or quasi in rem, so that the court, or its officer, has possession or must have control of the property which is the subject of the litigation in order to proceed with the cause and grant the relief sought the jurisdiction of the one court must yield to that of the other.[16] We have said that the principle applicable to both federal and state courts that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted, but applies as well where suits are brought to marshal assets, administer trusts, or liquidate estates, and in suits of a similar nature where, to give effect to its jurisdiction, the court must control the property.[17] The doctrine is necessary to the harmonious coöperation of federal and state tribunals.[18] While it has no application to a case in a federal court based upon diversity of citizenship, wherein the plaintiff seeks merely an adjudication of his right or his interest as a basis of a claim against a fund in the possession of a state court,[19] this is

[15] *Penn General Casualty Co.* v. *Pennsylvania,* 294 U. S. 189, 195, and cited cases.

[16] *Ibid.*

[17] *Farmers' Loan & T. Co.* v. *Lake Street E. R. Co.,* 177 U. S. 51, 61; *Palmer* v. *Texas,* 212 U. S. 118, 129; *United States* v. *Bank of New York & T. Co.,* 296 U. S. 463, 477.

[18] *United States* v. *Bank of New York & Trust Co., supra,* 478, and cases cited.

[19] *Commonwealth Trust Co.* v. *Bradford,* 297 U. S. 613, 619, and cases cited.

not such a case. No question is presented in the federal court as to the right of any person to participate in the res or as to the quantum of his interest in it. The contentions are solely as to administration and restoration of corpus.

Petitioners insist that *Shelby* v. *Bacon,* 10 How. 56, is conclusive that, under the law of Pennsylvania, the filing of an account on July 7, 1930, did not constitute the institution of a suit by the trustees, did not confer exclusive jurisdiction on the state court and did not bar the subsequent institution of a suit in the federal court for the same relief. In this we think they are in error. What was there said by this court to the effect that the filing of an account in the state court did not constitute a suit and did not confer jurisdiction on the state court, was not necessary to the decision and is not in accord with the law of Pennsylvania as declared by its own Supreme Court.[20] Assuming, however, that the state court had jurisdiction, this court held merely that the plaintiff had a right to establish his claim by suit in the Circuit Court notwithstanding the state court's jurisdiction over the trust. The court was careful to say that it was unnecessary to consider questions which might arise in the exercise of the jurisdiction of the federal court. The decision is in entire accord with many cases which hold that an action in the federal court to establish the validity or the amount of a claim constitutes no interference with a state court's possession or control of a res.

The Common Pleas Court could not effectively exercise the jurisdiction vested in it, without a substantial measure of control of the trust funds. Its proceedings are, as the court below held, quasi in rem, and the jurisdiction acquired upon the filing of the trustees' account is exclusive. The District Court for the Western District of

[20] *Whitney's Appeal,* 22 Pa. 500, 505.

Pennsylvania is without jurisdiction of the suit subsequently brought for the same relief, and the petitioners were properly enjoined from further proceeding in that court.

The judgment is

Affirmed.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* OWENS ET AL.*

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

No. 180. Argued December 9, 1938.—Decided January 3, 1939.

1. Under the Revenue Acts of 1932 and 1934, the basis for determining the amount of a loss sustained during the taxable year, arising from damage by casualty to property not used in the taxpayer's trade or business (as to which class of property no annual deductions for depreciation are allowed), is not the cost of the property but its value immediately before the casualty. P. 471.
2. In computing under the Revenue Act of 1934 the amount of the deduction for losses sustained during the taxable year from the sale or other disposition of property, § 113 (b) (1) (B)—and the corresponding provision of the 1932 Act—must be read as a limitation upon the amount of the deduction so that it may not exceed cost, and in the case of depreciable nonbusiness property may not exceed the amount of the loss actually sustained in the taxable year, measured by the then depreciated value of the property. P. 471.

95 F. 2d 318, reversed.
97 F. 2d 431, affirmed.

CERTIORARI, *post*, pp. 582, 585, to review, in No. 180, the affirmance, and in No. 318, the reversal, of decisions of the Board of Tax Appeals in favor of the taxpayers.

---

* Together with No. 318, *Obici et al.* v. *Helvering, Commissioner of Internal Revenue*, on writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit.

Mr. Norman D. Keller, with whom *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key, Paul A. Freund,* and *W. Croft Jennings* and *Louise Foster* were on the briefs, for the Commissioner of Internal Revenue.

Mr. Ewing Everett, with whom *Mr. O. H. Chmillon* was on the briefs, for respondents in No. 180 and petitioners in No. 318.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The courts below have given opposing answers to the question whether the basis for determining the amount of a loss sustained during the taxable year through injury to property not used in a trade or business, and therefore not the subject of an annual depreciation allowance, should be original cost or value immediately before the casualty.[1] To resolve this conflict we granted certiorari in both cases.

In No. 180 the facts are that the respondent Donald H. Owens purchased an automobile at a date subsequent to March 1, 1913, and prior to 1934, for $1825, and used it for pleasure until June 1934 when it was damaged in a collision. The car was not insured. Prior to the accident its fair market value was $225; after that event the fair market value was $190. The respondents filed a joint income tax return for the calendar year 1934 in which they claimed a deduction of $1635, the difference between cost and fair market value after the casualty. The Commissioner reduced the deduction to $35, the difference in market value before and after the collision. The Board of Tax Appeals sustained the taxpayers' claim and the Circuit Court of Appeals affirmed its ruling.

[1] *Helvering* v. *Owens,* 95 F. 2d 318; *Helvering* v. *Obici,* 97 F. 2d 431.

In No. 318 it appears that the taxpayers acquired a boat, boathouse, and pier in 1926 at a cost of $5,325. In August 1933 the property, which had been used solely for pleasure, and was uninsured, was totally destroyed by a storm. Its actual value immediately prior to destruction was $3905. The taxpayers claimed the right to deduct cost in the computation of taxable income. The Commissioner allowed only value at date of destruction. The Board of Tax Appeals held with the taxpayers but the Circuit Court of Appeals reversed the Board's ruling.

Decision in No. 180 is governed by the Revenue Act of 1934;[2] in No. 318 by the Revenue Act of 1932.[3] The provisions of both statutes touching the question presented are substantially the same and we shall refer only to those of the 1934 Act. Section 23 (e) (3) permits deduction from gross income of losses "of property not connected with the trade or business" of the taxpayer, "if the loss arises from . . . casualty." Subsection (h) declares that "The basis for determining the amount of deduction for losses sustained, to be allowed under subsection (e) . . ., shall be the adjusted basis provided in section 113 (b)." Section 113 is entitled "Adjusted basis for determining gain or loss"; in subsection (a) it provides that "The basis of property shall be the cost of such property," with exceptions not material. Subsection (b), to which 23 (h) refers, is: "*Adjusted basis.*—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided. (1) *General rule.*—Proper adjustment in respect of the property shall in all cases be made—(B) in respect of any period since February 28, 1913, for

[2] c. 277, 48 Stat. 680, §§ 23 (e) (f) (h) (l), 24(a)1, 41, 113; 26 U. S. C. §§ 23, 24, 41, 113.

[3] c. 209, 47 Stat. 169, §§ 23 (e) (f) (g) (h), 24(a)1, 113.

exhaustion, wear and tear, obsolescence, amortization, and depletion, to the extent allowed (but not less than the amount allowable) under this Act or prior income tax laws."

The income tax acts have consistently allowed deduction for exhaustion, wear and tear, or obsolescence only in the case of "property used in the trade or business." The taxpayers in these cases could not, therefore, have claimed any deduction on this account for years prior to that in which the casualty occurred. For this reason they claim they may deduct upon the unadjusted basis,—that is,—cost. As the income tax laws call for accounting on an annual basis; as they provide for deductions for "losses sustained during the taxable year"; as the taxpayer is not allowed annual deductions for depreciation of non-business property; as § 23 (h) requires that the deduction shall be on "the adjusted basis provided in section 113 (b)," thus contemplating an adjustment of value consequent on depreciation; and as the property involved was subject to depreciation and of less value in the taxable year, than its original cost, we think § 113 (b) (1) (B) must be read as a limitation upon the amount of the deduction so that it may not exceed cost, and in the case of depreciable non-business property may not exceed the amount of the loss actually sustained in the taxable year, measured by the then depreciated value of the property. The Treasury rulings have not been consistent, but this construction is the one which has finally been adopted.[4]

In No. 180 judgment reversed.
In No. 318 judgment affirmed.

---

[4] Treasury Regulations 86, Arts. 23(e)–1, 23 (h) 1, 113 (b) 1; G. C. M. XV 1, Cumulative Bulletin 115–118.

UNITED STATES *v.* McCLURE, ADMINISTRATRIX.

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

No. 154. Argued December 8, 1938.—Decided January 3, 1939.

1. A veteran allowed his yearly renewable term insurance to lapse by failing to pay the premium due in February, 1919, when he was suffering from a compensable disability for which compensation was not collected. In December, 1929, when he became permanently and totally disabled, there remained compensation due him sufficient to pay all premiums due on the lapsed policy. *Held* that his insurance was revived under § 305 of the World War Veterans' Act, which provides for revival of lapsed insurance by application to premium of compensation due. P. 473.

   This is not inconsistent with § 301, which provides generally for conversion of yearly renewable term insurance by July 2, 1927 and declares that "all yearly renewable term insurance shall cease on July 2, 1927, except when death or total permanent disability shall have occurred before July 2, 1927."
2. Although § 305 of the Act, and § 304 dealing with reinstatement of yearly renewable term insurance and prohibiting such reinstatement after July 2, 1927, both emanated from a single section in an earlier Act, they are to be regarded as distinct parts of the later statute, having been separated by Congress in order to provide for the individual treatment that has been given reinstatement as distinguished from revival of lapsed policies. The separation indicates an intended change. P. 477.
3. A proviso is to be read as referring, presumably, to the provision to which it is attached. P. 478.

95 F. 2d 744, affirmed.

CERTIORARI, *post*, p. 582, to review a judgment which reversed a judgment of the District Court dismissing an action on a war risk insurance policy. Upon the death of the assured, who brought the action for disability benefits, the present respondent was substituted, as administratrix and individually, and sought by her amended complaint to recover both total permanent disability bene-

fits and death benefits. The case was tried without a jury.

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

Mr. Graham K. Betts for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

We are called upon to determine whether § 301 or § 305 of the World War Veterans' Act [1] applies to a lapsed policy of War Risk yearly renewable term insurance.

Section 301 authorizes conversion of such policies and provides (with exceptions not applicable here) that "All yearly renewable term insurance shall cease on July 2, 1927, except when death or total permanent disability shall have occurred before July 2, 1927: . . ."

Section 305 provides that "Where any person has heretofore allowed his insurance to lapse, . . . while suffering from a compensable disability for which compensation was not collected and dies or has died, or becomes or has become permanently and totally disabled" while "entitled to compensation remaining uncollected . . . his insurance . . . shall not be considered as lapsed"; and the Veterans' Administration shall pay him or his beneficiaries "so much of his insurance as said uncollected compensation . . . would purchase if applied as premiums when due . . . less the unpaid premiums and interest at five per centum compounded annually in installments."

John F. McClure, a World War veteran, allowed his yearly renewable term insurance to lapse by failing to pay the premium due February, 1919, "while suffering

[1] 38 U. S. C., §§ 512, 516, 44 Stat. 686, 790.

from a compensable disability for which compensation was not collected." December 1, 1929, when he became permanently and totally disabled, there remained uncollected compensation due him sufficient to pay all premiums then due on his lapsed policy. The veteran brought suit on his policy alleging total and permanent disability and, at his death, respondent—as administratrix and individually—filed an amended complaint seeking recovery under § 305. The District Court held that the insurance was not revived under § 305 and entered judgment for the government. The Circuit Court of Appeals reversed,[2] believing § 301 did not limit § 305 and that respondent was entitled to judgment on the policy, contrary to the result reached by the Circuit Court of Appeals for the Tenth Circuit.[3]

Since this veteran's lapsed policy was "yearly renewable term insurance" and his permanent disability occurred after July 2, 1927, the question is: Did such insurance cease to exist on July 2, 1927 because of the general sweeping provisions of § 301, or was lapsed yearly renewable term insurance—such as his—saved by the special benefits extended under § 305? We find the answer in the language of the original War Risk Insurance Act and its amendments.

That original Act of October 6, 1917,[4] provided government insurance without medical examination for persons engaged in war services. Yearly renewable term insurance was granted with provision for conversion into other forms of insurance without medical examination not later than five years after the termination of the war.

August 9, 1921, Congress amended this Act and added § 408.[5] Section 408 greatly liberalized the rights

[2] 95 F. 2d 744.

[3] *Skelton* v. *United States*, 88 F. 2d 599.

[4] 40 Stat. 398, 409–410.

[5] 42 Stat. 147, 156.

of veterans, both to reinstate and to revive lapsed "yearly renewable term insurance." First. Veterans suffering from disability contracted in active war service were permitted to reinstate their policies despite such disability. Second. Veterans' insurance which had lapsed while the veterans were suffering from service connected disabilities for which compensation had not been paid—as here, was revived in the amount which such uncollected compensation—at death or date of total disability—would purchase. This first provision of § 408 was the original predecessor of § 304; the second provision—relied upon to enforce McClure's policy—became § 305.

By the Act of March 4, 1923,[6] Congress broadened both beneficial provisions of § 408 and left it as a single section. But in 1924, when Congress revised the War Risk Insurance Act,[7] these twin provisions of § 408 were severed and thereafter appeared as two separate and distinct paragraphs, §§ 304 and 305. Section 304 incorporated that portion of § 408 which had provided for reinstatement of lapsed term insurance despite physical disability. Section 305 reënacted the second provision of § 408 which had authorized utilization of uncollected compensation for revival of such lapsed insurance. It is of vital significance that Congress in creating these two new sections was careful to limit reinstatement of lapsed term insurance by concluding § 304 with the pointed proviso "That no term insurance shall be reinstated after July 2, 1926." But Congress placed no such limitation on the right of revival under § 305, on which this suit is brought.

The action of Congress in restricting the benefits only under one of the two sections must be considered together with § 301 of the same 1924 Act which provided that "All term insurance shall cease on July 2, 1926, except when death or total permanent disability shall have occurred

[6] 42 Stat. 1521, 1525, 1526.

[7] 43 Stat. 607, 625, 626.

before July 2, 1926." Congress in this 1924 Act, clearly evidenced its purpose to prohibit reinstatement of yearly renewable term policies under § 304 after July 2, 1926, in order to make § 304 conform to § 301 which authorized conversion of such policies prior to that date. Reinstatement under § 304, however, required action by the veteran. He was required to submit application, to comply with statutory and administrative regulations, and to pay back premiums. But action by the veteran was not required to revive a lapsed policy under § 305. His rights did not depend upon application, proof, compliance with regulations or payment. Because his policy had lapsed while the government owed him money for service connected disability which had become total and permanent, his lapsed policy was automatically revived. To have required action on his part would have been inconsistent with the manifest purpose of Congress to permit revival and continuation of insurance solely because the government had in its possession funds due the veteran and sufficient to pay for his insurance.

June, 1926,[8] § 301 was amended extending the date for conversion of yearly renewable term insurance to July 2, 1927, and the following month the proviso of § 304 was specifically amended to conform to the June amendment to § 301, by prohibiting reinstatement of such insurance after July 2, 1927.[9] Although the right of reinstatement under § 304 thus was again specifically restricted, Congress in no way indicated any intention to add the same restriction to the right of revival under § 305 on which the present suit is based. Instead, the benefits under § 305 were extended by the July amendment so as to permit beneficiaries to apply uncollected bonuses to the lapsed policies of deceased veterans. Congress again gave special

[8] 44 Stat. 686.

[9] 44 Stat. 790, 799.

attention to § 305 in 1928 [10] and authorized the revival of lapsed policies by utilization of compensation otherwise uncollectible because barred by limitations. Continuing the separate consideration and treatment of §§ 304 and 305, Congress in 1930 once more applied the restrictive proviso to § 304 but not to § 305.[11]

The deliberate intention of Congress to apply different restrictions to the right of reinstating lapsed policies under § 304 and that of reviving such policies under § 305 was also made manifest by other changes in the Act of July 2, 1926.[12] While reinstatement of yearly renewable term insurance under § 304, but not revival under § 305, was therein prohibited after July 2, 1927, a new proviso was added to § 305 under which the "insurance hereafter revived under this section [305] . . . shall be paid only to the insured, his widow, child or children, dependent mother or father, . . ." On the other hand, there is no such limitation as to beneficiaries of policies reinstated under the provisions of § 304. This studied limitation of the government's liability on policies revived under § 305, by restriction of beneficiaries, indicates a distinctive legislative consideration and treatment of that section.

To hold that a lapsed yearly renewable term insurance policy cannot be revived under § 305 would be to apply to that section, by construction, the proviso which Congress attached only to § 304. Sections 304 and 305 are distinct parts of the statute which contains them. While both sections emanated from a single prior section, Congress evidently separated them to provide for the individual treatment that has been given reinstatement as distinguished from revival of lapsed policies. A deliberate separation of the two parts of the old section—ap-

[10] 45 Stat. 964, 971.

[11] 46 Stat. 991, 1001, § 23.

[12] 44 Stat. 790, 799, 800.

plying a restriction to one and not the other—indicates that a change was intended.[13] This is in accord with the presumption that a proviso "refers only to the provision to which it is attached." [14]

In the light of the statutory development of the War Risk Insurance Act, there is no conflict between the general provisions of § 301 requiring conversion of yearly renewable term insurance by July 2, 1927, and the special benefits granted by § 305 to that particular group of veterans to whom the government had not paid disability compensation which was justly their due. The benefits of the special provisions of § 305 are extended to every veteran who has "heretofore allowed his insurance to lapse, . . ." The meaning of the words of the statute is apparent and we need not look beyond the language and statutory development of the War Risk Insurance Act.[15] A lapsed policy, whether yearly renewable term or in converted form, comes within the provisions of § 305.

Since the veteran in this case was due compensation for service connected disabilities at the time his policy lapsed and at the time he became totally and permanently disabled the amount of his uncollected compensation was sufficient to pay all premiums then due, his insurance was revived under § 305. The judgment of the Circuit Court of Appeals is therefore

Affirmed.

---

[13] Cf. *Brewster* v. *Gage*, 280 U. S. 327, 337; *United States* v. *Perryman*, 100 U. S. 235, 238.

[14] *United States* v. *Morrow*, 266 U. S. 531, 535.

[15] Cf. *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 356.

Counsel for Parties.

CHIPPEWA INDIANS OF MINNESOTA *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 244. Argued December 9, 12, 1938.—Decided January 3, 1939.

1. The Act of May 23, 1908, which created a national forest of lands then held by the Government in trust for the Chippewa Tribe of Indians and provided for payments of compensation to the Indians including the value of timber to be appraised, was a complete taking at the time the Act became effective, and the value of such timber is determined as of the date of the Act rather than as of the time of the making and approval of the appraisal, many years later. P. 480.
2. The legislation conferring on the Court of Claims jurisdiction to adjudicate all legal and equitable claims of the Chippewa Indians of Minnesota arising under or growing out of the Act of January 14, 1889, or arising under or growing out of any subsequent Act of Congress in relation to Indian affairs, did not include a claim on account of land alleged to have been excluded from Indian reservations through erroneous public surveys in 1872–1885 and to have been appropriated and sold by the Government, before the Act of 1889 was passed. P. 483.

   The terms of the Act of 1889 were restricted to the Chippewa reservations then existing (1889) in Minnesota. None of the subsequent Acts, relating to Indian affairs, upon which the Indians rely expanded the provisions of the 1889 Act so as to include Congressional treatment of the transactions made the basis of this claim.

87 Ct. Cls. 1, affirmed.

APPEAL from a judgment dismissing two claims against the United States.

Mr. Webster Ballinger for appellants.

Mr. Raymond T. Nagle, with whom *Solicitor General Jackson, Assistant Attorney General McFarland,* and *Mr. Oscar Provost* were on the brief, for the United States.

MR. JUSTICE BLACK delivered the opinion of the Court.

The Chippewa Indians filed suit in the Court of Claims asserting two separate claims against the government. The government pleaded offsets greatly in excess of the claims of the Tribe. Dismissing the Tribe's petition as to both its claims,[1] the Court found it unnecessary to pass upon the government's offsets, and therefore denied them without prejudice. The cause is here on appeal by virtue of a Special Act of Congress requiring our review of the judgment of the Court of Claims.[2]

As to the first claim. A Congressional Act of May 23, 1908, created a National Forest upon lands then in possession of the United States but held by the government as a trustee for the benefit of the Chippewa Indian Tribe.[3] This Act authorized the Secretary of the Interior to "proceed with the sale of the merchantable pine timber" upon certain of these lands; and provided for an appraisal "forthwith" of the timber on the lands; for payment to the Indians of the appraised value plus payments received from the sale of any timber by the Secretary of the Interior prior to the appraisal; and for payment to the Tribe of $1.25 per acre for all of the lands appropriated. Appraisal was not made "forthwith," but in 1922. In 1908, when the Act was passed, certain types of the timber were not "merchantable" and had no value. By 1923, however, when the appraisal was completed and approved, these particular timbers were appraised at $1,060,887.07. In view of the long delay in making the appraisal and payment, approximately $490,000 in interest was appropriated for the benefit of the Tribe in 1926. The Court of Claims construed the 1908 Act as an appropriation of the lands and timber for a public use at the date of

[1] 87 Ct. Cls. 1.

[2] 49 Stat. 1826; Act of June 22, 1936, c. 714.

[3] 35 Stat. 268.

enactment, and finding the timbers in question without a merchantable value at that time, decided against the Tribe on this claim.

The sole question raised by appellants' assignment of error with reference to this first claim attacks the Court of Claims' holding—based on its construction of the Act of 1908—that the appropriation of the Tribe's land and timber was effected by that Act and as of the date of the Act, and that court's failure to hold that the appropriation occurred when the timber was appraised and the appraisal approved in April, 1923.

The findings do not show as clearly as might be desired that the timber was without merchantable value in 1908. However, there is a complete absence of any controversy on this point, and appellants were not denied the right to introduce evidence to establish the value of the property. When these findings are considered with the pleadings and are clarified by the opinion of the court below, all possible doubt as to their meaning disappears, and they show that the Court found a lack of any merchantable value in 1908.[4]

Actual appropriation of the land or timber by the United States is admitted. Just compensation for the property appropriated must be its value as of the date when the Tribe's interest in the property was taken.[5] It is agreed that until the passage of the Act of 1908 the government held possession of the land and timber as trustee for the Tribe. Under the trust the government was charged with disposal of the property for the benefit of the Tribe. If the Act of 1908 actually deprived the Tribe of its beneficial interest in the property, the Act

[4] Cf. *Ackerlind* v. *United States,* 240 U. S. 531, 535; *Cartas* v. *United States,* 250 U. S. 545, 546; *American Propeller Co.* v. *United States,* 300 U. S. 475, 479, 480.

[5] *United States* v. *Rogers,* 255 U. S. 163, 169; *Shoshone Tribe* v. *United States,* 299 U. S. 476.

represented an exercise of the power of eminent domain and vested—when enacted—complete title in the government. This would be an appropriation—a complete taking of property—at the time the Act became effective.[6]

We need look no further than the language of this Act to ascertain its effect. The very first words after the enacting clause are " . . . there is hereby created in the State of Minnesota a national forest consisting of lands and territory described as follows, . . ." There follows a description of the lands in question by metes and bounds. Throughout the Act there are repeated declarations referring to the National Forest "hereby created." It would have been difficult for Congress to have selected language more clearly expressing the intent and purpose to deprive the Tribe completely—by the Act—of all its remaining beneficial interest in the property.

Appellants urge that appropriation of the property did not take place until the appraisal of the timber was approved in 1923. In support of this contention they rely chiefly upon the following provisions of § 5 of the Act: ". . . all moneys received from the sale of timber from any of the land set aside by this Act for a National Forest, prior to the appraisal herein provided for . . . shall be placed to the credit of the Chippewa Indians in the State of Minnesota . . . and after said appraisal the National Forest hereby created, as above described, shall be subject to all general laws and regulations . . . governing national forests, . . ." But this provision by its very terms characterizes the property as "the National Forest hereby created" and directs disposition of "all moneys received from the sale of timber from any of the land *set aside by this Act for a National Forest, . . .*" (italics supplied). The fact that the lands were not to

[6] *Hurley* v. *Kincaid*, 285 U. S. 95, 103, 104; *United States* v. *Lynah*, 188 U. S. 445, 470.

be subjected to the general laws and regulations governing National Forests until after the appraisal was made indicates no congressional intent to delay the creation of the National Forest. The government already had legal title to, and possession of the property, and the Act contemplated that the appraisal should be made "forthwith." Since the Tribe was to be paid the appraised value of all the timber, the Act appropriately provided that proceeds for sales of any timber sold before appraisal should be paid to the Tribe.

Upon examination of the Act we are of the opinion that the Court of Claims correctly decided that the appropriation of the land and timber occurred in 1908, when the Act became the law, and that accordingly it properly dismissed the claim.

Second. The jurisdictional Act under which the petition in this cause was filed [7] conferred jurisdiction upon the Court of Claims "to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of the Act of January 14, 1889 . . ., or arising under or growing out of any subsequent Act of Congress in relation to Indian affairs which said Chippewa Indians of Minnesota may have against the United States, . . ." Appellants' second claim was based upon allegations that the government made erroneous surveys of Indian lands between and including the years 1872 and 1885; that these errors resulted in wrongfully excluding the lands from Indian reservations; and that the government thereafter appropriated and sold these lands (some of which belonged to appellants) before the Act of 1889 was passed. Inspection of the 1889 Act [8] discloses that none of its provisions related to these lands

[7] 44 Stat. 555, as amended by Acts approved April 11, 1928 (45 Stat. 423) and June 18, 1934 (48 Stat. 979).

[8] 25 Stat. 642 (1889).

previously disposed of by the government. Its terms were restricted to the Chippewa reservations then existing (1889) in Minnesota. None of the subsequent Acts, relating to Indian affairs, upon which appellants rely [9] expanded the provisions of the 1889 Act so as to include Congressional treatment of the transactions made the basis of this second claim. Since this second claim did not arise from or grow out of the 1889 Act or subsequent Acts, the Court of Claims properly dismissed for want of jurisdiction.

The judgment is

Affirmed.

LYON *v.* MUTUAL BENEFIT HEALTH & ACCIDENT ASSN.

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

No. 189. Submitted December 12, 1938.—Decided January 3, 1939.

1. A health and accident policy (governed by the law of Arkansas), issued and effective December 31, 1926, and reciting and providing that it is issued "in consideration of . . . the payment in advance of $74.00 the first year" and that "the payment in advance of . . . $16.00 quarterly thereafter, beginning with April 1, 1927, is required to keep this policy in continuous effect,"—*construed* as meaning and intending that the payment in advance of $74.00 would keep the policy in force until December 31, 1927, and that payment of $16.00 April 1, 1927, would extend the policy a quarterly period beyond December 31, 1927, and that successive payments of $16.00 at the beginning of each quarter following the quarter beginning April 1, 1927, would extend the policy correspondingly. P. 488.
2. Delivery of the policy containing the recital that it "is issued in consideration of . . . the payment in advance of $74.00" established *prima facie* the fact of advance payment of that amount. *Id.*

---

[9] 32 Stat. 400 (1902); 35 Stat. 268 (1908).

3. Evidence supplementing this inference and showing payment of premiums, was not incompetent as an attempt to alter the terms of the policy but was admissible in proof of performance. P. 489.
4. In a suit to recover upon a contract of insurance payable upon the death of the insured, *held* that there was competent and substantial evidence to show that payments had been made to the insurer in sufficient amount to keep the policy in force beyond the quarterly premium payment period in which the death occurred; that the evidence on this point supported the verdict and judgment of the District Court for the plaintiff; and that reversal of the judgment by the Circuit Court of Appeals was erroneous. P. 489.
5. In a suit in Arkansas upon an Arkansas insurance policy, federal jurisdiction resting upon diversity of citizenship, the District Court, at the close of the evidence and upon the request of the defendant for a peremptory instruction, denied the request and directed a verdict for the plaintiff. There was ample evidence to justify the verdict. *Held*, that the court, consistently with the Conformity Act, followed the Arkansas procedural rule governing the effect of a request for a peremptory instruction, and that that rule did not deprive the defendant of any constitutional right. P. 490.

95 F. 2d 528, reversed.

CERTIORARI, *post*, p. 583, to review a judgment reversing a judgment for the petitioner in an action to recover upon a policy of insurance.

Mr. John W. Nance submitted for petitioner.

Messrs. Thomas B. Pryor and *Thomas B. Pryor, Jr.* submitted for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioner, (plaintiff below) brought suit as beneficiary in the District Court against respondent (defendant below) on a health and accident policy issued by respondent in 1926 to petitioner's husband. Plaintiff alleged that the insured was accidentally killed July 26, 1934, while the policy was in full force and effect insuring against death resulting from accidental causes. At

the conclusion of plaintiff's evidence, defendant declined to offer any evidence and did no more than move for a peremptory instruction. Defendant's motion was based upon the contentions that (1) the policy was not in effect when insured was killed because defendant had exercised an option granted it by the policy to reject the quarterly premium due July 1, 1934; (2) that the "premium receipts themselves show that the policy terminated on the first day of July, 1934, prior to the time this loss occurred." Defendant's motion for peremptory instruction was denied, defendant excepted, and the court directed the jury to return a verdict for plaintiff. Defendant's exception was noted, the jury rendered verdict for plaintiff, and the court entered judgment upon the verdict.

The Court of Appeals reversed,[1] holding that the policy was term insurance and reserved to defendant the right to reject any quarterly premium on the due date, that defendant had properly exercised its option in rejecting the quarterly premium due July 1, 1934, and that the policy was, therefore, terminated prior to insured's death. The court further held that no competent evidence had sustained plaintiff's allegations that the required premiums had been paid. We granted certiorari.[2]

In the view we take of the case, it is unnecessary to consider plaintiff's contention that the Court of Appeals erred in holding that defendant had the option to cancel the policy upon the due date of any quarterly premium. We find that there was competent and substantial evidence to sustain plaintiff's allegation that insured had paid premiums sufficient to keep the policy in effect up to and including the date of insured's death.

The evidence showed that:

The policy sued on was issued December 31, 1926; after advance payment of $74.00 for the first year's pre-

[1] 95 F. 2d 528.

[2] *Post,* p. 583; cf. *Ruhlin* v. *New York Life Ins. Co.,* 304 U. S. 202, 206.

mium, the policy was delivered to insured; thereafter, all quarterly premiums were paid to the defendant's local treasurer located at Rogers, Arkansas (where the policy was sold and delivered) up to and including the quarterly premium due January 1, 1934; these premiums were usually paid in advance, but not always; before April 1, 1934, plaintiff as agent for the insured went to the office of the local treasurer at whose office she had paid all the other premiums; he could not be found at the office; a young girl in the office suggested that the payment be sent to Little Rock; plaintiff mailed that payment to Little Rock and received a receipt dated March 30, 1934; plaintiff had not then received, and never did receive any notice from the company that it had moved its office or changed its method of collecting premiums; July 1, 1934, when the next premium was due she went to the local treasurer's office and found it closed; diligent search for him disclosed that not only had his office been closed, but he had moved from the house in which he had formerly resided; continuing to search for the treasurer, she finally found him several days later early in the morning entering a car in front of his office; he declined to accept the premium, told her to send it to Little Rock, and informed her that she should have received a notice from the company to that effect; that day, July 6, she bought a money order, "addressed the envelope just to the company at Little Rock" and mailed it; July 13, the Little Rock office of the company wrote her that it could not accept the payment because the Omaha home office had not sent an official receipt for this policy payment; in that letter and in a subsequent communication of July 26, the Little Rock office offered to reinstate the policy but with restricted benefits; on July 26, however, the insured was killed by accidental means within the terms of the policy. The defendant offered no evidence whatsoever.

First. The policy provides as to premium payments that "this policy is issued in consideration of . . . the payment in advance of $74.00 the first year, and the payment in advance of . . . $16.00 quarterly thereafter, beginning with April 1, 1927, is required to keep this policy in continuous effect." This language is clear and nothing elsewhere in the policy alters its meaning. True, the printed application signed by deceased, December 27, 1926, and upon which the policy was issued four days later, contains the printed question, "What is the premium?" and a typewritten answer, "$16.00 quarterly." However, this is not inconsistent with the provision of the policy for the payment of $74.00 in advance and $16.00 quarterly premiums. The provision for payment in advance of $74.00 the first year required payment before the date the policy took effect, which according to the policy was the date of issue. Under the language of this provision actual payment of a year's premium in advance purchased insurance for a year. The dates for further payments to extend the policy beyond a year could be and were fixed by the policy contract. Payment for the first year carried the policy to December 31, 1927, and the first quarterly payment, due by the policy's terms April 1, 1927 and paid in advance of that date, extended the policy another quarter beyond December 31, 1927. Each succeeding quarterly payment carried the policy a corresponding three months. The questions before the trial court were whether the $74.00 first payment was actually made, and whether thereafter quarterly payments were made in an amount sufficient to carry the policy from the end of the first year up to and including the quarterly period in which death of insured occurred.

Since the policy recites that "this policy is issued in consideration of . . . the payment in advance of $74.00 the first year . . .," delivery of the policy prima facie

established the fact of the advance payment of that amount.[3] This evidence was reinforced by plaintiff's testimony that the $74.00 was so paid. Defendant made no objection to this testimony. On cross-examination by defendant, plaintiff amplified her testimony as to why she paid the quarterly premium in April, 1927, after having already paid the premium for a whole year before the policy was delivered. She explained that this was because defendant's representative told her and the insured that "there were no days of grace included in the policy, but if we paid a year's premium in advance that would take the place of these days of grace."

Although defendant did not object to plaintiff's testimony of payment, and evoked explanation of it on cross-examination, the Court of Appeals, without any reference to governing State law,[4] concluded that the evidence was incompetent. That court believed this evidence represented an effort to alter the terms of the written policy contract by an oral agreement violating the provisions that "This policy . . . contains the entire contract of insurance," and "No agent has authority to change this policy or to waive any of its provisions." But this evidence of payment of premiums as required by the policy, did not affect the terms of the written contract. It was offered to prove the discharge of the insured's obligation under the contract. The evidence was material to establish the fact of payment. No statutes of Arkansas or decisions of the highest court of that State[5] have been

[3] *Washington Fidelity Nat. Ins. Co.* v. *Anderson,* 187 Ark. 974, 976; 63 S. W. 2d 535; *National Equity Life Ins. Co.* v. *Parker,* 190 Ark. 642, 644; 80 S. W. 2d 630; cf. *Splawn* v. *Martin,* 17 Ark. 146, 153.

[4] See 28 U. S. C., § 724.

Cf. *D'Wolf* v. *Rabaud,* 1 Pet. 476, 502; *Wilcox* v. *Hunt,* 13 Pet. 378, 379; *Nashua Savings Bank* v. *Anglo-American Co.,* 189 U. S. 221, 228; cf. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64.

[5] Cf. *Erie R. Co.* v. *Tompkins, supra.*

pointed out which would make such relevant evidence incompetent.[6] The $74.00 payment for the first year, together with quarterly payments undisputedly made through April 1, 1934, carried the policy to January 1, 1935. We, therefore, find it unnecessary to consider whether the six days delay in paying the July 1, 1934 premium was excused by reason of attendant circumstances.

Second. The Conformity Act requires that "The practice, pleadings, and forms and modes of proceeding in civil causes . . . in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held, any rule of court to the contrary notwithstanding." [7]

Our attention has not been directed to any more authoritative Arkansas ruling governing the procedural effect of a request for a peremptory instruction without more, than the decision of the Supreme Court of Arkansas in *A. B. Smith Lumber Co.* v. *Portis Bros.*, 140 Ark. 356; 215 S. W. 590. There the Court said (at 358, 359, 360): "The cause . . . proceeded to a hearing upon the pleadings and evidence. When the evidence was concluded, appellant requested a peremptory instruction, and no other. The court refused the instruction over the objection of appellant, and, on its own motion, instructed the jury to return a verdict in favor of appellees . . . over the objection and exception of appellant. . . . and the court, on its own motion, gave a peremptory instruction for appellee. The request for a peremptory

[6] Cf. *Splawn* v. *Martin, supra; Vaugine* v. *Taylor,* 18 Ark. 65, 79; *Borden* v. *Peay,* 20 Ark. 293, 306; *Hill* v. *First National Bank,* 129 Ark. 265, 269; 195 S. W. 678; *Lay* v. *Gaines,* 130 Ark. 167, 170; 196 S. W. 919.

[7] 28 U. S. C., § 724.

instruction by appellant and the giving of the peremptory instruction by the court for the adverse party was tantamount to submitting the case to the court sitting as a jury, and the court's finding became a verdict as much so as if it had been rendered by a jury upon the issues and evidence. . . . So the question presented by this record is not whether there was sufficient evidence in the record to warrant the court in sending the case to the jury upon the issue of whether or not the undertaking was collateral, but the question is, Was there any legal evidence to support the finding of the court that the undertaking was original?"

This rule of procedure closely approaches that frequently approved by this Court on the same subject, to the effect that " 'where both parties request a peremptory instruction and do nothing more they thereby assume the facts to be undisputed and, in effect, submit to the trial judge the determination of the inferences proper to be drawn therefrom'. And upon review, a finding of fact by the trial court under such circumstances must stand if the record discloses substantial evidence to support it." [8]

Here, there was ample evidence upon which to justify the verdict. Defendant obviously proceeded—after the evidence was closed—upon the belief that the facts and all the inferences to be drawn therefrom raised only a question of law for the court—not one of fact for the jury; and plaintiff acquiesced. Neither defendant nor plaintiff did anything to indicate a desire or belief that the jury should pass upon any facts. Thus, the District Court sitting in Arkansas, having jurisdiction only by reason of diversity of citizenship and trying a suit involving an Arkansas contract, followed the procedural rule announced by the highest court of that State.

[8] *Williams* v. *Vreeland,* 250 U. S. 295, 298; *Aetna Ins. Co.* v. *Kennedy,* 301 U. S. 389, 393.

While litigants in federal courts cannot—by rules of procedure—be deprived of fundamental rights guaranteed by the Constitution and laws of the United States, the local Arkansas rule followed by the District Court does not result in such deprivation. In effect, that local rule is practically identical with the federal rule which treats a request by both parties for peremptory instructions without more as a submission of issues of fact to the court. It is essential that the right to trial by jury be scrupulously safeguarded, and a state rule of procedure entrenching upon this right would not require observance by federal courts.[9] However, this Arkansas procedural rule—so closely approximating the federal rule—does not amount to a prohibited invasion of federal rights. Since the District Court followed the Arkansas procedural rule, and the verdict and judgment were supported by competent and substantial evidence, it follows that the Court of Appeals erroneously reversed the District Court's judgment. The judgment of the Court of Appeals is, therefore, reversed and that of the District Court is affirmed.

Reversed.

MR. JUSTICE ROBERTS did not participate in the consideration or decision of this case.

MR. JUSTICE BUTLER:

MR. JUSTICE MCREYNOLDS and I are unable to accept the opinion or to agree with the judgment of the court just announced.

We are of opinion that the judgment of the Circuit Court of Appeals should be reversed, and that, for the reasons given in the separate opinion of Circuit Judge Stone, 95 F. 2d 528, 534, the case should be remanded to the District Court for proceedings in accordance with that opinion.

---

[9] Cf. *Davis* v. *Wechsler*, 263 U. S. 22.

CONNECTICUT RAILWAY & LIGHTING CO. *v.* PALMER ET AL., TRUSTEES.

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

No. 63. Argued November 10, 14, 1938.—Decided January 3, 1939.

1. Review by certiorari is limited to the grounds upon which the writ was sought and allowed. A ruling to which there was but a mere reference in the petition, without request for review, not considered. P. 496.
2. The measure of damages upon rejection of a lease in a railroad reorganization proceeding under § 77 of the Bankruptcy Act, as amended Aug. 27, 1935, is the actual damages determinable as in equity proceedings and upon evidence. The Act fixes no limit to the amount of actual damages. Only such damages as are susceptible of definite, satisfactory proof may be allowed. Pp. 497–503.

   The provisions of the Act with respect to such claims in railroad reorganization are compared with those limiting like claims against individual debtors and in general corporate reorganization.
3. The conclusion that, in a railroad reorganization proceeding under § 77 of the Bankruptcy Act as amended, upon rejection of a lease with 969 years still to run, the lessor's damages were limited to the rent accrued, up to the latest practicable date in the reorganization for presentation of its claim, diminished by the net earnings of the property—thus barring proof of damages for loss of rent falling due after that date, and destroying, by operation of subdivision (f), the right of further recovery for such injury from the debtor after reorganization—*held* erroneous. *Id.*
4. Improvements and sinking funds which came into the possession of the lessor by the terms of the lease, *held* not to be considered as offsets against the claim of the lessor herein. P. 505.
5. Section 63 (a) (9) of the Bankruptcy Act *held* inapplicable to the present controversy. P. 506.

95 F. 2d 483, reversed.

CERTIORARI, *post*, p. 584, to review a decree which modified and affirmed a decree of the bankruptcy court determining a claim arising out of the rejection of a lease in a proceeding under § 77 of the Bankruptcy Act.

Messrs. George W. Martin and *Talcott M. Banks, Jr.* for petitioner.

Messrs. Hermon J. Wells and *James Garfield* for respondents.

By leave of Court, *Messrs. Robert G. Dodge* and *Talcott M. Banks, Jr.* filed a brief, as *amici curiae,* on behalf of Howard S. Palmer et al., Trustees of the property of the Old Colony Railroad Co.

Mr. Justice Reed delivered the opinion of the Court.

This case poses the question of the correct measure of damages allowable to a lessor creditor of a railroad debtor for the rejection of a lease under the reorganization provisions of § 77 of the Bankruptcy Act. The determination depends upon the meaning of the definitive clause "to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings." [1] Certiorari was granted, under § 240a of the Judicial Code, because the case involves an important question of federal law which should be settled by this Court.

On December 19, 1906, the Connecticut Railway and Lighting Company, petitioner here, leased certain gas, electric and street railway properties for 999 years to the Consolidated Railway Company, predecessor of the New York, New Haven and Hartford Railroad Company, hereinafter referred to as the New Haven. By a subsequent assignment the New Haven was divested of everything except the transportation properties involved here. On February 28, 1910, these were transferred to a wholly-owned subsidiary of the New Haven. Some question arose in the reorganization proceedings as to the New

[1] 49 Stat. 911, 914; 11 U. S. C. § 205 (b).

Haven's liability on the 1906 lease after this transfer to its subsidiary. The lower court, however, held the New Haven liable as lessee, and, no attack having been made upon this ruling, we treat, without further consideration, the Connecticut Railway as a lessor and the New Haven as lessee.

The lease gave the lessor the option to terminate, on default of the lessee, and to repossess the property "without prejudice to its right of action for arrears of rent or breach of covenant." It contained no provision for liquidation of damages for breach of the entire lease.

The New Haven agreed to pay all taxes on the property and on the lessor's income from the property. It also paid $1,049,563.50 annually for the street railways. Of this amount, $504,975 was intended to provide for the payment of interest on the Connecticut Railway's bonds and for payments into a sinking fund. These interest and sinking fund payments created a claim upon the lessor for the contents of the fund at the date of payment of the bonds. The arrangement looked to the cancellation of the bonds in 1951 by the New Haven's payments, and the issuance by the Connecticut Railway of new bonds in their place. The delivery to it of these bonds, the New Haven agreed, would liquidate its claim for the contents of the sinking fund. In effect the annual reserved rent would then be considerably decreased, for the interest and sinking fund payments would be for its benefit as owner of the new bonds.

On October 23, 1935, the New Haven filed its petition under § 77 of the Bankruptcy Act. The petition was approved and the respondents were appointed trustees. On December 18, 1935, they rejected the 1906 lease with the approval of the court. On November 16, 1936, the Connecticut Railway repossessed the street railway properties.

The Connecticut Railway filed claims against the New Haven's estate for numerous items, among them damages for breach of the lease and for deficiencies in property returned. It claims $23,190,314.73 as damages for rejection of the lease. This sum is alleged to be "the difference between the present worth of rent and of rental value for the balance of the term of the lease, liquidated by discounting at 4%."

The District Court held that under § 77 the lessor is a creditor for actual damages accruing from the rejection of the unexpired lease to the latest practicable date in the reorganization for presentation of lessors' claims. Damages were measured by the difference between the rent reserved in the lease and the net earnings of the property. The court allowed the amount proved up to June 20, 1937, with leave to the Connecticut Railway to apply for further hearings to liquidate damages suffered after that date.

The Circuit Court of Appeals affirmed, approving the trial court's exclusion of any future damage which had not accrued up to the latest possible hearing in the proceedings.

First. The claim for deficiencies in the property returned to petitioner is not properly before this Court. The petition for certiorari did not include the claim among the questions presented or reasons for the issuance of the writ. It was listed as one of three rulings below. The first related to rent accrued to petition filed, the second to deficiencies in property returned, and the third to damages for rejection of the lease. Nowhere in the petition was there complaint as to the first two items. Clearly the petition sought review solely of the decree in so far as it limited petitioner's claim under § 77 for damages from rejection of the unexpired lease. As clearly, certiorari was granted to review only the matter which this Court was advised aggrieved petitioner. *Johnson* v. *Manhattan Ry. Co.*, 289 U. S. 479, 494; *General Talking Pictures Co.* v. *Western Electric Co.*, 304 U. S. 175, 177–9.

Petitioner relies upon *Washington, V. & M. C. Co.* v. *National Labor Relations Board,* 301 U. S. 142, 146. Neither the language of that case nor the authorities there cited in support of the refusal to review a claim not mentioned give vitality to the suggestion of the petitioner that a mere reference in a petition for certiorari to a ruling, without a request for review, will cause its consideration.

Second. Under the Bankruptcy Act, prior to the amendment of § 63 (a) by the Act of June 7, 1934,[2] a claim for future rent was not provable.[3] A covenant, however, creating a liability for damages on the filing of a petition in bankruptcy, measured by the difference between the present fair value of the remaining rent and the present fair rental value of the premises for the balance of the term, resulted in a provable claim.[4] This condition made for inequality among both creditors and bankrupts, since

[2] 48 Stat. 923–924. "SEC. 4. (a) Section 63 (a) of the Act of July 1, 1898, entitled 'An Act to establish a uniform system of bankruptcy throughout the United States', approved July 1, 1898, as amended, is amended to read as follows: '(a) Debts of the bankrupt may be proved and allowed against his estate which are . . . (7) claims for damages respecting executory contracts including future rents whether the bankrupt be an individual or a corporation, but the claim of a landlord for injury resulting from the rejection by the trustee of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall in no event be allowed in an amount exceeding the rent reserved by the lease, without acceleration, for the year next succeeding the date of the surrender of the premises plus an amount equal to the unpaid rent accrued up to said date: *Provided,* That the court shall scrutinize the circumstances of an assignment of future rent claims and the amount of the consideration paid for such assignment in determining the amount of damages allowed assignee hereunder: *Provided further,* That the provisions of this clause (7) shall apply to estates pending at the time of the enactment of this amendatory Act.'"

The amendments of June 18, 1934, c. 580, 48 Stat. 991, June 5, 1936, c. 512, § 1, 49 Stat. 1475, and June 22, 1938, c. 575, 52 Stat. 840, are immaterial upon this point.

[3] *Manhattan Properties* v. *Irving Trust Co.,* 291 U. S. 320, 330.

[4] *Irving Trust Co.* v. *Perry Co.,* 293 U. S. 307, 310.

recovery by claimants depended upon the artistry with which their leases were drafted and discharged bankrupts were often left with surviving claims for rent, unduly burdensome upon their efforts at self-rehabilitation.[5] Everyone interested in bankruptcy problems had long been familiar with the future rent situation and its ramifications into the fields of anticipatory breach of executory contracts and the provability of contingent claims.[6]

During the years 1933 to 1935 the Congress dealt on several occasions with landlords' claims for future rent. The Act of March 3, 1933, made provision for the relief of individual debtors, agricultural and non-agricultural, and for railroad reorganization. Section 74 defined creditors thus: "The term 'creditor' shall include for the purposes of an extension proposal under this section all holders of claims of whatever character against the debtor or his property including a claim for future rent, whether or not such claims would otherwise constitute provable claims under this Act. A claim for future rent shall constitute a provable debt and shall be liquidated under section 63 (b) of this Act."[7] Similarly the railroad reorganization section treated of future rents in sub-sections 77 (b), (h) and (j), hereafter more fully considered. By the decision of *Manhattan Properties* v. *Irving Trust Co.*, on January 10, 1934, the difficulties of lessors were sharply emphasized. The Act of June 7, 1934, supplied procedure for corporate reorganization with arrangements permitting the proof of claims for future rent.[8] These provisions have been upheld.[9]

---

[5] *City Bank Co.* v. *Irving Trust Co.*, 299 U. S. 433, 437.

[6] Cf. *Manhattan Properties* v. *Irving Trust Co., supra; Maynard* v. *Elliott*, 283 U. S. 273, 278; *Central Trust Co.* v. *Chicago Auditorium Assn.*, 240 U. S. 581, 589–90.

[7] 47 Stat. 1467–68.

[8] "In case an executory contract or unexpired lease of real estate shall be rejected . . . any person injured by such rejection shall, for all purposes of this section and of the reorganization plan, its acceptance and confirmation, be deemed to be a creditor. The claim

The first provisions for proof of claims for future rent in railroad reorganizations appeared in the Act of March 3, 1933, simultaneously with the broadening of the Bankruptcy Act to include the railroads as debtors. This act included § 74 which enlarged the bankruptcy definition of creditor. For creditors of this type in railroad reorganizations, the enactment was equally broad.[10] The legislative history discloses nothing as to the motives which prompted the inclusion of the language. In the

---

of a landlord for injury resulting from the rejection of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall be treated as a claim ranking on a parity with debts which would be provable under section 63 (a) of this Act, but shall be limited to an amount not to exceed the rent, without acceleration, reserved by said lease for the three years next succeeding the date of surrender of the premises to the landlord or the date of reentry of the landlord, whichever first occurs, whether before or after the filing of the petition, plus unpaid rent accrued up to such date of surrender or reentry: *Provided*, That the court shall scrutinize the circumstances of an assignment of future rent claims and the amount of the consideration paid for such assignment in determining the amount of damages allowed assignee hereunder." 48 Stat. 915.

"(h) Upon final confirmation of the plan, . . . the property dealt with by the plan, when transferred and conveyed by the trustee or trustees to the debtor or the other corporation or corporations . . . shall be free and clear of all claims of the debtor, its stockholders and creditors . . ." 48 Stat. 920.

[9] *City Bank Co.* v. *Irving Trust Co.*, 299 U. S. 433; *Kuehner* v. *Irving Trust Co.*, 299 U. S. 445.

[10] 47 Stat. 1475, 1480, § 77, "(b) . . . The term 'creditors' shall, . . . include . . . all holders of claims, interests, or securities of whatever character against the debtor or its property, including claim for future rent, whether or not such claims, interests, or securities would otherwise constitute provable claims under this Act."

"(h) . . . The confirmation of the plan shall discharge the debtor from its debts except as provided in the plan. . . ."

"(j) Upon the confirmation of the plan the property dealt with by the plan, . . . shall, as the court may direct, be free and clear of all claims of the debtor, its stockholders and creditors, . . ."

Act of August 27, 1935, these clauses were amended to read as they now stand but again nothing has been found commenting upon the reasons for their adoption in either the original or present form. Changes of interest here from the 1933 language were proposed by the Federal Coördinator of Transportation,[11] but they were not deemed of sufficient importance by him to merit particular comment. The Committee on the Judiciary of the House of Representatives held hearings and reported a bill, based on the Coördinator's draft, with the language, here important, changed to the exact wording of the Act

---

[11] House Document No. 89, 74th Congress, 1st Session, Appendix X, page 229.

Those affecting the language of the Act of March 3, 1933, quoted in note 10, *supra*, were as follows:

"The term 'creditors' shall include for all purposes of this section all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act, including the holder of a claim under a contract executory in whole or in part including an unexpired lease." *Id.* p. 231.

"In case an executory contract or unexpired lease of property shall be rejected . . ., any person injured by such nonadoption or rejection, shall, for all purposes of this section be deemed to be a creditor to the extent of such damage or injury, provided, that the judge shall consider the circumstances of an assignment of future rent claims and the amount of consideration paid for such assignment in determining the amount of damages allowed an assignee hereunder and may limit such damages to the actual consideration paid for such claims." *Id.* pp. 231–2.

". . . the property dealt with by the plan, when transferred and conveyed . . . shall be free and clear of all claims of the debtor, its stockholders and creditors, . . . The final decree shall discharge the debtor from its debts and liabilities and shall terminate all rights and interests of its stockholders and creditors except as provided in the plan or as may be reserved as aforesaid." *Id.* p. 239.

Comment of Coördinator, *Id.* p. 100 *et seq.*

of August 27, 1935. Nothing which illumines this problem appears in the hearings [12] or committee report.[13]

The portions of the act which we must consider are as follows:

"Sec. 77. Reorganization of railroads . . . (b) . . . The term 'creditors' shall include . . . the holder of a claim under a contract executory in whole or in part including an unexpired lease.

" . . . In case an executory contract or unexpired lease of property shall be rejected . . . any person injured by such nonadoption or rejection shall for all purposes of this section be deemed to be a creditor of the debtor to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings. . . .

"(f) . . . The property dealt with by the plan, when transferred and conveyed . . . shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, . . ." 49 Stat. 911, 913, 920.

It is first to be noted that the successive acts of the Congress, on extension of individual debts and corporate and railroad reorganization, are directed generally at the rehabilitation of debtors.[14] As one of the means used consistently to accomplish this, claims for future rent are made provable and dischargeable, so that the debtor would not be burdened with the rent obligation after discharge.[15]

---

[12] Hearings before the Committee on the Judiciary on H. R. 6249, 74th Congress, 1st Session.

[13] H. R. Report No. 1283, 74th Congress, 1st Session.

[14] Cf. *Adair* v. *Bank of America National T. & S. Assn.*, 303 U. S. 350.

[15] Cf. *Manhattan Properties* v. *Irving Trust Co.*, 291 U. S. 320, 331–2.

Next, the limitation of the amount of future rent recoverable to one year in § 4 and to three years in § 1[77B(b)] of the Act of June 7, 1934, leaves no doubt that the Congress deemed a definite formula advantageous in bankruptcy and general corporate reorganization. Its failure to provide an exact measure in railroad reorganizations shows it was not there considered appropriate. Finally, it seems obvious that the changes of the Committee on the Judiciary in the wording of the Coördinator's draft, by which "actual" was inserted before "damage" and "determined in accordance with principles obtaining in equitable proceedings" added as a guide, were intended to call emphatically to the attention of those administering the reorganization section the requirement that only those damages susceptible of definite proof should be allowed. We cannot read a limitation on damages into the language as enacted. As reorganizations had been traditionally carried on in equity and would be carried on in a bankruptcy court with equity powers, it was natural to add the clause as to equitable proceedings. Leases were placed upon the same basis as executory contracts.

The New Haven urges that the reference to "equitable proceedings" is to receiverships in equity, as such receiverships were mentioned twice in the same subsection. The use of "equitable proceedings" instead of "equity receiverships" supports the view that something different was intended. The equitable principle for the allowance of claims for future rent the New Haven finds in *Pennsylvania Steel Co.* v. *New York City Ry. Co.*, 198 F. 721, expressed as follows, pages 741–742,

"Claims which when presented within the time limited by the court for their presentation are certain or are capable of being made certain by recognized methods of computation, should be allowed. Claims which are not then certain should be disallowed because they afford no basis for making dividends."

The conclusion of the District Court, as affirmed by the Circuit Court of Appeals, is then offered as the correct rule in this case. That conclusion was summarized by the brief of the New Haven in these words:

"The court thereupon held that damages measured by the difference between the rent reserved and the earnings of the property up to the date of hearing should be allowed, with the further right to the claimant, in common with all other claimants under rejected leases, to apply for a subsequent hearing at the latest practicable date to be determined by the court during the reorganization proceedings for the purpose of proving similar damages up to that date."

Damages for loss of rent which fell due after the latest practicable date for filing claims were thus barred from proof, and under the quoted language of subdivision (f), the right to recover for such injury from the debtor after reorganization was destroyed.

We are of the opinion that this construction of the statutory provisions for the measurement of damages for loss of future rent is erroneous. Notwithstanding its extended term, the lease created an obligation under the present Bankruptcy Act upon the New Haven entitled to share in its assets upon reorganization on an equality with the claims of other creditors.

While it could be said that the general rule in equity receiverships was that only accrued damages could be proven, there was no discernible equitable rule for the determination of damages for rejection or nonadoption of an unexpired lease. The actual damages from the breach were not determined. At the most an arbitrary time limit was set on proof. The reference to equity proceedings does not, in our opinion, refer to any rule for the measure of damages in equity receiverships. In their administration of estates, whether railroad or nonrailroad, claims for future rents depended for their prova-

bility upon the fact of reëntry,[16] the existence of a clause for indemnity in case of breach,[17] or the incidence of the maturity of the rent claim under the local law.[18]

The damages recovered by an injured party have always been limited to his "actual" damages. There is nothing to indicate that the Congress intended to have "actual" interpreted as "accrued." The measure of damages applied by the courts for the breach of a lease, where damages are permitted, is uniform. In *William Filene's Sons Co.* v. *Weed*[19] and in *Kuehner* v. *Irving Trust Co.*,[20] this Court said in analogous situations that the measure was the present value of the rent reserved less the present rental value of the remainder of the term.[21] The English Bankruptcy Act permits proof of future rents, as any claim is provable which is "as to mode of valuation, capable of being ascertained by fixed rules or as matter of opinion." [22] The measure of damages is the same.[23] The difficulties of proof are well recognized.[24]

---

[16] *Gardiner* v. *Butler & Co.*, 245 U. S. 603, 605.

[17] *Wm. Filene's Sons Co.* v. *Weed*, 245 U. S. 597, 602.

[18] *Gardiner* v. *Butler & Co.* 245 U. S. 603, 605; *Wake Development Co.* v. *Auburn-Fuller Co.*, 71 F. 2d 702; *Moore* v. *McDuffie*, 71 F. 2d 729; *In re McAllister-Mohler Co.*, 46 F. 2d 91; see Gerdes, Corporate Reorganizations, §§ 687–88.

[19] 245 U. S. 597, 602.

[20] 299 U. S. 445, 450.

[21] Cf. *Grayson* v. *Mixon*, 176 Ark. 1123; 5 S. W. 2d 312; *Curran* v. *Smith-Zollinger Co.*, 18 Del. Ch. 220; 157 A. 432; *Wilson* v. *National Refining Co.*, 126 Kan. 139; 266 P. 941; *Womble* v. *Leigh*, 195 N. C. 282; 142 S. E. 17; *In re Reading Iron Works*, 150 Pa. 369; 24 A. 617; Sutherland, Damages, Vol. III, Fourth Ed., § 844.

[22] Act of 1914, 4 and 5 Geo. V, c. 59, § 30 (8) (c).

[23] *In re Tickle*, 3 Morr. 126; *Ex parte Llynvi Coal & Iron Co.*, L. R. 7 Ch. App. 28; *In re Hinks, Ex parte Verdi*, 3 Morr. 218; *In re Carruthers*, 2 Mans. 172; cf. *Hardy* v. *Fothergill*, L. R. 13 A. C. 351, 358, where a claim on covenant to deliver well repaired at end of fifty-year term was held provable.

[24] *Pennsylvania Steel Co.* v. *New York City Ry. Co.*, 198 F. 721, 759.

The same rules apply to executory contracts. In *Kuehner* v. *Irving Trust Co.*[25] this Court pointed out as one of the reasons for upholding the validity of a statutory formula the uncertainty as to the loss entailed by abrogation of leases, an uncertainty growing greater as the remainder of the term lengthens. "Testimony as to present rental value," it was said, "partakes largely of the character of prophecy . . ." A remainder of fourteen years was there involved. Here there is a remainder of 969 years. That lease was for a store in the City of New York. Evidence of the value of unexpired terms of street railway leases would be even more difficult to produce, as possible lessees are limited in number. Since insolvencies are more frequent in economic depressions and since, as a consequence, estimates of the rental value of the remainder of the term are given under subnormal business conditions, the difficulties are multiplied.

Judges in equitable proceedings will have the advantage of evidence in applying the usual rules as to the measure of damages. It is well understood that such evidence must show damages to reasonable certainty. Mere "plausible anticipation" does not merit consideration nor are flights into the realm of pure speculation entitled to be treated as evidence.[26] The determination of the amount to be allowed as the damage will be based on evidence which satisfies the mind.

Third. We comment briefly on two other points raised. The betterments and sinking funds having come into the possession of the lessors by the terms of the lease are not to be considered as offsets against the claim of the lessor. Their possession by the lessor increases the earning power of the assets to the benefit of the lessee.

---

[25] 299 U. S. 445, 454.

[26] Cf. Sutherland, Damages, Vol. I, Fourth Ed., § 121.

Since subsection (l) of § 77 [27] is general in form and is specifically subordinated to the other provisions of the section, including subsection (b), § 63 (a) (9) of the Bankruptcy Act is inapplicable to the present controversy.

As certiorari was sought and allowed only upon so much of the order of the Circuit Court of Appeals as affected the measure of the lessor's damage for rejection of the lease in question, the order of that court is reversed only in that particular and this case is remanded to the District Court for further proceedings in accordance with the order and opinion of the Circuit Court of Appeals as herein modified and of this Court.

Reversed.

MR. JUSTICE MCREYNOLDS is of opinion that the judgment of the court below should be affirmed.

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

---

[27] 49 Stat. 922, "(l) In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

BALTIMORE & OHIO RAILROAD CO. ET AL. *v.* UNITED STATES ET AL.

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

No. 133. Argued December 7, 8, 1938.—Decided January 3, 1939.

Interstate carriers, at the Port of New York, in a competitive effort to induce shippers to patronize their respective lines and so increase their line-haul traffic, furnished warehouse space and services, at less than cost to the carriers and at less than the rates charged by private warehousemen. *Held:*

1. That the Interstate Commerce Commission properly ordered the carriers to cease furnishing such facilities below cost, upon the grounds that such warehousing is "commercial" and not part of the transportation, and the effect of furnishing it below cost, in order to attract line-haul patronage, is to allow what amounts to a rebate to those shippers who enjoy the below-cost warehousing and to work unjust discrimination and unreasonable prejudice against other shippers paying the published transportation rates, in violation of §§ 2, 3, and 6 of the Interstate Commerce Act. P. 520.

2. To this conclusion, the question whether the shipper pays less than fair or market value is immaterial. P. 523.

3. Inclusion of such below-cost warehousing service in the carrier's tariff, in connection with storage-in-transit privileges, though required by the Commission, does not make it a transportation cost or save it from the condemnation of § 6 (7) of the Act. P. 525.

20 F. Supp. 273; *id.* 917, affirmed.

APPEAL from a decree dismissing a bill to enjoin enforcement of an order of the Interstate Commerce Commission. The Interstate Commerce Commission, the Warehousemen's Protective Committee, the American Warehousemen's Association, the Boston Port Authority, and the City of Boston intervened and prayed for dismissal of the bill.

Mr. Edwin H. Burgess, with whom *Messrs. Alex H. Elder, Thomas P. Healy, Walter J. Larrabee, Carleton*

W. Meyer, Guernsey Orcutt, Douglas Swift, H. A. Taylor, Charles R. Webber, and *M. B. Pierce* were on the brief, for appellants.

The order condemns railroad leases to shippers upon the basic finding that the rentals reserved are less than the cost of providing the property leased. Upon this finding alone the Commission and the District Court hold that such rentals are "concessions" to shippers from the published tariff rates for road-haul transportation, in violation of §§ 2, 3, and 6 of the Act and "probably" in violation of the Elkins Act. It is neither the duty nor within the province of the Court to search the record to determine whether additional essential findings might have been made.

To make out an unlawful concession, receipt by the shipper of more value than he pays back must be shown by an express finding that the reasonable rental value of the lease given to the shipper exceeded the rental he actually paid.

Citing *Lehigh Valley R. Co.* v. *United States,* 243 U. S. 444, 446; *Wight* v. *United States,* 167 U. S. 512; *Mitchell Coal Co.* v. *Pennsylvania R. Co.,* 230 U. S. 247, 260–265; *United States* v. *American Tin Plate Co.,* 301 U. S. 402; *New York, N. H. & H. R. Co.* v. *Interstate Commerce Comm'n,* 200 U. S. 361; *National Fire Ins. Co.* v. *Thompson,* 281 U. S. 331; *Standard Oil Co.* v. *Southern Pacific Co.,* 268 U. S. 146, 155; *St. Louis & O'Fallon R. Co.* v. *United States,* 279 U. S. 461, 494; *Atchison, T. & S. F. Ry. Co.* v. *United States,* 284 U. S. 248, 260; *Great Northern Ry. Co.* v. *Weeks,* 297 U. S. 135, 149; *Donovan* v. *Pennsylvania R. Co.,* 199 U. S. 279; *Louisville & N. Ry. Co.* v. *West Coast Naval Stores Co.,* 198 U. S. 483; *Missouri-Pacific Ry.* v. *Nebraska,* 164 U. S. 403; *Davis* v. *Southern Pacific Co.,* 235 F. 731, 737; *Aron* v. *Pennsylvania R. Co.,* 80 F. 2d 100, cert. denied, 298 U. S. 658; *Cleveland, C. C. & St. L. Ry. Co.* v. *Hirsch,* 204 F. 849;

Central of Georgia Ry. Co. v. *Blount,* 238 F. 292; *Vandalia Ry. Co.* v. *United States,* 226 F. 713; *United States* v. *Northern Pacific Ry. Co.,* 18 F. 2d 299, 304; Andrews Bros. Co. *v.* Pennsylvania R. Co., 123 I. C. C. 733; Williams-Thompson Co. *v.* A. & W. P. R. Co., 126 I. C. C. 417; Johnson Lumber Co. *v.* Union Pacific R. Co., 219 I. C. C. 125.

Great hardship will result to the shippers and carriers throughout the country from this rigid cost or investment standard as the test of lawful rentals.

There is nothing strange or unusual in the circumstance that present fair value of leases may not equal "cost," if calculated to include, as the Commission's reports seem to contemplate, interest and depreciation on investment at some unstated rates, and taxes. The Commission's reports in this case show that most of the buildings in which the carriers have leased space to shippers were constructed in the years after the war and prior to the depression when, as the Court will judicially notice, price levels and all property values were materially higher than have prevailed later and when the leases here in issue were made.

Proceeding further upon the unsound cost theory, the court below went so far as to hold that a loss due to leasing property at a rental below cost necessarily reduces, by the amount of the loss, the carrier's "true net transportation return" from the tariff rates for transportation charged the shipper, and that such loss is automatically and correspondingly a gain by the shipper. Simply stated, the argument is that every railroad loss or reduction in "net transportation return" is somebody's concession or rebate. To state the proposition, we submit, is to disclose its fallacy.

A carrier may dissipate its revenue derived from the tariff rates on a given shipment in many ways. But mere dissipation can not constitute a concession. Unless

the loss sustained by the carrier also has the effect directly or indirectly of giving the shipper something of value over and above what he pays, there is, and in the very nature of things can be, no reduction in the tariff rates paid by the shipper, and therefore no concession from the standpoint of the shipper. It is not what the carrier retains as a net transportation return, but what the shipper pays, in relation to what he gets from the carrier, that determines whether or not the shipper has paid and borne the full tariff rate. It is not what the carrier loses, but what the shipper gains, if anything, from the lease, that controls.

The only finding that the Commission made as to appellants' storing of freight in their warehouses and piers is likewise that the charges therefor are less than the cost to the carrier of storing such freight. As to such storage that finding is, for the same reasons, insufficient to establish a concession.

All of appellants' "in-transit services," consisting of in-transit storage and the handling and insuring of goods in connection therewith, are covered by tariffs, and, under the Commission's express finding, must continue so to be. Appellants' full compliance with such tariffs, which is admitted, makes the existence of concessions in connection with such "in-transit services" impossible.

The order as to appellants' leases, storage, and "in-transit services" will deprive appellants of their liberty and property in contravention of the Fifth Amendment.

The Commission has full power, under the fair and reasonable value standard urged by appellants, to correct any practices that may result in concessions or discriminations.

Section 15a of the Act can not support the order.

Appellants have a legal right to make leases at fair rental values and to store goods at the reasonable worth

of the storage, and no section of the Act is violated by so doing.

Mr. J. Stanley Payne, with whom *Solicitor General Jackson, Assistant Attorney General Arnold,* and *Messrs. Elmer B. Collins* and *Daniel W. Knowlton,* Chief Counsel, I. C. C., were on the brief, for the United States et al., appellees.

The Commission's findings establish that appellants in their own competition for line-haul traffic cut warehousing charges and space rentals below their own costs and below those of the competitive commercial warehousemen, without regard to "fair value."

Appellants' contention that the only basic finding was that the warehousing charges are below cost, and that the Commission did not find that these charges were below fair value, is erroneous.

Competition for line-haul traffic was the only reason for the low warehousing charges.

The order, prescribing costs as the minimum, to correct violations of §§ 2, 3, and 6 of the Interstate Commerce Act, is fully supported by the *New Haven* case, 200 U. S. 361.

Appellants have no legal right to maintain commercial warehousing charges that are below costs for the purpose of inducing the movement of competitive traffic over their respective lines, where the effect is to transport the property in interstate commerce at less than the published tariff rates. *Warehouse Co.* v. *United States,* 283 U. S. 501; *New Haven Case,* 200 U. S. 361; *New York Central R. Co.* v. *United States,* 212 U. S. 481; *United States* v. *Union Stock Yard Co.,* 226 U. S. 286, 301–309.

The below-cost warehousing rates of appellants dissipate their revenues, cause unjust discrimination against particular shippers and against the general body of shippers over their lines, in violation of §§ 2, 3, and 6 and of

the purpose of the Act (§ 15a) to maintain adequate national railway service. *Wisconsin Railroad Comm'n* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563, 585; *New England Divisions Case,* 261 U. S. 184, 189–190; *Dayton-Goose Creek Ry. Co.* v. *United States,* 263 U. S. 456, 478; *Railroad Comm'n* v. *Southern Pacific Co.,* 264 U. S. 331, 341, 347; *United States* v. *Louisiana,* 290 U. S. 70; *Florida* v. *United States,* 292 U. S. 1, 7–8.

The Commission, though holding in its third report that tariffs publishing the storage, handling, and insurance rates on freight stored under the transit privilege should be filed, affirmed its prior finding that the services under these rates are not transportation services.

The fact that appellants' below-cost rates for storage, handling, and insurance on freight stored under the transit privilege were published in appellants' tariffs did not prevent them from causing the discriminations and other violations found by the Commission.

Appellants' brief suggests that the order requires rates that will yield a return on the investment in the operation of their warehouses, and depreciation. The Commission's reports find definitely that depreciation is a part of the costs. As to return on investment, the order does not require that appellants make warehousing and storage rates and space rentals that will yield a profit. It simply sets costs as the minimum. Where interest is properly a part of the costs, it is clear it must be included, but there is nothing in the report and order that rigidly requires the original or historical cost of construction of buildings to be used as the basis.

If appellants are in doubt as to whether in particular instances interest on investment is to be deemed a profit, or part of the costs, their proper procedure is to apply to the Commission for a ruling. *American Express Co.* v. *Caldwell,* 244 U. S. 617, 627.

It is obvious that the order does not attempt to require what might be impossible, that appellants' warehouses be operated at a profit.

The order for the future rightly corrects the discriminations and other violations of the Act by requiring removal of the means by which they were accomplished.

The order is a valid exercise of the Commission's regulatory power and therefore does not deprive appellants of their liberty or property in contravention of the Fifth Amendment.

Mr. John J. Hickey, with whom *Mr. Walter W. Ahrens* was on the brief, for the Warehousemen's Protective Committee; *Mr. A. Lane Cricher* for the American Warehousemen's Assn.; and *Mr. Henry E. Foley,* with whom *Messrs. Henry Parkman, Jr.* and *Lewis H. Weinstein* were on the brief, for the City of Boston and Boston Port Authority, appellees.

Mr. Justice Reed delivered the opinion of the Court.

The Interstate Commerce Commission entered an order on February 2, 1937, which directed certain carriers serving the Port of New York district to cease and desist on or before April 5, 1937, from permitting shippers in interstate commerce over the carriers' lines from occupying "space by lease or otherwise in warehouses, buildings or on piers owned or controlled directly or indirectly by, or affiliated with" the carriers involved "at rates and charges which failed to compensate said" carriers "for the cost of providing said space." The cease and desist order likewise directed the carriers to abstain from storing, handling or insuring goods for shippers at less than cost. One carrier was also directed to abstain from granting concessions to a warehouse company by means of leasing space to the warehouse company at less than the cost of the space to the carrier.

As authorized by the Judicial Code,[1] a petition in equity was filed in the United States District Court for the Southern District of New York on March 9, 1937, seeking a permanent injunction against the enforcement of the order. A hearing was had by a three-judge court pursuant to the provisions of the Urgent Deficiencies Appropriation Act of October 22, 1913,[2] and a final order dismissing the petition entered on March 23, 1938.[3] An appeal was taken directly to this Court as authorized by the Urgent Deficiencies Act and the Judicial Code.[4]

The order appealed from was entered in an investigation into "practices of carriers affecting operating revenues or expenses" [5] undertaken by the Interstate Commerce Commission upon its own motion.[6] For convenience the general investigation was divided into different parts; the one in which the order under consideration was entered is Part VI, "Warehousing and Storage of Property by Carriers at the Port of New York." The particular practices affected by the order were brought to the attention of the Commission by complaints of warehouse operators in the New York district that warehouses owned or controlled by the carriers were being operated contrary to the Interstate Commerce Act. Full reports of the investigation into the practices complained of were made by the Commission on December 12, 1933,[7] and June 8, 1936.[8] The first report terminated in an admonition; the second report was followed by an order

[1] § 24, subsection 28.

[2] 38 Stat. 220.

[3] For opinion below see *Baltimore & O. R. Co.* v. *United States* (I. C. C.), 20 F. Supp. 273.

[4] Judicial Code, § 238.

[5] Ex parte 104, 198 I. C. C. 134.

[6] Interstate Commerce Act, Act of Feb. 4, 1887, c. 104, § 13 (2), 24 Stat. 383, as amended; 49 U. S. C. § 13 (2).

[7] 198 I. C. C. 134.

[8] 216 I. C. C. 291.

which never became effective. This order was superseded by the Commission's order of February 2, 1937, in controversy here. This last order was entered by the Commission upon reconsideration of its former reports.[9] The Commission postponed its effective date until the injunction was brought and the lower court has entered an order for a further stay pending the determination of the appeal to this Court.

While the issues here are matters of law depending on whether admitted facts support the order, it will be helpful for an understanding of the basis of our opinion to have summarized the underlying facts found by the lower court.

The railroads affected by the order are The Baltimore & Ohio Railroad Company, The Central Railroad Company of New Jersey, The Delaware, Lackawanna & Western Railroad Company, Erie Railroad Company, Lehigh Valley Railroad Company, The New York Central Railroad Company and The Pennsylvania Railroad Company. All are subject to the Interstate Commerce Act. As common carriers they operate lines of railroad extending in a generally westward direction from the Port of New York district to various western points and compete each with the others for domestic and foreign commerce to and from the district. All united in the petition to enjoin the enforcement of the order. Their petition named as defendant the United States of America. The Interstate Commerce Commission and the Warehousemen's Protective Committee intervened. Later, orders were entered allowing the intervention of the American Warehousemen's Association, Merchandise Division; the Boston Port Authority; and the City of Boston.

It was the practice of these carriers to furnish to shippers in the Port of New York area the storage, handling and insurance which were under investigation. On ac-

[9] 220 I. C. C. 102.

count of the high price and great demand for storage space in the wholesale and retail business locations of New York, dealers must store their surplus stocks in low-rent sections. To serve those merchants who do not have their own warehouse facilities, numerous companies not affiliated with the carriers are engaged in the commercial warehouse business in the immediate vicinity of New York. Their business, like the warehouse businesses owned or operated by or affiliated with the carriers, not only covers the storage of goods but its handling in and out of cars and ships with all the incidental services connected therewith such as the issuance of warehouse receipts, inspection, cooperage, marking, and weighing.

Neither the complaints of the competitors of the carriers in the warehousing business nor the terms of the Commission's order are directed at the involuntary storage of goods incidental to transportation. This is the period before or after shipment during which goods occupy cars or floors without any charge above the strictly transportation rate. The warehousing practices complained of are those in connection with accessorial services of the carriers, accurately designated commercial warehousing. Examples of such services are the storage and other warehousing services furnished by the carriers or their affiliates or subsidiaries, to enable shippers to hold and handle their commodities beyond the time allowed by transportation rates and in ways not required by rail movement itself. All of the carriers "now generally store freight on piers owned or leased by them and in warehouses operated by affiliated or subsidiary companies." This business is carried on in various ways. Some carriers lease space to shippers for warehousing; others have aided in financing structures on their property in which they lease space from their own subsidiaries; and still others own directly the buildings and lease them to subsidiaries for warehouse operations. In all cases the carriers exercise sufficient

control over the warehouse facilities to make them subservient to the competitive needs of the carriers. Their entrance into warehousing was brought about by a desire to induce shippers to use particular rail facilities and as first one and then the other of the carriers gained traffic by their warehouse conveniences, it seemed necessary for their competitors to equip themselves with similar advantages. Obviously a shipper, who can secure transportation, storage, handling and insurance together from a carrier and its affiliates for an aggregate cost which is less than the sum for which he can secure the various services when purchased separately from carriers and non-affiliated enterprises, will deal with those offering the best terms. The storage largely determines the transportation route. To get the rail transportation of large shippers, the carriers sought them out and offered warehousing services and space below the rates of private warehousemen and below the cost to the carriers of the services rendered. It was not only a contest between carriers and private warehousemen but also between the carriers themselves. Traffic departments of the railroads became solicitors for warehousing business. Favored shippers were rented space by the carriers below compensatory figures. To meet the requirements of this competition the various Port of New York railroads added many new buildings in recent years. This provided many millions of square feet of space above the present needs of the district.[10]

Another form of warehousing is found in a development of the storage-in-transit privilege at the Port of New York. The carriers have rules and regulations governing this privilege which are published in separate tariffs filed with the Commission. These tariffs provide that westbound freight in carloads "from points within the free lighterage limits of New York Harbor may be

[10] Those interested in the details will find them in 198 I. C. C. 134, 216 I. C. C. 291, 220 I. C. C. 102.

stored in designated warehouses . . . within the Port District, and, if reforwarded by rail within the period specified in the tariffs . . . the through rate . . . from point of origin in New York Harbor to the final destination, will be applied."

As the through rate from shipside and from warehouse is the same, if the shipment moves outbound from the warehouse over the line of the inbound carrier, a shipper using carrier warehouses has the advantage of port stoppage without extra transportation cost. This tariff arrangement does not affect charges for warehousing services in connection with the storage. The storage is commercial in character and involves large tonnages. While the transportation tariffs permit varying periods of from twelve to thirty-six months for the different commodities, storage may be continued beyond this time limit at the same rate. Prior to October 16, 1934, the tariffs permitted the removal of the commodities stored at any time in any quantity and by any means of transportation without additional charge. On that date an additional charge was provided for withdrawal by means other than over the railroad which granted the storage. It will be noted that in the movement from shipside to a western destination an extra handling of the commodity is required if the warehouse is located directly on the water-front and two extra handlings if the goods must first be transported from the water-front to the warehouse and then loaded into westbound cars. The cost of these extra handlings is borne by the carrier. Insurance is furnished at a level premium rate notwithstanding the variables of the different exposures. All in all, it was determined, and this conclusion is not in dispute, that the warehouse services were performed "at rates and charges which fail to compensate" the carriers for the cost.

Through arrangements permitting distributors to avoid payment of tariff charges for storage, the Com-

mission and the District Court found that the carriers permitted distributors of flour to get unjust and discriminatory charges.

After examining the details of cost of the various carriers for warehousing, both as storage-in-transit and ordinary storage, the conclusion of the Interstate Commerce Commission was that the commercial warehousing was carried on at a substantial loss. The term "commercial warehousing" covers all warehousing practices except those strictly a part of the operation of rail transportation. This phase of the circumstances surrounding the order may be summed up in the words of the 179th finding of fact of the District Court, which reads as follows:

"In its first report the Commission pointed out that the matters and transactions referred to therein 'are further illustrations of serious waste resulting from the competition of railroads with each other for traffic.' The extent of this waste is indicated by statements contained in appendices to the report, Appendix I of which shows that the seven plaintiffs expended approximately $35,000,000 in connection with the warehouse projects considered in the report. In its second report the Commission found that up to the close of the year 1930, the cold storage industry had placed 33,688,546 cubic feet of refrigerated space on the market in the Port of New York District, and that within a period of three years thereafter warehouses affiliated with the Erie and Pennsylvania placed an additional 8,500,000 cubic feet of refrigerated space on the market, notwithstanding the fact that at the time there was an unused capacity of at least 30 per cent of the then-existing facilities; and further that as of the close of the year 1930 the 43 warehouse companies operating merchandise warehouses, other than cold storage, in the Port of New York District had placed 20,450,000 square feet of warehouse space on the market in that district, and that within six years subsequent to January

1, 1929, the plaintiffs or their affiliates placed 6,185,000 square feet of new additional merchandise warehouse space on the market, thereby, without commercial need, increasing the capacity at least 25 per cent. Appendix II of the first report shows that the loss incurred by plaintiffs in connection with their warehouse projects during the year 1931 was $1,260,441. Appendix III shows that the loss per ton of freight stored in transit during 1931 ranged from $1.28 to $6.18. These losses were added to by losses incurred on freight stored on railroad piers, and in cars, on insurance premiums, and from loans and advances. In this connection the Commission found: 'Whether or not initial advantages may have been realized at one time or another, by individual carriers, the result is that a preferred group of large shippers are now the sole beneficiaries, and are so at the expense of the carriers and the general shipping public.' And the Commission found 'that the respondents' warehousing and storage practices, charges assessed, and allowances made in connection therewith at the Port of New York district dissipate their funds and revenues, are not in conformity with efficient and economical management as contemplated by the Interstate Commerce Act, and are not in the public interest.' "

The final order of the District Court, dismissing upon these facts the petition for injunction to restrain the enforcement of the Commission's order, is attacked here upon two grounds: First, that the rendition of services to the public at less than cost is insufficient in law to establish that the carriers thereby make concessions and through such concessions are guilty of the violation of §§ 2, 3 and 6 of the Interstate Commerce Act; second, that the carriers having published and observed tariffs covering storage-in-transit cannot be guilty as to such services of violations of the same three sections.

The carriers contend that the questions involved in charges of violations of the Interstate Commerce Act by

discrimination and rebate are to be judged by the reasonable worth of the services rendered instead of by the cost to the carrier and that the charges for storage-in-transit are not warehousing costs but transportation costs and therefore it is no violation of the Act to furnish them at less than cost to the carriers.

Warehousing Charges.—The order, as entered by the Commission [11] and sustained by the lower court, was an

[11] The pertinent language of the order follows: "It is ordered, That the respondent carriers . . . be, and they are hereby, notified and required to cease and desist . . . from permitting shippers . . . to occupy space by lease or otherwise in . . . buildings, . . . owned or controlled . . . by . . . respondents . . . at rates and charges which fail to compensate said respondents for the cost of providing space;

"It is further ordered, That the respondent carriers . . . are hereby . . . required to cease and desist . . . from storing goods . . . at rates and charges which fail to compensate said respondents for the cost of storing such goods or providing such storage space.

"It is further ordered, That the respondent carriers . . . are hereby . . . required to cease and desist . . . from . . . handling goods . . . for shippers . . . at rates and charges which fail to compensate said respondents for the cost of said handling.

"It is further ordered, That the respondent carriers . . . (except The Central Railroad Company of New Jersey) . . . are hereby . . . required to cease and desist . . . from insuring goods . . . at less than the cost of providing such insurance.

"It is further ordered, That the respondent carriers above-named be, and they are hereby, notified and required to cease and desist from applying, by means of tariffs now on file with this Commission on or before April 15, 1937, noncompensatory rates and charges, as fully described in said reports, for the leasing of space, storage, handling and insurance of goods shipped over their lines in interstate commerce which goods are stored, handled or insured in connection with commercial warehousing service as fully defined and described in said reports.

. . . . . .

"And it is further ordered, That respondent, The Central Railroad Company of New Jersey, be, and it is hereby, notified and required to cease and desist, on or before April 15, 1937, and thereafter to

exercise by the Commission of its power to cause carriers to cease and desist from practices which result in the receipt of less than the published tariffs for transportation services, with the consequence that concessions were given and preferences and advantages obtained by certain shippers. Its validity, except as it may be affected by consideration of the point that the practices were in accordance with tariffs made and filed with the Commission, depends upon whether a finding that the warehousing services were rendered at a charge below cost to the carrier authorized the order, without the further finding that the reasonable value of the service was above the charge.

It was the view of the Commission and the lower court that the finding of the Commission showed a violation of §§ 2, 3 (1) and 6 (7) of the Interstate Commerce Act.[12]

abstain, from subsidizing and granting concessions to the Newark Central Warehouse Company by means of noncompensatory rentals collected or received for the spaced leased by the Newark Central Warehouse Company from said respondent carrier, as fully described of record and in said reports."

[12] Act of February 4, 1887, c. 104, 24 Stat. 379, as amended; 49 U. S. C. §§ 2, 3 (1), 6 (7).

"SEC. 2. If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful.

"SEC. 3. (1) It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in

These sections were enacted to assure the maintenance of rail transportation tariffs without rebate, discrimination or preference. No findings appear, nor has our attention been called to any evidence, which suggests the charges were made to meet the competition of the commercial warehousemen or were based upon the fair value of the services rendered, regardless of competition. On the contrary, it was the carriers' struggle to obtain line haul traffic which led them into the price cutting warfare. Charges for leases, storage, both in and out of the transit privilege, handling and insurance were alike slashed to meet the competition.

Since the tariffs for rail haul are fixed for the various points and freight classifications, every shipper must pay that tariff for his transportation. As the shippers of the Port of New York district can utilize, in many instances, commercial storage and other warehousing services in addition to rail transportation, a saving on the non-transportation services obviously figures out the same as a rebate on the transportation service. It is immaterial that the shipper pays fair value or the market price for the extra privilege he enjoys. Section 6 (7) of the Act forbids the carrier to receive less than the published rates

---

any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"SEC. 6. . . . (7) . . . nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

for transportation or to remit "by any device any portion of the rates." When services, not necessary for transportation, are furnished below cost in an effort to acquire rail transportation, as was done here, this provision is violated.[13] Since the carrier warehouse rates, as found by the Court and Commission, are not open to all shippers alike,[14] there is violation of §§ 2 and 3 (1) prohibiting discrimination and unreasonable prejudice. The rail transportation rates have charged against them the loss occasioned by warehousing practices designed to attract a volume of rail business.

This is not to say that for every situation it is necessary that accessorial services should be rendered at not less than cost, rather than market or fair value. The Commission pointed out it was not condemning bona fide storage-in-transit for milling, manufacturing or processing,[15] but only the storage practices indulged in here to get rail transportation. In other circumstances fair value and market have been recognized as legitimate bases.[16] Where competitive practices such as existed here are absent, reasonable or market value charges may well be the test. The power, however, is in the Commission, whenever it is of the opinion that any practice is unjust, unreasonable, preferential or otherwise violative of the Act, to prescribe what practice will be just, fair and reasonable.[17] As in *Merchants Warehouse Co.* v. *United States*[18] the Commission "rightly secured the discontinu-

[13] Cf. *Wight* v. *United States,* 167 U. S. 512; *Seaboard Air Line* v. *United States,* 254 U. S. 57, 63; *New York, N. H. & H. R. Co.* v. *Interstate Commerce Comm'n,* 200 U. S. 361.

[14] 198 I. C. C. at 197.

[15] 216 I. C. C. 291, 356.

[16] Leases and Grants by Carriers to Shippers, 73 I. C. C. 671, 683, 684. Cf. Wharfage Charges at Atlantic and Gulf Ports, 157 I. C. C. 663, 692; *Central of Georgia Ry. Co.* v. *Blount,* 238 F. 292, 296.

[17] § 15 (1), 41 Stat. 484; 49 U. S. C. § 15 (1).

[18] 283 U. S. 501, 513.

ance of the discrimination by ordering the carriers to cease employing the means by which it had been accomplished."

In-Transit Tariffs.—The carriers urge additional reasons why the order is invalid as to in-transit storage. They find in the order as to it all the alleged vices of the order with respect to leases and non-transit storage, which arise from basing the minimum charges on cost rather than market or fair value. They also contend that since the charges for in-transit arrangements are and must be published in tariffs, they are a part of transportation costs and therefore may be rendered at less than cost.[19] Even if the in-transit warehousing is not technically transportation, say the carriers, its inclusion in tariffs is sufficient to protect it from the attack that its below-cost charges violate § 6. The carriers insist that they do not remit by any device any portion of the specified tariff charges and that, as asserted violations of §§ 2 and 3 are predicated upon violations of § 6, none of the findings as to in-transit charges supports the orders.

The Commission found that the in-transit warehousing was not a part of transportation. This finding is not affected by the determination of the Commission that the rates and charges should be published in the tariffs. Indeed, in its report on the subject the Commission said "What is here condemned is the fact that the respondents have volntarily engaged in storage and warehousing services which are not within their common-carrier obligations and, by providing such services to shippers below the cost of such services, reduce the cost to such shippers for the transportation of their goods. The tariffs now on

[19] *Cleveland, C. C. & St. L. Ry. Co.* v. *Dettlebach,* 239 U. S. 588; *St. Louis & San Francisco Ry. Co.* v. *Gill,* 156 U. S. 649, 665, 666; *Atlantic Coast Line* v. *North Carolina Comm'n,* 206 U. S. 1, 26–7; *Northern Pacific R. Co.* v. *North Dakota,* 236 U. S. 585, 600; *Minneapolis & St. L. R. Co.* v. *Minnesota,* 186 U. S. 257, 268.

file are instruments which work violations of the act in that, through them, respondents hold themselves out to perform commercial services (under the guise of performing transportation services) at rates and charges which fail to compensate respondents for the cost of performing them, and thereby violate sections 2, 3, and 6 of the act." [20]

We accept this conclusion.[21] If the service is non-transportation, the fact that it is in a tariff does not save it from the condemnation of § 6 (7). That section forbids receiving a less compensation for transportation than the tariff. The loss on in-transit warehousing, entered into to secure the rail-haul, results in lowered receipts for the transportation and in violation of the section. Some shippers are not in a position to avail themselves of the below-cost in-transit service. They must pay the full transportation rate, without any offset from the warehousing. This discrimination between shippers is unlawful and the remedy applied by the order valid in these circumstances.

Conclusion.—We do not discuss the suggestion that the order deprives the carriers of their liberty and property contrary to the Fifth Amendment. If, as here held, the order is a valid regulation of rates for warehousing services which affect transportation tariffs, it cannot be unconstitutional. Appellants' contention of unconstitutionality is predicated on the invalidity of the order under the Interstate Commerce Act.

Affirmed.

---

[20] 220 I. C. C. at 103–104.

[21] *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402, 406.

UNITED STATES *v.* POWERS ET AL.

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

No. 102. Argued November 18, 1938.—Decided January 9, 1939.

1. The Treaty of May 7, 1868, between the United States and the Crow Indians, which established their reservation and contemplated settlement in severalty and farming by individual Indians, operated by implication to reserve the waters within the Reservation for the equal benefit of tribal members. *Winters* v. *United States*, 207 U. S. 564. Pp. 528–532.
2. Allottees and their grantees acquired the right to use some portion of the tribal waters essential for cultivation. *Id.*

   Subsequent Acts, cited in the opinion, do not deny to allottees participation in the use of waters essential to farming and home making. If possible, legislation subsequent to the Treaty must be interpreted in harmony with its plain purposes.
3. The General Allotment Act of 1887 recognizes equal rights in distribution of water among Indians resident on reservations, and authorizes the Secretary of the Interior by regulations to secure just and equal distribution. P. 533.
4. Adoption by the Secretary of the Interior of plans for irrigation projects to serve certain lands on the Crow Indian Reservation did not imply a purpose to exclude all other land from participation in essential water and thereby destroy the equal interest granted by the Treaty. P. 533.

   Subsequent allotments for farming followed by patents negative any such notion.

94 F. 2d 783, affirmed.

CERTIORARI, *post*, p. 581, to review a decree which affirmed a decree of the District Court, 16 F. Supp. 155, dismissing a bill by which the United States sought to enjoin the owners of certain tracts of land in the Crow Indian Reservation, Indian allotments which had been duly sold in fee, from using or diverting any water from two streams on the Reservation.

Mr. Charles W. Leaphart, with whom *Solicitor General Jackson* and *Assistant Attorney General McFarland* were on the brief, for the United States.

Mr. T. H. Burke for respondents.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

By this proceeding (begun in 1934) the United States seek to prevent further taking of water from certain non-navigable streams within the Crow Indian Reservation. This water is essential to the cultivation of respondents' lands allotted more than twenty years ago to members of the tribe and presently held under properly acquired fee simple titles. The prayer of the bill is for a permanent injunction against "maintaining or using said dams and ditches, as aforesaid, and from diverting by means of said dams and ditches or in any other manner any of the waters from Lodge Grass Creek or Little Big Horn River and their tributaries; . . ."

The decree of the Circuit Court of Appeals dismissing the bill must be affirmed.

By Treaty of May 7, 1868, 15 Stat. 649, 650–651, the United States set aside a large tract of arid land now within the State of Montana as a Reservation for the "absolute and undisturbed use and occupation" of Crow Indians, and they undertook to make their permanent homes thereon. It provides that whenever an individual Indian desires "to commence farming" he may select land, under stated conditions, which thereupon shall "cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it." Also—

"The President may at any time order a survey of the reservation, and, when so surveyed, Congress shall pro-

vide for protecting the rights of settlers in their improvements, and may fix the character of the title held by each. . . . When the head of a family or lodge shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of three years more, he shall be entitled to receive seeds and implements as aforesaid in value twenty-five dollars per annum."

The Treaty contains no definite provision concerning apportionment or use of waters. Although the lands are arid a considerable area is susceptible of cultivation under irrigation.

The Act of Congress approved April 11, 1882, ch. 74, 22 Stat. 42, 43, refers to "an agreement for the sale to the United States [by the Crows] of a portion of their said reservation, and for their settlement upon lands in severalty," etc. In return the United States agreed to survey the remaining lands and divide them among members of the tribe; also " 'to issue patents to us respectively, therefor, so soon as the necessary laws are passed by Congress.' " Section 2—

"That the Secretary of the Interior be, and he is hereby, authorized to cause to be surveyed a sufficient quantity of land on the Crow Reservation to secure the settlement in severalty of said Indians as provided in said agreement, and upon the completion of said survey he shall cause allotments of land to be made to each and all of the Indians of said Crow tribe in quantity and character as mentioned and set forth in the agreement above named, and upon the approval of said allotments by the Secretary of the Interior he shall cause patents to issue to each and every allottee for the lands so allotted, with the same

considerations, restrictions, and limitations mentioned therein as are provided in said agreement."

The Act of February 8, 1887, ch. 119, 24 Stat. 388, 389–390, provides for allotments in severalty to Indians upon any reservation created for their use whenever in the President's opinion any part is advantageous for agricultural and grazing purposes. And it directs that after allotments are approved the Secretary of the Interior shall issue patents declaring the United States will hold the land for twenty-five years in trust and thereafter "will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever . . ." Section 7—

"That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor."

The Act of March 3, 1891, ch. 543, 26 Stat. 989, 1040, mentions another conveyance by the Crows to the United States and appropriates $200,000 to be expended under direction of the Secretary of the Interior for irrigation in the valleys of the Big Horn and Little Big Horn Rivers and on Pryor Creek, within the diminished Reservation.

The Act of May 8, 1906, ch. 2348, 34 Stat. 182, 183, authorizes the Secretary of the Interior to issue to Indian allottees patents in fee simple "and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed . . ." Also—

"Hereafter when an allotment of land is made to any Indian, and any such Indian dies before the expiration of the trust period, said allotment shall be cancelled and

the land shall revert to the United States, and the Secretary of the Interior shall ascertain the legal heirs of such Indian, and shall cause to be issued to said heirs and in their names, a patent in fee simple for said land, or he may cause the land to be sold as provided by law and issue a patent therefor to the purchaser or purchasers, and pay the net proceeds to the heirs, or their legal representatives, of such deceased Indian. The action of the Secretary of the Interior in determining the legal heirs of any deceased Indian, as provided herein, shall in all respects be conclusive and final."

Commencing in 1901 allotments in severalty of tracts abutting or adjacent to the Little Big Horn River or Lodge Grass Creek were made to respondents' Indian predecessors. These culminated in the issuance of fee simple patents as provided by Act of May 8, 1906.[1] Each patent undertook to convey the land "together with all the rights, privileges, immunities and appurtenances, of whatsoever nature, thereunto belonging," but contained no express provision concerning water rights. Respondents have succeeded to the interest of the original allottees either by mesne conveyances or by purchase at government sales of deceased allottees' lands.

The Little Big Horn River and its affluent, Lodge Grass Creek, under normal conditions may afford sufficient water to irrigate twenty thousand acres within the Reservation. Through private ditches respondents and their predecessors have long conveyed water from these streams in order to irrigate their lands and thus render them susceptible of cultivation. It is not suggested that water therefor can be obtained from any other source.

Petitioners maintain—

> That prior to 1885, the United States commenced construction of irrigation works intended to divert

[1] Ch. 2348, 34 Stat. 182.

waters from the streams in question. These gradually developed into a system normally capable of carrying sufficient water to irrigate 20,000 acres.[2] None of respondents' lands lie within the ambit of these projects; and neither the original allotments nor the patents specifically granted the use of any water.

That Congress gave the Secretary of the Interior control of Reservation waters. Irrigation projects initiated under his authority prior to allotments of respondents' lands sufficed to dedicate and reserve sufficient water for full utilization of these projects; rights acquired by the allottees were taken subject to this reservation.

That because of drought during 1931 to 1934, and respondents' diversion of waters upstream from the projects so initiated, the available water became insufficient properly to irrigate some 8,000 acres lying therein and under cultivation. Accordingly the injunction should be granted; all waters from the two streams had been devoted to those and similarly situated lands so far as necessary for farming operations.

Respondents maintain that under the Treaty of 1868 waters within the Reservation were reserved for the equal benefit of tribal members (*Winters* v. *United States,* 207 U. S. 564) and that when allotments of land were duly made for exclusive use and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the owners.

The respondents' claim to the extent stated is well founded.

---

[2] See Act of March 1, 1899, ch. 324, 30 Stat. 924; Act of May 31, 1900, ch. 598, 31 Stat. 221; Act of April 27, 1904, ch. 1624, 33 Stat. 352.

Manifestly the Treaty of 1868 contemplated ultimate settlement by individual Indians upon designated tracts where they could make homes with exclusive right of cultivation for their support and with expectation of ultimate complete ownership. Without water productive cultivation has always been impossible.

We can find nothing in the statutes after 1868 adequate to show Congressional intent to permit allottees to be denied participation in the use of waters essential to farming and home making. If possible, legislation subsequent to the Treaty must be interpreted in harmony with its plain purposes.

The Secretary of the Interior had authority (Act 1887) to prescribe rules and regulations deemed necessary to secure just and equal distribution of waters. It does not appear that he ever undertook so to do. Certainly he could not affirmatively authorize unjust and unequal distribution. The statute itself clearly indicates Congressional recognition of equal rights among resident Indians.

Adoption by the Secretary of plans for irrigation projects to serve certain lands was not enough to indicate a purpose to exclude all other land from participation in essential water and thereby destroy the equal interest guaranteed by the Treaty. Subsequent allotments for farming followed by patents negative any such notion. The patented lands had no value for agriculture without water; they were selected for homes and individual farming.

The petitioners have shown no right to the injunction asked. We do not consider the extent or precise nature of respondents' rights in the waters. The present proceeding is not properly framed to that end.

The challenged decree must be

Affirmed.

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

PULLMAN COMPANY ET AL. *v.* JENKINS ET AL.

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

No. 210. Argued December 13, 14, 1938.—Decided January 16, 1939.

1. Existence of a separable controversy for removal under 28 U. S. C. § 71 is determined according to the plaintiff's pleading at the time of petition for removal. P. 537.
2. If, as to the non-resident defendant seeking removal, the controversy is separable within the purview of 28 U. S. C. § 71, the fact that under the state practice it may be joined in the same suit with another controversy as against other defendants, does not preclude removal. P. 538.
3. Where, in the absence of clear proof of bad faith in the joinder, concurrent acts of negligence on the part of the defendants sued as joint tort-feasors are sufficiently alleged, a separable controversy is not presented and the fact that the defendants might have been sued separately affords no ground for removal. This rule is applied where a non-resident employer and its resident employee, whose negligence caused the injury, are sued jointly. P. 538.
4. A non-resident sleeping car company and its resident porter were sued for negligence, committed by the action of the porter, in permitting a drunken and disorderly man to board a sleeping car, who, whilst being ejected, struck the plaintiff's husband, the train conductor, causing his death. *Held:*

   (1) That this controversy was separable from others in the same complaint, viz. a claim against the assailant for the assault, and a claim against the railway company and its gate tender for negligence in permitting the assailant to enter the station and go through the gates, without showing his ticket, to board the train. P. 539.

   (2) The non-resident car company, being charged jointly with its resident employee, could not remove the case to the federal court. P. 540.

   (3) The facts that the porter was sued by a fictitious name and his residence not alleged in the complaint, did not justify removal. *Id.*

   It was incumbent upon the car company to show that it had a separable controversy which was wholly between citizens of different States. As in determining whether there was such a separable

controversy with respect to the car company its porter could not be ignored, the car company was bound to show that he was a non-resident in order to justify removal.

5. Where there is a non-separable controversy against a non-resident and a resident defendant, the fact that the resident has not been served with process does not justify removal by the non-resident. P. 540.

6. It is always open to the non-resident defendant to show that the resident defendant has not been joined in good faith and for that reason should not be considered in determining the right to remove. P. 541.

96 F. 2d 405, affirmed as to result.

CERTIORARI, *post,* p. 583, to review the reversal of a judgment of the District Court, 17 F. Supp. 820, dismissing, upon the ground of settlement and release, an action in tort, which had been removed from a state court.

Messrs. Robert Brennan and *M. W. Reed,* with whom *Messrs. Leo. E. Sievert, H. K. Lockwood* and *Lawrence Livingston* were on the brief, for petitioners.

Mr. L. H. Phillips, with whom *Mr. Rex Hardy* was on the brief, for respondents.

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

The question is whether petitioner, the Pullman Company, was entitled to remove this cause to the federal court. The Circuit Court of Appeals, reversing the District Court, ordered remand (96 F. 2d 405) and because of conflict in the ground of its ruling with decisions of this Court, we granted certiorari.

Respondent, Mrs. Jenkins, and her son Robert W. Jenkins, by Mrs. Jenkins as guardian *ad litem,* brought this action on September 27, 1935, in the Superior Court for Los Angeles County, California, to recover damages for injuries causing the death of her husband. He was

employed by the Southern Pacific Company as conductor of a train running from Los Angeles to San Francisco. His injuries were due to a blow struck by A. J. Kash, who was being removed from the train by police officers called to assist the conductor in ejecting Kash because of his disorderly conduct. The suit was brought against the Southern Pacific Company, the Pullman Company, Kash, Hatch, the Pullman conductor, John Doe One, described as employed by the Pullman Company as porter, and John Doe Two, described as employed by the Southern Pacific Company as gate tender at the passenger depot at Los Angeles.

The complaint alleged two causes of action, one against all the defendants, the other against Kash alone. The plaintiffs and defendant Kash were stated to be residents of California. The Southern Pacific Company was described as a Kentucky corporation and the Pullman Company as an Illinois corporation. The residences of the defendants Hatch and John Doe One and John Doe Two were not set forth.

On November 20, 1935, the Pullman Company, as a citizen and resident of Illinois, insisting that the controversy as to it was a separable one, filed its petition for removal to the federal court, with bond; and on November 25, 1935, the petition and bond were approved and removal was ordered. On the day on which that order was entered, an amended complaint was filed in the state court which contained the allegation that the action was brought against the Southern Pacific Company under the Federal Employers' Liability Act. 45 U. S. C. 51. On December 27, 1935, Mrs. Jenkins as administratrix of the estate of the decedent was substituted as plaintiff. On January 17, 1936, the defendant Hatch demurred to the amended complaint upon the ground that it stated no cause of action against him, and on January 29, 1936, the demurrer was sustained.

On January 22, 1936, the plaintiffs moved to remand, stating that Edward E. Meyers, the Pullman porter, sued as John Doe One, had been served with process on January 14, 1936, and that he and the defendant Hatch were residents and citizens of California, and that the action as against them and the Pullman Company was not a separable controversy. Pending this motion, on February 8, 1936, the plaintiffs filed in the federal court a second amended complaint identifying Meyers as the Pullman porter and Fred M. Dolsen as John Doe Two, described as the Southern Pacific gate tender. This amended complaint repeated the allegation that the Southern Pacific was sued under the Federal Employers' Liability Act. On February 19, 1936, the court denied the motion to remand.

On December 28, 1936, the action was dismissed as against the Southern Pacific and Dolsen as the result of a compromise. Supplemental answers were then filed by the remaining defendants respectively claiming release by reason of the agreement with the Southern Pacific. The District Court sustained this defense and entered judgment dismissing the complaint.

On appeal, the Circuit Court of Appeals, passing the other questions, held that if it did not sufficiently appear at the time of the petition for removal that the cause was not separable, it did so appear when the second amended complaint was filed and hence that the District Court erred in denying the motion to remand. 96 F. 2d p. 410. This ruling was placed upon an erroneous ground. The second amended complaint should not have been considered in determining the right to remove, which in a case like the present one was to be determined according to the plaintiffs' pleading at the time of the petition for removal. *Barney* v. *Latham,* 103 U. S. 205, 213–216; *Graves* v. *Corbin,* 132 U. S. 571, 585; *Louisville & Nashville R. Co.* v. *Wangelin,* 132 U. S. 599, 601;

Salem Trust Co. v. *Manufacturers' Finance Co.*, 264 U. S. 182, 189, 190; *Saint Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283, 294, 295.

The question then is whether the original complaint set forth a separable controversy between the plaintiffs and the Pullman Company, that is, a controversy "which is wholly between citizens of different States, and which can be fully determined as between them." 28 U. S. C. 71. If, as to the non-resident defendant seeking removal, the controversy is separable within the purview of the statute as construed, the fact that under the state practice it may be joined in the same suit with another controversy as against other defendants, does not preclude removal. *Barney* v. *Latham, supra; Nichols* v. *Chesapeake & Ohio Ry. Co.*, 195 F. 913, 915, 916; *Stewart* v. *Nebraska Tire & Rubber Co.*, 39 F. 2d 309, 311; *Des Moines Elevator Co.* v. *Underwriters' Grain Assn.*, 63 F. 2d 103, 105; *Culp* v. *Baldwin*, 87 F. 2d 679, 680–682.

This is so whether the action sounds in contract or in tort. The question is determined by the plaintiff's pleading. Thus if defendants are charged with negligence, but the charge against the non-resident defendant is based on different and non-concurrent acts of negligence and a cause of action which is joint in character is not alleged, a separable controversy is presented. See *Culp* v. *Baldwin, supra.* Where, in the absence of clear proof of bad faith in the joinder, concurrent acts of negligence on the part of the defendants sued as joint tort-feasors are sufficiently alleged, a separable controversy is not presented and the fact that the defendants might have been sued separately affords no ground for removal. This rule is applied where a non-resident employer and its resident employee, whose negligence caused the injury, are sued jointly. *Chesapeake & Ohio Ry. Co.* v. *Dixon*, 179 U. S. 131, 139; *Alabama Great Southern Ry. Co.* v. *Thompson*, 200 U. S.

206, 212, 213, 220; *Chicago, R. I. & P. Ry. Co.* v. *Dowell,* 229 U. S. 102, 111–113; *Hay* v. *May Company,* 271 U. S. 318, 321, 322; *Watson* v. *Chevrolet Motor Co.,* 68 F. 2d 686, 689; *Harrelson* v. *Missouri Pacific Transportation Co.,* 87 F. 2d 176, 177.

In the instant case, the original complaint did not charge any negligence or wrongful conduct in ejecting Kash from the train. On the contrary, it was alleged that he was intoxicated and was acting in an offensive, threatening and quarrelsome manner in which he persisted despite remonstrance. There was clearly a separable controversy with respect to Kash. He was sued for his unlawful assault upon the conductor.

The negligence charged against the Southern Pacific Company and its gate tender was in the action of the latter in permitting Kash to enter the station and go through the gates to board the train without displaying his ticket and while drunk and disorderly. The negligence charged against the Pullman Company and its porter was alleged to consist in the action of the porter in permitting Kash to board the Pullman sleeper. No facts were alleged upon which liability of the Pullman Company and its employees could be predicated upon the negligence of the Southern Pacific Company and its gate tender. It was not shown that either the Pullman Company or the Southern Pacific Company was liable for the acts of the other or that they joined in the commission of any wrong. With respect to these companies in relation to each other, the cases above cited, so far as they hold that a separable controversy is not presented when master and servant are joined because of concurrent negligence, are not in point.

Nor was any negligence or wrongful act alleged on the part of the Pullman conductor.

The question, however, remains as to the effect of the joinder of the Pullman porter. If the porter had been

sued in his proper name, instead of John Doe, had been described as a citizen of California, and had been served with process prior to the petition for removal, there could be no question that the Pullman Company would not have been entitled to remove. *Chesapeake & Ohio Ry. Co.* v. *Dixon, supra; Alabama Great Southern Ry. Co.* v. *Thompson, supra; Hay* v. *May Company, supra.*

We think that the fact that the Pullman porter was sued by a fictitious name did not justify removal. His relation to the Pullman Company and his negligence as its servant were fully alleged. See *Grosso* v. *Butte Electric Ry. Co.,* 217 F. 422. Nor does the fact that the residence of the porter was not set forth justify disregarding him. It was incumbent upon the Pullman Company to show that it had a separable controversy which was wholly between citizens of different States. As in determining whether there was such a separable controversy with respect to the Pullman Company its porter could not be ignored, the Company was bound to show that he was a non-resident in order to justify removal.

At the time of the petition for removal the Pullman porter had not yet been served with process. Where there is a non-separable controversy with respect to several non-resident defendants, one of them may remove the cause, although the other defendants have not been served with process and have not appeared. *Tremper v. Schwabacher,* 84 F. 413, 416; *Bowles* v. *H. J. Heinz Co.,* 188 F. 937; *Hunt* v. *Pearce,* 271 F. 498; 284 F. 321, 323, 324; *Community Building Co.* v. *Maryland Casualty Co.,* 8 F. 2d 678; *Trower* v. *Stonebraker-Zea Co.,* 17 F. Supp. 687, 690; *Kelly* v. *Alabama-Quenelda Co.,* 34 F. 2d 790, 791. In such a case there is diversity of citizenship, and the reason for the rule is stated to be that the defendant not served may never be served, or may be served after the time has expired for the defendant who has been served to apply for a removal, and unless

the latter can make an effective application alone, his right to removal may be lost. *Hunt* v. *Pearce,* 284 F. p. 324. But the rule is otherwise where a non-separable controversy involves a resident defendant. In that case the fact that the resident defendant has not been served with process does not justify removal by the non-resident defendant. *Patchin* v. *Hunter,* 38 F. 51, 53; *Armstrong* v. *Kansas City Southern Ry. Co.,* 192 F. 608, 615; *Hunt* v. *Pearce,* 271 F. p. 502; *Del Fungo Giera* v. *Rockland Light & Power Co.,* 46 F. 2d 552, 554; *Hane* v. *Mid-Continent Petroleum Corp.,* 47 F. 2d 244, 246, 247. It may be said that the non-resident defendant may be prejudiced because his co-defendant may not be served. On the other hand there is no diversity of citizenship, and the controversy being a non-separable one, the non-resident defendant should not be permitted to seize an opportunity to remove the cause before service upon the resident co-defendant is effected. It is always open to the non-resident defendant to show that the resident defendant has not been joined in good faith and for that reason should not be considered in determining the right to remove. *Wecker* v. *National Enameling Co.,* 204 U. S. 176, 185, 186; *Chesapeake & Ohio Ry. Co.* v. *Cockrell,* 232 U. S. 146, 152; *Wilson* v. *Republic Iron & Steel Co.,* 257 U. S. 92, 97; *Clancy* v. *Brown,* 71 F. 2d 110, 112, 113.

In the instant case there was no charge that the joinder was fraudulent. On the motion to remand it appeared that the Pullman porter, identified as Meyers, was a resident of California and had then been served with process.

We conclude that the District Court erred in denying the motion to remand and that the judgment of the Circuit Court of Appeals should be

Affirmed.

MR. JUSTICE ROBERTS took no part in the consideration and decision of this case. [Over.]

MR. JUSTICE BLACK, concurring.

I agree that it was incumbent upon the Pullman Company, seeking removal, to show that it was sued in a controversy "wholly between citizens of different States";[1] that the Company failed to meet this burden; that plaintiff's joining the Pullman Company with a Pullman porter designated by a fictitious name did not relieve the Company of its statutory burden; that consequently the District Court erred in denying a motion to remand, and that the judgment of the Circuit Court of Appeals, reversing the District Court's refusal to remand, should be affirmed. To certain portions of the opinion, which this affirmance does not require, I cannot agree.

First. The original complaint filed in the state court indicated plaintiff's intention to rest its case against the Southern Pacific Company upon the Federal Employers' Liability Act, under which suits brought in state courts are not removable to federal courts.[2] The pleadings did not disclose that the suit was based on the federal Act as clearly as good pleading requires, and the complaint was doubtless subject to special demurrer because of its generality. But the mere fact that a complaint based on the federal Act is demurrable does not make it subject to removal. In addition, both an amendment filed in the state court before the order of removal (but after the petition for removal), and a second amendment filed after removal, served to make the original complaint more precise and made clear the original purpose of claiming under the Federal Employers' Liability Act without changing the original cause of action. "It is true that the declaration was amended after the petition to remove . . ., but the amendment if not unnecessary merely made the original cause of action more precise. On the question of

[1] c. 3, § 71, 28 U. S. C.

[2] c. 2, § 51, § 56, 45 U. S. C.

removal we have not to consider more than whether there was a real intention to get a joint judgment and whether there was a colorable ground for it shown as the record stood when the [petition for removal was ruled on] . . . We are not to decide whether a flaw could be picked in the declaration on special demurrer." [3]

Both from the original complaint and from its amendments it seems clear to me that plaintiff sought relief under the Federal Employers' Liability Act and that the ruling of the Court of Appeals on that ground was proper.

Second. The disposition of this case on the ground set out in the opinion does not require the statement that "If, as to the non-resident defendant seeking removal, the controversy is separable within the purview of the statute as construed, the fact that under the state practice it may be joined in the same suit with another controversy as against other defendants, does not preclude removal." Nor do I agree that this is a correct construction of the removal statute. The statement is rested on the case of *Barney* v. *Latham,* 103 U. S. 205, and opinions from two Circuit Courts of Appeals.[4] However, this Court later refused to accept the *Latham* case as authority for the proposition that the statutory right of removal "takes no account of . . . what may be the rules of practice, whether common law or statutory, of the State in which the action may be pending"; instead, it held exactly the opposite. *Alabama Great Southern Ry. Co.* v. *Thompson,* 200 U. S. 206, (see argument of counsel, page 209). And in *Cincinnati, N. O. & T. P. Ry. Co.* v. *Bohon,* 200 U. S. 221, 225,

[3] *Chicago, R. I. & P. Ry. Co.* v. *Schwyhart,* 227 U. S. 184, 194.

[4] *Nichols* v. *Chesapeake & Ohio Ry. Co.* (CCA 6th, decided 1912), 195 F. 913; *Stewart* v. *Nebraska Tire & Rubber Co.* (CCA 8th, decided 1930), 39 F. 2d 309; *Des Moines Elevator & Grain Co.* v. *Underwriters' Grain Assn.* (CCA 8th, decided 1933), 63 F. 2d 103; *Culp* v. *Baldwin* (CCA 8th, decided 1937), 87 F. 2d 679 (but see 679–80).

226 (considered and decided with the *Thompson* case), the Court stated:

"While the case did not show an attempt to remove, the discussion of the subject by the Chief Justice strongly intimates that if the action was properly joint in the forum in which it was being prosecuted it could not be removed as a separable controversy under the act of Congress. We have under consideration an action for tort which by the constitution and laws of the State, as interpreted by the highest court in the State, gives a joint remedy against master and servant to recover for negligent injuries. This court has repeatedly held that a separable controversy must be shown upon the face of the petition or declaration, and that the defendant has no right to say that an action shall be several which the plaintiff elects to make joint. (See cases cited in *Alabama Great Southern Railway Co.* v. *Thompson, supra.*) A State has an unquestionable right by its constitution and laws to regulate actions for negligence, and where it has provided that the plaintiff in such cases may proceed jointly or severally against those liable for the injury, and the plaintiff in due course of law and in good faith has filed a petition electing to sue for a joint recovery given by the laws of the State, we know of nothing in the Federal removal statute which will convert such action into a separable controversy for the purpose of removal, because of the presence of a non-resident defendant therein properly joined in the action under the constitution and laws of the State wherein it is conducting its operations and is duly served with process."

It was thus broadly held that there can be no other or separable controversy, if a plaintiff properly elects under state practice to sue defendants jointly. Even a separate defense, which may defeat a joint recovery, can-

not create a separable controversy when the plaintiff has a right to make his cause of action joint.[5]

In cases which have involved the right of removal since the *Latham* case, this Court has repeatedly held that the "joint liability of the defendants [one of whom is a non-resident] under the declaration as amended is a matter of state law, and upon that we shall not attempt to go behind the decision of the highest court of the State before which the question could come." [6]

Only two Circuit Courts of Appeals have held that causes of action properly joined under state practice may nevertheless be separable for purposes of removal; other Circuits have followed the decisions of this Court.[7] Cases from the two Circuits are relied upon to support the

---

[5] *Pirie* v. *Tvedt,* 115 U. S. 41; *Powers* v. *Chesapeake & Ohio Ry. Co.,* 169 U. S. 92, 97; *Chicago, B. & Q. Ry. Co.* v. *Willard,* 220 U. S. 413.

[6] *Chicago, R. I. & P. Ry. Co.* v. *Schwyhart, supra,* at 193 (decided 1913); *Southern Ry. Co.* v. *Miller,* 217 U. S. 209, 215, 216 (decided 1910); "The Supreme Court of the State decided that the petition stated a cause of action against Drake and the railway company, and whether it did, we said in *Chicago, Rock Island & Pacific Ry.* v. *Schwyhart,* 227 U. S. 184, was a matter of state law." *Chicago, R. I. & P. Ry. Co.* v. *Whiteaker,* 239 U. S. 421, 424 (decided 1915); *Chicago & Alton R. Co.* v. *McWhirt,* 243 U. S. 422 (decided 1917).

[7] In *Norwalk* v. *Air-way Electric Appliance Corp.,* 87 F. 2d 317, 319, the Circuit Court of Appeals for the Second Circuit held that "whether a separable controversy exists for the purpose of removal is determined by state law," citing the *Bohon* case and the *McWhirt* case, *supra.* To the same effect are, *Johnson* v. *Noble,* 64 F. 2d 396, 398, *Padgett* v. *Chicago, R. I. & P. Ry. Co.,* 54 F. 2d 576, 577, and *Centerville State Bank* v. *National Surety Co.,* 37 F. 2d 338 (CCA 10th); *Gulf Refining Co.* v. *Morgan,* 61 F. 2d 80, 81 (CCA 4th); see *Breymann* v. *Pennsylvania, O. & D. R. Co.,* 38 F. 2d 209 (CCA 6th); opinion of Hutcheson, Circuit Judge, in *Lake* v. *Texas News Co.,* 51 F. 2d 862, 863 (S. D. Texas); and *Waco* v. *U. S. Fidelity & G. Co.,* 76 F. 2d 470, 471 (CCA 5th).

language in the opinion of the Court to which I cannot agree.[8] However, the cases relied upon from one of these two Circuits no longer appear to represent the rule even in that Circuit.[9] And the lone case in the other of the two Circuits was contrary to and decided before the most recent decisions of this Court on the subject.[10]

Third. It is, of course, true that where governing state law characterizes actionable negligence of a local and a non-resident defendant as "concurrent negligence," there can be no right of removal. However, this is but one application of the rule governing removals under which we look to state law to determine the propriety of joining two or more defendants in a single suit.[11] The opinion in the *Thompson* case, *supra,* was expressly designed to resolve the "conflict in the authorities as to whether a corporation, whose liability does not arise from an act of concurrence or direction on its part, but solely as a result of the relation of master and servant, may be jointly

[8] See note 4, *supra.*

[9] Other cases in the Eighth Circuit throw some degree of doubt on the *Stewart* and *Grain Co.* cases, *supra,* and indicate a disposition to determine whether liability of a defendant under allegations of a complaint is joint or severable by reference to state law. See, *Harrelson* v. *Missouri Pacific Transportation Co.,* 87 F. 2d 176, 178; *Huffman* v. *Baldwin,* 82 F. 2d 5, 8; *Watson* v. *Chevrolet Motor Co.,* 68 F. 2d 686, 688, 689. After the decision of this Court in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, the Circuit Court of Appeals for the Eighth Circuit seemingly was of opinion (1938) that the question of "joint liability and of the bearing thereof on the question of removability" must be determined by the law of the State. *Ervin* v. *Texas Co.,* 97 F. 2d 806, 809.

[10] The *Nichols* case, *supra,* in the Sixth Circuit, was decided in 1912; the *Schwyhart* case, the *Whiteaker* case, and the *McWhirt* case, in this Court, were decided in 1913, 1915, and 1917, respectively (see note 6).

[11] See, *Chesapeake & Ohio R. Co.* v. *Dixon,* 179 U. S. 131, 140; *Alabama Great Southern Ry. Co.* v. *Thompson, supra,* 220; *Chicago, R. I. & P. Ry. Co.* v. *Dowell,* 229 U. S. 102, 112, 113.

sued with the servant whose negligent conduct directly caused the injury." (at pp. 213, 214). The question submitted for decision in that case was (pp. 212, 213): "May a railroad corporation be jointly sued with two of its servants . . . though . . . not charged with any concurrent act of negligence?" This Court gave an affirmative answer.

The principle has been well stated by the Circuit Court of Appeals of the Second Circuit:

"Appellees contend that removal is prevented only where a master and servant are charged with concurrent negligence. The rule is settled otherwise. In *Alabama Great So. Ry. Co.* v. *Thompson, supra,* and *Cincinnati, N. O. & Texas Pac. Ry.* v. *Bohon, supra,* the master was alleged to be liable on the doctrine of respondeat superior. It is immaterial that the liability of the master and that of the servant proceed on different grounds; even more distinct were the bases of liability of the lessee and lessor railroad companies in *Chicago, B. & Q. Ry. Co.* v. *Willard,* . . . [220 U. S. 413] where the lessor was held on its obligation to the public of which it could not be relieved by virtue of a lease. . . . Nothing in *Hay* v. *May Department Stores Co.,* 271 U. S. 318, . . . supports the claim that the rule of nonremovability is limited to instances of concurrent negligence." [12]

The Constitution authorizes Congress to fix the jurisdiction of federal District Courts. The constitutional division of powers between the States and the National Government makes it necessary that the jurisdictional policy declared by Congress be scrupulously observed. This is especially so in view of the fact that after removal of a cause from a state court by reason of diversity of citizenship, the federal court must proceed under state law and practice. Questions of state constitutional,

[12] *Norwalk* v. *Air-Way Electric Appliance Corp., supra,* 319.

statutory and general law, which have not been clearly and finally determined by the state's highest court, may arise in the federal court. The state court need not thereafter, in other litigation, follow the federal court's decision on such questions. However, cases for which Congress has not authorized removal from a state court can be appealed to the state's highest judicial tribunal, thus giving each litigant a final determination of his rights under state laws by the body vested with final authority to interpret those laws. Rights and privileges under the Federal Constitution and laws, which may be involved in such litigation in a state court, can still be protected by appeal to this Court.

The statutory privilege of removal should be protected. But I do not believe that judicial construction should expand the statutory privilege beyond limits intended by the statute and properly recognized by this Court in previous decisions. Particularly, I think it unwise to indicate this step in a case in which decision and judgment do not require discussion of the question.

ALTON RAILROAD CO. *v.* ILLINOIS COMMERCE COMMISSION ET AL.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 231. Argued December 15, 16, 1938.—Decided January 16, 1939.

1. A motion to dismiss or affirm will be overruled where, after argument, it appears that the question presented is not so clearly lacking in merit that it may be put aside on mere citation of earlier decisions. P. 550.
2. A railroad company, in Illinois, which has long operated, and maintained at its own cost, a switch track leading from its main line to industrial plants, is not deprived of property without due process by an order of the State requiring it to continue the up-keep, where, though constructed at the expense of the industries, on land in their ownership, the track crosses public thoroughfares

and, under the law of the State, constitutes a part of the railroad system which, with any extensions, may be used to serve other shippers and the public at large. P. 553.

368 Ill. 584; 15 N. E. 2d 508, affirmed.

APPEAL from a judgment sustaining an order of the commission requiring the railroad company to continue maintenance and operation of a switch track. The case went by appeal from the commission to a circuit court, which also sustained the order.

Mr. Frank H. Towner, with whom *Mr. Silas H. Strawn* was on the brief, for appellant.

Mr. Harry R. Booth, Assistant Attorney General of Illinois, with whom *Messrs. John E. Cassidy,* Attorney General, and *Homer D. Dines* were on the brief, for appellees.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The question is whether an order made by the commission, denying appellant's application for authority to discontinue, and requiring it to continue, maintenance and operation of a switch track in Chicago used to serve shippers, deprives it of its property in violation of the due process clause of the Fourteenth Amendment. Specifically, appellant maintains that by compelling it to expend its funds for the upkeep of a track not constructed or owned by it and upon land it does not own, the order is repugnant to that provision of the Constitution. The Illinois supreme court, affirming the circuit court of Cook County, sustained the order as a valid exercise of state power. 368 Ill. 584; 15 N. E. 2d 508.

Appellees, insisting that our decisions rule that question in their favor, filed a motion to dismiss or affirm.* We

*Appellees rest their motion to dismiss or affirm on: *Union Lime Co.* v. *Chicago & N. W. Ry. Co.,* 233 U. S. 211. *Lake Erie*

postponed consideration of the motion to the argument of the case on the merits. Now after hearing counsel it appears that the question presented by the appeal is not so clearly lacking in merit that upon mere citation of our decisions it may be put aside as not requiring further consideration. We therefore deny the motion. *Milheim* v. *Moffat Tunnel Dist.*, 262 U. S. 710, 716, 717. *Hamilton* v. *Regents*, 293 U. S. 245, 258.

Through purchasers at judicial sale July 18, 1931, appellant acquired the properties of the Chicago & Alton Railroad Company, a consolidated company formed in 1906 and in receivership from 1922 to the sale. It and its predecessors, including the receiver, may for brevity be referred to as the carrier.

The switch track in question extends from the carrier's main line about 150 feet on the right-of-way, thence 2,681 feet, crossing public streets and alleys, to the boundary of the plant of the Peoples Gas Light & Coke Company upon land largely, if not wholly, owned by that company and the other industries served by the track. The industries, commencing with the one nearest the main line, are Commonwealth Edison Company, E. Heldmaier, Inc., Moulding-Brownell Corp., and the gas company. All but the first depend upon the track for rail transportation. It has been extended for some distance into the plant of the gas company. Five spurs, that appropriately may be called private sidings, extend from it and serve within the plants of the industries. There is here no question as to the part of the track within the gas plant or of the spurs serving the industries. Construction was begun prior to 1884, and at least since 1887 the stretch here in question has been used to serve the gas

---

& W. R. Co. v. *Public Utilities Comm'n*, 249 U. S. 422. *Chicago & N. W. Ry. Co.* v. *Ochs*, 249 U. S. 416. *Western & Atlantic Railroad* v. *Public Service Comm'n*, 267 U. S. 493, 496.

company, and for more than 30 years other industries between that company's plant and the main line. The original cost of construction was borne by the gas company and possibly other industries. It does not appear by whom the cost of maintenance prior to 1904 was paid.

Pursuant to ordinance passed November 2, 1903, a part of the track was elevated at crossings of three streets and two intervening alleys. November 1, 1904, the carrier made an agreement with the gas company and the predecessor of the electric company pursuant to which they paid the cost of elevation. The gas company agreed to pay an annual fee of $300 imposed by the ordinance for the privilege of maintaining the track across the streets and alleys. The carrier agreed to maintain the track. And, by an assignment reciting that the ordinance had been obtained for their benefit, the carrier transferred it to the gas and electric companies. The gas company paid the fees until the 1903 ordinance expired November 2, 1923. Then it and the electric company insisted that future exactions by the city as well as maintenance should be borne by the carrier. The latter refused to accept the additional burden. December 10, 1924, the city passed an ordinance authorizing use of the streets for 20 years from expiration of the 1903 ordinance, increased the annual fee to $1,400, and required a bond to insure compliance. The carrier accepted the terms of the ordinance, having an understanding with the gas and electric companies that they would pay the charges. Nevertheless, it paid $1,400 annually from 1923 to 1932 and was reimbursed only to the extent of $300 paid by the gas company for each of three years in that period. As of November 2, 1932 the annual fee was reduced to $700, and appellant paid it up to November 2, 1936. The carrier bore the cost of maintaining the track from 1904 to March 26, 1936. On that

date, exercising as it asserts a right reserved by final decree in the receiverhip proceeding, it elected not to assume the contract. Nevertheless, it has continued to use and maintain the track. Thus since 1903 the carrier, in addition to maintaining the track, has paid $15,190 to the city as compensation for its occupancy of the public streets and alleys. Through error as it says, it paid taxes on the track for some of the time.

Needed repairs and betterments of the track involved will require expenditures amounting to about $4,000 a year for three years; then annual cost of maintenance will be about $1,000. It may be assumed that, in order to continue operation, appellant will have to pay whatever fees are charged by the city, and that, because the track is on land not owned by it, its expenditures for additions and betterments must, as it asserts, by accounting regulations be charged to operating expenses. The annual gross revenue for transportation over the track amounts to about $40,000.

Appellant does not suggest that operating expenses including the city charges, plus cost of replacements and betterments, will exceed revenue derived from use of the track or that operation of the track will not yield it a reasonable profit; nor does it claim, as of constitutional right, to be entitled to have any profit from use of the switch track separately considered. *Puget Sound Traction Co.* v. *Reynolds,* 244 U. S. 574, 580. *Fort Smith Light & Traction Co.* v. *Bourland,* 267 U. S. 330, 332. *Western & Atlantic Railroad* v. *Public Service Comm'n,* 267 U. S. 493, 496–497. Admittedly, appellant is willing to continue to use the track to serve the industries. Its petition prays an order requiring them to pay cost of maintenance and future city charges. It seeks authority to discontinue service and to cancel applicable rates, but only in case of failure of the industries to pay these op-

erating expenses. It wants, not to give up the traffic, but to shift a substantial financial burden that it has long been bearing to the industries served.

The state supreme court held: As between the public and the railroad, a switch track built for industrial purposes and across public thoroughfares becomes a part of the main line of the system which it joins and is subject to governmental regulation in the public interest, even though it was built by private funds and for the most part on private property; appellant uses the switch track in question for its own benefit to serve industries located on it and may use it and extensions of it to serve other shippers and the public at large; the public has an interest quite apart from that of the parties to the suit in the maintenance of the track; the state public utility act, § 50, is broad enough to impose upon a railroad duty to maintain the property which it uses for its own benefit as well as that to which it has title; the commission has ample power to enforce that duty and the order does not violate any provision of the state or federal constitutions.

We have held: The uses for which a track was desired are not the less public because the motive which dictated its location was to reach a private industry, or because the proprietors of that industry contributed to the cost. *Hairston* v. *Danville & Western Ry. Co.,* 208 U. S. 598, 608. The State, consistently with the due process clause of the Fourteenth Amendment, may empower a common carrier by railroad to condemn a right-of-way for a spur leading to a single industry to be operated under obligations of public service open to all and devoted to public use. *Union Lime Co.* v. *Chicago & N. W. Ry. Co.,* 233 U. S. 211, 222. It may compel a railroad to extend a siding to an adjacent industry so as to provide additional trackage for public use and, if necessary, to condemn a right-of-way. *Chicago & N. W. Ry. Co.* v. *Ochs,* 249

U. S. 416, 419. For similar exertions of state power, see *Lake Erie & W. R. Co.* v. *Public Utilities Comm'n,* 249 U. S. 422, 424 and *Western & Atlantic Railroad* v. *Public Service Comm'n, supra.*

The decision of the state supreme court in this case must here be held conclusively to establish that under the constitution and laws of Illinois the order is valid. The decisions of this Court above cited leave no doubt as to the power of the State to require a common carrier by railroad to condemn rights-of-way for and to construct switch tracks like the one here involved. So far as concerns decision of this case, it matters not whether Illinois has exerted that power, for the track has been laid and is being used by the carrier. The required mainteance and operation are not beyond the scope of the carrier's undertaking to serve the public. *Union Lime Co.* v. *Chicago & N. W. Ry. Co., supra. Chicago & N. W. Ry. Co.* v. *Ochs, supra.*

Assuming that the questions whether the switch track is open to public use and has become a part of the main line are so related to the constitutional issue here presented that the state court's determination of them is not binding upon this Court, we are of opinion that, upon the facts alleged in appellant's petition to the commission, the latter's unchallenged findings, and our decisions in similar cases, it is clear that in point of fact and law the switch track and any extensions of it that may be made are open to use to serve the public and constitute a part of the carrier's system.

Asserting that the duty to maintain a track such as that in question normally results from ownership, appellant earnestly insists that the order is shown to be unreasonable by the fact that rails and other materials purchased and owned by it when put into the track immediately cease to belong to it and become the property of the gas

company which, appellant says, retains right of ownership in the track. But, in making that and similar arguments, appellant ignores the decisions in this case of the commission, the state supreme court, and as well the ruling of this Court just indicated, to the effect that the track in question is one built for industrial purposes on and across public thoroughfares; a track that has become a part of the main line of the carrier's system and, though constructed without cost to it on lands owned by others, is open to public use; a track which has long been and is being used by the carrier for its own benefit and by it may be used with extensions if any shall be made, to serve the public at large.

Appellant does not suggest that as against the owners of the land or those who paid for building the track, it is a trespasser or without right to continue to maintain and operate the track as required by the order. Nor does it say that, by exertion of the power of eminent domain, it may not successfully resist demands of claimants or owners for possession of any part of the land or of the track not owned by it. See *Mapes* v. *Vandalia Railroad Co.*, 238 Ill. 142, 145; 87 N. E. 393; *Black* v. *Chicago, B. & Q. R. Co.*, 243 Ill. 534, 539; 90 N. E. 1075; *Roberts* v. *Northern Pacific R. Co.*, 158 U. S. 1, 11; *Northern Pacific R. Co.* v. *Smith*, 171 U. S. 260, 271.

If, as suggested, expenditures for needed betterments, as well as those for maintenance, are chargeable to operating expenses, all are returnable to the carrier, out of operating revenue, as a part of the cost of maintenance and use. And, if appellant acquires title to the land and track, then additions and betterments made by it will constitute a part of its investment in road and equipment owned and used for its purposes as a common carrier and, by the due process clauses of the state and federal constitutions, safeguarded against confiscation.

It is clear that enforcement of the order will not take appellant's property in violation of the due process clause of the Fourteenth Amendment.

Affirmed.

MR. JUSTICE BLACK is of opinion that the motion to dismiss should be granted.

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

DECISIONS PER CURIAM, ETC., FROM OCTOBER 3, 1938, THROUGH JANUARY 16, 1939.*

No. 112. CARTER *v.* TEXAS. Appeal from the Court of Criminal Appeals of Texas. Decided October 10, 1938. *Per Curiam:* The appeal herein is dismissed (1) for the want of a substantial federal question, *Whitney* v. *California,* 274 U. S. 357, 368; (2) for the reason that the appellant has no standing to raise the question as to the validity of the statute under the commerce clause, *United States* v. *Kapp,* 302 U. S. 214, 217–218; *Kay* v. *United States,* 303 U. S. 1, 6–7. *Messrs. Earle B. Mayfield, Dan Moody, J. S. Grisham,* and *R. N. Grisham* for appellant. No appearance for appellee. Reported below: 135 Tex. Crim. Rep. —; 116 S. W. 2d 371.

No. 150. HAHN *v.* OHIO. Appeal from the Supreme Court of Ohio. Decided October 10, 1938. *Per Curiam:* The motion of the appellee to dismiss the appeal is granted and the appeal is dismissed for the want of a substantial federal question. *Moore* v. *United States,* 150 U. S. 57; *Williamson* v. *United States,* 207 U. S. 425, 450, 451; *Heike* v. *United States,* 227 U. S. 131, 145; *Adams* v. *New York,* 192 U. S. 585, 599. *Messrs. Hiram C. Bolsinger* and *Joseph H. Hoodin* for appellant. *Messrs. Dudley Miller Outcalt, Carson Hoy,* and *Simon Leis* for appellee. Reported below: 133 Ohio St. 440; 14 N. E. 2d 354.

No. 179. DILLARD *v.* PIONEER TITLE INSURANCE & TRUST CO. ET AL. Appeal from the District Court of the United States for the Southern District of California. Decided October 10, 1938. *Per Curiam:* The motion of the appellees to dismiss the appeal herein is granted, and

*For decisions on applications for certiorari, see *post,* pp. 579, 595; for rehearing, *post,* p. 666.

the appeal is dismissed for the want of jurisdiction. Section 238, Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 938); § 266, Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 938); *Stratton* v. *St. Louis S. W. Ry.*, 282 U. S. 10, 15–16; *U. S. Naturopathic Assn.* v. *Chiropractic League*, 296 U. S. 539, 540. *Mr. Calvin S. Mauk* for appellant. *Mr. Ben Harrison* for appellees.

No. 181. SOVEREIGN CAMP OF THE WOODMEN OF THE WORLD *v.* CASADOS ET AL. Appeal from the District Court of the United States for the District of New Mexico. Decided October 10, 1938. *Per Curiam:* The decree is affirmed. *Brown-Forman Co.* v. *Kentucky*, 217 U. S. 563, 572, 573; *Northwestern Life Ins. Co.* v. *Wisconsin*, 247 U. S. 132, 140–141; *Tax Commissioners* v. *Jackson*, 283 U. S. 527, 537; *Lawrence* v. *State Tax Comm'n*, 286 U. S. 276, 284–285. *Messrs. Rainey T. Wells* and *J. O. Seth* for appellant. No appearance for appellees. Reported below: 21 F. Supp. 989.

No. 214. PUBLIC SERVICE CO. ET AL. *v.* LEBANON. Appeal from the Supreme Court of Indiana. Decided October 10, 1938. *Per Curiam:* The appeal herein is dismissed for the want of a final judgment. *Grays Harbor Co.* v. *Coats-Fordney Co.*, 243 U. S. 251, 255, 257; *Washington ex rel. McPherson Bros. Co.* v. *Superior Court*, 274 U. S. 726; *Ornstein* v. *Chesapeake & Ohio Ry. Co.*, 284 U. S. 572. *Messrs. Edmond W. Hebel, Willett H. Parr, Willett H. Parr, Jr., Ara Allen Parr,* and *Elza O. Rogers* for appellants. *Messrs. Frederick E. Matson* and *Harry T. Ice* for appellee. Reported below: 214 Ind. 295; 14 N. E. 2d 719.

No. 238. CRESCENT CREAMERY, INC., ET AL. *v.* MILK CONTROL BOARD ET AL. Appeal from the Supreme Court of Indiana. Decided October 10, 1938. *Per Curiam:* The appeal herein is dismissed as it does not appear from the record that there is a final judgment. *J. Bacon & Sons* v. *Martin, Commissioner of Revenue,* 302 U. S. 642. *Mr. U. S. Lesh* for appellants. *Mr. Joseph W. Hutchinson* for appellees. Reported below: 214 Ind. 240; 14 N. E. 2d 588; 15 N. E. 2d 80.

No. 243. CAMPBELL ET AL. *v.* ALDRICH ET AL. Appeal from the Supreme Court of Oregon. Decided October 10, 1938. *Per Curiam:* The motion of the appellees to dismiss the appeal herein is granted, and the appeal is dismissed for the want of a substantial federal question. *Phelps* v. *Board of Education,* 300 U. S. 319; *Dodge* v. *Board of Education,* 302 U. S. 74; *Groves* v. *Board of Education,* 303 U. S. 622. *Mr. Alfred E. Clark* for appellants. *Mr. W. Lair Thompson* for appellees. Reported below: 159 Ore. 208; 79 P. 2d 257.

No. 264. GARDNER *v.* MASSACHUSETTS;

No. 265. LORD-HEINSTEIN *v.* SAME;

No. 266. RAND *v.* SAME; and

No. 267. FERRIS *v.* SAME. Appeals from the Superior Court, County of Essex, Massachusetts. Decided October 10, 1938. *Per Curiam:* The appeals herein are dismissed for the want of a substantial federal question. *Powell* v. *Pennsylvania,* 127 U. S. 678, 685; *Jacobson* v. *Massachusetts,* 197 U. S. 11, 26–27; *Graves* v. *Minnesota,* 272 U. S. 425, 428; *Lambert* v. *Yellowley,* 272 U. S. 581, 596. *Messrs. Robert G. Dodge* and *Harold S. Davis* for appellants. No appearance for appellee. Reported below: 15 N. E. 2d 222.

No. 291. WALDING, KINNAN & MARVIN CO. *v.* DEPARTMENT OF LIQUOR CONTROL ET AL. Appeal from the District Court of the United States for the Southern District of Ohio. Decided October 10, 1938. *Per Curiam:* The decree is affirmed. *Mugler* v. *Kansas,* 123 U. S. 623; *Crowley* v. *Christensen,* 137 U. S. 86, 91; *Vance* v. *W. A. Vandercook Co.,* 170 U. S. 438, 444; *Crane* v. *Campbell,* 245 U. S. 304, 307; *Mahoney* v. *Joseph Triner Corp.,* 304 U. S. 401, 404. *Messrs. Robert A. Taft* and *Charles P. Taft* for appellant. No appearance for appellees.

No. 316. WAESCHE, TRUSTEE, *v.* THURMONT BANK. Appeal from the Circuit Court of Frederick County, Maryland. Decided October 10, 1938. *Per Curiam:* The motion of the appellee to dismiss the appeal herein is granted, and the appeal is dismissed for the reason that the judgment sought to be reviewed is based upon a non-federal ground adequate to support it. *Eustis* v. *Bolles,* 150 U. S. 361, 368–370; *Hale* v. *Lewis,* 181 U. S. 473, 479–480; *Gauss* v. *Detroit Trust Co.,* 297 U. S. 695. *Mr. Edward J. O'Mara* for appellant. *Mr. Randolph Barton, Jr.* for appellee. Reported below: 174 Md. 382; 198 A. 728.

No. 338. RICHFIELD OIL CORP. *v.* CALIFORNIA. Appeal from the Supreme Court of California. Decided October 10, 1938. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Packer Corporation* v. *Utah,* 285 U. S. 105; *State Board* v. *Young's Market Co.,* 299 U. S. 59, 64; *Schuylkill Trust Co.* v. *Pennsylvania,* 302 U. S. 506, 514. *Mr. Homer D. Crotty* for appellant. No appearance for appellee. Reported below: 11 Cal. 2d 296; 79 P. 2d 386.

No. —. SCOTT *v.* O'BANNON ET AL. October 10, 1938. Application denied.

No. —. VANN, RECEIVER, *v.* ALMOURS SECURITIES, INC., ET AL. October 10, 1938. Application denied. Reported below: 96 F. 2d 214.

No. —, original. EX PARTE LLOYD RUBIN. October 10, 1938. Motion for leave to file petition for writ of mandamus denied.

No. —, original. EX PARTE FRANCIS SCALESE. October 10, 1938. Motion for leave to file petition for writ of mandamus denied.

No. —, original. EX PARTE HOWARD LEE. October 10, 1938. Motion for leave to file a petition for writ of habeas corpus denied without prejudice to application to the appropriate court at the appropriate time.

No. —, original. EX PARTE MIKE HOLCHAK. October 10, 1938. A rule is ordered to issue, returnable within thirty days from this date, requiring the respondent to show cause why leave to file the petition for a writ of habeas corpus should not be granted.

No. —, original. EX PARTE CHARLIE JOHNSON. October 10, 1938. Motion for leave to file a petition for writ of habeas corpus denied.

No. 8, original. NEBRASKA *v.* WYOMING ET AL. October 10, 1938. The petition of intervention of the United States and the answers of the several States are received and ordered filed.

No. 13, original. CALIFORNIA *v.* LATIMER ET AL. October 10, 1938. Motion to dismiss and answer of the de-

fendants received and ordered filed and the case assigned for argument on the bill of complaint and motion to dismiss.

No. 21. NEBLETT ET AL. *v.* CARPENTER, INSURANCE COMMISSIONER, ET AL. October 10, 1938. On consideration of the suggestion of a diminution of the record and motion for a writ of certiorari in that relation, the motion for a writ of certiorari is denied. See *ante,* p. 297.

No. 301. O'BRIEN *v.* UNITED STATES; and

No. 324. BROWN *v.* SAME. October 10, 1938. On petitions for writs of certiorari to the Court of Appeals for the District of Columbia. Motions for leave to proceed further *in forma pauperis* denied for the reason that the applications for writs of certiorari were not made within the time provided by law, Rule XI, Rules of Practice and Procedure in Criminal Cases (292 U. S. 665). *Mr. James J. Laughlin* for petitioners. No appearance for the United States. Reported below: 99 F. 2d 131, 368.

No. 277. LOOMIS ET AL. *v.* FIRST FEDERAL SAVINGS & LOAN ASSN. October 10, 1938. In view of the Act of August 24, 1937 (50 Stat. 751), the Court hereby certifies to the Attorney General of the United States that the constitutionality of § 5 of the Home Owners' Loan Act of 1933 (48 Stat. 132), as amended by the Act of April 27, 1934 (48 Stat. 645), and by the Act of May 28, 1935 (49 Stat. 297), is drawn in question in this cause.

No. 221. UNITED STATES ET AL. *v.* MORGAN ET AL. Appeal from the District Court of the United States for the Western District of Missouri. October 10, 1938. The application of the appellants for a stay and supersedeas

is granted and it is ordered that the enforcement, operation, and execution of the order of June 18, 1938, appealed from, be, and the same is hereby, stayed and superseded pending determination of the cause by this Court. *Solicitor General Jackson, Assistant Attorney General Arnold,* and *Messrs. Warner W. Gardner* and *Wendell Berge* for the appellants. *Messrs. Frederick H. Wood, John B. Gage,* and *Thomas T. Cooke* for appellees. Reported below: 24 F. Supp. 214.

No. 158. PACIFIC EMPLOYERS INS. CO. *v.* INDUSTRIAL ACCIDENT COMM'N ET AL. Appeal from the Supreme Court of California. Decided October 10, 1938. The appeal herein is dismissed for the want of jurisdiction. Section 237 (a), Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by § 237 (c), Judicial Code, as amended (43 Stat. 936, 938), certiorari is granted. *Messrs. George C. Faulkner* and *W. N. Mullen* for appellant. *Mr. Everett A. Corten* for appellees. Reported below: 10 Cal. App. 2d 567; 75 P. 2d 1058.

No. 276. LANDIS ET AL. *v.* BUCK ET AL. Appeal from the District Court of the United States for the Northern District of Florida. October 10, 1938. Motion of the appellant State's Attorneys to vacate the decree and direct dismissal of the bill of complaint denied. Motion of the appellees to substitute granted and George Couper Gibbs, individually and as Attorney General of Florida, is substituted as a party appellant in the place and stead of Cary D. Landis, deceased. *Messrs. George Couper Gibbs, Andrew W. Bennett,* and *Lucien H. Boggs* for appellants. *Messrs. Thomas G. Haight, Frank J. Wideman, Louis D. Frohlich, Herman Finkelstein,* and *Manley P. Caldwell* for appellees.

No. 277. LOOMIS ET AL. *v.* FIRST FEDERAL SAVINGS & LOAN ASSN. On petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit. October 10, 1938. On consideration of the stipulation of the parties Frank H. Bixby, a member of the Banking Commission of Wisconsin, is substituted as a party petitioner in the place and stead of S. N. Schafer, resigned. The petition for writ of certiorari is granted. *Mr. Joseph P. Brazy* for petitioners. *Messrs. William Ryan* and *Horace Russell* for respondent. Reported below: 97 F. 2d 831.

No. —, original, October Term, 1937. EX PARTE FLORENCE F. GREAVES STONE. October 10, 1938. Motion for reconsideration of the motion for leave to file petition for writ of mandamus denied.

No. 183, October Term, 1936. HICKS *v.* MUTUAL LIFE INSURANCE CO. October 10, 1938. Motion for leave to file petition for rehearing denied. 299 U. S. 563.

No. 10. UNITED STATES *v.* ONE 1936 MODEL FORD V–8 DE LUXE COACH. Certiorari, 303 U. S. 633, to the Circuit Court of Appeals for the Fourth Circuit. Argued October 12, 1938. Decided October 17, 1938. *Per Curiam:* The judgment is affirmed by an equally divided Court. MR. JUSTICE BUTLER and MR. JUSTICE STONE took no part in the consideration or decision of this case. *Mr. Gordon Dean,* with whom *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Messrs. Mahlon D. Kiefer* and *W. Marvin Smith,* for the United States. *Messrs. Duane R. Dills* and *Eugene E. Heaton* for respondent. Reported below: 93 F. 2d 771.

No. 368. LOS ANGELES ET AL. *v.* LOS ANGELES COUNTY FLOOD CONTROL DISTRICT ET AL. Appeal from the Supreme Court of California. October 17, 1938. The mo-

tion to dismiss the appeal is granted as to the City of Los Angeles, and as to it the appeal is dismissed for the want of a substantial federal question. *Pawhuska* v. *Pawhuska Oil & Gas Co.,* 250 U. S. 394; *Trenton* v. *New Jersey,* 262 U. S. 182; *Williams* v. *Mayor,* 289 U. S 36, 40; *South Bend* v. *DeHaven,* 302 U. S. 644. As to the remaining appellant, further consideration of the question of the jurisdiction of this Court and of the motion to dismiss or affirm is postponed to the merits. *Messrs. Ray L. Chesebro, Frederick von Schrader, William H. Neal,* and *Bourke Jones* for appellants. *Messrs. W. B. McKesson* and *U. T. Clotfelter* for appellees. Reported below: 11 Cal. 2d 479; 80 P. 2d 479.

No. —, original. Ex parte Andrew G. Turcke. October 17, 1938. Motion for leave to file petition for writ of mandamus denied.

No. —, original. Ex parte Daisy C. Tegtmeyer. October 17, 1938. Motion for leave to file petition for writ of habeas corpus denied.

No. 1, original, October Term 1937. Georgia *v.* Tennessee Copper Co. October 17, 1938. The rule to show cause issued against the Ducktown Chemical & Iron Co. is discharged. It is ordered that costs in this cause since April 3, 1916, be taxed against the defendant, Tennessee Copper Co.

No. 359. Bowen *v.* Johnston, Warden. Certiorari, *post,* p. 579, to the Circuit Court of Appeals for the Ninth Circuit. October 17, 1938. *Seth W. Richardson, Esq.,* of Washington, D. C., a member of the bar of this Court, appointed to serve as counsel for the petitioner in this case. Reported below: 97 F. 2d 860.

No. 671, October Term 1937. SCHULTZ *v.* LIVE STOCK NATIONAL BANK, ADMINISTRATOR. October 17, 1938. Motion for leave to file a third petition for rehearing denied. See 302 U. S. 766; 303 U. S. 666; 304 U. S. 590.

No. 374. KALB *v.* LUCE ET AL.; and

No. 375. KALB ET AL. *v.* FEUERSTEIN ET AL. Appeals from the Supreme Court of Wisconsin. Decided October 24, 1938. *Per Curiam:* The appeals herein are dismissed for want of final judgments. *Missouri Ry. Co.* v. *Olathe,* 222 U. S. 185; *O'Mara* v. *Crampton,* 267 U. S. 575; *Manassas Park, Inc.,* v. *Robertson,* 274 U. S. 716; *American Bakeries Co.* v. *Huntsville,* 299 U. S. 514. *Mr. William Lemke* for appellants. *Mr. J. Arthur Moran* for respondents. Reported below: 228 Wis. 519, 525; 279 N. W. 685; 280 N. W. 725.

No. —, original. EX PARTE LOUISE DEAN MOYER. October 24, 1938. Motion for leave to file petition for writ of mandamus denied.

No. —, original. EX PARTE TAYLOR SEALS. OCTOBER 24, 1938. Motion for leave to file petition for writ of habeas corpus denied.

No. 277. LOOMIS ET AL. *v.* FIRST FEDERAL SAVINGS & LOAN ASSN. Certiorari, *ante,* p. 564, to the Circuit Court of Appeals for the Seventh Circuit. October 24, 1938. Motion of the United States for leave to intervene granted. *Solicitor General Jackson* for the United States. Reported below: 97 F. 2d 831.

No. 240. ANDERSON ET AL. *v.* NORTHERN STATES CONTRACTING CO. ET AL.;

No. 241. BROWN ET AL. *v.* SWORDS-McDOUGAL CO. ET AL.; and

No. 242. KNOX ET AL. *v.* MASSACHUSETTS BONDING & INSURANCE CO. Appeals from the Court of Appeals of Kentucky. Decided November 7, 1938. *Per Curiam:* The appeals herein are dismissed for the want of jurisdiction. Section 237 (a), Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeals were allowed as petitions for writs of certiorari as required by § 237 (c), Judicial Code, as amended (43 Stat. 936, 938), certiorari is denied. MR. JUSTICE BUTLER took no part in the consideration or decision of these cases. *Messrs. J. A. Edge, Paul B. Cromelin,* and *Francis C. Brooke* for appellants. *Messrs. Richard C. Stoll, Wallace Muir, James Park,* and *Seth W. Richardson* for appellees in No. 240. *Mr. Rodman W. Keenon* for appellees in Nos. 241 and 242. Reported below: 271 Ky. 140; 111 S. W. 2d 610.

No. 405. CRANCER ET AL. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Eastern District of Missouri. Decided November 7, 1938. *Per Curiam:* The decree is affirmed. *Hooker* v. *Knapp,* 225 U. S. 302; *Standard Oil Co.* v. *United States,* 283 U. S. 235, 238; *Interstate Commerce Comm'n* v. *United States ex rel. Campbell,* 289 U. S. 385, 388; *United States* v. *Griffin,* 303 U. S. 226, 233, 234. *Mr. Luther Ely Smith* for appellants. *Attorney General Cummings* and *Mr. Daniel W. Knowlton* for appellees. Reported below: 23 F. Supp. 690.

No. 410. DIAMOND TANK TRANSPORT, INC., ET AL. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Western District of Washington. Decided November 7, 1938. *Per Curiam:* The

decree is affirmed. *Hooker* v. *Knapp,* 225 U. S. 302; *Standard Oil Co.* v. *United States,* 283 U. S. 235, 238; *Interstate Commerce Comm'n* v. *United States ex rel. Campbell,* 289 U. S. 385, 388; *United States* v. *Griffin,* 303 U. S. 226, 233, 234. *Messrs. Henry T. Ivers* and *George E. Flood* for appellants. *Mr. Edward M. Reidy* for appellees. Reported below: 23 F. Supp. 497.

No. 423. PARKER *v.* GREENSBORO. Appeal from the Supreme Court of North Carolina. Decided November 7, 1938. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Welch* v. *Swasey,* 214 U. S. 91, 105–106; *Cusack* v. *Chicago,* 242 U. S. 526, 530–531; *Euclid* v. *Ambler Co.,* 272 U. S. 365, 388–389; *Gorieb* v. *Fox,* 274 U. S. 603, 608; *West Brothers Brick Co.* v. *Alexandria,* 302 U. S. 658. *Mr. Aubrey L. Brooks* for appellant. No appearance for appellee. Reported below: 214 N. C. 51; 197 S. E. 706.

No. 151. BOLLER *v.* KANSAS. Appeal from the Supreme Court of Kansas. Decided November 7, 1938. *Per Curiam:* Motion to reinstate the appeal granted and the appeal is dismissed for want of jurisdiction. Section 237 (a), Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by § 237 (c), Judicial Code, as amended (43 Stat. 936, 938), certiorari is denied. *Messrs. C. L. Kagey, L. M. Kagey,* and *Hal M. Black* for appellant. No appearance for appellee. Reported below: 147 Kan. 651; 77 P. 2d 950.

No. 409. TWIN FALLS COUNTY *v.* HENDERSON. Appeal from the Supreme Court of Idaho. Decided November 7, 1938. *Per Curiam:* The appeal herein is dis-

missed (1) for the want of a substantial federal question, *Pawhuska* v. *Pawhuska Oil & Gas Co.*, 250 U. S. 394; *Trenton* v. *New Jersey*, 262 U. S. 182; *Williams* v. *Mayor*, 289 U. S. 36, 40; *Los Angeles* v. *Los Angeles County Flood Control District, ante*, p. 564; (2) for the reason that the judgment sought herein to be reviewed is based upon a non-federal ground adequate to support it, *Eustis* v. *Bolles*, 150 U. S. 361, 366; *Hale* v. *Lewis*, 181 U. S. 473, 479; *Gauss* v. *Detroit Trust Co.*, 297 U. S. 695. *Mr. James R. Bothwell* for appellant. No appearance for appellee. Reported below: 59 Idaho 97.

No. —, original. Ex parte Romao Lukiancguk. November 7, 1938. Motion for leave to file petition for writ of habeas corpus denied.

No. —, original. Massachusetts *v.* Missouri et al. November 7, 1938. Rule ordered to issue requiring defendants to show cause why leave to file the bill of complaint herein should not be granted.

No. 329. Buck et al. *v.* Gallagher et al. Appeal from the District Court of the United States for the Western District of Washington. November 7, 1938. Motion to dismiss the appeal granted as to Ernest N. Hutchinson, John D. Evans, and Sam M. Driver, and the appeal is dismissed as to those three appellees. In all other respects the motion is denied. *Messrs. Thomas G. Haight, Louis D. Frohlich,* and *Herman Finkelstein* for appellants. *Messrs. G. W. Hamilton,* Attorney General of Washington, *John Egan Belcher,* Assistant Attorney General, *Edwin C. Ewing, Ralph E. Foley, Sam M. Driver,* and *Alfred J. Schweppe* for appellees. Reported below: 24 F. Supp. 541.

No. 146. PERRY *v.* KANSAS. Appeal from the Supreme Court of Kansas. Decided November 14, 1938. *Per Curiam:* The motion to reinstate the appeal is granted and the appeal is dismissed for the want of a substantial federal question. *Baldwin* v. *Kansas,* 129 U. S. 52, 57; *Castillo* v. *McConnico,* 168 U. S. 674, 683; *Old Colony Trust Co.* v. *Omaha,* 230 U. S. 100, 116; *Hebert* v. *Louisiana,* 272 U. S. 316, 317. *Messrs. C. L. Kagey, L. M. Kagey,* and *Hal M. Black* for appellant. No appearance for appellee. Reported below: 147 Kan. 319; 76 P. 2d 818.

No. 447. KRYDER *v.* INDIANA. Appeal from the Supreme Court of Indiana. Decided November 14, 1938. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Sugarman* v. *United States,* 249 U. S. 182, 184; *Zucht* v. *King,* 260 U. S. 174, 176; *Red "C" Oil Co.* v. *North Carolina,* 222 U. S. 380, 390; *Mutual Film Corp.* v. *Ohio Industrial Comm'n,* 236 U. S. 230, 245; *Pacific States Co.* v. *White,* 296 U. S. 176, 182. *Mr. Ode L. Rankin* for appellant. No appearance for appellee. Reported below: 214 Ind. 419; 15 N. E. 2d 386.

No. —, original. EX PARTE CLARENCE M. BRUMMETT;
No. —, original. EX PARTE CLINT SMITH; and
No. —, original. EX PARTE RALPH MARK. November 14, 1938. Motions for leave to file petitions for writs of habeas corpus denied.

No. 11, original. TEXAS *v.* FLORIDA ET AL. November 14, 1938. The report of the Special Master herein is received and ordered to be filed.

No. 442. MACKESY ET AL. *v.* MAINE. Appeal from the Superior Court of Maine. Decided November 21, 1938.

Per Curiam: The appeal herein is dismissed for the want of a properly presented substantial federal question. (1) *Harding* v. *Illinois,* 196 U. S. 78, 86, 87; *Capital City Dairy Co.* v. *Ohio,* 183 U. S. 238, 248; (2) *Nash* v. *United States,* 229 U. S. 373, 377; *Whitney* v. *California,* 274 U. S. 357, 368, 369; *Carter* v. *Texas, ante,* p. 557. *Mr. Albert Raymond Rogers* for appellants. *Mr. Frank T. Powers* entered an appearance for appellee. Reported below: 135 Me. 516; 200 A. 511.

No. —, original. Ex parte W. A. Denson. November 21, 1938. Motion for leave to file petition for writ of mandamus denied. Mr. Justice Black took no part in the consideration and decision of this application.

No. 387. Caroline C. Spalding *v.* United States; and

No. 388. Silby M. Spalding *v.* Same. November 21, 1938. Motions to recall orders (*post,* p. 644) denying petitions for writs of certiorari denied.

No. 104. Montana ex rel. Board of County Commissioners *v.* Bruce, County Assessor, et al. November 21, 1938. Leave granted the United States to appear and present oral argument as *amicus curiae* on motion of *Solicitor General Jackson* in that behalf.

No. —. Ex parte Century Indemnity Co. November 21, 1938. Returns of Honorable Curtis D. Wilbur and Honorable William Denman to the rule to show cause presented.

No. —, original. In the Matter of the Petition of Committee for Industrial Organization, American Civil Liberties Union, et al., for a Writ of Mandamus

AND/OR PROHIBITION, *v.* HON. J. WARREN DAVIS, HON. JOSEPH BUFFINGTON, HON. J. WHITAKER THOMPSON, HON. ALBERT BRANSON MARIS, AND HON. JOHN BIGGS, JR., UNITED STATES CIRCUIT JUDGES OF THE THIRD JUDICIAL CIRCUIT; and

No. —. COMMITTEE FOR INDUSTRIAL ORGANIZATION, AMERICAN CIVIL LIBERTIES UNION, ET AL. *v.* HAGUE ET AL. November 21, 1938. Motion for leave to file petition for a writ of mandamus and/or prohibition, for a rule to show cause why a writ of certiorari should not issue, and for interim stay, denied without prejudice to a petition for writ of certiorari in accordance with the Rules of this Court.

No. 463. BERKOWITZ *v.* ILLINOIS. Appeal from the Supreme Court of Illinois. Decided December 5, 1938. *Per Curiam:* The motion of the appellee to dismiss the appeal is granted and the appeal is dismissed for the want of a properly presented federal question. Section 237 (a), Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937). *Farney* v. *Towle,* 1 Black 350; *Capital City Dairy Co.* v. *Ohio,* 183 U. S. 238, 248; *Harding* v. *Illinois,* 196 U. S. 78, 86, 88; *Mackesy* v. *Maine, ante,* p. 570. *Mr. Wm. Scott Stewart* for appellant. *Mr. Otto Kerner,* Attorney General of Illinois, for appellee. Reported below: 369 Ill. 197; 15 N. E. 2d 699.

No. 475. WATCH TOWER BIBLE AND TRACT SOCIETY ET AL. *v.* BRISTOL ET AL. Appeal from the District Court of the United States for the District of Connecticut. Decided December 5, 1938. *Per Curiam:* The decree is affirmed. *In re Sawyer,* 124 U. S. 200, 210, 211; *Fenner* v. *Boykin,* 271 U. S. 240. *Mr. O. R. Moyle* for appellants. No appearance for appellees. Reported below: 24 F. Supp. 57.

No. —, original. Ex parte Taylor Seals;
No. —, original. Ex parte T. J. Audette;
No. —, original. Ex parte John Konik;
No. —, original. Ex parte Jules A. Newman; and
No. —, original. Ex parte Thomas J. Mooney. December 5, 1938. Motions for leave to file petitions for writs of habeas corpus denied.

No. —, original. Ex parte Wm. P. Deppe. December 5, 1938. Motion for leave to file petition for writ of mandamus denied.

No. —, original. Ex parte Thomas J. Mooney. December 12, 1938. Motion for award of writ of habeas corpus denied.

No. 3. Schriber-Schroth Co. *v.* Cleveland Trust Co. et al.;
No. 4. Aberdeen Motor Supply Co. *v.* Same; and
No. 5. F. E. Rowe Sales Co. *v.* Same. December 12, 1938. Ordered that in each of these cases the following direction be added to the judgment:

"On the remand the Court of Appeals will be free to consider whether the amendments to the Gulick application rendered void the patent issued upon it, and to consider all questions affecting the validity and infringement of the claims in suit of the Gulick and Maynard patents, but without including web flexibility or laterally flexible webs as an element in the combinations patented by them."

Ordered that the second sentence on page 1 of the opinion of this Court in this cause be amended to read:

"Respondent, the Cleveland Trust Company, is the assignee in trust of some eighty patents relating to pistons

of the type employed in internal combustion engines for automobiles, under a pooling agreement to which an automobile manufacturer and a number of manufacturers of pistons are parties."

And that the last sentence in the first full paragraph of page 4 of the opinion be amended to read:

"Reference to a combination including, with other elements, web connections, 'whereby said piston skirt is rendered yieldable during operation in response to cylinder wall pressure,' appears in Claim 18."

It is further ordered that respondent's motion to modify the judgments and the opinion be in all other respects denied, and that the petition for rehearing be denied.

Reported as amended, *ante,* p. 47.

No. 212. SOUTHERN PACIFIC CO. *v.* CORBETT ET AL. December 12, 1938. Andrew J. Gallagher, a member of the State Board of Equalization of California substituted as a party appellee in the place and stead of John C. Corbett, deceased, on motion of *Mr. Harry H. McElroy* in that behalf.

No. 213. PACIFIC TELEPHONE & TELEGRAPH CO. *v.* CORBETT ET AL. December 12, 1938. Andrew J. Gallagher, a member of the State Board of Equalization of California, substituted as a party appellee in the place and stead of John C. Corbett, deceased, on motion of *Mr. Francis N. Marshall* in that behalf.

No. 302. FELT & TARRANT MFG. CO. *v.* CORBETT ET AL. December 13, 1938. Andrew J. Gallagher, a member of the State Board of Equalization of California, substituted as a party appellee in the place and stead of John C.

Corbett, deceased, on motion of *Mr. A. Calder Mackay* in that behalf.

No. 490. GROSS ET AL. *v.* TITLE INSURANCE & TRUST CO. ET AL. Appeal from the District Court of the United States for the Southern District of California. Decided December 19, 1938. *Per Curiam:* The appeal herein is dismissed for the want of jurisdiction. Section 238, Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 938); § 266, Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 938); *Stratton* v. *St. Louis S. W. Ry.*, 282 U. S. 10, 15–16; U. S. *Naturopathic Assn.* v. *Chiropractic League,* 296 U. S. 539. *Messrs. Henry Gross, pro se,* and *Calvin S. Mauk* for appellants. *Mr. Arch H. Vernon* for Title Guarantee & Trust Co. et al., and *Mr. U. S. Webb,* Attorney General, for State of California, appellees.

No. —. ARROW DISTILLERIES, INC. *v.* ALEXANDER, ADMINISTRATOR OF THE FEDERAL ALCOHOL ADMINISTRATION. December 19, 1938. Petition for injunction denied.

No. 528. UTAH FUEL CO. ET AL. *v.* NATIONAL BITUMINOUS COAL COMM'N ET AL. December 19, 1938. Petition for writ of certiorari to the Court of Appeals for the District of Columbia granted. The motion for an injunction is granted, and it is ordered that the respondents be, and they are hereby, enjoined from carrying out the provisions of the order of August 31, 1938, of the National Bituminous Coal Commission, described more fully in the petition for writ of certiorari, and from introducing in any hearing before said Commission and from making available for inspection to interested parties, or others, the individual verified cost and price realization reports of petitioners, pending final disposition of the cause by

the Court. *Messrs. J. V. Norman* and *Robert E. Quirk* for petitioners. *Solicitor General Jackson, Assistant Attorney General Arnold,* and *Mr. Robert L. Stern* for respondents. Reported below: 101 F. 2d 426.

No. 11, original, October Term, 1934. NEW JERSEY *v.* DELAWARE. December 19, 1938. Motion for leave to file a second petition for rehearing denied. 304 U. S. 590.

No. 848, October Term, 1937. GORNY ET AL. *v.* TRUSTEES OF MILWAUKEE COUNTY ORPHANS BOARD. December 19, 1938. Motion for leave to file petition for rehearing denied. 304 U. S. 559.

No. 507. CONNOR *v.* RIVERS, GOVERNOR. Appeal from the District Court of the United States for the Northern District of Georgia. Decided January 3, 1939. *Per Curiam:* The motion of the appellees to affirm is granted and the decree is affirmed. *Healy* v. *Ratta,* 292 U. S. 263; *McNutt* v. *General Motors Acceptance Corp.,* 298 U. S. 178. *Mr. Albert H. Fry* for appellant. *Mr. M. J. Yeomans,* Attorney General of Georgia, for appellee.

No. 522. WHITMER *v.* ILLINOIS. Appeal from the Supreme Court of Illinois. Decided January 3, 1939. *Per Curiam:* The motion of the appellee to dismiss the appeal is granted and the appeal is dismissed (1) for the want of jurisdiction, § 237 (a), Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937); and (2) for want of a properly presented federal question. *Godchaux Co.* v. *Estopinal,* 251 U. S. 179; *Rooker* v. *Fidelity Trust Co.,* 261 U. S. 114, 117; *Herndon* v. *Georgia,* 295 U. S. 441, 443. *Mr. Wm. Scott Stewart* for appellant. *Mr. Otto Kerner,* Attorney General of Illinois, for appellee. Reported below: 369 Ill. 317; 16 N. E. 2d 757.

No. —, original. Ex parte Harmon M. Waley. January 3, 1939. Motion for leave to file petition for writ of mandamus denied.

No. —, original. Ex parte Harry Allen. January 3, 1939. Motion for leave to file petition for writ of habeas corpus denied.

No. —. Ex parte Sophy Callahan; and

No. —. Ex parte Robert Goldstein. January 3, 1939. Applications denied.

No. —. Washburn *v.* Michigan. January 3, 1939. Petition for appeal, referred by the Chief Justice to the Court, denied. See 285 Mich. 119; 280 N. W. 132.

No. 429. Prebyl *v.* Prudential Insurance Co. January 3, 1939. Motion for written opinion denied.

No. 552. Arrow Distilleries, Inc. *v.* Alexander, Administrator of the Federal Alcohol Administration. January 3, 1939. Application for rehearing of the petition for injunction denied. *Mr. Horace J. Donnelly, Jr.* for appellant. *Solicitor General Jackson* for appellee. Reported below: 24 F. Supp. 880.

No. 104. Montana ex rel. Board of County Commissioners *v.* Bruce, County Assessor, et al. Certiorari, *post*, p. 581, to the Supreme Court of Montana. Argued December 6, 7, 1938. Decided January 9, 1939. *Per Curiam:* The judgment of the Supreme Court of Montana is affirmed by an equally divided Court. *Messrs. Edwin S. Booth, Jr.* and *Edwin S. Booth, Sr.* for petitioner. *Messrs. John M. Kline* and *Enor K. Matson,* with

whom *Messrs. Harrison J. Freebourn,* Attorney General of Montana, *Thomas Dignan, E. G. Toomey,* and *R. S. McKellar* were on the brief, for respondents. *Mr. Warner W. Gardner,* with whom *Solicitor General Jackson* and *Mr. Oscar Provost* were on the brief, for the United States, as *amicus curiae,* by special leave of Court. Reported below: 106 Mont. 322; 77 P. 2d 403.

No. 325. PALMER ET AL., TRUSTEES, *v.* PALMER ET AL., TRUSTEES. On petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit. Decided January 9, 1939. *Per Curiam:* The petition for writ of certiorari in this case is granted, limited to the first question presented by the petition. The decree of the Circuit Court Appeals is reversed in that particular and the cause is remanded to the District Court for further proceedings in conformity with the opinion of this Court in case No. 63, *Connecticut Railway & Lighting Co.* v. *Palmer, ante,* p. 493. MR. JUSTICE BRANDEIS took no part in the consideration and decision of this case. *Messrs. Robert G. Dodge* and *Talcott M. Banks, Jr.* for petitioners. *Messrs. James Garfield* and *Hermon J. Wells* for respondents. Reported below: 98 F. 2d 670.

No. —. BUNDY *v.* UNITED STATES. January 9, 1939. Application denied.

No. 249. GOODMAN *v.* UNITED STATES. Certiorari, *post,* p. 587, to the Circuit Court of Appeals for the Third Circuit. Argued January 13, 1939. Decided January 16, 1939. *Per Curiam:* As it appears after hearing argument and upon examination of the record that the entire evidence is not contained in the bill of exceptions, the writ of certiorari is dismissed. *Mr. Patrick J. Friel* for petitioner. *Mr. B. D. Oliensis* was on a brief for petitioner.

Mr. Welly K. Hopkins, with whom *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Mr. William W. Barron* were on the brief, for the United States. Reported below: 97 F. 2d 197.

No. —, original. Ex parte Albert Bleecker. January 16, 1939. Motion for leave to file petition for writ of habeas corpus denied.

No. —, original. Ex parte Albert Leighton. January 16, 1939. Motion for leave to file petition for writ of mandamus denied.

No. 277. Loomis et al. *v.* First Federal Savings & Loan Assn. January 16, 1939. The motion to substitute is granted and John E. Martin, present Attorney General of Wisconsin, is substituted as a party petitioner in the place and stead of Orland S. Loomis, former Attorney General of Wisconsin.

DECISIONS GRANTING CERTIORARI, FROM OCTOBER 3, 1938, THROUGH JANUARY 16, 1939.

No. 359. Bowen *v.* Johnston, Warden. On petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. October 10, 1938. Motion for leave to proceed *in forma pauperis* granted and petition for writ of certiorari granted, limited to the question of the jurisdiction of the District Court on habeas corpus. *Hugh Allen Bowen, pro se.* No appearance for the United States. Reported below: 97 F. 2d 860.

No. 158. Pacific Employers Ins. Co. *v.* Industrial Accident Comm'n et al. See *ante,* p. 563.

No. 51. ARMSTRONG PAINT & VARNISH WORKS *v.* NU-ENAMEL CORP. ET AL. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. George A. Carpenter* and *George I. Haight* for petitioner. *Mr. Edward S. Rogers* for respondents. Reported below: 95 F. 2d 448.

No. 55. MCDONALD *v.* THOMPSON ET AL. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. T. S. Christopher* for petitioner. *Mr. William M. McCraw* for respondents. Reported below: 95 F. 2d 937.

No. 57. MISSOURI EX REL. GAINES *v.* CANADA, REGISTRAR OF THE UNIVERSITY OF MISSOURI, ET AL. October 10, 1938. Petition for writ of certiorari to the Supreme Court of Missouri granted. *Messrs. Charles H. Houston* and *Leon A. Ransom* for petitioner. *Messrs. Fred L. Williams, Fred L. English,* and *William S. Hogsett* for respondents. Reported below: 342 Mo. 121; 113 S. W. 2d 932.

No. 73. MINNESOTA *v.* UNITED STATES. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. William S. Ervin,* Attorney General of Minnesota, for petitioner. *Solicitor General Jackson, Assistant Attorney General McFarland,* and *Mr. Warner W. Gardner* for the United States. Reported below: 95 F. 2d 468.

No. 94. INTER-ISLAND STEAM NAVIGATION CO. *v.* HAWAII. October 10, 1938. Petition for writ or certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. J. Garner Anthony* for petitioner. *Mr.*

Julius Russell Cades and *Urban Earl Wied* for respondent. Reported below: 96 F. 2d 412.

No. 96. WHITE ET AL. *v.* UNITED STATES; and

No. 97. WHITE, EXECUTOR, *v.* UNITED STATES. October 10, 1938. Petition for writs of certiorari to the Court of Claims granted. *Mr. John P. Ohl* for petitioners. *Acting Solicitor General Townsend, Assistant Attorney General Morris,* and *Mr. Sewall Key* for the United States. Reported below: 86 Ct. Cls. 125; 21 F. Supp. 361.

No. 98. M. E. BLATT CO. *v.* UNITED STATES. October 10, 1938. Petition for writ of certiorari to the Court of Claims granted. *Mr. Lawrence Cake* for petitioner. *Acting Solicitor General Townsend, Assistant Attorney General Morris,* and *Mr. Sewall Key* for the United States. Reported below: 87 Ct. Cls. 413; 26 F. Supp. 461.

No. 102. UNITED STATES *v.* POWERS ET AL. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Jackson* for the United States. *Mr. H. T. Burke* for respondents. Reported below: 94 F. 2d 783.

No. 104. MONTANA EX REL. BOARD OF COUNTY COMMISSIONERS *v.* BRUCE, COUNTY ASSESSOR, ET AL. October 10, 1938. Petition for writ of certiorari to the Supreme Court of Montana granted. *Messrs. Edwin S. Booth, Sr.* and *Edwin S. Booth, Jr.* for petitioner. *Messrs. Thomas Dignan, Enor K. Matson, E. G. Toomey, R. S. McKellar,* and *John M. Kline* for respondents. Reported below: 106 Mont. 322; 77 P. 2d 403.

No. 118. PRINCESS LIDA OF THURN AND TAXIS ET AL. *v.* FITZGERALD ET AL. October 10, 1938. Petition for writ of certiorari to the Supreme Court of Pennsylvania granted. *Messrs. Charles H. Tuttle* and *Gerald J. Craugh* for petitioners. *Mr. Gerald Purcell Fitzgerald, pro se.* Reported below: 329 Pa. 497; 198 A. 58.

No. 127. MACKAY RADIO & TELEGRAPH CO. *v.* RADIO CORPORATION OF AMERICA. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Samuel E. Darby, Jr., Hugh M. Morris,* and *Paul Kolisch* for petitioner. *Messrs. Abel E. Blackmar, Jr.* and *Jo. Baily Brown* for respondent. Reported below: 96 F. 2d 587.

No. 154. UNITED STATES *v.* MCCLURE, ADMINISTRATRIX. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Jackson* for the United States. *Mr. Graham K. Betts* for respondent. Reported below: 95 F. 2d 744.

No. 169. UNITED STATES *v.* PLEASANTS. October 10, 1938. Petition for writ of certiorari to the Court of Claims granted. *Solicitor General Jackson* for the United States. *Messrs. Frederick Schwertner* and *George H. Warrington* for respondent. Reported below: 86 Ct. Cls. 679; 22 F. Supp. 964.

No. 180. HELVERING, COMMISSIONER OF INTERNAL REVENUE *v.* OWENS ET AL. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Jackson* for petitioner. *Messrs. Ewing Everett* and *O. H. Chmillon* for respondents. Reported below: 95 F. 2d 318.

No. 189. LYON *v.* MUTUAL BENEFIT HEALTH & ACCIDENT ASSN. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. John W. Nance* for petitioner. *Mr. Thomas B. Pryor* for respondent. Reported below: 95 F. 2d 528.

No. 210. PULLMAN COMPANY ET AL. *v.* JENKINS ET AL. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. Robert Brennan, Leo E. Sievert, H. K. Lockwood,* and *Lawrence Livingston* for petitioners. *Mr. Rex Hardy* for respondents. Reported below: 96 F. 2d 405.

No. 222. WASHINGTONIAN PUBLISHING CO. *v.* PEARSON ET AL. October 10, 1938. Petition for writ of certiorari to the Court of Appeals for the District of Columbia granted. *Messrs. Gibbs L. Baker* and *Horace S. Whitman* for petitioner. *Messrs. Elisha Hanson* and *Eliot C. Lovett* for respondents. Reported below: 68 App. D. C. 373; 98 F. 2d 245.

No. 229. NATIONAL LABOR RELATIONS BOARD *v.* COLUMBIAN ENAMELING & STAMPING CO. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Solicitor General Jackson* and *Mr. Charles Fahy* for petitioner. *Mr. Earl F. Reed* for respondent. Reported below: 96 F. 2d 948.

No. 245. UNITED STATES *v.* ALGOMA LUMBER CO.;

No. 246. SAME *v.* FOREST LUMBER CO.; and

No. 247. SAME *v.* LAMM LUMBER CO. October 10, 1938. Petition for writs of certiorari to the Court of

Claims granted. *Acting Solicitor General Townsend* for the United States. *Messrs. Jesse Andrews, Carl D. Matz,* and *William S. Bennet* for respondents in Nos. 245 and 246. *Mr. Ralph H. Case* for respondent in No. 247. Reported below: 86 Ct. Cls. 226, 188, 171.

No. 275. CURRIN ET AL. *v.* WALLACE, SECRETARY OF AGRICULTURE, ET AL. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Mr. J. W. H. Roberts* for petitioners. *Solicitor General Jackson* for respondents. Reported below: 95 F. 2d 856.

No. 294. TEXARKANA *v.* ARKANSAS LOUISIANA GAS CO. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Benjamin E. Carter* for petitioner. *Messrs. Henry C. Walker, Jr., William C. Fitzhugh,* and *William H. Arnold, Jr.* for respondent. Reported below: 97 F. 2d 5.

No. 312. TAYLOR ET AL. *v.* STANDARD GAS & ELECTRIC CO. ET AL. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Mr. Jason L. Honigman* for petitioners. *Messrs. Nathan A. Gibson* and *Wilbur J. Holleman* for respondent Standard Gas & Electric Co. *Messrs. Geo. S. Ramsey* and *Villard Martin* for respondent Greis, Trustee. *Messrs. William P. Sidley* and *James F. Oates, Jr.* for respondent Deep Rock Oil Corp. Reported below: 96 F. 2d 693.

No. 63. CONNECTICUT RAILWAY & LIGHTING CO. *v.* PALMER ET AL. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second

Circuit granted. MR. JUSTICE BRANDEIS took no part in the consideration and decision of this application. *Mr. George W. Martin* for petitioner. *Messrs. James Garfield* and *Hermon J. Wells* for respondents. Reported below: 95 F. 2d 483.

No. 304. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* CHESTER N. WEAVER CO. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Jackson* for petitioner. *Messrs. Adolphus E. Graupner* and *Arthur E. Cooley* for respondent. Reported below: 97 F. 2d 31.

No. 318. OBICI ET AL. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Messrs. Ewing Everett* and *O. H. Chmillon* for petitioners. *Solicitor General Jackson* for respondent. Reported below: 97 F. 2d 431.

Nos. 182 and 183. FORD MOTOR CO. *v.* NATIONAL LABOR RELATIONS BOARD. October 10, 1938. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Messrs. Frederick H. Wood, Louis J. Columbo,* and *Alfred McCormick* for petitioner. *Solicitor General Jackson,* and *Messrs. A. H. Feller, Charles Fahy,* and *Robert B. Watts* for respondent. Reported below: 99 F. 2d 1003, 1009.

No. 188. TITUS *v.* WALLICK. October 10, 1938. Petition for writ of certiorari to the Supreme Court of Ohio granted. Motion to print an abbreviated record, consisting of the parts of the record filed in this cause which

are designated in the motion, granted, with leave to the respondent to submit to the Court a motion designating any additional portions of the record which he desires to have printed and the Court will take this motion under advisement. *Messrs. Aaron Frank* and *Thomas I. Sheridan* for petitioner. *Mr. Rolland M. Edmonds* for respondent. Reported below: 133 Ohio St. 612; 15 N. E. 2d 140.

No. 195. Socony-Vacuum Oil Co. *v.* Smith. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. Mr. Justice Stone and Mr. Justice Roberts took no part in the consideration and decision of this application. *Mr. Henry B. Potter* for petitioner. *Mr. Frederick R. Graves* for respondent. Reported below: 96 F. 2d 98.

No. 274. National Labor Relations Board *v.* Sands Manufacturing Co. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Acting Solicitor General Townsend* and *Mr. Charles Fahy* for petitioner. *Mr. Harrison B. McGraw* for respondent. Reported below: 96 F. 2d 721.

No. 277. Loomis et al. *v.* First Federal Savings & Loan Assn. See *ante,* p. 564.

No. 142. Pierre *v.* Louisiana. October 17, 1938. Petition for writ of certiorari to the Supreme Court of Louisiana, and motion for leave to proceed further *in forma pauperis,* granted. *Mr. Maurice R. Woulfe* for petitioner. No appearance for respondent. Reported below: 189 La. 764; 180 So. 630.

No. 249. GOODMAN *v.* UNITED STATES. October 17, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit, and motion for leave to proceed further *in forma pauperis*, granted. *Messrs. B. D. Oliensis* and *Patrick J. Friel* for petitioner. No appearance for the United States. Reported below: 97 F. 2d 197.

No. 314. WICHITA ROYALTY CO. ET AL. *v.* CITY NATIONAL BANK ET AL. October 17, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. James T. Montgomery, Guy Rogers* and *Ray P. Bland* for petitioners. *Messrs. T. R. Boone* and *Leslie Humphrey* for respondents. Reported below: 95 F. 2d 671; 97 *id.* 249.

No. 330. KESSLER, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION, *v.* STRECKER. October 17, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Solicitor General Jackson* for petitioner. *Messrs. Whitney North Seymour, C. A. Stanfield,* and *Carol King* for respondent. Reported below: 95 F. 2d 976; 96 *id.* 1020.

No. 342. LOWDEN ET AL., TRUSTEES, *v.* SIMONDS-SHIELDS-LONSDALE GRAIN CO. October 17, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. Charles M. Miller* and *Cyrus Crane* for petitioners. *Mr. Dupuy G. Warrick* for respondent. Reported below: 97 F. 2d 816.

No. 328. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* R. J. REYNOLDS TOBACCO CO. October 17, 1938.

Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. MR. JUSTICE STONE took no part in the consideration and decision of this application. *Solicitor General Jackson* for petitioner. *Mr. J. G. Körner, Jr.,* for respondent. Reported below: 97 F. 2d 302.

No. 360. UNITED STATES *v.* TOWERY. October 24, 1938. Petition for writ or certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Solicitor General Jackson* for the United States. *Mr. Edward H. S. Martin* for respondent. Reported below: 97 F. 2d 906.

No. 364. KEIFER ET AL. *v.* RECONSTRUCTION FINANCE CORP. ET AL. October 24, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted, limited to the first question presented in the petition. *Messrs. Ernest B. Perry* and *Robert Van Pelt* for petitioners. *Solicitor General Jackson* and *Messrs. Peyton R. Evans* and *C. J. Durr* for respondents. Reported below: 97 F. 2d 812.

No. 384. GUARANTY TRUST CO., TRUSTEE, *v.* HENWOOD, TRUSTEE, ET AL. November 7, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. John W. Davis, Edwin S. S. Sunderland,* and *Ralph M. Carson* for petitioner. *Messrs. A. H. Kiskaddon, Carleton S. Hadley, Ben C. Dey,* and *George L. Buland* for respondents. Reported below: 98 F. 2d 160.

No. 391. UNITED STATES *v.* JACOBS, EXECUTRIX. November 7, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted.

Solicitor General Jackson for petitioner. *Messrs. Hugh W. McCulloch* and *Frank H. McCulloch* for respondent. Reported below: 97 F. 2d 784.

No. 385. First Chrold Corporation *v.* Commissioner of Internal Revenue. November 7, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. John E. McClure* and *Robert N. Miller* for petitioner. *Solicitor General Jackson* for respondent. Reported below: 97 F. 2d 22.

No. 417. Saxe *v.* Shea, Administrator. November 14, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Thomas D. Thacher* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. J. Louis Monarch, Berryman Green,* and *Warner W. Gardner* for respondent. By leave of Court, *Messrs. John J. Bennett, Jr.,* Attorney General of New York, and *Henry Epstein,* Solicitor General, filed a brief on behalf of that State, as *amicus curiae,* in support of the petitioner. Reported below: 98 F. 2d 83.

No. 372, October Term, 1937. Graves et al. *v.* Elliott et al. See *post,* p. 667.

No. 426. Milk Control Board *v.* Eisenberg Farm Products. November 21, 1938. Petition for writ of certiorari to the Supreme Court of Pennsylvania granted. *Messrs. Guy K. Bard* and *Harry Polikoff* for petitioner. *Mr. Thomas D. Caldwell* for respondent. By leave of Court, *Messrs. John J. Bennett, Jr.,* Attorney General of New York, *Henry Epstein,* Solicitor General, *Milo R.*

Kniffen, and *Robert G. Blabey* filed a brief on behalf of the Commissioner of Agriculture and Markets of New York, as *amicus curiae,* in support of petitioner. Reported below: 332 Pa. 34; 200 A. 854.

No. 416. UNITED STATES *v.* BERTELSEN & PETERSEN ENGINEERING CO. November 21, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. MR. JUSTICE REED took no part in the consideration and decision of this application. *Solicitor General Jackson* for the United States. *Mr. O. Walker Taylor* for respondent. Reported below: 95 F. 2d 867; 98 *id.* 132.

No. 436. NATIONAL LABOR RELATIONS BOARD *v.* FANSTEEL METALLURGICAL CORP. November 21, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Solicitor General Jackson* and *Mr. Charles Fahy* for petitioner. *Messrs. Benjamin V. Becker, Max Swiren,* and *Sidney H. Block* for respondent. Reported below: 98 F. 2d 375.

No. 437. UNITED STATES *v.* JAFFRAY ET AL. November 21, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. MR. JUSTICE REED took no part in the consideration and decision of this application. *Solicitor General Jackson* for the United States. *Messrs. J. B. Faegre* and *Hayner N. Larson* for respondents. Reported below: 97 F. 2d 488.

No. 166. TOLEDO PRESSED STEEL CO. *v.* STANDARD PARTS, INC.; and

No. 167. SAME *v.* HUEBNER SUPPLY CO. See *post,* p. 667.

No. 454. PERKINS, SECRETARY OF LABOR, ET AL. *v.* ELG; and

No. 455. ELG *v.* PERKINS, SECRETARY OF LABOR, ET AL. December 5, 1938. Petitions for writs of certiorari to the Court of Appeals for the District of Columbia granted. *Solicitor General Jackson* and *Mr. Green H. Hackworth* for petitioners in No. 454 and respondents in No. 455. *Mr. Henry F. Butler* for Elg. Reported below: 69 App. D. C. 175; 99 F. 2d 408.

No. 441. ELECTRIC STORAGE BATTERY CO. *v.* SHIMADZU ET AL. December 5, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Augustus B. Stoughton* and *Hugh M. Morris* for petitioner. *Messrs. Edmund B. Whitcomb* and *Geo. Whitefield Betts, Jr.* for respondents. Reported below: 98 F. 2d 831.

No. 453. UNITED STATES TRUST CO., EXECUTOR, *v.* COMMISSIONER OF INTERNAL REVENUE. December 5, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Wilder Goodwin* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Mr. Sewall Key* and *Helen R. Carloss* for respondent. Reported below: 98 F. 2d 734.

No. 460. LANE *v.* WILSON ET AL. December 12, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Mr. Charles A. Chandler* for petitioner. *Messrs. Joseph C. Stone* and *Charles A. Moon* for respondents. Reported below: 98 F. 2d 980.

No. 466. HONOLULU OIL CORP. ET AL. *v.* HALLIBURTON ET AL.; and

No. 479. HALLIBURTON ET AL. *v.* HONOLULU OIL CORP. ET AL. December 19, 1938. Petitions for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. A. W. Boyken* and *A. J. Hill* for Honolulu Oil Corp. et al. *Messrs. Frederick S. Lyon, Leonard S. Lyon, Henry S. Richmond,* and *William H. Davis* for Halliburton et al. Reported below: 98 F. 2d 436.

No. 478. GRAVES ET AL. *v.* NEW YORK EX REL. O'KEEFE. December 19, 1938. Petition for writ of certiorari to the Supreme Court of New York granted. *Messrs. John J. Bennett,* Attorney General of New York, *Henry Epstein,* Solicitor General, *Joseph M. Mesnig,* and *Austin Tobin* for petitioners. *Messrs. Daniel McNamara, Jr.* and *Ernest K. Neumann* for respondent. Reported below: 278 N. Y. 691; 253 App. Div. 91; 16 N. E. 2d 404; 1 N. Y. S. 2d 195.

No. 528. UTAH FUEL CO. ET AL. *v.* NATIONAL BITUMINOUS COAL COMM'N ET AL. See *ante,* p. 575.

No. 486. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* METROPOLITAN EDISON CO.; and

No. 487. SAME *v.* PENNSYLVANIA WATER & POWER CO. January 3, 1939. Petitions for writs of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General Jackson* for petitioner. No appearance for respondents. Reported below: 98 F. 2d 807, 812.

No. 491. STATE TAX COMMISSION ET AL. *v.* VAN COTT. January 3, 1939. Petition for writ of certiorari to the Supreme Court of Utah granted. *Messrs. Irwin Arno-*

vitz, Joseph Chez, Attorney General of Utah, *John D. Rice,* and *Alfred Klein* for petitioners. *Mr. W. Q. Van Cott, pro se.* Reported below: 95 Utah 43; 79 P. 2d 6.

No. 482. DIMOCK, EXECUTOR, *v.* CORWIN, LATE COLLECTOR OF INTERNAL REVENUE. January 3, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. MR. JUSTICE STONE took no part in the consideration and decision of this application. *Messrs. E. J. Dimock* and *J. D. Rawlings* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Edward J. Ennis* for respondent. Reported below: 99 F. 2d 799.

Nos. 492 and 493. GENERAL GAS & ELECTRIC CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. January 3, 1939. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Maurice Bower Saul* and *Francis J. Sweeney* for petitioner. *Solicitor General Jackson* for respondent. Reported below: 98 F. 2d 561.

No. 325. PALMER ET AL., TRUSTEES *v.* PALMER ET AL., TRUSTEES. See *ante,* p. 578.

No. 508. FEDERAL POWER COMMISSION *v.* PACIFIC POWER & LIGHT CO. ET AL. January 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Jackson* and *Mr. William C. Koplovitz* for petitioner. *Messrs. A. J. G. Priest, Sidman I. Barber,* and *Henry S. Gray* for respondents. Reported below: 98 F. 2d 835.

No. 514. NATIONAL LABOR RELATIONS BOARD *v.* FAINBLATT ET AL. January 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General Jackson* and *Mr. Charles Fahy* for petitioner. *Messrs. Leon Gerofsky, T. Girard Wharton,* and *Joseph Halpern* for respondents. Reported below: 98 F. 2d 615.

No. 65. FAIRBANKS *v.* UNITED STATES. See *post,* p. 667.

No. 495. CHEMICAL BANK & TRUST CO., TRUSTEE, *v.* HENWOOD, TRUSTEE, ET AL. January 16, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Alfred H. Phillips* for petitioner. *Messrs. A. H. Kiskaddon* and *Carleton S. Hadley* for respondents. Reported below: 98 F. 2d 179.

No. 590. BETHLEHEM STEEL CO. *v.* ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE CO. January 16, 1939. Petition for writ of certiorari to the Supreme Court of New York granted. MR. JUSTICE BLACK took no part in the consideration and decision of this application. *Messrs. Frederick H. Wood* and *Wm. D. Whitney* for petitioner. *Messrs. Nathan L. Miller, W. W. Miller,* and *Redmond F. Kernan, Jr.* for respondent. Reported below: 254 App. Div. 839, 840; 164 Misc. 498; 299 N. Y. S. 862.

No. 591. BETHLEHEM STEEL CO. *v.* ANGLO-CONTINENTALE TREUHAND, A. G., ET AL. January 16, 1939. Petition for writ of certiorari to the Supreme Court of New York granted. *Messrs. Frederick H. Wood* and *Wm.*

D. Whitney for petitioner. *Mr. Harry Hoffman* for respondents. Reported below: 254 App. Div. 844.

DECISIONS DENYING CERTIORARI, FROM OCTOBER 3, 1938, THROUGH JANUARY 16, 1939.

No. 21. NEBLETT ET AL. *v.* CARPENTER, INSURANCE COMMISSIONER, ET AL. See *ante*, p. 562.

No. 129. DENSON *v.* BOARD OF COMMISSIONERS OF THE STATE BAR. October 10, 1938. Petition for writ of certiorari to the Supreme Court of Alabama, and motion for leave to proceed further *in forma pauperis*, denied. MR. JUSTICE BLACK took no part in the consideration and decision of this application. *Mr. William Augustus Denson* for petitioner. *Mr. Benjamin F. Ray* for respondents. Reported below: 235 Ala. 313; 178 So. 434.

No. 109. FLETCHER *v.* UNITED STATES. October 10, 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. *Edmond G. Fletcher, pro se.* No appearance for the United States.

No. 117. STORY *v.* RIVES. October 10, 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 respondent. Reported below: 68 App. D. C. 325; 97 F. 2d 182.

No. 170. PFAFF *v.* UNITED STATES. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit, and motion for leave to

proceed further *in forma pauperis,* denied. *Mr. Warren E. Miller* for petitioner. No appearance for the United States. Reported below: 93 F. 2d 823.

No. 171. TAYLOR *v.* UNITED STATES. October 10, 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. *Mr. Henry E. Kahn* for petitioner. No appearance for the United States. Reported below: 96 F. 2d 16.

No. 172. FREEMAN *v.* UNITED STATES. October 10, 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. *Mr. Henry E. Kahn* for petitioner. No appearance for the United States. Reported below: 96 F. 2d 13.

No. 184. IN RE MINNIE REESE RICHARDSON WRAGG. October 10, 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. *Mr. Claude L. Dawson* for petitioner. Reported below: 95 F. 2d 252.

No. 192. CASWELL *v.* MORGENTHAU, SECRETARY OF THE TREASURY, ET AL. October 10, 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 A. Creswell* for petitioner. No appearance for respondents. Reported below: 69 App. D. C. 17; 98 F. 2d 296.

No. 225. FUTRELL, ADMINISTRATRIX, *v.* NEWPORT NEWS ET AL. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. William Davis Butts* for petitioner. No appearance for respondents. Reported below: 97 F. 2d 566.

No. 263. ROBERTSON ET AL. *v.* CHRONISTER ET AL. October 10, 1938. Petition for writ of certiorari to the Supreme Court of Arkansas, and motion for leave to proceed further *in forma pauperis,* denied. *Dora Robertson, pro se.* No appearance for respondents. Reported below: 196 Ark. 141; 116 S. W. 2d 1048.

No. 281. HELLMUTH *v.* HELLMUTH. October 10, 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. *Messrs. Dorsey K. Offutt, Reynolds Robertson,* and *Albert W. Fox* for petitioner. No appearance for respondent. Reported below: 69 App. D. C. 64; 98 F. 2d 431.

No. 317. KELLY *v.* JOHNSTON, WARDEN. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Walter Kelly, pro se.* No appearance for respondent. Reported below: 99 F. 2d 582.

No. 326. IRVIN *v.* ZERBST, WARDEN. October 10, 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 Irvin, pro se.* No appearance for respondent. Reported below: 97 F. 2d 257.

No. 327. Reed *v.* Colpoys. October 10, 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 respondent. Reported below: 99 F. 2d 396.

No. 353. Aurynger *v.* Radio Corporation of America. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. John J. Aurynger, pro se. Mr. Stephen H. Philbin* for respondent. Reported below: 98 F. 2d 765.

No. 6. Mooney *v.* Smith, Warden. October 10, 1938. Petition for writ of certiorari to the Supreme Court of California denied. Dissenting: Mr. Justice Black and Mr. Justice Reed. *Messrs. Frank P. Walsh, John F. Finnerty,* and *George T. Davis* for petitioner. *Messrs. U. S. Webb* and *Wm. F. Cleary* for respondent. Reported below: 10 Cal. 2d 1; 73 P. 2d 554.

No. 43. Milliken et al. *v.* Meyer. October 10, 1938. Petition for writ of certiorari to the Supreme Court of Colorado denied, as it does not appear from the record that there is a final judgment. *Messrs. C. R. Ellery* and *Harold H. Healy* for petitioners. *Mr. James A. Greenwood* for respondent. Reported below: 101 Colo. 564; 76 P. 2d 420.

No. 105. PALMER ET AL. *v.* CONNECTICUT RAILWAY & LIGHTING CO. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE BRANDEIS took no part in the consideration and decision of this application. *Messrs. Hermon J. Wells* and *James Garfield* for petitioners. *Mr. George W. Martin* for respondent. Reported below: 95 F. 2d 483.

No. 76. MAYTAG COMPANY *v.* HURLEY MACHINE CO. ET AL.; and

No. 77. SAME *v.* EASY WASHING MACHINE CORP. On petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit; and

No. 352. SAME *v.* GENERAL ELECTRIC SUPPLY CORP. On petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit. October 10, 1938. Motion to defer consideration of the applications for writs of certiorari in these cases, and petitions for writs of certiorari, denied. *Messrs. Thomas G. Haight, Wallace R. Lane, Benton Baker, Oscar W. Jeffery,* and *Nelson E. Johnson* for petitioner. *Messrs. William H. Davis* and *Dean S. Edmonds* for respondents. Reported below: Nos. 76 and 77, 96 F. 2d 87.

No. 143. HOWTH *v.* FARRAR ET AL. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Wm. Andress, Jr.* for petitioner. *Mr. William E. Allen* for respondents. Reported below: 94 F. 2d 654.

No. 162. MOSHER *v.* CONWAY. October 10, 1938. Petition for writ of certiorari to the Supreme Court of Arizona denied for the reason that application therefor

was not made within the time provided by law. Section 8 (a), Act of February 13, 1925 (43 Stat. 936, 940). *Mr. John W. Ray* for petitioner. No appearance for respondent. Reported below: 51 Ariz. 275; 76 P. 2d 231.

No. 166. TOLEDO PRESSED STEEL CO. *v.* STANDARD PARTS, INC.; and

No. 167. SAME *v.* HUEBNER SUPPLY CO. October 10, 1938. Motion to defer consideration of the application for writs of certiorari in these cases, and petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit, denied. *Mr. Wilber Owen* for petitioner. *Messrs. William P. Blair* and *Will Freeman* for respondents. Reported below: 93 F. 2d 336.

No. 168. INDIANAPOLIS ET AL. *v.* CHASE NATIONAL BANK, TRUSTEE, ET AL. October 10, 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 and decision of this application. *Messrs. Floyd J. Mattice, William H. Thompson,* and *Albert L. Rabb* for petitioners. *Messrs. Howard F. Burns* and *William L. Taylor* for respondents. Reported below: 96 F. 2d 363.

No. 32. GEORGE E. WARREN CORP. *v.* UNITED STATES. October 10, 1938. Petition for writ of certiorari to the Court of Customs and Patent Appeals denied. *Mr. Geo. W. Dalzell* for petitioner. *Solicitor General Jackson,* and *Messrs. Charles D. Lawrence* and *John R. Benney* for the United States. Reported below: 25 C. C. P. A. (Cust.) 450; 97 F. 2d 105.

No. 33. UNITED STATES *v.* DRIVER. October 10, 1938. Petition for writ of certiorari to the Court of Claims denied. *Solicitor General Jackson* for the United States. *Messrs. Samuel T. Ansell* and *Mahlon C. Masterson* for respondent. Reported below: 85 Ct. Cls. 702.

No. 34. PENICK & FORD, LTD. *v.* INTERNATIONAL PATENTS DEVELOPMENT CO. ET AL. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Stephen H. Philbin* for petitioner. *Messrs. Percival H. Truman* and *Charles H. Howson* for respondents. Reported below: 94 F. 2d 1018.

No. 35. BROOKS, ADMINISTRATRIX, *v.* SEATTLE. October 10, 1938. Petition for writ of certiorari to the Supreme Court of Washington denied. *Messrs. George F. Hannan* and *W. H. Cook* for petitioner. *Messrs. A. C. Van Soelen* and *John A. Homer* for respondent. Reported below: 193 Wash. 253; 74 P. 2d 1008.

No. 36. COLLINS *v.* DYE. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John W. Ray* for petitioner. No appearance for respondent. Reported below: 94 F. 2d 799.

No. 37. RUSSELL & TUCKER ET AL. *v.* UNITED STATES;
No. 38. PORTER BROTHERS & BIFFLE ET AL. *v.* SAME;
No. 39. PRICE ET AL. *v.* SAME;
No. 206. UNITED STATES *v.* RUSSELL & TUCKER ET AL.;
No. 207. SAME *v.* PORTER BROTHERS & BIFFLE ET AL.; and

No. 208. SAME *v.* PRICE ET AL. October 10, 1938. Petitions for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Blatchford Downing, Dayton Moses,* and *Ogden K. Shannon* for petioners in No. 37 and respondents in No. 206. *Mr. R. E. Taylor* for petitioners in Nos. 38 and 39 and respondents in Nos. 207 and 208. *Solicitor General Jackson, Assistant Attorney General Whitaker,* and *Mr. Paul A. Sweeney* for the United States. Reported below: 95 F. 2d 684, 694, 687.

No. 40. WABASH RAILWAY CO. *v.* BRIDAL. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Homer Hall* for petitioner. No appearance for respondent. Reported below: 94 F. 2d 117.

No. 41. KRUPP NIROSTA CO. ET AL. *v.* COE, COMMISSIONER OF PATENTS. October 10, 1938. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Mr. Fritz v. Briesen* for petitioners. *Solicitor General Jackson, Assistant Attorney General Whitaker,* and *Messrs. R. F. Whitehead* and *Paul P. Stoutenburgh* for respondent. Reported below: 68 App. D. C. 323; 96 F. 2d 1013.

No. 42. AMERICAN TOBACCO CO. *v.* BOWERS, EXECUTOR. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Robert H. Montgomery, Thomas G. Haight, J. Marvin Haynes,* and *James O. Wynn* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *F. E. Youngman* for respondent. Reported below: 94 F. 2d 1010.

No. 44. PARAMINO LUMBER CO. ET AL. *v.* MARSHALL, DEPUTY COMMISSIONER. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Cassius E. Gates* and *Edward G. Dobrin* for petitioners. *Solicitor General Jackson, Assistant Attorney General Whitaker,* and *Messrs. Henry A. Julicher* and *Charles Fahy* for respondent. Reported below: 95 F. 2d 203.

No. 45. KANSAS EX REL. BECK, ATTORNEY GENERAL, ET AL. *v.* OCCIDENTAL LIFE INSURANCE CO. ET AL. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Clarence V. Beck, John L. Hunt,* and *John G. Egan* for petitioners. *Messrs. George E. Brammer, Joseph Brody,* and *Clyde B. Charlton* for Occidental Life Ins. Co., and *Mr. T. M. Lillard* for Clyde W. Miller et al., respondents. Reported below: 95 F. 2d 935.

No. 46. WILLIAM B. SCAIFE & SONS CO. *v.* DRISCOLL, COLLECTOR. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. James M. Magee* and *Edmund W. Arthur* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Paul S. McMahon* for respondent. Reported below: 94 F. 2d 664.

No. 47. GUETTEL ET AL. *v.* UNITED STATES. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Maurice H. Winger* for petitioners. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Mr. Sewall Key* and *Helen R. Carloss* for the United States. Reported below: 95 F. 2d 229.

No. 50. VOORHEES *v.* SYCK, SHERIFF. October 10, 1938. Petition for writ of certiorari to the Supreme Court of Minnesota denied. *Mr. Matthias N. Orfield* for petitioner. No appearance for respondent. Reported below: 202 Minn. 252; 277 N. W. 926.

No. 52. LILLY *v.* SMITH, COLLECTOR. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. George L. Denny* and *William H. Thompson* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *F. E. Youngman* for respondent. Reported below: 96 F. 2d 341.

No. 54. BECKER STEEL CO. *v.* CUMMINGS, ATTORNEY GENERAL, ET AL. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. E. Crosby Kindleberger* for petitioner. *Solicitor General Jackson, Assistant Attorney General Whitaker,* and *Mr. Harry LeRoy Jones* for respondents. Reported below: 95 F. 2d 319.

No. 58. PROCTER & GAMBLE CO. *v.* COE, COMMISSIONER OF PATENTS. October 10, 1938. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. Frederic D. McKenney, Marston Allen, Charles E. Riordon,* and *C. Russell Riordon* for petitioner. *Solicitor General Jackson, Assistant Attorney General Whitaker,* and *Mr. R. F. Whitehead* for respondent. By leave of Court, *Messrs. Joshua R. H. Potts, Basel H. Brune,* and *Eugene Vincent Clarke* filed a brief as *amici curiae* on behalf of J. L. Prescott Co., in support of respondent. Reported below: 68 App. D. C. 246; 96 F. 2d 518.

Nos. 59 and 60. SHUBRICK ET AL. *v.* VAN CAMP PRODUCTS CO. ET AL. October 10, 1938. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Clair McTurnan, William R. Higgins, Denver C. Harlan, John G. Buchanan,* and *William J. Kyle, Jr.* for petitioners. *Messrs. George W. Palmer, James W. Noel, Paul Y. Davis,* and *Kurt F. Pantzer* for respondents. Reported below: 95 F. 2d 206.

No. 61. BERRY, TRUSTEE, *v.* AUSTIN, EXECUTOR, ET AL. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. James N. Hardin* for petitioner. No appearance for respondents. Reported below: 95 F. 2d 932.

No. 62. CLEVELAND-CLIFFS IRON CO. *v.* MARTINI, ADMINISTRATOR. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Thomas H. Garry* and *Gilbert R. Johnson* for petitioner. *Mr. James C. Connell* for respondent. Reported below: 96 F. 2d 632.

No. 64. ELKHORN COAL CO. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Leo H. Hoffman* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Ellis N. Slack* for respondent. Reported below: 95 F. 2d 732.

No. 65. FAIRBANKS *v.* UNITED STATES. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Arthur F. Driscoll* for petitioner. *Solicitor General Jackson, Assis-*

tant Attorney General Morris, and *Messrs. Sewall Key* and *A. F. Prescott* for the United States. Reported below: 95 F. 2d 794.

No. 67. GREIMAN, TRUSTEE, *v.* METROPOLITAN LIFE INSURANCE CO. ET AL. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Murray Greiman, pro se. Mr. Harry Cole Bates* for Metropolitan Life Ins. Co. et al.; *Mr. Edward A. Markley* for Equitable Life Assurance Society; and *Mr. Samuel Milberg* for Samuel S. Sachs, respondents. By leave of Court, *Mr. Sam T. Swansen* filed a brief on behalf of the Northwestern Mutual Life Ins. Co., as *amicus curiae,* in support of respondents. Reported below: 96 F. 2d 823.

No. 72. ARKANSAS LOUISIANA GAS CO. *v.* TEXARKANA ET AL. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. J. Merrick Moore, H. C. Walker, Jr., William C. Fitzhugh,* and *William H. Arnold, Jr.,* for petitioner. *Messrs. Willis B. Smith* and *Benjamin E. Carter* for respondents. Reported below: 96 F. 2d 179.

No. 78. COX ET AL. *v.* THOMPSON ET AL.; and

No. 204. THOMPSON ET AL. *v.* PARK SAVINGS BANK ET AL. October 10, 1938. Petitions for writs of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. Joseph T. Sherier, Otis Beall Kent, J. S. Flannery,* and *A. A. Hoehling, Jr.* for petitioners in No. 78. *Messrs. Sherier, Kent, Flannery,* and *Adolph A. Hoehling* for respondents in No. 204. *Messrs. E. Hilton Jackson, William E. Richardson, J. Bruce Kremer,* and *Herbert M. Bing-*

ham for respondents in No. 78. *Messrs. E. Hilton Jackson* and *William E. Richardson* for petitioners in No. 204. Reported below: No. 204, 68 App. D. C. 272; 96 F. 2d 544.

No. 79. INDIAN TERRITORY OIL & GAS CO. *v.* INDIAN TERRITORY ILLUMINATING OIL CO. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. W. H. Kornegay* for petitioner. *Messrs. W. P. McGinnis, Donald Prentice, Samuel H. Riggs,* and *W. T. Anglin* for respondent. Reported below: 95 F. 2d 711.

No. 80. DEPARTMENT OF WATER AND POWER OF LOS ANGELES *v.* ANDERSON. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Ray L. Chesebro* and *S. B. Robinson* for petitioner. *Mr. Fred S. Alward* for respondent. Reported below: 95 F. 2d 577.

No. 81. HIGGINS ET AL. *v.* OKLAHOMA CITY. October 10, 1938. Petition for writ of certiorari to the Supreme Court of Oklahoma denied. *Mr. Warren E. Libby* for petitioners. *Mr. W. H. Brown* for respondent.

No. 82. MCMULLIN, EXECUTRIX, *v.* SHEEHAN, COLLECTOR OF INTERNAL REVENUE. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Howard G. Cook* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Harry Marselli* for respondent. Reported below: 95 F. 2d 129.

No. 83. DYSART, TRUSTEE *v.* UNITED STATES. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Howard G. Cook* and *Robert T. McCracken* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Harry Marselli* for the United States. Reported below: 95 F. 2d 652.

No. 84. MORRIS, TRUSTEE, *v.* SAMPSELL ET AL. October 10, 1938. Petition for writ of certiorari to the Supreme Court of Wisconsin denied. *Messrs. Howard L. Duane* and *Walter L. Gold* for petitioner. *Mr. William Ryan* for respondents. Reported below: 224 Wis. 560; 272 N. W. 53.

No. 86. COLLINS *v.* STREITZ. October 10, 1938. Petion for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John W. Ray* for petitioner. No appearance for respondent. Reported below: 95 F. 2d 430.

No. 87. NESBIT ET AL., EXECUTORS, *v.* FREDERICK SNARE CORP. October 10, 1938. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. Roger O'Donnell, Lambert O'Donnell, Thomas W. O'Brien,* and *William J. Peters* for petitioners. *Messrs. Brice Clagett* and *Challen B. Ellis* for respondent. Reported below: 68 App. D. C. 263; 96 F. 2d 535.

No. 88. BOGY *v.* UNITED STATES. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Charles M. Bryan* for petitioner. *Solicitor General Jackson,* and *Messrs.*

Hugh A. Fisher, William W. Barron, and *W. Marvin Smith* for the United States. Reported below: 96 F. 2d 734.

No. 89. BOYCE *v.* UNITED STATES. October 10, 1938. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Wm. R. Green, Jr.* and *Hugh Satterlee* for petitioner. *Acting Solicitor General Gardner, Assistant Attorney General Morris,* and *Mr. Sewall Key* for the United States. Reported below: 86 Ct. Cls. 114; 21 F. Supp. 274.

No. 90. WRIGHT, ADMINISTRATRIX, *v.* UNITED STATES. October 10, 1938. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Martin J. McNamara* and *Wm. S. Hodges* for petitioner. *Acting Solicitor General Townsend, Assistant Attorney General Whitaker,* and *Mr. Paul A. Sweeney* for the United States. Reported below: 86 Ct. Cls. 290.

No. 91. CHIARA ET AL. *v.* DELAWARE, LACKAWANNA & WESTERN R. Co. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Peter P. Artaserse* for petitioners. *Mr. Walter J. Larrabee* for respondent. Reported below: 95 F. 2d 663.

No. 92. MOTLOW *v.* SOUTHERN HOLDING & SECURITIES CORP. ET AL. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Patrick H. Cullen* and *Clem F. Storckman* for petitioner. *Mr. John S. Leahy* for respondent Southern Holding & Securities Corporation. *Messrs. John T. Harding* and *David A. Murphy* for respondents Home Insurance Co. et al. Reported below: 95 F. 2d 721.

105537°—39——39

No. 93. HOME INDEMNITY CO. *v.* NATIONAL MOTORSHIP CORP. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Edwin R. Wolff* for petitioner. *Mr. Courtland Palmer* for respondent. Reported below: 96 F. 2d 88.

No. 95. VITAGRAPH, INC., ET AL., *v.* PERELMAN ET AL. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Gordon A. Block* for petitioners. *Mr. Benjamin M. Golder* for respondents. Reported below: 95 F. 2d 142.

No. 99. HURLBUT ET AL. *v.* MEYERSON. October 10, 1938. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Mr. Dean Hill Stanley* for petitioners. *Mr. C. Leo DeOrsey* for respondent. Reported below: 68 App. D. C. 360; 98 F. 2d 232.

No. 100. CLEMENTS *v.* UNITED STATES. October 10, 1938. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Mr. Warren E. Miller* for petitioner. *Solicitor General Jackson,* and *Messrs. Julius C. Martin, Wilbur C. Pickett, Young M. Smith,* and *W. Marvin Smith* for the United States. Reported below: 68 App. D. C. 261; 96 F. 2d 533.

No. 101. MEANS, EXECUTRIX, *v.* FALETTI, TRUSTEE, ET AL. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Gerald T. Wiley* for petitioner. *Mr. Harry J. Lurie* for respondents. Reported below: 95 F. 2d 451.

No. 103. MERCER *v.* LENCE, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Orr Chapman* and *Fred J. Babcock* for petitioner. *Acting Solicitor General Townsend,* and *Messrs. Hugh A. Fisher, William W. Barron,* and *W. Marvin Smith* for respondent. Reported below: 96 F. 2d 122.

No. 106. EVELOFF ET AL. *v.* WILLING, RECEIVER. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Milton A. Kamsler* for petitioners. *Mr. George P. Barse* for respondent. Reported below: 94 F. 2d 344.

No. 107. MASSACHUSETTS PROTECTIVE ASSN., INC., *v.* SWASEY. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. F. H. Nash* and *Pearce C. Rodey* for petitioner. *Mr. Fred Blair Townsend* for respondent. Reported below: 96 F. 2d 265.

No. 108. BATANGAS TRANSPORTATION CO. *v.* MANILA RAILROAD CO. ET AL. October 10, 1938. Petition for writ of certiorari to the Supreme Court of the Philippines denied. *Messrs. Frederic R. Coudert, George R. Harvey, S. W. O'Brien,* and *Mahlon B. Doing* for petitioner. *Messrs. Quintin Paredes* and *Ramon Diokno* for respondents.

No. 110. LOOSE-WILES BISCUIT CO. *v.* RASQUIN. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied.

Mr. Carroll G. Walter for petitioner. *Acting Solicitor General Townsend, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *James E. Murphy* for respondent. Reported below: 95 F. 2d 438.

No. 111. PORTER *v.* UNITED STATES. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. James C. Leaton* for petitioner. *Acting Solicitor General Townsend,* and *Messrs. Hugh A. Fisher, William W. Barron* and *W. Marvin Smith* for the United States. Reported below: 96 F. 2d 773.

No. 114. U. S. FIDELITY & GUARANTY CO. *v.* MERCANTILE HOME BANK & TRUST CO. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Louis M. Denit* for petitioner. *Mr. James P. Kem* for respondent. Reported below: 96 F. 2d 655.

No. 115. MUTUAL BENEFIT HEALTH & ACCIDENT ASSN. *v.* WARRELL. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Thomas B. Pryor* for petitioner. *Messrs. Frank Pace* and *Charles I. Evans* for respondent. Reported below: 96 F. 2d 447.

No. 116. REED ET AL. *v.* UNITED STATES. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Henry A. Uterhart* and *Alfred M. Schaffer* for petitioners. *Acting Solicitor General Townsend, Assistant Attorney General McMahon,* and *Mr. William W. Barron* for the United States. Reported below: 96 F. 2d 785.

No. 119. CANTER ET AL. *v.* RAMSEY ET AL. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Frank Aranow, William E. Leahy,* and *William J. Hughes, Jr.* for petitioners. *Mr. Joseph Fairbanks* for respondents. Reported below: 96 F. 2d 50.

No. 121. CORRAL, WODISKA Y CA. *v.* ANDERSON, THORSON & Co. ET AL. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Silas H. Strawn, K. I. McKay* and *Harold A. Smith* for petitioner. *Messrs. Justus Chancellor* and *James A. O'Callaghan* for respondents. Reported below: 95 F. 2d 11.

No. 122. STEINTHAL *v.* ARLINGTON SAMPLE BOOK Co. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Harry Langsam* for petitioner. *Messrs. Daniel C. Donoghue* and *Walter T. Fahy* for respondent. Reported below: 94 F. 2d 748.

No. 123. GROSS ET AL. *v.* SAGINAW BROADCASTING Co. October 10, 1938. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Mr. Arthur W. Scharfeld* for petitioners. No appearance for respondent. Reported below: 68 App. D. C. 282; 96 F. 2d 554.

No. 124. ROGERS OIL & GAS Co. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE; and

No. 125. GRISON OIL CORP. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 10, 1938. Petition for writ of certiorari to the Circuit of Appeals for the

Tenth Circuit denied. *Mr. Chas. H. Garnett* for petitioners. *Acting Solicitor General Townsend, Assistant Attorney General Morris,* and *Messrs. Sewall Key, Warren F. Wattles,* and *Warner W. Gardner* for respondent. Reported below: 96 F. 2d 125.

No. 126. PRUDENTIAL INSURANCE CO. *v.* HEROLD. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Frederick J. Shoyer* and *Kendall H. Shoyer* for petitioner. *Mr. G. Coe Farrier* for respondent. Reported below: 96 F. 2d 996.

No. 131. CITY NATIONAL BANK ET AL. *v.* STERNBERG. October 10, 1938. Petition for writ of certiorari to the Supreme Court of Arkansas denied. *Messrs. James B. McDonough* and *William L. Curtis* for petitioners. *Messrs. Harry P. Daily* and *John P. Woods* for respondent. Reported below: 195 Ark. 503; 114 S. W. 2d 39.

No. 132. WOOLLEY *v.* UNITED STATES. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Emmett E. Doherty* for petitioner. *Acting Solicitor General Townsend,* and *Messrs. Hugh A. Fisher, William W. Barron,* and *Warner W. Gardner* for the United States. Reported below: 97 F. 2d 258.

No. 134. MITCHELL *v.* ILLINOIS. October 10, 1938. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Messrs. John V. Hanney, George E. Billett,* and *Warren C. Lee* for petitioner. No appearance for respondent. Reported below: 368 Ill. 399; 14 N. E. 2d 216.

No. 135. GRUENWALD ET AL. *v.* MOIR HOTEL CO. ET AL. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Meyer Abrams* for petitioners. *Mr. Frederic Burnham* for respondent Continental Illinois National Bank & Trust Co. *Mr. Fletcher Lewis* for respondents Warren W. Jones et al. *Mr. Harold V. Amberg* for respondent First National Bank of Chicago. Reported below: 96 F. 2d 932.

No. 136. BRUSH-MOORE NEWSPAPERS, INC., *v.* COMMISSIONER OF INTERNAL REVENUE. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. William H. Vodrey* for petitioner. *Acting Solicitor General Townsend, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Lee A. Jackson* for respondent. Reported below: 95 F. 2d 900.

Nos. 137 and 138. FOLEY, EXECUTOR, ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. J. Harry LaBrum, George E. Beechwood,* and *Mark E. Lefever* for petitioners. *Acting Solicitor General Townsend, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Berryman Green* for respondent. Reported below: 94 F. 2d 958.

No. 139. ERCEG, GUARDIAN, *v.* FAIRBANKS EXPLORATION CO. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Morgan J. Doyle* for petitioner. *Messrs. Alfred Sutro* and *Francis R. Kirkham* for respondent. Reported below: 95 F. 2d 850.

No. 140. LONG *v.* COMMISSIONER OF INTERNAL REVENUE. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Jefferson P. Chandler* and *John F. Gilbert* for petitioner. *Acting Solicitor General Gardner, Assistant Attorney General Morris,* and *Messrs. Sewall Key, John J. Pringle, Jr.,* and *Robert K. McConnaughey* for respondent. Reported below: 96 F. 2d 270.

No. 141. CHESSER ET AL. *v.* UNITED PRODUCTION CORP. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. W. L. Matthews* and *J. W. Ragsdale* for petitioners. No appearance for respondent. Reported below: 94 F. 2d 790; 95 *id.* 521.

No. 144. PUBLIC MUTUAL BENEFIT FOUNDATION *v.* HUNT, INSURANCE COMMISSIONER OF PENNSYLVANIA. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Benjamin Dowden, Archibald Palmer,* and *Ralph W. Rymer* for petitioner. *Mr. Guy K. Bard* for respondent. Reported below: 94 F. 2d 749.

No. 145. MCGRATH ET AL., TRUSTEES, *v.* DAVISON. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Emanuel Celler* for petitioners. *Messrs. Alfred T. Davison* and *Orrin G. Judd* for respondent. Reported below: 96 F. 2d 157.

No. 148. BRINK ET AL., TRUSTEES, *v.* COMMISSIONER OF CORPORATIONS AND TAXATION. October 10, 1938. Petition for writ of certiorari to the Supreme Judicial Court

of Massachusetts, County of Suffolk, denied. *Mr. Lawrence E. Green* for petitioners. *Messrs. Paul A. Dever* and *Edward O. Proctor* for respondent. Reported below: 13 N. E. 2d 2.

No. 149. MURPHY *v.* KENTON COUNTY BAR ASSOCIATION EX REL. FINNEGAN ET AL. October 10, 1938. Petition for writ of certiorari to the Court of Appeals of Kentucky denied. *Mr. S. H. Brown* for petitioner. *Mr. Harry Brent Mackay* for respondents. Reported below: 272 Ky. 617; 114 S. W. 2d 722.

Nos. 152 and 153. SECURITIES ALLIED CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. October 10, 1938. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mabel Walker Willebrandt* for petitioner. *Acting Solicitor General Townsend, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *L. W. Post* for respondent. Reported below: 95 F. 2d 384.

No. 155. EDELSTEIN *v.* UNITED STATES. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. David P. Siegel* for petitioner. *Acting Solicitor General Townsend,* and *Messrs. Hugh A. Fisher, William W. Barron,* and *W. Marvin Smith* for the United States. Reported below: 97 F. 2d 271.

No. 156. MISSOURI PACIFIC R. CO. *v.* GRAVES. October 10, 1938. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Mr. Thomas J. Cole* for petitioner. *Mr. Wendell W. McCanles* for respondent. Reported below: 342 Mo. 542; 118 S. W. 2d 787.

No. 157. COLLINS *v.* FINLEY. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John W. Ray* for petitioner. *Messrs. Allan K. Perry* and *Charles L. Strouss* for respondent. Reported below: 94 F. 2d 935.

No. 159. HARRIS *v.* MISSOURI PACIFIC R. Co. October 10, 1938. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. H. G. Waltner, Jr.* and *Franklin E. Reagan* for petitioner. *Mr. Thomas J. Cole* for respondent. Reported below: 342 Mo. 330; 114 S. W. 2d 988.

No. 160. MORSE *v.* UNITED STATES. October 10, 1938. Petition for writ of certiorari to the Court of Claims denied. *Mr. L. L. Hamby* for petitioner. *Solicitor General Jackson, Assistant Attorney General Whitaker,* and *Mr. Paul A. Sweeney* for the United States. Reported below: 86 Ct. Cls. 649; 25 F. Supp. 580.

No. 173. PENNROAD CORPORATION *v.* LADNER, FORMER COLLECTOR. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. George G. Chandler, Robert T. McCracken,* and *C. B. Heiserman* for petitioner. *Acting Solicitor General Townsend, Assistant Attorney General Morris,* and *Messrs. Sewall Key, Paul S. McMahon,* and *Robert K. McConnaughey* for respondent. Reported below: 97 F. 2d 10.

No. 174. UNITED STATES EX REL. FINK *v.* REIMER, COMMISSIONER OF IMMIGRATION. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Benjamin*

Koenigsberg for petitioner. *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Messrs. William W. Barron* and *W. Marvin Smith* for respondent. Reported below: 96 F. 2d 217.

No. 175. SOUTHERN RAILWAY CO. *v.* LUNSFORD, ADMINISTRATRIX. October 10, 1938. Petition for writ of certiorari to the Court of Appeals of Georgia denied. *Messrs. G. E. Maddox, Rembert Marshall, Sidney S. Alderman,* and *S. R. Prince* for petitioner. *Mr. Reuben R. Arnold* for respondent. Reported below: 57 Ga. App. 53; 194 S. E. 602.

No. 176. SOUTHERN RAILWAY CO. *v.* GOREE. October 10, 1938. Petition for writ of certiorari to the Court of Appeals of Georgia denied. *Messrs. G. E. Maddox, Rembert Marshall, Sidney S. Alderman,* and *S. R. Prince* for petitioner. *Mr. Reuben R. Arnold* for respondent. Reported below: 57 Ga. App. 63; 194 S. E. 609.

No. 178. UNITED STATES *v.* POWELL ET AL. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Solicitor General Jackson* for the United States. *Mr. W. R. C. Cocke* for respondents. Reported below: 95 F. 2d 752.

No. 185. UNITED STATES EX REL. U. S. BORAX CO. *v.* ICKES, SECRETARY OF THE INTERIOR. October 10, 1938. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. Philip F. Herrick, William E. Colby,* and *Samuel Herrick* for petitioner. *Acting Solicitor General Townsend, Acting Assistant*

Attorney General Collett, and *Mr. Oscar A. Provost* for respondent. Reported below: 68 App. D. C. 399; 98 F. 2d 271.

No. 186. UNITED STATES *v.* FRENCH ET AL. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Solicitor General Jackson* for the United States. *Mr. Wayne G. Cook* for respondents. Reported below: 95 F. 2d 922.

No. 187. SEEMAN *v.* UNITED STATES. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. David P. Siegel* for petitioner. *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Messrs. William W. Barron* and *W. Marvin Smith* for the United States. Reported below: 96 F. 2d 732.

No. 190. GINSBURG *v.* UNITED STATES. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. I. Harvey Levinson* for petitioner. *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Mr. W. Marvin Smith* for the United States. Reported below: 96 F. 2d 882.

No. 193. LUCIANO *v.* NEW YORK; and

No. 194. BETILLO ET AL. *v.* SAME. October 10, 1938. Petitions for writs of certiorari to the Supreme Court of New York denied. *Mr. Moses Polakoff* for petitioner in No. 193. *Mr. Stanley H. Fuld* for respondent in No. 193. *Mr. David P. Siegel* for petitioner in No. 194. No appearance for respondent in No. 194. Reported below: 277 N. Y. 348; 14 N. E. 2d 433.

No. 196. WITTE *v.* PARKER. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Harry N. Guterman* for petitioner. No appearance for respondent. Reported below: 97 F. 2d 461.

No. 197. MAYER *v.* AMES, DIRECTOR OF SAFETY, ET AL. October 10, 1938. Petition for writ of certiorari to the Supreme Court of Ohio denied. *Messrs. Alfred H. Myers* and *Cedric Vogel* for petitioner. *Messrs. John D. Ellis* and *Ed F. Alexander* for respondents. Reported below: 133 Ohio St. 458; 14 N. E. 2d 217.

No. 198. KANSAS CITY SOUTHERN RY. CO. *v.* LARSEN. October 10, 1938. Petition for writ of certiorari to the Supreme Court of Arkansas denied. *Messrs. Frank H. Moore, James B. McDonough, Joseph R. Brown,* and *A. F. Smith* for petitioner. *Mr. Tom Poe* for respondent. Reported below: 195 Ark. 808; 114 S. W. 2d 1081.

No. 199. MINNEAPOLIS, ST. P. & S. S. M. RY. CO. *v.* INDUSTRIAL COMMISSION ET AL. October 10, 1938. Petition for writ of certiorari to the Supreme Court of Wisconsin denied. *Mr. William A. Hayes* for petitioner. *Mr. Mortimer Levitan* for respondents. Reported below: 227 Wis. 563; 279 N. W. 42.

No. 201. DERN ET AL. *v.* TANNER ET AL. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. John A. Shelton* and *Horace S. Davis* for petitioners. No appearance for respondents. Reported below: 96 F. 2d 401.

No. 202. SINGER SEWING MACHINE CO. *v.* AMERICAN SAFETY TABLE CO. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Robert C. Watson* for petitioner. *Messrs. Thomas G. Haight* and *Samuel E. Darby, Jr.* for respondent. Reported below: 95 F. 2d 543.

No. 205. BACHE ET AL. *v.* LOUISIANA OIL RFG. CORP. ET AL. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. H. Struve Hensel* and *Sidney L. Herold* for petitioners. *Messrs. Robert Roberts, Jr., Elias Goldstein,* and *Henry C. Walker, Jr.* for respondents. Reported below: 97 F. 2d 445.

No. 209. KILGALLON ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. James J. Kilgallon* and *John M. Treveiler* for petitioners. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key, John J. Pringle, Jr.,* and *Charles A. Horsky* for respondent. Reported below: 96 F. 2d 337.

No. 211. EVANS ET AL. *v.* TEXTILE DYEING & PRINTING CO. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Thomas G. Haight* and *E. W. Marshall* for petitioners. *Mr. Ralph E. Slayton* for respondent. Reported below: 96 F. 2d 639.

No. 215. DRAINAGE DISTRICT NO. 1 OF RICHARDSON COUNTY ET AL. *v.* MOONEY. October 10, 1938. Petition

for writ of certiorari to the Supreme Court of Nebraska denied. *Mr. Leonard A. Flansburg* for petitioners. *Mr. J. A. C. Kennedy* for respondent. Reported below: 133 Neb. 197; 274 N. W. 467; 278 N. W. 368.

No. 216. SANTA BARBARA COUNTY ET AL. *v.* THOMAS B. BISHOP CO. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Percy C. Heckendorf* and *David R. Faries* for petitioners. *Messrs. S. M. Haskins* and *Sterling Carr* for respondent. Reported below: 96 F. 2d 198.

No. 217. DUGGER, TRUSTEE, *v.* JENKINS ET AL. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Ernest F. Smith* for petitioner. *Mr. Collins Denney, Jr.* for respondents. Reported below: 96 F. 2d 727.

No. 218. MAGALHAES *v.* ROJAS ET AL. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Maurice Leon, Joseph H. Choate, Jr., Oscar Lawler,* and *Max Felix* for petitioner. *Mr. Louis W. Myers* for respondents. Reported below: 96 F. 2d 614.

No. 219. MISSISSIPPI EX REL. ROY *v.* MCLEAN. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Gerald Fitzgerald* for petitioner. No appearance for respondent. Reported below: 96 F. 2d 741.

No. 220. UNJIENG *v.* PHILIPPINE ISLANDS ET AL. October 10, 1938. Petition for writ of certiorari to the Su-

preme Court of the Philippines denied. *Mr. A. D. Gibbs* for petitioner. *Messrs. Jose Yulo, Clyde Alton Dewitt* and *Eugene Arthur Perkins* for respondents.

No. 223. National Conference on Legalizing Lotteries, Inc., *v.* Farley, Postmaster General. October 10, 1938. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Mr. Horace J. Donnelly, Jr.* for petitioner. *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Messrs. William W. Barron* and *W. Marvin Smith* for respondent. Reported below: 68 App. D. C. 319; 96 F. 2d 861.

No. 224. Pennsylvania Public Utility Comm'n *v.* Union Traction Co. et al. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Joseph Ominsky* and *Guy K. Bard* for petitioner. *Messrs. Francis Shunk Brown* and *Joseph Gilfillan* for respondents. Reported below: 98 F. 2d 1021.

No. 226. Perry *v.* United States. October 10, 1938. Petition for writ of certiorari to the Court of Claims denied. *Messrs. John M. Perry* and *Hersey Egginton* for petitioner. *Solicitor General Jackson,* and *Messrs. Harry LeRoy Jones, Paul A. Freund, Herman Oliphant,* and *Bernard Bernstein* for the United States. Reported below: 87 Ct. Cls. 182.

No. 230. Equitable Life Assurance Society et al. *v.* MacDonald. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Stephen V. Carey* for petitioners. *Mr. W. C. McCulloch* for respondent. Reported below: 96 F. 2d 437.

No. 232. KANSAS CITY SOUTHERN RY. CO. *v.* INTERSTATE COMMERCE COMMISSION ET AL. October 10, 1938. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. Samuel W. Moore, Frank H. Moore, A. F. Smith, W. E. Davis,* and *T. P. Littlepage* for petitioner. *Messrs. E. M. Reidy* and *Daniel W. Knowlton* for Interstate Commerce Comm'n; *Mr. Samuel W. Sawyer* for Kansas City Terminal Ry. Co.; and *Messrs. Bruce Scott, Walter McFarland, W. F. Dickinson, Wallace T. Hughes, A. C. Spencer, Dana T. Smith, H. H. Larimore, F. W. Clements, Charles H. Woods,* and *R. S. Outlaw* for Atchison, Topeka & S. F. Ry. Co. et al., respondents. Reported below: 68 App. D. C. 396; 98 F. 2d 268.

No. 233. RED RIVER BROADCASTING CO. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. October 10, 1938. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Mr. Paul M. Segal* for petitioner. *Solicitor General Jackson, Assistant Attorney General Arnold,* and *Mr. Hampson Gary* for respondents. Reported below: 69 App. D. C. 3; 98 F. 2d 282.

Nos. 234 and 236. SCRIPPS ET AL., EXECUTORS, *v.* COMMISSIONER OF INTERNAL REVENUE; and

Nos. 235 and 237. HOWARD ET AL., SUCCESSOR TRUSTEES, *v.* COMMISSIONER OF INTERNAL REVENUE. October 10, 1938. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. John C. Morley* for petitioners. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Ellis N. Slack* for respondent. Reported below: 96 F. 2d 492.

No. 239. WEST TENNESSEE POWER & LIGHT CO. *v.* JACKSON ET AL. October 10, 1938. Petition for writ of

certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Roane Waring* for petitioner. *Mr. W. P. Moss* for respondents. Reported below: 97 F. 2d 979.

No. 248. SCHEUER ET AL. *v.* UNITED STATES. October 10, 1938. Petition for writ of certiorari to the Court of Claims denied. *Mr. W. Bissell Thomas* for petitioners. No appearance for the United States. Reported below: 85 Ct. Cls. 592; 21 F. Supp. 116.

No. 250. PURVIN ET AL., EXECUTORS, *v.* COMMISSIONER OF INTERNAL REVENUE. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Allen H. Gardner* for petitioners. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key, F. E. Youngman,* and *Edward J. Ennis* for respondent. Reported below: 96 F. 2d 929.

No. 251. SPOKANE SILVER & LEAD CO. *v.* PRICE ET AL. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Paul Howland* for petitioner. *Mr. C. A. Wilson* for respondents. Reported below: 97 F. 2d 237.

No. 257. FLORATOS *v.* UNITED STATES. October 10, 1938. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Mr. Josiah Lyman* for petitioner. *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Mr. W. Marvin Smith* for the United States. Reported below: 99 F. 2d 353.

No. 259. STENECK ET AL. *v.* NEW JERSEY. October 10, 1938. Petition for writ of certiorari to the Hudson County Court of Quarter Sessions, of New Jersey, denied. *Mr. Edward A. Markley* for petitioners. *Messrs. Frank G. Schlosser* and *Atwood C. Wolf* for respondent. Reported below: 118 N. J. L. 268; 120 N. J. L. 188; 192 A. 381; 198 A. 848.

No. 261. FORD MOTOR CO. *v.* CULLUM. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. S. Austin Wier* for petitioner. No appearance for respondent. Reported below: 96 F. 2d 1.

No. 262. HARTFORD ACCIDENT & INDEMNITY CO. *v.* COLLINS. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. A. P. Pujo* for petitioner. *Mr. J. O. Modisette* for respondent. Reported below: 96 F. 2d 83.

No. 268. HIRAM WALKER & SONS, INC., *v.* UNITED STATES. October 10, 1938. Petition for writ of certiorari to the Court of Customs and Patent Appeals denied. *Mr. Benjamin A. Levett* for petitioner. *Solicitor General Jackson* and *Mr. Edward J. Ennis* for the United States. Reported below: 25 C. C. P. A. (Cust.) 190; 99 F. 2d 337.

No. 272. MEMPHIS FURNITURE MFG. CO. *v.* NATIONAL LABOR RELATIONS BOARD. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Hamilton E. Little* for petitioner. *Solicitor General Jackson,* and *Messrs. A. H.*

Feller, Charles A. Horsky, Charles Fahy, and *Robert B. Watts* for respondent. Reported below: 96 F. 2d 1018.

No. 273. Federal Reserve Bank *v.* Levy. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Shippen Lewis* for petitioner. *Mr. Louis Levinson* for respondent. Reported below: 97 F. 2d 50.

No. 278. Utah Power & Light Co. *v.* Provo City et al. October 10, 1938. Petition for writ of certiorari to the Supreme Court of Utah denied. *Mr. A. J. G. Priest* for petitioner. *Messrs. William A. Hilton* and *Elias Hansen* for respondents. Reported below: 94 Utah 203; 74 P. 2d 1191.

No. 279. Curtis Bay Towing Co. *v.* Dean. October 10, 1938. Petition for writ of certiorari to the Court of Appeals of Maryland denied. *Mr. William L. Marbury, Jr.* for petitioner. *Messrs. George Forbes* and *Henry L. Wortche* for respondent. Reported below: 174 Md. 498; 199 A. 521.

No. 280. Chicago Telephone Supply Co. *v.* United States. October 10, 1938. Petition for writ of certiorari to the Court of Claims denied. *Mr. Edward J. Metzdorf* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Mr. Sewall Key* for the United States. Reported below: 87 Ct. Cls. 425; 23 F. Supp. 471.

No. 282. Cleveland Clinic Foundation et al. *v.* Humphrys et al. October 10, 1938. Petition for writ

of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Howard F. Burns* for petitioners. *Messrs. Thomas B. Gilchrist* and *Luther Day* for respondents. Reported below: 97 F. 2d 849.

No. 283. LAUGHARN, TRUSTEE, *v.* BERNSTEIN ET AL. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Reuben G. Hunt* for petitioner. *Mr. Roland G. Swaffield* for respondents. Reported below: 96 F. 2d 616; 97 *id.* 505.

No. 284. EASTHOM-MELVIN CO. ET AL. *v.* HOFFMAN ET AL. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Harold O. Mulks* for petitioners. *Mr. Charles H. Hamill* for respondents. Reported below: 97 F. 2d 392.

No. 285. BLUE VALLEY CREAMERY CO. *v.* CONSOLIDATED PRODUCTS CO. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Joseph Joffe* for petitioner. *Mr. John T. Chadwell* for respondent. Reported below: 97 F. 2d 23.

No. 288. WISLAR *v.* UNITED STATES. October 10, 1938. Petition for writ of certiorari to the Court of Customs and Patent Appeals denied. *Mr. Edwin R. Wakefield* for petitioner. *Solicitor General Jackson,* and *Messrs. John R. Benney* and *Charles A. Horsky* for the United States. Reported below: 97 F. 2d 152.

No. 289. ADAMS, RECEIVER, ET AL. *v.* EASTMAN ET AL. October 10, 1938. Petition for writ of certiorari to the

Supreme Court of New York denied. *Mr. Anthony V. Lynch, Jr.* for petitioners. *Mr. John W. Drye, Jr.* for respondents.

No. 290. Humboldt Lovelock Irrigation, L. & P. Co. *v.* United States et al. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Clarence M. Hawkins* for petitioner. *Solicitor General Jackson, Assistant Attorney General McFarland,* and *Mr. Oscar A. Provost* for the respondents. Reported below: 97 F. 2d 38.

No. 292. Jacob Ruppert *v.* United States. October 10, 1938. Petition for writ of certiorari to the Court of Claims denied. *Mr. Howe P. Cochran* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Mr. Sewall Key* for the United States. Reported below: 86 Ct. Cls. 396; 22 F. Supp. 428.

No. 293. Shelton et al. *v.* Allen. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. George L. Shelton, pro se. Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key, J. Louis Monarch, Thomas G. Carney,* and *Warner W. Gardner* for respondent. Reported below: 96 F. 2d 102.

No. 296. In the Matter of Morris Pierce Paley. October 10, 1938. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Harold H. Corbin* for petitioner. *Mr. Felix C. Benvenga* in opposition. Reported below: 277 N. Y. 732; 252 App. Div. 850; 14 N. E. 2d 826; 300 N. Y. S. 997.

No. 297. UNITED STATES *v.* UTAH-IDAHO SUGAR CO. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Solicitor General Jackson* for the United States. *Mr. Charles D. Hamel* for respondent. Reported below: 96 F. 2d 756.

No. 298. GRAFFIS ET AL. *v.* WOODWARD, U. S. DISTRICT JUDGE, ET AL. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Clifford C. Bradbury* for petitioners. *Messrs. John R. Nicholson* and *Frank Parker Davis* for respondents. Reported below: 96 F. 2d 329.

No. 299. AMERICAN SURETY CO. *v.* HACK, RECEIVER; and

No. 300. HACK, RECEIVER, *v.* AMERICAN SURETY CO. October 10, 1938. Petitions for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Burke G. Slaymaker* for American Surety Co. *Messrs. Samuel D. Miller* and *Sidney S. Miller* for Hack. Reported below: 96 F. 2d 939.

No. 305. KROGER GROCERY CO. ET AL. *v.* MARTIN ET AL. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Frank E. Wood, Robert S. Marx, John C. Doolan,* and *Harry Kasfir* for petitioners. No appearance for respondents. Reported below: 97 F. 2d 348.

No. 319. DUPONT *v.* COMMISSIONER OF INTERNAL REVENUE. October 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit

denied. *Messrs. Robert N. Miller, Ward Loveless* and *Frederick O. Graves* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Joseph M. Jones* for respondent. Reported below: 98 F. 2d 459.

No. 393. WALL *v.* UNITED STATES. October 17, 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. Hal M. Black* for petitioner. No appearance for the United States. Reported below: 97 F. 2d 672.

No. 66. RHODES *v.* RHODES. October 17, 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. *M. Pearl McCall* and *Martha R. Gold* for petitioner. No appearance for respondent. Reported below: 68 App. D. C. 313; 96 F. 2d 715.

No. 128. DALHOVER *v.* UNITED STATES. October 17, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. C. Bonar Tinkham* for petitioner. No appearance for the United States. Reported below: 96 F. 2d 355.

No. 147. JONES *v.* UNITED STATES. October 17, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Leonidas C. Dyer* for petitioner. No appearance for the United States.

No. 306. CONSOLIDATED AUTOMATIC MERCHANDISING CORP. ET AL. *v.* UNITED STATES. October 17, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Nathan A. Smyth* for petitioners. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Lee A. Jackson* for the United States. Reported below: 96 F. 2d 996.

No. 307. AUTOMATIC TOY CORP. *v.* BUDDY "L" MFG. CO. ET AL. October 17, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Raymond F. Adams* and *George E. Middleton* for petitioner. *Mr. Merrill M. Blackburn* for respondents. Reported below: 97 F. 2d 991.

No. 313. HART ET AL. *v.* UNITED ARTISTS CORP. October 17, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Joseph Fischer* for petitioners. *Mr. Arthur F. Driscoll* for respondent. Reported below: 96 F. 2d 1017.

No. 315. HOUSE *v.* COMMISSIONER OF INTERNAL REVENUE. October 17, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Emily Marx* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key, Warren F. Wattles,* and *Charles A. Horsky* for respondent. Reported below: 97 F. 2d 516.

No. 322. CELITE CORPORATION *v.* DECALITE COMPANY. October 17, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied.

Messrs. Frederick S. Lyon and *Leonard S. Lyon* for petitioner. *Messrs. Charles E. Donnelly* and *Frederick Bachman* for respondent. Reported below: 96 F. 2d 242.

No. 323. Biddle Purchasing Co. et al. *v* Federal Trade Comm'n. October 17, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Adrien F. Busick, Raymond N. Beebe, Seth W. Richardson,* and *Samuel H. Kaufman* for petitioners. *Solicitor General Jackson* and *Mr. W. T. Kelley* for respondent. Reported below: 96 F. 2d 687.

No. 331. Hartford Fire Insurance Co. *v.* Palace Cafe, Inc.; and

No. 332. National Security Fire Insurance Co. *v.* Same. October 17, 1938. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. C. G. Myers* and *G. A. Farabaugh* for petitioners. *Mr. Thad M. Talcott, Jr.* for respondent. Reported below: 97 F. 2d 766.

No. 333. Schmitt, Administrator, *v.* Platt. October 17, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. William Milton Fitch* for petitioner. No appearance for respondent. Reported below: 102 F. 2d 1013.

No. 334. Lowell et al. *v.* Triplett et al. October 17, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Clifton V. Edwards, Gaylord Lee Clark,* and *John B. Brady* for petitioners. *Messrs. Stephen H. Philbin* and *Charles Markell* for respondents. Reported below: 97 F. 2d 521.

No. 335. RAFFOLD PROCESS CORP. *v.* CASTANEA PAPER Co. October 17, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Thomas G. Haight, Harrison F. Lyman* and *Edgar H. Kent* for petitioner. *Mr. William H. Davis* for respondent. Reported below: 98 F. 2d 355.

No. 336. THOMPSON *v.* KERNER, ATTORNEY GENERAL. October 17, 1938. Petition for writ of certiorari to the Appellate Court, 1st District of Illinois, denied. *Mr. James W. Breen* for petitioner. *Mr. Otto Kerner,* Attorney General of Illinois, for respondent. Reported below: 293 Ill. App. 454; 13 N. E. 2d 110.

No. 337. LANCASHIRE SHIPPING CO. *v.* DURNING, COLLECTOR OF CUSTOMS. October 17, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John W. Crandall* for petitioner. *Solicitor General Jackson, Assistant Attorney General Whitaker* and *Messrs. Warner W. Gardner* and *Henry A. Julicher* for respondent. Reported below: 98 F. 2d 751.

No. 341. MASONITE CORPORATION *v.* SECURITIES & EXCHANGE COMM'N. October 17, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Fletcher Lewis* and *Clarence N. Boord* for petitioner. *Solicitor General Jackson, Assistant Attorney General Arnold,* and *Messrs. Robert L. Stern, Chester T. Lane,* and *Robert E. Kline, Jr.* for respondent. Reported below: 97 F. 2d 1008.

No. 345. STATE LINE & SULLIVAN RAILROAD CO. *v.* PHILLIPS, COLLECTOR OF INTERNAL REVENUE. October

17, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Lawrence E. Green* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Lee A. Jackson* for respondent. Reported below: 98 F. 2d 651.

No. 346. DEPPE *v.* UNITED STATES BOARD OF TAX APPEALS ET AL. October 17, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. William P. Deppe, pro se. Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Carlton Fox* for respondents.

No. 351. MISSISSIPPI FOR THE USE OF SMITH ET AL. *v.* BRABHAM, SHERIFF, ET AL. October 17, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. N. Flowers* for petitioners. No appearance for respondents. Reported below: 96 F. 2d 210.

No. 354. NEW YORK, CHICAGO & ST. L. R. Co. *v.* HAYNES. October 17, 1938. Petition for writ of certiorari to the Circuit Court of Madison County, Illinois, denied. *Messrs. Clarence E. Pope* and *H. F. Driemeyer* for petitioner. *Mr. Thomas Williamson* for respondent.

No. 356. O'BRIEN *v.* FIRST NATIONAL BANK, TRUSTEE. October 17, 1938. Petition for writ of certiorari to the Appellate Court, 1st District, of Illinois, denied. *Mr. Lloyd C. Whitman* for petitioner. *Messrs. Harold V. Amberg* and *Walter H. Jacobs* for respondent. Reported below: 293 Ill. App. 474; 12 N. E. 2d 917.

No. 68. ALEXANDER *v.* UNITED STATES;

No. 69. DEBEH *v.* SAME;

No. 70. GEORGE M. LINDSAY *v.* SAME; and

No. 71. GEORGE M. LINDSAY, JR., *v.* SAME. October 17, 1938. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Leonidas C. Dyer* and *Patrick H. Cullen* for petitioners. *Solicitor General Jackson,* and *Messrs. Hugh A. Fisher, William W. Barron,* and *W. Marvin Smith* for the United States. Reported below: 95 F. 2d 873.

No. 411. LINDSEY ET AL. *v.* WASHINGTON. October 24, 1938. Petition for writ of certiorari to the Supreme Court of Washington, and motion for leave to proceed further *in forma pauperis,* denied. *Elbert B. Lindsey, pro se. E. R. Lindsey, pro se.* No appearance for respondent. Reported below: 194 Wash. 129; 77 P. 2d 596.

No. 379. SCARBOROUGH ET AL. *v.* LONG ET AL. October 24, 1938. Petition for writ of certiorari to the Supreme Court of Georgia, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Joseph B. Brennan* for petitioners. *Mr. W. D. Thomson* for respondent. Reported below: 186 Ga. 412; 197 S. E. 796.

No. 402. TOMPKINS *v.* ERIE RAILROAD CO. October 24, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Alexander L. Strouse* for petitioner. No appearance for respondent. Reported below: 98 F. 2d 49.

No. 380. GREAT ATLANTIC & PACIFIC TEA CO. *v.* LOUISIANA. October 24, 1938. Petition for writ of certiorari

to the Supreme Court of Louisiana denied for the reason that the judgment sought herein to be reviewed is based upon a non-federal ground adequate to support it. *Mr. Hugh M. Wilkinson* for petitioner. *Messrs. Gaston L. Porterie, Justin C. Daspit, F. A. Blanche,* and *E. Leland Richardson* for respondent. Reported below: 190 La. 925; 183 So. 219.

No. 321. INGRAM DAY LUMBER CO. *v.* UNITED STATES. October 24, 1938. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Raymond M. Hudson* and *Minor Hudson* for petitioner. *Solicitor General Jackson, Assistant Attorney General Whitaker,* and *Messrs. Paul A. Sweeney* and *Henry A. Julicher* for the United States. Reported below: 87 Ct. Cls. 468.

Nos. 343 and 344. PANCOE *v.* SOUTHMAN, TRUSTEE, ET AL. October 24, 1938. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Harris F. Williams* for petitioner. *Mr. Walter H. Eckert* for respondents. Reported below: 96 F. 2d 886.

No. 347. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* EUGENE W. WATERBURY;

No. 348. SAME *v.* DONALD N. WATERBURY;

No. 349. SAME *v.* CHARLOTTE M. WATERBURY; and

No. 350. SAME *v.* WHITFORD N. WATERBURY. October 24, 1938. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Solicitor General Jackson* for petitioner. *Mr. Allin H. Pierce* for respondents. Reported below: 97 F. 2d 383.

No. 355. LAWRENCE *v.* NORTH CAROLINA. October 24, 1938. Petition for writ of certiorari to the Supreme Court

of North Carolina denied. *Mr. Thomas C. Guthrie* for petitioner. *Mr. Harry McMullan* for respondent. Reported below: 213 N. C. 674; 197 S. E. 586.

No. 357. THOMPSON, TRUSTEE, *v.* STOTT, ADMINISTRATRIX. October 24, 1938. Petition for writ of certiorari to the Appellate Court, 4th District of Illinois, denied. *Messrs. Josiah Whitnel* and *T. T. Railey* for petitioner. *Messrs. Mark D. Eagleton* and *Roberts P. Elam* for respondent. Reported below: 294 Ill. App. 450; 14 N. E. 2d 246.

No. 358. STRAUSS, ADMINISTRATRIX, ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. October 24, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Samuel M. Shortridge* and *Henry C. Clausen* for petitioners. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Berryman Green* for respondent. Reported below: 97 F. 2d 549.

No. 361. TATE *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 362. TATE, EXECUTRIX, *v.* COMMISSIONER OF INTERNAL REVENUE. October 24, 1938. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Thomas Bond* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Harry Marselli* for respondent. Reported below: 97 F. 2d 658.

No. 363. INTERNATIONAL COMPANY *v.* OCCIDENTAL LIFE INSURANCE CO. October 24, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the

Eighth Circuit denied. *Mr. Walter N. Davis* for petitioner. *Messrs. George E. Brammer* and *Clyde B. Charlton* for respondent. Reported below: 98 F. 2d 138.

No. 366. CALDWELL *v.* STANDARD ACCIDENT INSURANCE Co. October 24, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Chas. S. Coffey* for petitioner. *Messrs. Merritt U. Hayden* and *Harry L. Greene* for respondent. Reported below: 98 F. 2d 364.

No. 369. MORTGAGE GUARANTEE CO. *v.* HERBERT V. APARTMENTS CORP. October 24, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Harry Miller* for petitioner. *Mr. Joseph Varbalow* for respondent. Reported below: 98 F. 2d 662.

No. 372. STALEY ELEVATOR CO. ET AL. *v.* OTIS ELEVATOR Co. October 24, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. William H. Davis* for petitioners. *Mr. Edwin W. Sims* for respondent. Reported below: 98 F. 2d 699.

No. 378. AMERICAN GLYCERIN CO. *v.* EASON OIL CO. ET AL. October 24, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Charles L. Yancey* and *G. C. Spillers* for petitioner. *Messrs. P. C. Simons, L. E. McKnight,* and *R. W. Simons* for respondents. Reported below: 98 F. 2d 479.

No. 397. NEW YORK LIFE INSURANCE CO. *v.* JACKSON ET AL. October 24, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied.

Messrs. Rudolph J. Kramer, Bruce A. Campbell, and *Louis H. Cooke* for petitioner. *Mr. Arthur J. Freund* for respondents. Reported below: 98 F. 2d 950.

No. 240. ANDERSON ET AL. *v.* NORTHERN STATES CONTRACTING CO. ET AL.;

No. 241. BROWN ET AL. *v.* SWORDS-McDOUGAL CO. ET AL.; and

No. 242. KNOX ET AL. *v.* MASSACHUSETTS BONDING & INSURANCE CO. See *ante,* p. 566.

No. 151. BOLLER *v.* KANSAS. See *ante,* p. 568.

No. 420. MILLER *v.* LYKES BROTHERS-RIPLEY S. S. CO. November 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. *Mr. Samuel Miller, pro se. Messrs. Geo. H. Terriberry, Jos. M. Rault,* and *Walter Carroll* for respondent. Reported below: 98 F. 2d 185.

No. 422. HAMMOND *v.* PLUMMER, WARDEN. November 7, 1938. Petition for writ of certiorari to the Supreme Court of California, and motion for leave to proceed further *in forma pauperis,* denied. *C. L. Hammond, pro se.* No appearance for respondent.

No. 429. PREBYL *v.* PRUDENTIAL INSURANCE CO. November 7, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Milton Prebyl, pro se.* No appearance for respondent. Reported below: 98 F. 2d 199.

No. 400. HERNDON *v.* PULASKI COUNTY. November 7, 1938. Petition for writ of certiorari to the Supreme Court of Arkansas, and motion for leave to proceed herein on the typewritten record, denied. *Mr. Will G. Akers* for petitioner. No appearance for respondent. Reported below: 196 Ark. 284; 117 S. W. 2d 1051.

No. 303. ARTHUR C. HARVEY CO. *v.* UNITED STATES. November 7, 1938. Petition for writ of certiorari to the Court of Claims denied. *Mr. O. Walker Taylor* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Mr. Sewall Key* for the United States. Reported below: 87 Ct. Cls. 320; 23 F. Supp. 444.

No. 365. STANDARD EDUCATION SOCIETY ET AL. *v.* FEDERAL TRADE COMMISSION. November 7, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Henry Ward Beer* for petitioners. *Solicitor General Jackson, Assistant Attorney General Arnold,* and *Messrs. Hugh B. Cox, Robert L. Stern, W. T. Kelley, Martin A. Morrison,* and *James W. Nichol* for respondent. Reported below: 97 F. 2d 513.

No. 370. EMERSON *v.* COMMISSIONER OF INTERNAL REVENUE. November 7, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Sigurd A. Emerson, pro se. Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Berryman Green* for respondent. Reported below: 98 F. 2d 650.

No. 376. COOPER *v.* O'CONNOR ET AL. November 7, 1938. Petition for writ of certiorari to the Court of Ap-

peals for the District of Columbia denied. *Messrs. Richard L. Merrick* and *Wade H. Cooper* for petitioner. *Mr. H. Winship Wheatley* for respondents. Reported below: 99 F. 2d 143.

No. 377. COOPER *v.* O'CONNOR ET AL. November 7, 1938. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. Richard L. Merrick* and *Wade H. Cooper* for petitioner. *Messrs. H. Winship Wheatley, Swagar Sherley,* and *Charles F. Wilson* for respondents. Reported below: 99 F. 2d 135.

No. 381. AERO NECK BAND & COLLAR CO. ET AL. *v.* BEAVER MANUFACTURING CO. November 7, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. W. Hastings Swenarton* and *J. Preston Swecker* for petitioners. *Mr. Irving F. Goodfriend* for respondent. Reported below: 97 F. 2d 363.

No. 382. CHICAGO PNEUMATIC TOOL CO. *v.* HUGHES TOOL CO. November 7, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Thomas G. Haight, William F. Hall,* and *Earle W. Evans* for petitioner. *Mr. George I. Haight* for respondent. Reported below: 97 F. 2d 945.

No. 383. JOHN MORRELL & CO. *v.* DOYLE ET AL. November 7, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Hugh M. Morris, Edward T. Fenwick, Charles R. Fenwick,* and *Alexander L. Nichols* for petitioner. *Messrs. Edward S. Rogers* and *W. M. Acton* for respondents. Reported below: 97 F. 2d 232.

No. 386. Florida Power & Light Co. *v.* Miami et al. November 7, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. John F. MacLane* and *Jno. P. Stokes* for petitioner. *Messrs. Sidney S. Hoehl* and *John W. Watson, Jr.* for respondents. Reported below: 98 F. 2d 180.

No. 387. Caroline C. Spalding *v.* United States; and

No. 388. Silsby M. Spalding *v.* Same. November 7, 1938. Petition for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Robert N. Miller* and *Joseph D. Peeler* for petitioners. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *A. F. Prescott* for the United States. Reported below: 97 F. 2d 697.

No. 389. Brown, Executrix, *v.* Commissioner of Internal Revenue. November 7, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. H. C. Walters* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Arnold Raum* for respondent. Reported below: 95 F. 2d 184.

No. 390. Boyer, Administratrix, *v.* Backus et al. November 7, 1938. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Mr. Howard H. Campbell* for petitioner. *Messrs. Thomas G. Long* and *John C. Bills* for respondents. Reported below: 282 Mich. 593, 701; 276 N. W. 564; 280 N. W. 756.

No. 396. Halsted *v.* State Highway Commissioner. November 7, 1938. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Mr. Harry W. Jones*

for petitioner. *Messrs. H. Victor Spike* and *Raymond W. Starr* for respondent. Reported below: 284 Mich. 414; 279 N. W. 883.

No. 406. ENGINEERING & RESEARCH CORP. ET AL. *v.* HORNI SIGNAL MANUFACTURING CORP. November 7, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Samuel E. Darby, Jr.* for petitioners. *Mr. Daniel V. Mahoney* for respondent. Reported below: 98 F. 2d 682.

No. 424. JOHNSON, ADMINISTRATRIX, *v.* STROMBERG CARLSON TELEPHONE MFG. CO. November 7, 1938. Petition for writ of certiorari to the Court of Appeals of New York denied. *Mr. William L. Clay* for petitioner. *Mr. William Charles Combs* for respondent. Reported below: 278 N. Y. 600; 276 *id.* 621; 250 App. Div. 352; 12 N. E. 2d 607; 16 N. E. 2d 119; 294 N. Y. S. 173.

No. 371. GEORGE W. HELME CO. *v.* UNITED STATES. November 7, 1938. Petition for writ of certiorari to the Court of Claims denied. *Mr. Philip Sheridan McNally* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Mr. Sewall Key* for the United States. Reported below: 87 Ct. Cls. 474; 23 F. Supp. 787.

No. 394. GLIWA *v.* U. S. STEEL CORP. ET AL. November 7, 1938. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *Agnes Gliwa, pro se. Mr. William Wallace Booth* for respondents. Reported below: 330 Pa. 515; 199 A. 916.

No. 395. CARUSI ET AL. *v.* SCHULMERICK. November 7, 1938. Petition for writ of certiorari to the Court of

Appeals for the District of Columbia denied. *Mr. Henry I. Quinn* for petitioners. *Messrs. Alvin L. Newmyer, David G. Bress, Howard W. Vesey,* and *Donald C. Beeler* for respondent. Reported below: 98 F. 2d 605.

Nos. 398 and 399. ADAMS ET AL. *v.* GREAT LAKES UTILITIES CORP. ET AL. November 7, 1938. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Hubert G. King* for petitioners. *Messrs. Hugh M. Morris* and *Edwin D. Steel, Jr.* for respondents. Reported below: 96 F. 2d 767.

No. 401. C. I. T. CORPORATION *v.* HIMES, TRUSTEE, ET AL. November 7, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Louis Caplan* and *Charles H. Sachs* for petitioner. *Mr. Leslie R. Himes, pro se.* Reported below: 98 F. 2d 589.

No. 404. SAINT PAUL MERCURY INDEMNITY CO. *v.* RED CAB CO. November 7, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Burke G. Slaymaker* for petitioner. *Mr. William E. Reiley* for respondent. Reported below: 98 F. 2d 189.

No. 414. HAMMOND *v.* IRVING TRUST CO., TRUSTEE. November 7, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Edwin J. Lukas* for petitioner. *Mr. Murray C. Bernays* for respondent. Reported below: 98 F. 2d 703.

No. 403. FERRIBEE *v.* UNITED STATES ET AL. November 14, 1938. Petition for writ of certiorari to the Circuit

Court of Appeals for the Seventh Circuit denied. *Messrs. Joseph E. Snowden* and *W. Robert Ming, Jr.* for petitioner. *Solicitor General Jackson, Assistant Attorney General McFarland* and *Mr. Oscar Provost* for the United States, and *Mr. Harold L. Reeve* for George T. O'Brien et al., respondents. Reported below: 97 F. 2d 759.

No. 408. HARVEY ET AL. *v.* FEDERAL LAND BANK ET AL. November 14, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Joseph G. M. Browne* for petitioners. *Solicitor General Jackson,* and *Mr. Peyton R. Evans* for Regional Agricultural Credit Corp., and *Mr. Peyton R. Evans, Mr. Thomas M. Darnall,* and *May T. Bigelow* for Federal Land Bank of Springfield, Massachusetts, respondents. Reported below: 97 F. 2d 918.

No. 412. BURNETT *v.* AMALGAMATED PHOSPHATE CO. November 14, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. O. K. Reaves* for petitioner. *Messrs. Thos. B. Adams* and *K. I. McKay* for respondent. Reported below: 96 F. 2d 974.

No. 413. STATE FARM MUTUAL AUTO INSURANCE CO. *v.* HINDEL, ADMINISTRATRIX. November 14, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Burke G. Slaymaker* for petitioner. No appearance for respondent. Reported below: 97 F. 2d 777.

No. 415. BOARD OF DIRECTORS OF ST. FRANCIS LEVEE DISTRICT *v.* KURN ET AL., TRUSTEES. November 14, 1938.

Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Walter G. Riddick, Charles T. Coleman,* and *Burk Mann* for petitioner. *Messrs. E. L. Westbrooke, A. P. Stewart,* and *J. W. Jamison* for respondents. Reported below: 98 F. 2d 394.

No. 419. LATZ ET AL. *v.* RELIANCE GRAPHIC CORP. ET AL. November 14, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Max Shlivek* for petitioners. *Messrs. Emanuel Celler* and *Asher Blum* for respondents. Reported below: 98 F. 2d 679.

No. 407. MORGAN ET AL. *v.* UNITED STATES. November 21, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Horace C. Wilkinson* and *L. E. Gwinn* for petitioners. *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Mr. William W. Barron* for the United States. Reported below: 98 F. 2d 473.

No. 421. NATIONAL BUILDERS BANK *v.* BROWN ET AL. November 21, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Charles S. Macaulay* for petitioner. *Messrs. Daniel Anderson* and *Emmett J. McCarthy* for respondents. Reported below: 97 F. 2d 733.

No. 425. GUARNERI *v.* KESSLER, DISTRICT DIRECTOR OF IMMIGRATION, ET AL. November 21, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Ignatius Edward Uzzo* for

petitioner. *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Messrs. William W. Barron* and *W. Marvin Smith* for respondents. Reported below: 98 F. 2d 580.

No. 434. JULIUS KAYSER & CO. ET AL. *v.* ROSEDALE KNITTING CO. November 21, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Hugh M. Morris, Noah A. Stancliffe,* and *Charles H. Howson* for petitioners. *Messrs. Thomas G. Haight, Samuel E. Darby, Jr.,* and *Henry N. Paul* for respondent. Reported below: 98 F. 2d 839.

No. 320. UNJIENG ET AL. *v.* NATIONAL CITY BANK ET AL. December 5, 1938. Motion to consider this application on an abbreviated record granted. Petition for writ of certiorari to the Supreme Court of the Philippines denied. *Messrs. Frederic R. Coudert, Mahlon B. Doing,* and *Lewis A. R. Innerarity* for petitioners. *Mr. Carl A. Mead* for National City Bank, and *Messrs. James Ross, Ewald E. Selph,* and *James M. Ross* for Malabon Sugar Co. et al., respondents.

No. 427. GEORGE K. GARRETT CO. *v.* NATIONAL LOCK WASHER CO. December 5, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Henry N. Paul, Jr.* and *Leonard L. Kalish* for petitioner. *Mr. Thomas G. Haight* for respondent. Reported below: 98 F. 2d 643.

No. 428. ARKANSAS NATURAL GAS CORP. *v.* SARTOR ET AL. December 5, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. H. C. Walker, Jr.* and *Elias Goldstein* for

petitioner. No appearance for respondents. Reported below: 98 F. 2d 527.

No. 431. UNITED STATES ex rel. GAROS *v.* REIMER, COMMISSIONER OF IMMIGRATION. December 5, 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 Jackson, Assistant Attorney General McMahon,* and *William W. Barron* for respondent. Reported below: 97 F. 2d 1019.

No. 435. TOBANI ET AL. *v.* CARL FISCHER, INC. December 5, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Sydney Rosenthal* for petitioners. *Mr. Francis Gilbert* for respondent. Reported below: 98 F. 2d 57.

No. 438. PHOENIX FINANCE CORP. *v.* IOWA-WISCONSIN BRIDGE CO. ET AL. December 5, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Lon O. Hocker* and *Casper Schenk* for petitioner. *Messrs. Fred A. Ontjes* and *Wm. C. Green* for Iowa-Wisconsin Bridge Co. et al., and *Messrs. Rex H. Fowler* and *C. S. Bradshaw* for First Trust & Savings Bank et al., respondents. Reported below: 98 F. 2d 416.

No. 439. STANTON ET AL., EXECUTORS, *v.* COMMISSIONER OF INTERNAL REVENUE. December 5, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Herbert Pope* and *Benjamin M. Price* for petitioners. *Solicitor*

General Jackson, Assistant Attorney General Morris, and *Mr. J. Louis Monarch* for respondent. Reported below: 98 F. 2d 739.

No. 440. CANNON *v.* TINKHAM. December 5, 1938. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. Robert H. McNeill* and *Claude L. Dawson* for petitioner. *Messrs. Roger J. Whiteford* and *P. H. Marshall* for respondent. Reported below: 69 App. D. C. 98; 99 F. 2d 133.

No. 450. JONES *v.* ST. PAUL FIRE & MARINE INS. CO. December 5, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Daniel MacDougald* for petitioner. *Mr. Lloyd E. Elliott* for respondent. Reported below: 98 F. 2d 448.

No. 433. NEWCOMB *v.* UNITED STATES. December 5, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. James E. Fenton* for petitioner. *Solicitor General Jackson, Assistant Attorney General McFarland,* and *Mr. Oscar A. Provost* for the United States. Reported below: 98 F. 2d 25.

No. 443. MARYLAND CASUALTY CO. *v.* UNITED STATES FOR THE USE OF HARRINGTON, ADMINISTRATOR, ET AL. December 5, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Frank Gibbons* for petitioner. *Mr. John S. Powers* for Harrington, and *Mr. Arthur E. Sutherland, Jr.* for Bonsignore et al., respondents.

No. 444. SIMMONS, TRADING AS PARIS IMPORT CO., ET AL. *v.* FARLEY, POSTMASTER GENERAL. December 5, 1938.

Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Mr. Horace J. Donnelly, Jr.* for petitioners. *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Messrs. William W. Barron* and *W. Marvin Smith* for respondent. Reported below: 69 App. D. C. 110; 99 F. 2d 343.

No. 445. CASTELL, ANCILLARY EXECUTOR, *v.* UNITED STATES. December 5, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Charles D. Hamel, John Enrietto,* and *Brainard Avery* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *A. F. Prescott* for the United States. Reported below: 98 F. 2d 88.

No. 451. DUBISKE *v.* UNITED STATES. December 5, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Lloyd F. Loux* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Paul R. Russell* for the United States. Reported below: 98 F. 2d 361.

No. 452. OHIO CASUALTY INSURANCE CO. *v.* MARR ET AL. December 5, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Raymond G. Brown* for petitioner. No appearance for respondents. Reported below: 98 F. 2d 973.

No. 457. MARKS *v.* UNITED STATES. December 5, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Allen*

H. Gardner and *George M. Morris* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key, Carlton Fox,* and *Charles A. Horsky* for the United States. Reported below: 98 F. 2d 564.

No. 464. ANCHOR STOVE & RANGE CO. *v.* RYMER ET AL. December 5, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Walter F. Murray* and *Vaughn Miller* for petitioner. *Mr. J. B. Sizer* for respondents. Reported below: 97 F. 2d 689.

No. 430. GEIBEL ET AL. *v.* STATE BAR OF CALIFORNIA. December 12, 1938. Petition for writ of certiorari to the Supreme Court of California denied. *Messrs. Martin E. Geibel* and *Charles R. Morfoot, pro se. Mr. Philbrick McCoy* for respondent. Reported below: 11 Cal. 2d 412; 79 P. 2d 1073.

No. 446. NATIONAL LABOR RELATIONS BOARD *v.* PENINSULAR & OCCIDENTAL STEAMSHIP CO. December 12, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Solicitor General Jackson* and *Mr. Charles Fahy* for petitioner. *Messrs. Scott M. Loftin, Jno. P. Stokes,* and *Harold B. Wahl* for respondent. By leave of Court, *Mr. Charlton Ogburn* filed a brief on behalf of the American Federation of Labor, as *amicus curiae,* in support of respondent. Reported below: 98 F. 2d 411.

No. 458. KRUMM *v.* BIRKHOFER ET AL. December 12, 1938. Petition for writ of certiorari to the District Court of Appeal, 4th Appellate District, of California, denied. *Mr. Benjamin W. Shipman* for petitioner. *Mr. Ernest*

Clewe for respondents. Reported below: 27 Cal. App. 513; 81 P. 2d 609.

No. 459. GUMBEL *v.* NEW ORLEANS TERMINAL CO. December 12, 1938. Petition for writ of certiorari to the Supreme Court of Louisiana denied. *Mr. Purnell M. Milner* for petitioner. No appearance for respondent. Reported below: 190 La. 904; 183 So. 212.

No. 461. CHEMICAL FOUNDATION, INC. *v.* GENERAL ANILINE WORKS, INC. December 12, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Seward Davis* and *Drury W. Cooper* for petitioner. *Mr. Thomas G. Haight* for respondent. Reported below: 99 F. 2d 276.

No. 468. SIEGEL *v.* MISSOURI-KANSAS-TEXAS R. CO. December 12, 1938. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. Douglas H. Jones* and *N. Murray Edwards* for petitioner. *Messrs. Charles S. Burg* and *Everett Paul Griffin* for respondent. Reported below: 342 Mo. 1130; 119 S. W. 2d 376.

No. 506. GENTLE, ADMINISTRATOR, *v.* WESTERN & ATLANTIC RAILROAD. December 19, 1938. Petition for writ of certiorari to the Court of Appeals of Georgia denied for the want of a final judgment and motion for leave to proceed further herein *in forma pauperis* also denied. *Messrs. John H. Gentle, B. P. Gambrell,* and *Reuben R. Arnold* for petitioner. *Messrs. Walton Whitwell* and *Wm. H. Swiggart* for respondent. Reported below: 58 Ga. App. 252; 198 S. E. 257.

No. 511. DOAK *v.* FEDERAL LAND BANK OF BALTIMORE. December 19, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit, and motion for leave to proceed further *in forma pauperis*, denied. *Mr. William B. Doak, pro se.* No appearance for respondent. Reported below: 99 F. 2d 145.

No. 476. MCQUILLEN ET AL. *v.* DILLON ET AL. December 19, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. The CHIEF JUSTICE took no part in the consideration and decision of this application. *Mr. Samuel Gottlieb* for petitioners. *Mr. John T. Cahill* for Clarence Dillon et al., *Mr. Watson Washburn* for Edward A. Deeds et al., and *Mr. Philip A. Carroll* for National Cash Register Co., respondents. Reported below: 98 F. 2d 726.

No. 469. GLIWA *v.* UNITED STATES STEEL CORP. ET AL. December 19, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Agnes Gliwa, pro se. Mr. William Wallace Booth* for respondents. Reported below: 98 F. 2d 113.

No. 471. RIO VISTA HOTEL & IMPROVEMENT CO. *v.* BELLE MEAD DEVELOPMENT CORP. December 19, 1938. Petition for writ of certiorari to the Supreme Court of Florida denied. *Mr. Joseph A. Scarlett* for petitioner. *Mr. Charles W. Proctor* for respondent. Reported below: 132 Fla. 88; 182 So. 417.

No. 472. TERMINAL RAILROAD ASSN. *v.* ALY. December 19, 1938. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. Walter N.*

Davis, T. M. Pierce, and *J. L. Howell* for petitioner. *Mr. William H. Allen* for respondent. Reported below: 342 Mo. 1116; 119 S. W. 2d 363.

No. 473. HUMPHREY ET AL. *v.* SOUTHERN PACIFIC CO. December 19, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Harry W. Glensor* for petitioners. *Mr. Arthur B. Dunne* for respondent. Reported below: 97 F. 2d 29.

No. 474. OQUENDO *v.* FEDERAL RESERVE BANK OF NEW YORK ET AL. December 19, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Benjamin A. Wilder* and *Michael M. Platzman* for petitioner. *Messrs. Ralph M. Carson* and *Chester Bordeau* for respondents. Reported below: 98 F. 2d 708.

No. 477. WOHL ET AL. *v.* REALTY ASSOCIATES SECURITIES CORP. December 19, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Emanuel Harris* for petitioners. *Mr. Frederick A. Keck* for respondent. Reported below: 98 F. 2d 722.

No. 529. HURT *v.* ZERBST, WARDEN. January 3, 1939. Petition for writ of certiorari to the Circuit Court of Appears for the Fifth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Payne Hurt, pro se.* No appearance for respondent. Reported below: 99 F. 2d 1007.

No. 533. DE MARIOS *v.* HUDSPETH, WARDEN. January 3, 1939. 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. *Alfred De Marios, pro se.* No appearance for respondent. Reported below: 99 F. 2d 274.

No. 540. Ross *v.* Wilson, Warden. January 3, 1939. Petition for writ of certiorari to the Supreme Court of New York, and motion for leave to proceed further *in forma pauperis,* denied. *Joseph Ross, pro se.* No appearance for respondent. Reported below: 250 App. Div. 143; 279 N. Y. 169; 295 N. Y. S. 42; 9 N. E. 2d 822.

No. 467. Market Street Railway Co. *v.* San Francisco et al. January 3, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. William M. Abbott* for petitioner. *Messrs. John J. O'Toole, Henry Heidelberg, George Olshausen,* and *Joseph C. Sharp* for respondents. Reported below: 98 F. 2d 628.

No. 470. Glick et al. *v.* Bank of America National Trust & Savings Assn. January 3, 1939. Petition for writ of certiorari to the Superior Court of California, Appellate Department, denied. *Mr. Clayton L. Howland* for petitioners. *Mr. Hugo A. Steinmeyer* for respondent.

No. 480. W. E. Hedger Transportation Corp. *v.* James Richardson & Sons. January 3, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Horace T. Atkins* for petitioner. *Mr. Henry E. Otto* for respondent. Reported below: 98 F. 2d 55.

No. 483. KEIG, TRUSTEE IN BANKRUPTCY, ET AL. *v.* HARRIS TRUST & SAVINGS BANK ET AL.;

No. 484. SAME *v.* HARRIS TRUST & SAVINGS BANK; and

No. 485. SAME *v.* FIRST NATIONAL BANK. January 3, 1939. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. William W. Wilson* and *Edmund D. Adcock* for petitioners. *Messrs. Charles LeRoy Brown* and *Jacob Logan Fox* for Harris Trust & Savings Bank, and *Messrs. Francis X. Busch, Harold V. Amberg, James J. Magner,* and *Cassius M. Doty* for First National Bank, respondents. Reported below: 98 F. 2d 952.

No. 494. MILLS DEVELOPMENT CORP. ET AL. *v.* SHIPP & HEAD, INC. January 3, 1939. Petition for writ of certiorari to the Supreme Court of Florida denied. *Messrs. Claude Pepper, C. L. Waller,* and *George F. Shea* for petitioners. *Messrs. Alfred R. Kline* and *W. H. Burwell* for respondent. Reported below: 126 Fla. 490, 495; 171 So. 533, 535; 183 So. 189.

No. 488. SCOTT COUNTY ET AL. *v.* KENT, RECEIVER. January 3, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. J. A. Fowler* for petitioners. *Mr. George P. Barse* for respondent. Reported below: 97 F. 2d 971.

Nos. 496 and 497. LOFLAND *v.* FOX, RECEIVER. January 3, 1939. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Wm. Elmer Brown, Jr.* for petitioner. No appearance for respondent. Reported below: 98 F. 2d 589.

No. 500. UNITED STATES TRUST CO. ET AL., EXECUTORS, *v.* COMMISSIONER OF CORPORATIONS & TAXATION;

No. 501. BRETT *v.* SAME; and

No. 502. HIGH *v.* SAME. January 3, 1939. Petition for writs of certiorari to the Supreme Judicial Court of Massachusetts denied. *Messrs. Samuel Gottlieb* and *Israel Gorovitz* for petitioners. *Messrs. Paul A. Dever,* Attorney General of Massachusetts, and *Edward O. Proctor,* Assistant Attorney General, for respondent. Reported below: 13 N. E. 2d 6.

No. 546. CLEMENTS *v.* CLEMENTS ET AL. January 9, 1939. Petition for writ of certiorari to the Court of Appeals, 1st Appellate District, of Ohio, and motion for leave to proceed further *in forma pauperis,* denied. *Messrs. Alfred H. Myers* and *Albert Spievack* for petitioner. No appearance for respondents.

No. 503. LONG BEACH DOCK & TERMINAL CO. *v.* PACIFIC DOCK & TERMINAL CO. January 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Walter M. Campbell* and *John F. McCarthy* for petitioner. *Messrs. George E. Farrand, Edward W. Tuttle,* and *Stephen M. Farrand* for respondent. Reported below: 98 F. 2d 833.

No. 510. JENKINS PETROLEUM PROCESS CO. *v.* SINCLAIR REFINING CO. January 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. James Craig Peacock, Paul F. Myers, Howard A. Hartman,* and *Henry Herrick Bond* for petitioner. *Messrs. Nathan L. Miller* and *Frank E. Barrows* for respondent. Reported below: 99 F. 2d 10.

No. 512. McAdoo & Neblett et al. *v.* F. P. Newport Corp. et al. January 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Wm. H. Neblett* and *R. Dean Warner* for petitioners. *Mr. Richard A. Turner* for H. F. Metcalf, Trustee in Bankruptcy, and *Mr. James E. Shelton* for Security First National Bank, respondents. Reported below: 98 F. 2d 453.

No. 519. Minneapolis, St. P. & S. S. M. Ry. Co. *v.* Pike Rapids Power Co. January 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. John L. Erdall* for petitioner. *Mr. James G. Nye* for respondent. Reported below: 99 F. 2d 902.

No. 373. Palmer et al., Trustees, *v.* Palmer et al., Trustees. January 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. Mr. Justice Brandeis took no part in the consideration and decision of this application. *Messrs. James Garfield* and *Hermon J. Wells* for petitioners. *Messrs. Robert G. Dodge* and *Talcott M. Banks, Jr.* for respondents. Reported below: 98 F. 2d 670.

No. 340. North Whittier Heights Citrus Assn. *v.* National Labor Relations Board. January 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Ivan G. McDaniel* for petitioner. *Solicitor General Jackson* and *Mr. Charles Fahy* for respondent. Reported below: 97 F. 2d 1010.

No. 249. Goodman *v.* United States. See *ante*, p. 578.

No. 562. WILLIAMS *v.* PENNSYLVANIA RAILROAD CO. January 16, 1939. 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. Ernest B. Williams, pro se.* No appearance for respondent.

No. 565. BIMBO *v.* ILLINOIS. January 16, 1939. Petition for writ of certiorari to the Supreme Court of Illinois, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Wm. Scott Stewart* for petitioner. No appearance for respondent. Reported below: 369 Ill. 618; 17 N. E. 2d 573.

No. 573. BROWN *v.* ZERBST, WARDEN. January 16, 1939. 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 H. Brown, pro se.* No appearance for respondent. Reported below: 99 F. 2d 745.

No. 547. OHIO EX REL. GREEN *v.* KING, CLERK OF COURT, ET AL. January 16, 1939. Petition for writ of certiorari to the Supreme Court of Ohio, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Carl Green* for petitioner. No appearance for respondents. Reported below: 134 Ohio St. 284; 16 N. E. 2d 342.

No. 499. BRYAN ET AL. *v.* UNITED STATES. January 16, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Chas. L. Yancey* and *Grover C. Spillers* for petitioners. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *J. Louis Monarch* for the United States. Reported below: 99 F. 2d 549.

No. 513. POTTS *v.* FLIPPEN, ADMINISTRATOR, ET AL. January 16, 1939. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia denied. *Mr. James Sheppard Potts, pro se.* No appearance for respondents. Reported below: 171 Va. 52; 197 S. E. 422.

No. 515. LIFSON, ADMINISTRATOR, ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. January 16, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. George T. Altman* for petitioners. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Harry Marselli* for respondent. Reported below: 98 F. 2d 508.

No. 526. INTERNATIONAL LADIES' GARMENT WORKERS' UNION ET AL. *v.* DONNELLY GARMENT CO. ET AL. January 16, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Frank P. Walsh, Jerome Walsh,* and *Roy W. Rucker* for petitioners. *Messrs. James A. Reed, Robert J. Ingraham,* and *William S. Hogsett* for Donnelly Garment Co. et al., and *Messrs. Frank E. Tyler* and *Alfred N. Gossett* for Donnelly Garment Workers' Union, respondents. Reported below: 99 F. 2d 309.

No. 527. SCHWARTZ SALES CO. *v.* STEINER SALES CO. January 16, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Wm. Nevarre Cromwell* for petitioner. *Mr. Harold Olsen* for respondent. Reported below: 98 F. 2d 999.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT THROUGH JANUARY 16, 1939.

No. 74. UPDIKE GRAIN CORP. *v.* MEGAN, TRUSTEE. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit. July 29, 1938. Dismissed per stipulation pursuant to Rule 35. *Mr. Alfred G. Ellick* for petitioner. *Messrs. William T. Faricy* and *Wymer Dressler* for respondent. Reported below: 94 F. 2d 551.

No. 258. MORGANSTEIN *v.* UNITED STATES. Petition for writ of certiorari to the Court of Appeals for the District of Columbia. September 19, 1938. Dismissed per stipulation pursuant to Rule 35. *Mr. Josiah Lyman* for petitioner. No appearance for the United States.

No. 27. TENNESSEE ELECTRIC POWER CO. ET AL. *v.* TENNESSEE VALLEY AUTHORITY ET AL. Appeal from the District Court of the United States for the Eastern District of Tennessee. October 3, 1938. Appeal dismissed as to appellants Tennessee Public Service Co. and Holston River Electric Co., on motion and stipulation signed by counsel for all appellants and the Government. *Messrs. R. T. Jackson, Charles C. Trabue,* and *Charles M. Seymour* for appellants. *Solicitor General Jackson,* and *Messrs. James Lawrence Fly, John Lord O'Brian, Paul A. Freund,* and *William C. Fitts, Jr.,* and *Bessie Margolin* for appellees. Reported below: 21 F. Supp. 947.

No. 85. HAYWOOD-WAKEFIELD CO. *v.* SMALL ET AL. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit. October 3, 1938. Dismissed

on motion of counsel for petitioner. *Mr. George L. Barnes* for petitioner. *Mr. Herbert W. Kenway* for respondents. Reported below: 96 F. 2d 496.

No. 146. PERRY *v.* KANSAS; and

No. 151. BOLLER *v.* SAME. Appeals from the Supreme Court of Kansas. October 3, 1938. Dismissed on motion of counsel for the appellants. *Messrs. C. L. Kagey, L. M. Kagey,* and *Hal M. Black* for appellants. No appearance for appellee. Reported below: 147 Kan. 319, 651; 76 P. 2d 818; 77 P. 2d 950.

No. 271. WALLACE RANCH WATER CO. *v.* FOOTHILL DITCH CO. Appeal from the District Court of Appeal, 4th Appellate District, of California. October 3, 1938. Dismissed on motion of counsel for appellant. *Messrs. Alex W. Davis* and *Robert B. Murphey* for appellant. No appearance for appellee. Reported below: 25 Cal. App. 2d 555; 78 P. 2d 215.

No. 27. TENNESSEE ELECTRIC POWER CO. ET AL. *v.* TENNESSEE VALLEY AUTHORITY ET AL. Appeal from the District Court of the United States for the Eastern District of Tennessee. October 10, 1938. Appeal dismissed as to appellant, Kentucky-Tennessee Light & Power Co., on motion and stipulation signed by counsel for all appellants and the Government. *Messrs. R. T. Jackson, Charles C. Trabue,* and *Charles M. Seymour* for appellants. *Solicitor General Jackson,* and *Messrs. James Lawrence Fly, John Lord O'Brian, Paul A. Freund,* and *William C. Fitts, Jr.,* and *Bessie Margolin* for appellees. Reported below: 21 F. Supp. 947.

No. 27. TENNESSEE ELECTRIC POWER CO. ET AL. *v.* TENNESSEE VALLEY AUTHORITY ET AL. Appeal from the District court of the United States for the Eastern District of Tennessee. November 15, 1938. Appeal dismissed as to appellant, West Tennessee Power & Light Company, on motion and stipulation signed by counsel for all appellants and the Government. *Messrs. R. T. Jackson, Charles C. Trabue,* and *Charles M. Seymour* for appellants. *Solicitor General Jackson,* and *Messrs. James Lawrence Fly, John Lord O'Brian, Paul A. Freund,* and *William C. Fitts, Jr.,* and *Bessie Margolin* for appellees. Reported below: 21 F. Supp. 947.

No. 120. BUCSI *v.* LONGWORTH BUILDING & LOAN ASSN. ET AL. Appeal from the Court of Errors and Appeals of New Jersey. November 17, 1938. Appeal dismissed on motion of counsel for the appellant. *Mr. Saul Nemser* for appellant. *Mr. John Warren* for appellees. Reported below: 119 N. J. L. 120; 194 A. 857.

No. 23. STEELMAN, TRUSTEE IN BANKRUPTCY, *v.* ALL CONTINENT CORPORATION ET AL. December 12, 1938. Certiorari, 304 U. S. 554, to the Circuit Court of Appeals for the Third Circuit dismissed with costs on motion of counsel for the petitioner. *Mr. Wm. Elmer Brown, Jr.* for petitioner. *Mr. Clarence L. Cole* for respondents. Reported below: 96 F. 2d 20.

No. 417. SAXE *v.* SHEA, ADMINISTRATOR. January 12, 1939. Certiorari, *ante,* p. 589, to the Circuit Court of Appeals for the Second Circuit. Dismissed and mandate ordered to issue forthwith on motion of counsel for the petitioner. *Mr. Thomas D. Thacher* for petitioner.

Solicitor General Jackson, Assistant Attorney General Morris, and *Messrs. J. Louis Monarch, Berryman Green,* and *Warner W. Gardner* for respondent. Reported below: 98 F. 2d 83.

No. 277. MARTIN ET AL. *v.* FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION. January 16, 1939. Certiorari, *ante,* p. 564, to the Circuit Court of Appeals for the Seventh Circuit. Dismissed on motion of counsel for the petitioners. *Messrs. Leo E. Vaudreuil,* Assistant Attorney General of Wisconsin, and *Joseph P. Brazy* for petitioners. *Messrs. Charles E. Wyzanski, Jr., Archibald Cox,* and *Emery J. Woodall* for First Federal Savings & Loan Assn., respondent. *Solicitor General Jackson, Assistant Solicitor General Bell,* and *Mr. Warner W. Gardner* for the United States, intervening-respondent. By leave of Court, *Messrs. John B. Hollister, Horace Russell, Robert A. Taft, John R. Bullock,* and *Robert B. Jacoby* filed a brief on behalf of the Federal Savings & Loan Division of the United States Building & Loan League, as *amicus curiae,* in support of respondent. Reported below: 97 F. 2d 831.

PETITIONS FOR REHEARING GRANTED, FROM OCTOBER 3, 1938, THROUGH JANUARY 16, 1939.

No. 10. UNITED STATES *v.* ONE 1936 MODEL FORD V–8 DE LUXE COACH. November 7, 1938. Petition for rehearing granted. The judgment of affirmance entered October 17, 1938, *ante,* p. 564, is vacated and the case is restored to the docket for reargument. *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Messrs. Gordon Dean, Mahlon D. Kiefer,* and *W. Marvin Smith* for the United States. *Messrs. Duane R. Dills* and *Eugene E. Heaton* for respondent. Reported below: 93 F. 2d 771.

No. 372, October Term 1937. GRAVES ET AL. *v.* ELLIOTT ET AL. November 14, 1938. The petition for rehearing is granted. The order denying certiorari, 302 U. S. 731, is vacated and the petition for writ of certiorari to the Surrogates' Court of the County of New York, State of New York, is granted. *Messrs. Henry Epstein* and *Mortimer M. Kassell* for petitioners. *Messrs. Walter H. Merritt* and *Frederick C. Bangs* for respondents. Reported below: 274 N. Y. 10, 634; 8 N. E. 2d 42; 248 App. Div. 713; 153 Misc. 70; 290 N. Y. S. 125; 274 N. Y. S. 463.

No. 166. TOLEDO PRESSED STEEL CO. *v.* STANDARD PARTS, INC.; and

No. 167. SAME *v.* HUEBNER SUPPLY CO. November 21, 1938. The petition for rehearing is granted. The orders denying certiorari, *ante*, p. 600, are vacated and the petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit is granted. *Mr. Wilber Owen* for petitioner. *Messrs. William P. Bair* and *Will Freeman* for respondents. Reported below: 93 F. 2d 336.

No. 65. FAIRBANKS *v.* UNITED STATES. January 16, 1939. The motion for leave to file a petition for rehearing is granted, and the petition for rehearing is also granted. The order denying certiorari, *ante*, p. 605, is vacated, and the petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit is granted. It is ordered that the entry of judgment herein by the United States District Court for the Southern District of California, Central Division be, and it hereby is, stayed until further order of the Court. *Messrs. Arthur F. Driscoll* and *William Stanley* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs.*

Sewall Key and *A. F. Prescott* for the United States. Reported below: 95 F. 2d 794.

PETITIONS FOR REHEARING DENIED, FROM OCTOBER 3, 1938, THROUGH JANUARY 16, 1939.*

No. 18, original, October Term, 1937. Ex parte Paysoff Tinkoff. October 10, 1938. The motion for leave to amend the record is denied. The petition for rehearing is denied. *Paysoff Tinkoff, pro se.* 304 U. S. 580.

No. 22, original, October Term, 1937. Ex parte Harry M. Blair et al. October 10, 1938. 304 U. S. 579.

No. 1021, October Term, 1937. Blair et al. *v.* McClintic, U. S. District Judge. October 10, 1938. 304 U. S. 580.

No. 215, October Term, 1937. Tax Commission of Ohio *v.* Wilbur et al. October 10, 1938. 304 U. S. 544.

No. 300, October Term, 1937. St. Louis, Brownsville & M. Ry. Co. et al. *v.* Brownsville Navigation District et al. October 10, 1938. 304 U. S. 295.

No. 437, October Term 1937. Hinderlider, State Engineer, et al. *v.* La Plata River & Cherry Creek Ditch Co. October 10, 1938. 304 U. S. 92.

Nos. 715 and 716, October Term 1937. Wright *v.* Union Central Life Insurance Co. October 10, 1938. 304 U. S. 502, 542.

---

* See Table of Cases Reported in this volume for earlier decisions in these cases, unless otherwise indicated.

No. 723, October Term, 1937. HELVERING, COMMISSIONER OF INTERNAL REVENUE *v.* NATIONAL GROCERY CO. October 10, 1938. 304 U. S. 282.

No. 779, October Term 1937. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* GERHARDT. October 10, 1938. 304 U. S. 405.

No. 780, October Term 1937. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* WILSON. October 10, 1938. 304 U. S. 405.

No. 781, October Term 1937. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* MULCAHY. October 10, 1938. 304 U. S. 405.

No. 948, October Term 1937. NED ET AL. *v.* ROBINSON. October 10, 1938. 304 U. S. 550.

No. 971, October Term 1937. MCDONALD *v.* UNITED STATES. October 10, 1938. 304 U. S. 564.

No. 996, October Term 1937. HUGHES *v.* WISCONSIN TAX COMM'N ET AL. October 10, 1938. 304 U. S. 548.

No. 997. October Term 1937. DROMEY, ADMINISTRATOR, *v.* WISCONSIN TAX COMM'N ET AL. October 10, 1938. 304 U. S. 548.

No. 1007, October Term 1937. UNITED STATES EX REL. SCHMIDT ET AL. *v.* MILES, U. S. MARSHAL. October 10, 1938. 304 U. S. 583.

No. 1015, October Term 1937. JOHNSON *v.* IGLEHEART BROTHERS, INC. October 10, 1938. 304 U. S. 585.

No. 1022, October Term 1937. MOREHEAD ET AL. *v.* CENTRAL TRUST CO., EXECUTOR. October 10, 1938. 304 U. S. 584.

No. 1024, October Term 1937. MEYERS *v.* UNITED STATES. October 10, 1938. 304 U. S. 583.

No. 1049, October Term 1937. FOWLER, ADMINISTRATOR, ET AL. *v.* SEYMOUR, TRUSTEE. October 10, 1938. 304 U. S. 580.

No. 1064, October Term 1937. LONERGAN *v.* UNITED STATES. October 10, 1938. 304 U. S. 581.

No. 134. MITCHELL *v.* ILLINOIS. November 7, 1938. The application for a stay and the motion for an extension of time within which to file a brief in support of the petition for rehearing are denied. The petition for rehearing is denied. *Messrs. John V. Hanney, George E. Billett,* and *Warren C. Lee* for petitioner. No appearance for respondent. Reported below: 368 Ill. 399; 14 N. E. 2d 216.

No. —, original. EX PARTE FRANCIS SCALESE. November 7, 1938.

No. 64. ELKHORN COAL CO. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. November 7, 1938.

No. 83. DYSART, TRUSTEE, *v.* UNITED STATES. November 7, 1938.

No. 115. MUTUAL BENEFIT HEALTH & ACCIDENT ASSN. *v.* WARRELL. November 7, 1938.

No. 131. CITY NATIONAL BANK ET AL. *v.* STERNBERG. November 7, 1938.

No. 149. MURPHY *v.* KENTON COUNTY BAR ASSOCIATION EX REL. FINNEGAN ET AL. November 7, 1938.

No. 181. SOVEREIGN CAMP OF THE WOODMEN OF THE WORLD *v.* CASADOS ET AL. November 7, 1938.

No. 214. PUBLIC SERVICE CO. ET AL. *v.* LEBANON. November 7, 1938.

No. 238. CRESCENT CREAMERY, INC., ET AL. *v.* MILK CONTROL BOARD OF INDIANA ET AL. November 7, 1938.

No. 289. ADAMS, RECEIVER, ET AL. *v.* EASTMAN ET AL. November 7, 1938.

No. 299. AMERICAN SURETY CO. *v.* HACK, RECEIVER. November 7, 1938.

No. 300. HACK, RECEIVER, *v.* AMERICAN SURETY CO. November 7, 1938.

No. 356. O'BRIEN *v.* FIRST NATIONAL BANK, TRUSTEE. November 7, 1938.

No. 6. MOONEY *v.* SMITH, WARDEN. November 14, 1938. Petition for rehearing denied. Under Rule 33 MR. JUSTICE BLACK and MR. JUSTICE REED took no part in the consideration and decision of this application.

No. —, original. EX PARTE ANDREW G. TURCKE. November 14, 1938.

No. 307. AUTOMATIC TOY CORP. *v.* BUDDY "L" MFG. CO. ET AL. November 14, 1938.

No. 335. RAFFOLD PROCESS CORP. *v.* CASTANEA PAPER CO. November 14, 1938.

No. 346. DEPPE *v.* UNITED STATES BOARD OF TAX APPEALS ET AL. November 14, 1938.

No. 378. AMERICAN GLYCERIN CO. *v.* EASON OIL CO. ET AL. November 14, 1938.

No. 128. DALHOVER *v.* UNITED STATES. November 17, 1938. Motion for leave to file petition for rehearing granted. The petitions for rehearing and for a stay are denied.

No. 990, October Term, 1937. E. I. DUPONT DE NEMOURS & CO. *v.* WAXED PRODUCTS CO. November 21, 1938. 304 U. S. 575.

No. 129. DENSON *v.* BOARD OF COMMISSIONERS OF THE STATE BAR OF ALABAMA. November 21, 1938.

No. 281. HELLMUTH *v.* HELLMUTH. November 21, 1938.

No. 358. STRAUSS, ADMINISTRATRIX, *v.* COMMISSIONER OF INTERNAL REVENUE. November 21, 1938.

No. 372. STALEY ELEVATOR CO. ET AL. *v.* OTIS ELEVATOR CO. November 21, 1938.

No. 402. TOMPKINS *v.* ERIE RAILROAD CO. November 21, 1938.

No. 429. PREBYL *v.* PRUDENTIAL INSURANCE CO. November 21, 1938.

No. 15. WAIALUA AGRICULTURAL CO. *v.* CHRISTIAN ET AL. December 5, 1938. 304 U. S. 553.

No. 17. CHRISTIAN *v.* WAIALUA AGRICULTURAL CO. December 5, 1938. 304 U. S. 553.

No. 31. SOVEREIGN CAMP OF THE WOODMEN OF THE WORLD *v.* BOLIN ET AL. December 5, 1938. 304 U. S. 557.

No. 303. ARTHUR C. HARVEY CO. *v.* UNITED STATES. December 5, 1938.

Nos. 376 and 377. COOPER *v.* O'CONNOR ET AL. December 5, 1938.

No. 382. CHICAGO PNEUMATIC TOOL CO. *v.* HUGHES TOOL COMPANY. December 5, 1938.

No. 387. CAROLINE C. SPALDING *v.* UNITED STATES. December 5, 1938.

No. 388. SILSBY M. SPALDING *v.* UNITED STATES. December 5, 1938.

No. 389. BROWN, EXECUTRIX, *v.* COMMISSIONER OF INTERNAL REVENUE. December 5, 1938.

No. 410. DIAMOND TANK TRANSPORT, INC., ET AL. *v.* UNITED STATES ET AL. December 5, 1938.

No. 3. SCHRIBER-SCHROTH CO. *v.* CLEVELAND TRUST CO. ET AL.;

No. 4. ABERDEEN MOTOR SUPPLY CO. *v.* SAME; and

No. 5. F. E. ROWE SALES CO. *v.* SAME. See *ante*, p. 573.

Nos. 2 and 56. KELLOGG COMPANY *v.* NATIONAL BISCUIT CO. December 12, 1938.

No. 53. HARRIS ET AL. *v.* AVERY BRUNDAGE CO. ET AL. December 12, 1938.

No. 371. GEORGE W. HELME CO. *v.* UNITED STATES. December 12, 1938.

No. 390. BOYER, ADMINISTRATRIX, *v.* BACKUS ET AL. December 12, 1938.

No. 407. MORGAN ET AL. *v.* UNITED STATES. December 12, 1938.

No. 408. HARVEY ET AL. *v.* FEDERAL LAND BANK ET AL. December 12, 1938.

No. 1018, October Term, 1937. EX PARTE PAYSOFF TINKOFF. December 19, 1938. 304 U. S. 573.

No. 13. WELCH *v.* HENRY ET AL. December 19, 1938.

No. 20. STOLL *v.* GOTTLIEB. December 19, 1938. 304 U. S. 554.

No. 428. ARKANSAS NATURAL GAS CORP. *v.* SARTOR ET AL. December 19, 1938.

No. 442. MACKESY ET AL. *v.* MAINE. December 19, 1938.

No. 452. OHIO CASUALTY INSURANCE CO. *v.* MARR ET AL. December 19, 1938.

No. 427. GEORGE K. GARRETT CO. *v.* NATIONAL LOCK WASHER CO. January 3, 1939.

No. 1. GENERAL TALKING PICTURES CORP. *v.* WESTERN ELECTRIC CO. ET AL. January 3, 1939.

No. 21. NEBLETT ET AL. *v.* CARPENTER, INSURANCE COMMISSIONER OF CALIFORNIA, ET AL. January 3, 1939.

No. 51. ARMSTRONG PAINT & VARNISH WORKS *v.* NU-ENAMEL CORPORATION ET AL. January 3, 1939.

No. 55. McDONALD *v.* THOMPSON ET AL. January 3, 1939.

No. 57. MISSOURI EX REL. GAINES *v.* CANADA, REGISTRAR OF UNIVERSITY OF MISSOURI, ET AL. January 3, 1939.

No. 438. PHOENIX FINANCE CORP. *v.* IOWA-WISCONSIN BRIDGE CO. ET AL. January 3, 1939.

No. 444. SIMMONS, TRADING AS PARIS IMPORT CO., ET AL. *v.* FARLEY, POSTMASTER GENERAL. January 3, 1939.

No. 463. BERKOWITZ *v.* ILLINOIS. January 3, 1939.

No. 464. ANCHOR STOVE & RANGE CO. *v.* RYMER ET AL. January 3, 1939.

No. —, original. EX PARTE CENTURY INDEMNITY CO. January 9, 1939.

No. 430. GEIBEL ET AL. *v.* STATE BAR OF CALIFORNIA. January 9, 1939.

No. 471. RIO VISTA HOTEL & IMPROVEMENT CO. *v.* BELLE MEAD DEVELOPMENT CORP. January 16, 1939. The petition for rehearing or written opinion is denied.

GENERAL ORDERS AND FORMS IN BANKRUPTCY

AMENDED AND ESTABLISHED BY THE

SUPREME COURT OF THE UNITED STATES

JANUARY 16, 1939

EFFECTIVE FEBRUARY 13, 1939

TABLE OF CONTENTS

GENERAL ORDERS AND FORMS IN BANKRUPTCY

ORDER

IT IS ORDERED, on this 16th day of January, 1939, that General Orders XIII, XXVII and XLVI of the General Orders in Bankruptcy, and Forms Nos. 4, 7, 8, 19, 29, 32, 36, 39, 41, 44, 45, 46, 49, 50, 51, 52, 53, 54, 55, 56, 60, 61, 62, 63, 64, 66, 70, 72 and 73 of the Forms in Bankruptcy, be, and they hereby are, abrogated.

IT IS FURTHER ORDERED that the General Orders and Forms in Bankruptcy be, and they hereby are, amended and established to read as hereinafter set forth.

IT IS FURTHER ORDERED that this order shall take effect on Monday, February 13, 1939, and shall govern all proceedings then pending to which its provisions are applicable, except to the extent that in the opinion of the court its application to such proceedings would not be practicable or would work injustice, in which event the General Orders and Forms in Bankruptcy heretofore established shall apply: *Provided,* That the General Orders and Forms in Bankruptcy heretofore established shall apply to proceedings pending under sections 12, 73 and 74, as amended, of the Act entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898.

1

DOCKET

The clerk shall keep a docket, in which the cases shall be entered and numbered in the order in which they are commenced. It shall contain a memorandum of the filing of the petition and of the action of the court there-

on; of the reference of the case, if any reference is made, to the referee; of the transmission by the referee to the clerk of all bonds, orders and reports, and of the referee's certified record of the proceedings; and of all proceedings in the case except those duly entered on the referee's certified record. The docket shall be arranged in a manner convenient for reference, and shall at all times be open to public inspection. If the proceeding is brought under section 75 or 77, or under chapter IX, X, XI, XII, or XIII, of the Act, the docket shall so indicate.

2

FILING OF PAPERS

The clerk or the referee shall indorse on each paper filed with him the day, and in the case of the original petition, the day and hour, of filing.

3

PROCESS

All process, summonses, and subpoenas, except such as are issued by the Interstate Commerce Commission in the performance of its duties under section 77 of the Act, shall issue out of the court, under the seal thereof, and be tested by the clerk; and blanks, with the signature of the clerk and seal of the court, may, upon application, be furnished to the referees.

4

CONDUCT OF PROCEEDINGS

Proceedings may be conducted by the bankrupt or debtor in person in his own behalf, or by a creditor; but a creditor will only be allowed to manage before the court his individual interest. Every party may appear and conduct the proceedings by attorney, who shall be

an attorney or counselor authorized to practice in the district court. The name of the attorney or counselor, with his business address, shall be entered upon the docket, with the date of the entry. Orders granted on motion shall contain the name of the party or attorney making the motion. Notices and orders which are not, by the Act or by these general orders, required to be served on the party personally may be served upon his attorney.

5

FORM OF PETITIONS AND OTHER PAPERS

(1) All petitions and schedules shall be printed or written out plainly, without abbreviation or interlineation, except where such abbreviation and interlineation may be for the purpose of reference.

(2) Petitioners in involuntary proceedings for adjudication, whose claims rest upon assignment or transfer from other persons, shall annex to one of the triplicate petitions all instruments of assignment or transfer, and an affidavit setting forth the true consideration paid for the assignment or transfer of such claims and stating that the petitioners are the bona fide holders and legal and beneficial owners thereof and whether or not they were purchased for the purpose of instituting bankruptcy proceedings.

(3) Each paper filed shall contain a caption setting forth the name of the court, the title of the proceeding, the docket number, and a brief statement of the character of the paper.

(4) Proceedings shall be entitled "In Bankruptcy," "In Proceedings for a Composition or Extension," "In Proceedings for the Reorganization of a Railroad," "In Proceedings for a Composition by a Public Debtor," "In Proceedings for the Reorganization of a Corporation," "In Proceedings for an Arrangement," "In Proceedings

for a Real Property Arrangement," or "In Proceedings for a Wage Earner Plan," as the case may be.

(5) In proceedings under chapter VIII, X, XI, XII, or XIII, of the Act, unless and until the debtor is adjudicated a bankrupt he shall be referred to as a "debtor." In proceedings under chapter IX, the debtor shall be referred to as the "petitioner."

6

PETITIONS IN DIFFERENT COURTS

If two or more petitions are filed by or against the same person or by or against different members of a partnership in different courts of bankruptcy, each of which has jurisdiction, the court first acquiring jurisdiction shall, upon application by any party in interest and after a hearing upon reasonable notice to parties in interest, determine the court in which the cases can proceed with the greatest convenience to parties in interest, and the proceedings upon the other petitions shall be stayed by the courts in which such petitions have been filed until such determination is made. If the court first acquiring jurisdiction determines that it shall hear the cases, it shall make its order to that effect, and other courts in which petitions have been filed, upon exhibition of a certified copy of such order, shall order the cases before them transferred to the court first acquiring jurisdiction. If the court first acquiring jurisdiction determines that the cases shall be heard by another court, it shall make its order to that effect and that the case before it be transferred to such court; and other courts in which petitions have been filed, upon exhibition of a certified copy of such order, shall order the cases before them transferred to the court named in the order of the court first acquiring jurisdiction.

7

PRIORITY OF PETITIONS

If two or more petitions are filed in the same court against the same person, and the debtor appears and shows cause against an adjudication of bankruptcy on the petitions, the petitions shall be heard and tried in the order of their filing: *Provided,* That the court, in its discretion, may order the proceedings consolidated.

8

PROCEEDINGS IN PARTNERSHIP CASES

(Abrogated, May 25, 1925, 268 U. S. 712.)

9

LIST OF CREDITORS IN INVOLUNTARY BANKRUPTCY

In all cases of involuntary bankruptcy in which the bankrupt is absent or cannot be found, it shall be the duty of the petitioning creditor to file, within five days after the date of the adjudication, a list of the names and places of residence of all the creditors of the bankrupt, according to the best information of the petitioning creditor.

10

INDEMNITY FOR EXPENSES

Before incurring any expense in publishing or mailing notices, or in traveling, or in procuring the attendance of witnesses, or in perpetuating testimony, the clerk, marshal, or referee may require, from the bankrupt, debtor, or other person in whose behalf the duty is to be performed, indemnity for such expense. Money advanced for this purpose by the bankrupt, debtor, or other person shall be repaid him out of the estate as part of the cost of administering the same.

11

AMENDMENTS

The court may allow amendments to the petition and schedules on application of the petitioner. Amendments shall be printed or written, signed and verified, like original petitions and schedules, and filed in triplicate. If amendments are made to separate schedules, the same must be made separately, with proper references. In the application for leave to amend, the petitioner shall state the cause of the error in the paper originally filed.

12

DUTIES OF REFEREE

(1) A copy of the order referring a proceeding to a referee shall forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court. And thereafter all the proceedings, except such as are required by the Act or by these general orders to be had before the judge, shall be had before the referee; and the bankrupt or debtor may receive from the referee a protection against arrest to continue, unless suspended or vacated by order of the court, until the final adjudication on his application for a discharge or for the confirmation of an arrangement or plan.

(2) The times when and places where the referees shall act upon the matters arising under the several cases referred to them shall be fixed by special order of the judge, or by the referee; and at such times and places the referees may perform the duties which they are empowered by the Act to perform.

(3) If a bankrupt files the list of creditors in advance of his schedules, the referee shall promptly call the first meeting of creditors without awaiting the filing of schedules.

(4) The referee, except in no asset cases, shall mail a summary of the trustee's final report and account to the creditors with the notice of the final meeting, together with a statement of the amount of claims proved and allowed.

13

APPOINTMENT AND REMOVAL OF TRUSTEE

(Abrogated.)

14

NO OFFICIAL OR GENERAL TRUSTEE

No official trustee shall be appointed by the court, nor any general trustee to act in classes of cases.

15

TRUSTEE NOT APPOINTED IN CERTAIN CASES

If the schedule of a voluntary bankrupt discloses no assets, and if no creditor appears at the first meeting, the court may, by order setting out the facts, direct that no trustee be appointed; but at any time thereafter a trustee may be appointed, if the court shall deem it desirable. If no trustee is appointed as aforesaid, the court may order that no meeting of the creditors other than the first meeting shall be called.

16

NOTICE TO TRUSTEE OF HIS APPOINTMENT

It shall be the duty of the referee, immediately upon the appointment and approval of the trustee, to notify him in person or by mail of his appointment; and the notice shall require the trustee forthwith to notify the referee of his acceptance or rejection of the trust, and shall contain a statement of the penal sum of the trustee's bond.

17

DUTIES OF TRUSTEE

(1) The trustee shall, immediately upon entering upon his duties, send notice by mail to the Commissioner of Internal Revenue, Washington, D. C., of the adjudication of bankruptcy, and prepare a complete inventory of all the property of the bankrupt or debtor that comes into his possession.

(2) The trustee shall make report to the court, within five days after receiving the notice of his appointment, unless further time is granted by the court, of the articles set off to the bankrupt or debtor by him, according to the provisions of section 47 of the Act, with the estimated value of each article; and any creditor or the bankrupt or debtor may file objections to the determination of the trustee within ten days after the filing of the report, unless further time is granted by the court.

(3) In case the trustee shall neglect to file any report or statement which it is made his duty to file or make by the Act or by these general orders, within five days after the same shall be due, it shall be the duty of the court to make an order requiring the trustee to show cause, at a time specified in the order, why he should not be removed from office. The court shall cause a copy of the order to be served upon the trustee at least three days before the time fixed for the hearing.

(4) All accounts of trustees and receivers shall be referred as of course to the referee for audit, unless otherwise specially ordered by the judge.

18

SALE OF PROPERTY

(1) All sales shall be by public auction unless otherwise ordered by the court. Where the property is sold by an auctioneer he shall, upon completion of the sale,

file with the court and also furnish the receiver or trustee an itemized statement of the property sold, the name of each purchaser, and the price received for each item or lot, or for the property as a whole if it is sold in bulk.

(2) Upon application to the court, and for good cause shown, the receiver or trustee may be authorized to sell the property of the estate or any specified portion thereof at private sale; in which case he shall keep an accurate and itemized account of all property sold, of the price received therefor, and to whom sold; which account he shall forthwith file with the court.

19

ACCOUNTS OF MARSHAL

The marshal shall make return, under oath, of his actual and necessary expenses in the service of every warrant addressed to him, and for custody of property, and other services, and other actual and necessary expenses paid by him, with vouchers therefor whenever practicable, and also with a statement that the amounts charged by him are just and reasonable.

20

PAPERS FILED AFTER REFERENCE

Proofs of claim and other papers filed subsequently to the reference, except such as call for action by the judge, may be filed either with the referee or with the clerk.

21

PROOFS OF CLAIM

(1) A proof of claim against an estate shall be correctly entitled in the court and in the cause. When made to prove a debt due to a partnership it shall state that the deponent is a member of the partnership; when made by

an agent, it shall state the reason the proof is not made by the claimant in person; and when made to prove a debt due to a corporation, the proof shall be made by a duly authorized officer of the corporation. A proof of claim for a debt founded upon an open account shall state when the debt became or will become due; and if it consists of items maturing at different dates the average due date shall be stated, in default of which no interest shall be allowed. Each such proof of claim shall state whether a note or other negotiable instrument has been received for such account or any part thereof, or whether any judgment has been rendered thereon. If a note or other negotiable instrument has been received, it shall be filed with the proof of claim. Proofs of claim received by any trustee shall be delivered to the referee to whom the cause is referred.

(2) Any creditor may file with the referee a request that all notices to which he may be entitled shall be addressed to him at a designated address; and thereafter, and until some other designation shall be made by such creditor, all notices shall be so addressed. In other cases notices shall be addressed to each creditor at the place designated in the proof of claim, or, if no proof of claim has been filed or if filed and no address is therein stated, at the place shown in the list of creditors.

(3) If a claim has been assigned after the commencement of the proceedings but before proof of claim has been filed, the proof of claim therefor shall be supported by an affidavit of the owner at the time of the commencement of proceedings, setting forth the true consideration for the debt, what payments have been made thereon, and that it is entirely unsecured, or if secured, the security as is required in proving secured claims. Upon the filing of satisfactory proof of the assignment of a claim, proof of which has been filed, the referee shall immediately give notice by mail to the original claimant of the filing of

such proof of assignment and that objection thereto must be made within ten days. If no objection be made within ten days, or within further time allowed by the referee, he shall make an order subrogating the assignee to the original claimant. If objection be made, he shall proceed to hear and determine the matter.

(4) The claims of persons contingently liable for the bankrupt or debtor may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is unknown, such claim may be proved in the name of the party contingently liable; but no dividend shall be paid upon such claim, except upon satisfactory proof that it will diminish pro tanto the original debt.

(5) The execution of any power of attorney to represent a creditor, or of an assignment of claim after proof, may be proved or acknowledged before any of the officers enumerated in section 20 of the Act. When executed on behalf of a partnership or of a corporation, the person executing the instrument shall make oath that he is a member of the partnership, or a duly authorized officer of the corporation on whose behalf he acts. When the person executing is not personally known to the officer taking the proof or acknowledgment, his identity shall be established by satisfactory proof.

(6) When the trustee or any creditor or the bankrupt or debtor shall desire the reconsideration of any claim allowed against the estate, he may apply by petition to the referee to whom the case is referred for an order for such reconsideration, and thereupon the referee shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor. At the time appointed the referee shall take the examination of the creditor, and of any witness that may be called by either party, and if it shall appear from such examination that the claim ought to be expunged or diminished, the referee may order accordingly.

22

TAKING OF TESTIMONY

The examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney, and shall be governed by the Rules of Civil Procedure for the District Courts of the United States, in so far as they are not inconsistent with the Act or with these general orders. The referee may rule upon the admissibility of evidence and may put witnesses on oath and may himself examine them and may call any party to the proceedings and examine him under oath. If an objection to a question propounded to a witness is sustained by the referee, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness. The referee may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. Upon the request of any party, however, the referee shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

23

ORDERS OF REFEREE

In all orders made by a referee, it shall be recited, according as the fact may be, that notice was given and the manner thereof; or that the order was made by consent; or that no adverse interest was represented at the hearing; or that the order was made after hearing adverse interests.

24

LIST OF PROVED CLAIMS AND INTERESTS

The person with whom proofs of claim or of interest are filed shall maintain open to inspection a list of the

claims and interests proved against the estate, with the names and addresses of the owners thereof, as given by them.

25

SPECIAL MEETING OF CREDITORS

Whenever, by reason of a vacancy in the office of trustee, or for any other cause, it becomes necessary to call a special meeting of the creditors in order to carry out the purposes of the Act, the court may call such a meeting, specifying in the notice the purpose for which it is called.

26

ACCOUNTS OF REFEREE

Every referee shall maintain, substantially in the manner indicated by Form No. 46, a cash book or a record in which he shall keep an accurate and itemized account showing (1) his receipts of moneys as indemnity or charges for expenses, and as compensation for his services, and the case number of the proceeding to which each receipt is credited; and (2) the disposition made of such moneys, showing the case number of the proceeding, if any, on account of which each sum is expended. All moneys received as aforesaid shall be deposited forthwith to the credit of the referee in his official capacity in a depository designated by the court for the purpose, and shall be disbursed only by checks signed by the referee in his official capacity. Within sixty days after the expiration of each six months period ending June thirtieth and December thirty-first of each year, each referee shall submit to the district court (1) a financial statement containing the information indicated by Form No. 47; (2) if the referee devotes part time to his duties, a statement showing the extent to which and the method by which any overhead expenses have been allocated to and reimbursed out of the aforesaid funds; (3) a copy of the

rule or a statement of the method by which the amount of the indemnity or expense charges against individual estates is computed or fixed; (4) a statement containing an inventory of law books, office equipment and other property acquired under the provisions of subdivision b of section 62 of the Act; and (5) a list of the proceedings referred to him which have remained open for more than eighteen months, giving the reasons in each instance why they have not been closed. The statements so submitted shall be in duplicate and verified; and one copy shall be transmitted by the clerk, forthwith upon its receipt, to the Attorney General.

27

REVIEW BY JUDGE

(Abrogated.)

28

REDEMPTION OF PROPERTY AND COMPOUNDING OF CLAIMS

Whenever it may be deemed for the benefit of an estate to redeem and discharge any mortgage, pledge, deposit or lien, upon any property, real or personal, or to compound and settle any debts or other claims due or belonging to the estate, the receiver or trustee, or the bankrupt or debtor, or any creditor who has proved his claim, may file his petition therefor; and thereupon the court shall appoint a suitable time and place for the hearing thereof, notice of which shall be given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing or directing such an act on the part of the receiver or trustee: *Provided,* That the court may, upon cause shown, order an immediate redemption of property without notice.

29

PAYMENT OF MONEYS DEPOSITED

No moneys deposited as required by the Act shall be drawn from the depository unless by check or draft, signed by the clerk of the court or by a receiver or trustee, and countersigned by the judge, or by a referee, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn. An entry of the substance of each check or draft, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the receiver or trustee; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this general order shall be furnished to the depository, and also the name of any clerk authorized to countersign said checks.

30

IMPRISONED DEBTOR

If, at the time of the commencement of the proceedings under this Act, the bankrupt or debtor shall be imprisoned, the court, upon application, may order him to be produced upon habeas corpus, by the jailer or any officer in whose custody he may be, before the court, for the purpose of testifying in any manner relating to said proceedings; and, if committed after the commencement of said proceedings upon process in any civil action founded upon a claim provable under the Act, the judge may, upon like application, discharge him from such imprisonment. If the bankrupt or debtor, during the pendency of said proceedings, be arrested or imprisoned upon process in any civil action, the judge, upon his application, may issue a writ of habeas corpus to bring him before the judge

to ascertain whether such process has been issued for the collection of any claim provable under the Act, and if so provable he shall be discharged; if not, he shall be remanded to the custody in which he may lawfully be. Before granting the order for discharge, the judge shall cause notice to be served upon the creditor or his attorney, so as to give him an opportunity of appearing and being heard before the granting of the order.

31

PETITION FOR DISCHARGE

The petition of a bankrupt corporation for a discharge shall state concisely, in accordance with the provisions of the Act and the orders of the court, the proceedings in the case and the acts of the bankrupt.

32

OPPOSITION TO DISCHARGE

Any person opposing a discharge shall, on or before the time fixed for the filing of objections to the discharge, file a specification in writing of the grounds of his opposition.

33

ARBITRATION AND COMPROMISE

Whenever a receiver, trustee or debtor in possession shall make application to the court for authority to submit to arbitration any controversy arising in the settlement of an estate, or for authority to compromise any such controversy, the application shall clearly and distinctly set forth the subject matter of the controversy, and the reasons why it is proper and for the best interest of the estate that the controversy should be settled by arbitration or compromise.

34

COSTS IN CONTESTED PROCEEDINGS

In cases of involuntary bankruptcy, when the debtor resists an adjudication, and the court, after hearing, adjudges the debtor a bankrupt, the petitioning creditor shall recover, and be paid out of the estate, the same costs that are allowed to a party recovering in a civil action cognizable as a case in equity; and if the petition is dismissed, the debtor shall recover like costs against the petitioner.

35

COMPENSATION OF CLERKS, REFEREES, RECEIVERS AND TRUSTEES

(1) The fees allowed by the Act to clerks shall be in full compensation for all services performed by them in regard to filing petitions or other papers required by the Act to be filed with them, or in certifying or delivering papers or copies of records to referees or other officers, or in receiving or paying out moneys; but shall not include copies furnished to other persons, or expenses necessarily incurred in publishing or mailing notices or other papers.

(2) The compensation of referees, prescribed by the Act, shall be in full compensation for all services performed by them under the Act, or under these general orders; but shall not include expenses necessarily incurred by them in publishing or mailing notices, in traveling, or in perpetuating testimony, or other expenses necessarily incurred in the performance of their duties under the Act and allowed by special order of the judge.

(3) The compensation allowed to receivers or trustees by the Act shall be in full compensation for the services performed by them; but shall not include expenses neces-

sarily incurred in the performance of their duties and allowed upon the settlement of their accounts.

(4) In any case in which the fees of the clerk, referee, and trustee are not required by the Act to be paid by a debtor before filing his petition to be adjudged a bankrupt, the judge, at any time during the pendency of the proceedings in bankruptcy, may order those fees to be paid out of the estate; or may, after notice to the bankrupt, and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and, if he fails to do so, may order his petition to be dismissed. He may also, pending such proceedings, both in voluntary and involuntary cases, order the commissions of referees, receivers and trustees to be paid immediately after such commissions accrue and are earned.

36

APPEALS

Appeals shall be regulated, except as otherwise provided in the Act, by the rules governing appeals in civil actions in the courts of the United States, including the Rules of Civil Procedure for the District Courts of the United States.

37

GENERAL PROVISIONS

In proceedings under the Act the Rules of Civil Procedure for the District Courts of the United States shall, in so far as they are not inconsistent with the Act or with these general orders, be followed as nearly as may be. But the court may shorten the limitations of time prescribed so as to expedite hearings, and may otherwise modify the rules for the preparation or hearing of any particular proceeding.

38

FORMS

The several forms annexed to these general orders shall be observed and used, with such alterations as may be necessary to suit the circumstances of any particular case.

39

REPRESENTATION OF CREDITORS BY RECEIVERS OR THEIR ATTORNEYS

Neither a receiver nor his attorney shall solicit any proof of claim, power of attorney, or other authority to act for or represent any creditor for any purpose in connection with the administration of an estate or the acceptance or rejection of any arrangement or plan.

40

RECEIVERS AND MARSHALS AS CUSTODIANS

A receiver or marshal appointed by the court to take charge of the property of a bankrupt after the filing of a petition, shall be deemed to be a mere custodian within the meaning of section 48 of the Act, unless his duties and compensation are specifically enlarged by order of the court, upon proper cause shown, either at the time of the appointment or later.

41

WAIVER OF RIGHT TO SHARE IN DEPOSITS OR IN PAYMENTS UNDER AN ARRANGEMENT OR PLAN

Before confirming an arrangement or plan the court shall require all creditors and other persons who may have waived their right to share in the distribution of the deposit or in payments under the arrangement or plan,

for claims, fees or otherwise, to set forth in writing and under oath all agreements with respect thereto with the debtor, his attorney or other person, and shall also require an affidavit by the debtor that he has not directly or indirectly paid or promised any consideration to any attorney, trustee, receiver, creditor, or other person in connection with the proceedings except as set forth in such affidavit or in the arrangement or plan, and that he has no knowledge of any such payment or promise by any other party.

42

COMPENSATION OF ATTORNEYS

No allowance of compensation shall be made to any attorney for a receiver, trustee or debtor in possession except for professional services.

43

FEES AND EXPENSES OF ATTORNEYS FOR PETITIONING CREDITORS

The court may deny the allowance of any fee to the attorney for petitioning creditors or the reimbursement of his expenses, or both, if it shall appear that the proceedings were instituted in collusion with the bankrupt or were not instituted in good faith.

44

APPOINTMENT OF ATTORNEYS

No attorney for a receiver, trustee or debtor in possession shall be appointed except upon the order of the court, which shall be granted only upon the verified petition of the receiver, trustee or debtor in possession, stating the name of the counsel whom he wishes to employ, the reasons for his selection, the professional services he is to

render, the necessity for employing counsel at all, and to the best of the petitioner's knowledge all of the attorney's connections with the bankrupt or debtor, the creditors or any other party in interest, and their respective attorneys. If satisfied that the attorney represents no interest adverse to the receiver, the trustee, or the estate in the matters upon which he is to be engaged, and that his employment would be to the best interests of the estate, the court may authorize his employment, and such employment shall be for specific purposes unless the court is satisfied that the case is one justifying a general retainer. If without disclosure any attorney acting for a receiver or trustee or debtor in possession shall have represented any interest adverse to the receiver, trustee, creditors or stockholders in any matter upon which he is employed for such receiver, trustee, or debtor in possession, the court may deny the allowance of any fee to such attorney, or the reimbursement of his expenses, or both, and may also deny any allowance to the receiver or trustee if it shall appear that he failed to make diligent inquiry into the connections of said attorney.

Nothing herein contained shall prevent the judge, in proceedings under section 77 of the Act, from authorizing the employment of attorneys who are attorneys of the corporation, or associated with its legal department, in connection with the operation of the business of the corporation by a trustee or trustees under subsection (c) of section 77, when such employment is found by the judge to be in the public interest in relation to such operation and is not adverse to the interests of the trustee or trustees or of the creditors of the corporation.

45

AUCTIONEERS, ACCOUNTANTS AND APPRAISERS

No auctioneer or accountant shall be employed by a receiver, trustee or debtor in possession except upon an

order of the court expressly fixing the amount of the compensation or the rate or measure thereof. The compensation of appraisers shall be provided for in like manner in the order appointing them.

46

BANKING INSTITUTION AS CUSTODIAN, RECEIVER OR TRUSTEE

(Abrogated.)

47

REPORTS OF REFEREES AND SPECIAL MASTERS

Unless otherwise directed in the order of reference the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous. The judge after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

48

PROCEEDINGS UNDER CHAPTER XI OF THE ACT

(1) This general order shall apply to proceedings under chapter XI of the Act.

(2) The general orders in bankruptcy shall, in so far as they are not inconsistent with the provisions of chapter XI or of this general order, apply to proceedings under chapter XI: *Provided,* That General Orders 18, 28 and 29 shall not apply to such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of the Act.

(3) The clerk shall forthwith transmit to the Collector of Internal Revenue for the district in which the proceedings are brought a copy of each petition filed under section 321 or 322 of the Act.

(4) All papers filed shall be accompanied by such copies as the clerk or referee may require to enable him to comply with the provisions of the Act and of this general order.

49

PROCEEDINGS UNDER SECTION 77 OF THE ACT

(1) This general order shall apply to proceedings under section 77 of the Act.

(2) The general orders in bankruptcy shall, in so far as they are not inconsistent with the provisions of section 77 or of this general order, apply to proceedings under section 77: *Provided,* That General Orders 17, 18, 21, 28, 29 and 41 shall not apply to such proceedings.

(3) Each circuit court of appeals shall cause written notice to be given to the judges of the district courts within the circuit of the names and addresses of the persons from time to time designated and qualified to act as special masters under the provisions of subsection (c) of section 77.

(4) The clerk of the district court in which proceedings under section 77 are brought shall forthwith transmit to the Interstate Commerce Commission copies of (a) the answer, if any, of the railroad corporation, or the pleading of any creditor controverting facts alleged in the petition; (b) the order approving or dismissing the petition; (c) any order (1) directing the debtor to give notice and fixing the date of a hearing on the appointment of a trustee or trustees, (2) appointing or removing a trustee, or (3) confirming the appointment of legal counsel for the trustee or trustees, or removing such counsel; (d) any application by a trustee for authority to issue certificates, and any order authorizing such issuance; (e) such schedules and reports as may be submitted by the officers of the corporation or trustees with respect to the conduct of the debtor's affairs and

the fairness of any proposed plan, and all orders issued to the trustee or trustees with respect to the operation of the corporation's business, together with the petitions upon which the orders were based; (f) the lists of bondholders, creditors, and stockholders required to be filed under paragraph (4) of subsection (c) of section 77, and any other information concerning the security holders filed pursuant to the order of the court; (g) any order determining the time within which, and the manner in which, claims may be filed or evidenced and allowed, and the division of creditors and stockholders into classes, and any order respecting the exercise of any power by any person or committee representing any creditor or stockholder; (h) any order allowing or rejecting such claims, or extending the time within which they may be filed or evidenced; (i) any order directing the trustee or trustees to report facts pertaining to irregularities, fraud, misconduct, or mismanagement, and any report made pursuant to such order; (j) any order directing the debtor or the trustee or trustees to keep records and accounts, in addition to those prescribed by the commission, for the segregation and allocation of earnings and expenses; (k) any order approving the special employment of assistants requested by the commission; (l) any application for allowances of compensation and expenses under the provisions of paragraphs (2) and (12) of subsection (c) of section 77, upon receipt of which the commission shall determine the maximum limits of such allowances and file with the court its report and order thereon, and any order making allowances for compensation and expenses under said paragraph; (m) any order issued upon the petition of the commission for the reference of particular matters to a special master, and the report of such master thereon; (n) any order allowing interested parties to intervene in the proceedings, any minute of appearance by a person other than interveners, and any rule defining matters upon which notice shall be

given to other than interveners; (o) any order extending the time for filing a plan; (p) any motion to dismiss the proceedings because of undue delay in a reasonably expeditious reorganization of the debtor, and notice of any hearing with reference to dismissing the proceedings for such cause; (q) any notice of the time within which parties in interest may file with the court objections to the plan approved by the commission, and any objection to such plan and any claim for equitable treatment filed by a party in interest; (r) any order affirming a finding of the commission affecting the requirement that the plan be submitted to creditors or stockholders as provided in the second paragraph of subsection (e) of section 77; (s) any order entered on the disapproval of the plan, and the judge's opinion stating his conclusions and reasons for such disapproval; (t) if the plan is not confirmed, the order, with the judge's opinion stating his conclusions and reasons therefor, dismissing the proceedings or referring the case back to the commission for further proceedings, and, if the case is referred back to the commission, a copy of the evidence received in any hearings with reference to confirmation; (u) the order confirming the plan, with the judge's opinion stating his conclusions and reasons therefor, and any order directing the transfer or other disposition of the property; (v) the final decree; and (w) such other papers filed in the proceedings as the commission may request of the clerk or the court may direct him to transmit.

(5) The Interstate Commerce Commission shall forthwith cause to be filed in the district court having jurisdiction of the proceedings copies of (a) any order ratifying the appointment of a trustee or trustees; (b) each report and order authorizing the issue of trustees' certificates; (c) each order or call for a hearing, with a statement of its purposes; (d) each plan of reorganization, other than the debtor's, filed with the commission; (e) any report finding a plan to be prima facie impracticable;

(f) any order refusing to approve a plan, together with the commission's report stating fully the reasons for its conclusions; (g) any petition for further hearing on a plan, and any supplemental order modifying any plan, together with the report stating the reasons for such modification; (h) the written acceptances of any plan which is finally approved; (i) any order granting authority for the issuance of securities or for other steps contemplated by the plan; (j) any order issued to the trustee or trustees with respect to the operation of the corporation's business; (k) any order issued under the provisions of subsection (p) of section 77 authorizing the solicitation, use, employment or action under or pursuant to proxies, authorizations, or deposit agreements; and (l) such other papers filed in the proceedings as the court may direct or the commission deem pertinent.

(6) The clerk of the district court in which proceedings under section 77 are brought shall forthwith transmit to the Secretary of the Treasury copies of (a) any petition filed under subsection (a) of section 77; (b) the answer, if any, of the railroad corporation; (c) the order approving or dismissing the petition; (d) any order appointing or removing a trustee; (e) any application by a trustee for authority to issue certificates, and any order authorizing or refusing to authorize such issuance; (f) any order determining the time within which, and the manner in which, claims may be filed or evidenced and allowed, and the division of creditors and stockholders into classes; (g) any plan of reorganization filed with the court; (h) any order approving a plan, or referring the proceedings back to the commission for further action; (i) the order confirming a plan; (j) any application for allowances of compensation and expenses, and any order making or refusing to make such allowances; (k) the order dismissing the proceedings; (l) the final decree; (m) any opinion of the court, or report of a special master, with respect to the matters above enumerated; and (n) such other papers

filed in the proceedings as the Secretary of the Treasury may request or the court may direct to be transmitted to him: *Provided,* That if the Secretary of the Treasury shall determine that the transmission of any such papers is unnecessary, he shall so notify the clerk, whereupon the clerk may dispense with the transmittal of further papers.

The clerk shall also transmit to the Collector of Internal Revenue for the district in which the proceedings are pending a copy of any petition filed under subsection (a) of section 77.

(7) The Interstate Commerce Commission shall forthwith cause to be transmitted to the Secretary of the Treasury copies of (a) any order ratifying the appointment of a trustee; (b) any plan of reorganization, other than the debtor's, filed with the commission; (c) any petition for alteration or modification of a plan; (d) any supplemental report and order modifying a plan; and (e) the plan certified by the commission to the court, together with the report and order approving the plan: *Provided,* That if the Secretary of the Treasury shall determine that the transmission of any such papers is unnecessary, he shall so notify the commission, whereupon the commission may dispense with the transmittal of further papers.

(8) All papers filed with the court and with the Interstate Commerce Commission shall have attached thereto such copies as may be required to carry out this general order.

(9) Any order fixing the time for a hearing on the approval or confirmation by the court of a plan which affects claims or stock of the United States shall include a reasonable notice to the Secretary of the Treasury of not less than thirty days.

(10) All proceedings before the commission under section 77 shall be conducted in accordance with its rules of practice and such special instructions, rules, and regula-

tions as it may issue pursuant to the provisions of said section.

(11) All process to be served outside of the district in which proceedings under section 77 are pending shall be returnable at such time as the judge shall determine, and shall be directed to and served by the United States marshal for the district in which service is to be effected.

50

PROCEEDINGS UNDER SECTION 75 OF THE ACT

The following rules shall apply to proceedings under section 75 of the Act:

(1) Upon the expiration of the term of office of a conciliation commissioner, the judge may reappoint him or appoint other or additional conciliation commissioners.

(2) Every petition for relief filed under subdivision (c) of section 75 shall specify the county or counties in which any land used in the petitioner's farming operations is situated, and shall not be granted unless a conciliation commissioner for such county, or for one of such counties, has previously been appointed. The clerk shall not accept the petition unless it is accompanied by the filing fee and the schedules, which shall be in duplicate. Upon the filing of the petition the judge shall enter an order either approving it as properly filed under the section, or dismissing it for want of jurisdiction. If the petition is approved, the case shall be referred, and one of the duplicate schedules delivered, to a conciliation commissioner appointed for service in said county or in one of said counties.

(3) Within ten days after the approval of the petition, or within such further time as the judge for cause shown may allow, the farmer shall file with the conciliation commissioner an inventory of his estate, and the commissioner shall thereupon call the first meeting of creditors, to be held before him at such place as he deems most

convenient for the parties in interest, upon written and published notice as provided in section 58 of the Act. Prior to the meeting he shall set off to the farmer the exemptions to which the farmer is entitled.

(4) If the farmer has not applied for confirmation within such reasonable time as has been finally fixed therefor, which shall be not later than three months after the date of the first meeting, the conciliation commissioner shall, unless the judge for cause shown shall have permitted a further extension, forthwith report the facts to the judge, who shall thereupon dismiss the proceedings.

(5) The money to be paid upon the confirmation of a composition shall be placed in a depository to be designated by order of the judge, subject to withdrawal by the depositor upon the countersignature of the conciliation commissioner. The judge shall furnish a copy of this general order to the depositories and also the name of any conciliation commissioner whose countersignature is authorized.

(6) Application for confirmation shall be filed with the conciliation commissioner who shall forthwith transmit it to the judge with (a) the acceptances, (b) the proofs of claims which have been allowed and those which have been disallowed, (c) a list of the debts having priority, (d) a list of the secured debts, with a description of the security of each, (e) the final inventory, with a list of the exemptions, and (f) a report of the commissioner recommending or opposing confirmation and, in the case of an extension, stating to what extent, if any, it would be desirable for the court after confirmation to retain jurisdiction of the farmer and his property.

(7) The judge shall fix a date and place for a hearing before him upon the application for confirmation. At the hearing any creditor opposing confirmation shall file a written specification of the grounds of his opposition. If the judge does not confirm the proposal he may dismiss the proceedings, or refer the specifications to the com-

missioner for testimony and report and thereafter confirm the proposal or dismiss the proceedings.

(8) If a composition or extension proposal is set aside for fraud under the provisions of subdivision (m) of section 75 the case may be dismissed and the clerk shall notify the creditors accordingly. Whenever the terms of the proposal are modified under the provisions of subdivision (l) of said section, the clerk shall send a written notice of the modifications to the creditors.

(9) The personal representative of a deceased farmer who desires in his representative capacity to effect, under section 75, a composition or extension of the debts of the estate, shall attach to his petition, in lieu of schedules, the following papers, certified as correct by the court which appointed him (hereinafter referred to as the probate court): (a) a copy of the order of his appointment, (b) a copy of an order of the probate court authorizing him to file the petition, (c) a detailed inventory of so much of the property constituting the estate as under the laws of the State of which the decedent died a resident would be available for creditors, and (d) a list of the names and addresses of the creditors, showing the amounts allowed or apparently owing to each, the nature of the securities or liens, if any, held by each, and the claims which are entitled to priority. The petition shall show to the satisfaction of the district court that the decedent at the time of his death was a farmer within the meaning of subdivision (r) of section 75, and shall specify the county or counties in which at the time of the decedent's death his farming operations occurred. If the petition is approved by the district court as properly filed under section 75, the clerk shall file a certified copy of the order of approval with the probate court, and from the date of such order until the case is dismissed the district court shall exercise exclusive jurisdiction over the property required to be listed in the inventory as above provided.

(10) Upon the approval of a personal representative's petition the case shall be referred to a conciliation commissioner and proceeded with as in all other cases under section 75 and this general order, except that (a) the original and any amended or supplementary inventory filed by the petitioner with the approval of the probate court shall be deemed to be correct, and no inventory shall be made by the commissioner; (b) all claims allowed by the probate court, and only such claims, shall be allowed by the commissioner or the district court; (c) the petitioner shall file with the application for confirmation a completed list of the claims allowed up to the date of the application, certified as correct by the probate court; and (d) the clerk shall file with the probate court certified copies of all orders of the judge confirming or denying the proposal, modifying its terms, or dismissing the proceedings before or after confirmation.

(11) In so far as is consistent with the provisions of section 75 and of this general order, the conciliation commissioner shall have all the powers and duties of a referee in bankruptcy and the general orders in bankruptcy shall apply to proceedings under said section. A supervisory conciliation commissioner, if appointed, shall exercise such supervision and control over the conduct of proceedings by conciliation commissioners as the judge may from time to time direct.

(12) The twenty-five dollar fees of the conciliation commissioner, and the fees and expenses of the supervisory conciliation commissioner, shall be payable out of appropriated funds in accordance with such instructions as may be issued from time to time by the Attorney General.

51

ANCILLARY RECEIVERSHIPS LIMITED

No ancillary receiver shall be appointed in any district court of the United States in any bankruptcy pro-

ceeding pending in any other district of the United States except (1) upon the application of the primary receiver, or (2) upon the application of any party in interest with the consent of the primary receiver, or by leave of a judge of the court of original jurisdiction. No application for the appointment of such ancillary receiver shall be granted unless the petition contains a detailed statement of the facts showing the necessity for such appointment, which petition shall be verified by the party in interest, or the primary receiver, or by an agent of the party in interest or primary receiver specifically authorized in writing for that purpose and having knowledge of the facts. Such authorization shall be attached to the petition.

52

PROCEEDINGS UNDER CHAPTER X OF THE ACT

(1) This general order shall apply to proceedings under chapter X of the Act.

(2) The general orders in bankruptcy shall, in so far as they are not inconsistent with the provisions of chapter X or of this general order, apply to proceedings under chapter X: *Provided,* That General Orders 12, 16, 17, 18, 20, 21, 28, 29 and 41 shall not apply to such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of the Act.

(3) The clerk shall forthwith transmit to the Collector of Internal Revenue for the district in which the proceedings are brought a copy of each petition filed under section 127 or 128 of the Act.

(4) Whenever, under the provisions of chapter X, a copy of any paper is required to be transmitted to the Securities and Exchange Commission, two copies thereof shall be transmitted.

(5) All papers filed shall be accompanied by such copies as the clerk or referee may require to enable him

to comply with the provisions of the Act and of this general order.

53

BOND OF DESIGNATED DEPOSITORY UNDER SECTION 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 the judicial district in which the court of bankruptcy or the banking institution is located, and two of whom are neither officers nor directors of the institution designated as a depository: *Provided,* That the judge may, in accordance with the provisions of, and the authority conferred in section 1126 of the Revenue Act of 1926, as amended (U. S. C., Title 6, section 15), accept the deposit of the securities therein designated, in lieu of a surety or sureties upon such bond.

(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 moneys deposited with it as such depository, and shall pay out such moneys only as provided by the bankruptcy law and applicable general orders and court rules, and shall abide by all orders of the court in respect of such moneys, and shall otherwise faithfully perform all duties pertaining to it as such depository.

(3) As one means of bringing before the judge of 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 removed from the judicial district of which he was a resident, 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 judge of 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 receiver, trustee or debtor in possession shall deposit with any one depository funds committed to his custody as such receiver, trustee or debtor in possession in excess of the amount of the bond of such depository then in force.

(6) It shall be the duty of the judge 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 has removed from the judicial district of which he was a resident, 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 judge to require each depository 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 judge 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 estates having deposits in such depository, it appears to the judge that the petition can be granted without injury to any party in in-

terest, the judge 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 judge, 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 judge 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 judge, it shall be the duty of the judge to order such depository to pay over all moneys on deposit with it as such depository, and to revoke its designation as depository.

54

PROCEEDINGS UNDER CHAPTER XII OF THE ACT

(1) This general order shall apply to proceedings under chapter XII of the Act.

(2) The general orders in bankruptcy shall, in so far as they are not inconsistent with the provisions of chapter XII or of this general order, apply to proceedings under chapter XII: *Provided,* That General Orders 17, 18, 21, 28 and 29 shall not apply to such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of the Act.

(3) The clerk shall forthwith transmit to the Collector of Internal Revenue for the district in which the proceedings are brought a copy of each petition filed under section 421 or 422 of the Act.

(4) All papers filed shall be accompanied by such copies as the clerk or referee may require to enable him to comply with the provisions of the Act and of this general order.

55

PROCEEDINGS UNDER CHAPTER XIII OF THE ACT

(1) This general order shall apply to proceedings under chapter XIII of the Act.

(2) The general orders in bankruptcy shall, in so far as they are not inconsistent with the provisions of chapter XIII or of this general order, apply to proceedings under chapter XIII: *Provided,* That General Orders 14, 18 and 28 shall not apply to such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of the Act.

(3) The clerk shall forthwith transmit to the Collector of Internal Revenue for the district in which the proceedings are brought a copy of each petition filed under section 621 or 622 of the Act.

(4) All papers filed shall be accompanied by such copies as the clerk or referee may require to enable him to comply with the provisions of the Act and of this general order.

(5) Each proof of claim shall, unless the court is satisfied from its other allegations that the claim is not based upon money loaned or upon any bond, note or other obligation, contain proof that the claim is free from usury as defined by the laws of the place where the debt was contracted.

56

RULES BY COURTS OF BANKRUPTCY

Each court of bankruptcy, by action of a majority of the judges thereof, may from time to time make and amend rules governing its practice in proceedings under the Act not inconsistent with the Act or with these general orders. Copies of rules and amendments so made by any court of bankruptcy shall, upon their promulgation, be furnished to the Supreme Court of the United States.

FORMS IN BANKRUPTCY.

(N. B.—Oaths required by the Act, except upon hearing before a judge, may be administered by referees, by officers authorized to administer oaths in proceedings before the courts of the United States or under the laws of the State where the same are to be taken, and by diplomatic or consular officers of the United States in any foreign country.

Each paper filed should have a caption, similar to that of the Debtor's Petition, Form No. 1, as prescribed in General Order 5.)

FORM No. 1.

DEBTOR'S PETITION.

In the District Court of the United States for the ——— District of ———.

In the matter of ———, *Bankrupt.*	In Bankruptcy No. ———.

PETITION

To the Honorable ——— ———,

Judge of the District Court of the United States for the ——— District of ———:

The petition of ——— ———, residing at No. — ——— Street, in ———, County of ———, State of ———, by occupation a ———, and employed by ——— [*or* engaged in the business of ———], respectfully represents:

1. Your petitioner has had his principal place of business [*or* has resided, *or* has had his domicile] at ———, within the above judicial district, for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district.

2. Your petitioner owes debts and is willing to surrender all his property for the benefit of his creditors, except such as is exempt by law, and desires to obtain the benefit of the Act of Congress relating to bankruptcy.

3. The schedule hereto annexed, marked Schedule A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and, so far as it is possible to ascertain, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said Act.

4. The schedule hereto annexed, marked Schedule B, and verified by your petitioner's oath, contains an accurate inventory of all his property, real and personal, and such further statements concerning said property as are required by the provisions of said Act.

Wherefore your petitioner prays that he may be adjudged by the court to be a bankrupt within the purview of said Act.

——— ———,
Petitioner.

———— ————, *Attorney.*

State of ————————}
County of ————————} *ss.*

I, ——— ———, the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

——— ———,
Petitioner.

Subscribed and sworn to before me this ——— day of ———, 19—.

——— ———,
———— ————.
[*Official character.*]

SCHEDULE A.—STATEMENT OF ALL DEBTS OF BANKRUPT.

SCHEDULE A–1.

Statement of all creditors to whom priority is secured by the act.

Claims which have priority.	Reference to ledger or voucher.	Names of creditors.	Residences (if unknown, that fact must be stated).	When and where incurred or contracted.	Whether claim is contingent, unliquidated or disputed.	Nature and consideration of the debt, and whether incurred or contracted as partner or joint contractor and, if so, with whom.	Amount due or claimed.
a.—Wages due workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt, to an amount not exceeding $600 each, earned within three months before filing the petition.							$
b.—Taxes due and owing to— (1) The United States. (2) The State of ———. (3) The county, district or municipality of ———, State of ———.							
c.—(1) Debts owing to any person, including the United States, who by the laws of the United States is entitled to priority. (2) Rent owing to a landlord who is entitled to priority by the laws of the State of ———, accrued within three months before filing the petition, for actual use and occupancy.						Total----------	

——— ———, *Petitioner.*

SCHEDULE A.—STATEMENT OF ALL DEBTS OF BANKRUPT—Continued

SCHEDULE A–2.

Creditors holding securities.

[N. B.—Particulars of securities held, with dates of same, and when they were given, to be stated under the names of the several creditors, and also particulars concerning each debt, as required by the Act of Congress relating to bankruptcy, and whether contracted as partner or joint contractor with any other person; and if so, with whom.]

Reference to ledger or voucher.	Names of creditors.	Residences (if unknown, that fact must be stated).	Description of securities.	When and where debts were contracted, and nature and consideration thereof.	Whether claim is contingent, unliquidated or disputed.	Value of securities.	Amount due or claimed.
						$	$
					Total		

——— ———, *Petitioner.*

SCHEDULE A–3.

Creditors whose claims are unsecured.

[N. B.—When the name and residence (or either) of any drawer, maker, indorser, or holder of any bill or note, etc., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property.]

Reference to ledger or voucher.	Names of creditors.	Residences (if unknown, that fact must be stated).	When and where contracted.	Whether claim is contingent, unliquidated or disputed.	Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner or joint contractor with any other person; and, if so, with whom.	Amount due or claimed.
						$
					Total	

——— ———, *Petitioner.*

SCHEDULE A.—STATEMENT OF ALL DEBTS OF BANKRUPT—Continued

SCHEDULE A–4

Liabilities on notes or bills discounted which ought to be paid by the drawers, makers, acceptors, or indorsers

[N. B.—The dates of the notes or bills, and when due, with the names, residences, and the business or occupation of the drawers, makers, acceptors, or indorsers thereof, are to be set forth under the names of the holders. If the names of the holders are not known, the name of the last holder known to the debtor shall be stated, and his business and place of residence. The same particulars shall be stated as to notes or bills on which the debtor is liable as indorser.]

Reference to ledger or voucher	Names of holders as far as known.	Residences (if unknown, that fact must be stated).	Place where contracted.	Whether claim is disputed.	Nature and consideration of liability, whether same was contracted as partner or joint contractor, or with any other person; and, if so, with whom.	Amount due or claimed.
						$
					Total	

——— ———, *Petitioner.*

SCHEDULE A–5.

Accommodation paper.

[N. B.—The dates of the notes or bills, and when due, with the names and residences of the drawers, makers, acceptors, and indorsers thereof, are to be set forth under the names of the holders; if the debtor be liable as drawer, maker, acceptor, or indorser thereof, it is to be stated accordingly. If the names of the holders are not known, the name of the last holder known to the debtor should be stated, with his residence. Give same particulars as other commercial paper.]

Reference to ledger or voucher.	Names of holders.	Residences (if unknown, that fact must be stated).	Names and residences of persons accommodated.	Place where contracted.	Whether claim is disputed.	Whether liability was contracted as partner or joint contractor, or with any other person; and, if so, with whom.	Amount due or claimed.
							$
						Total	

(723)

———— ————, *Petitioner.*

OATH TO SCHEDULE A.

State of ————}
County of ————} *ss.*

I, ————, the person who subscribed to the foregoing schedule, do hereby make solemn oath that the said schedule is a statement of all my debts, in accordance with the Act of Congress relating to bankruptcy, according to the best of my knowledge, information, and belief.

————— ————, *Petitioner.*

Subscribed and sworn to before me this ———— day of ————, 19—.

————— ————,
————— ————.
(*Official character.*)

SCHEDULE B.—STATEMENT OF ALL PROPERTY OF BANKRUPT.

SCHEDULE B–1.

Real estate.

Location and description of all real estate owned by debtor, or held by him, whether under deed, lease or contract.	Incumbrances thereon, if any, and dates thereof.	Statement of particulars relating thereto.	Estimated value of debtor's interest.	
			$	
		Total		

(724)

——— ———, *Petitioner.*

SCHEDULE B–2

Personal property.

		$	
a.—Cash on hand			
b.—Negotiable and non-negotiable instruments and securities of any description, including stocks in incorporated companies, interests in joint stock companies, and the like (each to be set out separately)			
c.—Stock in trade, in ——— business of ———, at ———, of the value of———			
d.—Household goods and furniture, household stores, wearing apparel and ornaments of the person			
e.—Books, prints, and pictures			
f.—Horses, cows, sheep, and other animals (with number of each)			
g.—Automobiles and other vehicles			
h.—Farming stock and implements of husbandry			
i.—Shipping, and shares in vessels			
j.—Machinery, fixtures, apparatus, and tools used in business, with the place where each is situated			
k.—Patents, copyrights, and trade-marks			
l.—Goods or personal property of any other description, with the place where each is situated			
	Total		

(725)

——— ———, *Petitioner.*

SCHEDULE B.—STATEMENT OF ALL PROPERTY OF BANKRUPT—Continued

SCHEDULE B–3.

Choses in action.

		$	
a.—Debts due petitioner on open account			
b.—Policies of insurance			
c.—Unliquidated claims of every nature, with their estimated value			
d.—Deposits of money in banking institutions and elsewhere			
	Total		

——— ———, *Petitioner.*

SCHEDULE B–4.

Property in reversion, remainder, or expectancy, including property held in trust for the debtor or subject to any power or right to dispose of or to charge.

[N. B.—A particular description of each interest must be entered, with a statement of the location of the property, the names and description of the persons now enjoying the same, the value thereof, and from whom and in what manner debtor's interest in such property is or will be derived. If all or any of the debtor's property has been conveyed by deed of assignment, or otherwise, for the benefit of creditors, the date of such deed should be stated, the name and address of the person to whom the property was conveyed, the amount realized as the proceeds thereof, and the disposal of the same, as far as known to the debtor.]

General interest.	Particular description.	Estimated value of interest.
Interest in land		$
Personal property		
Property in money, stock, shares, bonds, annuities, etc		
Rights and powers, legacies and bequests		
	Total	
Property heretofore conveyed for benefit of creditors.		Amount realized as proceeds of property conveyed.
Portion of debtor's property conveyed by deed of assignment, or otherwise, for the benefit of creditors; date of such deed, name and address of party to whom conveyed; amount realized therefrom, and disposal of same, as far as known to debtor		
Attorney's fees.		
Sum or sums paid to counsel, and to whom, for services rendered or to be rendered in this bankruptcy		
	Total	

(727)

———— ————, *Petitioner.*

SCHEDULE B.—STATEMENT OF ALL PROPERTY OF BANKRUPT—Continued

SCHEDULE B–5.

Property claimed as exempt from the operation of the act of Congress relating to bankruptcy.

[N. B.—Each item of property must be stated, with its valuation, and, if any portion of it is real estate, its location, description and present use.]

		Valuation.
Property claimed to be exempt by the laws of the United States, with reference to the statute creating the exemption		$
Property claimed to be exempt by State laws, with reference to the statute creating the exemption		
	Total	

(728)

———— ————, *Petitioner.*

SCHEDULE B–6

Books, papers, deeds and writings relating to debtor's business and estate.

The following is a true list of all books, papers, deeds and writings relating to petitioner's trade, business, dealings, estate and effects, or any part thereof, which, at the date of this petition, are in petitioner's possession or under petitioner's custody and control, or which are in the possession or custody of any person in trust for petitioner, or for petitioner's use, benefit, or advantage; and also of all others which have been heretofore, at any time, in petitioner's possession, or under petitioner's custody or control, and which are now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same.

Books.	
Deeds.	
Papers.	

———— ————, *Petitioner.*

OATH TO SCHEDULE B.

State of ————————
County of ———————— } *ss.*

I, ————, the person who subscribed to the foregoing schedule, do hereby make solemn oath that the said schedule is a statement of all my property, real and personal, in accordance with the Act of Congress relating to bankruptcy, according to the best of my knowledge, information, and belief.

———— ————, *Petitioner.*

Subscribed and sworn to before me this ———— day of ————, 19—.

———— ————,
————.
[*Official character.*]

Summary of debts and assets.

[From the statements of the debtor in Schedules A and B.]

Schedule A	1-a	Wages		
Schedule A	1-b (1)	Taxes due United States		
Schedule A	1-b (2)	Taxes due States		
Schedule A	1-b (3)	Taxes due counties, districts and municipalities		
Schedule A	1-c (1)	Debts due any person, including the United States, having priority by laws of the United States		
Schedule A	1-c (2)	Rent having priority		
Schedule A	2	Secured claims		
Schedule A	3	Unsecured claims		
Schedule A	4	Notes and bills which ought to be paid by other parties thereto		
Schedule A	5	Accommodation paper		
		Schedule A, total		
Schedule B	1	Real estate		
Schedule B	2-a	Cash on hand		
Schedule B	2-b	Negotiable and non-negotiable instruments and securities		
Schedule B	2-c	Stock in trade		
Schedule B	2-d	Household goods		
Schedule B	2-e	Books, prints, and pictures		
Schedule B	2-f	Horses, cows, and other animals		
Schedule B	2-g	Automobiles and other vehicles		
Schedule B	2-h	Farming stock and implements		
Schedule B	2-i	Shipping and shares in vessels		
Schedule B	2-j	Machinery, fixtures, and tools		
Schedule B	2-k	Patents, copyrights, and trade-marks		
Schedule B	2-l	Other personal property		
Schedule B	3-a	Debts due on open accounts		
Schedule B	3-b	Policies of insurance		
Schedule B	3-c	Unliquidated claims		
Schedule B	3-d	Deposits of money in banks and elsewhere		
Schedule B	4	Property in reversion, remainder, expectancy or trust		
Schedule B	5	Property claimed as exempt		
Schedule B	6	Books, deeds and papers		
		Schedule B, total		

FORM NO. 2.

STATEMENT OF AFFAIRS.

(For Bankrupt or Debtor Not Engaged in Business.)

(NOTE.—Each question should be answered or the failure to answer explained. If the answer is "none," this should be stated. If additional space is needed for the answer to any question, a separate sheet, properly identified and made a part hereof, should be used and attached.

The term, "original petition," as used in the following questions, shall mean the petition filed under section 3b or 4a of chapter III, section 322 of chapter XI, section 422 of chapter XII, or section 622 of chapter XIII.)

1. **Name and residence.**
   a. What is your full name?

   b. Where do you now reside?

   c. Where else have you resided during the six years immediately preceding the filing of the original petition herein?

2. **Occupation and income.**
   a. What is your occupation?

   b. Where are you now employed?
      (Give the name and address of your employer, or the address at which you carry on your trade or profession, and the length of time you have been so employed.)

   c. Have you been in partnership with anyone, or engaged in any business, during the six years immediately preceding the filing of the original petition herein?
      (If so, give particulars, including names, dates and places.)

   d. What amount of income have you received from your trade or profession during each of the two years immediately preceding the filing of the original petition herein?

   e. What amount of income have you received from other sources during each of these two years?
      (Give particulars, including each source, and the amount received therefrom.)

3. **Income tax returns.**
   a. Where did you file your last federal and state income tax returns, and for what years?

4. **Bank accounts and safe deposit boxes.**
   a. What bank accounts have you maintained, alone or together with any other person, and in your own or any other name, within the two years immediately preceding the filing of the original petition herein?
      (Give the name and address of each bank, the name in which the deposit was maintained, and the name of every person authorized to make withdrawals from such account.)

4. **Bank accounts and safe deposit boxes**—Continued.

b. What safe deposit box or boxes or other depository or depositories have you kept or used for your securities, cash or other valuables, within the two years immediately preceding the filing of the original petition herein?

(Give the name and address of the bank or other depository, the name in which each box or other depository was kept, the name of every person who had the right of access thereto, a brief description of the contents thereof, and, if surrendered, when surrendered, or, if transferred, when transferred and the name and address of the transferee.)

5. **Books and records.**

a. Have you kept books of account or records relating to your affairs within the two years immediately preceding the filing of the original petition herein?

b. In whose possession are these books or records?

(Give names and addresses.)

c. Have you destroyed any books of account or records relating to your affairs within the two years immediately preceding the filing of the original petition herein?

(If so, give particulars, including date of destruction and reason therefor.)

6. **Property held in trust.**

a. What property do you hold in trust for any other person?

(Give name and address of each person, and a description of the property and the amount or value thereof.)

7. **Prior bankruptcy or other proceedings; assignments for benefit of creditors.**

a. What proceedings under the Bankruptcy Act have been brought by or against you during the six years immediately preceding the filing of the original petition herein?

(Give the location of the bankruptcy court, the nature of the proceeding, and whether a discharge was granted or refused, or a composition, arrangement or plan was or was not confirmed.)

b. Was any of your property, at the time of the filing of the original petition herein, in the hands of a receiver or trustee?

(If so, give the name and location of the court, the nature of the proceeding, a brief description of the property, and the name of the receiver or trustee.)

7. **Prior bankruptcy or other proceedings; assignments for benefit of creditors**—Continued.

c. Have you made any assignment of your property for the benefit of your creditors, or any general settlement with your creditors, within the two years immediately preceding the filing of the original petition herein?

(If so, give dates, the name of the assignee, and a brief statement of the terms of assignment or settlement.)

8. **Suits, executions and attachments.**

a. Have you been party plaintiff or defendant in any suit within the year immediately preceding the filing of the original petition herein?

(If so, give the name and location of the court, the title and nature of the proceeding, and the result.)

b. Has any execution or attachment been levied against your property within the four months immediately preceding the filing of the original petition herein?

(If so, give particulars, including property seized and at whose suit.)

9. **Loans repaid.**

a. What repayments of loans have you made during the year immediately preceding the filing of the original petition herein?

(Give the name and address of the lender, the amount of the loan and when received, the amount and date when repaid, and, if the lender is a relative, the relationship.)

10. **Transfer of property.**

a. What property have you transferred or otherwise disposed of during the year immediately preceding the filing of the original petition herein?

(Give a description of the property, the date of the transfer or disposition, to whom transferred or how disposed of, and, if the transferee is a relative, the relationship, the consideration, if any, received therefor, and the disposition of such consideration.)

11. **Losses.**

a. Have you suffered any losses from fire, theft or gambling during the year immediately preceding the filing of the original petition herein?

(If so, give particulars, including dates, and the amounts of money or value and general description of property lost.)

——— ———,
Bankrupt [or *Debtor*].

State of ———— }
County of ———— } *ss.*

I, ——— ———, the person who subscribed to the foregoing statement of affairs, do hereby make solemn oath that the answers therein contained are true and complete to the best of my knowledge, information, and belief.

——— ———,
Bankrupt [or *Debtor*].

Subscribed and sworn to before me this ——— day of ———, 19—.

——— ———,
———.
[*Official character.*]

FORM No. 3.

STATEMENT OF AFFAIRS.

(For Bankrupt or Debtor Engaged in Business.)

(NOTE.—Each question should be answered or the failure to answer explained. If the answer is "none," this should be stated. If additional space is needed for the answer to any question, a separate sheet properly identified and made a part hereof, should be used and attached.

If the bankrupt or debtor is a partnership or a corporation, the questions shall be deemed to be addressed to, and shall be answered on behalf of, the partnership or corporation; and the statement shall be verified by a member of the partnership or by a duly authorized officer of the corporation.

The term, "original petition," as used in the following questions, shall mean the petition filed under section 3b or 4a of chapter III, section 322 of chapter XI, section 422 of chapter XII, or section 622 of chapter XIII.)

1. **Nature, location and name of business.**

a. What business are you engaged in?

(If business operations have been terminated, give the date of such termination.)

b. Where, and under what name, do you carry on such business?

c. When did you commence such business?

d. Where else, and under what other names, have you carried on business within the six years immediately preceding the filing of the original petition herein?

(Give street addresses, the names of any partners, joint adventurers, or other associates, the nature of the business, and the periods for which it was carried on.)

2. **Books and records.**

a. By whom, or under whose supervision, have your books of account and records been kept during the two years immediately preceding the filing of the original petition herein?

(Give names, addresses, and periods of time.)

b. By whom have your books of account and records been audited during the two years immediately preceding the filing of the original petition herein?

(Give names, addresses, and dates of audits.)

c. In whose possession are your books of account and records?

(Give names and addresses.)

3. **Financial statements.**

a. Have you issued any financial statements within the two years immediately preceding the filing of the original petition herein?

(Give dates, and the names and addresses of the persons to whom issued, including mercantile and trade agencies.)

4. **Inventories.**

a. When was the last inventory of your property taken?

b. By whom, or under whose supervision, was this inventory taken?

c. What was the amount, in dollars, of the inventory?

(State whether the inventory was taken at cost, market, or otherwise.)

4. **Inventories**—Continued.

d. When was the next prior inventory of your property taken?

e. By whom, or under whose supervision, was this inventory taken?

f. What was the amount, in dollars, of the inventory?

(State whether the inventory was taken at cost, market, or otherwise.)

g. In whose possession are the records of the two inventories above referred to?

(Give names and addresses.)

5. **Income other than from operation of business.**

a. What amount of income, other than from the operation of your business, have you received during each of the two years immediately preceding the filing of the original petition herein?

(Give particulars, including each source, and the amount received therefrom.)

6. **Income tax returns.**

a. Where did you file your last federal and state income tax returns, and for what years?

7. **Bank accounts and safe deposit boxes.**

a. What bank accounts have you maintained, alone or together with any other person, and in your own or any other name, within the two years immediately preceding the filing of the original petition herein?

(Give the name and address of each bank, the name in which the deposit was maintained, and the name of every person authorized to make withdrawals from such account.)

b. What safe deposit box or boxes or other depository or depositories have you kept or used for your securities, cash or other valuables, within the two years immediately preceding the filing of the original petition herein?

(Give the name and address of the bank or other depository, the name in which each box or other depository was kept, the name of every person who had the right of access thereto, a brief description of the contents thereof, and, if surrendered, when surrendered, or, if transferred, when transferred and the name and address of the transferee.)

8. **Property held in trust.**

a. What property do you hold in trust for any other person?

(Give name and address of each person, and a description of the property and the amount or value thereof.)

9. **Prior bankruptcy or other proceedings; assignments for benefit of creditors.**

a. What proceedings under the Bankruptcy Act have been brought by or against you during the six years immediately preceding the filing of the original petition herein?

(Give the location of the bankruptcy court, the nature of the proceeding, and whether a discharge was granted or refused, or a composition, arrangement or plan was or was not confirmed.)

b. Was any of your property, at the time of the filing of the original petition herein, in the hands of a receiver or trustee?

(If so, give the name and location of the court, the nature of the proceeding, a brief description of the property, and the name of the receiver or trustee.)

c. Have you made any assignment of your property for the benefit of your creditors, or any general settlement with your creditors, within the two years immediately preceding the filing of the original petition herein?

(If so, give dates, the name of the assignee, and a brief statement of the terms of assignment or settlement.)

10. **Loans repaid.**

a. What repayments of loans have you made during the year immediately preceding the filing of the original petition herein?

(Give the name and address of the lender, the amount of the loan and when received, the amount and date when repaid, and, if the lender is a relative, the relationship. If the bankrupt or debtor is a partnership, state whether the lender is or was a partner or a relative of a partner, and, if so, the relationship. If the bankrupt or debtor is a corporation, state whether the lender is or was an officer, director or stockholder, or a relative of an officer, director or stockholder, and, if so, the relationship.)

11. **Transfer of property.**

a. What property have you transferred or disposed of, other than in the ordinary course of business, during the year immediately preceding the filing of the original petition herein?

(Give a description of the property, the date of the transfer or disposition, to whom transferred or how disposed of, and, if the transferee is a relative, the relationship, the consideration, if any, received therefor, and the disposition of such consideration.)

12. **Accounts receivable.**

a. Have you assigned any of your accounts receivable during the year immediately preceding the filing of the original petition herein?

(If so, give names and addresses of assignees.)

13. **Losses.**

a. Have you suffered any losses from fire, theft or gambling during the year immediately preceding the filing of the petition herein?

(If so, give particulars, including dates, and the amounts of money or value and general description of property lost.)

(*If the bankrupt or debtor is a partnership or corporation the following additional questions should be answered.*)

14. **Withdrawals.**

a. What personal withdrawals, including loans, have been made by each member of the partnership, or by each officer, director or managing executive of the corporation, during the year immediately preceding the filing of the original petition herein?

(Give the name of each person, whether a partner, officer, director or manager, the dates and amounts of withdrawals, and the nature or purpose thereof.)

15. **Members of partnership; officers, directors, managers, and principal stockholders of corporation.**

a. What are the names and addresses of each member of the partnership, or the names, titles and addresses of each officer, director and managing executive, and of each stockholder holding 25 per cent. or more of the issued and outstanding stock, of the corporation?

_____ _____,

Bankrupt [or *Debtor*].

State of ————————|
County of ————————| *ss.*

I, ——— ———, the person who subscribed to the foregoing statement of affairs, do hereby make solemn oath that the answers therein contained are true and complete to the best of my knowledge, information, and belief.

——— ———,
Bankrupt [or *Debtor*].

Subscribed and sworn to before me this ——— day of ———, 19—.

——— ———,
———— ————
[*Official character.*]

FORM NO. 4.

PARTNERSHIP PETITION.

To the Honorable ——— ———, Judge of the District Court of the United States for the ——— District of ———:

The petition of ——— ———, of ———, and ——— ———, of ———, respectfully represents:

1. Your petitioners are copartners, trading under the firm name of ——— ———, and file this petition jointly in behalf of said partnership and of themselves, individually.

2. The said partnership and your petitioners have had their principal place of business at ———, within the above judicial district, for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district.

3. The said partnership and your petitioners owe debts.

4. Your petitioners are willing to surrender all of the property of said partnership and all of their individual property for the benefit of the creditors of said partnership and of their creditors, except such property as is exempt by law, and desire to obtain the benefit of the Act of Congress relating to bankruptcy.

5. The schedule hereto annexed, marked Schedule A, and verified by the oaths of your petitioners, contains a full and true statement of all the debts of said partnership, and, so far as it is possible to ascertain, the names and places of residence of its creditors, and such further statements concerning said debts as are required by the provisions of said Act.

6. The schedule hereto annexed, marked Schedule B, and verified by the oaths of your petitioners, contains an accurate inventory of all the property, real and personal, of said partnership, and such further statements concerning said property as are required by the provisions of said Act.

7. The schedule hereto annexed, marked Schedule C, and verified by the oath of your petitioner, ——— ———, contains a full and true statement of all his individual debts, and, so far as it is possible to ascertain, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said Act.

8. The schedule hereto annexed, marked Schedule D, and verified by the oath of your petitioner, ——— ———, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said Act.

9. The schedule hereto annexed, marked Schedule E, and verified by the oath of your petitioner, ——— ———, contains a full and true statement of all his individual debts, and, so far as it is possible to ascertain, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said Act.

10. The schedule hereto annexed, marked Schedule F, and verified by the oath of your petitioner, ——— ———, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said Act.

Wherefore your petitioners pray that the said partnership, and each of your petitioners, may be adjudged by the court to be a bankrupt within the purview of said Act.

——— ———,
——— ———,
Petitioners.

——— ———, *Attorney.*

State of ———— }
County of ———— } *ss.*

——— ——— and ——— ———, the petitioners named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of their knowledge, information, and belief.

——— ———,
——— ———,
Petitioners.

Subscribed and sworn to before me this ——— day of ———, 19—.

——— ———,
——— ———.
[*Official character.*]

[Schedules to be annexed corresponding with schedules under Form No. 1.]

FORM No. 5.

CREDITORS' PETITION.

To the Honorable ——— ———, Judge of the District Court of the United States for the ——— District of ———:

The petition of ——— ———, of ———, and ——— ———, of ———, and ——— ———, of ———, respectfully represents:

1. ——— ———, of ———, has had his principal place of business [*or* has resided *or* has had his domicile] at ———, within the above judicial district, for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district.

2. Said ——— ——— owes debts to the amount of $1000, and is not a wage-earner or a farmer.

3. Your petitioners are creditors of said ——— ———, having provable claims against him, fixed as to liability and liquidated in amount, amounting in the aggregate, in excess of the value of securities held by them, to $500. The nature and amount of your petitioners' claims are as follows:

———————————————————————

———————————————————————

4. Within four months next preceding the filing of this petition, the said ——— ——— committed an act of bankruptcy, in that he did heretofore, to wit, on the ——— day of ———, 19—, ———————

———————————————————————

Wherefore your petitioners pray that service of this petition, with a subpoena, may be made upon said ———, as provided in the Act of Congress relating to bankruptcy, and that he may be adjudged by the court to be a bankrupt within the purview of said Act.

——— ———,
——— ———,
——— ———,
Petitioners.

——— ———, *Attorney.*

State of ———————}
County of ———————} *ss.*

——— ———, ——— ———, and ——— ———, the petitioners above named, do hereby make solemn oath that the statements contained in the foregoing petition, subscribed by them, are true.

——— ———,
——— ———,
——— ———,
Petitioners.

Subscribed and sworn to before me this ——— day of ———, 19—.

———— ————,
————.
[*Official character.*]

FORM No. 6.

SUBPOENA TO ALLEGED BANKRUPT.

United States of America, ——— District of ———.
To ———, in said district:

A petition in bankruptcy having been filed on the ——— day of ———, 19—, before the District Court of the United States within and for the ——— District of ———, as a court of bankruptcy, praying that you may be adjudged a bankrupt under the Act of Congress relating to bankruptcy,

You are hereby summoned and required to appear and plead to said petition, on or before the ——— day of ———, 19—; and, if you fail to do so, you may be adjudged a bankrupt by default.

Witness the Honorable ——— ———, judge of said court, and the seal thereof, at ———, this ——— day of ———, 19—.

———— ————,
Clerk.

[SEAL OF THE COURT]

FORM No. 7.

ANSWER OF ALLEGED BANKRUPT.

A petition having been filed in the above court on the ——— day of ———, 19—, praying that your respondent, the alleged bankrupt above named, be adjudged a bankrupt, your respondent now appears and answers the said petition as follows:

1. Respondent admits the allegations contained in paragraphs ——— of the petition.

2. Respondent denies each and every allegation contained in paragraphs ——— of the petition.

Wherefore your respondent prays that a hearing may be had on said petition and this answer, and that the issues presented thereby may be determined by the court [*or* by a jury].

———— ————.

State of ————————}
County of ————————} *ss.*

I, ——— ———, the respondent named in the foregoing answer, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

———— ————.

Subscribed and sworn to before me this ——— day of ———, 19—.

———— ————,

————.

[*Official character.*]

FORM No. 8.

BOND OF APPLICANT FOR A RECEIVER OR MARSHAL.

Know all men by these presents: That we, ——— ———, as principal, and ——— ———, as surety, are held and firmly bound unto ——— ———, in the sum of ——— dollars, to be paid to the said ——— ———, his executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this ——— day of ———, 19—.

The condition of this obligation is such that whereas a petition in bankruptcy has been filed in the District Court of the United States for the ——— District of ——— against the said ——— ———, and the said ——— ——— has applied to that court to have a receiver [*or* marshal] take charge of the property of said ——— ———, subject to the further order of said court;

Now, therefore, if said property be taken in charge by said receiver [*or* marshal], and if the said ——— ——— shall indemnify the said ——— ——— for such costs, counsel fees, expenses, and damages as may be occasioned by such seizure, taking, and detention of such property in the event the said petition is dismissed or withdrawn by the petitioners, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in the presence of

———— ———— ———— ———— [SEAL]

———— ———— ———— ———— [SEAL]

Approved this ——— day of ———, 19—.

————,

District Judge or *Referee in Bankruptcy.*

FORM No. 9.

COUNTERBOND TO RECEIVER OR MARSHAL.

Know all men by these presents: That we, ——— ———, as principal, and ——— ———, as surety, are held and firmly bound unto ——— ———, marshal of the United States of the ——— District of ——— [*or* the receiver appointed by the District Court of the United States for the ——— District of ——— to take charge of the property of ——— ———], in the sum of ——— dollars, lawful money of the United States, to be paid to the said ——— ———, his successors in office or assigns, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Signed and sealed this ——— day of ———, 19—.

The condition of this obligation is such that whereas a petition in bankruptcy has been filed in the said district court against the said ——— ———, and the said court has ordered said ——— ——— to take charge of the property of the said ——— ———, subject to the further order of the court, and the said district court upon a petition of said ——— ——— has ordered the said property to be released to him,

Now, therefore, if the said property shall be released accordingly to the said ——— ———, and the said ——— ———, being adjudged a bankrupt, shall account for and turn over said property or pay the value thereof in money at the time of seizure to the trustee, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in
the presence of

——— ——— ——— ——— [SEAL]

——— ——— ——— ——— [SEAL]

Approved this ——— day of ———, 19—.

———,
District Judge or *Referee in Bankruptcy.*

FORM No. 10.

ADJUDICATION THAT DEBTOR IS NOT A BANKRUPT.

At ———, in said district, on the ——— day of ———, 19—.

This cause having been heard at ———, in said court, upon the petition of ——— ———, ——— ———, and ——— ———, that ——— ——— be adjudged a bankrupt under the Act of Congress relating to bankruptcy; and [*here state the proceedings, whether there was no opposition, or, if opposed, what proceedings were had*];

And, upon consideration of the proofs in said cause [*and the arguments of counsel thereon, if any*], it having been found that the material facts alleged in said petition were not proved;

It is adjudged that said ——— ——— is not a bankrupt as alleged, and that said petition be dismissed, with costs.

———— ————,
District Judge or *Referee in Bankruptcy.*

FORM No. 11.

ADJUDICATION OF BANKRUPTCY.

At ———, in said district, on the ——— day of ———, 19—.

The petition of ——— ———, filed on the ——— day of ———, 19—, that ——— ——— be adjudged a bankrupt under the Act of Congress relating to bankruptcy, having been heard and duly considered; and [*here state the proceedings, whether there was no opposition, or, if opposed, what proceedings were had*];

It is adjudged that the said ——— ——— is a bankrupt under the Act of Congress relating to bankruptcy.

———— ————,
District Judge or *Referee in Bankruptcy.*

FORM No. 12.

APPOINTMENT AND OATH OF APPRAISER.

——— ———, of ———, a disinterested person, is hereby appointed appraiser, forthwith to appraise, after having been duly sworn, all the items of real and personal property belonging to the estate of the said bankrupt, and to prepare and file with the court a report of said appraisal.

[*Here set out such instructions as may be deemed appropriate for the appraisal of the property of the particular estate*].

Dated at ———, this ——— day of ———, 19—.

———— ————,
Referee in Bankruptcy.

United States of America }
——— District of ——— } *ss.*

I, ——— ———, the person above named, do hereby make solemn oath that I will fully and fairly appraise the aforesaid property according to my best skill and judgment.

———— ————.

Subscribed and sworn to before me this ——— day of ———, 19—.

———— ————,
———— ————.
[*Official character.*]

FORM No. 13.

ORDER OF GENERAL REFERENCE.

At ———, in said district, on the ——— day of ———, 19—.

Whereas a petition was filed in this court, on the ——— day of ———, 19—, by [*or* against] ——— ———, the bankrupt [*or* alleged bankrupt] above named, praying that he be adjudged a bankrupt under the Act of Congress relating to bankruptcy; [*If the debtor has been adjudged a bankrupt, add:* and whereas the said ——— ——— was adjudged a bankrupt, upon said petition, on the ——— day of ———, 19—;]

It is ordered that the above entitled proceeding be, and it hereby is, referred to ——— ———, one of the referees in bankruptcy of this court, to take such further proceedings therein as are required and permitted by said Act, and that the said ——— ——— shall henceforth attend before the said referee and submit to such orders as may be made by him or by a judge of this court relating to said bankruptcy.

——— ———,
District Judge.

FORM No. 14.

ORDER OF REFERENCE IN JUDGE'S ABSENCE.

At ———, in said district, on the ——— day of ———, 19—.

Whereas a petition was filed in this court on the ——— day of ———, 19—, by [*or* against] ——— ———, the alleged bankrupt above named, praying that he be adjudged a bankrupt under the Act of Congress relating to bankruptcy; and whereas the judge of said court was absent from said district [*or* said division of said district] at the time of the filing of said petition [*or, in case of involuntary bankruptcy,* on the next day after the last day on which pleadings might have been filed, and none have been filed by the alleged bankrupt];

It is ordered that the above entitled proceeding be, and it hereby is, referred to ——— ———, one of the referees in bankruptcy of this court, to consider said petition and take such proceedings therein as are required and permitted by said Act, and that the said ——— ———, shall henceforth attend before said referee.

Witness my hand and the seal of the said court.

——— ———,
Clerk.

[SEAL OF THE COURT]

FORM No. 15.

REFEREE'S OATH OF OFFICE.

I, ——— ———, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as referee in bankruptcy, according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States: So help me God.

——— ———.

Subscribed and sworn to before me this ——— day of ———, 19—.

——— ———,

District Judge.

FORM No. 16.

BOND OF REFEREE.

Know all men by these presents: That we, ——— ———, of ———, as principal, and ——— ———, of ———, and ——— ———, of ———, as sureties, are held and firmly bound to the United States of America in the sum of ——— dollars, lawful money of the United States, to be paid to the said United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this ——— day of ———, 19—.

The condition of this obligation is such that whereas the said ——— ———, has been on the ——— day of ———, 19—, appointed by the Honorable ——— ———, Judge of the District Court of the United States for the ——— District of ———, a referee in bankruptcy in said district, under the Act of Congress relating to bankruptcy;

Now, therefore, if the said ——— ——— shall well and faithfully discharge and perform all the duties pertaining to the said office of referee in bankruptcy, then this obligation to be void; otherwise to remain in full force and virtue.

Signed and sealed in
the presence of

——— ———, [L. S.]

——— ———, [L. S.]

——— ———. [L. S.]

Approved this ——— day of ———, 19—.

——— ———,

District Judge.

FORM No. 17.

NOTICE OF FIRST MEETING OF CREDITORS.

To the creditors of ——— ———, of ———, in the County of ———, and district aforesaid, a bankrupt:

Notice is hereby given that said ——— ——— has been duly adjudged a bankrupt on a petition filed by [*or* against] him on the ——— day of ———, 19—, and that the first meeting of his creditors will be held at ———, in ———, on the ——— day of ———, 19—, at — o'clock in the ——— noon, at which place and time the said creditors may attend, prove their claims, appoint a trustee, appoint a committee of creditors, examine the bankrupt, and transact such other business as may properly come before said meeting.

Dated at ———, this ——— day of ———, 19—.

———— ————,
Referee in Bankruptcy.

FORM No. 18.

POWER OF ATTORNEY.

To ——— ——— and ——— ———:

I, ——— ———, of ———, in the County of ———, State of ———, do hereby authorize you, or any one of you, with full power of substitution, to attend all meetings of creditors of the bankrupt aforesaid, and all adjournments thereof, at the places and times appointed by the court, and for me and in my name to vote for or against any proposal or resolution that may be then submitted under the Act of Congress relating to bankruptcy, to vote for a trustee or trustees of the estate of the said bankrupt and for a committee of creditors, to accept any arrangement or wage-earner's plan proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends, and payment or delivery of money or of other consideration due me under such arrangement or wage-earner's plan, and for any other purpose in my interest whatsoever; and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be held therein for any of the purposes aforesaid.

In witness whereof I have hereunto signed my name and affixed my seal the ——— day of ———, 19—.

———— ————, [L. S.]

Signed, sealed and delivered
in the presence of

———— ————.

Acknowledged before me this ——— day of ———, 19—.

———— ————,
———— ————.
[*Official character.*]

FORM No. 19.

SPECIAL POWER OF ATTORNEY.

To ——— ——— and ——— ———:

I hereby authorize you, or any one of you, to attend the meeting of creditors of the bankrupt aforesaid, advertised or directed to be held at ———, on the ——— day of ———, before ———, or any adjournment thereof, and then and there for me and in my name to vote for or against any proposal or resolution that may be lawfully made or passed at such meeting or adjourned meeting, and in the choice of trustee or trustees of the estate of the said bankrupt.

In witness whereof I have hereunto signed my name and affixed my seal the ——— day of ———, 19—.

——— ———, [L. S.]

Signed, sealed and delivered
in the presence of
——— ———.

Acknowledged before me this ——— day of ———, 19—.

——— ———,
———.
[*Official character.*]

FORM No. 20.

ORDER APPROVING APPOINTMENT OF TRUSTEE.

At ———, in said district, on the ——— day of ———, 19—.

——— ———, of ———, having been appointed trustee of the estate of the above named bankrupt by the creditors of said bankrupt, as provided in the Act of Congress relating to bankruptcy,

It is ordered that the appointment of said ——— ———, as trustee be, and it hereby is, approved, and the amount of his bond is fixed at ——— dollars.

——— ———,
Referee in Bankruptcy.

FORM No. 21.

APPOINTMENT OF TRUSTEE BY REFEREE.

At ———, in said district, on the ——— day of ———, 19—.

The creditors of the above named bankrupt having failed to appoint a trustee as provided in the Act of Congress relating to bank-

ruptcy, I hereby appoint ——— ———, of ———, trustee of the estate of said bankrupt, and fix the amount of his bond at ——— dollars.

———— ————,
Referee in Bankruptcy.

FORM No. 22.

NOTICE TO TRUSTEE OF HIS APPOINTMENT.

To ——— ———, of ———:

I hereby notify you that you were duly appointed trustee [*or* one of the trustees] of the estate of the above named bankrupt at the first meeting of creditors, on the ——— day of ———, 19—, and I have approved said appointment. The amount of your bond as such trustee has been fixed at ——— dollars. You are required to notify me forthwith of your acceptance or rejection of the trust.

Dated at ———, the ——— day of ———, 19—.

———— ————,
Referee in Bankruptcy.

FORM No. 23.

BOND OF RECEIVER OR TRUSTEE.

Know all men by these presents: That we ——— ———, of ———, as principal, and ——— ———, of ———, and ——— ———, of ———, as sureties, are held and firmly bound unto the United States of America in the sum of ——— dollars, in lawful money of the United States, to be paid to the said United States, for which payment, well and truly to be made, we bind ourselves and our heirs, executors and administrators, jointly and severally, by these presents.

Signed and sealed this ——— day of ———, 19—.

The condition of this obligation is such that whereas the above named ——— ——— was, on the ——— day of ———, 19—, appointed receiver [*or* trustee] in the case pending in bankruptcy in said court, wherein ——— ——— is the bankrupt, and he, the said ——— ———, has accepted said trust with all the duties and obligations pertaining thereunto;

Now, therefore, if the said ——— ———, receiver [*or* trustee] as aforesaid, shall obey such orders as said court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets, and effects of the estate of said bankrupt which shall come into his hands and possession, and shall in all respects faith-

fully perform all his official duties as said receiver [*or* trustee], then this obligation to be void; otherwise, to remain in full force and virtue.

Signed and sealed in
the presence of

——— ——— ——— ——— [SEAL]
——— ——— ——— ——— [SEAL]
——— ——— [SEAL]

FORM No. 24.

ORDER APPROVING TRUSTEE'S BOND.

At ———, in said district, on the ——— day of ———, 19—.

The above named ——— ———, having been duly adjudged a bankrupt on a petition filed by [*or* against] him on the ——— day of ———, 19—; and ——— ———, of ———, in said district, having been duly appointed trustee of the estate of said bankrupt, and having duly qualified by giving a bond with sufficient sureties for the faithful performance of his official duties in the amount fixed by the order of this court, viz., ——— dollars;

It is ordered that the said bond be, and it hereby is, approved.

——— ———,
Referee in Bankruptcy.

FORM No. 25.

ORDER THAT NO TRUSTEE BE APPOINTED.

At ———, in said district, on the ——— day of ———, 19—.

It appearing that the schedule of the bankrupt discloses no assets, and that no creditor has appeared at the first meeting, and that the appointment of a trustee of the bankrupt's estate is not now desirable, it is hereby ordered that, until further order of the court, no trustee be appointed and no other meeting of the creditors be called.

——— ———,
Referee in Bankruptcy.

FORM No. 26.

ORDER FOR EXAMINATION OF BANKRUPT.

At ———, in said district, on the ——— day of ———, 19—.

Upon the application of ——— ———, trustee of said bankrupt [*or* a creditor of said bankrupt], it is ordered that said bankrupt attend before ——— ———, one of the referees in bankruptcy of this court,

at ———, on the ——— day of ———, at — o'clock in the ——— noon, to submit to examination under the Act of Congress relating to bankruptcy, and that a copy of this order be delivered to him, the said bankrupt, forthwith.

——— ———,
Referee in Bankruptcy.

FORM No. 27.

SUBPOENA TO WITNESS.

To ——— ———:

Whereas the above entitled proceeding is pending in the District Court of the United States for the ——— District of ———;

You are hereby commanded personally to be and appear before ——— ———, one of the referees in bankruptcy of said court, at ———, on the ——— day of ———, at — o'clock in the ———noon, [and bring with you ———————————————————————————————,]

then and there to be examined in relation to said proceeding.

Witness the Honorable ——— ———, judge of said court, and the seal thereof, at ———, this ——— day of ———, 19—.

——— ———,
Clerk.

FORM No. 28.

PROOF OF CLAIM BY INDIVIDUAL.

State of ———————}
County of ———————} *ss.*

——— ———, of No. — ——— Street, in ———, County of ———, State of ———, being duly sworn, deposes and says:

1. That ——— ———, the above named bankrupt, was at and before the filing by [*or* against] him of the petition for adjudication of bankruptcy, and still is, justly and truly indebted [*or* liable] to said deponent in the sum of ——— dollars.

2. That the consideration of said debt [*or* liability] is as follows: ———————————————————————————————
———————————————————————————————.

3. That no part of said debt [*or* liability] has been paid, except ———————————————————————————————
———————————————————————————————.

4. That there are no set-offs or counterclaims to said debt [*or* liability] except ———————————————————————————————
———————————————————————————————.

5. That deponent does not hold, and has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received, any security or securities for said debt [*or* liability], except ———— ————————————————————————————————————.

6. [*If the debt or liability is founded upon an instrument of writing*] That the instrument upon which said debt [*or* liability] is founded is attached hereto [*or* is lost or destroyed, as set forth in the affidavit attached hereto].

7. [*If the debt is founded upon an open account*] That the said debt was [*or* will become] due on ——— [*or* that the average due date thereof is ———]; that no note or other negotiable instrument has been received for such account or any part thereof [*or* that the said debt is evidenced by a note [*or* other negotiable instrument], which is attached hereto]; and that no judgment has been rendered thereon, except ———————————————————————————————————.

——— ———,
Creditor.

Subscribed and sworn to before me this ——— day of ———, 19—.

——— ———,
———— ————.
[*Official character.*]

FORM No. 29.

PROOF OF CLAIM BY CORPORATION.

State of ————————}
County of ————————} *ss.*

——— ———, of ———, in the County of ———, State of ———, being duly sworn, deposes and says:

1. That he is the ——— of ———, a corporation organized and existing under the laws of the State of ———, and carrying on business at No. — ——— Street, in ———, County of ———, State of ———, and is duly authorized to make this proof of claim on its behalf.

2. That ——— ———, the above named bankrupt, was at and before the filing by [*or* against] him of the petition for adjudication of bankruptcy, and still is, justly and truly indebted [*or* liable] to said corporation in the sum of ——— dollars.

3. That the consideration of said debt [*or* liability] is as follows: ———————————————————————————————————

———————————————————————————————————.

4. That no part of said debt [*or* liability] has been paid, except ———————————————————————————————————

———————————————————————————————————

5. That there are no set-offs or counterclaims to said debt [*or* liability], except ———————————————————————————————.

6. That said corporation does not hold, and has not, nor has any person by its order, or to deponent's knowledge or belief, for its use, had or received, any security or securities for said debt [*or* liability] except ———————————————————————————————.

7. [*If the debt or liability is founded upon an instrument of writing*] That the instrument upon which said debt [*or* liability] is founded is attached hereto [*or* is lost or destroyed, as set forth in the affidavit attached hereto].

8. [*If the debt is founded upon an open account*] That the said debt was [*or* will become] due on ——— [*or* that the average due date thereof is ———]; that no note or other negotiable instrument has been received for such account or any part thereof [*or* that the said debt is evidenced by a note [*or* other negotiable instrument], which is attached hereto]; and that no judgment has been rendered thereon, except ———————————————————————————————.

——— ———,
——— *of Said Corporation.*

Subscribed and sworn to before me this ——— day of ———, 19—.

——— ———,
———.
[*Official character.*]

FORM NO. 30.

PROOF OF CLAIM BY PARTNERSHIP.

State of ———|
County of ———| *ss.*

——— ———, of ———, in the County of ———, State of ———, being duly sworn, deposes and says:

1. That he is a member of ———, a copartnership composed of deponent and ——— ———, of ———, in the County of ———, State of ———, and carrying on business at No. — ——— Street, in ———, County of ———, State of ———.

2. That ——— ———, the above named bankrupt, was at and before the filing by [*or* against] him of the petition for adjudication of bankruptcy, and still is, justly and truly indebted [*or* liable] to said copartnership in the sum of ——— dollars.

3. That the consideration of said debt [*or* liability] is as follows:

———————————————————————————————.

4. That no part of said debt [*or* liability] has been paid, except ———.

5. That there are no set-offs or counterclaims to said debt [*or* liability], except ———.

6. That said copartnership does not hold, and has not, nor has any person by its order, or to deponent's knowledge or belief, for its use, had or received, any security or securities for said debt [*or* liability], except ———.

7. [*If the debt or liability is founded upon an instrument of writing*] That the instrument upon which said debt [*or* liability] is founded is attached hereto [*or* is lost or destroyed, as set forth in the affidavit attached hereto].

8. [*If the debt is founded upon an open account*] That the said debt was [*or* will become] due on ——— [*or* that the average due date thereof is ———]; that no note or other negotiable instrument has been received for such account or any part thereof [*or* that the said debt is evidenced by a note [*or* other negotiable instrument], which is attached hereto]; and that no judgment has been rendered thereon, except ———.

———.

——— ———.

Subscribed and sworn to before me this ——— day of ———, 19—.

——— ———,

——— ———.

[*Official character.*]

FORM No. 31.

PROOF OF CLAIM BY AGENT OR ATTORNEY.

State of ———————
County of ——————— } *ss.*

——— ———, of ———, in the County of ———, State of ———, being duly sworn, deposes and says:

1. That he is the attorney [*or* agent] of ——— ———, of No. ——— Street, in ———, County of ———, State of ———; that deponent is duly authorized by said ——— ——— to make this proof of claim in his behalf; and that said proof cannot be made by said ——— ——— in person because ———.

2. That ——— ———, the above named bankrupt, was at and before the filing by [*or* against] him of the petition for adjudication of bankruptcy, and still is, justly and truly indebted [*or* liable] to said ——— ——— in the sum of ——— dollars.

3. That the consideration of said debt [*or* liability] is as follows: ———.

4. That no part of said debt [*or* liability] has been paid, except ———.

5. That there are no set-offs or counterclaims to said debt [*or* liability], except ———.

6. That said ——— ——— does not hold, and has not, nor has any person by his order, or to deponent's knowledge or belief, for his use, had or received, any security or securities for said debt [*or* liability], except ———.

7. [*If the debt or liability is founded upon an instrument of writing*] That the instrument upon which said debt [*or* liability] is founded is attached hereto [*or* is lost or destroyed, as set forth in the affidavit attached hereto].

8. [*If the debt is founded upon an open account*] That the said debt was [*or* will become] due on ——— [*or* that the average due date thereof is ———]; that no note or other negotiable instrument has been received for such account or any part thereof [*or* that the said debt is evidenced by a note [*or* other negotiable instrument], which is attached hereto]; and that no judgment has been rendered thereon, except ———.

——— ———.

Subscribed and sworn to before me this ——— day of ———, 19—.

——— ———,

——— ———.

[*Official character.*]

FORM No. 32.

AFFIDAVIT OF LOSS OF NEGOTIABLE INSTRUMENT.

State of ———}
County of ———} *ss.*

——— ———, of ———, in the County of ———, State of ———, being duly sworn, deposes and says that the note [*or other negotiable*

instrument], the particulars whereof are underwritten, has been lost under the following circumstances: ———————————————

———————————————————————————————;

and that he, this deponent, has not been able to find the same; and this deponent further says that he has not, nor has the said ——— ———, or any person or persons to their use, to this deponent's knowledge or belief, negotiated the said note [*or other negotiable instrument*], nor in any manner parted with or assigned the legal or beneficial interests therein, or any part thereof; that he, this deponent, is the person now legally and beneficially interested in the same; and that the particulars of the said instrument are as follows:

Date.	When due.	Drawer or maker.	Acceptor.	Prior indorser or indorsers, if any.	Amount.

——— ———.

Subscribed and sworn to before me, this ——— day of ———, 19—.

——— ———,

———.

[*Official character.*]

FORM No. 33.

ORDER EXPUNGING OR REDUCING CLAIM.

At ———, in said district, on the ——— day of ———, 19—.

The petition for reconsideration of the claim of ——— ——— against the estate of the above named bankrupt in the amount of ——— dollars having been heard on the ——— day of ———, 19—; and due notice of said hearing having been given [*here state the manner of notice*] to said claimant; and upon the evidence submitted to this court upon said claim [*and, if the fact be so, upon hearing counsel thereon*];

It is ordered that the said claim of ——— ——— be, and it hereby is, expunged from the list of claims in this proceeding [*or*, reduced to ——— dollars and allowed at said amount].

——— ———,
Referee in Bankruptcy.

FORM No. 34.

ORDER FOR PAYMENT OF DIVIDENDS.

At ———, in said district, on the ——— day of ———, 19—.

It appearing that, pursuant to the provisions of section 65 of the Act of Congress relating to bankruptcy, a first [*or* further, *or* final] dividend should be declared and paid herein;

It is ordered that a first [*or* second, *etc.*, *or* final] dividend of ——— per cent. be, and it hereby is, declared on all unsecured claims, not entitled to priority, allowed against the estate of the above named bankrupt, in accordance with the following dividend sheet:

No.	Creditors. (The names of all parties to the proof to be set forth.)	Amount of Claim Allowed.	Amount of Dividend.
		$	$

——— ———,
Referee in Bankruptcy.

FORM No. 35.

PETITION FOR SALE OF REAL ESTATE.

The petition of ——— ———, trustee of the estate of the above named bankrupt, respectfully represents:

1. A portion of said bankrupt's estate consists of the following described real estate: [*Here describe the property and any mortgages or liens thereon, and give its appraised or estimated value.*]

2. In the judgment of your petitioner it will be for the benefit of said estate to sell said property at public auction, upon the follow-

ing terms and conditions: ———————————————————
———————————————————.

Wherefore your petitioner prays that he may be authorized to make sale by public auction of said real estate as aforesaid.

——— ———,
Trustee.

State of ———————}
County of ———————} *ss.*

I, ——— ———, the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief. ——— ———.

Subscribed and sworn to before me this ——— day of ———, 19—.

——— ———,
———.
[*Official character.*]

FORM NO. 36.

ORDER FOR SALE OF REAL ESTATE.

At ———, in said district, on the ——— day of ———, 19—.

The petition of ——— ———, trustee of the estate of the above named bankrupt, filed on the ——— day of ———, 19—, that said trustee be authorized to sell at public auction certain real estate belonging to said estate, having come on for hearing before me, of which hearing [*here set forth to whom notice was given and the manner thereof*], now after due hearing, no adverse interest being represented thereat [*or* after hearing ——— ——— in favor of said petition and ——— ——— in opposition thereto];

It is ordered that the said trustee be, and he hereby is, authorized to sell at public auction all that certain real estate, belonging to the estate of said bankrupt, mentioned in said petition and described as follows: ———————————————————
———————————————————;
upon terms and conditions as follows: ———————————————————
———————————————————;
and that the said trustee shall keep an accurate account of each lot or parcel sold and the price received therefor and to whom sold; which said account he shall forthwith file with this court.

——— ———,
Referee in Bankruptcy.

FORM No. 37.

PETITION FOR REDEMPTION OF PROPERTY.

The petition of ——— ———, trustee of the estate of the above named bankrupt, respectfully represents:

1. A portion of said bankrupt's estate consists of the following described property: [*Here describe the property and give its appraised or estimated value.*]

2. Said property is subject to the following described mortgage [*or* lien *or* pledge]: ———————————————————————————————————————.

3. In the judgment of your petitioner it will be for the benefit of the estate to redeem said property from said mortgage [*or* lien *or* pledge], for the following reasons: ———————————————————————————————————————.

Wherefore your petitioner prays that he may be authorized to pay out of the assets of said estate the sum of ——— dollars, being the amount of said mortgage [*or* lien *or* pledge], to redeem said property therefrom.

——— ———,
Trustee.

State of ————————}
County of ————————} *ss.*

I, ——— ———, the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

——— ———.

Subscribed and sworn to before me this ——— day of ———, 19—.

——— ———,
———.
[*Official character.*]

FORM No. 38.

ORDER FOR REDEMPTION OF PROPERTY.

At ———, in said district, on the ——— day of ———, 19—.

The petition of ——— ———, trustee of the estate of the above named bankrupt, filed on the ——— day of ———, 19—, that said trustee be authorized to redeem certain property belonging to said estate, having come on for hearing before me, of which hearing [*here*

set forth to whom notice was given and the manner thereof], now, after due hearing, no adverse interest being represented thereat [*or* after hearing ——— ——— in favor of said petition and ——— ——— in opposition thereto];

It is ordered that the said trustee be, and he hereby is, authorized to redeem that certain property, belonging to said estate, mentioned in said petition and described as follows: ———

———,

from the mortgage [*or* lien *or* pledge] so mentioned and described as follows: ———

———,

and for that purpose to pay out of the assets of said estate the said sum of ——— dollars.

———,
Referee in Bankruptcy.

FORM No. 39.

TRUSTEE'S REPORT OF EXEMPT PROPERTY.

To ——— ———, Referee in Bankruptcy:

The following is a schedule of property designated and set apart to be retained by the bankrupt aforesaid as his own property, under the provisions of the Act of Congress relating to bankruptcy, as his exemptions allowed by law and claimed by him in his schedules filed in the above entitled proceeding.

General head.	Particular description.	Estimated value.
Property claimed to be exempt by the laws of the United States, with reference to the statute creating the exemption		$
Property claimed to be exempt by State laws, with reference to the statute creating the exemption		

Dated this ——— day of ———, 19—.

———,
Trustee.

FORM No. 40.

REPORT OF TRUSTEE IN NO ASSET CASE.

To ——— ———, Referee in Bankruptcy:

——— ———, of ———, in the County of ———, State of ———, trustee of the estate of the above named bankrupt, respectfully reports that he has neither received any property nor paid any moneys on account of said estate; that he has made diligent inquiry into the whereabouts of property belonging to the said estate; and that there are no assets in said estate over and above the exemptions claimed by, and by him set aside to, the said bankrupt.

Wherefore he prays that this report be approved, and that he be discharged of his trust.

——— ———,
Trustee.

State of ———
County of ——— } *ss.*

I, ——— ———, the trustee named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

——— ———.

Subscribed and sworn to before me this ——— day of ———, 19—.

——— ———,

———.
[*Official character.*]

FORM No. 41.

PETITION FOR DISCHARGE.

The petition of ——— ———, the bankrupt above named, a corporation organized and existing under the laws of the State of ———, respectfully represents that on the ——— day of ———, 19—, a petition was filed by [*or* against] it, praying that it be adjudged a bankrupt under the Act of Congress relating to bankruptcy; that on the ——— day of ———, 19—, it was duly adjudged a bankrupt under said Act; that it has duly surrendered all its property and rights of property, and has fully complied with all the requirements of said Act, and with all the orders of the court pertaining to its bankruptcy.

Wherefore your petitioner prays that it may be decreed by this court to have a discharge from all debts provable against its estate under said Act, except such debts as are excepted by said Act from such discharge.

——— ———,
By ——— ———,
——— *of said corporation.*

State of ———}
County of ———} *ss.*

——— ———, being duly sworn, deposes and says that he is the ——— of ——— ———, the petitioner named in the foregoing petition, and is duly authorized to make this affidavit on its behalf, and that the statements contained in said petition are true according to the best of his knowledge, information, and belief.

——— ———.

Subscribed and sworn to before me this ——— day of ———, 19—.

——— ———,
———.
[*Official character.*]

FORM No. 42.

ORDER FIXING TIME FOR FILING OBJECTIONS TO DISCHARGE.

At ———, in said district, on the ——— day of ———, 19—.

It appearing that the above named bankrupt has been duly adjudged a bankrupt and has been duly examined at a meeting of creditors as required by the Act of Congress relating to bankruptcy; [*if the bankrupt is a corporation, add:* and it further appearing that said bankrupt filed its application for a discharge on the ——— day of ———, 19—;]

It is ordered that the ——— day of ———, 19—, be, and it hereby is, fixed as the last day for the filing of objections to the discharge of said bankrupt.

——— ———,
Referee in Bankruptcy.

FORM No. 43.

NOTICE OF ORDER FIXING TIME FOR FILING OBJECTIONS TO DISCHARGE.

To the creditors of the above named bankrupt and other parties in interest:

Notice is hereby given that on the ——— day of ———, 19—, an order was made in the above entitled proceeding, fixing the ——— day of ———, 19—, as the last day for the filing of objections to the discharge of said bankrupt.

Dated this ——— day of ———, 19—.

——— ———,
Referee in Bankruptcy.

FORM No. 44.

SPECIFICATION OF OBJECTIONS TO DISCHARGE.

——— ———, of ———, in the County of ———, State of ———, the trustee of the estate [*or* a creditor] of the above named bankrupt [*or* the United States attorney for said district [*or* the attorney designated by the Attorney General of the United States], having examined into the acts and conduct of said bankrupt and being satisfied that probable grounds exist for the denial of the discharge of said bankrupt and that the public interest so warrants], does hereby oppose the granting to said bankrupt of a discharge from his debts, and specifies the following as grounds of objection: [*Here specify in separately numbered paragraphs the grounds of objection.*]

——— ———,
Trustee [or *creditor, etc.*]

State of ———}
County of ———} *ss.*

I, ——— ———, the trustee [*or* creditor, *etc.*] named in the foregoing petition do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

——— ———,
———.
[*Official character.*]

FORM No. 45.

DISCHARGE OF BANKRUPT.

At ———, in said district, on the ——— day of ———, 19—.

It appearing that ——— ———, of ———, in the County of ———, State of ———, was duly adjudged a bankrupt on a petition filed by [*or* against] him on the ——— day of ———, 19—; and

It further appearing that, after due notice by mail, no objection to the discharge of said bankrupt was filed within the time fixed by the court [*or* objections to the discharge of the said bankrupt were filed and, after due notice by mail, were heard and were not sustained];

It is ordered that the said ——— ——— be, and he hereby is, discharged from all debts and claims which are made provable by said Act against his estate, except such debts as are, by said Act, excepted from the operation of a discharge in bankruptcy.

——— ———,

Referee in Bankruptcy.

FORM NO. 46.

Referee's cash book.

[Additional columns may be added if further itemization is desired.]

RECEIVED					DISBURSED								
Date	Case No.	From Whom and For What	Compensation of Referee	Indemnity, Costs, etc.	Date	Case No.	To Whom and For What	Check No.	Compensation of Referee	Office and Travel Expense	Publication and Printing Expense	Other Disbursements	Refunds
Amounts brought forward					Amounts brought forward								
Amounts carried forward					Amounts carried forward								

FORM No. 47.

REFEREE'S FINANCIAL STATEMENT.

District Court of the United States for the ——— District of ———.
Made by ——— ———, Referee, for period ending ———.

Balance brought forward from last report..... $———
Receipts during period:
Compensation of Referee..... $———
Indemnity, Costs, etc..... ———
Total..... $———
Total to be accounted for..... $———
Disbursements during period:
Compensation of Referee:
Statutory fees received from clerk..... $———
Commissions..... ———
Claims fees..... ———
Fees as special master..... ———
Other items..... ———
Total..... $———
Office and Travel Expense:
Office rent..... $———
Clerical assistance..... ———
Telephone and Telegraph..... ———
Office supplies and equipment... ———
Travel expense..... ———
Miscellaneous..... ———
Total..... $———
Publishing and Printing Expense..... $———
Other disbursements..... $———
Refunds..... $———
Total disbursements..... $———
Unexpended balance..... $———
Amount on deposit, at close of business, ———, 19—, with
——— ———..... $———
(Name of Bank) (Location)
Outstanding checks:
No. ——— Amount $———
——— ———
——— ———
Total amount of outstanding checks..... $———
Net bank balance..... ———
Cash on hand, if any..... ———
Total balance as shown by cash book..... ———

FORM No. 48.

ORIGINAL PETITION IN PROCEEDINGS UNDER CHAPTER XI.

To the Honorable ——— ———, Judge of the District Court of the United States for the ——— District of ———:

The petition of ——— ———, of ———, in the County of ———, State of ———, by occupation a ——— [*or* engaged in the business of ———], respectfully represents:

1. Your petitioner has had his principal place of business [*or* has resided, *or* has had his domicile] at ———, within the above judicial district, for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district.

2. No bankruptcy proceeding, initiated by a petition by or against your petitioner, is now pending.

3. Your petitioner is insolvent [*or* unable to pay his debts as they mature], and proposes the following arrangement with his unsecured creditors: ———.

4. The schedule hereto annexed, marked Schedule A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and, so far as it is possible to ascertain, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of the Act of Congress relating to bankruptcy.

5. The schedule hereto annexed, marked Schedule B, and verified by your petitioner's oath, contains an accurate inventory of all his property, real and personal, and such further statements concerning said property as are required by the provisions of said Act.

6. The statement hereto annexed, marked Exhibit 1, and verified by your petitioner's oath, contains a full and true statement of all his executory contracts, as required by the provisions of said Act.

7. The statement hereto annexed, marked Exhibit 2, and verified by your petitioner's oath, contains a full and true statement of his affairs, as required by the provisions of said Act.

Wherefore your petitioner prays that proceedings may be had upon this petition in accordance with the provisions of chapter XI of the Act of Congress relating to bankruptcy.

——— ———,
Petitioner.

——— ———, *Attorney.*

State of ———}
County of ———} *ss.*

I, ——— ———, the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

———— ————,
Petitioner.

Subscribed and sworn to before me this ——— day of ———, 19—.

———— ————,
————— ————.
[*Official character.*]

[Schedules to be annexed corresponding with schedules under Form No. 1.]

FORM NO. 49.

NOTICE OF MEETING OF CREDITORS IN PROCEEDINGS UNDER CHAPTER XI.

To the creditors of ——— ———, of ———, in the County of ———, and district aforesaid:

Notice is hereby given that on the ——— day of ———, 19—, the said ——— ——— filed a petition in this court proposing an arrangement with his unsecured creditors under the provisions of chapter XI of the Act of Congress relating to bankruptcy, and that a meeting of his creditors will be held at ———, in ———, on the ——— day of ———, 19—, at — o'clock in the ———noon, at which place and time the said creditors may attend, prove their claims, nominate a trustee, appoint a committee of creditors, examine the debtor, present written acceptances of the proposed arrangement, and transact such other business as may properly come before said meeting.

Annexed hereto is a copy of said proposed arrangement, a summary of the liabilities of said debtor as shown by his schedules, and a summary of the appraisal of the property of said debtor [*or* a summary of the assets of said debtor as shown by his schedules].

[*If appropriate, the following may be added:*]

Notice is also hereby given that the application to confirm said arrangement shall be filed with this court on or before the ——— day of ———, 19—; and that the hearing on the confirmation and objections thereto, if any, will be held at ———, in ———, on the ——— day of ———, 19—, at — o'clock in the ———noon.

Dated this ——— day of ———, 19—.

———— ————,
Referee in Bankruptcy.

FORM No. 50.

APPLICATION FOR CONFIRMATION OF AN ARRANGEMENT UNDER CHAPTER XI.

To ——— ———, Referee in Bankruptcy:

——— ———, the above named debtor, respectfully represents that the arrangement under chapter XI of the Act of Congress relating to bankruptcy, proposed in the petition filed by him on the ——— day of ———, 19—, has been duly accepted, in accordance with the provisions of said chapter, and that the deposit required by the provisions of said chapter and by the said arrangement, amounting to the sum of ——— dollars, has been deposited, subject to the order of the court, in ———, of ———, the depository designated by the court.

Wherefore the said ——— prays that the said arrangement be confirmed by the court.

——— ———,
Debtor.

State of ———
County of ——— } *ss.*

I, ——— ———, the debtor named in the foregoing application, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

——— ———,
Debtor.

Subscribed and sworn to before me this ——— day of ———, 19—.

——— ———,
———.
[*Official character.*]

FORM No. 51.

ORDER CONFIRMING AN ARRANGEMENT UNDER CHAPTER XI.
(WHERE ALL AFFECTED CREDITORS HAVE ACCEPTED.)

At ———, in said district, on the ——— day of ———, 19—.

A petition having been filed herein on the ——— day of ———, 19—, by the above named debtor, proposing an arrangement under chapter XI of the Act of Congress relating to bankruptcy, and said arrangement having been accepted in writing by all creditors affected thereby, at a meeting of creditors held on the ——— day of ———, 19—, of which meeting ——— days' notice by mail was given to said debtor, to his creditors, and to other parties in interest; and

It appearing that the deposit required by the provisions of said chapter and by said arrangement, amounting to the sum of ——— dollars, has been deposited, subject to the order of the court, in ———, of ———, the depository designated by the court, and that said arrangement and its acceptance are in good faith and have not been made or procured by any means, promises, or acts forbidden by said Act;

It is ordered that the said arrangement be, and it hereby is, confirmed.

——— ———,
Referee in Bankruptcy.

FORM NO. 52.

ORDER CONFIRMING AN ARRANGEMENT UNDER CHAPTER XI. (WHERE LESS THAN ALL AFFECTED CREDITORS HAVE ACCEPTED.)

At ———, in said district, on the ——— day of ———, 19—.

The application of ——— ———, the above named debtor, for confirmation of the arrangement under chapter XI of the Act of Congress relating to bankruptcy, proposed by said debtor in the petition filed by him on the ——— day of ———, 19—, having been heard and duly considered; and due notice of said hearing having been given [*here state the manner of notice*]; and [*here state the proceedings, whether there was no opposition, or if opposed, what proceedings were had*]; and

It appearing that said arrangement has been duly accepted in accordance with the provisions of said chapter, and that the said deposit required by the provisions of said chapter and by said arrangement, amounting to the sum of ——— dollars, has been deposited, subject to the order of the court, in ———, of ———, the depository designated by the court; and

It further appearing that the provisions of said chapter have been complied with; that the arrangement is for the best interests of the creditors of said debtor; that the arrangement is fair and equitable, and feasible; that the debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of a bankrupt; and that the proposal and its acceptance are in good faith and have not been made or procured by any means, promises, or acts forbidden by said Act;

It is ordered that the said arrangement be, and it hereby is, confirmed.

——— ———,
Referee in Bankruptcy.

FORM No. 53.

ORIGINAL PETITION IN PROCEEDINGS UNDER CHAPTER XII.

To the Honorable ——— ———, Judge of the District Court of the United States for the ——— District of ———:

The petition of ——— ———, of ———, in the County of ———, State of ———, by occupation a ——— [*or* engaged in the business of ———], respectfully represents:

1. Your petitioner has had his principal place of business [*or* has resided, *or* has had his domicile] at ———, within the above judicial district, for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district.

2. Your petitioner is the legal [*or* equitable] owner, as more fully set forth in the arrangement hereinafter proposed, of the real property [*or* chattel real] described in, and which is security for debts dealt with by, said arrangement, and has an interest in said property other than a right to redeem it from a sale had before the filing of this petition.

3. No bankruptcy proceeding, initiated by a petition by or against your petitioner, is now pending.

4. Your petitioner is insolvent [*or* unable to pay his debts as they mature], and proposes the following arrangement with his creditors:

_____

_____.

5. The schedule hereto annexed, marked Schedule A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and, so far as it is possible to ascertain, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of the Act of Congress relating to bankruptcy.

6. The schedule hereto annexed, marked Schedule B, and verified by your petitioner's oath, contains an accurate inventory of all his property, real and personal, and such further statements concerning said property as are required by the provisions of said Act.

7. The statement hereto annexed, marked Exhibit 1, and verified by your petitioner's oath, contains a full and true statement of all his executory contracts, as required by the provisions of said Act.

8. The statement hereto annexed, marked Exhibit 2, and verified by your petitioner's oath, contains a full and true statement of his affairs, as required by the provisions of said Act.

Wherefore your petitioner prays that proceedings may be had upon this petition in accordance with the provisions of chapter XII of the Act of Congress relating to bankruptcy.

——— ———,
Petitioner.

——— ———, *Attorney.*

State of ———
County of ——— } *ss.*

I, ——— ———, the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

——— ———,
Petitioner.

Subscribed and sworn to before me this ——— day of ———, 19—.

——— ———,
———.
[*Official character.*]

[Schedules to be annexed corresponding with schedules under Form No. 1.]

FORM No. 54.

NOTICE OF MEETING OF CREDITORS IN PROCEEDINGS UNDER CHAPTER XII.

To the creditors of ——— ———, of ———, in the County of ———, in the district aforesaid:

Notice is hereby given that on the ——— day of ———, 19—, the said ——— ——— filed a petition in this court proposing an arrangement with his creditors under the provisions of chapter XII of the Act of Congress relating to bankruptcy, and that a meeting of his creditors will be held at ———, in ———, on the ——— day of ———, 19—, at — o'clock in the ——— noon, at which place and time the said creditors may attend, prove their claims, examine the debtor, present written acceptances of the proposed arrangement, and transact such other business as may properly come before said meeting.

Annexed hereto is a copy of said proposed arrangement, a summary of the liabilities of said debtor as shown by his schedules, and a summary of the appraisal of the property of said debtor [*or* a summary of the assets of said debtor as shown by his schedules].

[*If appropriate, the following may be added:*]

Notice is also hereby given that the application to confirm said arrangement shall be filed with this court on or before the ——— day of ———, 19—; and that the hearing on the confirmation and objections thereto, if any, will be held at ———, in ———, on the ——— day of ———, 19—, at — o'clock in the ——— noon.

Dated this ——— day of ———, 19—.

——— ———,
Referee in Bankruptcy.

FORM No. 55.

APPLICATION FOR CONFIRMATION OF AN ARRANGEMENT UNDER CHAPTER XII.

To ——— ———, Referee in Bankruptcy:

——— ———, the above named debtor, respectfully represents that the arrangement under chapter XII of the Act of Congress relating to bankruptcy, proposed in the petition filed by him on the ——— day of ———, 19—, has been duly accepted, in accordance with the provisions of said chapter, and that the deposit required by the provisions of said chapter and by the said arrangement, amounting to the sum of ——— dollars, has been deposited, subject to the order of the court, in ———, of ———, the depository designated by the court.

Wherefore the said ——— ——— prays that the said arrangement be confirmed by the court.

——— ———,
Debtor.

State of ———}
County of ———} *ss.*

I, ——— ———, the debtor named in the foregoing application, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

——— ———,
Debtor.

Subscribed and sworn to before me this ——— day of ———, 19—.

——— ———,
———.
[*Official character.*]

FORM No. 56.

ORDER CONFIRMING AN ARRANGEMENT UNDER CHAPTER XII.
(WHERE ALL AFFECTED CREDITORS HAVE ACCEPTED.)

At ———, in said district, on the ——— day of ———, 19—.

A petition having been filed herein on the ——— day of ———, 19—, by the above named debtor, proposing an arrangement under chapter XII of the Act of Congress relating to bankruptcy, and said arrangement having been accepted in writing by all creditors affected thereby, at a meeting of creditors held on the ——— day of ———, 19—, of which meeting ——— days' notice by mail was given to said debtor, to his creditors, and to other parties in interest; and

It appearing that the deposit required by the provisions of said chapter and by said arrangement, amounting to the sum of ——— dollars, has been deposited, subject to the order of the court, in ———, of ———, the depository designated by the court, and that said arrangement and its acceptance are in good faith and have not been made or procured by any means, promises, or acts forbidden by said Act;

It is ordered that the said arrangement be, and it hereby is, confirmed.

———— ————,
Referee in Bankruptcy.

FORM No. 57.

ORDER CONFIRMING AN ARRANGEMENT UNDER CHAPTER XII.
(WHERE LESS THAN ALL AFFECTED CREDITORS HAVE ACCEPTED.)

At ———, in said district, on the ——— day of ———, 19—.

The application of ——— ———, the above named debtor, for confirmation of the arrangement under chapter XII of the Act of Congress relating to bankruptcy, proposed by said debtor in the petition filed by him on the ——— day of ———, 19—, having been heard and duly considered; and due notice of said hearing having been given [*here state the manner of notice*]; and [*here state the proceedings, whether there was no opposition, or if opposed, what proceedings were had*]; and

It appearing that said arrangement has been duly accepted in accordance with the provisions of said chapter, and that the deposit required by the provisions of said chapter and by said arrangement, amounting to the sum of ——— dollars, has been deposited, subject

to the order of the court, in ———, of ———, the depository designated by the court; and

It further appearing that the provisions of said chapter have been complied with; that the arrangement is for the best interests of the creditors of said debtor; that the arrangement is fair and equitable, and feasible; that the debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of a bankrupt; that the proposal and its acceptance are in good faith and have not been made or procured by any means, promises, or acts forbidden by said Act; and that all payments made or promised by the debtor, by any person issuing securities or acquiring property under the arrangement, or by any other person, for services and for costs and expenses in, or in connection with, this proceeding, or in connection with and incident to the arrangement, have been fully disclosed to the court and are reasonable [*or, if to be fixed after confirmation of the arrangement,* will be subject to the approval of the court];

It is ordered that the said arrangement be, and it hereby is, confirmed.

———— ————,
Referee in Bankruptcy

FORM No. 58.

ORIGINAL PETITION IN PROCEEDINGS UNDER CHAPTER XIII.

To the Honorable ——— ———, Judge of the District Court of the United States for the ——— District of ———:

The petition of ——— ———, of ———, in the County of ———, State of ———, by occupation a ———, and employed by ——— ———, respectfully represents:

1. Your petitioner has resided [*or* has had his domicile] at ———, within the above judicial district, for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district.

2. Your petitioner works for wages [*or* salary, *or* hire] at a rate of compensation which, when added to all his other income, does not exceed $3,600 per year.

3. No bankruptcy proceeding, initiated by a petition by or against your petitioner, is now pending.

4. Your petitioner is insolvent [*or* unable to pay his debts as they mature], and desires to effect a composition [*or* an extension of time to pay his debts, *or* a composition and an extension of time to pay his debts] out of his future earnings.

5. The schedule hereto annexed, marked Schedule A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and, so far as it is possible to ascertain, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of the Act of Congress relating to bankruptcy.

6. The schedule hereto annexed, marked Schedule B, and verified by your petitioner's oath, contains an accurate inventory of all his property, real and personal, and such further statements concerning said property as are required by the provisions of said Act.

7. The statement hereto annexed, marked Exhibit 1, and verified by your petitioner's oath, contains a full and true statement of all his executory contracts, as required by the provisions of said Act.

8. The statement hereto annexed, marked Exhibit 2, and verified by your petitioner's oath, contains a full and true statement of his affairs, as required by the provisions of said Act.

Wherefore your petitioner prays that proceedings may be had upon this petition in accordance with the provisions of chapter XIII of the Act of Congress relating to bankruptcy.

——— ———,
Petitioner.

———— ————, *Attorney.*

State of ————————}
County of ————————} *ss.*

I, ——— ———, the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

——— ———,
Petitioner.

Subscribed and sworn to before me this ——— day of ———, 19—.

——— ———,
——— ———.
[*Official character.*]

[Schedules to be annexed corresponding with schedules under Form No. 1.]

FORM No. 59.

NOTICE OF MEETING OF CREDITORS IN PROCEEDINGS UNDER CHAPTER XIII.

To the creditors of ——— ———, of ———, in the County of ———, and district aforesaid:

Notice is hereby given that on the ——— day of ———, 19—, the said ——— ——— filed a petition in this court stating that he desires to effect a composition or an extension of time to pay his debts out of his future earnings and praying that proceedings be had upon his petition in accordance with the provisions of chapter XIII of the Act of Congress relating to bankruptcy; and that a meeting of his creditors will be held at ———, in ———, on the ——— day of ———, 19—, at — o'clock in the ——— noon, at which place and time the said debtor shall submit his plan for a composition or extension, and the said creditors may attend, prove their claims, examine the debtor, present written acceptances of the plan proposed by him, and transact such other business as may properly come before said meeting.

[*If appropriate, the following may be added:*]

Notice is also hereby given that the application to confirm said plan shall be filed with this court on or before the ——— day of ———, 19—; and that the hearing on the confirmation and objections thereto, if any, will be held at ———, in ———, on the ——— day of ———, 19—, at — o'clock in the ——— noon.

Dated this ——— day of ———, 19—.

——— ———,
Referee in Bankruptcy.

FORM No. 60.

APPLICATION FOR CONFIRMATION OF AN ARRANGEMENT UNDER CHAPTER XIII.

To ——— ———, Referee in Bankruptcy:

——— ———, the above named debtor, respectfully represents that the plan under chapter XIII of the Act of Congress relating to bankruptcy, submitted by him at a meeting of his creditors on the ——— day of ———, 19—, has been duly accepted, in accordance with the provisions of said chapter, and that he has made the deposit of moneys required by the provisions of said chapter [*If it be the fact, add:* and that the deposit required by the provisions of

said plan, amounting to the sum of ——— dollars, has been deposited, subject to the order of the court, in ———, of ———, the depository designated by the court].

Wherefore the said ——— ——— prays that the said plan be confirmed by the court.

———,
Debtor.

State of ———
County of ——— } ss.

I, ——— ———, the debtor named in the foregoing application, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

———,
Debtor.

Subscribed and sworn to before me this —— day of ———, 19—

———,
———.
[*Official character.*]

FORM No. 61.

ORDER CONFIRMING A PLAN UNDER CHAPTER XIII. (WHERE ALL AFFECTED CREDITORS HAVE ACCEPTED.)

At ———, in said district, on the ——— day of ———, 19—.

The plan of ——— ———, the above named debtor, under chapter XIII of the Act of Congress relating to bankruptcy, submitted by him at a meeting of his creditors on the ——— day of ———, 19—, of which meeting ——— days' notice by mail was given to the said debtor and to his creditors, having been accepted in writing at said meeting by all creditors affected thereby; and

It appearing that said plan and its acceptance are in good faith and have not been made or procured by any means, promises, or acts forbidden by said Act; and that the deposit required by the provisions of said chapter has been made; [*If it be the fact, add:* and that the deposit required by the provisions of said plan, amounting to the sum of ——— dollars, has been deposited, subject to the order of the court, in ———, of ———, the depository designated by the court;]

It is ordered that the said plan be, and it hereby is, confirmed.

———,
Referee in Bankruptcy.

FORM NO. 62.

ORDER CONFIRMING A PLAN UNDER CHAPTER XIII. (WHERE LESS THAN ALL AFFECTED CREDITORS HAVE ACCEPTED.)

At ———, in said district, on the ——— day of ———, 19—.

The application of ——— ———, the above named debtor, for confirmation of the plan under chapter XIII of the Act of Congress relating to bankruptcy, submitted by said debtor at a meeting of his creditors on the ——— day of ———, 19—, having been heard and duly considered; and due notice of said hearing having been given [*here state the manner of notice*]; and [*here state the proceedings, whether there was no opposition, or if opposed, what proceedings were had*]; and

It appearing that said plan has been duly accepted in accordance with the provisions of said chapter, and that the deposit required by the provisions of said chapter has been made; [*If it be the fact, add:* and that the deposit required by the provisions of said plan, amounting to the sum of ——— dollars, has been deposited, subject to the order of the court, in ———, of ———, the depository designated by the court;] and

It further appearing that the provisions of said chapter have been complied with; that the plan is for the best interests of the creditors of said debtor; that the plan is fair and equitable, and feasible; that the debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of a bankrupt; and that the proposal and its acceptance are in good faith and have not been made or procured by any means, promises, or acts forbidden by said Act;

It is ordered that the said plan be, and it hereby is, confirmed.

——— ———,
Referee in Bankruptcy.

FORM NO. 63.

DEBTOR'S PETITION IN PROCEEDINGS UNDER SECTION 75 OF THE BANKRUPTCY ACT.

To the Honorable ——— ———, Judge of the District Court of the United States for the ——— District of ———:

The petition of ——— ———, of ———, in the county of ———, and district and State of ———, respectfully represents:

That he is primarily bona fide personally engaged in producing products of the soil [*or* that he is primarily bona fide personally

engaged in dairy farming, the production of poultry or livestock, or the production of poultry products or livestock products in their unmanufactured state, or the principal part of whose income is derived from any one or more of the foregoing operations] as follows:

_____

_____

_____;

that such operations occur in the county [*or* counties] of ———, within said judicial district; that he is insolvent [*or* unable to meet his debts as they mature]; and that he desires to effect a composition or extension of time to pay his debts under section 75 of the Bankruptcy Act.

That the schedule hereto annexed, marked "A", and verified by your petitioner's oath, contains a full and true statement of all his debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said Act.

That the schedule hereto annexed, marked "B", and verified by your petitioner's oath, contains an accurate inventory of all his property, both real and personal, and such further statements concerning said property as are required by the provisions of said Act.

Wherefore your petitioner prays that his petition may be approved by the court and proceedings had in accordance with the provisions of said section.

——— ———.

——— ———, Attorney. *Petitioner.*

United States of America, District of ———, ss:

I, ——— ———, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

——— ———,

Petitioner.

Subscribed and sworn to before me this ——— day of ———, A. D. 19—.

——— ———,

———.

[*Official character.*]

FORM No. 64.

ORDER APPROVING DEBTOR'S PETITION IN PROCEEDINGS UNDER SECTION 75.

At ———, in said district, on the ——— day of ———, 19—, before the Honorable ——— ———, judge of said court, the petition of ——— ———, praying that he be afforded an opportunity to effect a composition or an extension of time to pay his debts under section 75 of the Bankruptcy Act, having been heard and duly considered, is approved as properly filed under said section.

Witness the Honorable ——— ———, judge of said court, and the seal thereof, at ———, in said district, on the ——— day of ———, 19—.

——— ———,
Clerk.

[SEAL OF THE COURT]

FORM No. 65.

ORDER OF REFERENCE IN PROCEEDINGS UNDER SECTION 75.

Whereas the petition of ——— ———, filed in this court on the ——— day of ———, 19—, praying that he be afforded an opportunity to effect a composition or an extension of time to pay his debts under section 75 of the Bankruptcy Act, having been duly approved by order of this court on the ——— day of ———, 19—, it is thereupon ordered, that said matter be referred to ——— ———, one of the conciliation commissioners of this court, to take such further proceedings therein as are required by said section; and that the said ——— ——— shall attend before said conciliation commissioner on the ——— day of ———, at ———, and thenceforth shall submit to such orders as may be made by said conciliation commissioner or by this court relating to the proceedings under said section.

Witness the Honorable ——— ———, judge of the said court, and the seal thereof, at ———, in said district, on the ——— day of ———, 19—.

——— ———,
Clerk.

[SEAL OF THE COURT]

FORM No. 66.

BOND OF CONCILIATION COMMISSIONER.

Know all men by these presents: That we ——— ———, of ———, as principal, and ——— ———, of ——— and ——— ———, of ———, as sureties, are held and firmly bound to the United States of America in the sum of ——— dollars, lawful money of the United States, to be paid to the said United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this ——— day of ———, A. D. 19—.

The condition of this obligation is such that whereas the said ——— ——— has been on the ——— day of ———, A. D. 19—, appointed by the Honorable ——— ———, judge of the District Court of the United States for the ——— District of ———, a conciliation commissioner under section 75 of the Bankruptcy Act, in and for the county of ———, in said district:

Now, therefore, if the said ——— ——— shall well and faithfully discharge and perform all the duties pertaining to the said office of conciliation commissioner, then this obligation to be void; otherwise to remain in full force and virtue.

Signed and sealed in
the presence of—

——— ——— ——— ——— [L. S.]
——— ——— ——— ——— [L. S.]
——— ——— [L. S.]

Approved this ——— day of ———.

———,
District Judge.

FORM No. 67.

NOTICE OF FIRST MEETING OF CREDITORS IN PROCEEDINGS UNDER SECTION 75.

To the creditors of ——— ———, of ———, in the county of ———, and district aforesaid:

Notice is hereby given that on the ——— day of ———, A. D. 19—, the petition of the said ——— ———, praying that he be afforded an opportunity to effect a composition or an extension of time to pay his debts under section 75 of the Bankruptcy Act, was

approved by this court as properly filed under said section; and that the first meeting of his creditors will be held at ——— in ———, on the ——— day of ———, A. D. 19—, at — o'clock in the ——— noon, at which time the said creditors may attend, prove their claims, examine the debtor, and transact such other business as may properly come before said meeting.

———— ————,
Conciliation Commissioner.

———— —, 19—.

FORM No. 68.

APPLICATION FOR CONFIRMATION OF A COMPOSITION OR EXTENSION PROPOSAL UNDER SECTION 75.

To the Honorable ——— ———, Judge of the District Court of the United States for the ——— District of ———:

At ———, in said district, on the ——— day of ———, A. D. 19—, now comes ——— ———, the above-named debtor, and respectfully represents to the court that, after he had filed in court a schedule of his property and a list of his creditors, as required by law, he offered a proposal for a composition or an extension to his creditors, which proposal has been accepted in writing by a majority in number of all creditors whose claims have been allowed, including secured creditors whose claims are to be affected by the proposal, which number represents a majority in amount of such claims.

Wherefore the said ——— ——— respectfully asks that the said proposal be confirmed by the court.

———— ————,
Debtor.

FORM No. 69.

ORDER CONFIRMING A COMPOSITION OR EXTENSION PROPOSAL UNDER SECTION 75.

An application for the confirmation of the proposal offered by the debtor under section 75 of the Bankruptcy Act having been filed in court, and it appearing that the proposal has been accepted by a majority in number of creditors whose claims have been allowed, including secured creditors whose claims are to be affected by the proposal, which number represents a majority in amount of such claims; and it also appearing that the proposal includes an equitable

and feasible method of liquidation for secured creditors whose claims are affected and of financial rehabilitation for the debtor; that it is for the best interests of all creditors; and that the offer and its acceptance are in good faith and have not been made or procured by any means, promises, or acts contrary to the acts of Congress relating to bankruptcy: It is therefore hereby ordered that the said proposal be, and it hereby is, confirmed.

Witness the Honorable ——— ———, judge of said court, and the seal thereof, this ——— day of ———, A. D. 19—.

——— ———,
Clerk.

[SEAL OF THE COURT]

INDEX

I. **Miscellaneous.**

1. *Deciding Constitutional Questions.* Necessity for determination of essential facts. *Polk Co.* v. *Glover,* 5.

2. *Powers of Congress.* Validity of National Labor Relations Act as applied to utility company. *Consolidated Edison Co.* v. *Labor Board,* 197.

3. *Id.* Power of Congress over territories. *Inter-Island Co.* v. *Hawaii,* 306.

4. *Id.* Limitation of attorneys' fees for services before Veterans' Bureau valid, and binding on state court. *Hines* v. *Lowrey,* 85.

5. *Id. Federal Taxation.* Power of Congress to deny or limit deductions from gross income in computation of income tax. *Helvering* v. *Winmill,* 79.

6. *Delegation of Power* by Congress to Interstate Commerce Commission to determine whether electric railway is interurban, valid. *Shields* v. *Utah Idaho R. Co.,* 177.

7. *Id.* Whether state statute delegated legislative power to state officer in violation of state constitution, was question of state law. *Neblett* v. *Carpenter,* 297.

8. *Territorial Taxation.* Tax under Hawaii Utilities Act did not violate commerce clause or Fifth Amendment. *Inter-Island Co.* v. *Hawaii,* 306.

9. *Full Faith and Credit.* Enforcement of Virginia divorce decree in courts of District of Columbia. *Davis* v. *Davis,* 32.

10. *Id.* In enforcing certificate of fraternal beneficiary association, Missouri court failed to give full faith and credit to Nebraska statute and judgment. *Sovereign Camp* v. *Bolin,* 66.

○