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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1940

FROM MARCH 31, 1941 (CONCLUDED), TO AND INCLUDING
JUNE 2, 1941 (END OF TERM)

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JUSTICES
OF THE
SUPREME COURT

DURING THE TIME OF THESE REPORTS

CHARLES EVANS HUGHES, Chief Justice.*
HARLAN FISKE STONE, Associate Justice.
OWEN J. ROBERTS, Associate Justice.
HUGO L. BLACK, Associate Justice.
STANLEY REED, Associate Justice.
FELIX FRANKFURTER, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
FRANK MURPHY, Associate Justice.

RETIRED

JAMES CLARK McREYNOLDS, Associate Justice.
LOUIS D. BRANDEIS, Associate Justice.
GEORGE SUTHERLAND, Associate Justice.

ROBERT H. JACKSON, Attorney General.
FRANCIS BIDDLE, Solicitor General.
CHARLES ELMORE CROPLEY, Clerk.
THOMAS ENNALLS WAGGAMAN, Marshal.

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*Mr. Chief Justice Hughes retired from active service July 1, 1941, as authorized by Act of March 1, 1937, c. 21, 50 Stat. 24; 28 U. S. C. § 375a. See *post*, p. v.

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, FELIX FRANKFURTER, 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, FRANK MURPHY, Associate Justice.

For the Eighth Circuit, STANLEY REED, Associate Justice.

For the Ninth Circuit, WILLIAM O. DOUGLAS, Associate Justice.

For the Tenth Circuit, STANLEY REED, Associate Justice.

For the District of Columbia, CHARLES EVANS HUGHES, Chief Justice.

February 12, 1940.

(For next previous allotment, see 308 U. S. p. iv.)

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*By order of June 2, 1941, the Court assigned MR. JUSTICE MURPHY temporarily to the Sixth Circuit.

RETIREMENT OF THE CHIEF JUSTICE.

By order of MR. JUSTICE STONE the following correspondence between the Court and the CHIEF JUSTICE is appended to the minutes of June 2, 1941.

SUPREME COURT OF THE UNITED STATES,
Washington, D. C., June 2, 1941.

DEAR CHIEF JUSTICE: The announcement of your decision to retire from the active duties of your office brings to us a deep sense of regret that our association with you in the daily work of the Court must end. In all the years of that association you have been tireless in carrying the heavy burden which unavoidably rests on the Chief Justice. With single-minded devotion to the high purpose of the Court you have brought to your leadership there all the resources gained from many years of eminent public and professional service, wide knowledge of the law, and that unflagging energy and painstaking care with which you have guided our deliberations with thoroughness and dispatch.

At this moment of parting we wish to assure you of the high regard and esteem in which we hold you and your distinguished services to the Court and to the country. We wish for you in the years to come unabated vigor and good health and the full enjoyment of the opportunity to continue to employ your talents in agreeable and useful accomplishment.

Faithfully yours,

HARLAN F. STONE.
OWEN J. ROBERTS.
HUGO L. BLACK.
STANLEY REED.
FELIX FRANKFURTER.
WM. O. DOUGLAS.
FRANK MURPHY.

The CHIEF JUSTICE.

RETIREMENT OF THE CHIEF JUSTICE.

SUPREME COURT OF THE UNITED STATES,
Washington, D. C., June 3, 1941.

MY DEAR BRETHREN: I shall always treasure the generous words of your letter. I keenly regret the necessity of giving up the privilege of our daily association and I shall carry into my retirement an abiding and precious memory of the good will and friendly consideration you have invariably shown me in the intimacy of our common endeavor. Despite my withdrawal from active service, I trust that our companionship may still continue and I extend to each of you the assurance of my high esteem and my earnest wish for your health and happiness.

Faithfully yours,

CHARLES E. HUGHES.

MR. JUSTICE STONE.
MR. JUSTICE ROBERTS.
MR. JUSTICE BLACK.
MR. JUSTICE REED.
MR. JUSTICE FRANKFURTER.
MR. JUSTICE DOUGLAS.
MR. JUSTICE MURPHY.

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CASES ADJUDGED
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AT
OCTOBER TERM, 1940

MAGUIRE ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 346. Argued March 5, 6, 1941.—Decided March 31, 1941.

1. Under the Revenue Act of 1928, the basis for ascertaining gain or loss from the sale of personalty which had been delivered to the taxpayer by testamentary trustees is—

(1) In the case of personalty which the decedent owned, its value at the time when it was received by the trustees from the executors. P. 3.

(a) This conclusion is supported by the legislative history of the applicable provision of § 113 (a) (5) of the Act. P. 5.

(b) Under § 113 (a) (5), which provides that the basis for ascertaining gain or loss from the sale of property acquired by general bequest shall be the value at the time of the "distribution to the taxpayer," the time of "distribution to the taxpayer" in this case was the time of the delivery of the property to the trustees by the executors. P. 7.

(2) In the case of personalty purchased by the trustees, the cost thereof to the trustees. P. 8.

(a) The property purchased by the testamentary trustees and subsequently delivered to the taxpayer was not "acquired by will"; and the basis is governed by § 113 (a), not by § 113 (a) (5). P. 9.

2. Although the title of an Act may not be construed to limit the plain meaning of the text, it may be of aid in resolving an ambiguity. P. 9.

111 F. 2d 843, affirmed.

326252°—41——1

CERTIORARI, 311 U. S. 627, to review the reversal of a decision of the Board of Tax Appeals redetermining a deficiency in income tax.

Mr. Francis E. Baldwin, with whom *Mr. Albert H. Veeder* was on the brief, for petitioners.

Miss Helen R. Carloss argued the cause, and *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Norman D. Keller, Thomas E. Harris,* and *Arthur A. Armstrong* were on the brief, for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The taxpayer's [1] share of a testamentary trust, established pursuant to the will of her father, was delivered to her in kind in 1923. The property was personalty, part of which had been owned by the decedent and part purchased by the trustees. The decedent died in 1903 and his executors were discharged by the probate court in 1905. Pursuant to that order the executors turned over to themselves, as trustees, all of the residue of the estate.[2] From that residue the taxpayer's claim to the property in question derived. During the year 1930

[1] Petitioners are husband and wife who filed a joint return. The income here involved is that of the wife.

[2] The will directed the executors and trustees, not less than ten and not more than twenty years after the death of the testator, to make final distribution of this residue as follows: ". . . to my wife the one-third part thereof, the balance to be equally divided among my children, share and share alike, and should my wife not be living at the time of such distribution, then the same shall be divided equally among my children, share and share alike, the descendants of any deceased children in such distribution to take the proportion of their deceased parent, . . ."

parts of both groups of property were sold.[3] The questions presented relate to the proper basis under the Revenue Act of 1928 (45 Stat. 791) for determining gain or loss upon those sales: (1) whether the basis in case of the personalty owned by decedent is its value when received by the trustees from the executors or its value at the date of delivery by the trustees to the taxpayer; and (2) whether the basis in case of the personalty purchased by the trustees is its cost to the trustees or its value at the date of delivery by the trustees to the taxpayer. The case is here on a petition for certiorari which we granted because of a conflict among the circuits on those two questions.[4]

I. As respects the property owned by the decedent at his death, we are of the view that the date when it was received by the trustees from the executors, rather than the date when it was delivered by the trustees to the taxpayer, governs. In the case of general bequests, § 113 (a) (5) of the Revenue Act of 1928 provided that "the basis shall be the fair market value of the property at the time of the distribution to the taxpayer."[5] But

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[3] The sales were made by trustees of new *inter vivos* trusts under which the property had been placed on its delivery in 1923. It was stipulated that the beneficiaries (including the taxpayer) were taxable as though the sales were made by them individually.

[4] The opinion of the court below is reported at 111 F. 2d 843. On the first question it held that the basis was the value at the time the property was received by the trustees from the executors; on the second, that the basis was cost to the trustees. On those two questions that decision is in conflict with *Commissioner* v. *Gambrill*, 112 F. 2d 530, from the Second Circuit Court of Appeals. And see *Commissioner* v. *Libbey*, 100 F. 2d 458.

[5] Sec. 113 (a) (5) provided: "(a) Property acquired after February 28, 1913.—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that . . . (5) Property

in case of specific bequests of personalty or in case of realty, the basis was the fair market value of the property at the death of the decedent. § 113 (a) (5). In the latter cases the property either vested in the heir or devisee at death or was rather definitely marked at the time of death for the legatee. In the former the legatee normally must have awaited administration of the estate before the property bequeathed to him could have been identified with certainty. That difference suggests the distinction in treatment under § 113 (a)(5) of general bequests of personalty. It emphasizes that the words "at the time of the distribution to the taxpayer" meant the time when the distribution was made out of the estate. It supports the view that Congress focused

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transmitted at death.—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death;"

Sec. 113 (b) provided: "(b) Property acquired before March 1, 1913.—The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, shall be: (1) the cost of such property (or, in the case of such property as is described in subsection (a) . . . (5) . . . of this section, the basis as therein provided), or (2) the fair market value of such property as of March 1, 1913, whichever is greater."

§ 113 (a) (5) on the decedent's death and the administration of his estate, and not on subsequent transfers or transmissions of the property.

The legislative history of § 113 (a) (5) lends support to that conclusion. Prior to the 1928 Act the basis for property obtained by bequest, devise, or inheritance was the fair market value "at the time of such acquisition." [6] The House Bill [7] which became the Revenue Act of 1928 provided that the basis for all property acquired by bequest, devise, or inheritance should be the fair market value of the property at the date of the decedent's death—a provision designed to clarify [8] the meaning of "acquisition" in the earlier acts.[9] In the Senate that

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[6] Revenue Act of 1921 (42 Stat. 227) § 202 (a); Revenue Act of 1924 (43 Stat. 253) § 204 (a); Revenue Act of 1926 (44 Stat. 9) § 204 (a).

[7] H. R. 1, 70th Cong., 1st Sess.

[8] H. Rep. No. 2, 70th Cong., 1st Sess., Int. Rev. Bull., Cum. Bull. 1939–1, Pt. 2, p. 396. And see Report of the Joint Committee on Internal Revenue Taxation, H. Doc. No. 139, 70th Cong., 1st Sess., pp. 17–18.

[9] Much of that confusion was later eliminated by *Brewster* v. *Gage*, 280 U. S. 327, holding that in case of a residuary legatee of personal property the time of "acquisition" was the date of decedent's death, not the date of distribution of the property by the executors to the legatee. That decision was rendered in 1930 under the 1918 and 1921 Acts. The wording of § 113 (a) (5) contained in the 1928 Act was continued in the 1932 Act (47 Stat. 169, 199). But under the 1934 Act (48 Stat. 680, 706) there was a return to the language of the 1926 Act, the Senate Report stating: "Section 113 (a) 5 of the Revenue Act of 1932 is a reënactment of a similar provision contained in the 1928 Act. The change in the 1928 Act was made because there was some doubt as to the meaning of the term 'date of acquisition,' which was the term used under the Revenue Act of 1926. Since the 1928 Act was passed, the Supreme Court has defined 'the date of acquisition' to mean the date of death in the case of all property passing by bequest, devise, and inheritance, whether real or personal. (*Brewster* v. *Gage*, 280 U. S. 327.) Section

language of § 113 (a) (5) was changed to the form in which it appeared in the Revenue Act of 1928—a change specifically designed to avoid the confusion as to the basis on which gain or loss on the sale of property purchased by the executor and distributed to beneficiaries was to be determined.[10]

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113 (a) 5 of the House bill conforms to the language contained in the Revenue Act of 1926, so that a uniform basis rule may be required in the case of property passing at death, whether real or personal." S. Rep. No. 558, 73d Cong., 2d Sess., Int. Rev. Bull., *supra* note 8, pp. 612–613.

[10] S. Rep. No. 960, 70th Cong., 1st Sess., Int. Rev. Bull., *supra* note 8, p. 409, where it was said (p. 427): "It appears that the House bill is inadequate to take care of a number of situations which frequently arise. For example, the executor, pursuant to the terms of the will, may purchase property and distribute it to the beneficiaries, in which case it is impossible to use the value at the decedent's death as the basis for determining subsequent gain or loss, for the decedent never owned the property. Moreover, the fair market value of the property at the decedent's death can not properly be used as the basis, in case of property transferred in contemplation of death where the donee sells the property while the donor is living.

"Accordingly, the committee has revised section 113 (a) 5 and certain related sections, so as to provide that in the case of a specific bequest of personalty or a general or specific devise of realty, or the transmission of realty by intestacy, the basis shall be the fair market value at the time of the death of the decedent. In these cases it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent's death, and therefore the value at the date of death is a proper basis for the determination of gain or loss to the beneficiary. The same rule is applied to real and personal property transmitted by the decedent, where the sale is made by the executor. In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequest or by intestacy. It would also apply in cases where the executor purchases property and distributes it to the beneficiary."

There does not appear to be the slightest suggestion that this change was designed as a substantial departure from the value-at-death rule. To be sure, it did produce a limited deviation from that principle in that no income tax effect was to be given changes in value of personal property, passing otherwise than by specific bequest, during the administration of the estate. But to hold that it effected the change which petitioner urges would be to impute to Congress a purpose to go far beyond the exigencies of the specific situations with which it was dealing.

The language used does not require that result. "Distribution to the taxpayer" is not necessarily restricted to situations where property is delivered to the taxpayer. It also aptly describes the case where property is delivered by the executors to trustees in trust for the taxpayer. Such distribution of the estate results in the acquisition by the taxpayer of an equitable estate under the testamentary trust. The fact that he does not then obtain possession or control, the fact that his interest is conditional or contingent, the fact that legal title may not be transferred to him until years later, are immaterial. Sec. 113(a) (5) merely provided a point of reference and a standard of value for determination of gains or losses realized on subsequent sales of property acquired by bequest, devise, or inheritance. In *Brewster* v. *Gage*, 280 U. S. 327, 334, this Court held under earlier acts [11] that the date of death was the date of "acquisition" even in case of a residuary legatee whose interest at the date of death clearly was not absolute. That conclusion suggests that the critical date is the time when the legatee acquires some interest in the property although his interest then may not be unconditional. Hence, in case of remainders governed by § 113 (a) (5) of the 1928 Act, it

[11] See note 9, *supra*.

cannot realistically be asserted that the date when the remainderman acquired his interest came later than the time when he obtained an equitable estate under the testamentary trust.

There are other reasons why we cannot infer that Congress intended to make more than a limited departure from the value-at-death principle in enacting § 113 (a) (5) of the 1928 Act. As respondent points out, there would be a substantial disparity between the treatment of remaindermen of realty and remaindermen of personality under the same testamentary trust, if the latter were given a basis of value at the time of distribution by the trust. Furthermore, we cannot on the basis of the legislative history of § 113 (a) (5) impute to Congress a purpose to allow trustees either to sell the property or to distribute it in kind, as would be most advantageous for tax purposes. The creation of such an opportunity for manipulation of tax liability cannot be lightly presumed. Similarly we cannot assume in absence of explicit provisions that Congress intended to create substantial periods of time following the date of death during which the value of the property bequeathed would have no incidence as respects subsequent gains or losses. Respect for the obvious symmetry of this statutory scheme induces the conclusion that there was a "distribution to the taxpayer" when this property was delivered by the executors to the trustees.[12]

II. As respects the property which was purchased by the trustees, we are of the view that its cost to them, rather than its value at the date of delivery to the tax-

[12] We are not aided by administrative construction. The Bureau of Internal Revenue originally took the view which we have reached. G. C. M. 6195, VIII—1 Cum. Bull. 99 (1929). This view was reversed in G. C. M. 11309, XII—1 Cum. Bull. 126 (1933). Its original view was again taken in G. C. M. 14893, XIV—1 Cum. Bull. 202 (1935).

payer, governs. Sec. 113 (a) provided that the basis in case of property acquired after February 28, 1913, should be "the cost of such property." [13] That standard controls here unless these transactions are governed by the provision of § 113 (a) (5) that, "In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer." The latter provision is applicable if the property in question was "acquired . . . by will." We think it was not.

The title of § 113 (a) (5) is "Property transmitted at death." While the title of an act will not limit the plain meaning of the text (*Caminetti* v. *United States,* 242 U. S. 470, 490; *Strathearn S. S. Co.* v. *Dillon,* 252 U. S. 348, 354), it may be of aid in resolving an ambiguity. *Knowlton* v. *Moore,* 178 U. S. 41, 65. It suggests, as does the legislative history which we have related, that the foregoing provision of § 113 (a) (5) was confined, with minor exceptions, to the specific property owned by the decedent at his death. To be sure, the taxpayer's right in the property in question had its source in the provisions of the will. But there is no indication that Congress in drafting § 113 (a) (5) looked beyond the distribution of the estate by the executors. In that connection, the Senate Report specifically stated that the foregoing provision of § 113 (a) (5) governed purchases by the executors.[14] No reference was made to purchases by testamentary trustees. The inference is strong that Congress was fashioning § 113 (a) (5) on the theory that for income tax purposes acquisition of personal property passing by general bequest or intestacy did not occur until distribution of the estate was made. In that pos-

[13] See note 5, *supra.* And see § 113 (b), *supra* note 5, as respects the basis in case of property acquired before March 1, 1913.

[14] S. Rep. No. 960, *supra* note 10.

ture of the problem, property purchased by the executor (acting, so to speak, in the decedent's stead) prior to that distribution was acquired by the distributee "by will." But once the administration of the estate had been completed and the basic testamentary disposition effected, subsequent purchases were to be governed by cost as provided in § 113 (a). Property so purchased would not be part of the original inheritance. Certainly if the trustees themselves had sold the property, the transaction would have been taxable on the cost basis. To hold that a different basis applies in case the beneficiary made the sale would be to open an avenue for tax avoidance. Furthermore, we are dealing here with a statutory scheme which in general recognizes value at the date of death in computing subsequent gains or losses. We are not inclined in absence of clear and unambiguous language to imply a greater deviation from that principle than that which is necessitated by the declared objective of Congress.

Affirmed.

The CHIEF JUSTICE and MR. JUSTICE ROBERTS are of opinion that the judgment should be reversed for the reasons stated in the opinion of the Circuit Court of Appeals for the Second Circuit in *Commissioner* v. *Gambrill*, 112 F. 2d 530.

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

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

No. 472. Argued March 6, 1941.—Decided March 31, 1941.

1. Under § 113 (a) (5) of the Revenue Act of 1928, the basis for ascertaining gain or loss from the sale of property delivered to the taxpayer by testamentary trustees is its value when distributed by the executors to the trustees if the property was owned by the decedent at death, and cost to the trustees if it was purchased by them. *Maguire* v. *Commissioner, ante,* p. 1. P. 13.
2. For the purpose of determining whether property delivered to a taxpayer by testamentary trustees was "capital assets" within the capital gains and losses provisions of the Revenue Act of 1928, the period for which the taxpayer has held the property (although a remainder interest) dates from the death of the decedent in the case of property owned by the decedent at death, and from the date of purchase in the case of property purchased by the trustees. P. 14.
3. "Property held by the taxpayer," as used in § 101 (c) (8) of the Revenue Act of 1928, embraces not only full ownership but also any interest whether vested, contingent, or conditional. P. 15.

112 F. 2d 530, reversed.

CERTIORARI, 311 U. S. 639, to review the affirmance of a decision of the Board of Tax Appeals, 38 B. T. A. 981, redetermining a deficiency in income tax.

Miss Helen R. Carloss argued the cause, and *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Thomas E. Harris,* and *Arthur A. Armstrong* were on the brief, for petitioner.

Mr. Allin H. Pierce, with whom *Mr. Sidney W. Davidson* was on the brief, for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The questions involved here are in part the same as those in *Maguire* v. *Commissioner, ante,* p. 1. Respond-

ent was a remainderman under a trust created by the will of his grandmother [1] who died in 1897. The trust *res,* consisting of personalty, was delivered by the executors to themselves as trustees in 1898. The life beneficiary, respondent's mother, died in March, 1928. On May 5, 1928, the trustees delivered the corpus to respondent as remainderman. Some of the property was part of the original trust *res,* and some was purchased by the trustees both prior to and subsequent to March 1, 1913. During the year 1930 (in February, on May 6, and in June) respondent sold some of the property in each group. The Board of Tax Appeals (38 B. T. A. 981) and the Circuit Court of Appeals (112 F. 2d 530) held: (1) that for the purpose of determining gain or loss on the sale of the property in question the basis to respondent by virtue of § 113 (a) (5) of the Revenue Act of 1928 (45 Stat. 791) was the fair market value of the property on the date when the corpus was delivered to

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[1] Respondent was the sole surviving issue of his mother, Anna Van Nest Gambrill, and took under the following provisions of his grandmother's will:

"Ninth. All the residue of my estate of every kind I give and devise as follows:

'One half thereof in equal shares to my daughters Mary Van Nest Jackson, Anna Van Nest Gambrill, and Jennie Van Nest Foster, and my granddaughter, Mary Alice Van Nest absolutely.

'The other half thereof in four equal shares to my executors, to hold the same in trust, one share for the benefit of each of the same four persons to wit my said three daughters and my said granddaughter and to receive the income and pay the same to her during her life with full power to invest and reinvest in their discretion without any limitation whatsoever and at her death to transfer and deliver the same as she if leaving issue shall by will direct or in the absence of such direction, to her issue equally, or if she shall leave no issue, then to the survivors of the said four persons to wit my said three daughters and my said granddaughter, and to the issue of any of the said four persons who may have died, the issue to take the share which the parent would have taken if living.' "

respondent; and (2) that the property sold in February, 1930 had not been held by the taxpayer for more than two years and was, therefore, not a capital asset within the meaning of § 101 (c) of the 1928 Act, while that sold on May 6 and in June, 1930, had been held by respondent for more than two years and was therefore a capital asset.

The rulings on the first question were erroneous. For the reasons stated in *Maguire* v. *Commissioner, supra,* the basis under § 113 (a) (5) for the property delivered to respondent by the testamentary trustees was its value when distributed by the executors to the trustees if the property was owned by the decedent at her death, and cost to the trustees if it was purchased by them.[2]

We also disagree with the disposition made of the second question. Capital gains or losses are defined as those resulting from sales or exchanges of capital assets. § 101 (c) (1) and (2). Capital assets are defined (with exceptions not material here) as "property held by the taxpayer for more than two years." § 101 (c) (8). And § 101 (c) (8) (B) provides: "In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the

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[2] It should, of course, be noted that § 113 (b) provided:

"(b) Property acquired before March 1, 1913.—The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, shall be:

(1) the cost of such property (or, in the case of such property as is described in subsection (a) (1), (4), (5), or (12) of this section, the basis as therein provided), or

(2) the fair market value of such property as of March 1, 1913, whichever is greater. In determining the fair market value of stock in a corporation as of March 1, 1913, due regard shall be given to the fair market value of the assets of the corporation as of that date."

same basis in whole or in part in his hands as it would have in the hands of such other person."

We are of the view that under these provisions respondent's holding period dates from the decedent's death for property which she then owned and from the date of purchase for property purchased by the trustees. In *McFeely* v. *Commissioner,* 296 U. S. 102, this Court held that a legatee's holding period under § 101 (c) (8) of the 1928 Act dated from the decedent's death for property owned by the decedent and distributed to the legatee by the executors, in spite of the fact that the legatee's basis under § 113 (a) (5) was value at the time of distribution to him by the executors. The date of acquisition was held to be the date of death, regardless of the gap between that date and the date of distribution. And that result was reached even though some of the taxpayers involved were residuary legatees whose interests at date of death were not unconditional. The reasoning of that case plus § 101 (c) (8) (B) make it plain that respondent's interest, albeit a remainder, was acquired at the date of decedent's death for property then owned and at the date of purchase for property purchased by the trustees. The continuity in his holding was not broken by the intervening trust. The formal constitution of that trust though of special significance under § 113 (a) (5) (*Maguire* v. *Commissioner, supra*) did not change the basic quality of his property interest. And the fact that that interest did not ripen into full and complete ownership except by the passage of time or the occurrence of subsequent events is inconsequential. For § 101 (c) (8) (B) provides, as we have seen, that in determining the taxpayer's holding period there shall be included the period for which the property was held by any other person if under § 113 the property had the same basis in whole or in part in the taxpayer's hands as it would have in the hands of the other person. It is plain that under

§ 113 the basis to the trustees was the same as the basis to the taxpayer. Hence the period of their holding is not to be excluded from the period of the taxpayer's holding. That makes plain that "property held by the taxpayer" as used in § 101 (c) (8) embraces not only full ownership but also any interest whether vested, contingent, or conditional. Otherwise the period of the holding by trustees would not be included in the holding by a mere remainderman. Hence, as in *McFeely* v. *Commissioner, supra,* we look to the time when the taxpayer first acquired the interest which later ripened into full ownership. It is plain that for property owned by the decedent he acquired that interest at her death and that for property purchased by the trustees he acquired that interest at the date of purchase.

Reversed.

The CHIEF JUSTICE and MR. JUSTICE ROBERTS think the judgment should be affirmed for the reasons stated by the court below, 112 F. 2d 530.

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

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

No. 473. Argued March 6, 1941.—Decided March 31, 1941.

1. Under § 113 (a) (5) of the Revenue Acts of 1928 and 1932, the basis for ascertaining gain or loss from the sale of property which had been delivered to the taxpayer by testamentary trustees is, in respect to securities owned by the decedent at death and securities

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*Together with No. 474, *Helvering, Commissioner of Internal Revenue,* v. *Knox,* and No. 475, *Helvering, Commissioner of Internal Revenue,* v. *Rogers,* also on writs of certiorari, 311 U. S. 639, to the Circuit Court of Appeals for the Second Circuit.

purchased by the executors, their value when delivered by the executors to the trustees; and, in respect to securities purchased by the trustees, their cost to the trustees. P. 19.

2. For the purpose of determining whether property delivered to a taxpayer by testamentary trustees was "capital assets" within the capital gains and losses provisions of the Revenue Act of 1928, the period for which the taxpayer has "held" property which had been purchased by the trustees dates from the time of such purchase. P. 20.
3. As between stock which was delivered to the taxpayer by testamentary trustees, and stock which was purchased by the taxpayer prior to such delivery but subsequently to the creation of the trust, the former is regarded as having been acquired earlier, under the "first in, first out" rule of Treasury Regulations. P. 20.
4. The ascertainment of gain or loss from the sale of property acquired by bequest, devise, or inheritance, may properly be based upon value as of the time when the taxpayer first acquired an interest in the property, though contingent or conditional. Revenue Acts of 1928 and 1932. P. 21.

112 F. 2d 530, reversed.

CERTIORARI, 311 U. S. 639, to review the affirmance of decisions of the Board of Tax Appeals (No. 473, 39 B. T. A. 916) in favor of the taxpayers.

Miss Helen R. Carloss argued the cause, and *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Thomas E. Harris,* and *Arthur A. Armstrong* were on the brief, for petitioner.

Mr. Ralph M. Andrews, with whom *Messrs. Daniel J. Kenefick* and *John L. Kenefick* were on the brief, for respondents.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The questions presented by these cases are in part related to and in part the same as those involved in *Maguire* v. *Commissioner, ante,* p. 1, and *Helvering* v. *Gambrill, ante,* p. 11.

The father of these respondents died in 1915. By his will it was provided that his residuary estate should be divided into four parts. One part was devised and bequeathed to trustees: "To receive, hold and, from time to time, invest and reinvest the same, and to collect the rents, income, issues, and profits on the property from time to time constituting such trust fund and to pay over so much of the net income arising therefrom, as to my said trustees shall seem wise and proper toward the support, maintenance, and education of my daughter, Marjorie Knox, until she shall arrive at the age of twenty-one (21) years, and to accumulate the balance of the income during her minority for her benefit, and to pay over the accumulated income to her when she shall arrive at the age of twenty-one (21) years and thereafter to pay over the entire net income to my said daughter, Marjorie Knox, until she shall arrive at the age of twenty-eight (28) years, at which time, I give, devise, and bequeath to my said daughter, Marjorie Knox, one-half (½) of the property then constituting said trust fund and I direct my said trustees to pay over the net income on the remaining one-half (½) of said trust fund until she shall arrive at the age of thirty-five (35) years, at which time I give, devise, and bequeath the remaining part of said trust fund to my said daughter, Marjorie Knox, and to her heirs and assigns forever. In the event that my said daughter, Marjorie Knox, shall die before reaching the age of thirty-five (35) years, I give, devise, and bequeath any part or portion of said trust fund, which has not then been paid over to her, or to the possession of which at the time of her death she was not entitled, unto the issue of said Marjorie Knox, if any, surviving her, to be divided among them, share and share alike. And in case there be no issue her surviving, then I give, devise, and bequeath said trust fund unto her heirs."

Marjorie Knox is respondent Marjorie K. Campbell. Another part of the residuary estate was placed in trust for respondent Dorothy K. G. Rogers, under the same terms. And a third part together with certain securities was placed in trust for respondent Seymour H. Knox, under similar terms. He, however, was to receive $500,000 of the trust fund when he reached the age of twenty-five, one-half of the remaining trust fund when he became thirty, and the balance at thirty-five. Meanwhile, the income was payable to him. On July 1, 1921, the executors, pursuant to an order of the probate court, transferred the property to the trustees.

Marjorie K. Campbell attained the age of twenty-eight on July 10, 1928, and received at that time one-half of the property of her trust. Certain of the securities which she then received were sold by her during 1933 and certain of the bonds matured and were paid during 1933. Some of those securities had been held by her father at his death, others had been purchased by the executors, and some had been purchased by the trustees. In 1926 and 1927 she purchased stock of the F. W. Woolworth Co., which with dividends received in 1927 amounted to 1000 shares. In 1928 she received delivery from the trustees of 15,000 shares of Woolworth stock which represented shares owned by her father at his death, a subsequent tax-free stock split-up, stock dividends, and purchases by the trustees. In 1929 she surrendered the 16,000 shares she owned and received tax free 40,000 shares pursuant to a split-up of the stock. In 1933 she sold 10,000 of the shares received in 1929. There is no way of identifying the shares sold with any particular shares surrendered in 1929.

Dorothy K. G. Rogers became twenty-eight on August 26, 1924, and thirty-five on August 26, 1931, at which times she received distributions of the corpus. During

1933 she sold securities so received. Some of those securities had been purchased by the trustees, some by the executors, and others had been owned by her father at his death.

Seymour H. Knox attained the age of thirty on September 1, 1928, and received on that date one-half of the corpus, including 8,575 shares of stock of Maine Share Corp., of which 5,160 were purchased by the trustees on August 31, 1927, and 3,415 were purchased by the trustees on August 30, 1928. He later exchanged those shares in a non-taxable transaction and on June 10, 1930, sold the shares received in that exchange.

The Board of Tax Appeals [1] and the Circuit Court of Appeals (112 F. 2d 530) held: (1) that the basis to respondents under § 113 (a) (5) of the Revenue Acts of 1928 and 1932 [2] as respects sales made by them was the fair market value at the time when the securities were delivered to them by the trustees, no matter when or how the trustees or the executors may have obtained the securities; (2) that in determining how long respondent Knox held securities for purposes of computing the term of his holding under § 101 of the Revenue Act of 1928, the date of transfer from the trustees should govern; and (3) that as respects the sale of Woolworth stock by respondent Campbell, her own shares should be treated, under the "first-in-first-out" rule, as sold prior to those which were delivered to her by the trustees.

It follows from our holding in *Maguire* v. *Commissioner, supra,* that the rulings on the first issue were erroneous. As respects the securities owned by the decedent at death, the basis is their value when delivered

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[1] The opinion of the Board in *Helvering* v. *Campbell* is reported in 39 B. T. A. 916; its opinions in the other two cases are unreported.

[2] Sec. 113 (a) (5) of the 1932 Act (47 Stat. 169, 199) was the same as § 113 (a) (5) of the 1928 Act (45 Stat. 791, 819).

by the executors to the trustees. As respects the securities purchased by the trustees, the basis is cost to the trustees. And we are of the view that as respects securities purchased by the executors the basis is the value when delivered by them to the trustees. As we said in *Maguire* v. *Commissioner, supra,* the legislative history of § 113 (a) (5) clearly indicates that it applies to purchases by executors. Hence it follows from our reasoning in *Maguire* v. *Commissioner, supra,* that the date of delivery by the trustees to the beneficiaries is no more appropriate here than it is in case of property owned by the decedent at date of death.

We also disagree with the court below on the second issue. Some of the securities were sold by respondent Knox more than two years after they had been purchased by the trustees.[3] For the reasons stated in *Helvering* v. *Gambrill, supra,* it follows, therefore, that they had been "held" by him for more than two years within the meaning of § 101 (c) (8).

We also take a different view on the third proposition. The "first-in-first-out" rule is reflected in Treasury Regulations. The general rule [4] is that where shares of stock cannot be identified with any particular lots purchased,

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[3] On this phase of the cases no question is presented as to securities purchased by executors.

[4] Art. 58, Treas. Reg. 77, promulgated under the 1932 Act provides:

"Sale of stock and rights.—When shares of stock in a corporation are sold from lots purchased at different dates or at different prices and the identity of the lots cannot be determined, the stock sold shall be charged against the earliest purchases of such stock. In the determination of the earliest purchases of stock the rules prescribed in subparagraphs (A), (B), (C), and (D) of section 101 (c) (8) (relating to the period for which property has been held) shall be applied. . . ."

And see Art. 600 (4) dealing with stock or securities distributed in reorganization.

they will be charged against the earliest purchases.[5] For the purpose of determining the earliest purchases the regulation [6] adopts the rule of tacking contained in § 101 (c) (8) (B). That being true, it must be presumed that the Woolworth stock coming from the decedent's estate was first sold. The holding by the trustees is included in that of the beneficiary. Hence, as we indicated in *Helvering* v. *Gambrill, supra,* the date of acquisition by the beneficiary was the date of death. It is that date of acquisition which governs the application of the "first-in-first-out" rule. Therefore, the court below was in error in ruling that respondent Campbell's own shares were sold first.

Respondents have contended, at least in regard to some of these issues, that the nature of their remainder interests necessitates a different result. Thus, in case of respondent Knox it is strongly urged that in view of the conditional nature of his remainder interest he held the securities only from the date when his interest became indefeasible and the securities were distributed to him, since one cannot be deemed to have held or acquired property which he might never obtain. But unlike the situation in *Helvering* v. *Hallock,* 309 U. S. 106, we are not concerned here with the question as to when the transfers took effect for purposes of the estate tax. As we indicated in *Maguire* v. *Commissioner, supra,* we are

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[5] The regulations refer only to "purchases." But no question has been raised as to their application to shares acquired under a will. In fact, the Board of Tax Appeals stated (39 B. T. A. 916, 919) that the "parties are in agreement that the first in, first out rule must be applied, since the shares which the petitioner sold can not be identified as those purchased at any particular time." Furthermore, respondent concedes here that the rule should not be limited to securities which have been bought as distinguished from those which have been otherwise obtained.

[6] Art. 58, *supra* note 4.

dealing only with a point of reference and a standard of value for determination of gains or losses realized on subsequent sales of property acquired by bequest, devise, or inheritance. For that purpose distinctions between vested and contingent remainders or between absolute and conditional property interests have no relevancy. Each remainderman has become the taxpayer because he has obtained possession and control of the property and has sold it. While the property is held in trust, the vested remainderman has no more rights of possession and control than the contingent remainderman. Yet each has acquired a property interest. The statutory provisions here in question come into play when that interest later ripens into full ownership and a sale is made. Hence the value of the property at the time when the taxpayer first acquires an interest in it has relevance to a subsequent determination of the gains or losses. As we remarked in *Maguire* v. *Commissioner, supra,* the residuary legatee in *Brewster* v. *Gage,* 280 U. S. 327, was held to have acquired his interest at date of death though at that time it was not absolute. To be sure, in these cases the interest of the remaindermen in the property at the earlier time was limited by the very terms of the bequest. But the tax here in question is not on their remainder interests; it is on gains realized by them as owners of that property. Hence, to carry into that computation the earlier value of the property is not to tax them on values which they never received. It merely provides a rule of thumb in alleviation of a tax which would be computed by reference to the entire amount of the original inheritance were it to be based on cost to the taxpayer.

Reversed.

The Chief Justice and Mr. Justice Roberts think the judgments should be affirmed for the reasons stated by the court below, 112 F. 2d 530.

Counsel for Parties.

NATIONAL LABOR RELATIONS BOARD *v.* WHITE SWAN CO.

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

No. 529. Argued March 10, 1941.—Decided March 31, 1941.

1. Questions certified by the Circuit Court of Appeals in this case, involving the validity of an order of the National Labor Relations Board which required a company, engaged in the operation of a laundry and dry cleaning business located in a city on a state line, to cease and desist from certain unfair labor practices and to offer employment with back pay to certain employees found to have been discharged because of union affiliation and activities, *held* defective because of "objectionable generality," since the questions do not reflect the precise conclusions of the Board and the precise findings on which those conclusions were based; and also because, even if they did reflect those conclusions and findings, they would call for a "decision of the whole case." P. 27.
2. The necessity in this case of making a supposition as to the sense in which the Board made its finding under § 10 (a) that the unfair labor practices were "affecting commerce," reveals the hypothetical and abstract quality of the questions certified. P. 27.

Certificate dismissed.

CERTIFICATE from the Circuit Court of Appeals upon a petition to that court for enforcement of an order of the National Labor Relations Board. 19 N. L. R. B. 1079.

Mr. Warner W. Gardner argued the cause, and *Solicitor General Biddle* and *Messrs. Arnold Raum, Robert B. Watts, Laurence A. Knapp,* and *Mortimer B. Wolf* were on the brief, for the National Labor Relations Board.

Mr. H. C. A. Hofacker for the White Swan Company.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

A certificate from the Circuit Court of Appeals for the Fourth Circuit submitted pursuant to § 239 of the Judicial Code (28 U. S. C. § 346) is as follows:

This is a petition for enforcement of an order of the National Labor Relations Board, which directed the White Swan Company, a corporation of Wheeling, West Virginia, engaged in the operation of a laundry and dry cleaning business, to cease and desist from certain unfair labor practices and to offer employment with back pay to certain employees held to have been discharged because of union affiliation and activities. The findings of the Board with respect to the unfair labor practices and discriminatory discharge of employees are sustained by substantial evidence; but a question has arisen, as to which the members of the Court are divided and in doubt, with respect to the jurisdiction of the Board in the premises.

The respondent, White Swan Company, operates a combined laundry and dry cleaning establishment in the city of Wheeling, West Virginia. While certain of its supplies are obtained from without the state, the volume of the interstate business thus involved is not sufficient, in our opinion, to bring the business within the jurisdiction of the Board. The record shows that these supplies consist of soap, bluing, bleach, solvent, coal, water, paper, tape and padding, and that respondent's purchases thereof during 1938 amounted to $38,333.15, of which $10,810.90 came from without the state. Respondent, however, operates delivery trucks in Ohio as well as in West Virginia, three of the delivery routes from its plant being in Ohio and eleven in West Virginia. The business involved is necessarily of a purely local character, as the record shows that a radius of fifteen miles is the practical limit for a laundry or dry-cleaning business in this territory. The fact that business is done in Ohio outside the state in which respondent's laundry is located, results from the fact that this purely local business is

located in a city on a state line. Respondent transports garments in its trucks from those of its customers who reside in Ohio to its plant in West Virginia to be serviced, and then after servicing returns the garments in its trucks to the customers. Approximately 12.93 per cent of its gross income for 1938 was derived from this source. In addition thereto, approximately 5 per cent of its gross income during 1938 was derived from the servicing of garments which persons not in its employment collected in Ohio, brought to its plant for servicing and delivered in Ohio after they had been serviced. Respondent's total gross income in 1938 was $128,752.96. The total income from the business obtained from persons in Ohio during this period was $28,088.43.

We recognize that the collection and delivery of garments across state lines, as above described, constitutes interstate commerce. We are advertent, however, to the admonition of the court that in applying the act we are to bear in mind "the distinction between what is national and what is local in the activities of commerce." *N. L. R. B.* v. *Jones & Laughlin* (301 U. S. 1, 30). And although the letter of the National Labor Relations Act may cover such collections and deliveries in interstate commerce as are here involved, the question arises whether a proper interpretation of the Act, in view of the intent of Congress, would include them. Cf. *United States* v. *Sorrells,* 287 U. S. 435, 446. We are divided and in doubt as to whether such collection and delivery, which results from the fact that business of a local character, such as a laundry, is located on a state line, is sufficient to bring such business within the jurisdiction of the Board under the National Labor Relations Act. To so hold would be to bring under the jurisdiction of the Board a great variety of businesses of purely local character simply because they maintain a delivery service in cities located on state lines. As there are many such cities in the United States, the question seems to us one of sufficient importance to justify us in certifying it to the Supreme Court so that it may be definitely settled.

Being divided and in doubt, therefore, this Court respectfully certifies to the Supreme Court of the United States, for its instruction and advice, the following ques-

tions of law, the determination of which is indispensable to a proper decision of the case.

1. Should the National Labor Relations Act be interpreted as having application to a business of purely local character, such as a laundry, merely because such business is located in a city on a state line and derives a substantial portion of its income from business which involves collections or deliveries of articles in a state other than that in which the business is located?

2. Where a local business, such as a laundry, is located in a city on a state line, and is not engaged in interstate commerce, except in so far as it may collect articles to be serviced and may make deliveries to customers living across the state line, is such business, by reason of such collections and deliveries, deemed engaged in "commerce" within the meaning of Subsection 6 of Section 2 of the Act of July 5, 1935, ch. 372, 29 U. S. C. A. 152 (6), so that an unfair labor practice on its part would be an unfair labor practice "affecting commerce" within the meaning of Subsection 7 of said section (29 U. S. C. A. 152 (7)) and Subsection (a) of Section 10, 29 U. S. C. A. 160 (a) ?[1]

The certificate must be dismissed.

By § 10 (a) of the National Labor Relations Act (49 Stat. 449, 453; 29 U. S. C. § 160 (a)) the Board is empowered "to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce." The term "affecting commerce" is defined in § 2 (7) as "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." And "commerce" by § 2 (6) is defined so as to include "trade, traffic, commerce, transportation, or communication among the several States." On a review of an order of

[1] The court denied a motion made by the Solicitor General to amend the certificate by embodying the purchase of supplies in interstate commerce as well as the collections and deliveries.

the Board in a Circuit Court of Appeals the "findings of the Board as to the facts, if supported by evidence, shall be conclusive." § 10 (e).

The questions do not focus "the controversy in its setting." *Lowden* v. *Northwestern National Bank & Trust Co.*, 298 U. S. 160, 163. From the certificate we do not know on what grounds the Board based its jurisdiction—that the business was "in commerce" or that it was embraced within the other categories described in § 2 (7) of the Act. The terms "business of purely local character" and "local business" are meaningful for purposes of § 10 (a) of the Act only in light of specific findings of the Board. To answer the questions we would have to make a supposition as to the sense in which the Board made its finding under § 10 (a) that the unfair labor practices were "affecting commerce." The necessity of making that supposition reveals the hypothetical and abstract quality of the questions. And the fact that on the whole record the answer might be clear whichever the theory of the Board's findings does not make the questions any the less defective. The reviewing court is passing on the validity of a specific order of the Board. Since the questions certified do not reflect the precise conclusions of the Board and the precise findings on which those conclusions were based, they necessarily have an "objectionable generality." See *United States* v. *Mayer*, 235 U. S. 55, 56; *White* v. *Johnson*, 282 U. S. 367 371; *Triplett* v. *Lowell*, 297 U. S. 638, 648; *Atlas Life Ins. Co.* v. *W. I. Southern, Inc.*, 306 U. S. 563, 571; *Pflueger* v. *Sherman*, 293 U. S. 55, 57, 58. And if, in this case, they did reflect those conclusions and findings, they would be defective as calling for a "decision of the whole case." *News Syndicate Co.* v. *New York Central R. Co.*, 275 U. S. 179, 188.

Dismissed.

HORT *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 517. Argued March 7, 1941.—Decided March 31, 1941.

1. An amount received by a lessor in consideration of the cancellation of a lease of real estate is income taxable to him under § 22 (a) of the Revenue Act of 1932 and must be reported as gross income in its entirety. P. 30.
2. Although the amount so received be less than the difference between the present value of the unmatured rental payments and the fair rental value of the property for the unexpired period of the lease, there is no loss deductible under § 23 (e) of the Act. P. 32.
3. Even though the lease be regarded as "property," the consideration received for its cancellation is not, for the purposes of the Revenue Act of 1932, a return of capital. P. 31.

112 F. 2d 167, affirmed.

CERTIORARI, 311 U. S. 641, to review the affirmance of a decision of the Board of Tax Appeals, 39 B. T. A. 922, sustaining the determination of a deficiency in income tax.

Messrs. Walter J. Rosston and *Edwin Hort* submitted for petitioner.

Mr. Richard H. Demuth, with whom *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Morton K. Rothschild* were on the brief, for respondent.

MR. JUSTICE MURPHY delivered the opinion of the Court.

We must determine whether the amount petitioner received as consideration for cancellation of a lease of realty in New York City was ordinary gross income as

defined in § 22 (a) of the Revenue Act of 1932 (47 Stat. 169, 178), and whether, in any event, petitioner sustained a loss through cancellation of the lease which is recognized in § 23 (e) of the same Act (47 Stat. 169, 180).

Petitioner acquired the property, a lot and ten-story office building, by devise from his father in 1928. At the time he became owner, the premises were leased to a firm which had sublet the main floor to the Irving Trust Co. In 1927, five years before the head lease expired, the Irving Trust Co. and petitioner's father executed a contract in which the latter agreed to lease the main floor and basement to the former for a term of fifteen years at an annual rental of $25,000, the term to commence at the expiration of the head lease.

In 1933, the Irving Trust Co. found it unprofitable to maintain a branch in petitioner's building. After some negotiations, petitioner and the Trust Co. agreed to cancel the lease in consideration of a payment to petitioner of $140,000. Petitioner did not include this amount in gross income in his income tax return for 1933. On the contrary, he reported a loss of $21,494.75 on the theory that the amount he received as consideration for the cancellation was $21,494.75 less than the difference between the present value of the unmatured rental payments and the fair rental value of the main floor and basement for the unexpired term of the lease. He did not deduct this figure, however, because he reported other losses in excess of gross income.

The Commissioner included the entire $140,000 in gross income, disallowed the asserted loss, made certain other adjustments not material here, and assessed a deficiency. The Board of Tax Appeals affirmed. 39 B. T. A. 922. The Circuit Court of Appeals affirmed per curiam on the authority of *Warren Service Corp.* v. *Commissioner,* 110 F. 2d 723. 112 F. 2d 167. Because of conflict with *Commissioner* v. *Langwell Real Estate Corp.,* 47 F. 2d 841, we

granted certiorari limited to the question whether, "in computing net gain or loss for income tax purposes, a taxpayer [can] offset the value of the lease canceled against the consideration received by him for the cancellation." 311 U. S. 641.

Petitioner apparently contends that the amount received for cancellation of the lease was capital rather than ordinary income and that it was therefore subject to §§ 101, 111–113, and 117 (47 Stat. 169, 191, 195–202, 207) which govern capital gains and losses. Further, he argues that even if that amount must be reported as ordinary gross income he sustained a loss which § 23 (e) authorizes him to deduct. We cannot agree.

The amount received by petitioner for cancellation of the lease must be included in his gross income in its entirety. Section 22 (a), copied in the margin,[1] expressly defines gross income to include "gains, profits, and income derived from . . . rent, . . . or gains or profits and income derived from any source whatever." Plainly this definition reached the rent paid prior to cancellation just as it would have embraced subsequent payments if the lease had never been canceled. It would have included a prepayment of the discounted value of unmatured rental payments whether received at the inception of the lease or at any time thereafter. Similarly, it would have extended to the proceeds of a suit to recover damages had the Irving Trust Co. breached the lease in-

[1] Sec. 22 (a). "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.

stead of concluding a settlement. Compare *United States* v. *Safety Car Heating Co.*, 297 U. S. 88; *Burnet* v. *Sanford,* 282 U. S. 359. That the amount petitioner received resulted from negotiations ending in cancellation of the lease rather than from a suit to enforce it cannot alter the fact that basically the payment was merely a substitute for the rent reserved in the lease. So far as the application of § 22 (a) is concerned, it is immaterial that petitioner chose to accept an amount less than the strict present value of the unmatured rental payments rather than to engage in litigation, possibly uncertain and expensive.

The consideration received for cancellation of the lease was not a return of capital. We assume that the lease was "property," whatever that signifies abstractly. Presumably the bond in *Helvering* v. *Horst,* 311 U. S. 112, and the lease in *Helvering* v. *Bruun,* 309 U. S. 461, were also "property," but the interest coupon in *Horst* and the building in *Bruun* nevertheless were held to constitute items of gross income. Simply because the lease was "property" the amount received for its cancellation was not a return of capital, quite apart from the fact that "property" and "capital" are not necessarily synonymous in the Revenue Act of 1932 or in common usage. Where, as in this case, the disputed amount was essentially a substitute for rental payments which § 22 (a) expressly characterizes as gross income, it must be regarded as ordinary income, and it is immaterial that for some purposes the contract creating the right to such payments may be treated as "property" or "capital."

For the same reasons, that amount was not a return of capital because petitioner acquired the lease as an incident of the realty devised to him by his father. Theoretically, it might have been possible in such a case to value realty and lease separately and to label each a capital asset. Compare *Maass* v. *Higgins,* 312 U. S. 443;

Appeal of Farmer, 1 B. T. A. 711. But that would not have converted into capital the amount petitioner received from the Trust Co., since § 22 (b) (3)[2] of the 1932 Act (47 Stat. 169, 178) would have required him to include in gross income the rent derived from the property, and that section, like § 22 (a), does not distinguish rental payments and a payment which is clearly a substitute for rental payments.

We conclude that petitioner must report as gross income the entire amount received for cancellation of the lease, without regard to the claimed disparity between that amount and the difference between the present value of the unmatured rental payments and the fair rental value of the property for the unexpired period of the lease. The cancellation of the lease involved nothing more than relinquishment of the right to future rental payments in return for a present substitute payment and possession of the leased premises. Undoubtedly it diminished the amount of gross income petitioner expected to realize, but to that extent he was relieved of the duty to pay income tax. Nothing in § 23 (e)[3] indicates that

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[2] Sec. 22 (b). The following items shall not be included in gross income and shall be exempt from taxation under this title: . . .

(3) The value of property acquired by gift, bequest, devise, or inheritance (but the income from such property shall be included in gross income).

[3] Sec. 23 (e). Subject to the limitations provided in subsection (r) of this section, in the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise [shall be deductible from gross income]—

(1) if incurred in trade or business; or

(2) if incurred in any transaction entered into for profit, though not connected with the trade or business; or

(3) of property not connected with the trade or business, if the loss arises from fires, storms, shipwreck, or other casualty, or from theft. No loss shall be allowed as a deduction under this paragraph if at the time of the filing of the return such loss has been claimed as a deduction for estate tax purposes in the estate tax return.

Congress intended to allow petitioner to reduce ordinary income actually received and reported by the amount of income he failed to realize. See *Warren Service Corp.* v. *Commissioner, supra; Josey* v. *Commissioner,* 104 F. 2d 453; *Tiscornia* v. *Commissioner,* 95 F. 2d 678; Farrelly-Walsh, Inc., *v.* Commissioner, 13 B. T. A. 923; Goerke Co. *v.* Commissioner, 7 B. T. A. 860; Merckens *v.* Commissioner, 7 B. T. A. 32. Compare, *United States* v. *Safety Car Heating Co., supra; Voliva* v. *Commissioner,* 36 F. 2d 212; Appeal of Denholm & McKay Co., 2 B. T. A. 444. We may assume that petitioner was injured insofar as the cancellation of the lease affected the value of the realty. But that would become a deductible loss only when its extent had been fixed by a closed transaction. Regulations No. 77, Art. 171, p. 46; *United States* v. *White Dental Mfg. Co.,* 274 U. S. 398.

The judgment of the Circuit Court of Appeals is

Affirmed.

NYE ET AL. *v.* UNITED STATES ET AL.

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

No. 558. Argued March 12, 1941.—Decided April 14, 1941.

1. Seeking to terminate a suit for wrongful death which an administrator had brought in a federal district court, petitioners (strangers to the suit) induced the administrator, by undue influence, to file a final account and obtain his discharge as administrator, and to send letters to his attorney and the district judge asking dismissal of the suit. The misbehavior occurred more than 100 miles from the district court. Petitioners were adjudged guilty of contempt by the district judge; one was ordered to pay the costs of the contempt proceeding, including a sum to the administrator's attorney; and on both, fines were imposed. A notice of appeal was filed. *Held:*

(1) The case was not one of civil but of criminal contempt. P. 42.

(a) A contempt is considered civil "when the punishment is wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrent to offenses against the public." P. 42.

(b) That the contempt proceeding was entitled in the administrator's suit, and that the United States was not a party until the appeal, are not conclusive as to the nature of the contempt. P. 42.

(c) Nor is the fact that one of the petitioners was ordered to pay the costs of the proceeding, including a sum to the administrator's attorney, decisive. P. 42.

(d) The punitive character of the judgment of contempt was dominant. P. 43.

(2) The appeal is not governed by the Criminal Appeals Rules. P. 43.

(a) In this case there was no "plea of guilty," no "verdict of guilt by a jury," and no "finding of guilt by the trial court where a jury is waived." The quoted qualifying language of the Rules does not designate merely the stage of the proceedings in criminal cases when the Rules become applicable, but describes the kinds of cases to which they are to be applied. P. 43.

(b) In the light of the history of the Act authorizing the Rules, and the amendatory Act, the categories embraced in the Rules may not be expanded by interpretation to include the present case. P. 44.

(3) The appeal is governed by § 8 (c) of the Act of February 13, 1925. P. 44.

(4) This Court being equally divided in opinion as to whether the Circuit Court of Appeals had power, in the absence of an application for allowance of the appeal, to decide the case on the merits, the action of that court in taking jurisdiction of the appeal is affirmed. P. 44.

(5) The conduct of petitioners did not constitute "misbehavior . . . so near" the presence of the court "as to obstruct the administration of justice" within the meaning of § 268 of the Judicial Code. P. 52.

So far as the crime of contempt is concerned, the fact that the district judge received the administrator's letter is inconsequential.

2. The words "so near thereto" in § 268 of the Judicial Code are to be construed as having a geographical, rather than a causal, connotation. P. 48.

3. The phrase "so near thereto as to obstruct the administration of justice" likewise connotes that the misbehavior must have occurred in the vicinity of the court. P. 48.
4. The history of §§ 1 and 2 of the Act of March 2, 1831, and of § 135 of the Criminal Code, requires meticulous regard for the separate categories of offenses therein embraced, so that the instances where there is no right to jury trial will be narrowly restricted. P. 49.
5. The phrase "so near thereto" must be restricted to acts in the vicinity of the court and not be construed to apply to all acts which have a "reasonable tendency" to "obstruct the administration of justice." P. 49.
6. *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, overruled. P. 52.

113 F. 2d 1006, reversed.

CERTIORARI, 311 U. S. 643, to review the affirmance of an order upon an adjudication of contempt.

Mr. Lycurgus R. Varser, with whom *Messrs. J. Bayard Clark* and *O. L. Henry* were on the brief, for petitioners.

The court had no personal knowledge of the matters shown in the evidence. Therefore, it was necessary that the facts be set forth in an affidavit before the court in order to give the court jurisdiction to issue the order to show cause. *In re Deaton*, 105 N. C. 59, 64; *Sona* v. *Aluminum Castings Co.*, 214 F. 326. The testimony of Elmore was given on the defendants' motion to dismiss the suit for wrongful death, and not for the purpose of initiating a contempt proceeding.

The conduct alleged against the petitioners can not be construed as an affront to, or interference with, the court and its functions. Nothing was done in the presence of the court.

The District Court proceeded as in civil contempt. The caption in its findings of fact and judgment, in its order to show cause, in the motion of plaintiff's counsel, in the court minutes showing denial of motions and exceptions, and in the motions filed by the petitioners, is

the caption of the suit for damages for wrongful death. There was no order characterizing the charge as criminal contempt; and the conduct charged took place, if at all, so far from the District Court that it knew nothing about it until the efforts of plaintiff's counsel, and the testimony of Elmore on the motion to dismiss the main action, brought it to the attention of the court.

The District Court proceeded for constructive civil contempt under the "so near thereto" clause of § 268, Jud. Code, when it did not have the power to proceed for civil contempt and did not have power to enter a judgment otherwise. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 448; *In re Sixth & Wisconsin Tower, Inc.*, 108 F. 2d 538, 540.

If the conduct of the petitioners was hostile to any court, it was to the probate court. The District Court could entertain the action for wrongful death only as long as Elmore remained administrator of the estate, and the effect on the District Court of a discharge in the probate court could be only incidental.

If the affidavit and final account had been contemptuously procured by the petitioners and filed in the probate court, the power to punish for such conduct would have been in the probate court and not in the District Court.

The court concluded that all that Nye did by procuring the writing of the letters to the court and to plaintiff's counsel was for the purpose of preventing the prosecution of the civil action on its merits. Though the court says that this caused a long delay, several hearings and expense, there is no finding that Elmore's rights were prejudiced, or that the suit in the federal court was discharged on account of the filing of the final account in the probate court.

The judgment of non-suit rendered void the judgment of contempt.

Mr. Herbert Wechsler, with whom *Solicitor General Biddle, Assistant Attorney General Berge,* and *Mr. Louis B. Schwartz* were on the brief, for the United States.

The contempt adjudicated and charged was unmistakably criminal and the proceeding was appropriate for the purpose. For purposes of appeal, the nature of the judgment is decisive of the criminal or civil character of the contempt. The judgment imposed unconditional fines payable to the United States. Apart from the nature of the sentence, the judgment specifically found the petitioners guilty of misbehavior so near the presence of the court as to obstruct the administration of justice. This was unequivocal evidence that the purpose of the fines and of the adjudication of contempt was to vindicate the authority of the court, not to perfect the remedies of a private suitor.

The proceedings anterior to the judgment support the same conclusion. The prayer of the motion for a rule to show cause was not for remedial punishment in aid of the main suit. It speaks the language of public justice not of private litigation. The acts charged were unmistakably criminal contempt, if contempt at all. They did not violate a court order; they obstructed the work of the court and attempted to deceive the judge. Moreover, the respondents to the rule to show cause were not parties to a pending action; they were strangers. And the movant for the rule was not the plaintiff in the action, but his attorney. While the proceedings were entitled in the original action and the United States was not a party until the appeal, neither circumstance is decisive of the nature of the contempt. The defendants could not have been uncertain that punishment rather than relief was the object in view.

Since the contempt was criminal the jurisdictional objection must prevail. In any event, the proceedings were

adequate to support the imposition of a criminal penalty.

The findings of fact support the conclusion that the petitioners were guilty of misbehavior so near the presence of the court as to obstruct the administration of justice, within the meaning of § 268 of the Judicial Code.

The petitioners' conduct was a deliberate attempt to thwart the prosecution of an action by undue influence exercised on the litigant and misrepresentations made to the court. Such an attempt is a contempt when the means consists of force or threats directed against a suitor; and the type of influence exerted in the present case is indistinguishable. Moreover, the conduct of the petitioners amounted to a misrepresentation. Falsehood may have obstructive qualities which warrant a finding of contempt.

The misbehavior was in the presence of the court or "so near thereto as to obstruct the administration of justice." The early view that the power of summary punishment in cases of misbehavior is confined by the statute to assuring order and decorum in court has been abandoned. It is also clear that the language is not to be "spatially construed." It is unnecessary to rely upon the majority opinion in *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402; the present case falls fairly within the dissenting opinion of Mr. Justice Holmes. A court without plaintiffs can not do business as a court. While the petitioners' efforts to eliminate Elmore as a plaintiff ultimately failed, there was an actual obstruction of the administration of justice. Moreover, the letter which the petitioners had Elmore write to the judge was itself contumacious.

The contention that the District Court was without jurisdiction because the verification was filed a week after the motion for an order to show cause is without merit.

The contention that the settlement of Elmore's action for wrongful death, pending this appeal, requires the judgment of contempt to be set aside, rests upon the unsound premise that the contempt was civil.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioners were adjudged guilty of contempt under § 268 of the Judicial Code (36 Stat. 1163, 28 U. S. C. § 385) for their efforts to obtain a dismissal of a suit brought by one Elmore in the federal District Court for the Middle District of North Carolina. Elmore, administrator of the estate of his son, brought that action, *in forma pauperis,* against one Council and Bernard, partners, trading as B. C. Remedy Co., and alleged that his son died as a result of the use of a medicine, known as B C and manufactured and sold by them. The court appointed William B. Guthrie to represent Elmore. Defendants filed an answer April 29, 1939. On April 19, 1939, Elmore notified the District Judge and his lawyer by letters that he desired to have the case dismissed. The substance of the episode involving the improper conduct of petitioners was found as follows:

Elmore is illiterate and feeble in mind and body. Petitioners,[1] through the use of liquor and persuasion, induced Elmore to seek a termination of the action. Nye directed his own lawyer to prepare the letters to the District Judge and to Guthrie and to prepare a final administration account to be filed in the local probate court. Nye took Elmore to the probate court, had him discharged as administrator, and paid the clerk a fee of $1.

[1] Nye's daughter was married to the son of Council, one of the defendants in the Elmore action. Mayers (Meares) was Nye's tenant who was acquainted with Elmore.

He then took Elmore to the postoffce, registered the letters and paid the postage. Elmore, however, was not promised or paid anything. These events took place more than 100 miles from Durham, North Carolina, where the District Court was located.

On September 30, 1939, Guthrie filed a motion [2] asking for an order requiring Nye to show cause "why he should not be attached and held as for contempt of this Court."[3] The court issued a show cause order to Nye and Mayers who filed their answers. There was a hearing. Evidence was introduced and argument was heard on motions to dismiss. The court found that the writing of the letters and the filing of the final account were pro-

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[2] The court had deferred action on Elmore's inspired request for a dismissal at the request of Guthrie and pending an investigation by him. On July 20, 1939, Nye and Elmore's son were examined under oath before the court as to the episode. On August 29, 1939, defendants moved to dismiss Elmore's action on the ground that he had been discharged as administrator. A hearing was held on that motion and Elmore testified respecting his discharge. The evidence so adduced was the basis of the motion for an order to show cause on September 30, 1939.

[3] The motion for an order to show cause also prayed: "2. That the Court call to the attention of the United States District Attorney for this district the entire record in this cause with request to the said United States District Attorney to investigate the question as to whether or not a conspiracy was entered into by and between R. H. Nye, W. E. Timberlake and L. C. Mayers, all of Robeson County, North Carolina, to defeat the administration of justice and the orderly process of this Court and further as to whether or not they have been guilty of subornation of perjury and further whether they conspired to practice a fraud and did practice a fraud upon this Court. 3. That this matter through the office of the United States District Attorney for this district be submitted and inquired into by the Grand Jury for such action and attention the Grand Jury shall deem proper. 4. For such other and further procedure as to this Court may seem proper."

cured by Nye "for the express and definite purpose of preventing the prosecution of the civil action in the federal court and with intent to obstruct and to prevent the trial of the case on its merits"; and that the conduct of Nye and Mayers "did obstruct and impede the due administration of justice in this cause; that the conduct has caused a long delay, several hearings and enormous expense." It accordingly held that their conduct was "misbehavior so near to the presence of the court as to obstruct the administration of justice" and adjudged each guilty of contempt. It ordered Nye to pay the costs of the contempt proceedings, including $500 to Guthrie, and a fine of $500; and it ordered Mayers to pay a fine of $250. The District Court filed its finding of facts and judgment on February 8, 1940. On March 15, 1940, petitioners filed a notice of appeal from the judgment.[4] The Circuit Court of Appeals affirmed that judgment.[5] 113 F. 2d 1006. We granted the petition for certiorari because the interpretation of the power of the federal courts under § 268 of the Judicial Code to punish contempts raised matters of grave importance.

We are met at the threshold with a question as to the jurisdiction of the Circuit Court of Appeals over the appeal. The government concedes that if this was a case of civil contempt, the notice of appeal was effective under Rule 73 of the Rules of Civil Procedure. It argues, however, that the contempt was criminal—in which case the appeal was not timely if the Criminal Appeals Rules

[4] On March 13, 1940, Elmore, with the assent of Guthrie, submitted to a judgment of voluntary non-suit in the action for wrongful death upon payment of a "substantial sum."

[5] The United States was made a party when the case was docketed in the Circuit Court of Appeals. It entered its appearance but its attorneys apparently took no further part in the proceedings in that court.

govern,[6] and not made in the proper form if § 8(c) of the Act of February 13, 1925 (43 Stat. 936, 940, 45 Stat. 54, 28 U. S. C. § 230) is applicable.[7]

We do not think this was a case of civil contempt. We recently stated in *McCrone* v. *United States,* 307 U. S. 61, 64, "While particular acts do not always readily lend themselves to classification as civil or criminal contempts, a contempt is considered civil when the punishment is wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrent to offenses against the public." The facts of this case do not meet that standard. While the proceedings in the District Court were entitled in Elmore's action and the United States was not a party until the appeal, those circumstances though relevant (*Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, 445–446) are not conclusive as to the nature of the contempt. The fact that Nye was ordered to pay the costs of the proceeding, including $500 to Guthrie, is also not decisive. As Mr. Justice Brandeis stated in *Union Tool Co.* v. *Wilson,* 259 U. S. 107, 110, "Where a fine is imposed partly as compensation to the complainant and partly as punishment, the criminal feature of the order is dominant and fixes

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[6] Promulgated May 7, 1934. Rule III provides that an appeal shall be taken within five days after entry of judgment of conviction or of an order denying a motion for new trial. In the present case, the notice of appeal was filed more than a month after the judgment of the District Court. In case the Criminal Appeals Rules govern, the government also points out that Rule XI requires that petitions for certiorari to review a judgment of the appellate court shall be made within thirty days after the entry of judgment of that court. In the present case the petition for a writ of certiorari was filed about two months after the judgment of the Circuit Court of Appeals.

[7] "No appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree."

its character for purposes of review." The order imposes unconditional fines payable to the United States. It awards no relief to a private suitor. The prayer for relief [8] and the acts charged [9] carry the criminal hallmark. Cf. *Gompers* v. *Bucks Stove & Range Co., supra,* p. 449. They clearly do not reveal any purpose to punish for contempt "in aid of the adjudication sought in the principal suit." *Lamb* v. *Cramer,* 285 U. S. 217, 220. When there is added the "significant" fact (*Bessette* v. *W. B. Conkey Co.,* 194 U. S. 324, 329) that Nye and Mayers were strangers, not parties, to Elmore's action, there can be no reasonable doubt that the punitive character of the order was dominant.

We come then to the question of the jurisdiction of the Circuit Court of Appeals. We disagree with the government in its contention that the appeal in this case was governed by the Criminal Appeals Rules. Those rules were promulgated pursuant to the provisions of the Act of March 8, 1934 (48 Stat. 399; 28 U. S. C. § 723a) which provided, *inter alia,* that this Court should have "the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases." The rules were adopted "as the Rules of Practice and Procedure in all proceedings after plea of guilty, verdict of guilt by a jury or finding of guilt by the trial court where a jury is waived, in criminal cases." 292 U. S. 661. In this case there was no plea of guilty, there was

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[8] *Supra,* note 3.

[9] On October 30, 1939, the District Court denied motions to dismiss the rule to show cause saying that "the question to be determined is whether the respondents, or either of them, is guilty of misbehavior in the presence of the Court, or so near thereto to obstruct the administration of justice in this Court, and that is a matter of fact to be determined by the evidence and not on motion."

no verdict of guilt by a jury, and there was no finding of guilt by the court where a jury was waived. To be sure, the rules and the Act are applicable "in criminal cases." But we do not agree with the government that the qualifying language of the rules designates merely the stage of the proceedings "in criminal cases" when the rules become applicable. It is our view that the rules describe the kinds of cases to which they are to be applied. The Act of March 8, 1934 amended the Act of February 24, 1933 (47 Stat. 904) which gave this Court rule-making power "with respect to any or all proceedings after verdict in criminal cases." The legislative history makes it abundantly clear that the amendment in 1934, so far as material here, was made because "it would not seem to be desirable that there should be different times and manner of procedure in cases of appeal where there is a verdict of a jury as distinguished from cases in which there is a finding of guilt by the court on the waiver of a jury." H. Rep. No. 858, 73d Cong., 2d Sess., p. 1; S. Rep. No. 257, 73d Cong., 2d Sess., p. 1. In light of this history and the language of the order promulgating the rules we conclude that the categories of cases embraced in the rules cannot be expanded by interpretation to include this type of case.

That conclusion means that this appeal was governed by § 8 (c) of the Act of February 13, 1925. The Court is equally divided in opinion as to whether the Circuit Court of Appeals, in absence of an application for allowance of the appeal, had the power to decide the case on the merits. Hence the action of that court in taking jurisdiction over the appeal is affirmed.

We come then to the merits.

The question is whether the conduct of petitioners constituted "misbehavior . . . so near" the presence of the court "as to obstruct the administration of justice" within

the meaning of § 268 of the Judicial Code.[10] That section derives from the Act of March 2, 1831 (4 Stat. 487). The Act of 1789 (1 Stat. 73, 83) provided that courts of the United States "shall have power . . . to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same." Abuses arose,[11] culminating in impeachment proceedings against James H. Peck, a federal district judge, who had imprisoned and disbarred one Lawless for publishing a criticism of one of his opinions in a case which was on appeal. Judge Peck was acquitted.[12] But the history of that episode makes abundantly clear that it served as the occasion for a drastic delimitation by Congress of the broad undefined power of the inferior federal courts under the Act of 1789.

The day after Judge Peck's acquittal Congress took steps to change the Act of 1789. The House directed its Committee on the Judiciary "to inquire into the expediency of defining by statute all offences which may be punished as contempts of the courts of the United States, and also to limit the punishment for the same." [13] Nine

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[10] This section provides: "The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided,* That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts."

[11] See Nelles & King, Contempt by Publication in the United States, 28 Col. L. Rev. 401, 409 *et seq.*

[12] Stansbury, Report of the Trial of James H. Peck (1833).

[13] 7 Cong. Deb., 21st Cong., 2d Sess., Feb. 1, 1831, Cols. 560–561. And see House Journal, 21st Cong., 2d Sess., p. 245.

days later James Buchanan brought in a bill which became the Act of March 2, 1831. He had charge of the prosecution of Judge Peck and during the trial had told the Senate: [14] "I will venture to predict, that whatever may be the decision of the Senate upon this impeachment, Judge Peck has been the last man in the United States to exercise this power, and Mr. Lawless has been its last victim." The Act of March 2, 1831, "declaratory of the law concerning contempts of court," contained two sections, the first of which provided:

"That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the misbehaviour of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehaviour of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts."

Sec. 2 of that Act, from which § 135 of the Criminal Code [15] (35 Stat. 1113, 18 U. S. C. § 241) derives, provided:

"That if any person or persons shall, corruptly, or by threats or force, endeavour to influence, intimidate, or impede any juror, witness, or officer, in any court of the

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[14] Stansbury, *op. cit.* p. 430.

[15] That section presently provides: "Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United

United States, in the discharge of his duty, or shall, corruptly, or by threats or force, obstruct, or impede, or endeavour to obstruct or impede, the due administration of justice therein, every person or persons, so offending, shall be liable to prosecution therefor, by indictment, and shall, on conviction thereof, be punished, by fine not exceeding five hundred dollars, or by imprisonment, not exceeding three months, or both, according to the nature and aggravation of the offence."

In 1918 this Court in *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402, 418, 419, stated that "there can be no doubt" that the first section of the Act of March 2, 1831 "conferred no power not already granted and imposed no limitations not already existing"; and that it was "intended to prevent the danger by reminiscence of what had gone before, of attempts to exercise a power not possessed which . . . had been sometimes done in the exercise of legislative power." The inaccuracy of that historic observation has been plainly demonstrated. Frankfurter & Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers,* 37 Harv. L. Rev. 1010. Congress was responding to grievances arising out of the exercise of judicial power as dramatized by the Peck impeachment proceedings. Congress was intent on curtailing that power. The two sections of the Act of March 2, 1831 when read together, as they must be, clearly indicate that the category of criminal cases which could be tried without a jury was narrowly confined. That the previously undefined power of the courts was

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States commissioner or officer acting as such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both."

substantially curtailed by that Act was early recognized by lower federal courts. *United States* v. *Holmes,* Fed. Cas. No. 15,383, at p. 363; *Ex parte Poulson,* Fed. Cas. No. 11,350; *United States* v. *New Bedford Bridge,* Fed. Cas. No. 15,867, at p. 104; *United States* v. *Seeley,* Fed. Cas. No. 16,248a; *United States* v. *Emerson,* 4 Cranch (C. C.) 188; Fed. Cas. No. 15,050; Kent's Commentaries (3rd ed. 1836) pp. 300–301. And when the Act came before this Court in *Ex parte Robinson,* 19 Wall. 505, 511, Mr. Justice Field, speaking for the Court, acknowledged that it had limited the power of those courts. And see *Ex parte Bradley,* 7 Wall. 364, 374. So far as the decisions of this Court are concerned, that view persisted to the time when *Toledo Newspaper Co.* v. *United States, supra,* was decided. See *Ex parte Wall,* 107 U. S. 265; *Savin, Petitioner,* 131 U. S. 267, 276; *Cuddy, Petitioner,* 131 U. S. 280, 285; *Eilenbecker* v. *District Court,* 134 U. S. 31, 38.

Mindful of that history, we come to the construction of § 268 of the Judicial Code in light of the specific facts of this case. The question is whether the words "so near thereto" have a geographical or a causal connotation. Read in their context and in the light of their ordinary meaning, we conclude that they are to be construed as geographical terms. In *Ex parte Robinson, supra,* at p. 511, it was said that as a result of those provisions the power to punish for contempts "can only be exercised to insure order and decorum" in court. "Misbehavior of any person in their presence" plainly falls in that category. *Ex parte Terry,* 128 U. S. 289. And in *Savin, Petitioner, supra,* it was also held to include attempted bribes of a witness, one in the jury room and within a few feet of the court room and one in the hallway immediately adjoining the court room. See *Cooke* v. *United States,* 267 U. S. 517. The phrase "so near thereto as to obstruct the administration of justice" likewise con-

notes that the misbehavior must be in the vicinity of the court. Nelles & King, *Contempt by Publication in the United States,* 28 Col. L. Rev. 525, 530. It is not sufficient that the misbehavior charged has some direct relation to the work of the court. "Near" in this context, juxtaposed to "presence," suggests physical proximity not relevancy. In fact, if the words "so near thereto" are not read in the geographical sense, they come close, as the government admits, to being surplusage. There may, of course, be many types of "misbehavior" which will "obstruct the administration of justice" but which may not be "in" or "near" to the "presence" of the court. Broad categories of such acts, however, were expressly recognized in § 2 of the Act of March 2, 1831 and subsequently in § 135 of the Criminal Code. It has been held that an act of misbehavior though covered by the latter provisions may also be a contempt if committed in the "presence" of the Court. *Savin, Petitioner, supra.* And see *Sinclair* v. *United States,* 279 U. S. 749. Yet in view of the history of those provisions, meticulous regard for those separate categories of offenses must be had, so that the instances where there is no right to jury trial will be narrowly restricted. If "so near thereto" be given a causal meaning, then § 268 by the process of judicial construction will have regained much of the generality which Congress in 1831 emphatically intended to remove. See Thomas, *Problems of Contempt of Court* (1934) c. VII. If that phrase be not restricted to acts in the vicinity of the court but be allowed to embrace acts which have a "reasonable tendency" to "obstruct the administration of justice" (*Toledo Newspaper Co.* v. *United States, supra,* p. 421) then the conditions which Congress sought to alleviate in 1831 have largely been restored. See Fox, *The History of Contempt of Court* (1927) c. IX. The result will be that the offenses which Congress designated as true crimes under § 2 of the Act of March 2,

1831 will be absorbed as contempts wherever they may take place. We cannot by the process of interpretation obliterate the distinctions which Congress drew.

We are dealing here only with a problem of statutory construction, not with a question as to the constitutionally permissible scope of the contempt power. But that is no reason why we should adhere to the construction adopted by *Toledo Newspaper Co.* v. *United States, supra,* and leave to Congress the task of delimiting the statute as thus interpreted. Though the statute in question has been on the books for over a century, it has not received during its long life the broad interpretation which that decision gave it. Rather, that broad construction is relatively recent. So far as decisions of this Court are concerned, the statute did not receive any such expanded interpretation until *Toledo Newspaper Co.* v. *United States, supra,* was decided in 1918. The decisions of this Court prior to 1918 plainly recognized, as we have noted, that Congress through the Act of March 2, 1831 had imposed a limitation on the power to punish for contempts—a view consistent with the holdings of the lower federal courts during the years immediately following the enactment of the statute. The early view was best expressed in *Ex parte Poulson, supra,* decided in 1835. In that case it was held that the Act of March 2, 1831 gave the court no power to punish a newspaper publisher for contempt for publishing an "offensive" article relative to a pending case. It was held that the first section of the Act "alludes to that kind of misbehavior which is calculated to disturb the order of the court, such as noise, tumultuous or disorderly behavior, either in or so near to it as to prevent its proceeding in the orderly dispatch of its business." p. 1208. That was a plain recognition that the words "so near thereto" connoted physical proximity. And prior to 1918 the decisions of this Court did not depart from that theory,

however they may have expanded the earlier notions of "misbehavior." To be sure, the lower federal courts in the intervening years had expressed a contrariety of views on the meaning of the statute [16] and some were giving it an expanded scope [17] which was later approved in *Toledo Newspaper Co.* v. *United States, supra.* But it is significant that not until after the turn of this century did the first line of fracture appear suggesting that the statute authorized summary punishment for publication.[18] Thus the legislative history of this statute and its career demonstrate that this case presents the question of correcting a plain misreading of language and history so as to give full respect to the meaning which Congress unmistakably intended the statute to have. Its legislative history, its interpretation prior to 1918, the character and nature of the contempt proceedings, admonish us not to give renewed vitality to the doctrine of *Toledo Newspaper Co.* v. *United States, supra,* but to recognize the substantial legislative limitations on the contempt power which were occasioned by the Judge Peck episode. And they necessitate an adherence to the original construction of the statute so that, unless its requirements are clearly satisfied, an offense will be dealt with as the law deals with the run of illegal acts. Cf. Mr. Justice Holmes

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[16] That "so near thereto" is a geographical term see *Ex parte Schulenburg,* 25 F. 211, 214 (1885); *Hillmon* v. *Mutual Life Ins. Co.,* 79 F. 749 (1897); *Morse* v. *Montana Ore-Purchasing Co.,* 105 F. 337, 347 (1900); *Cuyler* v. *Atlantic & N. C. R. Co.,* 131 F. 95 (1904). And see Nelles & King, *op. cit.,* pp. 532, 539–542.

[17] For cases expanding the concept of "presence" and "so near thereto" see *In re Brule,* 71 F. 943 (1895); *McCaully* v. *United States,* 25 App. D. C. 404 (1905); *United States* v. *Zavelo,* 177 F. 536 (1910); *Kirk* v. *United States,* 192 F. 273 (1911); *In re Independent Pub. Co.,* 228 F. 787 (1915).

[18] Nelles & King, *op. cit.,* p. 539 citing *Ex parte McLeod,* 120 F. 130 (1903) and *United States* v. *Huff,* 206 F. 700 (1913).

dissenting in *Toledo Newspaper Co.* v. *United States, supra,* pp. 422 *et seq.*

The conduct of petitioners (if the facts found are taken to be true) was highly reprehensible. It is of a kind which corrupts the judicial process and impedes the administration of justice. But the fact that it is not reachable through the summary procedure of contempt does not mean that such conduct can proceed with impunity. Section 135 of the Criminal Code, a descendant of § 2 of the Act of March 2, 1831, embraces a broad category of offenses. And certainly it cannot be denied that the conduct here in question comes far closer to the family of offenses there described than it does to the more limited classes of contempts described in § 268 of the Judicial Code. The acts complained of took place miles from the District Court. The evil influence which affected Elmore was in no possible sense in the "presence" of the court or "near thereto." So far as the crime of contempt is concerned, the fact that the judge received Elmore's letter is inconsequential.

We may concede that there was an obstruction in the administration of justice, as evidenced by the long delay and large expense which the reprehensible conduct of petitioners entailed. And it would follow that under the "reasonable tendency" rule of *Toledo Newspaper Co.* v. *United States, supra,* the court below did not err in affirming the judgment of conviction. But for the reasons stated that decision must be overruled. The fact that in purpose and effect there was an obstruction in the administration of justice did not bring the condemned conduct within the vicinity of the court in any normal meaning of the term. It was not misbehavior in the vicinity of the court disrupting to quiet and order or actually interrupting the court in the conduct of its business. Cf. *Savin, Petitioner, supra,* at p. 278. Hence, it was not embraced within § 268 of the Judicial Code.

If petitioners can be punished for their misconduct, it must be under the Criminal Code where they will be afforded the normal safeguards surrounding criminal prosecutions. Accordingly, the judgment below is

Reversed.

MR. JUSTICE STONE, dissenting:

The court below did not pass on the question, mooted here, whether it acquired jurisdiction under the appeal provisions of the applicable section, 8 (c), of the Jurisdictional Act of February 13, 1925. Only four members of this Court are of opinion that it did. Assuming for present purposes that it had jurisdiction to decide the merits, I think its decision was right and that the judgment below should be affirmed.

We are concerned here only with the meaning and application of an act of Congress which has stood unamended on the statute books for one hundred and ten years. It gives statutory recognition to the power of the federal courts to punish summarily for contempt and provides that that power "shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice."

The issue is not whether this statute has curtailed an authority which federal courts exercised before its enactment. Concededly it has. The only question before us is whether it has so limited that authority as to preclude summary punishment of the contemptuous action of petitioner which, it is not denied, is "misbehavior" although not in the presence of the court, and which, it is admitted, seriously obstructed the administration of justice in a cause pending in the court. The question is important, for if conduct such as this record discloses may not be dealt with summarily the only recourse of a federal court for the protection of the integrity of proceed-

ings pending before it, from acts of corruption and intimidation outside the court room, is to await the indictment of the offenders, with or without adjournment of the pending proceedings as the exigencies of the case may require.

It is not denied that the distance of the present contemptuous action from the court in miles did not lessen its injurious effect, and in that sense it was "near" enough to obstruct the administration of justice. The opinion of the Court supports its conclusion on the ground that "near" means only geographical nearness and so implicitly holds that no contempt is summarily punishable unless it is either in the presence of the court or is some kind of physical interference with or disturbance of its good order, so that the nearness to the court of the contemptuous act has an effect in obstructing justice which it would not have if it took place at a more distant point. From all this it seems to follow that the surreptitious tampering with witnesses, jurors or parties in the presence of the court, although unknown to it, would be summarily punishable because in its presence, but that if it took place outside the court room or while the witness, juror or party was on his way to attend court it would not be punishable because geographical nearness is not an element in making the contemptuous action an obstruction to justice.

These contentions assume that "so near thereto" can only refer to geographical position and they ignore the entire history of the judicial interpretation of the statute. "Near" may connote proximity in causal relationship as well as proximity in space, and under this statute, as the opinion seems to recognize, even the proximity to the court, in space, of the contemptuous action, is of significance only in its causal relationship to the obstructions to justice which result from disorder or public disturbances. This Court has hitherto, without a dissenting

voice, regarded the phrase "so near thereto" as connoting and including those contempts which are the proximate cause of actual obstruction to the administration of justice, whether because of their physical nearness to the court or because of a chain of causation whose operation in producing the obstruction depends on other than geographical relationships to the court. See *Savin, Petitioner,* 131 U. S. 267; *Cuddy, Petitioner,* 131 U. S. 280; *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402; *Sinclair* v. *United States,* 279 U. S. 749, 764, 765; *Craig* v. *Hecht,* 263 U. S. 255. Cf. *McCann* v. *New York Stock Exchange,* 80 F. 2d 211, 213. Contempts which obstruct justice because of their effect on the good order and tranquillity of the court must be in the presence of the court or geographically near enough to have that effect. Contempts which are surreptitious obstructions to justice, through tampering with witnesses, jurors and the like, must be proximately related to the condemned effect. We are pointed to no legislative history which militates against such a construction of the statute.

In the *Savin,* the *Craig,* and the *Sinclair* cases, as well as in the *Toledo* case, the contempts were of this latter kind. The contempt held summarily punishable by this Court in the *Savin* case, decided sixty years ago, was the attempted bribery of a witness at a place in the court house but outside the courtroom, without any disorder or disturbance of the court. The contemptuous acts in the other cases took place at points distant from the court in the city where it sat. In all, the injurious effect on the administration of justice was unrelated to the distance from the court. In holding that they were contempts within the summary jurisdiction of the court this Court definitely decided that "so near thereto" is not confined to a spatial application where the evil effect of the alleged contempt does not depend upon its physical nearness to the court.

The *Savin* and *Sinclair* cases were decided by a unanimous court. The dissenting judges in the *Toledo* and *Craig* cases, in which the acts held to be contemptuous were the publication, at a distance from the court, of comments derogatory to the judge, made no contention that the phrase imposed a geographical limitation on the power of the court. Their position was that the particular contemptuous acts charged did not in fact have the effect of obstructing justice, a contention which cannot be urged here. In the *Toledo* case, Justice Holmes said, page 423: "I think that 'so near as to obstruct' means so near as actually to obstruct—and not merely near enough to threaten a possible obstruction." And in the *Craig* case, after commenting on the fact that no cause was pending before the court, he said, p. 281: "Suppose the petitioner falsely and unjustly charged the judge with having excluded him from knowledge of the facts, how can it be pretended that the charge obstructed the administration of justice. . . ." Complete agreement with the dissents in these cases neither requires the Court's decision here nor lends it any support.

I do not understand my brethren to maintain that the secret bribery or intimidation of a witness in the court room may not be summarily punished. Cf. *Savin, supra; Sinclair, supra.* If so, it is only because of the effect of the contemptuous act in obstructing justice, which is precisely the same if the bribery or intimidation took place outside the court house. If it may be so punished I can hardly believe that Congress, by use of the phrase "so near thereto," intended to lay down a different rule if the contemptuous acts took place across the corridor, the street, in another block, or a mile away.

If the point were more doubtful than it seems to me, I should still think that we should leave undisturbed a construction of the statute so long applied and not hitherto doubted in this Court. We recently declined to

consider the contention that the Sherman Act can never apply to a labor union, because of long standing decisions of this Court to the contrary, a construction which Congress had not seen fit to change. See *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 487, 488.

In view of our earlier decisions and of the serious consequences to the administration of justice if courts are powerless to stop, summarily, obstructions like the present, I think the responsibility of departing from the long accepted construction of this statute should be left to the legislative branch of the Government, to which it rightfully belongs.

The CHIEF JUSTICE and MR. JUSTICE ROBERTS concur in this opinion.

UNITED STATES *v.* RESLER, DOING BUSINESS AS RESLER TRUCK LINE AND AS BRADY TRUCK LINE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

No. 616. Argued March 14, 1941.—Decided April 14, 1941.

1. Section 212 (b) of the Motor Carrier Act of 1935, which subjects to the rules and regulations of the Interstate Commerce Commission transfers of certificates and permits, applies to a transfer of operating rights though not more than twenty motor vehicles are involved, notwithstanding the provision of § 213 (e) that "the provisions of this section requiring authority from the Commission for consolidation, merger, purchase, lease, operating contract, or acquisition of control shall not apply where the total number of motor vehicles involved is not more than twenty." P. 59.
2. Under the Motor Carrier Act of 1935, the Interstate Commerce Commission had authority to promulgate a rule making approval by the Commission prerequisite to an effective transfer of operating rights. P. 59.

Reversed.

APPEAL under the Criminal Appeals Act from a judgment sustaining a special plea in bar to an information charging violation of the Motor Carrier Act of 1935.

Mr. Fowler Hamilton, with whom *Solicitor General Biddle, Assistant Attorney General Arnold,* and *Messrs. James C. Wilson* and *S. R. Brittingham, Jr.* were on the brief, for the United States.

Mr. Harry S. Silverstein submitted for appellee.

MR. JUSTICE MURPHY delivered the opinion of the Court.

This appeal presents two important questions affecting the administration of the Motor Carrier Act of 1935 (49 Stat. 543). The first is whether § 213 (e) places beyond reach of § 212 (b) transfers of operating rights where not more than twenty vehicles are involved. The second is whether the Interstate Commerce Commission possessed statutory authority to rule that assent of the Commission is a condition precedent to an effective transfer which is subject to § 212 (b).

In July, 1940, the United States filed an information against appellee charging that he had engaged in interstate motor carrier operations over a specified route in Colorado without a certificate of public convenience and necessity required by § 206 (a) of the Motor Carrier Act of 1935. Appellee filed a special plea in bar alleging in substance that he had not violated § 206 (a) because he had acquired the requisite certificate from one Brady to whom it had been issued originally, and that the approval of the Interstate Commerce Commission was not necessary to validate that transfer. The District Court sustained this plea, and the United States appealed directly to this court, 34 Stat. 1246, 18 U. S. C. § 682. Counsel for appellant and appellee have stipulated that not more than twenty vehicles were involved in the transfer from

Brady to appellee, and that the Interstate Commerce Commission has not approved that transfer.

The transfer is governed by § 212 (b). That section provides: "Except as provided in section 213, any certificate or permit may be transferred pursuant to such rules and regulations as the [Interstate Commerce] Commission may prescribe." Section 213, regulating consolidations, mergers, and other acquisitions of control of motor carriers, provides in subsection (e) that ". . . the provisions of this section requiring authority from the Commission for consolidation, merger, purchase, lease, operating contract, or acquisition of control shall not apply where the total number of motor vehicles involved is not more than twenty."

The obvious sense of § 212 (b) could hardly be expressed more aptly than in the language quoted. Section 213 (e) is equally explicit. Read together, the two sections can mean only that a transfer involving not more than twenty vehicles is governed by § 212 (b) and the regulations enacted pursuant to it. The phrase "Except as provided in § 213" was intended to remove from the sweep of § 212 (b) only those transfers which were within the compass of § 213. It was never intended to place beyond reach of § 212 (b) the transfers which § 213 (e) expressly placed beyond reach of § 213.

Notwithstanding the fact that the instant transfer is subject to § 212 (b), appellee challenges the Commission's authority to enact Rule 1 (d) which provides: "No attempted transfer of any operating right shall be effective except upon full compliance with these rules and regulations and until after the Interstate Commerce Commission has approved such transfer as herein provided. . . ." Order of July 1, 1938, 3 Fed. Reg. 2157.

Power to make rules regulating the transfers embraced in § 212 (b) derives from the phrase in that section "pursuant to such rules and regulations as the Commission

may prescribe," and from § 204 (a) (6) which makes it the duty of the Commission to administer, execute, and enforce all provisions of [the Motor Carrier Act], to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration. . . ." Undoubtedly the power to prescribe regulations is not unlimited, but neither section provides or implies that the Commission is without authority to rule that parties to a proposed transfer which is governed by § 212 (b) must first obtain the consent of the Commission. Indeed, the conclusion is inescapable that such a rule is clearly within the regulatory power which Congress intended to confer on the Commission, for Congress could insure effective enforcement of other sections of the Act only by granting the Commission power to enact regulations broad enough to authorize Rule 1 (d).

Sections 213 (a) and 213 (b) carefully provide in detail for the regulation of transfers of operating rights by merger, consolidation, or by other specified means. Section 213 (a) (1) expressly stipulates that the approval of the Commission must precede a transfer which is subject to § 213. Manifestly, the administration of §§ 213 (a) and 213 (b) would be seriously hampered if the Commission were powerless to make the same requirement with respect to transfers subject to § 212 (b), particularly since the number of vehicles involved may determine which section is applicable.

In many respects a transferee such as appellee stands in the same relation to the Commission as an original applicant for permission to operate. Many inquiries which are relevant to the initial application are equally relevant to the proposed transfer. Section 206 (a), with immaterial exceptions, permits common carriers by motor vehicles to operate only if the carrier has first obtained a certificate of public convenience and necessity. Section 207 (a) expressly conditions issuance of the cer-

tificate on findings by the Commission that the applicant is "fit, willing, and able properly to perform the service proposed and to conform to the provisions of [the Motor Carrier Act] and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity." Plainly the finding of the requisite fitness, willingness, and ability of the first applicant is wholly inapplicable to his proposed transferee (see Rule 2 (c), 3 Fed. Reg. 2158), and the operations inceptively authorized no longer may serve public convenience and necessity because conditions have changed. See Rule 6, 3 Fed. Reg. 2158; compare §§ 208 (a), 212 (a). It is evident that full enforcement of §§ 206 (a) and 207 (a) likewise would be impeded if the Commission lacked power to rule that its consent must precede a transfer subject to § 212 (b).[1]

We conclude that the Commission acted within its authority to prescribe rules and regulations to implement § 212 (b) in ruling that its consent was a condition precedent to an effective transfer governed by that section. It was not compelled to contest the legality or propriety of such a transfer after it had been completed.

The judgment of the District Court is reversed and the cause is remanded for further proceedings.

Reversed.

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[1] Absent such power, the Commission would encounter similar difficulties in the administration of other sections. Section 215 requires the Commission to withhold a certificate until the carrier has complied with Commission regulations exacting security for damage to persons and property. Section 217 compels specified carriers to file tariff schedules. Section 221 obligates motor carriers to file written designations of agents for service of process and Commission orders.

See also §§ 220, 223.

DEPARTMENT OF TREASURY OF INDIANA ET AL. *v.* WOOD PRESERVING CORPORATION.

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

No. 654. Argued April 1, 1941.—Decided April 28, 1941.

1. A State may tax the gross receipts derived by a foreign corporation from goods bought and sold by it within the State. *Adams Manufacturing Co.* v. *Storen*, 304 U. S. 307, distinguished. P. 66.
2. A foreign corporation can not escape such a tax by arranging to have the proceeds of its intrastate transactions paid to it in another State. P. 67.
3. A Delaware corporation, respondent in this case, arranged by telephone from its Ohio office with Indiana producers for delivery of railroad ties in Indiana at a loading point on the line of a railroad company with which it had contracted both to sell ties and to treat them with creosote at its plant in Ohio. When brought to the railroad, in Indiana, the ties were examined by the railroad's inspector in the presence of respondent's agent, and those accepted by the inspector were immediately loaded on cars and were hauled to the Ohio plant, under bills of lading naming the respondent as consignor and an officer of the railroad as consignee. Respondent paid no freight for the transportation. Its Ohio office mailed weekly invoices to the railroad at its office in Maryland for the ties so delivered to the railroad, and monthly reports of such invoices were made to respondent's main office in Pennsylvania. All payments for ties were made to respondent's office in Pennsylvania and were there deposited in bank. *Held:*

   (1) That the sales of ties to the railroad in Indiana were local transactions separate from the creosoting service and the receipts from such sales were subject to the Indiana tax. P. 68.

   (2) The circumstance that the billing was in the name of the respondent as consignor is immaterial, in view of the completed delivery to the railroad in Indiana. P. 68.

114 F. 2d 922, reversed.

CERTIORARI, 312 U. S. 670, to review the reversal of a judgment against the present respondent in its suit to recover money collected as taxes by the Treasurer of the State of Indiana.

Messrs. Joseph P. McNamara and *Joseph W. Hutchinson,* Deputy Attorneys General of Indiana, with whom *Mr. George N. Beamer,* Attorney General, was on the brief, for petitioners.

Mr. Harry T. Ice, with whom *Messrs. Frederick E. Matson* and *Carleton M. Crick* were on the brief, for respondent.

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

This suit was brought by respondent, The Wood Preserving Corporation, to recover taxes collected from it by the Department of Treasury of the State of Indiana under the Indiana Gross Income Tax Act of 1933. The District Court denied recovery and its judgment was reversed by the Circuit Court of Appeals upon the ground that the taxes were invalid under the Federal Constitution as laid upon income received outside the State and as constituting an unlawful burden upon interstate commerce. 114 F. 2d 922. In view of the asserted conflict with applicable decisions of this Court, certiorari was granted, 312 U. S. 670.

The facts were found in accordance with the stipulation of the parties. Respondent is a Delaware corporation with its principal place of business at Pittsburgh, Pennsylvania. It is qualified to do business in Indiana but has no agents or employees within that State except as specified. Respondent is engaged in the business of treating railroad ties by creosoting them and also in the business of purchasing and selling ties. It does not, however, sell ties save to those with whom it has a contract for treatment.

The taxes in question were for the years 1934, 1935, and 1936. The taxes were laid upon respondent's gross receipts from the sale of ties to the Baltimore and Ohio

Railroad Company in accordance with certain contracts. One contract required the Railroad Company to deliver for treatment 600,000 ties annually to a treatment plant at Finney, Ohio, belonging (through a subsidiary) to respondent. The other provided for the sale of raw ties to the Railroad Company, delivered f. o. b. cars on the railroad tracks; also for treatment of ties at another plant to be operated by respondent (under lease from the Railroad Company) in West Virginia. A supplemental agreement required respondent to ship all ties delivered to the railroad in territory west of the Ohio River, including Indiana, to the plant at Finney, Ohio, for treatment. Respondent sold to the Railroad Company no ties that were not to be treated at one or the other of its plants before use.

The course of business, so far as material here, was as follows: Respondent itself produced no ties in Indiana. Requisitions for ties were issued from the Railroad Company's office in Baltimore and were accepted at respondent's office in Marietta, Ohio, by telephone or mail. Respondent then procured the ties from local producers in Indiana through communications by telephone or mail from its Marietta office. The Indiana vendors delivered the ties at loading points on the railroad in Indiana. When the ties were ready, an inspector for the Railroad Company and respondent's agent met at the loading point in Indiana, and as the ties were examined with respect to compliance with specifications, those accepted by the railroad inspector were loaded on freight cars furnished by the Railroad Company at the loading point. The inspection and loading were simultaneous. Respondent paid the Indiana producers only for ties which were thus accepted. Respondent's agent made out bills of lading with respondent as consignor and the Railroad Company's Chief Engineer of Maintenance at Finney, Ohio, as consignee, and the ties were

carried to Finney, Ohio, for treatment. Respondent paid no freight to the Railroad Company for that transportation. Respondent's office at Marietta mailed weekly invoices to the Railroad Company at its Baltimore office for the ties sold and delivered to the Railroad Company and monthly reports of such invoices were made to respondent's main office at Pittsburgh. All payments for ties were made to respondent's Pittsburgh office and were there deposited in bank.

The taxes in question were laid by the Indiana authorities on the receipts which respondent derived from the sale of the untreated ties. These receipts did not include charges for the creosoting treatment; those charges were separately billed by respondent's subsidiary when the treatment was completed.

Section 2 of the Indiana Taxing Act of 1933, the text of which is set forth in the margin,[1] provides for a tax upon gross income "derived from sources within the State of Indiana" of all nonresident persons and corporations. The court below has held that under this statute the

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[1] Section 2 of Chapter 50 of the Acts of 1933 of Indiana is as follows:

"Sec. 2. There is hereby imposed a tax, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the entire gross income of all residents of the State of Indiana, and upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state, and shall be in addition to all other taxes now or hereafter imposed with respect to particular occupations and/or activities. Said tax shall apply to, and shall be levied and collected upon, all gross incomes received on or after the first day of May, 1933, with such exceptions and limitations as may be hereinafter provided." 11 Burns Indiana Statutes, § 64-2602.

thing taxed was "the receipt of gross income" and as the income in question was received by respondent in Pennsylvania, it was beyond the jurisdiction of Indiana; that, if the contrary theory of the taxing officials was sound, still the tax was invalid because no method was provided for allocating the tax to the income derived from that part of the business transacted within Indiana; and, further, that the transactions in question "were had in interstate commerce," that the tax discriminated against that commerce and for that reason was void.

We think that the court was in error in each of these conclusions.

As to the first point, the court relied upon our decision in *Adams Manufacturing Co.* v. *Storen,* 304 U. S. 307. That was a case under the same taxing act of Indiana, but there the tax was applied to gross receipts derived by an Indiana corporation from sales in other States of goods manufactured in Indiana. We observed that the tax is not an excise for the privilege of domicile "since it is levied upon the gross income of nonresidents from sources within the State." The point of the decision was that "the tax is what it purports to be,—a tax upon gross receipts from commerce," and that the tax was there laid upon receipts from sales to customers in other States and abroad which constituted interstate and foreign commerce. *Id.,* pp. 310, 311.

The present question is as to the validity of the tax upon receipts "derived from sources within the State," [2] that is, under § 2 of the Act, from activities which petitioners insist were intrastate. If petitioners are right in this contention there can be no doubt that Indiana had authority to lay the tax. *Underwood Typewriter*

[2] See *Miles* v. *Department of Treasury,* 209 Ind. 172, 188; 199 N. E. 372; *Indiana Creosoting Co.* v. *McNutt,* 210 Ind. 656, 663, 664; 5 N. E. 2d 310.

Co. v. *Chamberlain,* 254 U. S. 113, 120, 121; *Bowman* v. *Continental Oil Co.,* 256 U. S. 642, 648, 649; *National Leather Co.* v. *Massachusetts,* 277 U. S. 413, 423; *Hans Rees' Sons* v. *North Carolina,* 283 U. S. 123, 134; *James* v. *Dravo Contracting Co.,* 302 U. S. 134, 149, 161; *Dravo Contracting Co.* v. *James,* 114 F. 2d 242, 247. Compare *Wisconsin* v. *J. C. Penney Co.,* 311 U. S. 435. In that view, it cannot be said that respondent had a constitutional right to escape that burden by arranging to have the proceeds of its intrastate transactions paid to it in another State. *Underwood Typewriter Co.* v. *Chamberlain, supra,* p. 120; *Continental Assurance Co.* v. *Tennessee,* 311 U. S. 5.

Further, as the sole subject of the challenged tax is the income derived from respondent's sales to the Railroad Company there is no occasion for apportionment. The creosoting operations in Ohio, and the income derived from them, were not involved. And the fact that the ties which were sold to the Railroad Company were purchased by respondent through orders given to the Indiana producers from respondent's Marietta office cannot affect the authority of Indiana to tax the receipts from intrastate activities of respondent in its dealings with the Railroad Company. *Woodruff* v. *Parham,* 8 Wall. 123, 140; *Banker Brothers* v. *Pennsylvania,* 222 U. S. 210; *Wiloil Corporation* v. *Pennsylvania,* 294 U. S. 169, 175.

As to these dealings, it appears that respondent received in Indiana the ties it purchased from the local producers and that respondent sold and delivered these ties in Indiana to the Railroad Company. The fact that the delivery by the producers to respondent and respondent's delivery to the Railroad Company took place at the same time is not important. Respondent was in Indiana acting through its agent at the designated points on the

railroad line. The Railroad Company was at the same points represented by its inspector. The ties brought there by the producers were then examined and those found by the inspector to be in accordance with specifications were accepted. In these transactions, respondent through its agent at once accepted from its vendors the ties which the Railroad Company found satisfactory and then and there sold and delivered these ties to the Railroad Company. These were local transactions,—sales and deliveries of particular ties by respondent to the Railroad Company in Indiana. The transactions were none the less intrastate activities because the ties thus sold and delivered were forthwith loaded on the railroad cars to go to Ohio for treatment. The contract providing for that treatment called for the treatment of ties to be delivered by the Railroad Company at the Ohio plant, and the ties bought by the Railroad Company in Indiana, as above stated, were transported and delivered by the Railroad Company to that treatment plant. Respondent did not pay the freight for that transportation and the circumstance that the billing was in its name as consignor is not of consequence in the light of the facts showing the completed delivery to the Railroad Company in Indiana. See *Superior Oil Co.* v. *Mississippi,* 280 U. S. 390.

We find no ground for saying that in taxing the receipts from these local transactions Indiana has exceeded its constitutional authority by taxing interstate commerce or discriminating against it.

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

Reversed.

SKIRIOTES *v.* FLORIDA.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 658. Argued March 14, 1941.—Decided April 28, 1941.

1. A State has power to govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with Acts of Congress. P. 77.
2. The Florida statute forbidding the use of diving equipment for the purpose of "taking commercial sponges from the Gulf of Mexico, or the Straits of Florida or other waters within the territorial limits of the State of Florida" is not in conflict with an Act of Congress which prohibits taking, in those waters, outside of state territorial limits, sponges of less than a particular size. P. 74.
3. The Florida regulation is within the competency of the State, regardless of the question of territorial limits, when applied to a citizen of the State found taking sponges with diving equipment at a point two marine leagues off the west shore-line of the State. Pp. 74, 79.

144 Fla. 220; 197 So. 736, affirmed.

APPEAL from a judgment affirming a conviction under § 5846 Rev. Gen. Stats.; § 8087 Comp. Gen. Laws, 1927, of Florida.

Mr. W. B. Dickenson for appellant.

Mr. Nathan Cockrell, Assistant Attorney General of Florida, with whom *Mr. J. Tom Watson,* Attorney General, was on the brief, for appellee.

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

Appellant, Lambiris Skiriotes, was convicted in the county court of Pinellas County, Florida, of the use on March 8, 1938, of diving equipment in the taking of sponges from the Gulf of Mexico off the coast of Florida

in violation of a state statute. Compiled General Laws of Florida (1927), § 8087. The conviction was affirmed by the Supreme Court of Florida (144 Fla. 220; 197 So. 736) and the case comes here on appeal.

The case was tried without a jury and the facts were stipulated. The statute, the text of which is set forth in the margin,[1] forbids the use of diving suits, helmets or other apparatus used by deep-sea divers, for the purpose of taking commercial sponges from the Gulf of Mexico, or the Straits of Florida or other waters within the territorial limits of that State.

The charge was that appellant was using the forbidden apparatus "at a point approximately two marine leagues from mean low tide on the West shore line of the State of Florida and within the territorial limits of the County of Pinellas." The state court held that the western boundary of Florida was fixed by the state constitution of 1885 at three marine leagues (nine nautical miles) from the shore; that this was the same boundary which had been defined by the state constitution of 1868 to which the Act of Congress had referred in admitting the State of Florida to representation in Congress. Act of June 25, 1868, 15 Stat. 73. The state court sustained the right of the State to fix its marine boundary with

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[1] The statute, originally § 4 of Chapter 7389 of the Laws of Florida of 1917, carried forward as § 5846 of the Revised General Statutes of Florida and as § 8087 of the Compiled General Laws of 1927, is as follows:

"It shall be unlawful for any person, persons, firm or corporation to maintain and use for the purpose of catching or taking commercial sponges from the Gulf of Mexico, or the Straits of Florida or other waters within the territorial limits of the State of Florida, diving suits, helmets or other apparatus used by deep-sea divers.

"Anyone violating any of the provisions of this section shall be fined in the sum not exceeding five hundred dollars or by imprisonment not exceeding one year, or by both such fine and imprisonment." See *Lipscomb* v. *Gialourakis*, 101 Fla. 1130; 133 So. 104.

the approval of Congress, and concluded that the statute was valid in its application to appellant's conduct.

By motions to quash the information and in arrest of judgment, appellant contended that the constitution of Florida fixing the boundary of the State and the statute under which he was prosecuted violated the Constitution and treaties of the United States; that the criminal jurisdiction of the courts of Florida could not extend beyond the international boundaries of the United States and hence could not extend "to a greater distance than one marine league from mean low tide" on the mainland of the State and adjacent islands included within its territory.

In support of this contention appellant invoked several provisions of the Constitution of the United States, to wit, Article I, § 10, Clauses 1 and 3, Article II, § 2, Clause 2, Article VI, and the Fourteenth Amendment. Appellant also relied upon numerous treaties of the United States, including the Treaty with Spain of February 22, 1919, and the treaties with several countries, signed between 1924 and 1930, inclusive, for the prevention of smuggling of intoxicating liquors. There were also introduced in evidence diplomatic correspondence and extracts from statements of our Secretaries of State with respect to the limits of the territorial waters of the United States. These contentions were presented to the highest court of the State and were overruled.

The first point of inquiry is with respect to the status of appellant. The stipulation of facts states that appellant "is by trade and occupation a deep-sea diver engaged in sponge fishery, his residence address being at Tarpon Springs, Pinellas County, Florida," and that he "has been engaged in this business for the past several years." Appellant has not asserted or attempted to show that he is not a citizen of the United States, or that he is a citizen of any State other than Florida, or

that he is a national of any foreign country. It is also significant that in his brief in this Court, replying to the State's argument that as a citizen of Florida he is not in a position to question the boundaries of the State as defined by its constitution, appellant has not challenged the statement as to his citizenship, while he does contest the legal consequences which the State insists flow from that fact.

It further appears that upon appellant's arrest for violation of the statute, he sued out a writ of *habeas corpus* in the District Court of the United States and was released, but this decision was reversed by the Circuit Court of Appeals. *Cunningham* v. *Skiriotes*, 101 F. 2d 635. That court thought that the question of the statute's validity should be determined in orderly procedure by the state court subject to appropriate review by this Court, but the court expressed doubt as to the right of the appellant to raise the question, saying: "Skiriotes states he is a citizen of the United States resident in Florida, and therefore is a citizen of Florida. His boat, from which his diving operations were conducted, we may assume was a Florida vessel, carrying Florida law with her, but of course as modified by superior federal law." *Id.*, pp. 636, 637.

In the light of appellant's statements to the federal court, judicially recited, and upon the present record showing his long residence in Florida and the absence of a claim of any other domicile or of any foreign allegiance, we are justified in assuming that he is a citizen of the United States and of Florida. Certainly appellant has not shown himself entitled to any greater rights than those which a citizen of Florida possesses.

In these circumstances, no question of international law, or of the extent of the authority of the United States in its international relations, is presented. International law is a part of our law and as such is the law

of all States of the Union (*The Paquete Habana,* 175 U. S. 677, 700), but it is a part of our law for the application of its own principles, and these are concerned with international rights and duties and not with domestic rights and duties. The argument based on the limits of the territorial waters of the United States, as these are described by this Court in *Cunard Steamship Co.* v. *Mellon,* 262 U. S. 100, 122, and in diplomatic correspondence and statements of the political department of our Government, is thus beside the point. For, aside from the question of the extent of control which the United States may exert in the interest of self-protection over waters near its borders, although beyond its territorial limits,[2] the United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed. With respect to such an exercise of authority there is no question of international law,[3] but solely of the purport of the municipal law which establishes the duty of the citizen in relation to his own government. *American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347, 355, 356; *United States* v. *Bowman,* 260 U. S. 94; *Cook* v. *Tait,* 265 U. S. 47; *Blackmer* v. *United States,* 284 U. S. 421, 437. Thus, a criminal statute dealing with acts that are directly injurious

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[2] See Jessup, "The Law of Territorial Waters and Maritime Jurisdiction," Introductory Chapter, p. XXXIII, also pp. 9 *et seq.,* 80 *et seq.; Church* v. *Hubbart,* 2 Cranch 187; *The Grace and Ruby,* 283 F. 475; *The Henry L. Marshall,* 286 F. 260, 292 F. 486; *United States* v. *Ford,* 3 F. 2d 643; 40 Harv. L. R. 1.

[3] Oppenheim, International Law, 4th ed., Vol. I, § 145, p. 281; Story, Conflict of Laws, 8th ed., § 540, p. 755; Moore's International Law Digest, Vol. II, pp. 255, 256; Hyde, International Law, Vol. I, § 240, p. 424; Borchard, Diplomatic Protection of Citizens Abroad, § 13, pp. 21, 22.

to the government, and are capable of perpetration without regard to particular locality, is to be construed as applicable to citizens of the United States upon the high seas or in a foreign country, though there be no express declaration to that effect. *United States* v. *Bowman, supra,*[4] The *Bowman* case arose under § 35 of the Criminal Code. 18 U. S. C., § 80. Another illustration is found in the statute relating to criminal correspondence with foreign governments. 18 U. S. C., § 5. In *Cook* v. *Tait, supra,* we held that Congress could impose a tax upon income received by a citizen of the United States who was domiciled in a foreign country although the income was derived from property there located. In *Blackmer* v. *United States, supra,* the validity of an Act of Congress requiring a citizen of the United States residing in France to return to this country for the purpose of giving testimony and the service of a subpoena upon him personally by an American consul were sustained.

For the same reason, none of the treaties which appellant cites are applicable to his case. He is not in a position to invoke the rights of other governments or of the nationals of other countries. If a statute similar to the one in question had been enacted by the Congress for the protection of the sponge fishery off the coasts of the United States there would appear to be no ground upon which appellant could challenge its validity.

The question then is whether such an enactment, as applied to those who are subject to the jurisdiction of Florida, is beyond the competency of that State. We have not been referred to any legislation of Congress with which the state statute conflicts. By the Act of

[4] As to venue of prosecutions for offenses committed upon the high seas or elsewhere out of the jurisdiction of any particular state or district see 28 U. S. C., § 102.

August 15, 1914[5] (38 Stat. 692, 16 U. S. C., § 781), Congress has prohibited "any citizen of the United States, or person owing duty of obedience to the laws of the United States" from taking "in the waters of the Gulf of Mexico or the Straits of Florida outside of state territorial limits" any commercial sponges which are less than a given size, or to possess such sponges or offer them for sale. But that Act is limited to the particular matter of size and does not deal with the divers' apparatus which is the particular subject of the Florida statute. According to familiar principles, Congress having occupied but a limited field, the authority of the State to protect its interests by additional or supplementary legislation otherwise valid is not impaired. *Reid* v. *Colorado,* 187 U. S. 137, 147, 150; *Savage* v. *Jones,* 225 U. S. 501, 533; *Mintz* v. *Baldwin,* 289 U. S. 346, 350; *Kelly* v. *Washington,* 302 U. S. 1, 10. It is also clear that Florida has an interest in the proper maintenance of the sponge fishery and that the statute so far as applied to conduct within the territorial waters of Florida, in the absence of conflicting federal legislation, is within the police power of the State. *Manchester* v. *Massachusetts,* 139 U. S. 240, 266. See, also, *Cooley* v. *Board of Port Wardens,* 12 How. 299; *Morgan's S.S. Co.* v. *Louisiana,* 118 U. S. 455; *Compagnie Francaise* v. *Board of Health,* 186 U. S. 380; *Minnesota Rate Cases,* 230 U. S. 352, 402–410; *California* v. *Thompson, post,* p. 109. Nor is there any repugnance in the provisions of the statute to the equal protection clause of the Fourteenth Amendment. The statute applies equally to all persons within the jurisdiction of the State.

Appellant's attack thus centers in the contention that the State has transcended its power simply because the

[5] This Act repealed the Act of June 20, 1906, 34 Stat. 313, which was before this Court in the case of *The Abby Dodge,* 223 U. S. 166.

statute has been applied to his operations inimical to its interests outside the territorial waters of Florida. The State denies this, pointing to its boundaries as defined by the state constitution of 1868, which the State insists had the approval of Congress and in which there has been acquiescence over a long period. See *Lipscomb* v. *Gialourakis,* 101 Fla. 1130, 1134, 1135; 133 So. 104; *Pope* v. *Blanton,* 10 F. Supp. 18, 22.[6] Appellant argues that Congress by the Act of June 25, 1868,[7] to which the state court refers, did not specifically accept or approve any boundaries as set up in the state constitution but merely admitted Florida and the other States mentioned to representation in Congress. And, further, that if Congress can be regarded as having approved the boundaries defined by the state constitution, these have been changed by the treaties with foreign countries relating to the smuggling of intoxicating liquors, in which the principle of the three-mile limit was declared.

But putting aside the treaties, which appellant has no standing to invoke, we do not find it necessary to resolve the contentions as to the interpretation and effect of the Act of Congress of 1868. Even if it were assumed that the *locus* of the offense was outside the territorial waters of Florida, it would not follow that the State could not prohibit its own citizens from the use of the described divers' equipment at that place. No question as to the authority of the United States over these waters, or over the sponge fishery, is here involved. No right of a citizen of any other State is here asserted. The question is solely between appellant and his own State. The present case thus differs from that of *Manchester* v. *Massachusetts, supra,* for there the regulation by Massa-

[6] The bill in this case was dismissed because of the absence of the jurisdictional amount. *Pope* v. *Blanton,* 299 U. S. 521.

[7] 15 Stat. 73.

chusetts of the menhaden fisheries in Buzzards Bay was sought to be enforced as against citizens of Rhode Island (*Id.*, p. 242) and it was in that relation that the question whether Buzzards Bay could be included within the territorial limits of Massachusetts was presented and was decided in favor of that Commonwealth. The question as to the extent of the authority of a State over its own citizens on the high seas was not involved.

If the United States may control the conduct of its citizens upon the high seas, we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress. Save for the powers committed by the Constitution to the Union, the State of Florida has retained the status of a sovereign. Florida was admitted to the Union "on equal footing with the original States, in all respects whatsoever." [8] And the power given to Congress by § 3 of Article IV of the Constitution to admit new States relates only to such States as are equal to each other "in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself." *Coyle* v. *Smith*, 221 U. S. 559, 567.

There is nothing novel in the doctrine that a State may exercise its authority over its citizens on the high seas. That doctrine was expounded in the case of *The Hamilton*, 207 U. S. 398. There, a statute of Delaware giving damages for death was held to be a valid exercise of the power of the State, extending to the case of a citizen of that State wrongfully killed on the high seas in a vessel belonging to a Delaware corporation by the negligence of another vessel also belonging to a Delaware corporation. If it be said that the case was one of vessels and for the recognition of

[8] Act of March 3, 1845, 5 Stat. 742.

the formula that a vessel at sea is regarded as part of the territory of the State, that principle would also be applicable here. There is no suggestion that appellant did not conduct his operations by means of Florida boats. That he did so conduct them was assumed by the Circuit Court of Appeals in dealing with appellant's arrest in *Cunningham* v. *Skiriotes, supra,* and that reasonable inference has not in any way been rebutted here.

But the principle recognized in *The Hamilton, supra,* was not limited by the conception of vessels as floating territory. There was recognition of the broader principle of the power of a sovereign State to govern the conduct of its citizens on the high seas. The court observed that "apart from the subordination of the State of Delaware to the Constitution of the United States" there was no doubt of its power to make its statute applicable to the case at bar. And the basic reason was, as the court put it, that when so applied "the statute governs the reciprocal liabilities of two corporations, existing only by virtue of the laws of Delaware, and permanently within its jurisdiction, for the consequences of conduct set in motion by them there, operating outside the territory of the State, it is true, but within no other territorial jurisdiction." If confined to corporations, "the State would have power to enforce its law to the extent of their property in every case." But the court went on to say that "the same authority would exist as to citizens domiciled within the State, even when personally on the high seas, and not only could be enforced by the State in case of their return, which their domicil by its very meaning promised, but in proper cases would be recognized in other jurisdictions by the courts of other States." That is, "the bare fact of the parties being outside the territory in a place belonging to no other sovereign would not limit the authority of the State, as accepted by civilized theory." *The Hamilton, supra,* p. 403. When its action does not conflict with

federal legislation, the sovereign authority of the State over the conduct of its citizens upon the high seas is analogous to the sovereign authority of the United States over its citizens in like circumstances.

We are not unmindful of the fact that the statutory prohibition refers to the "Gulf of Mexico, or the Straits of Florida or other waters within the territorial limits of the State of Florida." But we are dealing with the question of the validity of the statute as applied to appellant from the standpoint of state power. The State has applied it to appellant at the place of his operations and if the State had power to prohibit the described conduct of its citizen at that place we are not concerned from the standpoint of the Federal Constitution with the ruling of the state court as to the extent of territorial waters. The question before us must be considered in the light of the total power the State possesses (*Castillo* v. *McConnico,* 168 U. S. 674, 684; *Hebert* v. *Louisiana,* 272 U. S. 312, 316; *United Gas Co.* v. *Texas,* 303 U. S. 123, 142), and so considered we find no ground for holding that the action of the State with respect to appellant transcended the limits of that power.

The judgment of the Supreme Court of Florida is

Affirmed.

MITCHELL *v.* UNITED STATES ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 577. Argued March 13, 1941.—Decided April 28, 1941.

1. An order of the Interstate Commerce Commission dismissing a complaint against an interstate carrier by an individual, charging unjust and unlawful discrimination in the matter of facilities afforded him as a passenger on an interstate journey, is reviewable, though negative in form. P. 92.
2. The right of a colored citizen to complain to the Interstate Commerce Commission of discrimination against him, because of his race, in the matter of facilities afforded on an interstate railroad journey, does not depend upon whether he intends to make a similar journey in the future. P. 93.
3. In the case of a passenger, as in the case of a shipper, it is within the authority of the Commission to determine whether a discrimination is unjust and unlawful, upon inquiry into the particular facts and the practice of the carrier in the particular relation. P. 93.
4. Because of his race, a colored man who had paid a first-class fare for an interstate journey, and who offered to pay the proper charge for an available seat in a Pullman car, was compelled, in accordance with custom, to leave that car and ride in a second-class car, and was thus denied the standard conveniences afforded first-class passengers. *Held:*

   (1) The discrimination was essentially unjust and violated the Interstate Commerce Act. P. 94.

   (2) Paragraph 1 of § 2 of the Act, which declares it unlawful for any carrier to subject any particular person to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, applies to discrimination against colored passengers because of their race, and requires that colored persons who buy first-class tickets shall be furnished with accommodations equal in comforts and conveniences to those afforded to first-class white passengers. P. 95.

   (3) The fact that there was but one instance of discrimination in the case of the complainant affords no reason why such discrimination should not be forbidden for the future. P. 96.

(4) The fact that there is comparatively little demand for first-class accommodations for colored people can not justify such discrimination. P. 97.

Reversed.

APPEAL from a decree of the District Court of three judges which dismissed for want of jurisdiction a suit to set aside an order of the Interstate Commerce Commission. 229 I. C. C. 703.

Messrs. Arthur W. Mitchell and *Richard E. Westbrooks* for appellant.

The appellant was engaged in through interstate travel, to which the separate coach law of Arkansas was inapplicable. *McCabe* v. *Atchison, T. & S. F. Ry.*, 235 U. S. 151, 160; s. c., 186 F. 966. See, also, *Louisville, N. O. & T. Ry. Co.* v. *Mississippi*, 133 U. S. 587, 590; *Chesapeake & Ohio Ry. Co.* v. *Kentucky*, 179 U. S. 388, 391; *Hines* v. *Davidowitz*, 312 U. S. 52.

The Commission disregarded the law as laid down by this Court and consistently followed by all federal courts, that the separate coach laws of the several States do not apply to interstate commerce. *Hart* v. *State*, 60 A. 457; *Huff* v. *Norfolk & Southern Ry. Co.*, 171 N. C. 203; *Washington, B. & A. Electric R. Co.* v. *Waller*, 289 F. 598, 600.

Smith v. *Tennessee*, 100 Tenn. 494, and *Southern Ry. Co.* v. *Norton*, 112 Miss. 302, cited by the defendants, have not been followed or approved.

The power to regulate commerce embraces all the instruments by which such commerce may be conducted; and when the subject to which the power applies is national in its character, or admits of uniformity of regulation, the power is exclusive of all state authority.

The right of appellant to first-class accommodations and facilities does not depend upon the volume of traffic.

McCabe v. *Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151, 161, 162; s. c., 186 F. 966, 977; *Buchanan* v. *Warley*, 245 U. S. 60, 74–80; *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337, 350; *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344, 351, 352.

The record shows that the personal constitutional rights of the appellant were ruthlessly violated. Personal rights include personal liberty. Personal rights include the equal protection of the laws and the right to contract for first-class services, accommodations and facilities in interstate commerce, and the right to enforce the contract.

Many decisions of the Commission condemn such discrimination as was practiced in this case.

The Interstate Commerce Act provides a comprehensive system for the regulation of interstate commerce, which excludes the application of local separate coach laws.

Congress has prohibited discrimination, undue prejudice, unreasonable and undue advantage and preference in relation to citizens traveling as interstate passengers.

The appellant having suffered direct injury to his rights guaranteed by the Constitution and laws made pursuant thereto has the right to prosecute these proceedings.

Custom does not justify continued unjust discrimination.

Refund of money is not adequate redress for the wrongful exclusion. *Brown* v. *Memphis & C. Ry. Co.*, 7 F. 51.

The court should take judicial notice of discrimination against colored people in the lack of facilities on interstate railroads. *Ohio Bell Tel. Co.* v. *Public Utilities Comm'n*, 301 U. S. 292, 301.

Mr. J. Stanley Payne, with whom *Mr. Daniel W. Knowlton* was on the brief, for the Interstate Commerce Commission, appellee.

Appellant has failed to show that he has legal interest in the accommodations to be furnished in the future by

the Rock Island on its train No. 45. *Rochester Tel. Corp.* v. *United States,* 307 U. S. 125.

Appellant's case before the Commission related solely to the accommodations furnished to him on a single trip from Chicago to Hot Springs. He neither alleged nor submitted evidence to show that he will have occasion or intends to make a similar trip in the future. In these circumstances it would seem that recovery of damages, if any, sustained on his one trip would constitute complete relief. He has an action at law pending in a state court for such damages.

He was not authorized to seek avoidance of discrimination against other colored passengers. This Court has said several times that it "will not listen to a party who complains of a grievance which is not his." *Interstate Commerce Comm'n* v. *Chicago, R. I. & P. Ry.,* 218 U. S. 88, 109, and cases cited; *Arkadelphia Co.* v. *St. Louis S. W. Ry. Co.,* 249 U. S. 134, 149; *Avent* v. *United States,* 266 U. S. 127; *McCabe* v. *Atchison, T. & S. F. Ry. Co.,* 235 U. S. 151; *Moffat Tunnel League* v. *United States,* 289 U. S. 113; *Hines Trustees* v. *United States,* 263 U. S. 143, 148; *Sprunt* v. *United States,* 281 U. S. 249, 254; *Pittsburgh & W. Va. Ry.* v. *United States,* 281 U. S. 479, 486.

The Commission is authorized to award full damages for any violation of the Act. § 16 (1) Interstate Commerce Act; *Louisville & N. R. Co.* v. *Ohio Valley Tie Co.,* 242 U. S. 288.

The circumstances seem to indicate that appellant's action at law is based on alleged violation of common law rights. Such suits have been maintained in several instances; in none was it held that an administrative determination by the Commission was necessary. *Chiles* v. *Chesapeake & Ohio R. Co.,* 218 U. S. 71; *Washington, B. & A. Electric R. Co.* v. *Waller,* 289 F. 598; *Huff* v. *Norfolk-S. R. Co.,* 88 S. E. 344.

The defendants urged that the complaint was insufficient to raise any issue as to practice, since the complaint mentions but a single instance of alleged discrimination and prejudice, and that one instance does not amount to a practice.

Section 13 (2) of the Interstate Commerce Act provides that no complaint shall at any time be dismissed because of the absence of direct damage to the complainant. Cf., *Interstate Commerce Comm'n* v. *Baird,* 194 U. S. 25, 39.

But the right of an individual or of an association or league to prosecute proceedings before the Commission does not in itself confer the right to maintain judicial proceedings to set aside the Commission's order and the corollary right to take a direct appeal to this Court. *Hines Trustees* v. *United States,* 263 U. S. 143, 148; *Pittsburgh & W. Va. Ry.* v. *United States,* 281 U. S. 479. See also *Sprunt* v. *United States,* 281 U. S. 249, 256–257; *Algoma Coal Co.* v. *United States,* 11 F. Supp. 487, 495–496; *United States* v. *Merchants Assn.,* 242 U. S. 178, 188.

The Commission's findings are fully supported by the evidence.

Not all discriminations are unlawful under the Interstate Commerce Act but only those that are undue, unreasonable, or unjust. Whether a discrimination is undue, unreasonable, or unjust is a question of fact for the Commission. *Texas & Pacific Ry.* v. *Interstate Commerce Comm'n,* 162 U. S. 197; *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 481; *Nashville Ry.* v. *Tennessee,* 262 U. S. 318; *United States* v. *Trucking Co.,* 310 U. S. 344.

In determining appellant's case the Commission properly gave consideration to the national transportation policy, which has for its purpose the maintenance of adequate transportation service. It was within its power, and therefore not in excess of its authority, to decline to issue an order, operating indefinitely and permanently in

the future, the effect of which would be to require the carrier to provide facilities which appellant has not shown he will ever use, at an expense widely disproportionate to the demand for such facilities, and the revenue to be derived therefrom, in the face of the undisputed evidence that negro passengers purchasing first-class tickets are seated in the drawing rooms of Pullman cars, at the regular seat fare, and that ordinarily such facilities are ample to take care of the colored demand. Cf. *Wisconsin Railroad Comm'n* v. *Chicago, B. & Q. R.,* 257 U. S. 563, 585; *New England Divisions Case,* 261 U. S. 184, 189–190; *United States* v. *Louisiana,* 290 U. S. 70, 75; *Dayton-Goose Creek Ry.* v. *United States,* 263 U. S. 456; *Texas* v. *United States,* 292 U. S. 530, 531; *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.,* 270 U. S. 266; *Piedmont & Nor. Ry.* v. *United States,* 280 U. S. 469; 286 U. S. 299; *Atchison Ry.* v. *Railroad Comm'n,* 283 U. S. 380; *Florida* v. *United States,* 292 U. S. 1, 6–7.

The Interstate Commerce Act neither requires nor prohibits segregation.

The evidence submitted to the Commission was very narrow in its scope. It did not disclose general conditions; it related almost entirely to one train of one railroad. The Commission obviously could not lawfully issue an order having general application, upon the narrow record before it.

The general question whether segregation is to be abolished in all sections of the country where it is now practiced—the South and the Southwest—would seem to be one appropriately for determination by Congress.

The Commission's order contravenes no constitutional provision. *New York* v. *United States,* 257 U. S. 591, 600–601.

The question of segregation is not here involved. Councill v. W. & A. R. Co., 1 I. C. C. 399, 345; Heard v. Georgia R. Co., 1 I. C. C. 428; 3 I. C. C. 111; Edwards v.

Nashville, C. & St. L. R. Co., 12 I. C. C. 247; Gaines v. S. A. L. Ry., 16 I. C. C. 471. See also Cozart v. Southern Ry. Co., 16 I. C. C. 226; Crosby v. St. Louis-S. Ry. Co. 112 I. C. C. 239, and Harden v. Pullman Co., 120 I. C. C. 359.

The question of the applicability of the Arkansas segregation statute to interstate passengers, and of its constitutionality if so applicable, is not necessarily presented for decision in this case. See *Louisville, N. O. & T. R. Co.* v. *Mississippi,* 133 U. S. 587; *Chesapeake & Ohio Ry. Co.* v. *Kentucky,* 179 U. S. 388; *McCabe* v. *Atchison, T. & S. F. R. Co.,* 235 U. S. 151; *Chiles* v. *Chesapeake & Ohio Ry. Co.,* 218 U. S. 71; *Plessy* v. *Ferguson,* 163 U. S. 540; *Hall* v. *DeCuir,* 95 U. S. 485.

Many decisions of the Commission recognize the right of interstate carriers to require segregation.

As to the applicability of state segregation statutes to interstate commerce, see *Hall* v. *DeCuir, supra; McCabe* v. *Atchison, T. & S. F. Ry. Co.,* 186 F. 966, 972; 235 U. S. 151; *Hart* v. *State,* 60 A. 457, 462; *Washington, B. & A. Electric R. Co.* v. *Waller,* 289 F. 598; *Smith* v. *State,* 46 S. W. 566; *Alabama & V. Ry. Co.* v. *Morris,* 60 So. 11; *Southern Ry. Co.* v. *Norton,* 73 So. 1; *Southern Ry. Co.* v. *Primrose,* 73 So. 2.

Mr. Wallace T. Hughes, with whom *Messrs. Vernon W. Foster, Marcus L. Bell, E. C. Craig, C. S. Williston,* and *Erwin W. Roemer* were on the brief, for Frank O. Lowden, et al., appellees.

The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body. *Rochester Tel. Corp.* v. *United States,* 307 U. S. 125, 146.

Appellant's acceptance of the constitutionality of the Arkansas separate-coach statute removes the Fourteenth Amendment and the Civil Rights Act from the case, and their discussion by appellant thus becomes irrelevant.

Whether or not the Arkansas separate-coach statute applies to an interstate passenger is of no importance, unless it can be found to have controlled the Commission's decision to the exclusion of its own administrative judgment. An analysis shows that, while the Commission took notice of the statute, it dealt with the question of accommodations within the terms of the Interstate Commerce Act. The question of an undue or unreasonable preference or prejudice being one of fact and not of law, the Commission's decision that the present accommodations furnished colored passengers on the train involved meet the requirements of the Interstate Commerce Act is conclusive.

The several court decisions cited by appellant to support his contention that the Arkansas law does not apply to an interstate passenger are not pertinent, for none of them dealt with a proceeding in which the Interstate Commerce Commission had previously exercised its statutory power. They called for a different judicial power from that invoked here. This case involves merely a request by appellant for an administrative ruling from a body whose limits of jurisdiction he was bound to know. Besides, the cited cases do not establish finally that a State may not adopt a legislative policy, in the exercise of its police power, for the preservation of the public peace and order, even though such a policy may incidentally affect interstate commerce, in the absence of Congressional action occupying the same field. The Congress has enacted no legislation prohibiting the separation of races on interstate journeys.

Appellees provide accommodations which, the Commission finds, meet the requirements of the Interstate Commerce Act. The Commission has not made mere volume of business the test of a right, but has merely permitted volume of business to determine the reasonableness of the capacity of accommodations furnished. This is properly within the expert discretion of the regulating body.

Solicitor General Biddle and *Messrs. Warner W. Gardner* and *Frank Coleman* for the United States, filed a memorandum against the judgment below.

Messrs. Jack Holt, Attorney General of Arkansas; *Thomas S. Lawson,* Attorney General of Alabama, and *Silas C. Garrett, III,* Assistant Attorney General; *J. Tom Watson,* Attorney General of Florida, and *Lewis W. Petteway,* Assistant Attorney General; *Ellis Arnall,* Attorney General of Georgia, and *Linton S. Johnson,* Assistant Attorney General; *Hubert Meredith,* Attorney General of Kentucky; *Eugene Stanley,* Attorney General of Louisiana; *Greek L. Rice,* Attorney General of Mississippi; *W. F. Barry,* Solicitor General of Tennessee; *Gerald C. Mann,* Attorney General of Texas; and *Abram P. Staples,* Attorney General of Virginia, filed a brief on behalf of the States of Arkansas, Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, Tennessee, Texas, and Virginia, as *amici curiae. Messrs. Hubert Meredith,* Attorney General, and *M. B. Holifield,* Assistant Attorney General, filed a brief on behalf of the State of Kentucky, as *amicus curiae,* urging affirmance.

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

Appellant, Arthur W. Mitchell, filed a complaint with the Interstate Commerce Commission alleging an unjust discrimination in the furnishing of accommodations to colored passengers on the line of the Chicago, Rock Island & Pacific Railway Company from Chicago to Hot Springs, Arkansas, in violation of the Interstate Commerce Act. The Commission dismissed the complaint (229 I. C. C. 703) and appellant brought this suit to set aside the Commission's order. Upon a hearing before three judges, the District Court found the facts as stated in the Commission's findings, and held that the latter were supported by substantial evidence and that

the Commission's order was supported by its findings. The court then ruled that it was without jurisdiction, and its dismissal of the complaint was stated to be upon that ground. The case comes here on direct appeal. 28 U. S. C. 47a.

The following facts were found by the Commission: Appellant, a Negro resident of Chicago, and a member of the House of Representatives of the United States, left Chicago for Hot Springs on the evening of April 20, 1937, over the lines of the Illinois Central Railroad Company to Memphis, Tennessee, and the Rock Island beyond, traveling on a round-trip ticket he had purchased at three cents per mile. He had requested a bedroom on the Chicago-Hot Springs Pullman sleeping car but none being available he was provided with a compartment as far as Memphis in the sleeper destined to New Orleans. Just before the train reached Memphis, on the morning after leaving Chicago, he had a Pullman porter transfer him to the Chicago-Hot Springs sleeper on the same train. Space was there available and the porter assigned him a particular seat in that car for which he was to pay the established fare of ninety cents. Shortly after leaving Memphis and crossing the Mississippi River into Arkansas, the train conductor took up the Memphis-Hot Springs portion of his ticket but refused to accept payment for the Pullman seat from Memphis and, in accordance with custom, compelled him over his protest and finally under threat of arrest to move into the car provided for colored passengers. This was in purported compliance with an Arkansas statute requiring segregation of colored from white persons by the use of cars or partitioned sections providing "equal, but separate and sufficient accommodations" for both races. Later the conductor returned the portion of the ticket he had taken up and advised appellant that he could get a refund on the basis of the coach fare of

two cents per mile from Memphis. That refund was not claimed from defendants and was not sought before the Commission, but it was found that the carriers stood ready to make it upon application. Appellant has an action at law pending against defendants in Cook County, Illinois, for damages incident to his transfer.

The Commission further found that the Pullman car contained ten sections of berths and two compartment drawing rooms; that the use of one of the drawing rooms would have amounted to segregation under the state law and ordinarily such combinations are available to colored passengers upon demand, the ninety cent fare being applicable. Occasionally they are used by colored passengers but in this instance both drawing rooms were already occupied by white passengers. The Pullman car was of modern design and had all the usual facilities and conveniences found in standard sleeping cars. It was air-conditioned, had hot and cold running water and separate flushable toilets for men and women. It was in excellent condition throughout. First-class white passengers had, in addition to the Pullman sleeper, the exclusive use of the train's only dining-car and only observation-parlor car, the latter having somewhat the same accommodations for day use as the Pullman car.

The coach for colored passengers, though of standard size and steel construction, was "an old combination affair," not air-conditioned, divided by partitions into three main parts, one for colored smokers, one for white smokers and one in the center for colored men and women, known as the women's section, in which appellant sat. There was a toilet in each section but only the one in the women's section was equipped for flushing and it was for the exclusive use of colored women. The car was without wash basins, soap, towels or running water, except in the women's section. The Commission stated that, according to appellant, the car was "filthy

and foul smelling," but that the testimony of defendants' witnesses was to the contrary.

The Commission found that in July, 1937, about three months after complainant's journey above mentioned, the old combination coach was replaced by a modern, all-steel, air-conditioned coach, which was divided by a partition into two sections, one for colored and the other for white passengers, and had comfortable seats. In each section there are wash basins, running hot and cold water, "and separate flush toilets for men and women." This coach, the Commission said, was "as fully desirable in all its appointments as the coach used entirely by white passengers traveling at second-class fares."

The Commission also found that the demand of colored passengers for Pullman accommodations over the route in question was shown to have been negligible for many years; that "only about one negro to twenty white passengers rides this train from and to points on the line between Memphis and Hot Springs," and there is hardly ever a demand from a colored passenger for Pullman accommodations. The conductor estimated that this demand did not amount to one per year. What demand there may have been at ticket offices did not appear.

The Commission's conclusion was thus stated: "The present coach properly takes care of colored second-class passengers, and the drawing rooms and compartments in the sleeper provide proper Pullman accommodations for colored first-class passengers, but there are no dining-car nor observation-parlor car accommodations for the latter, and they cannot lawfully range through the train."

The Commission, though treating the enforcement of the state law as a matter for state authorities, thought that in deciding the case on the facts presented it must recognize that the state law required the defendants

to segregate colored passengers; that in these circumstances the present colored-passenger coach and the Pullman drawing rooms met the requirements of the Act; and that as there was comparatively little colored traffic and no indication that there was likely to be such demand for dining-car and observation-parlor car accommodations by colored passengers as to warrant the running of any extra cars or the construction of partitions, the discrimination and prejudice was "plainly not unjust or undue." The Commission observed that it was only differences in treatment of the latter character that were "unlawful and within the power of this Commission to condemn, remove and prevent."

From the dismissal of the complaint, five Commissioners dissented.

The United States as a party to this suit to set aside the Commission's order, and one of the appellees, does not support the judgment of the court below and has filed a memorandum stating its reasons. The Government concludes that the Commission erroneously supposed that the Arkansas Separate Coach Law applied to an interstate passenger and erroneously determined that the small number of colored passengers asking for first-class accommodations justified an occasional discrimination against them because of their race.

The other appellees—the Interstate Commerce Commission and the carriers—appear in support of the judgment.

First. The Commission challenges the standing of appellant to bring this suit. We find the objection untenable. This question does not touch the merits of the suit, but merely the authority of the District Court to entertain it. The fact that the Commission's order was one of dismissal of appellant's complaint did not foreclose the right of review. Appellant was an aggrieved party and the negative form of the order is not control-

ling. *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 143.

Nor is it determinative that it does not appear that appellant intends to make a similar railroad journey. He is an American citizen free to travel, and he is entitled to go by this particular route whenever he chooses to take it and in that event to have facilities for his journey without any discrimination against him which the Interstate Commerce Act forbids. He presents the question whether the Act does forbid the conduct of which he complains.

The question of appellant's right to seek review of the Commission's order thus involves the primary question of administrative authority, that is, whether appellant took an appropriate course in seeking a ruling of the Commission. The established function of the Commission gives the answer. The determination whether a discrimination by an interstate carrier is unjust and unlawful necessitates an inquiry into particular facts and the practice of the carrier in a particular relation, and this underlying inquiry is precisely that which the Commission is authorized to make. As to the duty to seek a determination by the Commission in such a case, we do not see that a passenger would be in any better situation than a shipper. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426; *Robinson* v. *Baltimore & Ohio R. Co.,* 222 U. S. 506; *Mitchell Coal Co.* v. *Pennsylvania R. Co.,* 230 U. S. 247; *Morrisdale Coal Co.* v. *Pennsylvania R. Co.,* 230 U. S. 304; *General American Tank Car Corp.* v. *El Dorado Terminal Co.,* 308 U. S. 422.

The District Court had jurisdiction to review the action of the Commission and the question on that review was whether that action was in accordance with the applicable law.

Second. The case was submitted to the District Court upon the evidence taken before the Commission. The

undisputed facts showed conclusively that, having paid a first-class fare for the entire journey from Chicago to Hot Springs, and having offered to pay the proper charge for a seat which was available in the Pullman car for the trip from Memphis to Hot Springs, he was compelled, in accordance with custom, to leave that car and to ride in a second-class car and was thus denied the standard conveniences and privileges afforded to first-class passengers. This was manifestly a discrimination against him in the course of his interstate journey and admittedly that discrimination was based solely upon the fact that he was a Negro. The question whether this was a discrimination forbidden by the Interstate Commerce Act is not a question of segregation [1] but one of equality of treatment. The denial to appellant of equality of accommodations because of his race would be an invasion of a fundamental individual right which is guaranteed against state action by the Fourteenth Amendment (*McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151, 160–162; *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337, 344, 345) and in view of the nature of the right and of our constitutional policy it cannot be maintained that the discrimination as it was alleged was not essentially unjust. In that aspect it could not be deemed to lie outside the purview of the sweeping prohibitions of the Interstate Commerce Act.

We have repeatedly said that it is apparent from the legislative history of the Act that not only was the evil of discrimination the principal thing aimed at, but that there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach. *The Shreveport Case*, 234

[1] In this view, we have no occasion to consider the questions discussed by the Attorneys General of several States in their briefs as *amici curiae*.

U. S. 342, 356; *Louisville & Nashville R. Co.* v. *United States,* 282 U. S. 740, 749, 750; *Merchants Warehouse Co.* v. *United States,* 283 U. S. 501, 512, 513. Paragraph 1 of § 3 of the Act says explicitly that it shall be unlawful for any common carrier subject to the Act "to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." 49 U. S. C. 3. From the inception of its administration the Interstate Commerce Commission has recognized the applicability of this provision to discrimination against colored passengers because of their race and the duty of carriers to provide equality of treatment with respect to transportation facilities; that is, that colored persons who buy first-class tickets must be furnished with accommodations equal in comforts and conveniences to those afforded to first-class white passengers. See Councill *v.* Western & Atlantic R. Co., 1 I. C. C. 339; Heard *v.* Georgia R. Co., 1 I. C. C. 428; Heard *v.* Georgia R. Co., 3 I. C. C. 111; Edwards *v.* Nashville, C. & St. L. Ry. Co., 12 I. C. C. 247; Cozart *v.* Southern Ry. Co., 16 I. C. C. 226; Gaines *v.* Seaboard Air Line Ry. Co., 16 I. C. C. 471; Crosby *v.* St. Louis-San Francisco Ry. Co., 112 I. C. C. 239.[2]

Third. We find no sound reason for the failure to apply this principle by holding the discrimination from which the appellant suffered to be unlawful and by forbidding it in the future.

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[2] In Edwards *v.* Nashville, C. & St. L. Ry. Co., 12 I. C. C. 247, 249, the principle was thus stated: "If a railroad provides certain facilities and accommodations for first-class passengers of the white race, it is commanded by the law that like accommodations shall be provided for colored passengers of the same class. The principle that must govern is that carriers must serve equally well all passengers, whether white or colored, paying the same fare. Failure to do this is discrimination and subjects the passenger to 'undue and unreasonable prejudice and disadvantage.'"

That there was but a single instance was not a justification of the treatment of the appellant. Moreover, the Commission thought it plain that "the incident was mentioned as representative of an alleged practice that was expected to continue." And the Commission found that the ejection of appellant from the Pullman car and the requirement that he should continue his journey in a second-class car was "in accordance with custom," that is, as we understand it, according to the custom which obtained in similar circumstances.

Nor does the change in the carrier's practice avail. That did not alter the discrimination to which appellant had been subjected, and as to the future the change was not adequate. It appears that since July, 1937, the carrier has put in service a coach for colored passengers which is of equal quality with that used by second-class white passengers. But, as the Government well observes, the question does not end with travel on second-class tickets. It does not appear that colored passengers who have bought first-class tickets for transportation by the carrier are given accommodations which are substantially equal to those afforded to white passengers. The Government puts the matter succinctly: "When a drawing room is available, the carrier practice of allowing colored passengers to use one at Pullman seat rates avoids inequality as between the accommodations specifically assigned to the passenger. But when none is available, as on the trip which occasioned this litigation, the discrimination and inequality of accommodation become self-evident. It is no answer to say that the colored passengers, if sufficiently diligent and forehanded, can make their reservations so far in advance as to be assured of first-class accommodations. So long as white passengers can secure first-class reservations on the day of travel and the colored passengers cannot, the latter are subjected to inequality and discrimination because

of their race." And the Commission has recognized that inequality persists with respect to certain other facilities such as dining-car and observation-parlor car accommodations.

We take it that the chief reason for the Commission's action was the "comparatively little colored traffic." But the comparative volume of traffic cannot justify the denial of a fundamental right of equality of treatment, a right specifically safeguarded by the provisions of the Interstate Commerce Act. We thought a similar argument with respect to volume of traffic to be untenable in the application of the Fourteenth Amendment. We said that it made the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of that right is that it is a personal one. *McCabe* v. *Atchison, T. & S. F. Ry. Co., supra.* While the supply of particular facilities may be conditioned upon there being a reasonable demand therefor, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual, we said, who is entitled to the equal protection of the laws,—not merely a group of individuals, or a body of persons according to their numbers. *Id.* See, also, *Missouri ex rel. Gaines* v. *Canada,* pp. 350, 351. And the Interstate Commerce Act expressly extends its prohibitions to the subjecting of "any particular person" to unreasonable discriminations.

On the facts here presented, there is no room, as the Government properly says, for administrative or expert judgment with respect to practical difficulties. It is enough that the discrimination shown was palpably unjust and forbidden by the Act.

The decree of the District Court is reversed and the cause is remanded with directions to set aside the order of the Commission and to remand the case to the Commission for further proceedings in conformity with this opinion. *Reversed.*

HUDSON & MANHATTAN RAILROAD CO. *v.* UNITED STATES ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

No. 628. Argued April 7, 8, 1941.—Decided April 28, 1941.

The Interstate Commerce Commission, acting on a passenger tariff raising the fare from 6 to 10 cents, and finding that 10 cents would be unreasonable but that 8 cents would be reasonable and would produce the better revenue, fixed the fare at 8 cents. *Held:*

1. The question whether a 10 or an 8 cent fare would produce more revenue was one of judgment upon evidence. P. 99.

2. There was evidence to support the findings and order. P. 99.

33 F. Supp. 495, affirmed.

APPEAL from a judgment dismissing a bill to set aside an order of the Interstate Commerce Commission. 227 I. C. C. 741.

Mr. John F. Finerty, with whom *Messrs. Donald C. Swatland* and *John A. Hartpence* were on the brief, for appellant.

Mr. Edward M. Reidy, with whom *Solicitor General Biddle* and *Mr. Daniel W. Knowlton* were on the brief, for the United States et al.; and *Mr. Charles Hershenstein* for Jersey City, appellees.

PER CURIAM.

On July 31, 1937, appellant filed with the Interstate Commerce Commission a passenger tariff establishing a fare of 10 cents for interstate transportation on its downtown line in lieu of the existing fare of 6 cents. The Commission suspended the tariff and after full hearing found that the revenue results to appellant would be more favorable under an 8-cent fare than under a 10-cent fare and further determined that the proposed 10-cent fare would be unreasonable under §§ 1 and 15a of the

Interstate Commerce Act and that an 8-cent fare had been justified.

The Commission directed the cancellation of the schedule filed, without prejudice to the establishment of an 8-cent fare, and accordingly, in July, 1938, appellant canceled its proposed tariff and put into effect a fare of 8 cents. The Commission refused a rehearing.

In June, 1939, appellant brought this suit to set aside the Commission's order. The case was heard in the District Court by three judges upon the record made before the Commission, and the court rendered its decision in June, 1940, holding that the findings of the Commission were based upon substantial evidence and that the order was within the Commission's authority, was not confiscatory, and did not deprive appellant of its property without due process of law. 33 F. Supp. 495.

As this Court has observed, "The raising of rates does not necessarily increase revenue. It may in particular localities reduce revenue instead of increasing it, by discouraging patronage." *Florida* v. *United States,* 282 U. S. 194, 214. The effect of an increased rate of 10 cents as compared with one of 8 cents, with respect to resulting revenues, was necessarily one of judgment upon evidence and the Commission had evidence before it with respect to traffic conditions in the area in question and the extent of probable diversion of traffic if the fare were increased to 10 cents. We conclude that in this relation there was evidence to support the Commission's findings and its findings supported its order.

The decree of the District Court is affirmed. *Interstate Commerce Commission* v. *Louisville & Nashville R. Co.,* 227 U. S. 88, 98; *Virginian Railway Co.* v. *United States,* 272 U. S. 658, 665, 666; *Florida* v. *United States,* 292 U. S. 1, 9; *Ohio* v. *United States,* 292 U. S. 498, 506; *United States* v. *American Tin Plate Co.,* 301 U. S. 402, 411. *Affirmed.*

SHAMROCK OIL & GAS CORP. *v.* SHEETS ET AL., DOING BUSINESS AS FRIONA INDEPENDENT OIL CO.

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

No. 727. Argued April 8, 1941.—Decided April 28, 1941.

1. Removability of suits from state to federal courts is determined by the federal removal statute, unaffected by local law. P. 104.
2. The right of removal under the Act of 1887, Jud. Code § 28, is confined to the defendant or defendants. P. 104.
3. The interposition by the citizen defendant in a suit in a state court, of a counterclaim setting up an independent cause of action involving the requisite jurisdictional amount, does not confer upon the non-citizen plaintiff the right of removal. P. 107.

   The amount of the plaintiff's demand in the state court is immaterial.
4. Not only does the language of the jurisdictional Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive Acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such jurisdiction. P. 108.

115 F. 2d 880, affirmed.

CERTIORARI, 312 U. S. 675, to review the reversal of a judgment of the District Court in a suit removed from a state court. The judgment went in favor of the defendant, petitioner herein, both on the cause of action set up in the complaint and on a counterclaim.

Mr. W. M. Sutton, with whom *Messrs. R. C. Johnson, Joseph B. Dooley,* and *R. A. Wilson* were on the brief, for petitioner.

The cross-action or counterclaim filed by the respondents sought affirmative relief for more than $3,000 on a matter unrelated to the verified account sued upon by petitioner.

Under Texas practice a cross-action or counterclaim such as that here involved is a suit, and one who defends

it is a defendant. Cf. *Mason City & Fort Dodge R. Co.* v. *Boynton,* 204 U. S. 570; *Merchants Heat & Light Co.* v. *James B. Clow & Sons,* 204 U. S. 286; *Kirby* v. *American Soda Fountain Co.,* 194 U. S. 141.

The cross-action or counterclaim was for damages totaling $7,200 for alleged breach of contract. Such contract allegedly was made on a different date from that upon which the indebtedness to the petitioner was incurred, and was unrelated to that indebtedness.

To that cross-action, petitioner not only occupied the position of a defendant but was an actual defendant within the letter and intent of the removal statute.

Of twenty-five decisions by the lower federal courts since the enactment of § 28 of the Judicial Code in 1887, wherein was involved the right of a defendant to a cross-action to remove such cross-action, twenty-one recognize the right of removal. The cases upholding the right of removal are better reasoned. See *Bankers Securities Corp.* v. *Insurance Equities Corp.,* 85 F. 2d 856, 857; *American Fruit Growers* v. *LaRoche,* 39 F. 2d 243, 244; *San Antonio Suburban Irrigated Farms* v. *Shandy,* 29 F. 2d 579, 581; *Wichita Royalty Co.* v. *City National Bank,* 18 F. Supp. 609, 610; 95 F. 2d 671; 306 U. S. 103.

The decision that the term "defendant" in the Removal Act is used in a technical sense and refers only to the party designated as the original defendant in the action, conflicts with decisions of this Court as well as those above referred to which directly pass upon the question. In *Mason City & Fort Dodge R. Co.* v. *Boynton,* 204 U. S. 570, 579, this Court held that the word "defendant" as used in the Act was directed to more important matters than the burden of proof or the right to open and close. It has repeatedly held that, under the Judiciary Acts of 1875 and 1887–8, in determining the right of removal, the parties should be realigned in accordance with the matter in dispute without regard to the position they occupy in

the pleadings as plaintiff or defendant. [Citing many cases.]

The decision that the Act gives the right of removal to an original defendant only, likewise conflicts with the following decisions recognizing the removal right of a third party, brought in by a cross-action. *Habermel* v. *Mong,* 31 F. 2d 822; *Houlton Savings Bank* v. *American Laundry Machinery Co.,* 7 F. Supp. 858; *Ellis* v. *Peake,* 22 F. Supp. 908. Distinguishing *West* v. *City of Aurora,* 6 Wall. 139.

The plain meaning of the language used in the Act may not be ignored. *New Orleans* v. *Quinlan,* 173 U. S. 191.

The action of Congress in omitting from the Act of 1887–8 the provision in the Judiciary Act of 1789 that the defendant should "at the time of entering his appearance in such state court" file his petition for removal, which language was held by the Supreme Court in *West* v. *City of Aurora, supra,* to limit the right of removal to an original defendant under the Act of 1789, manifests an intent that the right of removal should not be limited to the original defendant. *Fisk* v. *Henairie,* 142 U. S. 459.

Where the defendant in the cross-action files his removal petition at or before the time required, by the laws of the State or the rules of the state court, to plead to the complaint in the cross-action, § 29 Jud. Code has been complied with.

Cases denying to a defendant in a cross-action the right to remove are based upon *West* v. *City of Aurora, supra,* which is not controlling under the present removal statutes in the present controversy.

Mr. E. Byron Singleton for respondents.

Mr. Justice Stone delivered the opinion of the Court.

Respondent, a citizen of Texas and defendant in a court of that state, set up by way of counterclaim or

cross-action against petitioner, the non-citizen plaintiff in the suit, a cause of action for damages in excess of $3,000 for breach of a contract, which was separate and distinct from the alleged indebtedness sued upon by the petitioner. The question for decision is whether the suit in which the counterclaim is filed, is one removable by the plaintiff to the federal district court on grounds of diversity of citizenship under § 28 of the Judicial Code, 28 U. S. C. § 71.

The plaintiff in the state court removed the cause to the United States District Court for Northern Texas, which denied respondent's motion to remand. After a trial on the merits it gave judgment for petitioner, plaintiff below, both on the cause of action set up on its complaint in the suit and on the counterclaim. The Court of Appeals for the Fifth Circuit reversed, 115 F. 2d 880, and ordered the cause remanded to the state court on the ground that the plaintiff in the state court was not a "defendant" within the meaning of § 28 of the Judicial Code, and so was not entitled to remove the cause under that section, which in terms authorizes the removal of a suit subject to its provisions only "by the defendant or defendants therein." We granted certiorari, 312 U. S. 675, to resolve the conflict of the decision of the court below and that of *Waco Hardware Co.* v. *Michigan Stove Co.*, 91 F. 289; see *West* v. *Aurora City*, 6 Wall. 139, with numerous decisions of other circuit courts of appeals. *Carson & Rand Lumber Co.* v. *Holtzclaw*, 39 F. 578; *Bankers Securities Corp.* v. *Insurance Equities Corp.*, 85 F. 2d 856; *Chambers* v. *Skelly Oil Co.*, 87 F. 2d 853, and cases cited in note 5 of the opinion below, 115 F. 2d 880, 882.

We assume for purposes of decision, that if the cause was removable by petitioner, the removal proceedings were regular and timely; that respondent's counterclaim stated an independent cause of action and that the amount

in controversy in that action exceeded the jurisdictional amount, and we confine our decision to the question of statutory construction raised by the petition for certiorari.

Petitioner argues that although nominally a plaintiff in the state court it was in point of substance a defendant to the cause of action asserted in the counterclaim upon which, under Texas procedure, judgment could go against the plaintiff in the full amount demanded. *Peck* v. *McKellar*, 33 Tex. 234; *Gimbel & Son* v. *Gomprecht & Co.*, 89 Tex. 497; 35 S. W. 470; *Harris* v. *Schlinke*, 95 Tex. 88; 65 S. W. 172. But at the outset it is to be noted that decision turns on the meaning of the removal statute and not upon the characterization of the suit or the parties to it by state statutes or decisions. *Mason City & Ft. Dodge R. Co.* v. *Boynton*, 204 U. S. 570. The removal statute, which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization of the subject matter to which it is to be applied. Hence the Act of Congress must be construed as setting up its own criteria, irrespective of local law, for determining in what instances suits are to be removed from the state to the federal courts. Cf. *Burnet* v. *Harmel*, 287 U. S. 103, 110.

Section 28 of the Judicial Code authorizes removal of the suits to which it applies "by the defendant or defendants therein."[1] During the period from 1875 to 1887

[1] "Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction, in any State court, may be removed by the defendant or defendants therein to the district court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction, in any State court, may be removed into the district court of the United

the statute governing removals, 18 Stat. 470, specifically gave to "either party" to the suit the privilege of removal. At all other periods since the adoption of the Judiciary Act of 1789 the statutes governing removals have in terms given the privilege of removal to "defendants" alone, except the Act of 1867, 14 Stat. 558, continued as part of § 28 of the Judicial Code, which permits either plaintiff or defendant to remove where there is the additional ground of prejudice and local influence.

Section 12 of the Judiciary Act of 1789, 1 Stat. 79, declared that "if a suit be commenced in any state court against an alien . . . or . . . against a citizen of another state, and the matter in dispute exceeds" the jurisdictional amount "and the defendant shall, at the time of entering his appearance in such state court, file a petition for the removal of the cause," it shall be removable to the circuit court. In *West* v. *Aurora*

States for the proper district by the defendant or defendants therein, being nonresidents of that state. . . . And where a suit is brought in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the district court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said district court that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause. . . . At any time before the trial of any suit in any district court, which has been removed to said court from a State court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said State court, the district court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in said State court, it shall cause the same to be remanded thereto. . . ."

City, 6 Wall. 139, this Court held that removal of a cause from a state to a federal court could be effected under § 12 only by a defendant against whom the suit is brought by process served upon him. Consequently a non-citizen plaintiff in the state court, against whom the citizen-defendant had asserted in the suit a claim by way of counterclaim which, under state law, had the character of an original suit, was not entitled to remove the cause. The Court ruled that the plaintiff, having submitted himself to the jurisdiction of the state court, was not entitled to avail himself of a right of removal conferred only on a defendant who has not submitted himself to the jurisdiction.

By § 3 of the Act of 1875, the practice on removal was greatly liberalized. It authorized "either party or any one or more of the plaintiffs or defendants entitled to remove any suit" from the state court to do so upon petition in such suit to the state court "before or at the term at which said cause could be first tried and before the trial thereof." These provisions were continued until the adoption of the provisions of the present statute, so far as now material, by the Act of 1887, 24 Stat. 552.

We cannot assume that Congress, in thus revising the statute, was unaware of the history which we have just detailed,[2] or certainly that it regarded as without signifi-

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[2] See H. Rept. No. 1078, 49th Cong., 1st Sess., p. 1:

"The next change proposed is to restrict the right to remove a cause from the State to the Federal court to the defendant. As the law now provides, either plaintiff or defendant may remove a cause. This was an innovation on the law as it existed from 1789 until the passage of the act of 1875.

"In the opinion of the committee it is believed to be just and proper to require the plaintiff to abide his selection of a forum. If he elects to sue in a State court when he might have brought his suit in a Federal court there would seem to be, ordinarily, no good reason to allow him to remove the cause. Experience in the practice under the act of 1875 has shown that such a privilege is often

cance the omission from the earlier act of the phrase "either party," and the substitution for it of the phrase authorizing removal by the "defendant or defendants" in the suit, or the like omission of the provision for removal at any time before the trial, and the substitution for it of the requirement that the removal petition be filed by the "defendant" at or before the time he is required to plead in the state court.

We think these alterations in the statute are of controlling significance as indicating the Congressional purpose to narrow the federal jurisdiction on removal by reviving in substance the provisions of § 12 of the Judiciary Act of 1789 as construed in *West* v. *Aurora City, supra.* See H. Rept. No. 1078, 49th Cong., 1st Sess., p. 1. If, in reënacting in substance the pertinent provisions of § 12 of the Judiciary Act, Congress intended to restrict the operation of those provisions or to reject the construction which this Court had placed upon them, by saving the right of a plaintiff, in any case or to any extent, to remove the cause upon the filing of a counterclaim praying an affirmative judgment against him, we can hardly suppose that it would have failed to use some appropriate language to express that intention. That its omission of the reference in the earlier statute to removal by "either party" was deliberate is indicated by the committee reports which recommended the retention of the provisions of the Act of 1867 for removal by either plaintiff or defendant when an additional ground of removal

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used by plaintiffs to obtain unfair concessions and compromises from defendants who are unable to meet the expenses incident to litigation in the Federal courts remote from their homes.

"The committee, however, believe that when a plaintiff makes affidavit that from prejudice or local influence he believes that he will not be able to obtain justice in the State court he should have the right to remove the cause to the Federal court. The bill secures that right to a plaintiff."

is prejudice and local influence. See H. Rept., *op. cit.*, *supra*, p. 2.

The cases in the federal courts on which petitioner relies have distinguished the decision in *West* v. *Aurora City, supra,* on the ground that it arose under an earlier statute. But we find no material difference upon the present issue between the two statutes, and the reasoning of the Court in support of its decision is as applicable to one as to the other. In some of those cases it is suggested also that a plaintiff who brings his suit in a state court for less than the jurisdictional amount does not waive his right to remove, upon the filing of a counterclaim against him. And petitioner argues that this is so even when, as in the present case, the plaintiff's demand is in excess of the jurisdictional amount. But we think the amount of the plaintiff's demand in the state court is immaterial, for one does not acquire an asserted right by not waiving it, and the question here is not of waiver but of the acquisition of a right which can only be conferred by Act of Congress. We can find no basis for saying that Congress, by omitting from the present statute all reference to "plaintiffs," intended to save a right of removal to some plaintiffs and not to others. The question of the right of removal, decided in *Wichita Royalty Co.* v. *City National Bank,* 95 F. 2d 671, 674, on which petitioner also relies, was not presented to or passed upon by this Court. 306 U. S. 103. It involved factors not here present which we find it unnecessary to consider.

Not only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation. The power reserved to the states

under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. "Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Healy* v. *Ratta,* 292 U. S. 263, 270; see *Kline* v. *Burke Construction Co.,* 260 U. S. 226, 233, 234; *Matthews* v. *Rodgers,* 284 U. S. 521, 525; cf. *Elgin* v. *Marshall,* 106 U. S. 578.

Affirmed.

CALIFORNIA *v.* THOMPSON.

CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT, LOS ANGELES COUNTY, CALIFORNIA.

No. 687. Argued April 3, 1941.—Decided April 28, 1941.

1. The Commerce Clause did not wholly withdraw from the States the power to regulate matters of local concern with respect to which Congress has not exercised its power, even though the regulation affects interstate commerce. P. 113.
2. The federal Motor Carrier Act of 1935 does not include the regulation of casual or occasional interstate transportation of passengers by persons not engaged in such transportation as a regular occupation or business, § 303 (b) (9). P. 112.
3. A California statute requires every "transportation agent," defined as one who sells or offers to sell or negotiate for transportation on the public highways of the State, to obtain a license assuring his fitness and to file a bond securing faithful performance of the transportation contracts which he negotiates. It applies alike to agents negotiating for interstate or intrastate commerce, is not a revenue measure, and does not appear to increase the cost of interstate commerce. Its apparent object is to safeguard members of the public, desiring to secure transportation by motor vehicle, from fraud and overreaching. *Held,* consistent with the Commerce Clause when applied to a person who, without having obtained the

license or furnished the bond, arranged for motor transportation of passengers from California to Texas, by a carrier who, so far as appears, made only the single trip. P. 115.

4. *Di Santo* v. *Pennsylvania,* 273 U. S. 34, overruled. P. 116.

41 Cal. App. 2d 965, reversed.

CERTIORARI, 312 U. S. 672, to review the reversal of a conviction on a charge of misdemeanor.

Mr. William J. McFarland argued the cause, and *Messrs. Ray L. Chesebro, Frederick Von Schrader, John L. Bland,* and *Bourke Jones* were on the brief, for petitioner.

In order to protect the public safety and welfare, and to prevent fraud upon the public, the business of acting as agent or broker for the sale of transportation of persons by means of private passenger motor vehicles operated casually by unlicensed persons must be regulated.

The decision below that even in the absence of legislation by Congress the States are without such power in respect of transportation to destinations beyond the State, conflicts with decisions of this Court.

This legislation is not a direct burden upon interstate commerce. *Bradley* v. *Public Utilities Comm'n,* 289 U. S. 92; *Continental Baking Co.* v. *Woodring,* 286 U. S. 352; *Francis* v. *Allen,* 54 Ariz. 377, 386; *Bowen* v. *Hannah,* 167 Tenn. 451, 463; *Martin* v. *Railroad Comm'n,* 93 S. W. 2d 1155, 1157, 1159; *contra, Ex parte Talkington,* 132 Tex. Cr. R. 361; *Ex parte Martin,* 127 Tex. Cr. R. 25.

The principles enunciated in the dissenting opinions in *Di Santo* v. *Pennsylvania,* 273 U. S. 34, have been adopted and approved by this Court in subsequent decisions. *Continental Baking Co.* v. *Woodring,* 286 U. S. 352; *Bradley* v. *Public Utilities Comm'n,* 289 U. S. 92; *H. P. Welch Co.* v. *New Hampshire,* 306 U. S. 79; *Eichholz* v. *Public Service Comm'n,* 306 U. S. 268; *Ziffrin* v. *Reeves,* 308 U. S. 132; *Maurer* v. *Hamilton,* 309 U. S.

598; *Hartford Accident & Indemnity Co.* v. *Illinois,* 298 U. S. 155.

The Motor Carrier Act of 1935 excludes from its operation the casual, occasional or reciprocal transportation of passengers in interstate commerce, for compensation, by any person not engaged in transportation by motor vehicle as a regular occupation or business. Hale Broker Application, 14 M. C. C. 451, 453; Michaux Broker Application, 11 M. C. C. 317, 318; Frank Broker Application, 8 M. C. C. 15, 19. See *Maurer* v. *Hamilton, supra; H. P. Welch Co.* v. *New Hampshire, supra.*

No appearance for respondent.

Mr. Justice Stone delivered the opinion of the Court.

A statute of California, Ch. 390, Statutes of 1933, p. 1011, as amended by Ch. 665, Statutes of 1935, p. 1833, defines a transportation agent as one who "sells or offers to sell or negotiate for" transportation over the public highways of the state, § 2, and requires every such agent to procure a license from the State Railroad Commission authorizing him so to act. By §§ 6, 7, and 8, prerequisites to the license are determination by the Commission of the applicant's fitness to exercise the licensed privilege, the payment of a license fee of $1.00, and the filing by the applicant of a bond in the sum of $1,000, conditioned upon the faithful performance of the transportation contracts which he negotiates. By § 16 any person acting as a transportation agent without a license is guilty of a misdemeanor. The question for decision is whether the statutory exaction of the license and bond infringes the Commerce Clause of the Constitution when applied to one who negotiates for the transportation interstate of passengers over the public highways of the state.

Respondent was convicted of violation of the statute by arranging for the transportation by motor vehicle, of

passengers from Los Angeles, California, to Dallas, Texas, by one who, so far as appears, made only the single trip in question. The state appellate court reversed the judgment of conviction, holding on the authority of *Di Santo* v. *Pennsylvania,* 273 U. S. 34, that the statute as applied infringes the Commerce Clause. We granted certiorari, 312 U. S. 672, the question, considered in the light of our decisions since the *Di Santo* case, sustaining state regulations affecting interstate transportation by motor vehicle, being of importance.

Congress has not undertaken to regulate the acts for which respondent was convicted or the interstate transportation to which they related. The Motor Carrier Act of 1935, 49 Stat. 543, 49 U. S. C. §§ 301–327, which applies to certain classes of common and contract interstate carriers by motor vehicle, excludes from its operation the casual or occasional transportation by motor vehicle of passengers in interstate commerce by persons not engaged in such transportation as a regular occupation or business, § 303 (b) (9). Hence we are concerned here only with the constitutional authority of the state to regulate those who, within the state, aid or participate in a form of interstate commerce over which Congress has not undertaken to exercise its regulatory power.

The statute is not a revenue measure. Cf. *Texas Transport Co.* v. *New Orleans,* 264 U. S. 150. It applies alike to transportation agents who negotiate for transportation intrastate as well as interstate and so does not discriminate against interstate commerce. Cf. *Real Silk Mills* v. *Portland,* 268 U. S. 325. It does not appear that the regulation will operate to increase the cost of the transportation or in respects not already indicated affect interstate commerce. It is not shown to be other than what on its face it appears to be, a measure to safeguard the members of the public desiring to secure transporta-

tion by motor vehicle, who are peculiarly unable to protect themselves from fraud and overreaching of those engaged in a business notoriously subject to those abuses.

As this Court has often had occasion to point out, the Commerce Clause, in conferring on Congress power to regulate commerce, did not wholly withdraw from the states the power to regulate matters of local concern with respect to which Congress has not exercised its power, even though the regulation affects interstate commerce. Ever since *Willson* v. *Black Bird Creek Marsh Co.*, 2 Pet. 245, and *Cooley* v. *Board of Port Wardens*, 12 How. 299, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce, but which because of their local character and their number and diversity may never be adequately dealt with by Congress. Because of their local character, also, there is wide scope for local regulation without impairing the uniformity of control of the national commerce in matters of national concern and without materially obstructing the free flow of commerce which were the principal objects sought to be secured by the Commerce Clause. Notwithstanding the Commerce Clause, such regulation in the absence of Congressional action has, for the most part, been left to the states by the decisions of this Court, subject only to other applicable constitutional restraints. See cases collected in *Di Santo* v. *Pennsylvania, supra*, 40.

A state may license trainmen engaged in interstate commerce in order to insure their skill and fitness. *Smith* v. *Alabama*, 124 U. S. 465; *Nashville, C. & St. L. Ry. Co.* v. *Alabama*, 128 U. S. 96. It may define the size of crews manning interstate trains, *Chicago, R. I. & P. Ry. Co.* v. *Arkansas*, 219 U. S. 453; *Missouri Pacific R. Co.* v. *Norwood*, 283 U. S. 249, and prescribe regulations for payment of their wages. *Erie R. Co.* v. *Williams*, 233

U. S. 685. It may require interstate passenger cars to be heated and guard posts to be placed on bridges of an interstate railroad. *New York, N. H. & H. R. Co.* v. *New York,* 165 U. S. 628. It may limit the speed of interstate trains within city limits. *Erb* v. *Morasch,* 177 U. S. 584. It may require an interstate railroad to eliminate grade crossings. *Erie R. Co.* v. *Public Utility Commissioners,* 254 U. S. 394, 409, 412. It may pass local quarantine laws applicable to merchandise moving in interstate commerce, as a means of protecting local health. *Morgan's S. S. Co.* v. *Louisiana,* 118 U. S. 455; *Compagnie Francaise* v. *Board of Health,* 186 U. S. 380. It may regulate and protect the safe and convenient use of its harbors and navigable waterways unless there is conflict with some act of Congress. *Willson* v. *Black Bird Creek Marsh Co., supra;* see *Clyde Mallory Lines* v. *Alabama,* 296 U. S. 261, 267. It may regulate pilots and pilotage in its harbors. *Cooley* v. *Board of Port Wardens, supra.* Where, as here, Congress has not entered the field, a state may pass inspection laws and regulations, applicable to articles of interstate commerce, designed to safeguard the inhabitants of the state from fraud, provided only that the regulation neither discriminates against nor substantially obstructs the commerce. *Turner* v. *Maryland,* 107 U. S. 38; *Plumley* v. *Massachusetts,* 155 U. S. 461; *Patapsco Guano Co.* v. *North Carolina,* 171 U. S. 345, 357, 358; *Savage* v. *Jones,* 225 U. S. 501; see also *Minnesota Rate Cases,* 230 U. S. 352, 398–412 and cases cited; *South Carolina Highway Dept.* v. *Barnwell Bros.,* 303 U. S. 177, 185–191 and cases cited.

The present case is not one of prohibiting interstate commerce or licensing it on conditions which restrict or obstruct it. Cf. *Crutcher* v. *Kentucky,* 141 U. S. 47; *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282. For here the regulation is applied to one who is not himself

engaged in the transportation but who acts only as broker or intermediary in negotiating a transportation contract between the passengers and the carrier. The license required of those engaged in such business is not conditioned upon any control or restriction of the movement of the traffic interstate but only on the good character and responsibility of those engaged locally as transportation brokers.

Fraudulent or unconscionable conduct of those so engaged which is injurious to their patrons, is peculiarly a subject of local concern and the appropriate subject of local regulation. In every practical sense regulation of such conduct is beyond the effective reach of Congressional action. Unless some measure of local control is permissible, it must go largely unregulated. In any case, until Congress undertakes its regulation, we can find no adequate basis for saying that the Constitution, interpreted as a working instrument of government, has foreclosed regulation, such as the present, by local authority.

In *Di Santo* v. *Pennsylvania*, this Court took a different view. Following what it conceived to be the reasoning of *McCall* v. *California*, 136 U. S. 104, it held that a Pennsylvania statute requiring others than railroad or steamship companies, who engage in the intrastate sale of steamship tickets or of orders for transportation to and from foreign countries, to procure a license by giving proof of good moral character and filing a bond as security against fraud and misrepresentation to purchasers, was an infringement of the Commerce Clause. Since the decision in that case this Court has been repeatedly called upon to examine the constitutionality of numerous local regulations affecting interstate motor vehicle traffic. It has uniformly held that in the absence of pertinent Congressional legislation there is constitutional power in the states to regulate interstate commerce by

motor vehicle wherever it affects the safety of the public or the safety and convenient use of its highways, provided only that the regulation does not in any other respect unnecessarily obstruct interstate commerce. *Continental Baking Co.* v. *Woodring,* 286 U. S. 352, 371; *Bradley* v. *Public Utilities Commission,* 289 U. S. 92, 95; see *South Carolina Highway Dept.* v. *Barnwell Bros., supra,* and cases cited; *H. P. Welch Co.* v. *New Hampshire,* 306 U. S. 79, 83; *Eichholz* v. *Public Service Commission,* 306 U. S. 268; *Maurer* v. *Hamilton,* 309 U. S. 598, 603; and see *Ziffrin, Inc.* v. *Reeves,* 308 U. S. 132.

If there is authority in the state, in the exercise of its police power, to adopt such regulations affecting interstate transportation, it must be deemed to possess the power to regulate the negotiations for such transportation where they affect matters of local concern which are in other respects within state regulatory power, and where the regulation does not infringe the national interest in maintaining the free flow of commerce and in preserving uniformity in the regulation of the commerce in matters of national concern. See *Hartford Accident & Indemnity Co.* v. *Illinois,* 298 U. S. 155.

The decision in the *Di Santo* case was a departure from this principle which has been recognized since *Cooley* v. *Board of Port Wardens, supra.* It cannot be reconciled with later decisions of this Court which have likewise recognized and applied the principle, and it can no longer be regarded as controlling authority.

Reversed.

CASKEY BAKING CO., INC. *v.* VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 676. Argued April 2, 1941.—Decided April 28, 1941.

A statute of Virginia imposes an annual fee of $100 for each vehicle used in the business of peddling goods, wares, or merchandise "by selling and delivering the same at the same time to licensed dealers or retailers at other than a definite place of business operated by the seller." The statute exempts manufacturers taxable by the State on capital; distributors of manufactured goods paying a state license tax on their purchases; and wholesale dealers regularly licensed by the State. *Held*—as applied to a foreign corporation which had its principal office and place of business outside of the State and whose drivers brought into the State bread which they there sold and delivered to regular customers—not in contravention of the commerce clause or the equal protection clause of the Federal Constitution. P. 119.

176 Va. 170; 10 S. E. 2d 535, affirmed.

APPEAL from the affirmance of a conviction for violation of a state license tax statute.

Messrs. R. Gray Williams and *Clarence E. Martin,* with whom *Messrs. J. Sloan Kuykendall* and *Clarence E. Martin, Jr.* were on the brief, for appellant.

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

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The appellant, a corporation of West Virginia, has its principal office and place of business in Martinsburg, in that State. As a foreign corporation registered in Virginia, it has paid the latter State an annual registration fee and an income tax on its net profits allocable to its

Virginia business. It makes bread which it sells to grocers and other retailers in territory adjacent to Martinsburg, including Winchester and other places in Virginia. Appellant's trucks carry the bread into Virginia where they serve regular routes at regular intervals. The drivers call only on regular customers, inquire of each how much bread he needs and, in response to his order, take it from the truck and deliver it to the customer. Thus each such transaction in Virginia is a sale and delivery in that State to a regular customer.

The company has no property permanently located in Virginia and no place of business in the State, except that, as required by the statute respecting registered foreign corporations, it maintains an office in the State where claims against it may be audited, settled, and paid.

The appellant was convicted for making a sale in Virginia without having procured a license pursuant to § 192b [1] of the Tax Code of Virginia and a fine was imposed. The Supreme Court of Appeals affirmed the conviction.[2]

So far as material the statute provides: "There is hereby imposed an annual State license tax on every person, firm and corporation (other than . . . a manufacturer taxable on capital by this State, or a distributor of manufactured goods paying a State license tax on his purchases) who or which shall peddle goods, wares or merchandise by selling and delivering the same at the same time to licensed dealers or retailers at other than a definite place of business operated by the seller. Provided, however, this act shall not be construed to apply to wholesale dealers regularly licensed by this State, and who shall at the same time sell and deliver merchandise

[1] Acts of Virginia, 1932, p. 376, 1938, p. 440; Va. Tax Code, 1936, 192b, Michie, p. 2458, 1940 Supp. 472.

[2] 176 Va. 170, 10 S. E. 2d 535.

to retail merchants." The annual fee is $100 for each vehicle used in the business.

It is admitted that appellant was not a manufacturer taxable on its capital stock, nor a distributor of manufactured products paying a state license tax on its purchases, nor a licensed wholesale dealer, and did not, therefore, come within any of the classes exempted by the Act.

In the state courts, and here, the appellant challenged the statute as contravening the commerce clause and the equal protection clause of the federal Constitution. Its position is that it is doing either an interstate business which the State may not burden by imposing a license tax, or an intrastate business as to which the exaction works a forbidden discrimination. We hold both contentions untenable.

1. While the transportation of bread across the state line is interstate commerce, that is not the activity which is licensed or taxed. The purely local business of peddling is what the Act hits, and this irrespective of the source of the goods sold. It is settled that such a statute imposes no burden upon interstate commerce which the Constitution interdicts.[3] The appellant, however, urges that the Act discriminates against interstate commerce by exempting from its operation the privilege of sales by manufacturers paying tax on their capital employed in manufacture in Virginia. It is said that if its bakery were situate in Virginia the appellant would have the benefit of this exemption and, since it is not, the marketing of appellant's goods shipped into the State is the target of a hostile discrimination. But the argument overlooks the fact that peddlers resident in Virginia who buy their goods within the State, or buy or procure them

[3] *Machine Co.* v. *Gage,* 100 U. S. 676; *Emert* v. *Missouri,* 156 U. S. 296; *Wagner* v. *Covington,* 251 U. S. 95.

from extra-state sources, are alike subject to the Act. The contention that the Act discriminates against interstate commerce by virtue of the exemption in question is negatived by our decisions.[4]

2. Examination of the Tax Code of Virginia discloses that the Act in question is but one portion of a comprehensive scheme of taxation. Manufacturers who sell their own products pay a tax on capital, which the State deems sufficient to cover all their activities, including the vending of the goods.[5] Wholesale merchants who have a fixed place of business pay a license tax measured by a percentage of all their purchases; and if they are also licensed by the town or city in which they have their place of business or, in lieu thereof, are taxed by such town or city on the capital employed in the business, they may sell and deliver at the same time and place anywhere in the State without payment of any additional license tax.[6] Every distributing house, whether operated by a manufacturer or wholesaler, for distributing goods amongst the owner's retail stores, must be licensed and pay the same tax as if it were a wholesaler.[7] Retail merchants [8] and peddlers at retail [9] must be licensed and pay license taxes,—the former a percentage of the value of his purchases and the latter a fixed annual fee. Those who have no fixed place of business, who peddle their wares only to licensed dealers or retailers at the places of business of the latter, fall into none of the described classes. As the court below points out, were it not for

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[4] *Armour & Co.* v. *Virginia*, 246 U. S. 1, and cases therein cited.

[5] Tax Code of Virginia, 1936, §§ 73, 188, Va. Code, 1936, Michie, pp. 2416, 2451.

[6] Tax Code of Virginia, § 188, Va. Code, 1936, Michie, pp. 2451–2452.

[7] *Ibid.*

[8] *Ibid.*

[9] *Id.*, § 192, Va. Code, 1936, Michie, p. 2457.

§ 192b, such peddlers would be the only vendors in Virginia to escape some form of taxation.

Peddlers at wholesale are not entitled to be licensed and taxed on the same basis as other vendors, as respects either form or amount. As we have repeatedly held, the equal protection clause of the Fourteenth Amendment does not prevent a State from classifying businesses for taxation or impose any iron rule of equality.[10] Some occupations may be taxed though others are not. Some may be taxed at one rate, others at a different rate. Classification is not discrimination. It is enough that those in the same class are treated with equality. That is true here.

Affirmed.

CITY BANK FARMERS TRUST CO., TRUSTEE, *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE.

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

Nos. 408 and 409. Argued April 1, 1941.—Decided April 28, 1941.

The administration of a trust by a testamentary trustee whose duties and activities are confined to holding and safeguarding a fund of stocks and bonds, collecting income, making safe investments and reinvestments, distributing income to beneficiaries, keeping accounts, preparing and filing income tax returns, etc., is not a "carrying on business" within § 23 (a) of the Revenue Act of 1928. Hence the commissions allowed and paid the trustee are not deductible under that section as expenses of carrying on a business. In computing the taxable income the trust is subject to the same rules as an individual, Revenue Act, 1928, §§ 161–162. *Higgins* v. *Commissioner*, 312 U. S. 212, followed. P. 124.

112 F. 2d 457, affirmed.

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[10] *State Board of Tax Commissioners* v. *Jackson*, 283 U. S. 527, 537, and cases cited.

CERTIORARI, 312 U. S. 672, to review a judgment affirming a decision of the Board of Tax Appeals, 39 B. T. A. 29.

Mr. Rollin Browne, with whom *Messrs. John G. Jackson, Jr.* and *George Craven* were on the brief, for petitioner.

The Commissioner's concession at the trial that certain items were deductible as business expenses in computing the net income of the trusts was an admission that the administration of the trusts was a business. That issue was thus removed from the case. The Commissioner should not have been permitted to repudiate his concession.

By settled and uniform administrative practice, "ordinary and necessary" trustees' commissions have been allowed as "business" expenses. While this administrative practice has been in effect, the statutory provision allowing deductions for ordinary and necessary business expenses has been reënacted twelve times. This indicates Congressional approval of the administrative practice and gives to it the force and effect of law.

The administrative practice is sound, and should be approved. *Higgins* v. *Commissioner,* 312 U. S. 212, involving personal investment activities of an individual, is distinguishable. Here, the trusts were separate legal and taxable entities, and the trustee was administering the trust estates for the benefit of others. Therefore, the commissions of the trustee and the other expenses of administering the trusts can not possibly be regarded as "personal" expenses.

The trusts were established for the investment and reinvestment of a large sum and accumulating and reinvesting the income therefrom, thus building up an ever-increasing fund. Investment activities of that nature, when carried on by a corporation or a trust, have often been held to constitute the conduct of business.

The disallowance of trustees' commissions as "business" expenses would produce difficult complications, and would result in only a slight increase in the public revenues.

The commissions here in issue should not be disallowed merely because they were computed on the basis of and paid out of principal of the trust funds. Such commissions were paid for the trustee's care and management of the trusts, and not for the mere act of receiving the principal. They differ in no respect from the commissions paid on income, which the respondent conceded are allowable deductions. An item otherwise deductible in computing net income taxable to a trust as an entity may not be disallowed just because it is charged against principal instead of income of the trust.

Mr. Arnold Raum, with whom *Assistant Attorney General Clark* and *Messrs. Newman A. Townsend, Sewall Key,* and *Lee A. Jackson* were on the brief, for respondent.

Mr. Weston Vernon, Jr. filed a brief on behalf of the Committee of Banking Institutions on Taxation, as *amicus curiae,* in support of the petitioner.

MR. JUSTICE BLACK delivered the opinion of the Court.

The ultimate question here involved is whether two testamentary trusts of which petitioner is trustee were in 1931 "carrying on . . . business" within the meaning of § 23 (a) of the Revenue Act of 1928.

Pursuant to the will of Angier B. Duke, two trusts, consisting of stocks and bonds worth approximately $7,600,000, were established in 1923 for the benefit of Duke's two minor sons. Petitioner, as trustee, was charged with the duty of applying a sufficient amount of the income of each trust to the support and education of the beneficiary;

the surplus income was to be accumulated until the beneficiary's majority; and at that time all accumulated income was to be paid to the beneficiary, while the principal was to be continued in trust for the benefit of the son and his descendants. By 1931, the principal and accumulated income of the two trusts aggregated about $10,000,000. In that year the Surrogate Court of New York County allowed trustees' commissions of about $77,000, ordering that payment be made out of principal. In reporting trust income for 1931, the trustee did not claim any deduction for these commissions. Later, in proceedings before the Board of Tax Appeals, the deduction was claimed but denied. The ground of denial was that during the taxable year the trusts had not been "carrying on any trade or business," the carrying on of such an activity being a condition precedent to the allowance of the claimed deduction under the controlling Revenue Act.[1] The Circuit Court of Appeals affirmed.[2] Differing interpretations as to the meaning and scope of "carrying on any trade or business" prompted us to grant certiorari in this case, in the case of *Pyne* v. *United States,* 92 Ct. Cls. 44; 35 F. Supp. 81; *post,* p. 127, and in the case of *Higgins* v. *Commissioner,* 111 F. 2d 795, 312 U. S. 212.

In the *Higgins* case, 312 U. S. 212, we affirmed the judgment of the same Circuit Court of Appeals that rendered the decision below. Higgins, an individual taxpayer whose activities did not vary materially from the activi-

[1] Revenue Act of 1928, §§ 23 (a), 161, 162, 45 Stat. 799, 838. Cf. George Vanderbilt Trust, 36 B. T. A. 967. Though petitioner urges that the Commissioner, because of concessions made before the Board of Tax Appeals, should be barred from asserting that the trusts were not carrying on business, the judgment of the Board rested on its finding that the trusts were not so engaged, and the issue is properly before us.

[2] 112 F. 2d 457.

ties of the taxpaying trusts in the case at bar,[3] was denied the deduction which petitioner here seeks. And §§ 161–162 of the Revenue Act of 1928 provide: "The taxes imposed by this title upon individuals shall apply to the income of estates or of any kind of property held in trust. . . . The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual. . . ." Since the trust is subject to the same rules as the individual, and since the findings of the Board of Tax Appeals in the *Higgins* case and in the case at bar are substantially the same,[4] the *Higgins* case is controlling here, unless, as petitioner contends, dis-

[3] The Board found in this case that the trustee's activities were limited to reviewing the stocks and bonds in trust several times a year; selling securities and reinvesting the proceeds in other stocks and bonds; collecting interest and dividends on security; keeping account books for the trusts and rendering statements to the interested parties; preparing and filing income tax returns; and distributing income to the beneficiaries. Summarizing, the Board of Tax Appeals said, "The above facts demonstrate conclusively to us that this is a case of passive investment and not of carrying on a business, for not only is the trustee limited in its investments, but it is cautioned in effect to be a safe investor rather than a participant in trade or business, and, plainly carrying out the testator's injunctions, it conducts no business, because it has, as above seen, no expenses of conducting business other than the collection of coupons and mailing bonds, amounting to a few dollars, and an even more negligible amount for transfer stamps or notary fees. . . . Extensive authority need not be compiled to demonstrate that a mere passive investor, collecting interest and clipping coupons, and making a very few reinvestments, is not engaged in trade or business."

[4] It is clear that the Board was justified in reaching the conclusion that the instant trusts were not "business trusts" but existed merely to hold and conserve property and distribute the income received. Compare *Morrisey* v. *Commissioner,* 296 U. S. 344, 356–357; *Von Baumbach* v. *Sargent Land Co.,* 242 U. S. 503, 515; *Zonne* v. *Minneapolis Syndicate,* 220 U. S. 187.

tinguishable by reason of administrative practice in relation to trusts.

But we regard the *Higgins* decision as controlling despite petitioner's insistence that administrative practice has long permitted deduction of trustees' commissions. In view of the express Congressional command that the same method and basis of computation must be applied to trust income as to individual income, it is doubtful whether any administrative practice, no matter how clear or long existing, would warrant our applying one concept of carrying on business in the case of an individual and another concept in the case of a trust. This is particularly true here, where the statutory interpretation petitioner urges has never received support in any regulations promulgated by the Secretary of the Treasury.[5] And not only is the result reached by the court below consistent with our decision in *Higgins* v. *Commissioner,* but, as we said in the *Higgins* case, the conclusion of the Board of Tax Appeals "is adequately supported by this record, and rests upon a conception of carrying on business similar to that expressed by this Court for an antecedent section."[6] The judgment below is accordingly

Affirmed.

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[5] *Biddle* v. *Commissioner,* 302 U. S. 573, 582; *Helvering* v. *New York Trust Co.,* 292 U. S. 455, 467–468.

[6] The case referred to was *Van Wart* v. *Commissioner,* 295 U. S. 112, 115.

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

CERTIORARI TO THE COURT OF CLAIMS.

No. 683. Argued April 2, 1941.—Decided April 28, 1941.

1. Executors in caring for securities and investments in order to conserve and protect the estate pending final distribution, are not carrying on business within the meaning of §§ 23 (a), 161, and 162 of the Revenue Act of 1934, whatever the size of the estate or the number of those whose services are required in its conservation; and fees paid to an attorney for advice on legal and economic questions arising in the course of administration of the estate are not deductible in computing their income tax under that Act. Pp. 129, 132.

   Therefore, a finding of the Court of Claims that the executors continued to conserve the decedent's estate as he had when he was himself "a financier and investor" falls short of a finding that they were entitled to a deduction accorded by Congress only to those "carrying on . . . business."

2. This Court will not weigh the facts set out in subsidiary findings of the Court of Claims to supply an ultimate and determinative finding which that court failed to make but which is necessary to support the judgment. P. 130.

92 Ct. Cls. 44; 35 F. Supp. 81, reversed.

CERTIORARI, 312 U. S. 672, to review a judgment allowing a claim for a refund of money exacted, and paid under protest, as an income tax.

Mr. Arnold Raum, with whom *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *J. Louis Monarch* were on the brief, for the United States.

Mr. Allen G. Gartner for respondents.

The Commissioner would not have allowed the deduction of other expenses, consisting of office rent, management, and salaries of employees, had he not recognized the fact that the taxpayer was engaged in carrying on a business.

The determination of whether the activities of a taxpayer are "carrying on a business" requires an examination of the facts in each case. *Higgins* v. *Commissioner*, 312 U. S. 212.

The findings clearly reflect the evidence showing that the taxpayer continued the business in which the decedent was engaged at the time of his death and itself was engaged in business while also administering the estate. Upon this showing, the court apportioned the attorney's fees between business expense and administration expense.

The petitioner is asking this Court to reverse the factual determination of the Court of Claims, without having any of the evidence before it.

The facts found by the lower court received their proper application to the statutory provisions of the Revenue Act authorizing the deduction of business expenses by a taxpayer carrying on business.

MR. JUSTICE BLACK delivered the opinion of the Court.

The question presented is whether upon this record the Court of Claims [1] committed error in concluding that respondents, as executors, were, in computing their federal income tax, entitled to deduct expenses properly incurred in the administration of an estate, Congress having provided that such a deduction could be taken only by individuals, estates, or trusts engaged in "carrying on . . . business." Revenue Act of 1934, §§ 23 (a), 161, 162, 48 Stat. 688, 727. Compare *City Bank Farmers Trust Co.* v. *Helvering, ante,* p. 121.

In computing the 1934 net income of the estate, respondents claimed a deduction of $40,000 for fees paid to the estate's attorney during the taxable year. The Com-

[1] 92 Ct. Cls. 44; 35 F. Supp. 81.

missioner of Internal Revenue disallowed the deduction; the respondents paid under protest, and filed suit for refund in the Court of Claims. Their complaint alleged that "The payment of attorney's fees and the claim for allowance thereof as a deduction from gross income is predicated upon the contention that the tremendous size of the corpus of the estate and the proper administration thereof constituted the operation of a business and the employment of an attorney as counsel to guide the executors in the handling of the affairs of the estate was just as much a necessary expense of the estate as is incurred in the operation of any commercial business engaged in the manufacturing or selling of commodities." The court made detailed findings of fact, and as its single conclusion of law stated that the respondents should recover.

We recently stated in *Higgins* v. *Commissioner*, 312 U. S. 212, that determination of what amounts to carrying on business requires examination of the facts in each case. In this case, the record before us contains the findings of the Court of Claims, a conclusion of law, and an opinion summarizing the findings of fact and indicating the reasons which prompted the court to reach its conclusion of law. The most that can be said of the findings of fact is that the court was of the opinion that the facts found showed that the activities of the executors were such as to meet certain criteria set out in the opinion as determinative of what constituted carrying on business. For what the court found as a fact was that the decedent, prior to his death "was engaged in business as a financier and investor, maintaining an office where he employed an office manager and an average of six clerks. . . . In general, the operations of the estate continued in substantially the same manner after the decedent's death as before. . . ." In addition the court found that the attorney employed by the executors "was called upon to advise them with reference to mat-

ters both legal and economic that arose in the business activities of the estate, with reference to federal estate and state inheritance taxes, and also in regard to the acquisition and disposal of the estate's securities and in regard to various matters pertaining to companies in which the estate held investments." But the executors might do all the things that the court found that they did and still not be engaged in "carrying on . . . business" within the meaning of the Revenue Act. For as we said in the *Higgins* case, "All expenses of every business transaction are not deductible. Only those are deductible which relate to carrying on a business." Also, we there sustained a holding that an individual who was engaged in financial and investing activities in all ways similar to those of the decedent and his executors in this case was not entitled to a deduction such as that sought by respondents. Therefore, the finding of the Court of Claims that the executors continued to conserve the decedent's estate as he had when he was himself "a financier and investor" falls far short of a finding that the executors were entitled to a deduction accorded by Congress only to those "carrying on . . . business." Failure of the Court of Claims to make a specific finding on this ultimate and determinative issue deprives that court's judgment of support. Under such circumstances we are not called upon to weigh the different facts set out in the subsidiary findings in order to determine whether or not they would support a conclusion that the executors were "carrying on . . . business" within the meaning of the statute.[2]

When we turn to the opinion of the Court of Claims,[3] it is made clear that absence of such a specific finding

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[2] *United States* v. *Esnault-Pelterie*, 299 U. S. 201, 206.

[3] Cf. *Chippewa Indians* v. *United States*, 305 U. S. 479, 481; *American Propeller & Mfg. Co.* v. *United States*, 300 U. S. 475, 479–480.

was the result of the court's adoption of criteria of "carrying on . . . business" inconsistent with our holding in the *Higgins* case. Since the judgment must be vacated because not supported by adequate findings, it is appropriate that we point out this inconsistency. Accepting as true the statement of the Court of Claims that a broad definition of "business" might be that it is "whatever engages the time, attention, and labor of men in order to conserve what they have or to avoid loss" it does not follow at all that this is synonymous with the statutory language, "carrying on . . . business." This definition of "business" stems in part from the case of *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 171, upon which the Court of Claims relied. But however applicable that definition may have been to the case there under consideration, it cannot be accepted as a guide in the present case. The reasons why it is not applicable to the statutory provision now under consideration were given in our opinion in the *Higgins* case; its nonapplicability to specific situations has also been explained in a number of other opinions of this Court.[4]

Nor can the judgment of the Court of Claims be supported by that court's statement that the executors were engaged "in the business of conserving the estate and protecting its income." Such activities are the traditional duty of executors. Executors who engage actively in trade and business are the exception and not the rule. Rather obviously, there could be clear cases where executors "carry on . . . business" by continuing to operate a store, a factory or some other well known, well marked type of business activity. But in the absence of evidence showing activities coming within the general acceptation of the concept of carrying on a trade or business,

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[4] See, e. g., *Von Baumbach* v. *Sargent Land Co.*, 242 U. S. 503, 514–515; *McCoach* v. *Minehill & Schuylkill Haven R. Co.*, 228 U. S. 295, 303; *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187, 190.

it cannot be said as a matter of law that an executor comes into this category merely because he conserves the estate by marshalling and gathering the assets as a mere conduit for ultimate distribution. And determination of what constitutes "carrying on . . . business" under the Revenue Act does not depend upon the size of the estate or the number of people whose services are required in order properly to conserve it.

The judgment of the Court or Claims is vacated and the cause is remanded to that court for proceedings in accordance with the views herein expressed.

Judgment vacated.

ARKANSAS CORPORATION COMMISSION ET AL. *v.* THOMPSON, TRUSTEE.

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

No. 715. Argued April 4, 1941.—Decided April 28, 1941.

1. *Assumed,* without deciding, that § 64 (a) of the Bankruptcy Act is applicable in railroad reorganization proceedings under § 77. P. 138.
2. Section 64 (a) (4) of the Bankruptcy Act giving priority to "taxes legally due and owing by the bankrupt to . . . any State," and providing "That, in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the [bankruptcy] court," does not empower that court to revise the valuation of a railroad which has been finally fixed, pursuant to the state law, as the basis for a state tax. P. 142.

   So *held* where the valuation was by a state commission having broad authority in the regulation of railroads and other public utilities and over valuations for tax purposes, in quasi-judicial proceedings in which the reorganization trustee had been fully heard and from the result of which he took no appeal to the state courts, as permitted by state law. *New Jersey* v. *Anderson,* 203 U. S. 483, distinguished.

116 F. 2d 179, reversed.

CERTIORARI, 312 U. S. 673, to review the affirmance of an order in a railroad reorganization proceeding which overruled a motion by the present petitioners for the dismissal of a petition filed by Thompson, Trustee. His petition alleged that certain state taxes laid on the railroad were excessive and unlawful and sought to have their validity determined by the bankruptcy court.

Messrs. Joseph M. Hill and *Leffel Gentry,* Assistant Attorney General of Arkansas, with whom *Messrs. Jack Holt,* Attorney General, and *Henry L. Fitzhugh* were on the brief, for petitioners.

The bankruptcy court exceeded its power. *Palmer* v. *Massachusetts,* 308 U. S. 79; *Continental National Bank* v. *Chicago, R. I. & P. Ry. Co.,* 294 U. S. 648; *Isaacs* v. *Hobbs Tie & Timber Co.,* 282 U. S. 734; *Thompson* v. *Terminal Shares,* 104 F. 2d 1; *McLaughlin* v. *St. Louis & S. W. Ry.,* 232 F. 579; *Missouri Pacific R. Co.* v. *Conway & Vilonia Road Dist.,* 280 F. 401; *Massachusetts* v. *Palmer,* 101 F. 2d 48. See, also, §§ 77 and 77 (b) of the Bankruptcy Act; the Johnson Act of 1934, 28 U. S. C. § 41; Tax Act of 1937, 28 U. S. C. § 41.

Section 64 (a) of the Bankruptcy Act is inconsistent with and no part of § 77. Finletter on Bankruptcy Reorganization, p. 344; § 77, Bankruptcy Act, 11 U. S. C. 205; *In re Brannon,* 62 F. 2d 959; *Thompson* v. *Louisiana,* 98 F. 2d 108.

Section 64 (a) is not applicable to trustees' taxes. *Hennepin County* v. *M. W. Savage Factories,* 83 F. 2d 453; *Boteler* v. *Ingels,* 308 U. S. 57; *Thompson* v. *Louisiana,* 98 F. 2d 108; *Haggerty* v. *Michigan,* 286 U. S. 334; *Robertson* v. *Goree,* 29 F. 2d 595; *MacGregor* v. *Johnson-Cowdin-Emmerich, Inc.,* 39 F. 2d 574; 11 U. S. C. § 104; Act of June 18, 1934, 48 Stat. 993.

The order of April 11, 1940, was an injunction. Johnson Act of 1934, 41 Stat. 774; 28 U. S. C. § 41; *Griesa* v.

Mutual Life Ins. Co., 165 F. 48; *Western Union Telegraph Co.* v. *United States & Mexican Trust Co.*, 221 F. 545; *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379; Jud. Code § 24; 28 U. S. C. § 41.

The trustee had an adequate remedy under Arkansas law for any unconstitutional or arbitrary invasion of rights. *Martineau* v. *Clear Creek Oil & Gas Co.*, 141 Ark. 596; Pope's Digest, § 1936; *Clear Creek Oil & Gas Co.* v. *Ft. Smith Co.*, 161 Ark. 12; *Fort Smith Co.* v. *Clear Creek Oil & Co.*, 267 U. S. 231; *Atlas Life Ins. Co.* v. *Southern*, 306 U. S. 561; *Terry* v. *New York*, 104 F. 2d 498; *East Ohio Co.* v. *Cleveland*, 84 F. 2d 443; *McLaughlin* v. *St. Louis & S. W. Ry Co.*, 232 F. 579; *Missouri Pacific Ry. Co.* v. *Conway & Vilonia Road Dist.*, 280 F. 401.

The Trustee's petition does not present a justiciable issue for review in a state or federal court. The petition presents only a question of the relation of recognized evidentiary factors, and these are exclusively questions for the state board. See Public Aids to Transportation, Coordinator's Section of Research, Vol. 2, p. 200; *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573; *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U. S. 134; *Nashville, C. & St. L. Ry.* v. *Browning*, 310 U. S. 362; *Rowley* v. *Chicago & N. W. R. Co.*, 293 U. S. 102; *Central Railway* v. *Martin*, 115 F. 2d 968; the Johnson Act of 1934, 28 U. S. C. § 41.

Mr. James M. Chaney, with whom *Messrs. Thomas T. Railey* and *Harvey G. Combs* were on the brief, for respondent.

The powers of the bankruptcy court were not exceeded. *In re Wood & Henderson*, 210 U. S. 246; *U. S. Fidelity & Guaranty Co.* v. *Bray*, 225 U. S. 205; *Van Huffel* v. *Harkelrode*, 294 U. S. 225; *New York* v. *Irving Trust Co.*, 288 U. S. 329; *New Jersey* v. *Anderson*, 203 U. S. 483; *Kalb* v. *Feuerstein*, 308 U. S. 433.

The provision of § 64 of the Bankruptcy Act "that in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the Court" is not inconsistent with § 77, and is of governing force in proceedings under § 77. *Michigan* v. *Michigan Trust Co.,* 296 U. S. 334; *In re Denver & Rio Grande Western R. Co.,* 23 F. Supp. 298; *St. Francis Levee Dist.* v. *Kurn,* 91 F. 2d 118; *St. Francis Levee District* v. *Kurn,* 98 F. 2d 394.

The jurisdiction to hear and determine any question as to taxes, under the provisions of § 64 (a) of the Act, extends to taxes accruing during the Trustee's possession of the property. *Henderson County* v. *Wilkins,* 43 F. 2d 670; *Dickinson* v. *Riley,* 96 F. 2d 385; *In re Denver & Rio Grande Western R. Co.,* 23 F. Supp. 298; *St. Francis Levee Dist.* v. *Kurn,* 91 F. 2d 118; *St. Francis Levee Dist.* v. *Kurn,* 98 F. 2d 394.

The order of April 11, 1940, was not an injunction and was not in violation of Jud. Code § 24. *Ex parte Baldwin,* 291 U. S. 610; *Henderson County* v. *Wilkins,* 43 F. 2d 670; *St. Francis Levee Dist.* v. *Kurn,* 91 F. 2d 118; *St. Francis Levee Dist.* v. *Kurn,* 98 F. 2d 394.

Even though the Arkansas statutes may provide for a judicial review in the state's courts of the assessments made by the Corporation Commission, this does not deprive the bankruptcy court of jurisdiction to hear and determine the amount or legality of any tax involved. *U. S. Fidelity & Guaranty Co.* v. *Bray,* 225 U. S. 205; *Kalb* v. *Feuerstein,* 308 U. S. 433.

The issue presented by the Trustee's petition is clearly justiciable. See Constitution of Arkansas, Art. XVI, § 5; Ark. Stats. §§ 2044, 2048; *Dawson* v. *Kentucky Distilleries,* 255 U. S. 288; *New Jersey* v. *Anderson,* 203 U. S. 483; *In re Schaefer Co.,* 103 F. 2d 237; *Great Northern Ry. Co.* v. *Weeks,* 297 U. S. 135; *Chicago & N. W. Ry.* v. *Eveland,* 13 F. 2d 442; *Bailey* v. *Megan,* 102 F. 2d 651;

Standard Oil Co. v. *Southern Pacific Co.*, 268 U. S. 146; *Atlanta, B. & C. R. Co.* v. *United States*, 296 U. S. 33; *Kansas City Southern Ry. Co.* v. *Road Improvement Dist.*, 256 U. S. 658; *Road Improvement Dist.* v. *Missouri Pacific R. Co.*, 274 U. S. 188.

Messrs. Jack Holt, Attorney General of Arkansas, *Charles T. Coleman* and *Walter G. Riddick* filed a brief on behalf of the State of Arkansas.

The validity and amount of tax claims must be determined in accordance with the laws of the taxing sovereignty.

The Arkansas Corporation Commission is a quasi-judicial tribunal. Its decisions can not be overturned by the courts for mere mistakes of fact or errors of judgment.

The trustee did not exhaust the administrative remedy provided by the Arkansas statute. The principle that the administrative remedy for relief against an alleged illegal tax must be exhausted before resort may be had to the courts for that purpose, is applicable to trustees in bankruptcy. *In re Gustav Schaefer Co.*, 103 F. 2d 237; *City of Springfield* v. *Hotel Charles*, 84 F. 2d 589; *In re Perlmutter*, 256 F. 861; *In re 168 Adams Building Corp.*, 105 F. 2d 704; *In re A. V. Manning's Sons*, 16 F. Supp. 632; *In re Schach*, 17 F. Supp. 437.

The bankruptcy court has no power, under § 77, to reassess the taxes due by the Trustee. Section 77 authorizes the formulation of a railroad reorganization plan, subject to the approval of the Interstate Commerce Commission and of the court, that will be fair and just to the creditors and stockholders, and which will guarantee the continued operation of the railroad. The word "taxes" does not appear in § 77, and there is nothing in the section indicating an intention to confer on bankruptcy courts the extraordinary power to assess or re-assess taxes.

If a tax is valid when measured by the laws of the taxing sovereign the bankruptcy court should allow it. If a tax is invalid when measured by those laws, it is the duty of the bankruptcy court to disallow it. The allowance or disallowance of a tax claim exhausts the entire judicial power of the court.

The assessment of taxes is referable to the legislative power, and it is no part of the judicial function. *Central Kentucky Natural Gas Co.* v. *Railroad Commission,* 290 U. S. 264. See also: *West Ohio Gas Co.* v. *Public Utilities Commission,* 294 U. S. 63; *Rowley* v. *Chicago & N. W. Ry. Co.,* 293 U. S. 102; *Great Northern Ry. Co.* v. *Weeks,* 297 U. S. 136; *Reagan* v. *Farmers Loan & Trust Co.,* 154 U. S. 362; *West* v. *Chesapeake & Potomac Tel. Co.,* 295 U. S. 662; *Central R. Co.* v. *Martin,* 115 F. 2d 968.

This principle has been held to be applicable to tax claims filed in bankruptcy proceedings. *City of Detroit* v. *Detroit & Canada Tunnel Co.,* 92 F. 2d 833; *Cross* v. *Georgia Iron & Coal Co.,* 250 F. 438; *In re Gould Manufacturing Co.,* 11 F. Supp. 644; *In re Schach,* 17 F. Supp. 437; *In re 168 Adams Building Corp.,* 27 F. Supp. 247.

The trustee's petition is a collateral attack on the assessment made by the Commission. The assessment is *prima facie* valid and it must be judged on the record before the Commission. The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.

Messrs. David T. Wilentz, Attorney General of New Jersey, and *Duane E. Minard* filed a brief on behalf of the State of New Jersey, as *amicus curiae,* urging reversal.

Mr. Justice Black delivered the opinion of the Court.

This case raises questions concerning the right and power of a federal bankruptcy court to revise and re-

determine for state tax purposes the property value of a railroad (Missouri Pacific) in reorganization under § 77 of the Bankruptcy Act, the state (Arkansas) having already determined such value through its own taxing officials and in accordance with the procedure prescribed by valid state legislation.

Over the objections of Arkansas officials, the District Court sitting in bankruptcy held that it did have such power. 33 F. Supp. 728. The Circuit Court of Appeals affirmed. 116 F. 2d 179. In so holding, both courts relied on § 64 (a) of the general bankruptcy act, 11 U. S. C. § 104 (a) (Supp. 1939), as the source of this power. That section, so far as pertinent here, provides "The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates . . . shall be . . . (4) taxes legally due and owing by the bankrupt to the United States or any State . . . : *Provided*, . . . That, in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the [bankruptcy] court . . ."

Petitioners contend that § 64 (a) is in its entirety inconsistent [1] with the aims and purposes of § 77, 11 U. S. C. § 205 (Supp. 1939), and that it therefore has no application here. That question we need not decide. For we are of opinion that the Congressional language giving

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[1] Section 77 (l) provides: "In proceedings under this section *and consistent with the provisions thereof*, the jurisdiction and powers of the court, . . . and the rights and liabilities of creditors, . . . 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." (Italics supplied.)

Among the federal court decisions cited in briefs supporting the petition as bearing on the issue of inconsistency between §§ 64 (a) and 77, either directly or indirectly, are the following: *Lowden* v. *Northwestern National Bank & Trust Co.*, 298 U. S. 160, 164;

to the bankruptcy court power to determine the "amount or legality" of taxes does not mean that the court is given power to redetermine and revise the property value finally fixed by a state under the circumstances revealed by the trustee's petition, even though that value is the basis used in computing the amount of taxes "legally due and owing."

An explanation of the power, functions, and action of the Arkansas Corporation Commission is essential to a clear understanding of this case. That Commission is a state agency created pursuant to state constitutional requirements.[2] It is vested with broad authority in the regulation of railroads, canals, turnpikes, public utilities, motor vehicles, sleeping cars, telephone and telegraph companies, and companies transmitting and distributing gas, oil and electricity.[3] Also, in the administration of the state tax laws the Corporation Commission has general and complete supervision and control over the valuation, assessment and equalization of all property. Before entering upon his duties in the assessment of property, each member of the Commission must subscribe to an oath that he will well and truly value and assess all property required to be assessed.[4] The Commission has full power to summon witnesses and hear evidence, but further, before assessments are finally determined, all persons interested have the right, on written application, to appear and be heard.

In re Chicago, M., St. P. & P. R. Co., 27 F. Supp. 685; *City of Springfield* v. *Hotel Charles Co.*, 84 F. 2d 589; *In re A. V. Manning's Sons*, 16 F. Supp. 932; *In re New York, O. & W. Ry. Co.*, 25 F. Supp. 709; *Texas Co.* v. *Blue Way Lines*, 93 F. 2d 593; *Henderson County* v. *Wilkins*, 43 F. 2d 670. And see Finletter, The Law of Bankruptcy Reorganization (1939) pp. 343–344.

[2] Ark. Dig. Stats. (Pope, 1937) § 1930.

[3] *Id.*, §§ 1930–2128.

[4] *Id.*, § 2042.

The Missouri Pacific has been in reorganization under § 77, with respondent as trustee, since 1933. In 1939, as in the preceding years, the railroad's properties were being operated by the trustee. The Commission, after a hearing in which the trustee participated, fixed the value of the railroad's Arkansas property, and levied an assessment for 1939. The trustee's motion for rehearing was heard, considered, and overruled by the Commission. The trustee concedes here that the hearing granted by the Commission was in "full compliance with all the administrative steps required by the Arkansas statute." Under controlling Arkansas law, it is provided that "Within thirty days after the entry on the record of the said Arkansas Corporation Commission of any order made by it, any party aggrieved may file a written motion with any member of such commission or with the secretary thereof praying for appeal from such order to the circuit court of Pulaski County; and thereupon said appeal shall be automatically deemed as granted as a matter of right without any further order." [5] Any party aggrieved by the Circuit Court's decision may then obtain as a matter of right an appeal to the Supreme Court of the state.[6] It is provided by statute that preferential standing on the docket be given to appeals from the Commission to the Circuit Court, and from the Circuit Court to the Supreme Court.

The Commission's final order fixing the value of the railroad's property for tax assessment was entered on December 4, 1939. The trustee did not appeal to the Circuit Court of Pulaski County within thirty days as authorized by Arkansas law, and the assessment of the Corporation Commission thereupon became final. Thus tested by Arkansas taxation legislation, the assessed taxes were, in

[5] *Id.*, § 2019.
[6] *Id.*, § 2020.

the language of § 64 (a), "legally due and owing" to the state in the "amount" fixed by the Commission, and were not subject to further judicial review, unless the special circumstance that a taxpayer is in bankruptcy or reorganization places it in a separate tax classification different from that of all other Arkansas taxpayers.

But three months after the expiration of the time allowed by the state for the trustee to appeal from the Commission's order—specifically, on April 11, 1940—the trustee petitioned the bankruptcy court, sitting in Missouri, to determine the "amount or legality" of the Arkansas tax by revising the property value found by the Corporation Commission and upon which the amount was based. The basis of the trustee's petition was that the Commission had made an overassessment, in that after a hearing it had determined the property to be worth far more than its actual value. This argument rested upon a contention that the Commission had overvalued the property by giving "predominant weight . . . to original cost and to cost of reproduction, and wholly inadequate consideration . . . to the market value of the railroad's stocks and bonds and to an enormous reduction in earnings occasioned by general business considerations and to rapid increase of competition from buses, trucks, water and air." The bankruptcy court was asked to find the Commission's tax assessment illegal upon three grounds: (1) The value determined by the Board was greatly in excess of the fair market value of the railroad's property and therefore there was a violation of that section of Arkansas law which provides that the assessment shall be "upon the consideration of what a clear fee simple title thereto would sell for under conditions under which that character of property is usually sold." [7] (2) The assessment was in violation of § 5 of Article 16 of the Constitution of Arkansas which

[7] *Id.*, § 2044.

provides that all property shall be taxed according to its value and that no one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value, and that all values shall be ascertained so as to make the same equal and uniform throughout the state. (3) The alleged excessive valuation fixed by the Commission was in violation of the Fourteenth Amendment of the Constitution of the United States.

It is thus obvious that the trustee's petition, which the bankruptcy court refused to dismiss, rested entirely upon the assumption that § 64 (a) (4) gave the bankruptcy court power to hold a completely new hearing in order to set its own value on the property, regardless of the value fixed by the state through its expert and specially constituted quasi-judicial agency.[8]

But we do not so interpret § 64 (a) (4). What § 64 (a) (4) relates to is "taxes legally due and owing by the bankrupt." And what that section further provides is that "in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court; . . ." Nothing in this language indicates that taxpayers in bankruptcy or reorganization are intended to have the extraordinary privilege of two separate trials, one state and one federal, on an identical issue of controverted fact—the value of the property taxed. Manifestly, whether or not taxes are "legally due and owing" to a state depends upon the valid laws of that state. Ad valorem taxes depend upon a determination of value. The governmental function of fixing the value for tax purposes has rarely, if ever,

[8] Among the lower federal court decisions discussing the power of bankruptcy courts under § 64 (a) (4) are: *In re Gould Mfg. Co.*, 11 F. Supp. 644; *In re 168 Adams Building Corp.*, 27 F. Supp. 247, affirmed, 105 F. 2d 704; *In re Schach*, 17 F. Supp. 437, 439; *In re Lang Body Co.*, 92 F. 2d 338; *Henderson County* v. *Wilkins*, 43 F. 2d 670.

been a judicial function. The "legality" of the action of Arkansas in entrusting the determination of value to its Corporation Commission is not challenged here, as of course it could not be. If the Commission properly found the value of the property, the "amount" of the taxes is not in question. For it is not asserted that the Commission made an improper arithmetical computation in applying the legal tax rate to the determined property value. It is in this respect, as well as with regard to the dissimilar duties and functions of the state administrative agencies involved, that this case differs from that of *New Jersey* v. *Anderson,* 203 U. S. 483, upon which the trustee here strongly relies. In that case, as here, the relevant provision of § 64 (a) was relied on as authorizing the bankruptcy court to determine the "amount or legality" of taxes. New Jersey had imposed a franchise tax upon the outstanding—not the authorized—capital stock of corporations, varying in proportion to the number of shares. A state agency, without a hearing, imposed a tax on the $40,000,000 authorized stock of the company involved, when in fact the company had only $10,000,000 of such stock outstanding. This Court said: "It may well be doubted whether the board had power to tax any other stock [except that outstanding]. But be that as it may, section 64*a* specifically provides that in case any question arises as to the amount or legality of taxes, the same shall be heard and determined by the court, with a view to ascertaining the amount really due. We do not think it was the intention of Congress to conclude the bankruptcy courts by the findings of boards of this character, and that the claim should have been upon the basis of the capital stock actually outstanding." But in that case the trustee argued in his brief before this Court that under controlling New Jersey law "the assessors acted ministerially, not judicially," their "determination was merely

computation," and their actions exceeded their statutory authority.[9]

The Arkansas Corporation Commission, however, does not act ministerially. On the contrary, it is a quasi-judicial agency entrusted with wide responsibilities in connection with the general tax system of the state. Upon it the state relies for the hearing and determination of matters essential to the maintenance and fair functioning of a uniform tax system. For reasons deemed suitable to it, the state has elected to confide this duty to the same agency which has power to exercise state-wide regulatory supervision over public utilities, including railroads. The difficulties in fixing railroad valuations are well known, and have been many times adverted to by this Court.[10] The Corporation Commission has been chosen by Arkansas as the ultimate guardian of the rights of the state and its taxpayers, subject only to that judicial review provided for by the state. "The State has confided those rights to its protection and has trusted to its honor and capacity as it confides the protection of other social relations to the courts of law." *Chicago, B. & Q. Ry. Co.* v. *Babcock,* 204 U. S. 585, 598.

If the trustee had availed himself of his right of appeal to the courts of Arkansas, with an ultimate right of appeal to this Court for final determination of federal questions, it is difficult to believe that it would now be seriously argued that Congress, by § 64 (a) (4), in-

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[9] In advancing this argument counsel called attention to the case of *People's Investment Co.* v. *State Board of Assessors,* 66 N. J. L. 175; 48 A. 579, in which the Court had said that it was beyond the jurisdiction of the tax agent to levy a tax on any but the outstanding capital stock. Counsel also relied on *Arimex Copper Co.* v. *State Board of Assessors,* 69 N. J. L. 121; 54 A. 244.

[10] E. g., *Nashville, C. & St. L. Ry.* v. *Browning,* 310 U. S. 362, 370; *Rowley* v. *Chicago & N. W. Ry. Co.,* 293 U. S. 102, 109, and cases cited.

tended to impose upon the bankruptcy court the unusual power and delicate duty of trying out afresh the facts found by the state with relation to the value of property. And there is no more reason to assume that Congress intended that the bankruptcy court should fail to give respect to an unappealed determination of value made by the Arkansas Corporation Commission. Bankruptcy and reorganization proceedings today cover a wide area in the business field. But there is nothing in the history of bankruptcy or reorganization legislation to support the theory that Congress intended to set the federal courts up as super-assessment tribunals over state taxing agencies. The express legislative purpose of Arkansas to move towards a more nearly uniform and fairly distributed tax burden through relying on supervision by a single agency could be in large part frustrated by the construction of the Bankruptcy Act for which the trustee here contends. Section 64 (a), thus construed, would tend to obstruct, and not to facilitate, the enforcement of state tax laws.[11] Nothing in the language of the Act requires such a construction. And the policy of revising and redetermining state tax valuations contended for by the trustee would be a complete reversal of our historic national policy of federal non-interference with the taxing power of states.

For the reasons given, it is our opinion that the District Court should have dismissed the trustee's petition.

Reversed.

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

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[11] *Boteler* v. *Ingels,* 308 U. S. 57, 61; *Healy* v. *Ratta,* 292 U. S. 263, 270; *Pennsylvania* v. *Williams,* 294 U. S. 176, 185. Cf. Bankruptcy Act of 1867, § 28 (5), 14 Stat. 531; Act of June 18, 1934, 28 U. S. C. § 124 (a), 48 Stat. 993.

PITTSBURGH PLATE GLASS CO. *v.* NATIONAL LABOR RELATIONS BOARD.*

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

No. 521. Argued March 7, 10, 1941.—Decided April 28, 1941.

1. A ruling of the National Labor Relations Board determining an appropriate unit for collective bargaining is not directly reviewable but is subject to challenge when a complaint of unfair practices is based upon it. P. 154.
2. An order of the National Labor Relations Board requiring an employer to cease and desist from recognizing or dealing with a union as a labor organization, entered on stipulation of the employer, without hearing, in a proceeding charging violations of §§ 8 (1) and (2) of the National Labor Relations Act to which the union was not a party, is binding upon the employer but leaves the union's private rights untouched. P. 155.
3. In proceedings before the Board under § 9 (b) of the Act to determine the appropriate bargaining unit or units for the employees in a plurality of plants operated by the same employer and manufacturing similar products, the desire of the employees at one of the plants to be represented by their own union rather than by a single organization representing the employees in all the plants, is a fact to be weighed, together with the similarity of working duties and conditions, the character of the various plants, and the anticipated effectiveness of the unit to be chosen in maintaining industrial peace through collective bargaining. P. 156.
4. The availability of a workers' organization for purposes of representation at a particular plant is not in itself decisive against joining the employees in that plant with those of other plants of the same employer as an appropriate bargaining unit. P. 156.
5. In determining whether the employees of a plant having its separate union should be included with those in other plants operated by the same employer, as an appropriate bargaining unit, the fact of employer-domination in that plant is to be considered; but it

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*Together with No. 523, *Crystal City Glass Workers' Union* v. *National Labor Relations Board*, also on writ of certiorari, 311 U. S. 642, to the Circuit Court of Appeals for the Eighth Circuit.

pertains rather to the subsequent certification of bargaining representative. P. 156.

6. In proceedings under § 9 (b) of the National Labor Relations Act in which all the employees in a plurality of separate plants were found to constitute an appropriate bargaining unit and a single labor federation was certified as their bargaining representative, the Board had received the petition of a union including a large majority of the workers at one of the plants showing their desire to be classed as a separate unit with separate representation. In a subsequent proceeding under §§ 8 (1) and (5), charging the employer with unfair labor practice in refusing to bargain with the federation so certified, further evidence of this desire of the workers in the single plant was offered in the endeavor to show that their inclusion in the unit was unlawful. *Held*:

(1) That refusal by the Board to admit the additional evidence was not arbitrary, since the two proceedings were virtually one and the knowledge of the workers' desires obtained in the first could properly be considered in the second. P. 157.

(2) A refusal to admit evidence that the union at the single plant was free from employer-domination, was within the discretion of the Board, in view of an order forbidding such domination, which it had made, on stipulation of the employer, in a distinct proceeding in which the union failed to appear, and in view of the full investigation made by the Board in the unit hearing, at which the union and all other interested parties were present. P. 158.

(3) Refusal to admit evidence cumulative to that received at the unit hearing, to show that the employees at the local plant had interests distinct from those of the employees at the other plants, was justifiable in view of the testimony on the subject adduced by the union at the unit hearing. P. 161.

(4) Evidence that the union had bargained for its members with the employer until the employer refused to do so because of charges of domination filed against it, and evidence that the membership of the union had increased, might properly be rejected by the Board as of slight probative value in determining an appropriate bargaining unit. P. 162.

(5) Considering together all the contentions about exclusion of evidence, the Court does not find that in the aggregate the evidence excluded could have materially affected the outcome of the "appropriate unit" issue, in the light of the criteria by which the Board determined that issue. P. 163.

7. Evidence *held* adequate to support a conclusion of the Labor Board that all of the employees in a plurality of plants should be included in one bargaining unit notwithstanding that one of them was a separate industrial unit, which was not mechanically integrated with the others, which did not exchange employees with them, and which had its own superintendent to deal with labor grievances and its own purchasing agent. P. 163.

   Labor policies and wages for all the plants were determined at a central office. Work, wages, hours, working conditions and manufacturing processes were similar. The Board was justified in finding that an independent unit at the plant in question would frustrate general effort at labor adjustments, and would enable the employer to use the plant for continuous operation in case of stoppage of labor at the other plants. P. 164.

8. Section 9 (b) of the National Labor Relations Act, which provides that the Board "shall decide in each case whether, in order to insure the employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purpose of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof," supplies adequate standards for administrative action and does not unconstitutionally delegate legislative power. P. 164.

113 F. 2d 698, affirmed.

CERTIORARI, 311 U. S. 642, to review a judgment affirming an order of the National Labor Relations Board. 15 N. L. R. B. 515. See also 102 F. 2d 1004, enforcing 8 N. L. R. B. 1210; and 10 N. L. R. B. 1111.

Mr. J. W. McAfee, with whom *Messrs. Leland Hazard* and *Joseph T. Owens* were on the brief, for petitioner in No. 521. *Mr. Henry H. Oberschelp* for petitioner in No. 523.

Solicitor General Biddle, with whom *Messrs. Warner W. Gardner, Robert B. Watts, Laurence A. Knapp, Mortimer B. Wolf,* and *Owsley Vose* were on the brief, for respondent.

MR. JUSTICE REED delivered the opinion of the Court.

The petitioners in the two cases covered by these certioraris[1] are the Pittsburgh Plate Glass Company, an employer, and the Crystal City Glass Workers Union, an "independent" or "local" union, that is a union unaffiliated with any other employee organization. Charged with an unfair labor practice in refusing to bargain collectively with duly accredited representatives of its employees, the Company countered the complaint with the assertion that it had and did bargain collectively with the proper representatives of its employees but that it denied the validity of a Board decision including the Crystal City plant of the Company as a part of the appropriate bargaining unit. The central issue thus is the legality of the Labor Board's decision, under § 9 (b) of the National Labor Relations Act,[2] determining that "the production and maintenance employees of the Company" at all six plants of its flat glass division, as a whole, constitute the appropriate unit for collective bargaining for the Crystal City employees, rather than the employees of the Crystal City plant only. The Board's conclusion is challenged on the merits, on procedural and on constitutional grounds. The certioraris were granted because of the importance of the "appropriate unit" problem in the administration of the Act.

The six plants of the flat glass division are located in five different states: Ford City, Pennsylvania; Creighton, Pennsylvania; Mount Vernon, Ohio; Clarksburg, West Virginia; Henryetta, Oklahoma; and Crystal City,

[1] Certioraris granted, 311 U. S. 642.

[2] 49 Stat. 449.

Missouri.[3] The normal number of employees in the whole division is about 6500. The Crystal City plant, with 1600, and the slightly larger plants at Ford City and Creighton account for the bulk of these workers; the remaining three together employ only about 1000. The Federation of Flat Glass Workers, an affiliate of the Congress of Industrial Organization, has a majority of all the employees in the flat glass division and also a majority at each plant except Crystal City. Its position, which the Board sustained, is that the entire division should be a single bargaining unit. The Crystal City Union, which claims a majority at that plant, and the Company both contend that the circumstances of this case require Crystal City to be separated from the rest of the division for the purpose of fixing the unit.

The present proceedings are the third stage of this labor dispute. Originally, in June, 1938, the Board filed a complaint against the Company alleging domination of and interference with the Crystal City Union in violation of §§ 8 (1) and (2).[4] The Crystal City Union was not named as a party in that proceeding. Before any hearing had been held the Company consented to entry of an order that it would cease and desist from dominating or contributing to the Crystal City Union or from recognizing or dealing with it as a labor organization. The Board issued the stipulated order in September, 1938, and later, also pursuant to the stipulation, obtained an enforcement order from the Circuit Court

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[3] The division also includes two small plants with 65 employees at Kokomo and Elwood, Indiana. The work done at these plants is not similar to that at any of the six referred to, and none of the parties contended that they should be included in the unit. Accordingly, the Board excluded them.

[4] The complaint also alleged certain unlawful discriminations in regard to hire and tenure, and other interferences with the employees' right of self-organization.

of Appeals.[5] The Federation of Flat Glass Workers, which had filed the charges leading to the issuance of the complaint, also had requested an investigation and certification of representatives pursuant to § 9 (c) of the Act. Extensive hearings on this second stage took place in October, 1938, at which the Crystal City Union appeared and participated. On January 13, 1939, the Board issued its decision fixing the bargaining unit and certification of representatives. The Board found that the Company's production and maintenance employees throughout the entire flat glass division (with the exception of window glass cutters, clerical employees not directly connected with production, and supervisory employees) constitute an appropriate unit, and it certified the Federation as the exclusive representative of all the employees in the unit.[6] This order, under our ruling in *American Federation of Labor* v. *Labor Board*,[7] was not subject to direct judicial review under § 10 (f) of the Act. The Company, however, continued to assert that the Crystal City plant should be excluded from the unit, and refused to bargain with the Federation with respect to that group of employees. Accordingly, about a month after its certification order, the Board issued a complaint in this proceeding, the third and pending stage of the labor dispute, alleging a refusal to bargain collectively in violation of §§ 8 (1) and (5). At the hearing on this complaint, at which the Crystal City Union was permitted to intervene, the trial examiner excluded a certain offer of proof by it and the Company. For various reasons the Board found that the exclusion was in part proper and for the rest non-prejudicial. On the merits the Board, with one member dissenting, adhered to its

[5] 102 F. 2d 1004, enforcing 8 N. L. R. B. 1210.

[6] 10 N. L. R. B. 1111.

[7] 308 U. S. 401.

original view that the Crystal City plant should be included in the unit and therefore found that the Company had committed an unfair labor practice.[8] The Company and the Crystal City Union sought review of the Board's decision in the Circuit Court of Appeals, which affirmed,[9] and we brought the case here on certiorari.

To reach a conclusion upon the complaint under consideration against the Company of unfair labor practices, violating § 8, subsections (1) and (5) of the National Labor Relations Act, the validity of the Board's decision as to the appropriate unit must be decided. As the unfair practice charged was the refusal to bargain collectively because of the inclusion of the Crystal City employees in the unit, if they were improperly included the complaint fails.

The Labor Act places upon the Board the responsibility of determining the appropriate group of employees for the bargaining unit. In accordance with this delegation of authority, the Board may decide that all employees of a single employer form the most suitable unit for the selection of collective bargaining representatives, or the Board may decide that the workers in any craft or plant or subdivision thereof are more appropriate.[10] The

[8] 15 N. L. R. B. 515.

[9] 113 F. 2d 698.

[10] 49 Stat. 453:

"SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such pruposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

"(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the

petitioners' contention that § 9 (a) grants to the majority of employees in a unit appropriate for such purposes the absolute right to bargain collectively through representatives of their own choosing [11] is correct only in the sense that the "appropriate unit" is the one declared by the Board under § 9 (b), not one that might be deemed appropriate under other circumstances. In its Annual Reports, the Board has stated the general considerations which motivate its action:

"In determining whether the employees of one, several, or all plants of an employer, or the employees in all or only a part of a system of communications, transportation, or public utilities, constitute an appropriate unit for the purposes of collective bargaining, the Board has taken into consideration the following factors: (1) the history, extent, and type of organization of the employees; (2) the history of their collective bargaining, including any contracts; (3) the history, extent, and type of organization, and the collective bargaining, of employees of other employers in the same industry; (4) the relationship between any proposed unit or units and the employer's organization, management, and operation of his business, including the geographical location of the various plants or parts of the system; and (5) the skill, wages, working conditions, and work of the employees." [12]

In its hearings on the appropriate unit the Board received evidence as to the organization of the Com-

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policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

[11] § 7.

[12] Fourth Annual Report (1939) 89–90. See also First Annual Report (1936) 112–20; Second Annual Report (1937) 122–40; Third Annual Report (1938) 156–97; Fifth Annual Report (1940) 63–72.

pany, the variety of its business, its distribution of this business into divisions and the location, size and method of operation of its flat glass plants, which composed the flat glass division. The history of collective bargaining in the business was developed. Finally the relation of the several plants of the flat glass division was examined and the characteristics of each plant and their respective employees gone into. From this evidence the Board determined that the production and maintenance employees of the six scattered flat glass plants were the appropriate unit and that the Federation, which had majorities of the employees in all the plants except Crystal City, was the labor representative for purposes of collective bargaining.

The Company and the local union contend that Crystal City's inclusion was erroneous because neither in the hearings on the appropriate unit nor on this unfair labor practice did the Board permit the introduction of material evidence on the question of appropriate units, the exclusion of which was prejudicial to the respondents.

While the ruling of the Board determining the appropriate unit for bargaining is not subject to direct review under the statute, the ruling is subject to challenge when, as here, a complaint of unfair practices is made predicated upon the ruling.[13] Petitioners press that challenge upon the ground (1) that the procedure denied due process of law, (2) that there was no substantial evidence to justify the ruling, and (3) that the authority granted the Board is an unconstitutional delegation of legislative power.

First. Petitioners find in the refusal of the Board to admit certain proffered evidence in the unit hearing and

[13] *American Federation of Labor* v. *Labor Board,* 308 U. S. 401, 408–411.

in this hearing a denial of due process in that the exclusion was illegal and arbitrary in depriving the parties of a full and fair hearing as guaranteed by the Fifth Amendment. The petitioners sought to adduce the excluded evidence by petition to the Circuit Court of Appeals for an order that the additional evidence be taken by the Board.[14] This was denied.

There is no challenge to the September 22, 1938, order of the Board, subsequently affirmed by the Court,[15] in the original proceeding where the Crystal City Glass Workers Union was not a party. This withdraws the employer's recognition of the Union as the employees' representative "as a labor organization." As the order does not run against the Union, its presence was unnecessary.[16] After such an order the employer may not be compelled by any other agency of the government to perform any acts inconsistent with that order.[17] While it leaves the Union's private rights untouched this order does forbid further dealings by the Company with the Union as labor representative of the employees. *National Licorice Co.* v. *Labor Board,* 309 U. S. 350, 366.

Acquiescing, for the argument, in the conclusion that selection of the appropriate unit is a function of the Board, petitioners urge that this function must be exercised in the light of properly available evidence. Much may be and was said upon either side of the issue as to whether Crystal City plant or the flat glass division would be the most efficient collective bargaining unit. Additional evidence might have brought the Board to a

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[14] § 10(e) and (f); *Consolidated Edison Co.* v. *Labor Board,* 305 U. S. 197, 226.

[15] 102 F. 2d 1004.

[16] *Labor Board* v. *Greyhound Lines,* 303 U. S. 261, 271; *National Licorice Co.* v. *Labor Board,* 309 U. S. 350, 365.

[17] *National Licorice Co.* v. *Labor Board, supra,* 364.

different conclusion. Hence, urge petitioners, the Board's refusal to permit the introduction of certain evidence before it, either in the hearing on the appropriate unit and certification of representatives or in this present hearing on unfair labor practices predicated upon that determination and certification, is important. As the Board's conclusion upon the appropriate unit determined that the Federation, the choice of a majority in the selected unit, would be the bargaining representative for all, including the Crystal City employees, we need not give specific consideration to the refusal of the Board to certify the petitioner, the Crystal City Glass Workers Union, as the bargaining representative of those workers. Certification of the bargaining representative follows the determination of the appropriate unit. As will presently appear, however, this does not dispose of the admissibility of evidence as to the Crystal City workers' desire to be represented by the Union. This is a fact which has a bearing on the determination of the appropriate unit.

For the same reason, the availability of a workers' organization for purposes of representation is not in itself decisive in determining the appropriate bargaining unit. Naturally the wishes of employees are a factor in a Board conclusion upon a unit. They are to be weighed with the similarity of working duties and conditions, the character of the various plants and the anticipated effectiveness of the unit in maintaining industrial peace through collective bargaining. It can hardly be said that the domination of a labor union by an employer is irrelevant to the question of what unit is appropriate for the choice of labor representative, but certainly it is a collateral matter in that investigation. It is only a fact to take into consideration. If the unit chosen has an employer dominated union, the workers may be given an opportunity to choose representatives, free of this infirmity,

and if the union is free of employer influence, it may be chosen as representative. In short, domination pertains directly to representation but influences the choice of a unit only casually.

Turning to the refusal of the Board to admit tendered evidence in this case, there are five instances alleged as error.[18] In the next preceding paragraph we have referred to the first, the desire of 1500 workers out of 1800 in the Crystal City plant to have that plant a bargaining unit and their opposition to Federation representation. This was before the Board. The petition of the Crystal City workers was presented in the hearing on the appropriate unit, was admitted and considered.[19] It is entirely proper for the Board to utilize its knowledge

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[18] 15 N. L. R. B. at 518.

[19] The petition was admitted after the following colloquy:

"Mr. HOLMES. We certainly object to the introduction of a petition of that kind in evidence, being irrelevant, not proper to show the wishes of the individual employees or members of this claimed Union at Crystal City. It has no place at this hearing, it is not proper evidence.

"Mr. BUCHANAN. We ask for the records.

"Trial Examiner DUDLEY. I will admit the exhibits for such weight as it may have."

In its opinion on the appropriate unit the Board said (10 N. L. R. B. at 1118):

"Moreover, the prior existence of the Crystal City Union for over 3 years, until almost the day of the hearing in this proceeding, to a large degree explains the desire of the 1,300 Crystal City employees for a separate bargaining unit, as expressed in their petition, and such desires may well undergo a radical change as the effect of the termination of the Crystal City Union's function as a labor organization is fully realized by these employees."

In its opinion on the refusal to bargain (15 N. L. R. B. at 523):

"In so far as this evidence can be assumed to show opposition among the Crystal City plant employees to the Federation, the Board's Decision of January 13, 1939, considered such arguments by the respondent and the Crystal City Union. We see no reason to alter our determination there set forth."

of the desires of the workers obtained in the prior unit proceeding, since both petitioners, the employer and the Crystal City Union, were parties to that prior proceeding.[20] The unit proceeding and this complaint on unfair labor practices are really one.[21] Consequently the refusal to admit further evidence of the attitude of the workers is unimportant.

The second offer refused is to produce evidence that the Crystal City Union, contrary to the previous finding of the Board in a distinct proceeding in which the Union was

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[20] Cf. Final Report of the Attorney General's Committee on Administrative Procedure, p. 70.

[21] 49 Stat. 453, § 9:

"(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

"(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript."

Section 10 (c) sets out the procedure before the Board for the hearing of complaints alleging unfair labor practices by employers. It requires a written record of the hearing. Sections 10 (e) and 10 (f) give the right of judicial enforcement and review of the Board's orders on such complaints to the Circuit Courts of Appeals on petition of the Board or any person aggrieved by the order.

not a party,[22] is free of employer domination. The entry of the order upon stipulation and consent does not detract from its force. *Swift & Co.* v. *United States,* 276 U. S. 311, 327. As previously explained, this question of domination is a collateral issue to the determination of the appropriate unit and we think to refuse to hear again upon a subject this remote from the inquiry was well within the discretion of the Board.[23] On September 22, 1938, the Board issued its cease and desist order directed against "recognizing or dealing with the Union as a labor organization" and on January 13, 1939, its appropriate unit order. The first order is not attacked. It is true that the Board based its refusal to permit this evidence partly on the finality of the original order. But it was of the view that the Crystal City Union had not availed itself of its chance to enter an appearance or voluntarily intervene

[22] 8 N. L. R. B. 1210. After stipulation the following excerpts became part of the Board's order:

The Company shall

"1. Cease and desist:

"(a) From such unfair labor practices as have occurred in the past; . . .

"(h) From in any manner dominating or interfering with the administration of the Crystal City Glass Workers' Union or any other organization of its employees, or contributing aid or support to said organization, or any other labor organization of its employees; from recognizing or dealing with the Crystal City Glass Workers' Union as a labor organization, or any person or group of persons purporting to represent said organization.

"2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

"(a) Withdraw all recognition from the Crystal City Glass Workers' Union as the representative of the respondent's employees, or any of them, as a labor organization, and notify said organization to that effect; . . ."

[23] *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 228; *Tennessee Power Co.* v. *T. V. A.,* 306 U. S. 118, 145.

in that proceeding.[24] The Board had just barred the Company from dominating the Union and caused it to withdraw recognition from it as an employee labor organization. At the hearing on the appropriate unit, at which all parties here were represented and took active part, full investigation was made of the relevant criteria to determine the appropriate bargaining unit. The history of the Federation was appraised, its efforts at division-wide collective bargaining, the opposition of Crystal City employees to the Federation and the characteristics of the various plants. These are factors which the Board thought determinative of the appropriate unit. Whether the Union was dominated by the employer or not was not stressed in fixing the unit. Counsel for the Union stated his position at the unit hearing as follows:

"I want to make a statement inasmuch as counsel for the Federation of Flat Glass Workers has made his statement. Very briefly I want to state the position of the Crystal City Glass Workers' Union. When the first statement was made by counsel, it was apparent that this proceeding is going to revolve about the Crystal City plant, which is Pittsburgh Plate Glass Company Plant No. 9. We expect to show on behalf of Plant No. 9 that approximately 1,300 out of the total of 1,600 employees are members of the Crystal City Glass Workers' Union. We expect to show that with reference to the integration at the plant the conditions are entirely different, they are very different in Crystal City than in any other plant. We expect to show that there are certain distinct features with reference to the Crystal City plant that do not exist at any other plant.

"We expect to show further that community conditions differ entirely at Crystal City from what they are at any other plant.

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[24] 15 N. L. R. B. at 519, n. 4.

"We expect to show that the social status, the economic status and the community status in general of the employees who work in the Crystal City plant is entirely different than it is in any other plant of the Pittsburgh Plate Glass Company.

"If we show those things we feel that the proper unit for the Crystal City plant is the plant unit because of the conditions that I have mentioned, and if any other organization with any other unit was recognized at that plant, it would defeat the purpose of the Act."

Each of these points was fully covered by the evidence before the Board on the unit hearing, with the result that the Crystal City Union received a full and complete hearing on every proposition covered by the statement.

The refusal to reconsider the issue of domination in the present unfair labor practice hearing accords, in our view, with the Board's discretionary powers.

The other three instances may be listed in the language of the Board, adopted by petitioners, as follows: (3) that the employees at the Crystal City plant had distinct interests from employees at the Company's other plants; (4) that the Crystal City Union had bargained collectively with the Company for its members until the Company refused to continue such bargaining because of the charges filed against it by the Federation; and (5) that since the stipulation of July 22, 1938, was entered into by the Board, the Company and the Federation, and since the Board's decision of January 13, 1939, the membership of the Crystal City Union had increased.

With respect to item (3), the distinct interests of the Crystal City employees, the Board ruled that in the unit proceeding the Company and the Crystal City Union were given full opportunity to present such evidence, and in the present proceeding neither of them had indicated that the proof sought to be admitted related to evidence unavailable at, discovered since, or not intro-

troduced in, the unit hearing. The full justification for this ruling by the Board becomes clear only after an examination of the record in the unit proceeding, which under § 9(d) of the Act is part of the record here.

The Crystal City Union appeared at the unit proceeding; it participated in the hearings; it called witnesses, and cross-examined those called by the other parties. A great deal of the hearing was taken up by testimony designed to bring out any interests of the Crystal City workers that might be distinct from those of employees at other plants. Thus there was abundant testimony with respect to their racial origins, their agricultural surroundings, their inclination or disinclination to visit cities, their lack of a "union" background, their recreational habits, etc. There was also a thorough canvassing of all the details in which the processes of production and the working conditions at Crystal City diverged from those at the other plants. If the Company or the Crystal City Union desired to relitigate this issue, it was up to them to indicate in some way that the evidence they wished to offer was more than cumulative. Nothing more appearing, a single trial of the issue was enough.

As to (4), collective bargaining by the Crystal City Union, and (5), that Union's growing membership at Crystal City, the Board said:

"Accepting the foregoing offer of proof as correctly stating the facts, nevertheless, in view of the proceedings against the respondent culminating in the court decree of January 14, 1939, negotiations between the respondent and the Crystal City Union cannot be regarded by the Board as evidence of genuine collective bargaining; nor can the Crystal City Union's membership and representation of employees at the Crystal City plant be considered by the Board as expressing the free

choice of the employees at that plant or as establishing the existence of another labor organization, in addition to the Federation, capable of bargaining collectively with the respondent for the employees there." [25]

The fact that the local union had undertaken negotiations with the employer or that it had grown in numbers would be of slight probative value in a proceeding to determine the bargaining unit. The Board might properly say as it did that accepting the offers of proof it would not alter the determination of the appropriate unit.

Further, if we consider all the contentions about exclusion of evidence together instead of separately, we do not find that in the aggregate the evidence excluded could have materially affected the outcome on the "appropriate unit" issue, in the light of the criteria by which the Board determined that issue.

Second. Petitioners complain that the record contains no evidence to support certain essential findings. One of these is the finding in regard to the history of collective bargaining. The Board determined that the Federation after 1934 and until 1937 held written labor agreements covering their members in all the plants of the Company, including Crystal City:

"Not until January 20, 1937, did the Company for the first time insist that Crystal City be excluded from the agreement between it and the Federation on the ground that the Federation did not have as members a majority of the employees at this plant. The written agreement signed on that day, at the insistence of the Company, despite the Federation's objections, did not cover the Federation members at Crystal City." [26]

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[25] 15 N. L. R. B. at 523.

[26] 10 N. L. R. B. at 1117.

The Board thought the evidence justified the conclusion that the Federation had sought and sometimes succeeded in organizing the Company on a "division-wide" basis. An examination of the contracts shows that three were entered into with the Federation between 1934 and 1937, all three of which recognized obligations towards "employees who are members of the Federation of Flat Glass Workers of America." Another granted a five per cent wage increase "in all plate and safety glass plants." This included Crystal City. There was testimony that all plants were covered and testimony by petitioners that the Crystal City plant was not covered. There were certain provisions applicable only where a plant had a local union. There was none at Crystal City. The evidence, we conclude, justifies the Board's finding that contracts were signed on a division-wide basis. Certainly the express exclusion of Crystal City employees in the 1937 contract on the employer's demand shows an endeavor to organize on that basis.

Petitioners find failure of evidence to establish the appropriateness of the division-wide unit. It is true the record shows a substantial degree of local autonomy. Crystal City is a separate industrial unit, not one mechanically integrated into the division. The local superintendent deals with labor grievances, the plant has its own purchasing agent and there is no exchange of employees. On the other hand, labor policies and wages come from the central office in Pittsburgh, there is great similarity in the class of work done. Wages, hours, working conditions, manufacturing processes differ only slightly among the plants. An independent unit at Crystal City, the Board was justified in finding, would frustrate division-wide effort at labor adjustments. It would enable the employer to use the plant there for continuous operation in case of stoppage of labor at the

other plants.[27] We are of the view that there was adequate evidence to support the conclusion that the bargaining unit should be division-wide.

Third. Finally petitioners urge that the standards for Board action as to the appropriate unit are inadequate to give a guide to the administrative action and the result is necessarily capricious, arbitrary and an unconstitutional delegation of legislative power. We find adequate standards to guide the Board's decision. While the exact limits of the Board's powers or the precise meaning of the terms have not been fully defined, judicially, we know that they lie within the area covered by the words "employer," "plant," and "craft."[28] The division-wide unit here deemed appropriate is well within these limits. As a standard, the Board must comply, also, with the requirement that the unit selected must be one to effectuate the policy of the act, the policy of efficient collective bargaining. Where the policy of an act is so definitely and elab-

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[27] With reference to the shifting of orders, the head of the Company's flat glass division testified:

"Q. There is some testimony from you about strikes. I don't know how long. During that time I think you said these plants were shut down except the Crystal City plant; is that correct?

A. That is right.

Q. And during the time of the strike, did you fill orders from the Crystal City plant that you would normally have filled from the other plants?

A. Yes.

Q. And you found that you could successfully transfer the orders from Creighton and Ford City?

A. There is no difference in the kind of orders they work on. They may be working at times on the same pattern for the same automobile company.

Q. All you would do would be to wire Crystal City or Creighton?

A. Yes."

[28] § 9 (b). Cf. Fifth Annual Report, N. L. R. B., V, G, 1 to 4 inclusive.

orately stated, this requirement acts as a permitted measure of delegated authority.[29]

Affirmed.

MR. JUSTICE STONE:

I think the judgment below should be reversed.

The Board's order, so far as it directs petitioner, the Glass Company, to recognize and bargain with respondent Federation as the representative of the Company's employees at its Crystal City plant, cannot be sustained unless the Board's certification of the Federation as the appropriate bargaining agency for those employees is upheld. I think that both should be set aside because of the Board's failure in those proceedings to afford to petitioner, Crystal City Glass Workers' Union, an "appropriate hearing," and its failure to determine the unfair labor practice issue on the evidence, both of which, to say nothing of constitutional requirements, are commanded by §§ 9 (c) and 10 (c) of the National Labor Relations Act.

The Federation, affiliated with the C. I. O., has organized local unions at each of the Company's six plants except that at Crystal City, whose employees, some 1600 in number, have been organized by the Union. The Company has recognized and bargained with the Federation as the representative of its employees at all except its Crystal City plant. In 1934 it entered into a written contract with the Federation which provided a method of settling grievances of employees at all its

[29] Cf. *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 24–25; *Opp Cotton Mills* v. *Administrator of Wage and Hour Division*, 312 U. S. 126.

Cf. also *Labor Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318, 340; *International Assn. of Machinists* v. *Labor Board*, 311 U. S. 72; *American Federation of Labor* v. *Labor Board*, 308 U. S. 401. Section 9 (b) is treated as valid in these cases.

plants, through local unions of the Federation. These provisions were renewed in 1935 but as the efforts of the Federation to organize a local union at Crystal City, begun in 1933 and continued actively during 1937 and since, have never succeeded, those provisions have remained inoperative at Crystal City. The renewal contract with the Federation in 1937, which is still in force, does not include the Crystal City plant.

The Union was incorporated in 1938. In April it organized the employees at the Crystal City plant and in the following month the Board, on petition of the Federation, instituted the certification proceeding now before us. In June of that year the Board issued its complaint, charging the Company with unfair labor practices, specifically alleging that it had "dominated and interfered with the formation and administration" of the Union. The Company answered denying the allegation. The Union was not a party to the proceeding and so far as appears had no knowledge of it. The Board, without taking any evidence and without making any finding of an unfair labor practice, which is prerequisite to an order under § 10 (c), made its order, on consent of the Company, directing it to cease and desist from "in any manner dominating or interfering with the administration" of the Union, or "contributing aid or support" to it and "from recognizing or dealing with it." The usual provision disestablishing the Union was omitted from the order.

As soon as the Board had made this order it proceeded with hearings in the certification proceeding in which both the Federation and the Union participated and in which the Board certified the Federation as the appropriate bargaining agency for the employees in all six of the Company's plants.

Upon the refusal of the Company to recognize the Federation as the agent of its employees at Crystal City,

the Board, on complaint of the Federation, began the present unfair labor practice proceeding against the Company. An agreement was then entered into between the Company and the Federation that the existing bargaining contract with the Federation, which did not include Crystal City, should remain in force pending a final determination of the appropriate bargaining unit for Crystal City.

In the present unfair labor practice proceeding the Board reconsidered and heard evidence on the question of the appropriate unit. In the course of the hearings both the Union and the Company offered to prove: (1) that 1500 out of the 1800 employees at Crystal City belonged to the Union and that these members were opposed to being represented by the Federation; (2) that the Union was not dominated by nor had its formation or administration been interfered with by the Company and that the Company had not contributed to its financial or other support; (3) that the employees at Crystal City had distinct interests from those at the other plants of the Company; (4) that the representatives of the Union had bargained collectively for its members with the Company until the Company declined to continue such bargaining by reason of the consent order of September, 1938, which the Board had entered against it, to which order and proceedings leading to it the Union was not a party; and (5) that since the order was made and since the certification of the Federation as the representative for collective bargaining of all the employees the membership in the Union had increased.

All of these offers were rejected and the proffered evidence was excluded. The Board reaffirmed its finding in the certification proceeding that the Federation was the appropriate bargaining agency and made its order directing the Company to bargain with the Federation.

One member of the Board, Mr. Leiserson, dissented, on the ground that the Board's decision was based upon an assumption that the Crystal City employees were incapable of making a free choice of representatives and that the Board's order imposed on the employees at that plant a representative not of their own choosing without any opportunity to express their own choice as to representation, and that it disregarded the history of the bargaining by the Company with the employees at the Crystal City plant and its existing contract with the Federation which excluded the Crystal City plant from its operation.

Throughout the certification and the later unfair labor practice proceedings the Board took the position that the Union and the Glass Company, because of the consent order against the Company, were no longer free to urge the wishes of the Union members as to representation or to show the actual bargaining relation between the Union and the Company or that the Company did not in fact dominate the Union. In the certification proceeding the Board stated that the Union, by reason of the consent order, had "ceased to be able to function as a labor organization and its existence as such at Crystal City then terminated" and that "Since the Crystal City Union can no longer function as a labor organization, its wishes are immaterial."

In reviewing the evidence in the unfair labor practice proceeding the Board adhered to its view that the Union by reason of the consent order must be treated by it as dominated by the Company and that for that reason the proffered and rejected evidence on this point was without weight, and that accordingly it must be taken that there never had been a "genuine and legitimate attempt by the Crystal City employees to bargain with the Company separately from the other plants."

A substantial part of the Board's findings in both proceedings is devoted to the inferences justifying its conclusion as to the appropriate unit, which it drew from this so-called finding of domination derived wholly from the consent order. It found that the wishes of the Union were immaterial since, under the order, it could no longer function as a labor organization. It stated that the existence of the Union for more than three years "to a large degree explains the desire of the 1300 Crystal City employees for a separate bargaining unit, as expressed in their petition, and such desires may well undergo a radical change as the effect of the termination of the Crystal City Union's function as a labor organization is fully realized by those employees."

In addition the Board thought that the evidence of negotiations between the Company and the Union, could not be "evidence of genuine collective bargaining"; it found that the membership of the large majority of the Crystal City employees in the Union cannot be considered "as expressing the free choice of the employees at that plant or as establishing the existence of another labor organization, in addition to the Federation, capable of bargaining with the respondent [company] for the employees there"; and it declared that one of the factors leading to the conclusion "that the interests of all the employees of the various plants are interwoven and that collective bargaining for all the employees involved can most effectively be achieved through the establishment of a single bargaining unit," was "the fact that the membership of the Crystal City Union is coerced and not voluntary." Thus on the questions as to the desires of the employees in each of the six plants and the history of collective bargaining there—both factors which the Board has uniformly considered heretofore in determining the probable effectiveness of future bargaining on the basis of a unit claimed to be appropriate—the Board

has not only rejected proffered evidence, admittedly relevant, but has drawn conclusions contrary to the rejected evidence, from facts found by the Board to be true, only by treating the conflicting evidence tendered by the Union as without weight.

In order to appraise the issues in the several proceedings before the Board and its action taken with respect to them, it is necessary to consider the function which the Board was called on to perform both in the certification proceedings and the unfair labor practice proceeding, both of which are now before us for review as provided by § 9 (d) of the Act. Section 9 (a) provides that representatives "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive bargaining representatives of all the employees in such unit for the purposes of collective bargaining." And under § 9 (b) it is the duty of the Board to "decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." The policies of the Act which the Board is to effectuate by its choice of the proper bargaining unit, are declared by § 1 to be the mitigation and elimination of obstructions to interstate commerce resulting from labor disputes "by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing," for purposes of collective bargaining "or other mutual aid or protection."

It will be observed that the function assigned to the Board is not the choice of the labor organization to rep-

resent a bargaining unit, for that is to be the free choice of the majority of the employees in some defined group of employees which the Board finds to constitute the appropriate unit. In making the choice of the unit, whether composed of the employees of a plant, a craft, or of an employer, the Board is required to observe the standards prescribed by the Act, which are "to insure to employees the full benefit of their right to self-organization and to collective bargaining" and to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing."

These are obviously the standards to be applied in a certification proceeding under § 9 (c) which provides that when a question arises "concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 [complaints for unfair labor practices] or otherwise and may take a secret ballot of employees or utilize any other suitable method to ascertain such representatives." A similar requirement is imposed on the Board upon complaint of unfair labor practices.

It is evident therefore that in the present proceeding the Board could not find the Company guilty of an unfair labor practice unless it had refused to bargain with the representative of an appropriate unit, which in turn required the Board to find from relevant evidence which it was required to hear whether the employees of the Crystal City plant constituted such a unit. In making that determination the Board considered, as it could under § 9 (d), the certification proceeding, but it was not required to and did not confine its consideration to

that proceeding. It heard evidence by numerous witnesses bearing on the question of the appropriate unit. It was bound to receive and consider all the evidence relevant to that issue, which was whether the policies of the Act would be better effectuated and whether the right of all of the Company's employees to self-organization would be fully secured by certifying a unit comprising all the employees of the six plants, or two units, one composed of the Crystal City employees and the other the employees in the five plants where the Federation admittedly had a majority.

The Board has always hitherto weighed the desires of the employees in determining the appropriate unit. And here the Board concedes that the Crystal City employees strongly preferred to be represented by the Union. In refusing to attribute any weight to this fact the Board found that their choice was not free, since it considered that the Union, because of the consent order, was company dominated. Whether the Union and the employees were in fact dominated by the employer, and the nature of the bargaining relations with the employer, were thus crucial issues in the case to be determined on evidence. And we are confronted with the extraordinary fact that the Board has determined those issues without ever having heard any evidence on the subject either in the present or the two earlier proceedings.

The present wishes of the employees, their freedom in self-organization from the domination and interference of the employer, their past bargaining relations with the employer, were all admittedly relevant considerations. Even though the Board could have refused to hear the evidence offered as to the wishes of the Crystal City employees and as to the prior bargaining history there, on the ground that, if true, the greater effectiveness of employee bargaining through a division-wide representative and the common interests of the em-

ployees in the six plants warranted the selection of the employees in the six plants as the appropriate unit, it did not attempt to do so. Instead, it rejected the evidence proffered by the Union not on technical or procedural grounds, nor because it thought these circumstances immaterial, or insufficient to change its determination, but on the sole ground that the Union was company dominated and "had ceased to function" by reason of the Board's order directing the Company not to bargain with it. It did this without having found in the present or in either of the earlier proceedings that the Union had ever been dominated or interfered with by the Company, and without having made any order running against the Union or purporting to bind it. The position of the Board thus seems to be that the right of the Crystal City employees to act as a unit, and the right of the Union to represent them in proceedings for ascertaining the appropriate bargaining unit and in collective bargaining with the employer, were forever foreclosed in a proceeding in which they were not represented, to which the Union was not a party, in which no evidence was received or finding made of any unfair labor practice, and which resulted only in an order on consent of the employer which did not purport to control the Crystal City employees or the Union, or determine their rights.

The only support which the opinion of the Court affords for a result so extraordinary is an intimation that the Crystal City employees and the Union had forfeited their right to have the proffered evidence considered by the Board because the Union had failed to intervene in the first proceeding in which the Board made its consent order against the Company, and because in the opinion of the Court the excluded evidence, if considered, would not have materially affected the outcome.

As the opinion of the Court itself points out, the first order of the Board did not run against or purport to bind the Union, see *Labor Board* v. *Pennsylvania Greyhound Lines,* 303 U. S. 261; and as this Court has decided the Board is without authority under the provisions of the Act, to say nothing of constitutional limitations, to make any order determining the rights of a labor organization in a proceeding to which it is not made a party. It was because the Board purported thus to determine the rights of an absent party which had failed to intervene, that we modified its order in *National Licorice Co.* v. *Labor Board,* 309 U. S. 350, 362, 367. It is new doctrine in the law, that one who is not a necessary party to a proceeding in which no order is made against him, nevertheless in some way and on some undisclosed theory, forfeits his rights if he does not voluntarily become a party. At the present term of Court we have had occasion to reaffirm the long recognized principle that a judgment of a court which purports to bind parties not present or represented in the litigation is without efficacy to bind them because if given such effect the judgment would be a denial of due process. *Hansberry* v. *Lee,* 311 U. S. 32. The order of an administrative board can have no greater force.

There is no provision of the statute providing for notice or other procedure on the basis of which the rights of absent parties are to be foreclosed, and in the present case it does not even appear that the Union or the Crystal City employees were notified or were otherwise aware of the proceeding in which the order was made on consent of the employer, which it is now asserted operated to terminate the existence of the Union and for that reason forfeited its right and the right of the employees to have relevant evidence considered in a representation proceeding.

The suggestion that an appropriate hearing upon evidence may be dispensed with because the rejected evidence would not have materially affected the outcome, seems to be based either on the assumption that the Board has in some way passed on the weight of the rejected evidence without hearing it, or that the Court is now free to appraise it and perform the function which the Board neglected to perform. Neither position is tenable. The Board refused to consider any of the proffered evidence on the sole and erroneous ground that the Union and the Crystal City employees had lost the status which they otherwise would have had entitling them to have their wishes and their relations with the employer considered in a representation proceeding. We have no warrant for saying that the Board would have attributed less weight to these factors than to others favorable to the Federation which it did consider, or that if it had thought that it was free to consider them the outcome would have been the same, or that in any case, on review of the Board's order, the interested parties would not have been entitled to urge that the Board, upon consideration of all the evidence, had not properly exercised its discretion.

As we are often reminded, most of the decisions of the Board involve discretion which is to be exercised by it alone and not the courts. For that reason the only substantial right of the litigant before the Board is, in most cases, the right to invoke the exercise of that discretion upon a full and fair consideration of all the relevant evidence. That right the Board has denied to petitioners in this case by refusing to consider the evidence upon palpably erroneous grounds. We are no more free in this case to pass upon the weight and sufficiency of the evidence, with the details of which, like the Board, we are unacquainted, than in any other case in which the Board is required to receive and pass upon evidence.

One of the most important safeguards of the rights of litigants and the minimal constitutional requirement, in proceedings before an administrative agency vested with discretion, is that it cannot rightly exclude from consideration facts and circumstances relevant to its inquiry which upon due consideration may be of persuasive weight in the exercise of its discretion. *Interstate Commerce Commission* v. *Chicago, R. I. & P. Ry. Co.,* 218 U. S. 88, 102; *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 75, 78; *Ohio Bell Telephone Co.* v. *Commission,* 301 U. S. 292, 304, 305.

The CHIEF JUSTICE and MR. JUSTICE ROBERTS concur in this opinion.

PHELPS DODGE CORP. *v.* NATIONAL LABOR RELATIONS BOARD.*

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

No. 387. Argued March 11, 1941.—Decided April 28, 1941.

1. Under § 8 (3) of the National Labor Relations Act, an employer who refuses to hire an applicant for employment solely because of the applicant's affiliation with a labor union is guilty of an unfair labor practice. P. 182.
2. When applicants have been unlawfully refused employment solely because of their affiliations with a labor union, § 10 (c) of the Labor Act empowers the Labor Board to order the employer to undo the discrimination by offering them the opportunity for employment which should not have been denied them. P. 187.
3. In this the Act does not violate the Fifth Amendment. P. 187.
4. In § 10 (c) of the Labor Act, empowering the Labor Board to require an employer guilty of an unfair labor practice to desist and

*Together with No. 641, *National Labor Relations Board* v. *Phelps Dodge Corp.,* also on writ of certiorari, 312 U. S. 669, to the Circuit Court of Appeals for the Second Circuit.

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to take such affirmative action, "including reinstatement of employees with or without back pay," as will effectuate the policies of the Act, the participial phrase "including reinstatement," etc., is illustrative merely and is not to be construed as a limitation upon the Board's power to remedy unlawful discrimination in the hiring as well as in the discharge of workers. P. 188.

5. Under § 10 (c) of the Labor Relations Act an employer who has been guilty of the unfair labor practice of refusing to hire men because of their union affiliations may be required by the Board, for effectuation of the policies of the Act, to offer them opportunity for employment, even though they have, in the meantime, obtained regular and substantially equivalent employment elsewhere. P. 189.

6. The broad meaning of the term "employee" as used in § 10 (c) of the Labor Act and in the earlier part of § 2 (3), is not restricted by the concluding clause of § 2 (3), which declares that the term "employee" shall include any individual whose work has ceased as a consequence of any unfair labor practice "and who has not obtained any other regular and substantially equivalent employment." P. 191.

   This last provision is assignable to other purposes, *e. g.*, for determining who are the "employees" with whom an employer must bargain collectively, §§ 8 (5), 9 (a), or who are to be treated as "employees" within a bargaining unit, § 9 (b).

7. To deny the Board power to neutralize discrimination merely because workers have obtained other compensatory employment would confine the "policies of this Act" to the correction of private injuries, whereas the Board was not devised for such a limited function, but is the agency of Congress for translating into concreteness the purpose of safeguarding and encouraging the right of self-organization. P. 192.

8. Although an employer who has denied re-employment to workers solely because of their labor union affiliations may be required to offer them employment notwithstanding their having obtained equivalent employment elsewhere, this remedy does not flow from the Act automatically when the discrimination is found, but depends upon a finding by the Board, in the exercise of its informed discretion, that effectuation of the policies of the Act requires such reinstatement. P. 193.

9. An order of the Labor Board requiring an employer to reinstate strikers who obtained other employment, should state the basis of the order. P. 197.

10. The remedy of ordering back pay is in the Board's discretion, not mechanically compelled by the Act. P. 198.
11. Where an order of the Labor Board requires that a worker be restored to employment and be compensated for loss of pay, deduction should be made not only for actual earnings of the worker while out of employment but also for losses which he willfully incurred. P. 197.
12. The amount of such deduction should be determined by the Board prior to formulation of its order. P. 200.

113 F. 2d 202, modified.

CERTIORARI, 312 U. S. 669, to review a judgment sustaining in part and in part disapproving an order of the National Labor Relations Board, 19 N. L. R. B. 547.

Mr. Denison Kitchel, with whom *Messrs. John Mason Ross, Matthew C. Fleming,* and *William E. Stevenson* were on the brief, for the Phelps Dodge Corporation.

It is not an unfair labor practice for an employer to refuse employment because of union membership or activity to one who is not his "employee" as that term is defined in § 2 (3) of the Act, and the Board has no authority to order the employment of or the payment of back pay to such a person.

If construed to authorize the Board to require the employment of one who was not an "employee" at the time when he was refused employment, the Act violates the Fifth Amendment.

The individuals who went on strike on June 10, 1935, were not "employees" of the Company when the Act became effective and did not become such by virtue of its provisions.

They have at no time occupied the status of "employees" under the Act and no unfair labor practice has been committed by the Company. They did not occupy the status of "employees" between July 5, 1935, and August 24, 1935, merely by virtue of the picketing, which was discontinued on the latter date.

Even assuming that the persons who went on strike on June 10, 1935, were "employees" of the Company under the Act between July 5 and August 24, 1935, there was no discriminatory refusal to "reinstate" and consequently no unfair labor practice during that period. The discriminatory refusals to hire occurred after August 24, 1935, but from and after that date the persons who had previously been on strike were clearly not "employees" and no unfair labor practice was committed.

The Board has no authority under § 10 (c) to order the reinstatement of persons who were discriminated against while occupying the status of "employees" as defined in § 2 (3), but who thereafter obtained "other regular and substantially equivalent employment" within the meaning of the latter provision, because such persons no longer occupy the status of "employees."

Section 10 (c) limits the Board's authority to "reinstatement of employees with or without back pay" and does not authorize the Board to award back pay to persons as to whom it has no authority to order reinstatement.

A person who has been the object of an unfair labor practice has the duty of exercising reasonable diligence to secure and retain other employment and the amount of back pay to which he might otherwise be entitled should be reduced by whatever amount he failed without excuse to earn.

Where the representatives of persons who claim to have been discriminated against delay for more than two years before filing charges, and the Board thereafter takes an additional two and a half years to dispose of the case, an employer who during that entire period has been helpless to obtain a determination of his rights and obligations is entitled to judicial relief from an excessive award of back pay.

Mr. Thomas E. Harris, with whom *Solicitor General Biddle* and *Messrs. Robert B. Watts, Laurence A. Knapp, Mortimer B. Wolf,* and *Morris P. Glushien* were on the brief, for the National Labor Relations Board.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The dominating question which this litigation brings here for the first time is whether an employer subject to the National Labor Relations Act may refuse to hire employees solely because of their affiliations with a labor union. Subsidiary questions grow out of this central issue relating to the means open to the Board to "effectuate the policies of this Act," if it finds such discrimination in hiring an "unfair labor practice." Other questions touching the remedial powers of the Board are also involved. We granted a petition by the Phelps Dodge Corporation and a cross-petition by the Board, 312 U. S. 669, to review a decision by the Circuit Court of Appeals for the Second Circuit, 113 F. 2d 202, which enforced the order of the Board, 19 N. L. R. B. 547, with modifications. The main issue is intrinsically important and has stirred a conflict of decisions. *Labor Board* v. *Waumbec Mills,* 114 F. 2d 226.

The source of the controversy was a strike, begun on June 10, 1935, by the International Union of Mine, Mill and Smelter Workers at Phelps Dodge's Copper Queen Mine, Bisbee, Arizona. Picketing of the mine continued until August 24, 1935, when the strike terminated. During the strike, the National Labor Relations Act came into force. Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. § 151 *et seq.* The basis of the Board's conclusion that the Corporation had committed unfair labor practices in violation of § 8 (3) of the Act was a finding, not challenged here, that a number of men had been refused employment

because of their affiliations with the Union. Of these men, two, Curtis and Daugherty, had ceased to be in the Corporation's employ before the strike but sought employment after its close. The others, thirty-eight in number, were strikers. To "effectuate the policies" of the Act, § 10 (c), the Board ordered the Corporation to offer Curtis and Daugherty jobs and to make them whole for the loss of pay resulting from the refusal to hire them, and it ordered thirty-seven of the strikers reinstated with back pay, and the other striker made whole for loss in wages up to the time he became unemployable. Save for a modification presently to be discussed, the Circuit Court of Appeals enforced the order affecting the strikers but struck down the provisions relating to Curtis and Daugherty.

First. The denial of jobs to men because of union affiliations is an old and familiar aspect of American industrial relations. Therefore, in determining whether such discrimination legally survives the National Labor Relations Act, the history which led to the Act and the aims which infuse it give direction to our inquiry. Congress explicitly disclosed its purposes in declaring the policy which underlies the Act. Its ultimate concern, as well as the source of its power, was "to eliminate the causes of certain substantial obstructions to the free flow of commerce." This vital national purpose was to be accomplished "by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association." § 1. Only thus could workers ensure themselves economic standards consonant with national well-being. Protection of the workers' right to self-organization does not curtail the appropriate sphere of managerial freedom; it furthers the wholesome conduct of business enterprise. "The Act," this Court has said, "does not interfere with the normal exercise of the right of the employer to select

its employees or to discharge them." But "under cover of that right," the employer may not "intimidate or coerce its employees with respect to their self-organization and representation." When "employers freely recognize the right of their employees to their own organizations and their unrestricted right of representation there will be much less occasion for controversy in respect to the free and appropriate exercise of the right of selection and discharge." *Labor Board* v. *Jones & Laughlin,* 301 U. S. 1, 45, 46. This is so because of the nature of modern industrialism. Labor unions were organized "out of the necessities of the situation. . . . Union was essential to give laborers opportunity to deal on equality with their employer." Such was the view, on behalf of the Court, of Chief Justice Taft, *American Steel Foundries* v. *Tri-City Council,* 257 U. S. 184, 209, after his unique practical experience with the causes of industrial unrest as co-chairman of the National War Labor Board. And so the present Act, codifying this long history, leaves the adjustment of industrial relations to the free play of economic forces but seeks to assure that the play of those forces be truly free.

It is no longer disputed that workers cannot be dismissed from employment because of their union affiliations. Is the national interest in industrial peace less affected by discrimination against union activity when men are hired? The contrary is overwhelmingly attested by the long history of industrial conflicts, the diagnosis of their causes by official investigations, the conviction of public men, industrialists and scholars.[1] Because of

[1] United States Industrial Commission, Final Report (1902) p. 892; Anthracite Coal Strike Commission, Report to the President on the Coal Strike of May–October, 1902, S. Doc. No. 6, 58th Cong., Spec. Sess., p. 78; Laidler, Boycotts and the Labor Struggle (1913) p. 39 *et seq.;* United States Commission on Industrial Relations, Final Report (1916) S. Doc. No. 415, 64th Cong., 1st Sess., p. 118;

the Pullman strike, Congress in the Erdman Act of 1898 prohibited inroads upon the workingman's right of association by discriminatory practices at the point of hiring.[2] Kindred legislation has been put on the statute books of more than half the states.[3] And during the late war the National War Labor Board concluded that discrimination against union men at the time of hiring violated its declared policy that "The right of workers to organize in trade-unions and to bargain collectively . . .

Interchurch World Movement, Commission of Inquiry, Report on the Steel Strike of 1919 (1920) pp. 27, 209, 219; Bonnet, Employers' Associations in the United States (1922) pp. 80, 296, 550; Gulick, Labor Policy of the United States Steel Corporation (1924) pp. 125–27; Cummins, The Labor Problem in the United States (2d ed. 1935) p. 351; Bureau of Labor Investigation of Western Union and Postal Telegraph-Cable Companies (1909) S. Doc. No. 725, 60th Cong., 2d Sess., pp. 39–41; S. Rep. No. 46, Part 1, 75th Cong., 1st Sess., p. 8.

[2] 30 Stat. 424; see United States Strike Commission, Report on the Chicago Strike of June–July, 1894, S. Doc. No. 7, 53d Cong., 3d Sess.; Olney, Discrimination Against Union Labor—Legal? (1908) 42 Amer. L. Rev. 161.

[3] Ala. Code Ann. (1928) § 3451; Ark., Acts of 1905, Act 214, p. 545; Cal. Labor Code (1937) §§ 1050–54; Colo. Stat. Ann. (1935) c. 97, §§ 88, 89, 93; Conn. Gen. Stat. (1930) §§ 6210–11; Fla. Comp. Gen. Laws Ann. (1927) § 6606; Ill. Ann. Stat. (1935) c. 38, § 139; Ind. Stat. Ann. (1933) §§ 40–301, 40–302; Iowa Code (1939) §§ 13253–54; Kan. Gen. Stat. (1935) §§ 44–117, 44–118, 44–119; Me. Laws (1933) c. 108; Minn. Stat. (1927) § 10378; Miss. Code Ann. (1927) §§ 9271–74; Mo. Rev. Stat. (1939) § 4643; Mont. Rev. Code Ann. (1935) §§ 3093–94; Nev. Comp. Laws (1929) §§ 10461–63; N. M. Stat. Ann. (1929) §§ 35–4613, 35–4614, 35–4615; New York Labor Law § 704(2), (9); N. C. Code Ann. (1939) §§ 4477–78; N. D. Comp. Laws Ann. (1913) § 9446; Okla. Stat. Ann. (1937) tit. 40, §§ 172–73; Ore. Comp. Laws Ann. (1940) §§ 102–806, 102–807; Tex. Stat. (1936) arts. 1616–1618; Utah Rev. Stat. Ann. (1933) §§ 49–5–1, 49–5–2; Va. Code (1936) § 1817; Wash. Rev. Stat. Ann. (1932) § 7599; Wis. Stat. (1939) § 343.682. See (1937) 37 Col. L. Rev. 816, 819; Witte, The Government in Labor Disputes (1932) pp. 213–18.

shall not be denied, abridged, or interfered with by the employers in any manner whatsoever." [4] Such a policy is an inevitable corollary of the principle of freedom of organization. Discrimination against union labor in the hiring of men is a dam to self-organization at the source of supply. The effect of such discrimination is not confined to the actual denial of employment; it inevitably operates against the whole idea of the legitimacy of organization. In a word, it undermines the principle which, as we have seen, is recognized as basic to the attainment of industrial peace.

These are commonplaces in the history of American industrial relations. But precisely for that reason they must be kept in the forefront in ascertaining the meaning of a major enactment dealing with these relations. To be sure, in outlawing unfair labor practices Congress did not leave the matter at large. The practices condemned "are strictly limited to those enumerated in section 8," S. Rep. No. 573, 74th Cong., 1st Sess., p. 8. Section 8 (3) is the foundation of the Board's determination that in refusing employment to the two men because of their union affiliations Phelps Dodge violated the Act. And so we turn to its provisions that "It shall be an unfair labor practice for an employer . . . By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

Unlike mathematical symbols, the phrasing of such social legislation as this seldom attains more than approximate precision of definition. That is why all relevant aids are summoned to determine meaning. Of compelling

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[4] Awards of the National War Labor Board: Sloss-Sheffield Steel & Iron Co., Docket No. 12. See also Omaha & Council Bluffs Street Ry., Docket No. 154; Smith & Wesson Co., Docket No. 273. Cf. Gregg, The National War Labor Board (1919) 33 Harv. L. Rev. 39.

consideration is the fact that words acquire scope and function from the history of events which they summarize. We have seen the close link between a bar to employment because of union affiliation and the opportunities of labor organizations to exist and to prosper. Such an embargo against employment of union labor was notoriously one of the chief obstructions to collective bargaining through self-organization. Indisputably the removal of such obstructions was the driving force behind the enactment of the National Labor Relations Act. The prohibition against "discrimination in regard to hire" must be applied as a means towards the accomplishment of the main object of the legislation. We are asked to read "hire" as meaning the wages paid to an employee so as to make the statute merely forbid discrimination in one of the terms of men who have secured employment. So to read the statute would do violence to a spontaneous textual reading of § 8 (3) in that "hire" would serve no function because, in the sense which is urged upon us, it is included in the prohibition against "discrimination in regard to . . . any term or condition of employment." Contemporaneous legislative history,[5] and, above all, the background of industrial experience, forbid such textual mutilation.

The natural construction which the text, the legislative setting and the function of the statute command, does not impose an obligation on the employer to favor union members in hiring employees. He is as free to hire as he is to

[5] Rather clearly the House Committee which reported the bill viewed the word "hire" as covering the situation before us. H. R. Rep. No. 1147, 74th Cong., 1st Sess., p. 19. The Chairman of the Senate Committee expressly stated during the debate that "no employer may discriminate in hiring a man whether he belongs to a union or not, and without regard to what union he belongs [except where there is a valid closed shop agreement]." 79 Cong. Rec. 7674. For further materials bearing on the legislative history see the able opinion of Judge Magruder in *Labor Board* v. *Waumbec Mills*, 114 F. 2d 226.

discharge employees. The statute does not touch "the normal exercise of the right of the employer to select its employees or to discharge them." It is directed solely against the abuse of that right by interfering with the countervailing right of self-organization.

We have already recognized the power of Congress to deny an employer the freedom to discriminate in discharging. *Labor Board* v. *Jones & Laughlin,* 301 U. S. 1. So far as questions of constitutionality are concerned we need not enlarge on the statement of Judge Learned Hand in his opinion below that there is "no greater limitation in denying him [the employer] the power to discriminate in hiring, than in discharging." The course of decisions in this Court since *Adair* v. *United States,* 208 U. S. 161, and *Coppage* v. *Kansas,* 236 U. S. 1, have completely sapped those cases of their authority. *Pennsylvania R. Co.* v. *Labor Board,* 261 U. S. 72; *Texas & N. O. R. Co.* v. *Railway Clerks,* 281 U. S. 548; *Virginian Ry.* v. *Federation,* 300 U. S. 515; *Labor Board* v. *Jones & Laughlin, supra.*

Second. Since the refusal to hire Curtis and Daugherty solely because of their affiliation with the Union was an unfair labor practice under § 8 (3), the remedial authority of the Board under § 10 (c) became operative. Of course it could issue, as it did, an order "to cease and desist from such unfair labor practice" in the future. Did Congress also empower the Board to order the employer to undo the wrong by offering the men discriminated against the opportunity for employment which should not have been denied them?

Reinstatement is the conventional correction for discriminatory discharges. Experience having demonstrated that discrimination in hiring is twin to discrimination in firing, it would indeed be surprising if Congress gave a remedy for the one which it denied for the other. The powers of the Board as well as the restrictions upon

it must be drawn from § 10 (c), which directs the Board "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." It could not be seriously denied that to require discrimination in hiring or firing to be "neutralized," *Labor Board* v. *Mackay Co.*, 304 U. S. 333, 348, by requiring the discrimination to cease not abstractly but in the concrete victimizing instances, is an "affirmative action" which "will effectuate the policies of this Act." Therefore, if § 10 (c) had empowered the Board to "take such affirmative action as will effectuate the policies of this Act," the right to restore to a man employment which was wrongfully denied him could hardly be doubted. Even without such a mandate from Congress this Court compelled reinstatement to enforce the legislative policy against discrimination represented by the Railway Labor Act. *Texas & N. O. R. Co.* v. *Railway Clerks*, 281 U. S. 548.[6] Attainment of a great national policy through expert administration in collaboration with limited judicial review must not be confined within narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies. Compare *Virginian Ry.* v. *Federation*, 300 U. S. 515, 552. To differentiate between discrimination in denying employment and in terminating it, would be a differentiation not only without substance but in defiance of that against which the prohibition of discrimination is directed.

But, we are told, this is precisely the differentiation Congress has made. It has done so, the argument runs,

[6] An injunction had been granted against interference with the workers' self-organization and reinstatement was ordered in contempt proceedings after employees had been discharged for union activities. Surely, a court of equity has no greater inherent authority in this regard than was conveyed to the Board by the broad grant of all such remedial powers as will, from case to case, translate into actuality the policies of the Act.

by not directing the Board "to take such affirmative action as will effectuate the policies of this Act," *simpliciter*, but, instead, by empowering the Board "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." To attribute such a function to the participial phrase introduced by "including" is to shrivel a versatile principle to an illustrative application. We find no justification whatever for attributing to Congress such a casuistic withdrawal of the authority which, but for the illustration, it clearly has given the Board. The word "including" does not lend itself to such destructive significance. *Helvering* v. *Morgan's, Inc.*, 293 U. S. 121, 125, note.

Third. We agree with the court below that the record warrants the Board's finding that the strikers were denied reëmployment because of their union activities. Having held that the Board can neutralize such discrimination in the case of men seeking new employment, the Board certainly had this power in regard to the strikers. And so we need not consider whether the order concerning the strikers should stand, as the court below held it should, even though that against Curtis and Daugherty would fall.

Fourth. There remain for consideration the limitations upon the Board's power to undo the effects of discrimination. Specifically, we have the question of the Board's power to order employment in cases where the men discriminated against had obtained "substantially equivalent employment." The Board as a matter of fact found that no such employment had been obtained, but alternatively concluded that, in any event, the men should be offered employment. The court below, on the other hand, in harmony with three other circuits, *Mooresville Cotton Mills* v. *Labor Board*, 94 F. 2d 61 (C. C. A. 4th); *Labor Board* v. *Botany Worsted Mills*,

106 F. 2d 263 (C. C. A. 3rd); *Labor Board* v. *Carlisle Lumber Co.*, 99 F. 2d 533 (C. C. A. 9th), ruled that employment need not be offered any worker who had obtained such employment, and since the record as to some of the strikers who had gone to work at the Shattuck Denn Company was indecisive on this issue, remanded the case to the Board for further findings. This aspect of the Board's authority depends on the relation of the general remedial powers conferred by § 10 (c) to the provisions of § 2 (3).

The specific provisions of the Act out of which the proper conclusion is to be drawn should be before us. Section 10 (c), as we already know, authorizes the Board "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." The relevant portions of § 2 (3) follow: "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment."

Merely as a matter of textual reading these provisions in combination permit three possible constructions: (1) a curtailment of the powers of the Board to take affirmative action by reading into § 10 (c) the restrictive phrase of § 2 (3) regarding a worker "who has not obtained any other regular and substantially equivalent employment"; (2) a completely distributive reading of § 10 (c) and § 2 (3), whereby the factor of "regular and substantially equivalent employment" in no way limits the Board's usual power to require employment to be offered a worker who has lost employment because of discrimination; (3) an avoidance of this either-or read-

ing of the statute by pursuing the central clue to the Board's powers—effectuation of the policies of the Act—and in that light appraising the relevance of a worker's having obtained "substantially equivalent employment."

Denial of the Board's power to order opportunities of employment in this situation derives wholly from an infiltration of a portion of § 2 (3) into § 10 (c). The argument runs thus: § 10 (c) specifically refers to "reinstatement of employees"; the latter portion of § 2 (3) refers to an "employee" as a person "who has not obtained any other regular and substantially equivalent employment"; therefore, there can be no reinstatement of an employee who has obtained such employment. The syllogism is perfect. But this is a bit of verbal logic from which the meaning of things has evaporated. In the first place, we have seen that the Board's power to order an opportunity for employment does not derive from the phrase "including reinstatement of employees with or without back pay," and is not limited by it. Secondly, insofar as any argument is to be drawn from the reference to "employees" in § 10 (c), it must be noted that the reference is to "employees," unqualified and undifferentiated. To circumscribe the general class, "employees," we must find authority either in the policy of the Act or in some specific delimiting provision of it.

Not only is the Act devoid of a comprehensive definition of "employee" restrictive of § 10 (c) but the contrary is the fact. The problem of what workers were to be covered by legal remedies for assuring the right of self-organization was a familiar one when Congress formulated the Act. The policy which it expressed in defining "employee" both affirmatively and negatively, as it did in § 2 (3), had behind it important practical and judicial experience. "The term 'employee'," the section reads, "shall include any employee, and shall not

be limited to the employees of a particular employer, unless the Act explicitly states otherwise. . . ." This was not fortuitous phrasing. It had reference to the controversies engendered by constructions placed upon the Clayton Act and kindred state legislation in relation to the functions of workers' organizations and the desire not to repeat those controversies. Cf. *New Negro Alliance* v. *Grocery Co.*, 303 U. S. 552. The broad definition of "employee," "unless the Act explicitly states otherwise," as well as the definition of "labor dispute" in § 2 (9), expressed the conviction of Congress "that disputes may arise regardless of whether the disputants stand in the proximate relation of employer and employee, and that self-organization of employees may extend beyond a single plant or employer." H. R. Rep. No. 1147, 74th Cong., 1st Sess., p. 9; see also S. Rep. No. 573, 74th Cong., 1st Sess., pp. 6, 7.

The reference in § 2 (3) to workers who have "obtained regular and substantially equivalent employment" has a rôle consonant with some purposes of the Act but not one destructive of the broad definition of "employee" with which § 2 (3) begins. In determining whether an employer has refused to bargain collectively with the representatives of "his employees" in violation of § 8 (5) and § 9 (a) it is of course essential to determine who constitute "his employees." One aspect of this is covered by § 9 (b) which provides for determination of the appropriate bargaining unit. And once the unit is selected, the reference in § 2 (3) to workers who have obtained equivalent employment comes into operation in determining who shall be treated as employees within the unit.

To deny the Board power to neutralize discrimination merely because workers have obtained compensatory employment would confine the "policies of this Act" to the

correction of private injuries. The Board was not devised for such a limited function. It is the agency of Congress for translating into concreteness the purpose of safeguarding and encouraging the right of self-organization. The Board, we have held very recently, does not exist for the "adjudication of private rights"; it "acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining." *National Licorice Co.* v. *Labor Board,* 309 U. S. 350, 362; and see *Amalgamated Utility Workers* v. *Edison Co.,* 309 U. S. 261. To be sure, reinstatement is not needed to repair the economic loss of a worker who, after discrimination, has obtained an equally profitable job. But to limit the significance of discrimination merely to questions of monetary loss to workers would thwart the central purpose of the Act, directed as that is toward the achievement and maintenance of workers' self-organization. That there are factors other than loss of wages to a particular worker to be considered is suggested even by a meager knowledge of industrial affairs. Thus, to give only one illustration, if men were discharged who were leading efforts at organization in a plant having a low wage scale, they would not unnaturally be compelled by their economic circumstances to seek and obtain employment elsewhere at equivalent wages. In such a situation, to deny the Board power to wipe out the prior discrimination by ordering the employment of such workers would sanction a most effective way of defeating the right of self-organization.

Therefore, the mere fact that the victim of discrimination has obtained equivalent employment does not itself preclude the Board from undoing the discrimination and requiring employment. But neither does this remedy automatically flow from the Act itself when discrim-

ination has been found. A statute expressive of such large public policy as that on which the National Labor Relations Board is based must be broadly phrased and necessarily carries with it the task of administrative application. There is an area plainly covered by the language of the Act and an area no less plainly without it. But in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review. Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy. On the other hand, the power with which Congress invested the Board implies responsibility—the responsibility of exercising its judgment in employing the statutory powers.

The Act does not create rights for individuals which must be vindicated according to a rigid scheme of remedies. It entrusts to an expert agency the maintenance and promotion of industrial peace. According to the experience revealed by the Board's decisions, the effectuation of this important policy generally requires not only compensation for the loss of wages but also offers of employment to the victims of discrimination. Only thus can there be a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination. But even where a worker has not secured equivalent employment, the Board, under particular circumstances, may refuse to order his employment

because it would not effectuate the policies of the Act. It has, for example, declined to do so in the case of a worker who had been discharged for union activities and had sought reëmployment after having offered his services as a labor spy. Matter of Thompson Cabinet Co., 11 N. L. R. B. 1106, 1116–17.

From the beginning the Board has recognized that a worker who has obtained equivalent employment is in a different position from one who has lost his job as well as his wages through an employer's unfair labor practice. In early decisions, the Board did not order reinstatement of workers who had secured such equivalent employment. See Matter of Rabhor Co., Inc., 1 N. L. R. B. 470, 481; Matter of Jeffery-De Witt Insulator Co., 1 N. L. R. B. 618, 628. It apparently focussed on the absence of loss of wages in determining the applicable remedy. But other factors may well enter into the appropriateness of ordering the offending employer to offer employment to one illegally denied it. Reinstatement may be the effective assurance of the right of self-organization. Again, without such a remedy industrial peace might be endangered because workers would be resentful of their inability to return to jobs to which they may have been attached and from which they were wrongfully discharged. On the other hand, it may be, as was urged on behalf of the Board in *Mooresville Cotton Mills* v. *Labor Board,* 97 F. 2d 959, 963, that, in making such an order for reinstatement the necessity for making room for the old employees by discharging new ones, as well as questions affecting the dislocation of the business, ought to be considered. All these and other factors outside our domain of experience may come into play. Their relevance is for the Board, not for us. In the exercise of its informed discretion the Board may find that effectuation of the Act's policies may or may not require reinstatement. We have no warrant for speculating on matters of fact the determination of

which Congress has entrusted to the Board. All we are entitled to ask is that the statute speak through the Board where the statute does not speak for itself.

The only light we have on the Board's decision in this case is its statement that, if any of the workers discriminated against had obtained substantially equivalent employment, they should be offered employment "for the reasons set forth in" Matter of Eagle-Picher Mining & Smelting Co., 16 N. L. R. B. 727, 833. But in that case the Board merely concluded that § 2 (3) did not deny it the power to order reinstatement; it did not consider the appropriateness of its exercise. Thus the Board determined only the dry legal question of its power, which we sustain; it did not consider whether in employing that power the policies of the Act would be enforced. The court below found, and the Board has not challenged the finding, that the Board left the issue of equivalence of jobs at the Shattuck Denn Company in doubt, and remanded the order to the Board for further findings. Of course, if the Board finds that equivalent employment has not been obtained, it is within its province to require offers of reëmployment in accordance with its general conclusion that a worker's loss in wages and in general working conditions must be made whole. Even if it should find that equivalent jobs were secured by the men who suffered from discrimination, it may order employment at Phelps Dodge if it finds that to do so would effectuate the policies of the Act. We believe that the procedure we have indicated will likewise effectuate the policies of the Act by making workable the system of restricted judicial review in relation to the wide discretionary authority which Congress has given the Board.

From the record of the present case we cannot really tell why the Board has ordered reinstatement of the strikers who obtained subsequent employment. The Board first found that the men had not obtained sub-

stantially equivalent employment within the meaning of § 2 (3); later it concluded that even if they had obtained such employment it would order their reinstatement. It did so, however, as we have noted, merely because it asserted its legal power so to do. When the court below held that proof did not support the Board's finding concerning equivalence of employment at Shattuck Denn and remanded the case to the Board for additional evidence on that issue, the Board took this issue out of the case by expressly declining to ask for its review here.

The administrative process will best be vindicated by clarity in its exercise. Since Congress has defined the authority of the Board and the procedure by which it must be asserted and has charged the federal courts with the duty of reviewing the Board's orders (§ 10 (e) and (f)), it will avoid needless litigation and make for effective and expeditious enforcement of the Board's order to require the Board to disclose the basis of its order. We do not intend to enter the province that belongs to the Board, nor do we do so. All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it. This is to affirm most emphatically the authority of the Board.

Fifth. As part of its remedial action against the unfair labor practices, the Board ordered that workers who had been denied employment be made whole for their loss of pay. In specific terms, the Board ordered payment to the men of a sum equal to what they normally would have earned from the date of the discrimination to the time of employment less their earnings during this period. The court below added a further deduction of amounts which the workers "failed without excuse to earn," and the Board here challenges this modification.

Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces.

Since only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred. To this the Board counters that to apply this abstractly just doctrine of mitigation of damages to the situations before it, often involving substantial numbers of workmen, would put on the Board details too burdensome for effective administration. Simplicity of administration is thus the justification for deducting only actual earnings and for avoiding the domain of controversy as to wages that might have been earned.

But the advantages of a simple rule must be balanced against the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment. The Board, we believe, overestimates administrative difficulties and underestimates its administrative resourcefulness. Here again we must avoid the rigidities of an either-or rule. The remedy of back pay, it must be remembered, is entrusted to the Board's discretion; it is not mechanically compelled by the Act. And in applying its authority over back pay orders, the Board has not used stereotyped formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations.[7] See (1939) 48 Yale L. J.

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[7] In accordance with the Board's general practice, deductions were made in the present case for amounts earned during the period of the back pay award. But the deductions have been limited to earnings during the hours when the worker would have been employed by the employer in question. Matter of Pusey, Maynes & Breish Co., 1 N. L. R. B. 482; Matter of National Motor Bearing Co., 5 N. L. R. B. 409. And only "net earnings" are deducted, allowance being made for the expense of getting new employment which, but for the discrimination, would not have been necessary. Matter of Crossett Lumber Co., 8 N. L. R. B. 440.

Even though a strike is caused by an unfair labor practice the Board does not award back pay during the period of the strike. Matter of Sunshine Hosiery Mills, 1 N. L. R. B. 664. Employees who are discriminatorily discharged are treated as strikers if during

1265. The Board has a wide discretion to keep the present matter within reasonable bounds through flexible procedural devices. The Board will thus have it within its power to avoid delays and difficulties incident to passing on remote and speculative claims by employers, while at the same time it may give appropriate weight to a clearly

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a strike they refuse an unconditional offer of reinstatement. Matter of Harter Corp., 8 N. L. R. B. 391. Originally back pay was ordered from the date of application for reinstatement, Matter of Sunshine Hosiery Mills, *supra*, but later orders have started back pay five days after application. Matter of Tiny Town Togs, Inc., 7 N. L. R. B. 54.

If there is unjustified delay in filing charges before the Board, a deduction is made for the period of the delay. Matter of Inland Lime & Stone Co., 8 N. L. R. B. 944. Similar action is taken when a case is reopened after having been closed or withdrawn. Matter of C. G. Conn, Ltd., 10 N. L. R. B. 498. And if the trial examiner rules in favor of the employer and the Board reverses the ruling, no back pay is ordered for the period when the examiner's ruling stood unreversed. Matter of E. R. Haffelfinger Co., 1 N. L. R. B. 760; and see the order in the present case.

The Board has refused to order any back pay where discriminatory discharges were made with honest belief that they were required by an invalid closed-shop contract. Matter of McKesson & Robbins, Inc., 19 N. L. R. B. 778.

If the business conditions would have caused the plant to be closed or personnel to be reduced, back pay is awarded only for the period which the worker would have worked in the absence of discrimination. Matter of Ray Nichols, Inc., 15 N. L. R. B. 846. At times fluctuations in personnel so complicate the situation that a formula has to be devised for the distribution of a lump sum among the workers who have been discriminated against. Matter of Eagle-Picher Mining & Smelting Co., 16 N. L. R. B. 727.

The rate of pay used in computing awards is generally that at the time of discrimination, but adjustments may be made for subsequent changes. Matter of Lone Star Bag & Bagging Co., 8 N. L. R. B. 244; cf. Matter of Acme Air Appliance Co., 10 N. L. R. B. 1385. Normal earnings in tips or bonuses have been taken into account. Matter of Club Troika, 2 N. L. R. B. 90; Matter of Central Truck Lines, 3 N. L. R. B. 317.

unjustifiable refusal to take desirable new employment. By leaving such an adjustment to the administrative process we have in mind not so much the minimization of damages as the healthy policy of promoting production and employment. This consideration in no way weakens the enforcement of the policies of the Act by exerting coercion against men who have been unfairly denied employment to take employment elsewhere and later, because of their new employment, declaring them barred from returning to the jobs of their choice. This is so because we hold that the power of ordering offers of employment rests with the Board even as to workers who have obtained equivalent employment.

But though the employer should be allowed to go to proof on this issue, the Board's order should not have been modified by the court below. The matter should have been left to the Board for determination by it prior to formulating its order and should not be left for possible final settlement in contempt proceedings.

Sixth. Other minor objections to the Board's order were found without substance below. After careful consideration we agree with this disposition of these questions, and do not feel that further discussion is required.

The decree below should be modified in accordance with this opinion, remanding to the Board the two matters discussed under *Fourth* and *Fifth* herein, for the Board's determination of these issues.

Modified.

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

MR. JUSTICE MURPHY:

While I fully approve the disposition of the first three issues in the opinion just announced, I cannot assent to the modification of that part of the Board's order

which required reinstatement of certain employees, or to the limitation imposed on the Board's power to make back pay awards.

First. The Board is now directed to reconsider its order of reinstatement merely because, in the course of its recital, it stated that even if the employees in question had secured other substantially equivalent employment it would nevertheless order their reinstatement for the reasons set forth in Matter of Eagle-Picher Mining & Smelting Co., 16 N. L. R. B. 727.[1] There is neither claim nor evidence that reinstatement will not effectuate the policies of the Act. There is no suggestion that the order the Board issued was wrong or beyond its power. That order is challenged only because the statement and reference to the Eagle-Picher case are said to

[1] The entire paragraph in which this statement appears reads: "We have found that the respondent has discriminated in regard to hire and tenure of employment of certain individuals named above. In accordance with our usual practice we shall order the reinstatement or the reëmployment of such individuals. The respondent contends that the Board lacks power to order the reinstatement of any striker who has obtained other regular and substantially equivalent employment. We have found that none of the strikers discriminated against has obtained other regular and substantially equivalent employment within the meaning of the Act. Nevertheless, even if any striker had obtained such employment, we would, for the reasons set forth in Matter of Eagle-Picher Mining & Smelting Co., . . . still order his reinstatement by the respondent." 19 N. L. R. B. 547, 598.

It is to be noted, of course, that in the Eagle-Picher case the Board's remarks were made in answer to the argument advanced here, that § 2 (3) narrows the application of the term "employees" in § 10 (c).

It is worth noting, too, that in that case the Board stated: "Further to effectuate the purposes and policies of the Act, and as a means of removing and avoiding the consequences of the respondents' unfair labor practices, we shall, in aid of our cease and desist order, order the respondents to take certain affirmative action, more particularly described below." 16 N. L. R. B. 727, 831.

demonstrate that the Board ordered reinstatement mechanically due to a misconception of its functions under the statute, and that it did not consider whether reinstatement would effectuate the policies of the Act.

Even if it be assumed that this recital imports an inaccurate appraisal of the Board's power, an assumption which I believe is without justification, modification of its order is not a necessary consequence. The question before us is whether the order the Board issued was within its power. There is no occasion now to determine what disposition should be made of an order which was not an exercise of the Board's administrative discretion, or to infer that the Board must investigate the substantial equivalency of other employment before it may order reinstatement. Suffice to say, the Board found that certain employees had been the objects of unfair labor practices and that it would effectuate the policies of the Act to order their reinstatement. It expressly rested its order upon those findings.

The circumstances occasioning the latter finding are convincing evidence that the Board not only was required to but did exercise discretion in the formulation of its order of reinstatement. Throughout the hearing the employer's counsel sought to show by cross-examining them that the complaining employees were not entitled to reinstatement. Shortly after that examination commenced, the trial examiner requested the Board's attorney to state the theory upon which he contended that those employees should be reinstated. Considerable testimony was offered to show the working conditions, hours, rates of pay, continuity of operation, etc., of mines in which the witnesses had secured other employment.

All this was in the record certified to the Board. Accompanying it was the contention of the employer that reinstatement should be denied for various reasons. The

Board explicitly considered the contention, among others, that reinstatement would provoke further disputes and discord among the employees rather than promote labor peace. It also considered the contention that many of the employees had obtained other substantially equivalent employment, making both general and specific findings concerning it.[2] Finally, it concluded that the policies of the Act would be effectuated by ordering the employer to tender reinstatement to designated employees.

That its order of reinstatement was more than a perfunctory exercise of power is pointedly manifest from the Board's own statements. Answering the employer's contention that reinstatement might foster discord among the employees, the Board declared: "We cannot but consider the difficulties of adjustment envisaged in the foregoing testimony [upon which the employer relied] as conjectural and insubstantial, especially in view of the lapse of time since the strike. However, even assuming that the asserted resentment of nonstrikers towards strikers and picketers persists, *the effectuation of the policies of the Act patently requires*[3] the restoration of the strikers and picketers to their *status quo* before the discrimination against them."

In discussing its proposed order, the Board said: "Having found that the respondent has engaged in unfair labor practices, we will order it to cease and desist therefrom and to take certain affirmative action *designed to effectuate the policies of the Act*[4] and to restore as nearly

[2] The Board found that none of the employees had obtained other substantially equivalent employment. The Circuit Court of Appeals reversed this finding in part. The reversal is not challenged here, but that is immaterial since the Court now decides that the Board has the power to order reinstatement even though the employees have found other substantially equivalent employment, provided that the policies of the Act will be effectuated.

[3] Emphasis added.

[4] Emphasis added.

as possible the condition which existed prior to the commission of the unfair labor practices."

And in its formal order, the Board stated: "Upon the basis of the above findings of fact and conclusions of law, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Phelps Dodge Corporation . . . shall: . . . 2. Take the following affirmative action *which the Board finds will effectuate the policies of the Act*:[5] (a) Offer to the following persons immediate and full reinstatement to their former or substantially equivalent positions . . .; (b) Make whole [the following employees] for any loss of pay they may have suffered by reason of the respondent's discriminatory refusal to reinstate them . . . less the net earnings of each . . ."

The italicized phrases in these quotations were not chance or formal recitals. They expressed in summary a considered exercise of administrative discretion. The Board carefully followed the precise procedure which this Court says it should have adopted. It found that the employees in question had been the victims of unfair labor practices. It also found that the policies of the Act would be effectuated by ordering their reinstatement. Since there was evidence to support these findings, it is difficult to understand what more the Board should or could have done.

But if we are now to consider in the abstract whether the Board properly opined that it might have the power to order reinstatement without regard to the substantial equivalency of other employment, I am nevertheless unable to approve the modification of its order, or to accept the inference that the Board must consider the substantial equivalency of other employment before it may order reinstatement. There is nothing in § 10 (c) or in the Act

[5] Emphasis added.

as a whole which expressly or impliedly obligates the Board to consider the substantial equivalency of other employment or to make findings concerning it before it may order reinstatement. Indeed, such a rule narrows rather than broadens the administrative discretion which the Act confers on the Board.

Practical administrative experience may convince the Board that the self-interest of the employee is a far better gauge of the substantial equivalency of his other employment than any extended factual inquiry of its own. Conversely, the Board may conclude that the policies of the Act are best effectuated by an investigation in every case into the nature of his other employment. That choice of rules is an exercise of discretion which Congress has entrusted to the Board. Whichever rule the Board adopts, it does not follow that reinstatement becomes a remedy which is granted automatically upon a finding of unfair labor practices. If for other reasons the Board finds that the policies of the Act will not be effectuated, of course it not only could but should decline to order an offer of reinstatement. Compare Matter of Thompson Cabinet Co., 11 N. L. R. B. 1106.

Second. As already indicated, I am unable to accept the limitation now imposed on the Board's power to make back pay awards. Again the question is simply this: Was the back pay order within the power of the Board and supported by evidence? What order the Board should have made or what rule of law it should have followed if some of the employees had "willfully incurred" losses are questions of importance which we should answer only when they are presented. They are not here now.

The Board expressly found that the policies of the Act would be effectuated by ordering the employer to make whole those employees who had been the victims of discriminatory practices. We are pointed to nothing which requires a different conclusion. We are not referred to

any employee who "willfully incurred" losses, or to any evidence in the record compelling us to hold that any of them did. At most the record shows only that some of the employees obtained other employment—which was not substantially equivalent—and then voluntarily relinquished it. For all we know, the Board could have determined that this evidence did not establish "willfully incurred" losses. Plainly that was a permissible inference from the evidence, and, this being so, there is no occasion now to decide what the Board should have done had it drawn some other inference.

But again, if we are now to rule on the abstract issue, I cannot agree that the power to make back pay awards must be fettered in the manner described in the opinion just announced. For if the Board has no choice but to accept the limitation now imposed, its administrative discretion is curbed by the very decision which purports to leave it untouched.

It must be conceded that nothing in the Act requires such a limitation in so many words. To be sure, nothing in the Act requires a back pay award to be diminished by the amounts actually earned (compare *Republic Steel Corp.* v. *Labor Board,* 311 U. S. 7), but that should admonish us to hesitate before we introduce yet another modification which Congress has not seen fit to enact, especially when the two situations differ in many respects. It is not our function to read the Act as we think it should have been written, or to supplant a rule adopted by the Board with one which we believe is better. Our only office is to determine whether the rule chosen, tested in the light of statutory standards, was within the permissible range of the Board's discretion.

The Board might properly conclude that the policies of the Act would best be effectuated by refusing to embark on the inquiry whether the employees had willfully incurred losses. Administrative difficulties engendered

by a contrary rule would be infinite, particularly as the number of individuals involved in the dispute increased. Underlying the contrary rule is the supposition that the employee would purposely remain idle awaiting his back pay award. But that attributes to the employee an omniscience frequently not given to members of the legal profession. He must be able to determine that the employer actually has committed unfair labor practices; that the unfair labor practices affect commerce within the meaning of §§ 2 (6) and 2 (7); that the Board will take favorable action and make a back pay award; that the Circuit Court of Appeals will enforce that order in full; and that this Court finally will affirm if the case comes here.

This is not all. He must have capital sufficient to provide for himself and for any dependents while he awaits the back pay award, even though that may not come until several years later.[6] He must risk union disfavor by dividing his efforts between a labor dispute and a search for a new job. He must realize, although his natural suppositions are otherwise, that he will probably not endanger seniority rights or chance of reinstatement by accepting other employment. He must be able to decide when he has made sufficient efforts to secure other employment notwithstanding that he is not told whether he can or must accept any job no matter where it is or what type of employment, wages, hours, or working conditions.

At his peril he must determine all these things because conventional common law concepts and doctrines of damages, applicable in suits to enforce purely private rights, are to be imported into the National Labor Relations Act.

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[6] The labor dispute which gave rise to this proceeding occurred in 1935.

Having these considerations in mind, supplemented perhaps by others not available or suggested to us, the Board might well decide that the rule disapproved here would best effectuate the policies of the Act. I do not think we should substitute our judgment on this issue for that of the Board.

Accordingly, I would affirm the order of the Board in full.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS concur in this opinion.

MR. JUSTICE STONE:

With two rulings of the Court's opinion the CHIEF JUSTICE and I are unable to agree.

Congress has, we think, by the terms of the Act, excluded from the Board's power to reinstate wrongfully discharged employees, any authority to reinstate those who have "obtained any other regular and substantially equivalent employment." And we are not persuaded that Congress, by granting to the Board, by § 10 (c) of the Act, authority "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of the Act," has also authorized it to order the employer to hire applicants for work who have never been in his employ or to compel him to give them "back pay" for any period whatever.

The authority of the Board to take affirmative action by way of reinstatement of employees is not to be read as conferring upon it power to take any measures, however drastic, which it conceives will effectuate the policies of the Act. We have held that the provision is remedial, not punitive, *Consolidated Edison Co.* v. *Labor Board,* 305 U. S. 197, 235, 236; see also *Labor Board* v. *Pennsylvania Greyhound Lines,* 303 U. S. 261, 267, 268,

and that its purpose is to effectuate the policies of the Act by achieving the "remedial objectives which the Act sets forth" and "to restore and make whole employees who have been discharged in violation of the Act." *Republic Steel Corp.* v. *Labor Board*, 311 U. S. 7, 12. The Act itself has emphasized this purpose when, in including in the category of "employees" those who might not otherwise have been so included, it provided, § 2 (3), that the term "employee" "shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment."

While the stated policy of a statute is an important factor in interpreting its command, we cannot ignore the words of the command in ascertaining its policy. In enlarging the category of "employees" to include wrongfully discharged employees and at the same time excluding from it those who have obtained "other regular and substantially equivalent employment," the Congress adopted a policy which it may well have thought would further the cause of industrial peace quite as much as the enforced employment of discharged employees where there was no occasion to compensate them for the loss of their employment. It is the policy of the Act and not the Board's policy which is to be effectuated, and in the face of so explicit a restriction of the definition of discharged employees to those who have not procured equivalent employment, we can only conclude that Congress has adopted the policy of restricting the authorized "reinstatement of employees" to that class.

Even if we read the language of § 2 (3) distributively, it seems difficult to say that the specially granted power to reinstate employees extends to those who, by definition, are not employees, and this is the more so when the effect of the definition is consonant with what appears

to be the declared purpose of the reinstatement provision. Nor can it fairly be said that the definition of employees is of significance only for the purpose of determining the appropriate bargaining agency of the employees. There is no evidence in the statute itself, or to be derived from its legislative history, that the definition was not to be applied in the one case quite as much as in the other. Certainly the fact of substantially equivalent employment has as much bearing upon making the discharged employee whole as upon his right to participate in the choice of a bargaining representative, and no ground has been advanced for saying that it applies to one and not the other.

As a majority of the Court is of opinion that the Board does possess the power to order reinstatement even though the discharged employees had obtained other equivalent employment, we agree that the case should now be remanded to the Board for a determination of the question whether reinstatement here would further the policies of the Act.

We agree that petitioner's refusal to hire two applicants for jobs, because of their union membership, was an unfair labor practice within the meaning of § 8 (3) of the Act, even though they had never been employees of the petitioner, and that under § 9 (c) the Board was authorized to order petitioner to cease and desist from the practice and to take appropriate proceedings under § 10 to enforce its order. But it is quite another matter to say that Congress has also authorized the Board to order the employer to hire applicants for work who have never been in his employ and to compel him to give them "back pay."

The Congressional debates and committee reports give no hint that, in enacting the National Labor Relations Act, Congress or any member of it thought it was giving the Board a remedial power which few courts had ever

assumed to exercise or had been thought to possess, and we are unable to say that the words of the statute go so far. The authority given to the Board by § 10 (c) is, as we have said, not an unrestricted power, and the grant is not to be read as though the words "including reinstatement of employees with or without back pay" were no part of the statute. None of the words of a statute are to be disregarded and it cannot be assumed that the introduction of the phrase in this one was without a purpose.

Undoubtedly, the word "including" may preface an illustrative example of a general power already granted, *Helvering* v. *Morgan's, Inc.,* 293 U. S. 121, 125, or it may serve to define that power or even enlarge it. Cf. *Montello Salt Co.* v. *Utah,* 221 U. S. 452, 462, *et seq.* Whether it is the one or another must be determined by the purpose of the Act, to be ascertained in the light of the context, the legislative history, and the subject matter to which the statute is to be applied.

In view of the traditional reluctance of courts to compel the performance of personal service contracts, it seems at least doubtful whether an authority to the Board to take affirmative action could, without more, fairly be construed as permitting it to take a kind of affirmative action which had very generally been thought to be beyond the power of courts. This is the more so because the Board's orders were by § 10 (c) made subject to review and modification of the courts without any specified restriction upon the exercise of that authority.

It is true that in *Texas & N. O. R. Co.* v. *Railway Clerks,* 281 U. S. 548, this Court had held that upon contempt proceedings for violation of a decree enjoining coercive measures by the employer against his union employees, a court could properly direct that the contempt be purged on condition that the employer restore the status quo. But Congress in enacting the National

Labor Relations Act took a step further by providing that the Board could order reinstatement of employees even though there had been no violation of any previous order of the Board or of a court. It thus removed the doubt which would otherwise have arisen by defining and, as we think, enlarging the Board's authority to take affirmative action so as to include the power to order "reinstatement" of employees. But an authority to order reinstatement is not an authority to compel the employer to instate as his employees those whom he has never employed, and an authority to award "back pay" to reinstated employees is not an authority to compel payment of wages to applicants for employment whom the employer was never bound to hire.

Authority for so unprecedented an exercise of power is not lightly to be inferred. In view of the use of the phrase "including reinstatement of employees," as a definition and enlargement, as we think it is, of the authority of the Board to take affirmative action, we cannot infer from it a Congressional purpose to authorize the Board to order compulsory employment and wage payments not embraced in its terms.

CONTINENTAL OIL CO. *v.* NATIONAL LABOR RELATIONS BOARD.

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

No. 413. Argued March 11, 1941.—Decided April 28, 1941.

Decided upon the authority of No. 387, *Phelps Dodge Corp.* v. *National Labor Relations Board, ante*, p. 177. P. 214.
113 F. 2d 473, modified and remanded.

CERTIORARI, 311 U. S. 637, to review in part a judgment sustaining in part an order of the National Labor Relations Board, 12 N. L. R. B. 789.

Mr. John P. Akolt, with whom *Messrs. James J. Cosgrove, Elmer L. Brock, E. R. Campbell,* and *Milton Smith* were on the brief, for petitioner.

The Board has no power to order reinstatement unless the status of "employee" exists at the time of the entry of the Board's order, and unless the employee has not, in the meantime, obtained any other regular and substantially equivalent employment. *Mooresville Cotton Mills* v. *Labor Board,* 94 F. 2d 51, 66; *Standard Lime & Stone Co.* v. *Labor Board,* 97 F. 2d 531, 535; *Labor Board* v. *Carlisle Lumber Co.,* 99 F. 2d 533, 537, 538; *Labor Board* v. *Hearst,* 102 F. 2d 658, 664; *Labor Board* v. *National Motor Bearing Co.,* 105 F. 2d 652, 662; *Labor Board* v. *Botany Worsted Mills,* 106 F. 2d 263, 269; *Phelps Dodge Corp.* v. *Labor Board,* 113 F. 2d 202.

The Board made no finding that the employee had not obtained substantially equivalent employment. One who becomes a proprietor of a business does not retain his status as an "employee."

The power of the Board to require affirmative action is remedial, not punitive. *Consolidated Edison Co.* v. *Labor Board,* 305 U. S. 197; *Labor Board* v. *Fansteel Metallurgical Corp.,* 306 U. S. 240; *Republic Steel Corp.* v. *Labor Board,* 311 U. S. 7.

In connection with the reinstatement, the Board ordered that Jones should be reimbursed for his earnings loss up until the time when offer of reinstatement was made. It can not be proper to require an employer to subsidize a business venture and protect a former employee against the losses in the business venture in which he has voluntarily engaged.

The evidence shows a transfer of Moore, but no discharge. There is no finding of any discharge, but there is a finding of a discriminatory transfer. Such a finding, not in conformity with any charge in the complaint, is not sufficient to justify any reinstatement relief.

Moore's employment at the penitentiary at a wage of $70 per month, plus room and board, was regular employment substantially equivalent to his former employment. He therefore could not be considered an employee within the reinstatement provisions of the Act. *Labor Board* v. *Carlisle Lumber Co.*, 99 F. 2d 533, 537.

Mr. Thomas E. Harris, with whom *Solicitor General Biddle* and *Messrs. Robert B. Watts, Laurence A. Knapp, Mortimer B. Wolf,* and *Morris P. Glushien* were on the brief, for respondent.

Mr. Justice Frankfurter delivered the opinion of the Court.

In its petition the Continental Oil Company challenged various provisions of an order of the Labor Board which the Circuit Court of Appeals had enforced, but we brought here only so much of the case as pertained to the reinstatement of two men, Jones and Moore, 311 U. S. 637. Continental's contention is that reinstatement was precluded because neither man remained an "employee" within § 2 (3) of the National Labor Relations Act. The decisive question, however, as we have ruled in the *Phelps Dodge* case, *ante,* p. 177, is whether reinstatement will "effectuate the policies" of the Act. We therefore remand the case for an exercise by the Board of its judgment on that issue, in light of our opinion in the *Phelps Dodge* case. *Remanded.*

Mr. Justice Roberts took no part in the consideration or disposition of this case.

The Chief Justice and Mr. Justice Stone reiterate the views expressed by them in the *Phelps Dodge* case.

Mr. Justice Black, Mr. Justice Douglas, and Mr. Justice Murphy are of opinion that the Board's order should be affirmed for the reasons set forth by them in the *Phelps Dodge* case.

SAMPSELL, TRUSTEE IN BANKRUPTCY, *v.* IMPERIAL PAPER & COLOR CORP.

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

No. 601. Argued March 31, 1941.—Decided April 28, 1941.

1. A court of bankruptcy has jurisdiction, by summary proceedings, to cover into the estate of the bankrupt, property of a corporation, the only stockholders and officers of which were the bankrupt, his wife and son, and to which the bankrupt had made a transfer, not in good faith, of his property; and an order to that effect, entered after notice to the corporation and its stockholders, is binding on the corporation, and may not be collaterally attacked in proceedings wherein a creditor of the corporation sought priority against its assets. P. 218.
2. In such case, an unsecured creditor of the corporation, who had some knowledge of the fraudulent character of the transfer by the bankrupt to the corporation, *held* entitled only to *pari passu* participation with individual creditors of the bankrupt. P. 219.

114 F. 2d 49, reversed.

CERTIORARI, 312 U. S. 669, to review a judgment reversing an order denying priority to a claim in bankruptcy.

Mr. Thomas S. Tobin for petitioner.

Mr. Hiram E. Casey for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

One Downey was adjudged a voluntary bankrupt in November, 1938. Prior to June, 1936, Downey had been engaged in business, unincorporated, and had incurred a debt to the predecessor of Standard Coated Products Corporation of approximately $104,000. In that month he formed a corporation, Downey Wallpaper & Paint Co., under the laws of California. Downey, his wife and his son were the sole stockholders, directors and officers.

Downey's stock of goods was transferred to the corporation [1] on credit, which was extended from time to time. He leased space in the store building occupied by him to the corporation, which continued business at the old stand. Except for qualifying shares,[2] neither he nor the other members of his family paid cash for the stock which was issued to them [3] but received most of those shares a few months prior to bankruptcy in satisfaction of the balance of the obligation owed to him by the corporation.[4] Respondent extended credit to the corporation. At the time of Downey's bankruptcy respondent's claim amounted to about $5,400 and was unsecured.

On petition of the trustee in bankruptcy, the referee issued an order to show cause directed to the corporation, Downey, his wife and son why the assets of the corporation should not be marshalled for the benefit of the creditors of the bankrupt estate and administered by the trustee.[5] Downey answered. There was a hearing. The referee found, *inter alia,* that the transfer of the property to the corporation was not in good faith but was made for the purpose of placing the property beyond the reach of Downey's creditors and of retaining for

[1] A notice of the intended sale was recorded under the California Bulk Sales Law. Civil Code, § 3440.

[2] The shares had a par value of $100. Downey apparently paid $500 in cash for the qualifying shares.

[3] There were 99 shares issued. On July 1, 1938, Downey caused 49 shares to be transferred to his wife and 25 shares to his son. Those transfers, according to the referee, were "entirely without consideration" to Downey.

[4] There is some dispute as to the amount of this obligation. Petitioner insists, and the findings of the referee lend some support to his view, that the stock of goods was transferred to the corporation at the inventory price—about $14,000. The court below said that it was transferred at $7,500. The corporation apparently had paid $5,000 on that obligation.

[5] Shortly after the adjudication the receiver, pursuant to a stipulation, took possession of the property of the corporation.

Downey and his family all of the beneficial interest therein; that the stock was issued in satisfaction of Downey's claim against the corporation, when Downey was hopelessly insolvent, to prevent Downey's creditors from reaching the assets so transferred; that the corporation was "nothing but a sham and a cloak" devised by Downey "for the purpose of preserving and conserving his assets" for the benefit of himself and his family; and that the corporation was formed for the purpose of hindering, delaying and defrauding his creditors. The referee accordingly ordered that the property of the corporation was property of the bankrupt estate and that it be adminstered for the benefit of the creditors of the estate. That order was entered on April 7, 1939. No appeal from that order was taken.

Respondent, who was not a party to that proceeding, later filed its claim stating that as a creditor of the corporation it had a prior right to distribution of the funds in the hands of the trustee received from the liquidation of the assets of the corporation. It secured an order to show cause why the trustee should not so apply such funds. The trustee objected to the allowance of the claim as a prior claim and contended that it should be allowed only as a general unsecured claim. There was a hearing. The referee found that respondent, with knowledge of Downey's indebtedness, was instrumental in getting him to form the corporation and had full knowledge of its fraudulent character. He disallowed respondent's claim as a prior claim but allowed it as a general unsecured claim. That order was confirmed. On appeal, the Circuit Court of Appeals reversed, holding that respondent's claim should be accorded priority against the funds realized from the liquidation of the corporation's property. 114 F. 2d 49. We granted the petition for certiorari because of the importance in administration of the Bankruptcy Act of the questions raised.

We think the Circuit Court of Appeals was in error.

1. The order entered in the summary proceedings against Downey, his wife, his son and his family corporation was a final order binding as between the parties. There can be no question but that the jurisdiction of the bankruptcy court was properly exercised by summary proceedings. The circumstances are many and varied where an affiliated corporation does not have, as against the trustee of the dominant stockholder, the status of a substantial adverse claimant within the rule of *Taubel-Scott-Kitzmiller Co.* v. *Fox,* 264 U. S. 426. The legal existence of the affiliated corporation does not *per se* give it standing to insist on a plenary suit. *In re Muncie Pulp Co.,* 139 F. 546; *W. A. Liller Bldg. Co.* v. *Reynolds,* 247 F. 90; *In re Rieger, Kapner & Altmark,* 157 F. 609; *In re Eilers Music House,* 270 F. 915; *Central Republic Bank & Trust Co.* v. *Caldwell,* 58 F. 2d 721; *Commerce Trust Co.* v. *Woodbury,* 77 F. 2d 478; *Fish* v. *East,* 114 F. 2d 177. Mere legal paraphernalia will not suffice to transform into a substantial adverse claimant a corporation whose affairs are so closely assimilated to the affairs of the dominant stockholder that in substance it is little more than his corporate pocket. Whatever the full reach of that rule may be, it is clear that a family corporation's adverse claim is merely colorable where, as in this case, the corporation is formed in order to continue the bankrupt's business, where the bankrupt remains in control, and where the effect of the transfer is to hinder, delay or defraud his creditors. *In re Schoenberg,* 70 F. 2d 321; *In re Berkowitz,* 173 F. 1013. And see Glenn, Liquidation, §§ 30–32. Cf. *Shapiro* v. *Wilgus,* 287 U. S. 348. Hence, Downey's corporation was in no position to assert against Downey's trustee that it was so separate and insulated from Downey's other business affairs as to stand in an independent and adverse position. Furthermore, there was no appeal

from the order entered in the summary proceedings. It therefore could not be collaterally attacked in the proceedings by which respondent sought priority for its claim.

2. That conclusion, of course, does not mean that the order consolidating the estates did, or in the absence of the respondent as a party could, determine what priority, if any, it had to the corporate assets. *In re Foley,* 4 F. 2d 154. All questions of fraudulent conveyance aside, creditors of the corporation normally would be entitled to satisfy their claims out of corporate assets prior to any participation by the creditors of the stockholder. *In re Smith,* 36 F. 2d 697. Such priority, however, would be denied if the corporation's creditors were parties to a fraudulent transfer of the stockholder's assets to the corporation. Furthermore, where the transfer was fraudulent or where the relationship between the stockholder and the corporation was such as to justify the use of summary proceedings to absorb the corporate assets into the bankruptcy estate of the stockholder, the corporation's unsecured creditors would have the burden of showing that their equity was paramount in order to obtain priority as respects the corporate assets. Cf. *New York Trust Co.* v. *Island Oil & Transport Corp.,* 56 F. 2d 580. The power of the bankruptcy court to subordinate claims or to adjudicate equities arising out of the relationship between the several creditors is complete. *Taylor* v. *Standard Gas & Electric Co.,* 306 U. S. 307; *Pepper* v. *Litton,* 308 U. S. 295; *Bird & Sons Sales Corp.* v. *Tobin,* 78 F. 2d 371. But the theme of the Bankruptcy Act is equality of distribution. § 65–a; *Moore* v. *Bay,* 284 U. S. 4. To bring himself outside of that rule an unsecured creditor carries a burden of showing by clear and convincing evidence that its application to his case so as to deny him priority would work an injustice. Such burden has been sustained by creditors of the affiliated corporation and their paramount equity

has been established where there was no fraud in the transfer, where the transferor remained solvent, and where the creditors had extended credit to the transferee. *Commerce Trust Co.* v. *Woodbury, supra.*

But in this case there was a fraudulent transfer. The saving clause in 13 Eliz. which protected innocent purchasers for value [6] was not broad enough to protect mere unsecured creditors of the fraudulent transferee. *Clark's Administrator* v. *Rucker,* 7 B. Mon. (Ky.) 583; *Mullanphy Savings Bank* v. *Lyle,* 75 Tenn. 431; *Powell* v. *Ivey,* 88 N. C. 256; *Lockren* v. *Rustan,* 9 N. D. 43, 45; 81 N. W. 60. To be sure, creditors of a fraudulent transferee have at times been accorded priority over the creditors of the transferor where they have "taken the property into their own custody." 1 Glenn, Fraudulent Conveyances and Preferences (1940) § 238. Cf. *O'Gasapian* v. *Danielson,* 284 Mass. 27; 187 N. E. 107. The same result obtains in case of *bona fide* lien creditors of the fraudulent transferee. *W. T. Rawleigh Co.* v. *Groseclose,* 174 Okl. 193; 49 P. 2d 1085; *Plauche* v. *Streater Investment Corp.,* 189 La. 785; 180 So. 637. Cf. *Haskell* v. *Phelps,* 191 Wash. 567; 71 P. 2d 550. And estoppel or other equitable considerations might well result in the award of priority even to unsecured creditors of the transferee, the conveyance being good between the parties.[7] Cf. *Kennedy* v. *Georgia State*

[6] See *Clements* v. *Moore,* 6 Wall. 299; *Harrell* v. *Beall,* 17 Wall. 590. That the same result follows in absence of the saving clause, see *Astor* v. *Wells,* 4 Wheat. 466, interpreting L. Ohio, 1809–10, ch. LVII, § 2. And see 1 Glenn, Fraudulent Conveyances and Preferences (1940) § 237.

[7] All question of the rights of creditors of the grantor aside, creditors of the transferee have at times been allowed to reach the property after its reconveyance to the grantor. *Chapin* v. *Pease,* 10 Conn. 69; *Budd* v. *Atkinson,* 30 N. J. Eq. 530; *Hegstad* v. *Wysiecki,* 178 App. Div. 733; 165 N. Y. S. 898. But see *Farmers' Bank* v. *Gould,* 48 W. Va. 99; 35 S. E. 878; *Westervelt* v. *Hagge,* 61 Neb. 647; 85 N. W. 852; *Bicocchi* v. *Casey-Swasey Co.,* 91 Tex. 259; 42 S. W. 963.

Bank, 8 How. 586, 613. Yet none of these considerations is applicable here. The facts do not justify the invocation of estoppel against Downey's individual creditors. Respondent is neither a lien creditor nor an innocent grantee for value. At best it is in no more favorable position than a judgment creditor who has not levied execution. Furthermore, respondent had at least some knowledge as to the fraudulent character of Downey's corporation. Cf. *Goodwin* v. *Hammond,* 13 Cal. 168; *Bull* v. *Ford,* 66 Cal. 176; 4 P. 1175. And title to the property fraudulently conveyed has vested in the bankruptcy trustee of the grantor. We have not been referred to any state law or any equitable considerations which under these circumstances would accord respondent the priority which it seeks. It therefore is entitled only to *pari passu* participation with Downey's individual creditors. *Buffum* v. *Barceloux Co.,* 289 U. S. 227.

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

Reversed.

GELFERT, EXECUTOR, *v.* NATIONAL CITY BANK OF NEW YORK.

CERTIORARI TO THE SUPREME COURT OF NEW YORK.

No. 740. Argued April 3, 4, 1941.—Decided April 28, 1941.

1. A state statute (N. Y. Laws, 1938, c. 510, amending § 1083 Civil Prac. Act), directing that the amount of a deficiency judgment after foreclosure sale of mortgaged property shall be ascertained by deducting from the amount of the debt the fair and reasonable market value of the property (to be determined by the court upon affidavits or otherwise) or the sale price of the property, whichever is higher, is not invalid under the Contract Clause of the Federal Constitution as applied to the case of a mortgagee who bought in the property at the foreclosure sale for much less than the debt, and who, under the law as it existed when the mortgage was made, would have been entitled to a deficiency judgment for

the difference between the amount of the debt and the amount of the sale price. P. 231.

The fact that the later statute was not based on any declared public emergency and that it confined the determination of the right to a deficiency judgment to the foreclosure proceeding, leaving the mortgagee no alternative remedy substantially co-extensive with that afforded by the older statute, did not affect the validity of the later statute as applied to the mortgage.

2. It is quite uniformly the rule in this country, as in England, that while equity will not set aside a foreclosure sale for mere inadequacy of price, it will do so if the inadequacy is so great as to shock the conscience or if there are additional circumstances against its fairness, such as chilled bidding. P. 232.
3. There is no constitutional reason why, in lieu of the more restricted control by a court of equity, the legislature can not substitute a uniform rule designed to prevent mortgagees, bidding at foreclosure sales, from obtaining more than their just due. P. 233.

257 App. Div. 1076; 14 N. Y. S. 2d 995, reversed.

CERTIORARI, 312 U. S. 674, to review a judgment entered on remittitur from the Court of Appeals of New York, 284 N. Y. 13; 29 N. E. 2d 449, which, reversing a judgment of the Supreme Court, Appellate Division, affirmed and reinstated (1) an order at Special Term confirming a referee's report of a mortgage foreclosure sale and (2) a deficiency judgment entered pursuant to that order.

Mr. George Link, Jr. for petitioner.

Mr. Barney B. Fensterstock for respondent.

As applied to a mortgage executed prior to its enactment, the new § 1083 contravenes the prohibition of Art. I, § 10 of the Federal Constitution against the passage by a State of legislation impairing the obligation of contracts.

It is neither emergency nor temporary legislation. Cf. *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398. It is a permanent statute applicable to foreclosures of all mortgages, regardless of date, amount or parties, and con-

tains no provisions apposite to the relief of any pressing public needs. *W. B. Worthen Co.* v. *Thomas,* 292 U. S. 426. The Court of Appeals found that it is not addressed to the general welfare of the State, but is directed solely to the private contractual rights of parties to an indebtedness secured by a mortgage on real property. Cf. *Veix* v. *Sixth Ward Assn.,* 310 U. S. 32.

The law which provides a remedy for the enforcement of a contract, as that law exists at the time of the making of the contract, enters into and becomes part of the contract as if fully set forth therein, *Farmers Bank* v. *Federal Reserve Bank,* 262 U. S. 649; *Bronson* v. *Kinzie,* 1 How. 311, and subsequent legislation may not constitutionally change such remedy in any material respect, at least unless a substantially co-extensive remedy remains or is furnished thereby. *Edwards* v. *Kearzey,* 96 U. S. 595; *McCracken* v. *Hayward,* 2 How. 608, 612; *Oshkosh Water Works Co.* v. *Oshkosh,* 187 U. S. 437, 439; *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 434. See *Clark* v. *Reynolds,* 8 Wall. 318, 322.

No remedy substantially equivalent to that afforded by the old § 1083 remains to the mortgagee. The right to recover the mortgage debt at law, apart from the mortgage security, is circumscribed by a statutory prohibition against the levy of execution on the mortgagor's equity of redemption. New York Civil Practice Act, § 710. The maintenance of a second action, after foreclosure, to recover a deficiency resulting from the foreclosure sale is prohibited by statute except by leave of the court, New York Civil Practice Act, § 1078, but settled authority is against the granting of such leave in respect of a party who could have been made a defendant in the foreclosure action unless special circumstances are shown manifestly requiring that relief. *Equitable Life Assurance Society* v. *Stevens,* 63 N. Y. 341; *Scofield* v. *Doscher,* 72 N. Y. 491; *Vanderbilt* v. *Schreyer,* 91 N. Y.

392; *Morrison* v. *Slater,* 128 App. Div. 467; *Darmstadt* v. *Manson,* 144 App. Div. 249; *Stehl* v. *Uris,* 210 App. Div. 444. Whether the new § 1083 has superseded § 1078 so as to forbid the granting of such leave in any case was left open by the Court of Appeals in its opinion, but some indication was given that such a holding was not improbable. See *Honeyman* v. *Hanan,* 275 N. Y. 382, 392.

State statutes similar in purpose and effect have been held unconstitutional as applied to contracts in existence at the time of their enactment. *Bronson* v. *Kinzie,* 1 How. 311; *McCracken* v. *Hayward,* 2 How. 608; *Gantly's Lessee* v. *Ewing,* 3 How. 707. Cf., *Jeffries* v. *Federal Land Bank,* 302 U. S. 708.

In recent years, numerous state courts of last resort have voided similar statutes as applied retroactively. *Bontag* v. *McCurdy,* 59 P. 2d 326 (Ariz.); *Adams* v. *Spillyards,* 61 S. W. 2d 686 (Ark.); *Hales* v. *Snowden,* 65 P. 2d 847 (Cal.); *Atlantic Loan Co.* v. *Peterson,* 181 Ga. 266; *Vanderbilt* v. *Brunton Piano Co.,* 111 N. J. L. 596; *Federal Land Bank* v. *Garrison,* 193 S. E. 308; cert. denied *sub nom. Jeffries* v. *Federal Land Bank, supra; Langever* v. *Miller,* 76 S. W. 2d 1025 (Tex.) Dist'g *Honeyman* v. *Jacobs,* 306 U. S. 539.

See *W. B. Worthen Co.* v. *Thomas,* 292 U. S. 426; *Worthen Co.* v. *Kavanaugh,* 295 U. S. 56.

So far as the opinion in the *Honeyman* case may have indicated that the act there considered was sustainable, apart from the existent emergency, on the ground that it merely codified a power which courts of equity in New York have always possessed to control the measure of deficiency judgments in foreclosure actions, the Court of Appeals, in an unbroken line of decisions from earliest times to the case at bar, has held that no such equitable jurisdiction in foreclosure suits ever existed or now exists, apart from statute, in New York. *Morris* v. *Morange,*

38 N. Y. 172; *Wager* v. *Link,* 134 N. Y. 122; *Feiber Realty Corp.* v. *Abel,* 265 N. Y. 94; *Frank* v. *Davis,* 135 N. Y. 275, 277–8; *Emigrant Industrial Savings Bank* v. *Van Bokkelen,* 269 N. Y. 110, 116; *Guaranteed Title & Mortgage Co.* v. *Scheffres,* 275 N. Y. 30.

Equity courts have always had and still have power to refuse confirmation of foreclosure sales upon equitable grounds,—fraud, collusion, inadequacy of price so gross as to shock the conscience of the court, etc. But the only relief which the court could grant the mortgagor would be to order a resale. *Emigrant Industrial Savings Bank* v. *Van Bokkelen,* 269 N. Y. 110, 115.

In respect of matters of local law, the pronouncements of the Court of Appeals are controlling and conclusive upon this Court. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64; *Ruhlin* v. *New York Life Ins. Co.,* 304 U. S. 202.

Distinguishing *Richmond Mortgage & Loan Corp.* v. *Wachovia Bank & Trust Co.,* 300 U. S. 124.

The decision at bar is sustainable upon a further ground. At the time the mortgage herein was made and at the time the moneys secured thereby were advanced, mortgages executed on and after July 1, 1932 were, by express statutory exception, excluded from the coverage of the moratory deficiency judgment act. Laws of 1933, Chap. 794, § 4. The stimulation of business by the encouragement of new loans was an integral part of the legislative policy in dealing with the then existing emergency. In effect, therefore, there was direct legislative assurance to lenders that loans secured by mortgages made after July 1, 1932 would be enforceable in the manner provided by the then § 1083. While this assurance may not have the full contractual force of the government bonds involved in the "Gold Clause" cases, there is sufficient analogy in the legislative attempt, by the new § 1083, to revoke its pledge retroactively, to give appreciable aptness to the language of this Court in one

of those cases. *Perry* v. *United States,* 294 U. S. 330, 351. See *Home Owners Loan Corp.* v. *Robinson,* 285 N. W. 768.

Upon the same analysis and for the same reasons the new § 1083, as applied to the mortgage at bar, is violative of § 6 of Article I of the Constitution of the State of New York and is also invalid thereunder. *Sliosberg* v. *New York Life Ins. Co.,* 217 App. Div. 67, 72; aff'd 244 N. Y. 482; *People* v. *Otis,* 90 N. Y. 48.

The judgment is sustainable apart from the constitutional question. The proceedings in the Supreme Court, Kings County, were, as a matter of local practice, a compliance with the requirements of new § 1083.

The loans secured by the guaranty of the appellant's testator, which was in turn secured by the mortgage at bar, were ordinary commercial loans to a business corporation. They were not advances made on the security of real estate, and neither by the agreement of the parties nor by any reasonable construction of their transaction was real estate to be the primary source of repayment. It would be neither "just" nor "equitable" to compel the Bank to credit upon the indebtedness thus incurred an amount in excess of the actual proceeds of the foreclosure sale of the property which, at most, was secondary security. In fact, any such requirement would be contrary to the public interest in the stability and liquidity of banks. *Rothschild* v. *Manufacturers Trust Co.,* 279 N. Y. 355, 359–361. The Bank could not have agreed at the inception of the transaction to accept land in repayment, for that would have been, in effect, an agreement to purchase real property, which is prohibited by the National Banking Act, 44 Stat. 1277, c. 191, § 3; 12 U. S. C. § 29. The public policy underlying this statute is the desirability of keeping the capital of banks liquid and of preventing the accumulation of real estate in their hands, *National Bank* v. *Matthew,* 98 U. S. 621,

626, and it would be a manifest frustration of that policy to permit a borrower to convert his obligation to repay his loan in cash into a right to repay it with real estate merely because the bank had taken a mortgage as additional security.

Nor is the instant decision unjust or inequitable to the appellant. The debt was contracted in 1937 and was to be repaid within a short time. The same general economic conditions prevailed throughout this period.

The judgment is sustainable on the ground that the price realized at the foreclosure sale was the fair and reasonable market value of the premises at the time of such sale.

Mr. Justice Douglas delivered the opinion of the Court.

This action was brought by respondent to foreclose a mortgage made in December, 1932, by Carpenter. At that time § 1083 of the New York Civil Practice Act provided that the amount of the deficiency judgment was to be measured by the residue of the debt remaining unsatisfied after a sale of the mortgaged property and the application of the proceeds pursuant to the directions contained in the judgment. In November, 1938, a judgment of foreclosure and sale was entered for $18,401.25, and in December, 1938, the foreclosure sale was held at which the property was purchased by respondent's nominee for $4,000. The referee, appointed by the court to sell, reported a deficiency which after the inclusion of taxes, fees and expenses was computed at $16,162.12. Respondent moved to confirm the referee's report of sale and asked that a deficiency judgment be entered for that amount. Petitioner took exceptions to the report and made a cross-motion to have the court fix the value of the property for the purpose of determining the amount of the deficiency judgment on the ground that the sale

price was "wholly inequitable and unconscionable." A new § 1083[1] (L. 1938, ch. 510), effective April 7, 1938, provides in substance that the court in determining the amount of a deficiency judgment should, on appropriate motion, "determine, upon affidavit or otherwise as it shall direct, the fair and reasonable market value of the mortgaged premises" and should deduct from the amount of the debt the "market value as determined by the court or the sale price of the property whichever shall be the higher." The right to recover any deficiency is made de-

[1] That section provides:

"Judgment for deficiency; limitation. If a person who is liable to the plaintiff for the payment of the debt secured by the mortgage is made a defendant in the action, and has appeared or has been personally served with the summons, the final judgment may award payment by him of the whole residue, or so much thereof as the court may determine to be just and equitable, of the debt remaining unsatisfied, after a sale of the mortgaged property and the application of the proceeds, pursuant to the directions contained in such judgment, the amount thereof to be determined by the court as herein provided. Simultaneously with the making of a motion for an order confirming the sale provided such motion is made within ninety days after the date of the consummation of the sale by the delivery of the proper deed of conveyance to the purchaser in all cases where the sale is held after the date this section as hereby amended takes effect, and in all cases where the sale was held prior to the date this section as hereby amended takes effect and said sale has not heretofore been confirmed, then within ninety days from the date this section as hereby amended takes effect or within ninety days after the date of the consummation of the sale by delivery of the proper deed of conveyance to the purchaser, regardless of whether the sale was held prior or subsequent to or on the date this section as hereby amended takes effect, the party to whom such residue shall be owing may make a motion in the action for leave to enter a deficiency judgment upon notice to the party against whom such judgment is sought or the attorney who shall have appeared for such party in such action. Such notice shall be served personally or in such other manner as the court may direct. Upon such motion the court, whether or not the respondent appears,

pendent on the making of such a motion. The court denied petitioner's cross-motion [2] and directed the entry of a deficiency judgment for $16,162.12. The judgment of the Appellate Division denying respondent a deficiency judgment because it had not made a motion for one under the new § 1083 (257 App. Div. 465, 13 N. Y. S. 2d 600), was reversed by the Court of Appeals, which held, one judge dissenting, that the new § 1083, as applied to mortgage contracts previously made, violated the contract clause of the Federal Constitution. 284 N. Y. 13, 29 N. E. 2d 449. We granted the petition for certiorari because of the important constitutional question which was raised.

As noted by the Court of Appeals, the measure of a deficiency under the new § 1083 is in substance the same as that prescribed by the New York moratory deficiency

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shall determine, upon affidavit or otherwise as it shall direct, the fair and reasonable market value of the mortgaged premises as of the date such premises were bid in at auction or such nearest earlier date as there shall have been any market value thereof and shall make an order directing the entry of a deficiency judgment. Such deficiency judgment shall be for an amount equal to the sum of the amount owing by the party liable as determined by the judgment with interest, plus the amount owing on all prior liens and encumbrances with interest, plus costs and disbursements of the action including the referee's fee and disbursements, less the market value as determined by the court or the sale price of the property whichever shall be the higher. If no motion for a deficiency judgment shall be made as herein prescribed the proceeds of the sale regardless of amount shall be deemed to be in full satisfaction of the mortgage debt and no right to recover any deficiency in any action or proceeding shall exist. . . ."

[2] An affidavit of a real estate broker submitted by petitioner in support of his cross-motion stated that in his opinion the fair market value of the property was $11,000. An affidavit of an appraiser submitted by respondent in opposition stated that in his view the fair market value of the property was $6,500. The property was assessed by New York City for tax purposes at $15,000.

judgment act—§ 1083–a of the Civil Practice Act. The latter section was sustained by this Court under the contract clause of the Federal Constitution in *Honeyman* v. *Jacobs,* 306 U. S. 539. But the Court of Appeals said that the new § 1083, unlike the moratory deficiency judgment act, is not addressed to a declared public emergency, is unrestricted in its application,[3] "concerns merely the private contract relationship of the parties to a real property mortgage," is not "designed for the relief of urgent public needs," is not "conditioned upon any equitable factor," leaves "no room for the play of any equitable consideration," benefits "every mortgagor irrespective of the character or amount of his investment," and burdens "every mortgagee no matter what his necessities." The Court pointed out that, under previously existing statutes of New York, the liability for a deficiency was to be finally determined by a judgment of foreclosure and sale, that the "subsequent docketing of a deficiency judgment was a merely clerical act," and that the deficiency was to be ascertained by a sale and "not by the estimates of witnesses or other less satisfactory evidence." It held that that system of foreclosure "entered into the engagement of the present parties and created and defined the legal and equitable obligations of their contract." It also pointed out that, unlike the situation in *Richmond Mortgage & Loan Corp.* v. *Wachovia Bank & Trust Co.,* 300 U. S. 124, there remained under the laws of New York no remedy available to the mortgagee which was "substantially coextensive" with that afforded by the old § 1083, since, though an action at law for the debt might lie, the judgment debtor's equity of redemption could not be sold under an execution upon that judgment, and since the right to bring a second action to recover a defi-

[3] The moratory deficiency judgment act did not apply to mortgages or connected agreements dated on or after July 1, 1932. See 284 N. Y. 13, 16–17; 29 N. E. 2d 449.

ciency resulting on a foreclosure sale, if it existed at all under the new legislation, was drastically restricted. Accordingly, it held that in light of such cases as *Barnitz* v. *Beverly,* 163 U. S. 118, the new § 1083 could not be applied to mortgage contracts previously made, without violation of the contract clause of the Federal Constitution.

We take a different view.[4]

The formula which a legislature may adopt for determining the amount of a deficiency judgment is not fixed and invariable. That which exists at the date of the execution of the mortgage does not become so embedded in the contract between the parties that it cannot be constitutionally altered. As this Court said in *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 435, "Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order." And see *Voeller* v. *Neilston Warehouse Co.,* 311 U. S. 531. It is that reserved legislative power with which we are here concerned.

The control of judicial sales of realty by courts of equity and by legislatures in order to prevent sacrificial prices has a long history. Weiner, Conflicting Functions of the Upset Price, 27 Col. L. Rev. 132, 133, *et seq.* In chancery sales in England during the eighteenth century, there developed the practice of opening the bidding, prior to confirmation, on an offer to advance the price 10 per cent. *Graffam* v. *Burgess,* 117 U. S. 180, 191. That practice, much criticized by Lord Eldon, was gradually supplanted by reserved bidding—in the first instance by equity (*Jervoise* v. *Clarke,* 1 Jac. & W. 388) and subsequently by stat-

[4] We are concerned here solely with the application of this statute to a situation where the mortgagee purchases the property at foreclosure sale. We intimate no opinion on its constitutionality as applied to the case where the mortgagee is not the purchaser.

ute. Sale of Land by Auction Act, 1867, 30 & 31 Vict. c. 48, § 7; *Graffam* v. *Burgess, supra,* p. 191; 1 Daniell, Chancery Practice (7th ed. 1901) pp. 879–880. Though the early English rule of advance bidding found little foothold in this country, reserved bidding has its counterpart here in the occasional utilization by equity courts of the upset price in mortgage foreclosures. *Blair* v. *St. Louis, H. & K. R. Co.,* 25 F. 232; *Pewabic Mining Co.* v. *Mason,* 145 U. S. 349; 2 Bonbright, Valuation of Property, pp. 849, *et seq.;* Stetson *et al.,* Some Legal Phases of Corporate Financing, Reorganization and Regulation (1927), p. 202. And it is quite uniformly the rule in this country, as in England, that while equity will not set aside a sale for mere inadequacy of price,[5] it will do so if the inadequacy is so great as to shock the conscience or if there are additional circumstances against its fairness, such as chilled bidding. *Cocks* v. *Izard,* 7 Wall. 559; *Graffam* v. *Burgess, supra; Ballentyne* v. *Smith,* 205 U. S. 285. Beyond that, a number of states by statute have endeavored to prevent property going for a song at judicial sales. Provisions that the property shall not be sold at less than a designated percentage of its appraised value, and requirements that a stated percentage of the appraised value above the sales price must be credited on the debt, are illustrative. 3 Jones, Mortgages (8th ed. 1928) §§ 1695 *et seq.,* 2 Bonbright, Valuation of Property, pp. 839 *et seq.*

We mention these matters here because they indicate that for about two centuries there has been a rather continuous effort, either through general rule or by appeal to the chancellor in specific cases, to prevent the machinery of judicial sales from becoming an instrument of oppression. And, so far as mortgage foreclosures are con-

[5] But see *Suring State Bank* v. *Giese,* 210 Wis. 489; 246 N. W. 556; *Wilson* v. *Fouke,* 188 Ark. 811; 67 S. W. 2d 1030; *Teachers' Retirement Fund Assn.* v. *Pirie,* 150 Ore. 435; 46 P. 2d 105.

cerned, numerous devices have been employed to safeguard mortgagors from sales which will, or may, result in mortgagees collecting more than their due. The variety of formulae which has been employed to that end is ample evidence not only of the intrusion which advanced notions of fairness have made on the earlier concern for stability of judicial sales but also of the flexibility of the standards of fairness themselves. Underlying that change has been the realization that the price which property commands at a forced sale may be hardly even a rough measure of its value. The paralysis of real estate markets during periods of depression, the wide discrepancy between the money value of property to the mortgagee and the cash price which that property would receive at a forced sale, the fact that the price realized at such a sale may be a far cry from the price at which the property would be sold to a willing buyer by a willing seller, reflect the considerations which have motivated departures from the theory that competitive bidding in this field amply protects the debtor.

Mortgagees are constitutionally entitled to no more than payment in full.[6] *Honeyman* v. *Jacobs, supra.* They cannot be heard to complain on constitutional grounds if the legislature takes steps to see to it that they get no more than that. As we have seen, equity will intervene in individual cases where it is palpably apparent that gross unfairness is imminent. That is the law of New York. 284 N. Y. 13, 20; 29 N. E. 2d 449. And see *Fisher* v. *Hersey,* 78 N. Y. 387. But there is no constitutional reason why in lieu of the more restricted control by a court of equity the legislature cannot substitute a uniform comprehensive rule designed to reduce or to avoid, in the run of cases, the chance that the mort-

[6] As to the bankruptcy power see *Wright* v. *Union Central Life Ins. Co.,* 311 U. S. 273, and cases cited.

gagee will be paid more than once. Cf. *Suring State Bank* v. *Giese,* 210 Wis. 489; 246 N. W. 556. Certainly under this statute it cannot be said that more than that was attempted. The "fair and reasonable market value" of the property has an obvious and direct relevancy to a determination of the amount of the mortgagee's prospective loss. In a given case the application of a specified criterion of value may not result in a determination of actual loss with mathematical certitude. But "incidental individual inequality" is not fatal. *Phelps* v. *Board of Education,* 300 U. S. 319, 324. The fact that men will differ in opinion as to the adequacy of any particular yardstick of value emphasizes that the appropriateness of any one formula is peculiarly a matter for legislative determination. Certainly, so far as mortgagees are concerned, the use of the criterion of "fair and reasonable market value" in cases where they obtain the property for a lesser amount holds promise of tempering the extremes of both inflated and depressed market prices. And so far as mortgagors are concerned, it offers some assurance that they will not be saddled with more than the amount of their obligations. To hold that mortgagees are entitled under the contract clause to retain the advantages of a forced sale would be to dignify into a constitutionally protected property right their chance to get more than the amount of their contracts. *Honeyman* v. *Jacobs, supra.* The contract clause does not protect such a strategical, procedural advantage.

In conclusion, the statute in question, like the one involved in *Richmond Mortgage & Loan Corp.* v. *Wachovia Bank & Trust Co., supra,* p. 130, "cannot fairly be said to do more than restrict the mortgagee to that for which he contracted, namely, payment in full." Here, as in that case, the obligation of the mortgagee's contract is recognized; the statute does no more than limit

"that right so as to prevent his obtaining more than his due." *Id.*, p. 130. To be sure, the mortgagee retained in that case an alternative remedy, while in the instant one the Court of Appeals has said that under New York law there remained no alternative remedy "substantially coextensive" with that which had been removed. But it is clear from *Honeyman* v. *Hanan*, 302 U. S. 375, that a requirement that the right to a deficiency judgment should be determined in the foreclosure proceeding, or that a mortgagee is not entitled to a deficiency judgment unless he moves for one, raises no substantial federal question. As stated by this Court in that case (302 U. S. at p. 378), the Federal Constitution does not prevent the states from determining, on due notice and opportunity to be heard, "by what process legal rights may be asserted or legal obligations" enforced. The principles of those cases are applicable here. The fact that an emergency was not declared to exist when this statute was passed does not bring within the protective scope of the contract clause rights which were denied such protection in *Honeyman* v. *Jacobs*, *supra*. See *Home Building & Loan Assn.* v. *Blaisdell*, *supra*.

Respondent points out that earlier decisions of this Court have struck down under the contract clause, as respects contracts previously made, a state statute requiring judicial sales to bring two-thirds of the amount of the appraised value of the property. *Bronson* v. *Kinzie*, 1 How. 311; *McCracken* v. *Hayward*, 2 How. 608. And see *Gantly's Lessee* v. *Ewing*, 3 How. 707. Those cases, however, have been confined to the special circumstances there involved. *Home Building & Loan Assn.* v. *Blaisdell*, *supra*, pp. 431–434. We cannot permit the broad language which those early decisions employed to force legislatures to be blind to the lessons which another century has taught.

The judgment is reversed and the cause is remanded to the New York Supreme Court for proceedings not inconsistent with this opinion.

Reversed.

OLSEN, SECRETARY OF LABOR OF NEBRASKA, *v.* NEBRASKA EX REL. WESTERN REFERENCE & BOND ASSOCIATION, INC., ET AL.

CERTIORARI TO THE SUPREME COURT OF NEBRASKA.

No. 671. Argued April 8, 9, 1941.—Decided April 28, 1941.

1. A Nebraska statute limiting the amount of the fee which may be charged by private employment agencies, to ten per cent. of the first month's salary or wages of the person for whom employment was obtained, *held* consistent with due process of law. *Ribnik* v. *McBride,* 277 U. S. 350, overruled. P. 243.
2. The wisdom, need and appropriateness of this legislation are for the State to determine. P. 246.

138 Neb. 574; 293 N. W. 393, reversed.

CERTIORARI, 312 U. S. 673, to review a judgment for a peremptory writ of mandamus requiring the Secretary of Labor of the State of Nebraska to issue licenses for the operation of private employment agencies. The above-named association was the original relator. A number of other employment agencies, which sought and obtained the same relief by intervention, were also respondents in this court. Mr. Olsen was substituted for his predecessor in office, Mr. Kinney, *post,* p. 541.

Mr. Don Kelley, Assistant Attorney General of Nebraska, with whom *Mr. Walter R. Johnson,* Attorney General, was on the brief, for petitioner.

Mr. Walter Gordon Merritt for respondents.

The statute violates the due process clause of the Fourteenth Amendment. *Ribnik* v. *McBride,* 277 U. S. 350, 359.

The Act imposes a maximum limit on the fees to be charged, and forbids the exaction of any other "compensation or reward," regardless of the amount of service rendered, or the expense of placing the employee. Moreover, if the employee arbitrarily rejects the position offered, any fee paid beyond the registration fee must be returned. If the employee remains less than a week in the job, whether due to his own fault or the fault of his employer, the agency is required to repay all fees in excess of the registration fee, either to the employee or his employer, as the case may be.

The statute upon its face—and particularly as applied to executive, technical and professional employment—is far more arbitrary and unreasonable than the statute in the *Ribnik* case.

The *Ribnik* case has been recognized as established law in many subsequent cases in this Court and has never been disapproved or overruled. *Williams* v. *Standard Oil Co.*, 278 U. S. 235, 239; *Tagg Bros.* v. *United States*, 280 U. S. 420, 438–9; *Near* v. *Minnesota*, 283 U. S. 697, 707–8; *Nebbia* v. *New York*, 291 U. S. 502, 536–7; *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.*, 299 U. S. 183, 192; *United States* v. *Rock Royal Co-operative*, 307 U. S. 533, 570.

Freedom of contract is the general rule and restraint the exception. Legislative abridgment of this freedom can be justified only by exceptional circumstances. Cf., *Chas. Wolff Packing Co.* v. *Industrial Court*, 262 U. S. 522, 534; s. c., 267 U. S. 552, 566. See, also, *Liggett* v. *Baldridge*, 278 U. S. 105, 111; *Nebbia* v. *New York*, 291 U. S. 502, 523; *Old Dearborn Co.* v. *Seagram-Distillers Corp.*, 299 U. S. 183, 192.

Special circumstances creating exceptions must be shown in order to support such drastic regulation as price-fixing. In some cases, they may appear from the inherent nature of the subject matter regulated, while in

other cases the burden of proof is on him who challenges the validity of the act. See *Liggett Co.* v. *Baldridge,* 278 U. S. 105. Here, a presumption arises from the *Ribnik* case that legislative price-fixing, as applied to employment exchanges, is arbitrary and unreasonable; and the burden of overcoming that presumption rests upon the petitioner.

If the power to fix maximum wages is added to the power to fix minimum wages, there is little left of the personal liberty to make contracts, which is both a right of liberty and property. Can it be said that fixing maximum fees for securing positions for executive, technical and professional workers is any more subject to legislative control than are the salaries of such classes of workers? These occupations involve a class of people who have not been thought to be in need of special protection from exploitation.

It was said in *Near* v. *Minnesota,* 283 U. S. 697, 708, that "The power of the state stops short of interference with what are deemed to be certain indispensable requirements of the liberty assured, notably with respect to the fixing of prices and wages."

In *Tyson & Brother* v. *Banton,* 273 U. S. 418, and the *Ribnik* case this Court struck down attempts at legislative price-fixing for personal services. In *Wilson* v. *New,* 243 U. S. 332, the Court denied such power except to meet the temporary emergency of a threatened railroad strike.

In a different class are minimum wage laws. *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379; *United States* v. *Darby,* 312 U. S. 100.

In *O'Gorman & Young* v. *Hartford Fire Ins. Co.,* 282 U. S. 251, the Court laid stress upon the fact that the insurance business is so far affected with a public interest that the State may regulate the rates. *German Alliance Ins. Co.* v. *Lewis,* 233 U. S. 389. The Court was

dealing with an activity which traditionally was subjected to far-reaching regulations of various kinds, including rate-fixing. *Tagg Bros & Moorhead* v. *United States,* 280 U. S. 420; *Stafford* v. *Wallace,* 258 U. S. 495. The Court held in the *Tagg Bros.* case that the statute and the orders issued by the Secretary of Agriculture, fixing charges by market agencies, were valid, but emphasized the fact that these agencies had a monopoly and were accustomed to fix prices by agreement among themselves.

Thus far only has this Court gone in fixing maximum charges for personal services. Dist'g *Townsend* v. *Yeomans,* 301 U. S. 441, and *Munn* v. *Illinois,* 94 U. S. 113.

In the case of employment exchanges, and particularly those providing employment for executives, technicians and professional men, services rendered are not capable of standardization without arbitrariness, as has already been found by this Court, and as was found in effect by the Nebraska Supreme Court in this case.

Legislative limitation on maximum fees for employment agencies is certain to react unfavorably upon those members of the community for whom it is most difficult to obtain jobs.

The argument showing the impracticability and injustice of such regulation is entitled to special consideration as respects an industry which is subject to subsidized competition from free public employment exchanges in almost every section of the Nation; so that the evil of excessive charges, whatever may have been its extent in the past, no longer exists. No one wishes unnecessarily to destroy the liberty of people to serve and be served on terms agreed upon, or to reduce unnecessarily the circle of constitutional liberty.

Because of increasing competition of the public employment agencies, as well as the increasing number of

charitable, labor union and employer association employment agencies, any tendency of the past toward excessive fees by private employment agencies must have come to an end. Those private agencies which have not been put out of business by competition, publicly subsidized, can no longer hope to collect excessive fees. There is therefore no constitutional base for regulating their charges. See the dissenting opinion of Mr. Justice Stone in *Ribnik* v. *McBride,* 277 U. S. 350, 360; *Lawton* v. *Steele,* 152 U. S. 133, 137.

In *Wolff Co.* v. *Industrial Court,* 262 U. S. 522, 535–6, the Court deals, in detail, with the classification of industries which may be subject to price regulation, and points to the fact that this includes a group of occupations which may be subject to such changing circumstances as to result in their being transferred to the group which is affected with the public interest.

Accord: *Tyson & Bro.* v. *Banton,* 273 U. S. 418, 431; *Ribnik* v. *McBride,* 277 U. S. 350, 355; *Williams* v. *Standard Oil Co.,* 278 U. S. 235, 239; *New State Ice Co.* v. *Liebman,* 285 U. S. 262, 277; *Nebbia* v. *New York,* 291 U. S. 502, 536; *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.,* 299 U. S. 183, 192.

Other cases indicate that the limits of constitutional power in cases of this character may hinge on changing conditions in respect to the evil or emergency justifying such a drastic intrusion on liberty. *Wilson* v. *New,* 243 U. S. 332; *Block* v. *Hirsh,* 256 U. S. 135; *Marcus Brown Holding Co.* v. *Feldman,* 256 U. S. 170; *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393.

Mr. Justice Douglas delivered the opinion of the Court.

In reliance upon *Ribnik* v. *McBride,* 277 U. S. 350, the Supreme Court of Nebraska held, one judge dissenting,

that a statute of that state fixing the maximum compensation which a private employment agency might collect from an applicant for employment [1] was unconstitu-

[1] Neb. Comp. Stat. 1929, § 48–508:

"Private Employment Agencies, Registration Fee. A registration fee not to exceed two dollars may be charged by such licensed agency when such agency shall be at actual expense in advertising such individual applicant, or in looking up the reference of such applicant. In all such cases a complete record of such references shall be kept on file which record shall, during all business hours, be open for the inspection of the secretary of labor, the chief deputy secretary of labor, or any other inspector appointed by the secretary of labor to make such inspection, and upon demand shall be subject to the inspection and examination by the applicant. For such registration fee a receipt shall be given to said applicant for help or employment, giving name of such applicant, date of payment and character of position or help applied for. Such registration fee shall be returned to said applicants on demand, after thirty days and within sixty days from date of receipt, less the amount that has been actually expended by said licensed agency for said applicant, and an itemized account of such expenditures shall be presented to said applicant on request at the time of returning the unused portion of such registration fee, provided no position has been furnished by said licensed agency to and accepted by said applicant. No licensed person or persons shall, as a condition to registering or obtaining employment for such applicant, require such applicant to subscribe to any publication or exact other fees, compensation or reward, other than the registration fee, aforesaid, and a further fee, the amount of which shall be agreed upon between such applicant and such licensed person, to be payable at such time as may be agreed upon in writing, 'the amount of which, together with said registration fee of $2.00 added thereto shall in no case exceed 10 per cent of all moneys paid to or to be paid or earned by said applicant, for the first month's service growing out of said employment furnished by said employer. *Provided, however,* that if through no fault of said applicant or employee, he fails to remain in service with said employer and other positions or places of employment are furnished to said applicant by said licensed agency, then said licensed agency shall not accept, collect or charge more than one fee every three months,' but the further fee aforesaid shall not be received by such licensed person before the applicant has been tendered a position

tional [2] under the due process clause of the Fourteenth Amendment. 138 Neb. 574, 293 N. W. 393. The case is here on a petition for certiorari which we granted be-

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by said licensed person. In the event that the position, so tendered is not accepted by or given such applicant, said licensed person shall refund all fees requested by said applicant, other than the registration fees aforesaid within three days after demand is made therefor. No such licensed person shall send out any applicant for employment without having obtained a *bona fide* order therefor, and if it shall appear that no employment of the kind applied for existed at the place where said applicant was directed, said licensed person shall refund to such applicant within five days after demand, any sum paid by such applicant for transportation in going to and returning from said place and all fees paid by said applicant. In addition to the receipt provided to be given for registration fee it shall be the duty of such licensed person to give, to every applicant for employment from whom other fee or fees shall be received, an additional receipt, in which shall be stated the name of such applicant, the date and amount of such other fees; and to every applicant for help from whom other fee or fees shall be received, an additional receipt, stating the name and address of said applicant, the date and amount of such other fee or fees, and the kind of help to be provided. All receipts shall have printed on the back thereof, in the English language, the name and address of the state secretary of labor and the chief deputy secretary of labor. Every such licensed person shall give to every applicant for employment, a card or printed paper containing the name of the applicant, the name and address of such employment agency, and the written name and address of the person to whom the applicant is sent for employment. If an employee furnished fails to remain one week in a situation, through no fault of the employer, then all fees paid or pledged, in excess of the registration fee aforesaid, shall be refunded to the employer upon demand. If the employment furnished the applicant does not continue more than one week, through no fault of the employee, then all fees paid or pledged, in excess of the registration fee aforesaid, shall be refunded to the employee upon demand."

[2] The court upheld those provisions of the statute under § 3, Art. I of the Nebraska Constitution which provides that "No person shall be deprived of life, liberty, or property, without due process of law." See Art. XV, § 9.

cause of the importance of the constitutional question which was raised.

The action is for a peremptory writ of mandamus ordering petitioner, Secretary of Labor of Nebraska, to issue a license to the relator[3] to operate a private employment agency for the year commencing May 1, 1940. The license was withheld because of relator's refusal to limit its maximum compensation, as provided by the statute, to ten per cent of the first month's salary or wages of the person for whom employment was obtained. The petition in mandamus challenged the constitutionality of those provisions of the act.[4] The answer sought to sustain them by alleging that the business of a private employment agency is "vitally affected with a public interest" and subject to such regulation under the police power of the state. The relator's motion for judgment on the pleadings was sustained and it was ordered that a peremptory writ of mandamus should issue.

We disagree with the Supreme Court of Nebraska. The statutory provisions in question do not violate the due process clause of the Fourteenth Amendment.

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[3] The petition in mandamus was filed by respondent Western Reference & Bond Assn., Inc. The other respondents are Mills Teachers Agency, Thomas Employment Service, Co-Operative Reference Co., Marti Reference Co., Watts Reference Co., Cornhusker Teachers Bureau, Grace Boomer, and Davis School Service, who intervened in the action and challenged the constitutionality of the act. Their petition of intervention stated that they, as well as the relator, confine their business "to soliciting and securing positions for clerical, executive, technical and professional workers, and do not engage in the business of securing placements for common laborers, domestic servants or other classes of unskilled workers." That seems to be conceded.

[4] By stipulation filed in the state court it was agreed that the "sole and only issue for determination" was the constitutionality of the act "in so far as the same fixes or limits the fees or compensation of private employment agencies."

The drift away from *Ribnik* v. *McBride, supra,* has been so great that it can no longer be deemed a controlling authority. It was decided in 1928. In the following year this Court held that Tennessee had no power to fix prices at which gasoline might be sold in the state. *Williams* v. *Standard Oil Co.,* 278 U. S. 235. Save for that decision and *Morehead* v. *Tipaldo,* 298 U. S. 587, holding unconstitutional a New York statute authorizing the fixing of women's wages, the subsequent cases in this Court have given increasingly wider scope to the price-fixing powers of the states and of Congress.[5] *Tagg Bros.* v. *United States,* 280 U. S. 420, decided in 1930, upheld the power of the Secretary of Agriculture under the Packers and Stockyards Act to determine the just and reasonable charges of persons engaged in the business of buying and selling in interstate commerce livestock at a stockyard on a commission basis. In 1931 a New Jersey statute limiting commissions of agents of fire insurance companies was sustained by *O'Gorman & Young* v. *Hartford Fire Ins. Co.,* 282 U. S. 251. A New York statute authorizing the fixing of minimum and maximum retail prices for milk was upheld in 1934. *Nebbia* v. *New York,* 291 U. S. 502. And see *Hegeman Farms Corp.* v. *Baldwin,* 293 U. S. 163; *Borden's Farm Products Co.* v. *Ten Eyck,* 297 U. S. 251. Cf. *Baldwin* v. *G. A. F. Seelig, Inc.,* 294 U. S. 511; *Mayflower Farms* v. *Ten Eyck,* 297 U. S. 266. In 1937 *Adkins* v. *Children's Hospital,* 261 U. S. 525, was overruled and a statute of Washington which authorized the fixing of minimum wages for women and minors was sustained. *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379. In the same year, *Townsend* v. *Yeomans,* 301 U. S. 441, upheld a

[5] But see *New State Ice Co.* v. *Liebmann,* 285 U. S. 262; *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.,* 299 U. S. 183, 192; *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 316.

Georgia statute fixing maximum warehouse charges for the handling and selling of leaf tobacco. Cf. *Mulford* v. *Smith,* 307 U. S. 38; *Currin* v. *Wallace,* 306 U. S. 1. The power of Congress under the commerce clause to authorize the fixing of minimum prices for milk was upheld in *United States* v. *Rock Royal Co-operative,* 307 U. S. 533, decided in 1939. The next year the price-fixing provisions of the Bituminous Coal Act of 1937 were sustained. *Sunshine Coal Co.* v. *Adkins,* 310 U. S. 381. And at this term we upheld the minimum wage and maximum hour provisions of the Fair Labor Standards Act of 1938. *United States* v. *Darby,* 312 U. S. 100. These cases represent more than scattered examples of constitutionally permissible price-fixing schemes. They represent in large measure a basic departure from the philosophy and approach of the majority in the *Ribnik* case. The standard there employed, following that used in *Tyson & Brother* v. *Banton,* 273 U. S. 418, 430 *et seq.,* was that the constitutional validity of price-fixing legislation, at least in absence of a so-called emergency,[6] was dependent on whether or not the business in question was "affected with a public interest." Cf. *Brazee* v. *Michigan,* 241 U. S. 340. It was said to be so affected if it had been "devoted to the public use" and if "an interest in effect" had been granted "to the public in that use." *Ribnik* v. *McBride, supra,* p. 355. That test, labelled by Mr. Justice Holmes in his dissent in the *Tyson* case (273 U. S. at p. 446) as "little more than a fiction," was discarded in *Nebbia* v. *New York, supra,* pp. 531–539. It was there stated that such criteria "are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices," and that the phrase "affected with a public interest" can mean "no more than

[6] Cf. *Highland* v. *Russell Car & Snow Plow Co.,* 279 U. S. 253.

that an industry, for adequate reason, is subject to control for the public good." *Id.*, p. 536. And see the dissenting opinion in *Ribnik* v. *McBride, supra,* at p. 359.

The *Ribnik* case, freed from the test which it employed, can no longer survive. But respondents maintain that the statute here in question is invalid for other reasons. They insist that special circumstances must be shown to support the validity of such drastic legislation as price-fixing, that the executive, technical and professional workers which respondents serve have not been shown to be in need of special protection from exploitation, that legislative limitation of maximum fees for employment agencies is certain to react unfavorably upon those members of the community for whom it is most difficult to obtain jobs, that the increasing competition of public employment agencies and of charitable, labor union and employer association employment agencies have curbed excessive fees by private agencies, and that there is nothing in this record to overcome the presumption as to the result of the operation of such competitive, economic forces. And in the latter connection respondents urge that, since no circumstances are shown which curb competition between the private agencies and the other types of agencies, there are no conditions which the legislature might reasonably believe would redound to the public injury unless corrected by such legislation.

We are not concerned, however, with the wisdom, need, or appropriateness of the legislation. Differences of opinion on that score suggest a choice which "should be left where . . . it was left by the Constitution—to the States and to Congress." *Ribnik* v. *McBride, supra,* at p. 375, dissenting opinion. There is no necessity for the state to demonstrate before us that evils persist despite the competition which attends the bargaining in this field. In final analysis, the only constitutional pro-

hibitions or restraints which respondents have suggested for the invalidation of this legislation are those notions of public policy embedded in earlier decisions of this Court but which, as Mr. Justice Holmes long admonished, should not be read into the Constitution. *Tyson & Brother* v. *Banton, supra,* at p. 446; *Adkins* v. *Children's Hospital, supra,* at p. 570. Since they do not find expression in the Constitution, we cannot give them continuing vitality as standards by which the constitutionality of the economic and social programs of the states is to be determined.

The judgment is reversed and the cause is remanded to the Supreme Court of Nebraska for proceedings not inconsistent with this opinion.

Reversed.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* WILLIAM FLACCUS OAK LEATHER CO.

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

No. 627. Argued April 3, 1941.—Decided April 28, 1941.

A sum received by a taxpayer as proceeds of insurance on buildings and equipment destroyed by fire (no part of the sum so received having been expended to replace the destroyed property, which prior to 1935 had been completely depreciated for income tax purposes), *held* not a gain from the "sale or exchange" of capital assets within the meaning of § 117 (d) of the Revenue Act of 1934. P. 249.

114 F. 2d 783, reversed.

CERTIORARI, 312 U. S. 671, to review the reversal of a decision of the Board of Tax Appeals which sustained the Commissioner's determination of a deficiency in income tax.

Mr. J. Louis Monarch, with whom *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Lee A. Jackson* were on the brief, for petitioner.

Mr. John A. McCann for respondent.

MR. JUSTICE MURPHY delivered the opinion of the Court.

In September, 1935, respondent's plant was destroyed by fire. Later that year it received $73,132.50 from an insurance company as compensation for the loss of buildings, machinery, and equipment. The buildings, machinery, and equipment had been fully depreciated for income tax purposes prior to 1935, and no part of the insurance proceeds was used to acquire other property similar or related in service or use to the property destroyed, or to acquire control of a corporation owning such property, or to establish a fund to replace the property destroyed.

In its return for 1935, respondent reported the insurance proceeds as capital gain and added to that amount a gain, not in issue here, of $862.50 from sales of securities. During that same year, respondent had capital losses, also not in dispute, of $76,767.62 which it used to offset completely the total reported capital gains of $73,995. This left an excess of capital losses over capital gains of $2,772.62, and respondent deducted $2,000 of that amount from ordinary income.

The Commissioner held that the insurance proceeds were ordinary income rather than capital gain. Accordingly, he decreased respondent's capital gain and increased its ordinary income by $73,132.50, and allowed respondent capital losses of only $2,862.50, an amount equal to the gain from security sales plus $2,000. The Board of Tax Appeals affirmed in a memorandum opinion on the authority of Estate of Herder, 36 B. T. A. 934.

The Circuit Court of Appeals reversed. 114 F. 2d 783. We granted certiorari, 312 U. S. 671, because the decision below was in conflict with *Herder* v. *Helvering*, 70 App. D. C. 287; 106 F. 2d 153.

It is conceded that respondent's losses resulted from sales or exchanges of capital assets. It is also conceded that the entire amount received from the insurance company must be included in respondent's income since the property had been fully depreciated for income tax purposes prior to 1935. Respondent contends, however, that that amount may be reported as capital gain, in order that capital losses may absorb it, rather than as an item of ordinary gross income.

Section 117 (d) of the Revenue Act of 1934 (48 Stat. 680) provides in part: "Losses from sales or exchanges of capital assets shall be allowed only to the extent of $2,000 plus the gains from such sales or exchanges." Thus, the single question is whether the amount respondent received from the insurance company derived from the "sale or exchange" of a capital asset.

Generally speaking, the language in the Revenue Act, just as in any statute, is to be given its ordinary meaning, and the words "sale" and "exchange" are not to be read any differently. Compare *Helvering* v. *Hammel*, 311 U. S. 504; *Fairbanks* v. *United States*, 306 U. S. 436; *Burnet* v. *Harmel*, 287 U. S. 103. Neither term is appropriate to characterize the demolition of property and subsequent compensation for its loss by an insurance company. Plainly that pair of events was not a sale. Nor can they be regarded as an exchange, for "exchange," as used in § 117 (d), implies reciprocal transfers of capital assets, not a single transfer to compensate for the destruction of the transferee's asset.

The fact that § 112 (f) characterizes destruction of property and indemnification for its loss as an involuntary conversion does not establish that the two events constituted a sale or exchange. That section provides: "If

property (as a result of its destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation, or the threat or imminence thereof) is compulsorily or involuntarily converted into property similar or related in service or use to the property so converted, or into money which is forthwith in good faith, under regulations prescribed by the Commissioner with the approval of the Secretary, expended in the acquisition of other property similar or related in service or use to the property so converted, or in the acquisition of control of a corporation owning such other property, or in the establishment of a replacement fund, no gain or loss shall be recognized. If any part of the money is not so expended, the gain, if any, shall be recognized, but in an amount not in excess of the money which is not so expended."

We can find nothing in this language or in other sections of the Act which indicates, either expressly or by implication, that Congress intended to classify as "sales or exchanges" the involuntary conversions enumerated in § 112 (f). It is true that § 111 (c) says that "in the case of a sale or exchange, the extent to which the gain or loss . . . shall be recognized . . . shall be determined under the provisions of section 112." It is also true that § 112 (f) follows § 112 (a) which provides that "upon the sale or exchange of property the entire amount of the gain or loss . . . shall be recognized, except as hereinafter provided in this section."

The inference, drawn from the juxtaposition and cross referencing of these three sections, that the involuntary conversion of respondent's property is thus implicitly characterized as a sale or exchange ignores the fact that in the same Act Congress has chosen a particular method for classifying as sales or exchanges transactions which would not ordinarily be described by one of those terms. Thus § 115 (c) provides: "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."

Section 117 (e) provides: "For the purposes of this title gains or losses from short sales of property shall be considered as gains or losses from sales or exchanges of capital assets; and gains or losses attributable to the failure to exercise privileges or options to buy or sell property shall be considered as gains or losses from sales or exchanges of capital assets held for one year or less." See H. Rep. No. 704, 73d Cong., 2d Sess., p. 31; H. Rep. No. 1385, 73d Cong., 2d Sess., p. 23. Section 117 (f) provides: "For the purposes of this title, amounts received by the holder upon the retirement of bonds, debentures, notes, or certificates or other evidences of indebtedness issued by any corporation . . . with interest coupons or in registered form, shall be considered as amounts received in exchange therefor." See *McClain* v. *Commissioner,* 311 U. S. 527; *Fairbanks* v. *United States, supra;* H. Rep. No. 704, 73d Cong., 2d Sess., p. 31.

These sections demonstrate that Congress has expressly specified the ambiguous transactions which are to be regarded as sales or exchanges for income tax purposes. They are convincing evidence that the involuntary conversion of respondent's property, which bears far less resemblance to a sale or exchange than the transactions embraced in §§ 115 (c), 117 (e), and 117 (f), is not to be placed in one or the other of those categories by implication. The prompt withdrawal of Article 113 (a) (9) (1) of Treasury Regulations No. 86 (see T. D. 4698, XV–2 Cum. Bull. 159) indicates that the administrators charged with the enforcement of § 112 (f) reached a similar conclusion. Compare *Burnet* v. *Chicago Portrait Co.,* 285 U. S. 1, 16.

The judgment of the Circuit Court of Appeals is

Reversed.

DEPARTMENT OF TREASURY OF INDIANA ET AL. *v.* INGRAM-RICHARDSON MANUFACTURING CO. OF INDIANA, INC.

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

No. 655. Argued April 1, 1941.—Decided May 5, 1941.

An Indiana corporation having a factory in that State at which it manufactured enamel and applied it by heat to metal articles, obtained through its traveling salesmen from manufacturers in other States orders for the enameling of metal parts which they used in the making of stoves and refrigerators; pursuant to which contracts, it transported the parts from the customers' plants to its own plant, enameled them there, and returned them to the plants of the customers, doing the transportation by means of its own trucks. Thereafter it billed the customers for the enameling, and remittances were made to it by mail. The value of the metal parts as units after the completion of the enameling process was from two and one-half to three times the value of the parts before the enameling. *Held:*

1. That the income was derived from services, not from sales of the enamel in interstate commerce. P. 254.

2. The gross receipts from the enameling were taxable by Indiana under its Gross Income Tax Law. P. 254.

3. The transportation was an incident to the enameling service. P. 255.

4. If the transportation was an item of service for which deductions should have been allowed in the tax, the taxpayer should have claimed the deduction and shown its amount. P. 255.

5. The question whether the Indiana tax law allows the taxpayer to claim deductions in his tax return and secure an apportionment of the tax, is a question of state law which this Court is not called upon to answer, the taxpayer not having presented it to the state authorities. P. 256.

114 F. 2d 889, reversed.

CERTIORARI, 312 U. S. 671, to review a judgment affirming a recovery in a suit for a refund of taxes alleged to have been unlawfully collected.

Mr. Joseph P. McNamara, Deputy Attorney General of Indiana, with whom *Messrs. George N. Beamer,* Attorney General, and *Joseph W. Hutchinson,* Deputy Attorney General, were on the brief, for petitioners.

Mr. Earl B. Barnes, with whom *Messrs. Alan W. Boyd* and *Charles M. Wells* were on the brief, for respondent.

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

The Circuit Court of Appeals, affirming the District Court, has held that respondent, Ingram-Richardson Manufacturing Company, is entitled to a refund of a tax levied under the Indiana Gross Income Tax Law,[1] upon the ground of the invalidity of the tax under the commerce clause of the Federal Constitution. 114 F. 2d 889. We granted certiorari because of an alleged conflict with applicable decisions of this Court.

The tax was for $5410.20 [2] and was laid upon respondent's gross receipts derived as follows:

Respondent, an Indiana corporation, has a factory at Frankfort in that State where it manufactures enamel, both in a granular form, known as frit, and in a hard, finished form fused with metal articles. In the instant case the enamel was fused with metal parts used in stoves and refrigerators manufactured by respondent's customers in various States other than Indiana. Respondent's traveling salesmen solicited orders from such customers pursuant to which respondent transported by its trucks the stove and refrigerator parts belonging to its customers from their plants to its own plant for enameling. There

[1] Section 2 of Chapter 50 of the Acts of Indiana of 1933. 11 Burns Indiana Statutes, § 64–2602. See *Department of Treasury* v. *Wood Preserving Corp., ante,* p. 62.

[2] The suit also embraced a claim for an additional sum of $1154.26 recovery of which was denied below. That claim is not before us.

the enameling was done by the process set forth in the findings, and respondent then hauled the enameled parts back to its customers' factories. Respondent thereafter billed its customers for the enameling and remittances were made to respondent by mail. The value of the metal parts as units after the completion of the enameling process was from two and one-half to three times the value of the respective parts before the enameling.

Respondent's contention, as set forth in its complaint and as still asserted, is that these transactions constituted sales of the hard, finished enamel in interstate commerce. The Circuit Court of Appeals disagreed with that contention and held that the income in question was derived from services. We are in accord with that view.

In the alternative, respondent contends that the services paid for included the solicitation of orders by respondent's agents and the execution of contracts in other States, interstate communications by mail, telephone and telegraph, and also the transportation by respondent of the stove and refrigerator parts from and to places in other States.

The enameling process was an activity performed at respondent's plant in Indiana and the gross receipts therefrom were taxable by Indiana under its Gross Income Tax Law. See *Department of Treasury* v. *Wood Preserving Corp., ante,* p. 62. The fact that the orders for the enameling were obtained by respondent's agents and contracts were executed outside Indiana did not make the enameling process other than an intrastate activity and any the less a proper subject for the application of the taxing statute. *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250, 253.

But the court below has held that there was included in the service rendered by respondent the transportation by its trucks of the stove and refrigerator parts from and to the customers' plants in other States. The court thought

that the reasoning of our opinion in *Gwin, White & Prince* v. *Henneford,* 305 U. S. 434, applied. That case, however, presented a different situation. The business there was that of a marketing agent for a federation of fruit growers and the state tax was measured by the gross receipts of the taxpayer from the business of marketing fruit shipped from the taxing State to the places of sale in other States and foreign countries. We found that the entire service for which the compensation was paid was "in aid of the shipment and sale of merchandise in that commerce" (interstate and foreign) and hence the service was held to be within the protection of the commerce clause. *Id.,* p. 437. Here, on the contrary, the entire service was in aid of the enameling business conducted within the State. The transportation of the metal parts to and from Indiana were but incident to that intrastate business, as was the circulation of appellants' magazine in States other than the taxing State in the *Western Live Stock* case, *supra,* p. 254.

Moreover, if the transportation of the metal parts were regarded as an item of service for which a deduction should have been allowed, we think that it was the duty of respondent, in view of the fact that it was conducting an intrastate business clearly subject to the tax, to claim the deduction and show the amount which should be allowed. It does not appear that respondent did either. Respondent made its claim for a total exemption from the tax upon the ground that it was laid upon interstate sales, a contention which it has failed to support.

The State contends, citing provisions of the taxing act, that the legislature of Indiana contemplated that the taxpayer would reflect in the tax return any deductions claimed, making a separation between taxable and non-taxable items, and that the tax return itself provided a method for claiming any deductions to which

the taxpayer thought itself entitled. Respondent insists that the Act did not provide a method of apportionment. In the absence of an effort on the part of respondent to present a claim for deduction and to have the state authorities pass upon the question of deduction or apportionment, as distinguished from its claim for a total exemption, we are not called upon to attempt to resolve the question of state law.

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

Reversed.

JENKINS *v.* KURN ET AL., TRUSTEES.

CERTIORARI TO THE SUPREME COURT OF MISSOURI.

No. 732. Argued April 8, 1941.—Decided May 5, 1941.

1. The right of action conferred by the Federal Employers Liability Act, 45 U. S. C. § 51, is not to be burdened with impossible conditions. P. 258.
2. In an action by a locomotive fireman to recover damages for injuries resulting from a fall alleged to have been due to the negligence of the engineer in failing to apply the brakes after notice that a train was standing on the track ahead, *held* that evidence tending to prove that the engineer received a warning from the fireman which, under the circumstances, he should have understood, was sufficient to go to the jury without further proof that he actually understood what was said. P. 258.

146 Mo. 904; 144 S. W. 2d 76, reversed.

CERTIORARI, 312 U. S. 675, to review a judgment reversing a recovery in an action under the Federal Employers Liability Act.

Mr. Harry G. Waltner, Jr. for petitioner.

Mr. Frank C. Mann, with whom *Mr. Alexander P. Stewart* was on the brief, for respondents.

MR. JUSTICE MURPHY delivered the opinion of the Court.

When the interstate train on which he was fireman emerged from a curve on the outskirts of Winfield, Kansas, petitioner sighted a train standing not more than six hundred feet ahead on the same track. He shouted to the engineer to push the brake valve over in emergency. The engineer turned and looked at him but did nothing to arrest the movement of the train. Petitioner jumped from his seat, crossed the cab, and stood behind the engineer for a brief time but said nothing. When the engine was but two or three car lengths from the standing train, the engineer applied the brakes. At that moment petitioner leaped from the engine and landed in some rocks along the track. He sustained serious injuries and to recover damages brought the instant action under the Federal Employers' Liability Act (45 U. S. C. §§ 51–59) against respondents in a Missouri circuit court.

The complaint contained five counts charging negligence, but only the fourth was submitted to the jury. Count four alleged: ". . . that said engineer . . . was further negligent in that after he was notified by [petitioner] that the [train] was standing on said track near said crossing, he failed to immediately apply the air in the emergency, to stop said train, which negligence created a dilemma of imminent peril, which forced [petitioner] to jump from said train in order to save his life, or some bodily harm."

The case was tried before a jury which returned a verdict of $12,000. From judgment in that amount entered for petitioner, respondents appealed, assigning various errors. Confining its attention to one, the Supreme Court of Missouri held that the circuit court should have granted respondents' motion for a directed

verdict. It reversed the judgment but did not remand the cause for a new trial. 146 Mo. 904; 144 S. W. 2d 76. We granted certiorari, 312 U. S. 675.

It is conceded that the action was properly brought under the Federal Employers' Liability Act. The single question is whether the trial court correctly refused to direct a verdict for respondents.

In explanation of its conclusion that the trial court erred, the Supreme Court of Missouri observed: "The burden was on [petitioner] to establish that he notified the engineer to go into emergency. He did not so notify him unless the engineer understood what was said, and there is not even a scintilla of evidence that the engineer understood what [petitioner] said." In other words, not only must petitioner prove that he moved to warn the engineer of the impending danger, but he must prove the engineer's subjective comprehension and correct interpretation of that warning, verbal or otherwise. We cannot agree.

To be sure, petitioner was required by the allegations of his complaint to prove that he acted promptly and reasonably to awaken the engineer to the danger ahead. Since the only count submitted to the jury charged that the engineer was negligent in failing to apply the brakes after notice of the train in front, petitioner was compelled also to prove that the notice was communicated to the engineer. But to establish the fact of communication petitioner had only to prove that the engineer should have comprehended the warning under the circumstances disclosed. He was not obligated to go further and produce evidence of the subjective reactions in the engineer's mind. The right of action conferred by § 51 is not to be burdened with impossible conditions.

There was evidence from which the jury could have concluded that if not subject to any physical disability the engineer would have comprehended petitioner's mo-

nition and understood that peril was imminent. Petitioner testified without contradiction that he "hollered" his warning loudly; that only a narrow space separated his perch from the engineer's seat; that the engineer's hearing was "all right"; that petitioner and the engineer could and did carry on "normal conversations" while the train was operating; and that there was comparatively little noise in the cab from the train.

Judged by the test outlined above, that evidence was ample to warrant submission of the issue to the jury. Since other questions, which our decision does not touch, were presented to the Supreme Court of Missouri, the judgment is reversed and the cause is remanded to that court for further proceedings not inconsistent with this opinion.

Reversed.

DETROLA RADIO & TELEVISION CORP. *v.* HAZELTINE CORPORATION.

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

No. 666. Argued April 7, 1941.—Decided May 12, 1941.

Wheeler reissue patent, No. 19,744, Claims 1–7, inclusive, and 9–13, inclusive, relating to amplifiers in modulated current-carrying signaling systems, wherein the limit of amplification is automatically maintained substantially at a predetermined level,—*held* invalid for want of invention over the prior art. P. 268.

The alleged invention, as upheld by the court below, was of improved means for obtaining automatic amplification control by the combination in a radio receiver of a diode detector with a high resistance connected between the anode of the detector and the cathode of the amplifying tube, and a direct connection between the anode of the detector and the grid of the amplifier for impressing negative potential upon the latter, thus obtaining from the signal voltage a so-called linear response to the variations in the amplitude of the signal current.

Wheeler accomplished an old result by a combination of means which, singly or in similar combination, were disclosed by the prior art, and notwithstanding the fact that he was ignorant of the pending applications which antedated his claimed date of invention and eventuated into patents, he was not in fact the first inventor, since his advance over the prior art, if any, required only the exercise of the skill of the art.
117 F. 2d 238, reversed.

CERTIORARI, 312 U. S. 671, to review a decree which affirmed the District Court in upholding a patent, enjoining infringement, and retaining jurisdiction to take an account of profits, assess damages, etc.

Mr. Samuel E. Darby, Jr., with whom *Mr. Floyd H. Crews* was on the brief, for petitioner.

Mr. William H. Davis, with whom *Messrs. R. Morton Adams* and *George E. Faithfull* were on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

July 7, 1927, Harold A. Wheeler applied for a patent for a circuit designed automatically to control the amplitude of amplified signal voltage in modulated carrier-current signalling systems. Patent No. 1,879,863 issued September 27, 1932, to the respondent as assignee of Wheeler.

A suit was brought in the Eastern District of New York for infringement of Claims 1, 5, 6, and 10.[1] The District Court held the claims invalid for want of invention. The Circuit Court of Appeals for the Second Circuit affirmed the decree.[2]

September 26, 1934, while the appeal to the Circuit Court of Appeals was pending, respondent applied for

[1] *Hazeltine Corporation* v. *Abrams*, 7 F. Supp. 908.
[2] *Hazeltine Corporation* v. *Abrams*, 79 F. 2d 329.

a reissue. After the decision of the Circuit Court of Appeals, respondent redrafted the claims and, October 29, 1935, a reissue patent, No. 19,744, was granted. The present suit was thereafter instituted against the petitioner for infringement of all the thirteen claims of the reissue except Claim 8.* The District Court held the patent valid and infringed, and its decree was affirmed by the Circuit Court of Appeals.[3] The petition for certiorari presented, *inter alia,* the question whether the decision conflicts with that of the Second Circuit.

Control of the amplification of a modulated carrier-wave signal is useful in connection with transmitting and receiving apparatus and, in the original patent, Wheeler claimed his system as respects both. In his specifications, however, he confined himself to its application to receivers, wherein its function is to control the volume of sound emitted from the loud speaker. In broadcasting, a high frequency wave, known as a carrier wave, is impressed with another low frequency wave or, as it is said, modulated. The high frequency, or signal, wave is picked up by the antenna of a receiver and conducted thence to the input of an amplifying device which consists of an amplifier tube, or several of them in series. These tubes have three electrodes, a cathode, an anode, and a grid, and are called triodes. The signal wave, as amplified, is carried from the output of the amplifying device to the input of a vacuum tube, known as a detector or rectifier, which transmutes the alternating current into a unidirectional or direct pulsating current. This is led to audio tubes which enhance its volume, and thence to a loud speaker. Such a receiving set has other equipment for selecting signals of varying frequency and adjusting the amplification of the audio waves, with which we need not concern ourselves.

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*As amended by order of October 13, 1941, see 314 U. S. — REPORTER.

[3] *Detrola Radio & Television Corp.* v. *Hazeltine Corporation,* 117 F. 2d 238.

One of the problems of the art has arisen from variations of the received signals. When the set is tuned from a weak signal to a much stronger one, the tendency is for potential to build up in the last amplifying tube, which results in what is known as blasting in the loud speaker. Often the same signal varies in intensity. Weakening may result in fading, whereby the sound production weakens or disappears; and strengthening may beget distortion of the sounds emitted.

Wheeler essayed to obviate these objectionable features. It was known that the amplification of the carrier signal could be controlled by increasing or decreasing the potential upon the grid of a triode amplifier. Wheeler proposed automatically to vary this potential so as to increase or decrease the degree of amplification and thus hold it at a substantially predetermined level. To this end he provided means to increase the negative potential upon the anode of the detector tube in step with the increased strength of the signal and to conduct a direct current from that anode to the grid electrode of one or more of the amplifying tubes. Thus an increase of the strength of the signal would automatically increase the negative potential on the grid of the amplifier and decrease the amplification; the reverse result would be effected if the signal weakened. The means he adopted to accomplish this were alternative.

According to one method, the signal was amplified to a comparatively high voltage, and a diode used as a detector. The output voltage from the detector was approximately as great as that of the amplified signal. By coupling the cathode and anode of the detector and inserting a resistance in the coupling he could maintain the anode of the detector slightly negative at all times. Since he connected all the cathodes in parallel the cathode of the detector was maintained at substantially the same potential as the cathode of the radio frequency am-

plifier. By this means, the anode of the detector could be maintained normally negative relative to at least a part of the amplifier cathode. When the rectified current flowing through the detector circuit increased with the strength of the signal, there was developed at the output terminal of the detector circuit, through the operation of the resistance, which was also connected between the anode of the detector and the grid of the amplifier, an increase of negative voltage which, through the direct current connection from the terminal of the detector circuit to the grid of the amplifier, increased the negative potential thereof, and lessened the signal amplification. Conversely, if the strength of the signal current decreased, the negative potential developed upon the anode of the detector correspondingly decreased and there was a decreased inhibition of the amplifying power of the signal amplifier.

In his alternative method, he accomplished the same result with a triode detector. In this arrangement he maintained a negative voltage on the grid of the detector triode by the use of a battery and a potentiometer connected across the cathode of the detector tube. The output circuit of the detector included a resistance connected between the anode of the detector and the common "B" battery of a radio set. A direct connection was provided from the output terminal of this circuit to the grid of the signal amplifier for impressing thereon the potential developed on the anode of the detector. The amplified signal voltage operated to bring into play the voltage of the battery which created the potential on the anode of the detector.

According to the specifications, each arrangement had advantages and disadvantages. The diode detector used in the first furnished no amplification but it dispensed with the necessity of an additional battery or source of current supply. The second not only required an addi-

tional battery but an adjustment between the voltage delivered by the two batteries which coöperate to vary the negative potential on the anode of the triode detector.

Both arrangements include devices to prevent the passage from the detector to the audio tubes, and from the detector to the grid of the amplifier tubes, of undesired forms of electrical energy and both embrace means to provide a time constant with respect to the transmission of negative potential from the anode of the detector to the grid of the amplifier. None of these are now asserted to be novel or to constitute a part of the asserted invention.

In Wheeler's drawings and specifications he exhibited both methods and said of them that they operate "substantially in the same manner," and again that they are "substantially similar in operation." In his application he presented claims which did not specify the kind of detector to be used, and others calling for a diode. All of the latter were disallowed and he concurred in their cancellation without prejudice. He had asserted in prosecuting his application that "the invention can obviously be used with any kind of detector." Nine claims were finally allowed. Just before the patent issued, and nearly five years after original application, Wheeler presented a number of additional claims. In two he described the detector as a diode and in one of these he denominated the resistance connected between the detector anode and the amplifier cathode as a "high resistance." He asserted that these two claims were "practically the same as allowed Claim 11," which became Claim 1 of the patent as issued and specified no particular form of detector tube and no high resistance. They were allowed as Claims 10 and 11 of the patent as issued.

In the *Abrams* suit only Claims 1, 5, 6 and 10 were in issue. The contention was that the invention was a broad one covering the principle of automatic volume control by means of any form of circuit. The defendant insisted

that the patent involved no invention in view of the prior art and cited patents issued before Wheeler's date of conception [4] and others issued before the patent in suit on applications antedating his date of invention and pending when his application was filed.[5]

Some of these were for transmission systems and some for receiving systems. Several disclosed automatic amplification control. All constituted prior art.[6] Hazeltine attempted to distinguish them from the Wheeler patent in three respects. It contended that Wheeler's patent was limited to the receiving art and that prior inventions addressed to automatic amplification control in transmission did not constitute anticipation. The District Court answered that Wheeler's patent was not limited but was for any modulated wave carrier signalling system. Hazeltine also insisted that some of the prior art dealt with amplification control in amplifiers beyond the detector rather than in those through which the controlled current passed before it reached the detector, as in Wheeler. The District Court was unable to find any such distinction from the prior art in the Wheeler claims. Finally, Hazeltine urged that the time constant device was not found in the prior art cited. The District Court held that, if any of these alleged differences constituted invention on Wheeler's part the claims did not disclose them, and that to sustain Hazeltine's contention would be to rewrite the claims.

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[4] Wheeler's date of conception of his invention, according to his testimony, was December 17, 1925.

[5] Affel, 1,574,780, March 2, 1926; Heising, 1,687,245, October 9, 1928; Bjornson, 1,666,676, April 17, 1928, and Schelleng, 1,836,556, December 15, 1931. Friis, 1,675,848, July 3, 1928, and Evans, 1,736,852, November 26, 1929, were also cited but not discussed in the opinion. It was stipulated that the disclosures and claims of these patents did not differ materially from those embodied in the applications therefor.

[6] *Alexander Milburn Co.* v. *Davis-Bournonville Co.*, 270 U. S. 390.

The Circuit Court of Appeals took a more liberal view of the Wheeler patent as evidenced by the claims in connection with the specifications. It assumed, for the purposes of decision, that Wheeler's patent was limited to receivers. It recognized the difference between the feed of the negative potential back to the radio frequency amplifiers instead of forward but it found no invention in the change. It held there was no invention in the provision of a time constant. That court, therefore, found that all Wheeler did was to take certain obvious steps in an already crowded art, which steps were based upon various disclosures of that art, and that the changes he made did not amount to invention. Both the District Court and the Circuit Court of Appeals found that the mention of a diode detector in Claim 10 represented no new inventive element since at least one of the patents in the prior art—that of Heising—disclosed the use of such a tube in an automatic amplification control system.

Confronted with these holdings, Hazeltine, as has been stated, rewrote the specifications and claims in its application for reissue. It eliminated all reference to the use of a triode detector in its drawings and specifications and limited them to a system employing a diode. Certain of the claims of the old patent, however, were retained which make no distinction between a diode and a triode since they refer merely to a detector. Hazeltine also altered the specifications to refer particularly to a diode and a high resistance. Such a high resistance had been claimed as part of the invention in Claim 11 of the original patent, which claim was not in suit in the *Abrams* case. This fact is significant for, if the high resistance had been considered novel or essential to the invention, it is hard to see why suit was not founded on Claim 11, the only claim which disclosed it.

It is evident that Hazeltine found it necessary to abandon its broad claims to a monopoly of automatic

volume control circuits and to limit the claims to an alleged improvement in such circuits. The petitioner insists that the effort is unavailing for the reason that the patent, as defined in the reissue, fails to disclose invention in view of the prior art.

As is admitted, automatic amplification control was old in the art when Wheeler made his alleged invention. The invention must then consist in the conception of improved means for obtaining such control. The courts below have found invention in the combination in a radio receiver of a diode detector with a high resistance connected between the anode of the detector and the cathode of the amplifying tube and a direct connection between the anode and the grid of the amplifier for impressing negative potential upon the latter, thus obtaining from the signal voltage a so-called linear response to the variations in the amplitude of the signal current. This combination, they held, was such an advance in the art as to constitute invention. We think the decision below conflicts with that in the *Abrams* case and fails to give due weight to the disclosures of the prior art.

The Circuit Court of Appeals distinguishes from Wheeler's conception automatic amplification control used in receivers, such control used in transmitters, such control used for other purposes than volume control of audio waves, or accomplished by the use of a triode or by means other than those which employ the signal current itself and also sets apart amplification control which does not produce a linear response.

There can be no question that the patents cited as prior art disclose the accomplishment of linear response. The curve exhibited in Wheeler's drawings to illustrate the result of the use of his system is duplicated in similar curves by Affel and Friis. It cannot be claimed, therefore, that Wheeler has accomplished a new result. At most he can have obtained an old result by new means.

The prior art discloses that automatic amplification control is useful both in receiving and transmitting devices for the accomplishment of various ends, including volume control. We agree with the Circuit Court of Appeals for the Second Circuit that the limitation of Wheeler's claims to receivers of radio signals would not spell invention.

The respondent insists, and the courts below held, that the reissue patent is limited to claiming a diode detector and a high resistance connected between the detector anode and the amplifier cathode and a direct connection of anode with cathode. Passing the fact that Claims 2, 3, and 6 in suit embrace any sort of detector without limitation, and assuming that the reissue is limited as suggested, it remains that practically all of the patents cited from the prior art employ a resistance to impress the required potential on the amplifier grid for controlling amplification and that two of them, those of Heising and Slepian, disclose the use of a resistance in connection with a diode.

The court below distinguishes Heising on the ground that his purpose was not to control the volume of audio waves but rather to use less current in the radio frequency amplifiers of a transmitter. We hold, as did the Circuit Court of Appeals of the Second Circuit, that these distinctions do not negative anticipation by Heising. With respect to Slepian, the court below remarks that his device was intended to accomplish a different end. This is true for his object was to provide a receiving system which would admit of an extremely high amplification of received signal impulses. But the use of automatic amplification control, whatever the end in view, is the critical consideration.

The court below states that neither Heising nor Slepian succeeded in producing automatic amplification control. In this the court overlooked the uncontradicted testimony

of the respondent's expert, Dr. Hazeltine, who flatly testified that each of them does produce it. And Heising produces it from the signal current by the use of a diode detector, a "high resistance" inserted between the anode thereof and the cathode of the amplifier and a direct current connection from the detector anode to the amplifier cathode.

We think the court below was in error in stating that all the workers in the prior art obtained their control potential from an additional battery whereas Wheeler obtained it from signal energy. This is not true of Heising or Slepian.

Nor can Wheeler claim novelty, as the court held, in the production of a linear response. While Friis obtained energy for the production of potential from a battery, he discloses a resulting linear response comparable to that claimed by Wheeler. If, as is now asserted, the insertion of a high resistance between the anode of the detector and the cathode of the amplifier is an integral part of Wheeler's conception, it may be noted that a resistance to develop a potential to be carried to the amplifier grid is disclosed by prior inventors, including Heising, Friis, Slepian, Affel and Evans and several of them describe it as Wheeler does, namely, a "high resistance."

We conclude that Wheeler accomplished an old result by a combination of means which, singly or in similar combination, were disclosed by the prior art and that, notwithstanding the fact he was ignorant of the pending applications which antedated his claimed date of invention and eventuated into patents, he was not in fact the first inventor, since his advance over the prior art, if any, required only the exercise of the skill of the art.

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

Reversed.

CARLOTA BENITEZ SAMPAYO *v.* BANK OF NOVA SCOTIA.

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

No. 90. Submitted April 10, 1941.—Decided May 12, 1941.

The status of "farmer" for the purposes of proceedings under § 75 of the Bankruptcy Act, is determined by the definition of that term in § 75 (r); not by the definition in § 1 (17), which relates to other sections. Pp. 271, 274.

This results not only from the language of § 75 (r) but also from the legislative history.

109 F. 2d 743, 750, reversed.

CERTIORARI, 311 U. S. 623, to review the affirmance of an order of the District Court which dismissed a proceeding under § 75 of the Bankruptcy Act on the ground that the petitioner was not a "farmer."

Messrs. Fernando B. Fornaris and *Elmer McClain* submitted for petitioner.

Messrs. Walter L. Newsom, Jr. and *J. Henri Brown* submitted for respondent.

MR. JUSTICE MURPHY delivered the opinion of the Court.

To arrange a composition or an extension as a farmer-debtor, petitioner filed a petition in October, 1938, under § 75 of the Bankruptcy Act (47 Stat. 1467, 1470; as amended 48 Stat. 925; *Id.*, 1289; 49 Stat. 246; *Id.*, 942). Failing to secure the assents required by § 75 (g), petitioner amended her petition in November, 1938, to proceed under § 75 (s). Respondent then moved to dismiss the petition on the ground that petitioner was not a "farmer" and therefore was not entitled to the relief

afforded by § 75 (s). After a hearing, the District Court sustained the motion.

The Circuit Court of Appeals affirmed. It held that the formula for determining whether petitioner was a farmer was to be found in § 1 (17) of the Chandler Act of 1938 (52 Stat. 840, 841), and that petitioner could not be regarded as a farmer within its terms. 109 F. 2d 743, on rehearing, 109 F. 2d 750. Because the decision was substantially inconsistent with Order 50 (9) of the General Orders in Bankruptcy (305 U. S. 677, 710), we granted certiorari.[1] 311 U. S. 623.

The ultimate question, of course, is whether petitioner may proceed under § 75 (s) as a farmer-debtor, but for present purposes the problem is to select the definition of "farmer" which is applicable to persons petitioning for relief under § 75.

The Bankruptcy Act contains two definitions of the term "farmer." Section 1 (17) of the Chandler revision provides: " 'Farmer' shall mean an individual personally engaged in farming or tillage of the soil, and shall include an individual personally engaged in dairy farming or in the productions of poultry, livestock, or poultry or livestock products in their unmanufactured state, if the principal part of his income is derived from any one or more of such operations."

Section 75 (r), as amended in 1935 (49 Stat. 246) provides: "For the purposes of this section, section 4 (b), and section 74, the term 'farmer' includes not only an individual who is primarily bona fide personally engaged in producing products of the soil, but also any individual who is primarily bona fide personally engaged in dairy farming, the production of poultry or livestock, or the

[1] Insofar as material here, Order 50 (9) reads: ". . . 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. . . ."

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, and includes the personal representative of a deceased farmer. . . ."

Starting with the premise that only one of the definitions can stand, respondent contends that § 1 (17) is an implicit repeal of § 75 (r). To support the contention, respondent points to the obsolete reference in § 75 (r) to § 74, and to a statement in a committee report which is said to indicate that Congress intended the definition in § 1 (17) to measure the applicability of § 4 (b) to persons who claim to be farmers.[2]

The argument ignores the plain import of § 75 (r). The meaning of the phrase "for the purposes of this section" is hardly open to question. Obviously, it is neither impossible nor necessarily inconsistent to prescribe one definition for a particular section or sections and another for the balance of the Act. Nor is the applicability of § 75 (r) to proceedings under § 75 seriously placed in doubt because the former section refers to a section which no longer exists under that number and to a section which now may be governed by § 1 (17). The only question here is whether § 75 (r) or § 1 (17) is applicable to § 75.

Section 75, with immaterial differences, first appeared in the distressed-debtor legislation of 1933. 47 Stat.

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[2] The latter argument, upon which we express no opinion, is grounded on the statement in H. Rep. No. 1409, 75th Cong., 1st Sess., p. 6, which runs: "The amendment of May 5 (*sic*), 1935 . . . extends the meaning of the term 'farmer.' . . . Correspondingly, section 4 of the act is amended by substituting the phrase 'a farmer' for the language 'a person engaged chiefly in farming or the tillage of the soil.' Pursuant to this purpose of Congress to expand the meaning of the term, it would seem advisable to formulate a new definition and to include it in section 1 as clause (17)."

1467, 1470–1473. Designed for a particular purpose, the relief of hard-pressed farmers, it was regarded as a special and temporary enactment. See § 75 (c); compare S. Rep. No. 1215, 73d Cong., 2d Sess., p. 3; H. Rep. No. 1898, 73d Cong., 2d Sess., p. 2. In 1938 its time limit was extended to 1940. 52 Stat. 84, 85. At that time a special committee held extensive hearings on a proposal to make § 75 a permanent part of the Bankruptcy Act, and finally concluded that the section should be continued only as temporary legislation. Hearings before Special Subcommittee on Bankruptcy of the Committee on the Judiciary, 75th Congress, 2d and 3d Sessions; see also H. Rep. No. 1833, 75th Cong., 3d Sess., p. 2; S. Rep. No. 899, 75th Cong., 1st Sess.; H. Rep. No. 1658, 76th Cong., 3d Sess., p. 2. Naturally enough, legislation drafted for such a purpose carried its own test for determining the persons to whom it should apply.

When the proposed revision of 1938 was before a Senate Committee, Representative Chandler, the proponent of the bill, stated: "We did not touch [§ 75] and it is not affected by this Act." Discussing the alterations in existing statutes worked by the new act, the House Report laconically observed that there was "no change" in § 75. H. Rep. No. 1409, 75th Cong., 1st Sess., p. 144. Somewhat less briefly, the Senate Report stated: "Section 75 relates to agricultural compositions and extensions. These expire by limitation and are, therefore, not covered by the bill." S. Rep. No. 1916, 75th Cong., 3d Sess., p. 18.

The Chandler Act, a careful and comprehensive revision of bankruptcy legislation, was the product of several years of thoughtful study. See 81 Cong. Rec. 8646–8649. One of its avowed purposes was to clarify or remove inconsistent and overlapping provisions. See H. Rep. No. 1409, 75th Cong., 1st Sess., pp. 1–3. As a part of this comprehensive revision, numerous definitions were

overhauled or inserted for the first time. Among the latter was § 1 (17). See H. Rep. No. 1409, *supra*, p. 6. But § 75 (r) also was left in the Act, and, as already indicated, its existence was not unknown to the revisors. Its very presence in the statute after the revision is persuasive evidence that § 1 (17) was not intended to govern proceedings under § 75.

We conclude that petitioner's activities must be tested by the definition in § 75 (r) rather than by the one in § 1 (17). The judgment is reversed and the cause is remanded to the Circuit Court of Appeals for consideration of other questions in light of our decision.

Reversed.

MR. JUSTICE STONE did not participate in the consideration or decision of this case.

UNITED STATES *v.* ALABAMA.

No. 12, original. Argued April 28, 1941.—Decided May 26, 1941.

1. The law of Alabama fixes October 1st of each year as the tax day as of which real property shall be assessed for the taxes of the succeeding tax year, and provides a statutory process whereby, in due course, valuations of properties and amounts of tax are determined. Taxes are made liens on the properties taxed, relating back to the tax day and continuing until the taxes have been paid. The lien is effective not only against the owner on the tax day but also against subsequent purchasers. *Held*:

   (1) That the tax lien is not objectionable under the Federal Constitution as applied to a purchaser who bought on or after the tax day and before the amount of the tax had been fixed by levy and assessment. P. 279.

   (2) The fact that the purchaser, in such circumstances, was the United States did not invalidate the lien. P. 281.

   (3) Such a lien can not be enforced against the United States without its consent. P. 281.

2. A proceeding against property in which the United States has an interest is a suit against the United States. P. 282.

THIS was a suit brought in this Court by the United States against the State of Alabama in which the plaintiff sought to have removed, as clouds on its title, tax liens imposed under the law of the State upon lands purchased by the plaintiff.

The Court decrees that tax sales and certificates of purchase, resulting from proceedings in an Alabama county court for enforcement of the liens, shall be set aside, but in other respects the bill is dismissed.

Assistant Attorney General Littell, with whom *Attorney General Jackson* and *Solicitor General Biddle* were on the brief, for the United States.

The lands were acquired before the time when, by completion of levy and assessment, the amounts of state taxes had been ascertained. They are therefore not subject to liens for the taxes.

Two things are requisite for the ascertainment of an *ad valorem* tax: The tax rate must be fixed and the property must be valued. On October 1, 1936, only the state tax rate was fixed. The lands had not been valued and the county and school tax rates had not been fixed. And when the three tracts were acquired by the United States, the taxes were still unascertained. If the assessments had not been thereafter determined and the additional levies made, the taxes would never have been imposed. See *Bannon* v. *Burnes,* 39 F. 892, 898; *Portland* v. *Multnomah County,* 135 Ore. 469, 473.

The ascertainment of the taxes after acquisition of the lands by the United States, could not impose any liability upon the lands. The State could still levy and assess for the purpose of imposing a personal liability on the former owners. But the property of the United States is not subject to state taxation. *Van Brocklin* v. *Tennessee,* 117 U. S. 151, 179–180; *Clallam County* v. *United States,* 263 U. S. 341, 345; *Lee* v. *Osceola Imp.*

Dist., 268 U. S. 643, 645; *Mullen Benevolent Corp.* v. *United States*, 290 U. S. 89, 94–95.

The Alabama lien statute did not *per se* make the lands liable for taxes. It neither fixes rates of taxation nor enumerates subjects of taxation. It does not impose taxes but secures their payment. Unless taxes are imposed, § 372 accomplishes nothing. Cf., *Heine* v. *Levee Commissioners*, 19 Wall. 655, 659. *In re Opinions of the Justices*, 234 Ala. 358. The declaration that the lien attaches as of October 1, when the procedure of imposing the tax commences, does not do away with the necessity of completing that procedure. Nor will it cure any defect of procedure. See *Gaston* v. *Reconstruction Finance Corporation*, 237 Ala. 111, 112; *Lewis* v. *Burch*, 215 Ala. 20, 21; *Laney* v. *Proctor*, 236 Ala. 318, 320.

The statutory declaration of a lien for taxes imposes no liability upon property conveyed to the United States before, by completion of levy and assessment, the taxes have been ascertained. *Bannon* v. *Burnes*, 39 F. 892, 897, 898; *United States* v. *Pierce County*, 193 F. 529, 532–533; *Territory* v. *Perrin*, 9 Ariz. 316, 320; see, also, *United States* v. *City of Buffalo*, 54 F. 2d 471, 474; cert. den. 285 U. S. 550; *United States* v. *Certain Lands in City of St. Louis, Mo.*, 29 F. Supp. 92, 96; 3 Cooley, Taxation (4th ed. 1924), § 1232, n. 13, pp. 2454–2455; Berg, The Status of Taxes Relative to Land Acquired by the United States, 16 Ore. L. Rev. 340–356; 48 L. R. A. (N. S.) 708–712. See also, *New York* v. *Maclay*, 288 U. S. 290, 294.

Nor does a declaration of lien like that of the Alabama statute impose liability upon property when, before ascertainment of taxes, the power to tax is lost by reason of acquisition of the property by a State or one of its political subdivisions, *State* v. *Snohomish County*, 71 Wash. 320, 322–326; *Portland* v. *Multnomah County*, 135 Ore. 469, 473; *City of Laurel* v. *Weems*, 100 Miss. 335,

340–341, or is lost because the property is disconnected from the territory of the taxing power, *Gillmor* v. *Dale*, 27 Utah 372, 377; *State ex rel. Hinson* v. *Nickerson*, 99 Neb. 517, 520, or because the legislature divests the taxing body of power to tax. *Denver* v. *Research Bureau*, 101 Colo. 140, 144 *et seq.* See, also, *United States* v. *Pierce County*, 193 F. 529, 533.

The probate court was without jurisdiction to decree that the lands of the United States be sold to pay the taxes.

Messrs. J. Edward Thornton and *John W. Lapsley*, Assistant Attorneys General of Alabama, with whom *Mr. Thomas S. Lawson*, Attorney General, was on the brief, for the State of Alabama.

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

The United States brought this suit to quiet its title to land in Macon County, Alabama. The complaint alleges that the State of Alabama is asserting liens as attaching to the land on October 1, 1936, for state and county taxes for the tax year 1937; and further that the State claims an interest in the land by reason of tax sales and the issue to the State of certificates of purchase. The Government asks a decree declaring the liens, tax sales and certificates of purchase to be invalid and enjoining the State from asserting its claims. The case was heard on bill and answer.

There are three tracts involved, which were conveyed by the owners to the United States on October 1, 1936, December 10, 1936, and March 10, 1937, respectively.

The applicable statute of Alabama[1] provides that "From and after the first day of October of each year,

[1] Section 372, Act No. 194, General Acts Alabama, 1935, p. 566, is as follows:

"From and after the first day of October of each year, when property becomes assessable the State shall have a lien upon each and

when property becomes assessable the State shall have a lien upon each and every piece or parcel of property owned by any taxpayer for the payment of all taxes which may be assessed against him . . . which lien shall continue until such taxes are paid." The county is to have a like lien for taxes assessed by it. These liens are made superior to all other liens and may be enforced by sale as provided in the Act.

Under the statute, the process of assessment for the tax year 1937 began on October 1, 1936. The grantors in the above mentioned conveyances, as the respective owners on that date, made their returns and in due course the tax assessor listed and valued the several tracts.[2] His

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every piece or parcel of property owned by any taxpayer for the payment of all taxes which may be assessed against him and upon each piece and parcel of property real or personal assessed to owner unknown which lien shall continue until such taxes are paid, and the county shall have a like lien thereon for the payment of the taxes which may be assessed by it; and if such property is within the limits of a municipal corporation such municipal corporation shall have a like lien thereon for the payment of the taxes which may be assessed by it These liens shall be superior to all other liens and shall exist in the order named and each of such liens may be enforced and foreclosed by sale for taxes as provided in this Act, or as other liens upon property are enforced."

The State also cites § 8874 of Article 6, Chapter 314, of the Code of Alabama, 1923, which provides:

"From and after the first day of October of each year, the state shall have a prior lien upon each and every piece or parcel of property, real or personal, for the payment of any and all taxes which may be assessed against the owner, or upon such property, during that year, for the use of the state; and the county shall have a like lien thereon for the payment of the taxes which may be assessed against such owner, or upon such property, during that year, for the use of the county; and these liens shall exist as to all lands bid in by the state at tax sales for the annual taxes thereafter assessed on the value of the property so purchased, in the event of the tax title failing."

[2] Act No. 194, General Acts Alabama, 1935, § 29, p. 274.

valuations were certified as provided by the statute to the county board of review, which by virtue of its authority to fix valuations, made the definitive assessments.[3] It appears that the board of review met on March 8, 1937, and adjourned on March 20, 1937. It also appears that the rate for state taxes had been fixed by the statute,[4] and the rate for county taxes was set on February 8, 1937, under the authority given to the court of county commissioners.[5] The school district tax was approved by the electors of the school district at an election held on June 14, 1937. The taxes for the year 1937 became payable on October 1, 1937, and became delinquent on January 1, 1938.[6] Proceedings were then instituted in the county court for the sale of the lands, and under its decrees the sales took place on June 12, 1939. The lands were sold to the State and certificates of purchase were issued accordingly.

First. The Government, invoking the principle that lands owned by the United States cannot be taxed by a State (*Van Brocklin* v. *Tennessee,* 117 U. S. 151), contends that the asserted liens are without validity because at the time the tracts were acquired by the United States the amount of the taxes had not been ascertained, as the values had not then been assessed and the rates of taxation had not been fixed. Therefore it is said that the taxes had not then been imposed. The argument is that the Alabama tax statute does not "impose taxes" but "secures their payment" and that unless taxes are imposed the statute has no effect. The lien, it is urged, becomes "fixed and final" only when the taxes have been ascertained "by completion of levy and assessment."

There is no question however, as the Government concedes, that the state statute purports to impose a lien as

[3] *Id.,* §§ 50, 72, pp. 284, 292.
[4] *Id.,* § 7, p. 263.
[5] *Id.,* § 64, p. 288.
[6] *Id.,* § 11, p. 267.

of October 1, 1936, for the taxes which by the process of assessment were to become payable for the tax year 1937. October first is fixed as the tax day, and as of that day owners are to make their returns, values are to be fixed and the taxes laid. There is no question that the State thus undertakes to create an inchoate lien upon the lands as of the tax day, a lien which is to be effective for the amount of the taxes for the ensuing year as these are fixed by the defined statutory method. This lien by the state law is made effective not only as against the owners on the tax day but also as against subsequent mortgagees and purchasers. "It follows the land in the hands of the vendee, all persons being chargeable with a knowledge of its existence." *Driggers* v. *Cassaday,* 71 Ala. 529, 534. See, also, *Swann* v. *State,* 77 Ala. 545; *State* v. *Alabama Educational Foundation,* 231 Ala. 11, 16; 163 So. 527. We find nothing in the Federal Constitution which invalidates such a statutory scheme. Subsequent lienors and purchasers have due notice of the tax liability imposed as of the tax day and of the process of assessment, and that liability, when its amount is definitely ascertained, relates back to the day specified. We recognized the validity of such a provision in *New York* v. *Maclay,* 288 U. S. 290, 292, where we observed that a tax lien created in a similar manner under a statute of New York "is effective for many purposes though its amount is undetermined. It is notice to mortgagees or purchasers, who are held to loan or purchase at their own risk if they take their mortgages or deeds before the tax has been assessed or paid." The precise decision in that case allowing priority to the United States under R. S. 3466 for debts due by an insolvent corporation over claims of the State for franchise taxes due but not assessed or liquidated until after a receivership, in no way detracted from the recognition of the effectiveness of the state law creating a lien as against mortgagees and purchasers. As the court said,

"Against mortgagees and purchasers a lien perfected afterwards may take effect by relation as of the date of the inchoate lien through which mortgagees and purchasers become chargeable with notice." *Id.*, p. 293. See also, *Osterberg* v. *Union Trust Co.*, 93 U. S. 424, 425, 428; *People* v. *Commissioners*, 104 U. S. 466, 468. Compare *Shotwell* v. *Moore*, 129 U. S. 590, 598. The lien in such a case, though inchoate on the day specified, and maturing when the extent of liability is ascertained by the statutory process, is similar in that respect, as the court said in the *Maclay* case, to the lien of a transfer tax or duty upon the estate of a decedent which is effective although the amount is ascertained after death.

Our present inquiry is whether, assuming the validity of the state statute creating a lien as of October 1, 1936, as against other subsequent purchasers, it should be deemed invalid as against the United States. The question is not whether such a lien could be enforced against the United States. The fact that the United States had taken title and that proceedings could not be taken against the United States without its consent would protect it against such enforcement. But that immunity would not be predicated upon the invalidity of the lien. If in this instance title had been taken by the United States in the summer of 1937 after the amount of the taxes had been ascertained and the respective liens were concededly valid, still proceedings against the United States could not be prosecuted without its consent.

The Government is not content with that measure of protection. The Government brings this suit in the view that it is entitled to have a marketable title and it seeks to remove the liens in question as clouds upon that title which would interfere with the disposition of the lands in the future. From that standpoint the Government asks a decree declaring the invalidity of the liens and enjoining the State from asserting any claim in the lands

either adverse to the United States or to its successors in title. We think that the United States is not entitled to that relief. The United States took the conveyances with knowledge of the state law fixing the lien as of October 1st. That law in creating such liens for the taxes subsequently assessed in due course and making them effective as against subsequent purchasers did not contravene the Constitution of the United States and we perceive no reason why the United States, albeit protected with respect to proceedings against it without its consent, should stand, so far as the existence of the liens is concerned, in any different position from that of other purchasers of lands in Alabama who take conveyances on and after the specified tax date. It is familiar practice for grantees who take title in such circumstances to see that provision is made for the payment of taxes and the Government could easily have protected itself in like manner. Finding no constitutional infirmity in the state legislation, we think that the liens should be held valid.

We make no exception of the tract conveyed to the United States on the tax day, October 1, 1936, as we think the state statute, as contended by the State, is to be deemed effective from the moment the tax day began. See *Beck* v. *Johnson,* 235 Ala. 323, 324; 179 So. 225.

Second. With respect to the tax sales the case has a different aspect. The proceedings in the county court for the sale of the lands were taken and the decrees were rendered after the United States had become the owner of the tracts. 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. The United States was an indispensable party to proceedings for the sale of the lands, and in the absence of its consent to the prosecution of such proceedings, the county court was without jurisdiction and its decrees, the tax sales and the certificates of purchase issued to the State were void. *Minnesota* v. *United States,* 305 U. S. 382, 386. While

pleading to the contrary in its answer, the invalidity of the tax sales is now conceded by the State.

The United States is entitled to a decree setting aside the tax sales and the certificates of purchase, and in other respects the complaint is dismissed.

It is so ordered.

CITY OF NEW YORK *v.* FEIRING, TRUSTEE IN BANKRUPTCY.

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

No. 863. Argued May 7, 1941.—Decided May 26, 1941.

1. The question whether an obligation to a State is a tax entitled to priority under § 64 of the Bankruptcy Act is a federal question. P. 285.
2. The Bankruptcy Act is of nationwide application and § 64 thereof is not to be construed or varied by the particular characterization by local law of the state's demand. P. 285.

   Provisions of the state law creating the obligation and decisions of the state courts interpreting them are resorted to not to learn whether they have denominated the obligation a "tax" but to ascertain whether its incidents are such as to constitute a tax within the meaning of § 64.
3. The tax imposed by the New York City Sales Tax Law is a tax on the seller within the meaning of § 64 of the Bankruptcy Act, as well as on the buyer, since both are made liable for payment *in invitum* and subject to distraint of their property for its collection. P. 287.

   It is not any the less a tax laid on the seller because the statute places a like burden in the alternative on the purchaser or because it affords to the seller facilities of which he did not avail himself to pass the tax on to the buyer.

118 F. 2d 329, reversed.

CERTIORARI, *post*, p. 552, to review the affirmance of an order of the District Court refusing priority of payment to a tax claim asserted by the City of New York under § 64 of the Bankruptcy Act.

Mr. Paxton Blair, with whom *Messrs. William C. Chanler, Sol Charles Levine,* and *Morris L. Heath* were on the brief, for petitioner.

Mr. Benjamin Siegel for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

The question is whether the obligation imposed upon sellers by a New York City sales tax (No. 20, Local Laws of New York City, 1934, as amended, No. 24, Local Laws of New York City, 1934), to pay a tax laid upon receipts from sales of personal property and collectible alternatively from the buyer or the seller is a "tax" entitled to priority of payment in bankruptcy under § 64 of the Bankruptcy Act.

Petitioner, New York City, filed its claim against the estate of the bankrupt for taxes on sales of tangible property by the bankrupt during the five years following January 10, 1934. In the proceeding before the referee it appeared that the bankrupt had failed to collect most of the taxes from its buyers as required by the applicable law, and that the sole issue was with respect to the right of the City to priority of payment of the City's claim over those of general creditors. The District Court set aside the referee's order allowing the priority and the Court of Appeals for the Second Circuit affirmed, 118 F. 2d 329, holding that the sum claimed was not a tax, but that the "bankrupt was liable to the city as a tax collector who owes as a debt the amount of taxes collected or to be collected." We granted certiorari April 14, 1941, because of the suggested failure of the court below to follow our decision in *New York City* v. *Goldstein,* 299 U. S. 522, reversing *In re Lazaroff,* 84 F. 2d 982, and of the asserted conflict in principle of the decision below with that of the Court of Appeals for the Tenth Circuit in *Barbee* v. *Oklahoma Tax Commission,* 103 F. 2d 114.

Section 64 of the Bankruptcy Act, as amended June 22, 1938, 52 Stat. 840, 874, awards priority of payment, in bankruptcy, to "taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof . . ." Whether the present obligation is a "tax" entitled to priority within the meaning of the statute is a federal question. *New Jersey* v. *Anderson,* 203 U. S. 483, 491; cf. *Burnet* v. *Harmel,* 287 U. S. 103, 110; *Palmer* v. *Bender,* 287 U. S. 551, 555; cf. *United States* v. *Pelzer,* 312 U. S. 399. Intended to be nation-wide in its application, nothing in the language of § 64 or its legislative history suggests that its incidence is to be controlled or varied by the particular characterization by local law or the state's demand. Hence we look to the terms and purposes of the Bankruptcy Act as establishing the criteria upon the basis of which the priority is to be allowed.

As was pointed out in *New Jersey* v. *Anderson, supra,* 491, the priority commanded by § 64 extends to those pecuniary burdens laid upon individuals or their property, regardless of their consent, for the purpose of defraying the expenses of government or of undertakings authorized by it. The particular demand for which the City now claims priority of payment as a tax is created and defined by state enactment. We turn to its provisions and to the decisions of the state courts in interpreting them, not to learn whether they have denominated the obligation a "tax" but to ascertain whether its incidents are such as to constitute a tax within the meaning of § 64. Cf. *Morgan* v. *Commissioner,* 309 U. S. 78, 80, 81 and cases cited; *United States* v. *Pelzer, supra; Ryerson* v. *United States,* 312 U. S. 405.

The present exaction is that which was considered, and its constitutionality sustained, in *McGoldrick* v. *Berwind-White Co.,* 309 U. S. 33. The discussion of it there will be supplemented here only so far as is needful for the

disposition of the issue now before us. It was enacted by the municipal assembly of New York City as an emergency revenue measure to defray the expense of unemployment relief, pursuant to authority conferred by the state legislature. Ch. 815, New York Laws 1933; Ch. 873, New York Laws 1934. Originally No. 24 of New York Local Laws, 1934, it has since been annually renewed with minor amendments not now material. Section 2 lays a tax upon receipts from retail sales in New York City of tangible personal property, and requires the seller, with exceptions not now material, to charge the buyer with the amount of the tax, separately from the sales price and to collect the tax from him. Penalties are imposed by § 15 for the seller's willful failure to comply with these requirements. Section 2 also commands that the tax "shall be paid by the purchaser to the vendor, for and on account of the City of New York." Section 5 requires the seller to file with the City Comptroller a "return of his receipts and of the taxes payable thereon" for prescribed periods. Section 6 requires the seller, at the time of filing a return to pay to the Comptroller the taxes upon all receipts required to be included in his return and also provides that "all taxes for the period for which a return is required to be filed shall be due from the vendor and payable to the Comptroller on the date limited for the filing of the return for such period, without regard to whether a return is filed or whether the return which is filed correctly shows the amount of receipts and the taxes due thereon." But if the seller fails to collect the tax § 2 also makes it the duty of the purchaser to file a return with the Comptroller and commands that "such tax shall be payable by the purchaser directly to the Comptroller."

By § 8, whenever either the seller or purchaser "shall fail to collect or pay over any tax and/or to pay any tax" imposed by the law, the City is authorized to bring an

action for its recovery or, as an alternative remedy, the Comptroller is authorized to issue a warrant directed to the sheriff of the county, commanding him to levy upon and sell the real and personal property of the seller or the purchaser and apply the proceeds to the payment of the tax. In construing these provisions the New York Court of Appeals has held that while the Comptroller may proceed under § 2 to collect the tax from the purchaser if he has not paid it to the seller, see *Matter of Kesbec, Inc.* v. *McGoldrick,* 278 N. Y. 293; 16 N. E. 2d 288, the duty to pay the tax is also laid upon the seller whether he has in fact collected it and regardless of his ability to collect it from the buyer. *Matter of Atlas Television Co.,* 273 N. Y. 51; 6 N. E. 2d 94; *Matter of Brown Printing Co.,* 285 N. Y. 47; 32 N. E. 2d 787.

The statute thus contains provisions which in its normal operation are calculated to enable the seller to shift the tax burden to the purchaser, see *Matter of Kesbec, Inc.* v. *McGoldrick, supra,* 297; *Matter of Merchants Refrigerating Corp.* v. *Taylor,* 275 N. Y. 113, 124; 9 N. E. 2d 799; cf. *McGoldrick* v. *Berwind-White Co., supra,* 43, 44. But it is plain that both the vendor and the vendee are made liable for payment of the tax *in invitum* without regard to those provisions by which the seller may shift the incidence of the tax to the buyer and the tax may be summarily collected by distraint of the property of either the seller or the buyer. A pecuniary burden so laid upon the bankrupt seller for the support of government, and without his consent, thus has all the characteristics of a tax entitled to priority of payment in bankruptcy within the meaning of § 64 of the Bankruptcy Act. *New Jersey* v. *Anderson, supra.* Cf. *United States* v. *Updike,* 281 U. S. 489, 494. It is not any the less a tax laid on the seller because the statute places a like burden in the alternative on the purchaser or because it affords to the seller facilities of which he did not avail himself to pass

the tax on to the buyer. While an action in debt may be resorted to for the recovery of a tax, it is evident that in this case the bankrupt is liable to the state only because it owes a tax. *Price* v. *United States,* 269 U. S. 492, 500; *Milwaukee County* v. *White Co.,* 296 U. S. 268, 271.

In *New York City* v. *Goldstein, supra,* we reversed *per curiam,* citing *Matter of Atlas Television Co., supra,* a decision of the Court of Appeals for the Second Circuit that a claim of the City for payment of tax by the seller was not entitled to priority under § 64 of the Bankruptcy Act. The court below attributed our reversal to the circumstances that at that time, though not now, § 64 allowed priority to debts entitled to priority under state law, and to the decision of the state court in the *Atlas* case, that upon a general assignment for the benefit of creditors made under state law a claim against the seller for the sales tax was entitled to priority. But in placing this interpretation upon our decision in the *Goldstein* case the court below overlooked the fact that the Court of Appeals ruled in the *Atlas* case that an ordinary debt due the state is not entitled to priority by state law, and it sustained the priority in that case only on the ground that the demand was for a tax, the unqualified duty to pay which was placed by the statute on the seller. This interpretation of the state statute was reaffirmed by that court in the *Matter of Brown Printing Co., supra.* For reasons already given, the duty imposed upon the seller by the taxing act thus construed is also a tax within the meaning of § 64 of the Bankruptcy Act.

Reversed.

MR. JUSTICE ROBERTS thinks the judgment should be affirmed for the reasons stated by the Circuit Court of Appeals.

ROYAL INDEMNITY CO. *v.* UNITED STATES.

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

No. 817. Argued May 7, 1941.—Decided May 26, 1941.

1. Collectors of Internal Revenue are subordinate officers charged with the ministerial duty of collecting taxes; and in the absence of any statute granting the authority, they can not release a bond to the Goverment of the United States securing payment of a tax. Only the Commissioner of Internal Revenue, with the consent of the Secretary of the Treasury, is authorized to compromise a tax deficiency for a sum less than the amount lawfully due. P. 294.
2. The rule against allowing interest as damages for delay in paying interest alone, is inapplicable to an action to enforce a surety's agreement to pay a tax with interest found due to the Government under the revenue laws. P. 295.
3. A suit upon a contractual obligation to pay money at a fixed or ascertainable time is a suit to recover damage for its breach, including both the principal amount and interest by way of damage for delay in payment of the principal, after the due date. And, in the absence of any controlling statutory regulation, the trial court is as competent to determine the amount of interest for delay as any other item of damage. P. 295.
4. In the absence of an applicable federal statute, it is for the federal courts to determine, according to their own criteria, the appropriate measure of damage, expressed in terms of interest, for delayed payment of a contractual obligation of the United States. P. 296.
5. In an action at law by the United States to recover an amount due and owing from a taxpayer's surety, equitable rules governing interest recoverable in suits for an accounting or for recovery on quasi-contractual obligations are inapplicable, and interest upon the principal sum from the date of default, at a fair rate, is an appropriate measure of damage for the delay in payment. P. 296.
6. In the circumstances of this case, a suitable rate of interest is that prevailing in New York, the State where the obligation was contracted and to be performed. P. 297.

116 F. 2d 247, affirmed.

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CERTIORARI, *post*, p. 552, to review a judgment affirming with modification a recovery by the United States in an action against the surety on a taxpayer's bond.

Mr. Harry S. Hall, with whom *Mr. Nathaniel E. Wheeler* was on the brief, for petitioner.

The Collector of Internal Revenue was vested with implied power to cancel the surety bond and to discharge from liability thereon. 26 U. S. C. § 1541 (a); R. S. 3183; 26 U. S. C. § 1549 (b). See *United States* v. *Wolper*, 86 F. 2d 715; *United States* v. *Royal Indemnity Co.*, 116 F. 2d 247, 248; *United States* v. *Fidelity & Deposit Co.*, 80 F. 2d 24, cert. den. 298 U. S. 665.

This implied power derives from his express powers in the collection of taxes. *Heinemann Chemical Co.* v. *United States*, 92 F. 2d 302, 303, 304; *Brewerton* v. *United States*, 9 F. Supp. 503, 507. Cf., *United States* v. *Alexander*, 110 U. S. 325, 328. The Government's acquiescence in the practice points persuasively to the existence of such implied power.

In the collection of taxes, the Collector is not a subordinate official of the Government. 26 U. S. C. § 1541 (a). He has no superior vested with power or authority to direct and control him in the performance of his duties. *State ex rel. Landis* v. *Blake*, 110 Fla. 178, 181; *People ex rel. Jacobus* v. *Van Wyck*, 157 N. Y. 495, 506; *Kane* v. *Erie R. Co.*, 142 F. 682, 685; *In re Weaver*, 131 N. Y. S. 144, 145.

The Collector is vested with power to collect taxes without direction as to how it is to be exercised. He therefore has discretion in the exercise of the power. *State* v. *Superior Court*, 98 P. 2d 985, 900; *State* v. *Hildebrant*, 93 Oh. 1, 11, 12; *Thompson* v. *United States*, 9 Ct. Cls. 187, 197, 198; *American Stores Co.* v. *United States*, 68 Ct. Cls. 128; *Levy* v. *United States*, 63 Ct. Cls. 126; *United States* v. *West Point Grocery Co.*, 30 F. 2d 941;

United States v. *Corliss Steam Engine Co.*, 91 U. S. 321, 322, 323.

To the same point, see *Great Falls Mfg. Co.* v. *Attorney General*, 124 U. S. 581, 596, 597; *Maryland Steel Co.* v. *United States*, 235 U. S. 451, 459; *United States* v. *Mason & Hangar Co.*, 260 U. S. 323, 325; *Wells* v. *Nickles*, 104 U. S. 444; *Brooks* v. *United States*, 39 Ct. Cls. 494, 505; *Haynes* v. *Butler*, 30 Ark. 69; *Reliance Mfg. Co.* v. *Board of Prison Commissioners*, 161 Ky. 135, 142; *State* v. *Younkin*, 108 Kan. 634, 638; *State ex rel. Bybee* v. *Hackmann*, 276 Mo. 110, 116; *State* v. *District Court*, 19 N. D. 819; *Kasik* v. *Janssen*, 158 Wis. 606, 609, 610; *City of Wilburton* v. *King*, 18 P. 2d 1075, 1076; *Mayor* v. *Sands*, 105 N. Y. 210, 217–220.

The interest claimed by respondent is that provided by New York General Business Law, Consol. Laws, c. 20, § 370, as damages for breach of contract. This interest is not provided for in the bond; and is therefore not a part of the contract and cannot be recovered as such. If recoverable at all, it is by way of damages for the detention of money after it is due.

Interest is the compensation allowed by law, or fixed by the parties, for the use or forbearance of money, or as damages for its detention. *Loudon* v. *Shelby County Taxing District*, 104 U. S. 771, 774; *New Orleans Ins. Assn.* v. *Piaggio*, 16 Wall. 378, 386; *Hiatt* v. *Brown*, 15 Wall. 177, 185, 186.

The law allows interest only on the ground of a contract, express or implied, for its payment, or as damages for the detention of money, or for the breach of some contract, or the violation of some duty. *Morley* v. *Lake Shore R. Co.*, 146 U. S. 162, 168; *New York Trust Co.* v. *Detroit R. Co.*, 251 F. 514; *Herman H. Hettler Lumber Co.* v. *Olds*, 242 F. 456, 459.

Interest which might have been prevented by reasonable and diligent efforts on the part of respondent in

promptly asserting and prosecuting its claim is not recoverable. *Warren* v. *Stoddard,* 105 U. S. 224, 229; *Wicker* v. *Hoppock,* 6 Wall. 94; *Western Real Estates Trustees* v. *Hughes,* 172 F. 206 211; *Lillard* v. *Kentucky Distillers & Warehouse Co.,* 134 F. 168, 178.

Where such interest is claimed, laches is a bar to recovery. *United States* v. *Sanborn,* 135 U. S. 271, 281, 282; *Redfield* v. *Ystalyfera Iron Co.,* 110 U. S. 174; *Redfield* v. *Bartels,* 139 U. S. 694; *Mason* v. *Walkowich,* 150 F. 699, 700, 706; *Jouralmon* v. *Ewing,* 80 F. 604, 607, 608; *Stewart* v. *Schell,* 31 F. 65, 66; *Mitchell* v. *Kelsey,* Fed. Cas. No. 9,664. The same rule has been held by this Court to apply to the United States. *United States* v. *Sanborn, supra.*

Mr. Edward J. Ennis, with whom *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Lee A. Jackson* were on the brief, for the United States.

Mr. Justice Stone delivered the opinion of the Court.

A collector of internal revenue, who had accepted a surety bond filed with him by a taxpayer to accompany his claim for abatement of income tax, consented to termination of all liability upon the bond and surrendered it before its obligation was fully satisfied. The questions for decision are whether the collector had power to release the obligation of the bond and, if not, whether the United States is entitled to interest on the amount of its claim against the surety.

Upon the Commissioner's assessment in 1920 of additional income taxes in the sum of $29,128, asserted to be due from the taxpayer for 1917, the taxpayer filed a claim for abatement of the assessment, and to secure suspension of collection of the tax, executed a bond to the

collector in the sum of $38,000 with petitioner as surety, conditioned upon payment on May 2, 1923, of the tax with interest. The Commissioner allowed the claim in abatement in part but rejected it to the extent of $8,223.38, on which interest had then accrued in the sum of $4,169.07. On demand of the Commissioner on August 5, 1926, for the principal amount of the tax with interest to the date of demand, petitioner paid only the principal amount of the tax to the collector by draft of December 17, 1926, bearing the notation on its face that it was in full payment of the tax and of all liability on the bond. The collector collected the draft and surrendered the bond to petitioner with the statement that all liability on it had terminated.

In the present suit on the bond the District Court held that the collector was without authority to release the bond and gave judgment for the sum of $4,169.07, found by the Commissioner to be the interest on the unpaid tax to the date of the rejection of the claim for its abatement, but refused to allow interest accruing subsequent to that date. On appeal the Circuit Court of Appeals ruled that, under § 370 of the New York General Business Law, interest at six per cent. should be added to the unpaid balance found to be due on the bond, and modified the judgment accordingly. 116 F. 2d 247. We granted certiorari April 7, 1941, because of the importance of the questions presented, and of a conflict of the decision below with that of the Circuit Court of Appeals for the Third Circuit in *Heinemann Chemical Co.* v. *United States,* 92 F. 2d 302.

It is not denied that the collector had authority to accept the bond, that it created a new cause of action distinct from that on the taxpayer's obligation, and that, if it has not been released, the United States has authority to sue upon it, see *United States* v. *John Barth Co.,* 279 U. S. 370; *Gulf States Steel Co.* v. *United States,* 287

U. S. 32; *United States* v. *Wolper,* 86 F. 2d 715; *United States* v. *Oswego Falls Corp.,* 113 F. 2d 322. And it is conceded that, as the bond was conditioned on the payment of the taxes with interest, petitioner is indebted to the Government upon it for the amount of the interest which had accrued at the time of the rejection of the claim in abatement. See *Botany Worsted Mills* v. *United States,* 278 U. S. 282; *Hughson* v. *United States,* 59 F. 2d 17, 19; *United States* v. *Steinberg,* 100 F. 2d 124, 126. Respondent's contentions are that the balance of interest then due was released by the collector and that in any case it was not bound to pay interest on that balance.

Power to release or otherwise dispose of the rights and property of the United States is lodged in the Congress by the Constitution. Art. IV, § 3, Cl. 2. Subordinate officers of the United States are without that power, save only as it has been conferred upon them by Act of Congress or is to be implied from other powers so granted. *Whiteside* v. *United States,* 93 U. S. 247, 256–257; *Hart* v. *United States,* 95 U. S. 316, 318; *Hawkins* v. *United States,* 96 U. S. 689, 691; *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 409; *Wilber National Bank* v. *United States,* 294 U. S. 120, 123–124; cf. *United States* v. *Shaw,* 309 U. S. 495, 501; *Ritter* v. *United States,* 28 F. 2d 265; *United States* v. *Globe Indemnity Co.,* 94 F. 2d 576. Collectors of internal revenue are subordinate officers charged with the ministerial duty of collecting the taxes. R. S. § 3183, *Erskine* v. *Hohnbach,* 14 Wall. 613, 616; *Harding* v. *Woodcock,* 137 U. S. 43, 46; *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373, 380, 381. There is no statute in terms authorizing them to remit taxes, to pass upon the claims for abatement of taxes, or to release any obligation for their payment. Only the Commissioner, with the consent of the Secretary of the Treasury, is authorized to compromise a tax deficiency for a sum less than

the amount lawfully due. R. S. §§ 3220, 3229, 26 U. S. C. 1661; 45 T. R., Art. 1011 (1918 Act); *Botany Worsted Mills* v. *United States, supra,* 288; *Loewy & Son* v. *Commissioner,* 31 F. 2d 652, 654.

There is thus no basis in the statutes of the United States for implying an authority in a collector to release a bond for the payment of the tax which the Commissioner alone is permitted to reduce by way of compromise when the Secretary of the Treasury consents. *Heinemann Chemical Co.* v. *United States, supra,* and *Brewerton* v. *United States,* 9 F. Supp. 503, to the contrary, plainly rest upon a misapplication of the ruling in *United States* v. *Alexander,* 110 U. S. 325, which sustained the release of a bond for taxes by the Secretary of the Treasury which had been specifically authorized by an Act of Congress.

The District Court rejected the Government's claim for interest upon the balance found due upon the bond as a demand for interest on interest, which has generally been held not to be an appropriate measure of damages for the delayed payment of interest alone. See *Cherokee Nation* v. *United States,* 270 U. S. 476, 490. In any case, it thought that the allowance of interest would be inequitable because of the collector's return of the bond to petitioner and the Government's delay in bringing the suit. But, as the Court of Appeals held, the obligation of petitioner to pay the interest accrued on the principal amount of tax under the applicable provisions of the Revenue Act was not damage assessed against petitioner for its nonpayment of interest. Petitioner's obligation was contractual to pay an amount found to be due from the taxpayer, and the suit against it is for a debt *ex contractu,* due and owing in conformity to the terms of the bond. See *United States* v. *John Barth Co., supra; Gulf States Steel Co.* v. *United States, supra.*

A suit upon a contractual obligation to pay money at a fixed or ascertainable time is a suit to recover damage

for its breach, including both the principal amount and interest by way of damage for delay in payment of the principal, after the due date. And in the absence of any controlling statutory regulation the trial court is as competent to determine the amount of interest for delay as any other item of damage. *United States* v. *United States Fidelity Co.*, 236 U. S. 512, 528; *Young* v. *Godbe*, 15 Wall. 562, 565; *Maryland Casualty Co.* v. *United States*, 76 F. 2d 626; *United States* v. *Wagner*, 93 F. 2d 77; *United States* v. *Hamilton*, 96 F. 2d 878; *Massachusetts Bonding & Ins. Co.* v. *United States*, 97 F. 2d 879, 881.

But the rule governing the interest to be recovered as damages for delayed payment of a contractual obligation to the United States is not controlled by state statute or local common law. In the absence of an applicable federal statute, it is for the federal courts to determine, according to their own criteria, the appropriate measure of damage, expressed in terms of interest, for non-payment of the amount found to be due. *Board of County Commissioners* v. *United States*, 308 U. S. 343, 350, 352; *Young* v. *Godbe, supra*, 565; cf. *Billings* v. *United States*, 232 U. S. 261, 284, *et seq.*

The present suit is at law for the recovery of an amount due and owing, which petitioner has contracted to pay. To such a case, equitable rules relating to interest recoverable in suits for an accounting, or for recovery on quasi-contractual obligations arising from payment of money by mistake, are inapplicable. *United States* v. *United States Fidelity Co., supra*, 528; cf. *Redfield* v. *Ystalyfera Iron Co.*, 110 U. S. 174, 176; *United States* v. *Sanborn*, 135 U. S. 271, 281; *Redfield* v. *Bartels*, 139 U. S. 694, 702. Here, responsibility for delay in payment rests quite as much upon the debtor, who is chargeable with knowledge of its own obligation and the breach of it, as upon the creditor. And in the meantime the debtor has had the use of the money, of which its default has de-

prived the creditor. Interest upon the principal sum from the date of default, at a fair rate, is therefore an appropriate measure of damage for the delay in payment. *United States* v. *United States Fidelity Co., supra,* 528; *Massachusetts Bonding & Ins. Co.* v. *United States, supra. United States* v. *Wagner, supra; Maryland Casualty Co.* v. *United States, supra.* While the New York statute fixing the rate of interest is not controlling, the allowance of interest does not conflict with any state or federal policy, and we think that, in the circumstances of this case, a suitable rate is that prevailing in the state where the obligation was given and to be performed. See *Young* v. *Godbe, supra,* 565; *Board of County Commissioners* v. *United States, supra,* 352.

Affirmed.

MR. JUSTICE BLACK, dissenting:

I agree with the Court's judgment that the Collector of Internal Revenue did not have power to release a taxpayer from his obligation to pay, but I am unable to agree with the Court's conclusions on the question of interest. The contract on which the Government's suit rests contained no provision for interest. The state's interest law, according to the holding of the Court, is not controlling. Congress has enacted no law requiring payment of interest and fixing an interest rate on contracts guaranteeing tax payments. Nevertheless, this Court now requires that interest be paid—a judicial requirement which under similar circumstances has been frankly described as "judicial law-making." *Board of County Commissioners* v. *United States,* 308 U. S. 343, 350.

Were the question an open one, I would be reluctant to acquiesce in holding that federal courts, in the absence of statutes, could or should assume the power to fix interest in such a case. But, granting that we have the power to take this step, the rate of interest to be charged

is from necessity an element of the legislative and policy power thus exercised, and that rate must therefore be determined by the Court. The rate fixed in this case is 6%. Resolution as to the amount is rested in part at least on New York's legislative rate. The inference is that a different rate might apply to contracts guaranteeing tax payments made in other states. For it is well known that interest rates fixed by state legislatures are not uniform but vary in amount.

Since in prescribing interest and fixing an interest rate we are passing upon questions of public policy, not marked at all by definite legislative boundaries, I find it difficult to agree to the result here for two reasons: (1) Unless the rate fixed is to be considered in the nature of a penalty, 6% seems very high. A smaller rate would appear to come nearer to harmonizing with fair and equitable interest exactions. (2) I am of opinion that since our "judicial law-making" is and must be national in its scope, the law which we adopt fixing a rate of interest for transactions such as that here involved should operate with uniformity throughout the nation. Federal taxpayers or their sureties should not be required to pay 6% in one state, 4% in a second, and 10% in a third. Such varying rates are not subject to criticism by federal courts if they govern local intrastate transactions subject to state law. But it seems to me that federal taxpayers and their sureties should be subject to the same interest rate without regard to the state rates governing purely local transactions within a particular area in which federal taxpayers happen to reside. To the extent that the Court's opinion indicates the possibility of such a variance among the states, I am compelled to disagree.

MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY concur in this opinion.

UNITED STATES *v.* CLASSIC ET AL.

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

No. 618. Argued April 7, 1941.—Decided May 26, 1941.

1. Review under the Criminal Appeals Act of a judgment sustaining a demurrer to an indictment is confined to the questions of statutory construction and validity decided by the District Court. P. 309.
2. In Louisiana, a primary election to nominate a party candidate for the office of Representative in Congress is conducted at the public expense and regulated by statute. Candidates who may be voted for at general elections are restricted to primary nominees; to persons, not candidates in the primary, who file nomination papers with the requisite number of signatures; and to persons whose names may be lawfully written into the ballots by the electors. The practical effect is to impose serious restrictions upon the choice of candidates by the voters save by voting at the primary election. The primary election is an integral part of the procedure for choosing Representatives; and in this case, as alleged by the indictment, its practical operation, in the particular Congressional District involved, is to secure the election of the primary nominee of a particular political party. P. 311 *et seq.*
3. The right of the people to choose Representatives in Congress is a right established and guaranteed by Art. I, § 2 of the Constitution and hence is one secured by it to those citizens and inhabitants of the State who are entitled to exercise the right. P. 314.

   The right to vote for Representatives in Congress is a right "derived from the States," only in the sense that the States are authorized by the Constitution to legislate on the subject, as provided by § 2 of Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under § 4, and its more general power, under Art. I, § 8, cl. 18, "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."
4. Included within the right to choose, secured by the Constitution, is the right of qualified voters within a State to cast their ballots and have them counted at Congressional elections. P. 315.

   Since the constitutional command is without restriction or limitation, this right, unlike those guaranteed by the Fourteenth and Fif-

teenth Amendments, is secured against the action of individuals as well as of States.

5. Where the state law has made the primary election an integral part of the procedure of choosing Representatives, or where in fact the primary effectively controls the choice, the right of the qualified elector to vote and have his ballot counted at the primary, is part of the right to choose Representatives secured by Art. I, § 2. P. 316.

   In determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses. Hence we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government.

6. A primary election which is a necessary step in the choice of candidates for election as Representatives in Congress, and which in the circumstances of the case controls that choice, is an election within the meaning of Art. I, §§ 2 and 4 of the Constitution, and is subject to Congressional regulation as to the manner of holding it. P. 317.

7. Art. I, § 8, cl. 18 of the Constitution empowers Congress to safeguard by appropriate legislation the right of choice by the people of Representatives in Congress secured by § 2 of Art. I. P. 320.

8. Section 19 of the Criminal Code, making it a crime to conspire to "injure" or "oppress" any citizen "in the free exercise of any right or privilege secured to him by the Constitution," embraces a conspiracy to prevent qualified voters from exercising their constitutional right of voting, and having their votes counted, in a primary election prerequisite to the choice of party candidates for a Congressional election. P. 321.

9. Section 20 of the Criminal Code provides that whoever, "under color of any law," willfully subjects any inhabitant of any State to the deprivation of any rights, privileges or immunities secured or protected by the Constitution and laws of the United States "or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens," shall be punished as prescribed. *Held:*

(1) The acts of election officials who conducted a primary election to nominate a party candidate for Representative in Congress in willfully altering and falsely counting and certifying the ballots, were acts under color of state law depriving the voter of constitutional rights within the meaning of the section. P. 325.

(2) The section authorizes punishment for two different offenses: The offense of willfully subjecting any inhabitant to the deprivation of rights secured by the Constitution, and the offense of willfully subjecting any inhabitant to different punishments on account of his alienage, color or race, than are prescribed for the punishment of citizens. P. 327.

10. The Court declines to consider the application of § 20 to deprivations of the right to equal protection of the laws guaranteed by the Fourteenth Amendment, a point apparently raised for the first time by the Government's brief in this Court and not assigned as error. Since the indictment on its face does not purport to charge a deprivation of equal protection to voters or candidates, the Court is not called upon to construe the indictment in order to raise a question of statutory validity or construction. P. 329.

35 F. Supp. 66, reversed.

APPEAL from an order of the District Court sustaining a demurrer to two counts of an indictment.

Mr. Herbert Wechsler, with whom *Solicitor General Biddle, Assistant Attorney General Berge,* and *Messrs. Warner W. Gardner, Alfred B. Teton, Rene A. Viosca,* and *Robert Weinstein* were on the brief, for the United States.

The right to choose members of Congress is secured and protected by § 2 of Art. I of the Constitution, against interference by private individuals, as well as against interference by action of the States. Congress may protect the rights by providing for the punishment of both types of interference and has done so by §§ 19 and 20 of the Criminal Code.

As a matter of law, the Louisiana primary elections determine the candidates at the general election. As a matter of unbroken practice, the Democratic primary

election determines the victor at the general election. Either of these considerations demonstrates that the right to choose Representatives, secured by § 2 of Art. I, reaches to the Louisiana primary.

If the machinery of choice involves two elections, primary and general, rather than one, the right to participate in the choice must include both steps.

Art. I, § 2 applies to the decisive phase of the process by which Representatives are chosen. Cf., *United States* v. *Wood,* 299 U. S. 123, 143. The framers may not have anticipated the primary, but they gave to the qualified electors of the States the right to choose their Representatives in Congress.

The chief source of serious disagreement at the Constitutional Convention, so far as the suffrage was concerned, had to do with the qualifications of voters. United States Documents Illustrative of the Union of the American States (1927) 487, 488, 489, 492. It was to avoid any obstacles to ratification which might have arisen from this controversy that the Convention accepted the compromise embodied in Article I, § 2. Story, Commentaries on the Constitution of the United States (Bigelow, 5th ed. 1891), § 584. In the state ratifying conventions the debate shifted to the grant of Congressional power to regulate national elections which is contained in Article I, § 4. It is true that six States included in their resolutions of ratification the recommendation that a Constitutional amendment be adopted to deny Congressional authority to regulate elections unless the States should refuse to provide for them or should be unable to do so because of invasion or for any other reason. But no such amendment was ever adopted, and any lingering doubt as to the unconditional power of Congress to regulate the conduct of national elections was removed in *Ex parte Siebold,* 100 U. S. 371. Clearly neither of these disputes is relevant to

the nature and bounds of the constitutionally protected right to choose. Indeed, the word "elected" in a draft of the proposal which became Art. I, § 2, was eliminated by the Committee of Detail in favor of the seemingly broader word "chosen." Distinguishing *United States* v. *Gradwell,* 243 U. S. 476; *Newberry* v. *United States,* 256 U. S. 232; and *Grovey* v. *Townsend,* 295 U. S. 45.

Congressional practice has weight in determining the meaning of constitutional provisions. But it is especially significant where the practice involves a Congressional interpretation of the Constitution in a field in which Congress has an autonomous power. Cf., *Smiley* v. *Holm,* 285 U. S. 355, 369.

Voters in a primary election are denied the equal protection of the laws by state officers who refuse to count their votes as cast and count them in favor of an opposing candidate. It is of no consequence that the indictment does not count in terms upon the Fourteenth Amendment and the right of the voters to equal protection of the laws. The charge is laid in the language of the statute and specifies as the right "secured" and "protected" by the Constitution the right of the voters whose ballots were altered to have their votes counted as cast. If the infringement of that right by the alleged acts of the defendants constitutes a denial of equal protection, the District Court erred in holding that the right is not "secured" and "protected" by the Constitution of the United States.

Sections 19 and 20 of the Criminal Code are otherwise applicable to the acts alleged in the indictment.

It is no more material that primary elections were unknown when the statute was passed than it would be that a city ordinance which worked a deprivation of federal rights was enacted after 1870 or, indeed, that the city which enacted the ordinance was not established until after that time. Nor is there significance in the fact that in

1894 Congress repealed the companion provisions of the statute dealing with specific irregularities in elections. *United States* v. *Mosley*, 238 U. S. 383.

Nothing in the enabling clause of the Fourteenth Amendment suggests that legislation is not "appropriate" to enforce the Amendment if it deals not only with rights guaranteed by the Amendment against state action but also with rights protected by other constitutional provisions against individual action as well. *Karem* v. *United States*, 121 F. 250; cf., *United States* v. *Reese*, 92 U. S. 214; Flack, The Adoption of the Fourteenth Amendment, 1908, 219 *et seq.*; *Guinn* v. *United States*, 238 U. S. 347, 368.

Mr. Warren O. Coleman, with whom *Mr. Charles W. Kehl* was on the brief, for appellees.

The district judge correctly sustained the demurrer. Section 19 does not apply to the affairs of a political party in conducting a party primary. Nor could it apply to the purely private political rights of a candidate to a vote cast by a citizen. The right to vote and to have the vote counted as cast belongs to the citizen, not to the candidate. *United States* v. *Mosley*, 238 U. S. 383.

The commissioners are not officers or employees of the State. They are officers of a political party. They act for and on behalf of the political party, and not for and on behalf of the State, and therefore do not act under color of any law of the State. The candidates alone have the right to name them.

The fact that a political party, and its nominating primary, is regulated by state law, does not make it a creature of the State, nor does it make the party's officials, officers or employees of the State.

Primaries are in no sense elections for an office, but merely methods by which party adherents agree upon candidates whom they intend to offer to support for

ultimate choice by all qualified electors. General provisions affecting elections in Constitutions or statutes are not necessarily applicable to primaries,—the two things being radically different. *Newberry* v. *United States,* 256 U. S. 232; *United States* v. *Gradwell,* 243 U. S. 476; *Grovey* v. *Townsend,* 295 U. S. 45; *Nixon* v. *Herndon,* 273 U. S. 536; *Nixon* v. *Condon,* 286 U. S. 73; *United States* v. *O'Toole,* 236 F. 993.

The state courts differentiate between a nominating primary and an election. They have held that primary elections to choose delegates to conventions are not within constitutional or statutory requirements in regard to elections; that primary elections are not a part of the general election because held at the same time as the latter, with the same machinery, merely for convenience and economy; that primaries are not elections within the common law meaning of the term; that laws providing for the determination of contested elections do not apply to primary elections; that a statute making it a misdemeanor to place any bet or wager on any election does not apply to primaries; that a statute disqualifying a person from holding office when he shall have given a bribe, threat or reward to secure his election does not apply to primaries; and that it is not an offense for officials at primaries to electioneer, when the general election laws forbid it.

If the word "elections" is held to include the manner by which a voluntary association or political party selects its candidates by direct primary (a concept unknown by the framers of the Constitution), then Congress may pass laws to regulate the internal affairs of political parties, and dictate the time, place and manner of their selection or nomination of the candidate they will support in the ensuing general election, or may prohibit the holding of primaries altogether. *State* v. *Simmons,* 117 Ark. 159.

In *Nixon* v. *Herndon,* 273 U. S. 536, the Court did not adopt the theory that exclusion from a primary by specific state law would constitute a denial of the right to vote within the meaning of the Fifteenth Amendment, but found the law unconstitutional under the equal protection clause of the Fourteenth Amendment. So in *Nixon* v. *Condon,* 286 U. S. 73.

The power conferred upon Congress in § 4 of Art. I is a limited power. It was not intended to deprive the people of the States of their freedom with respect to their political activities.

Since Congress asserted its power to the fullest extent, in the enforcement Act of 1870, the limitation upon its power is illustrated by a consideration of the history of those bills in *United States* v. *Gradwell,* 243 U. S. 476, 482–484.

The Constitution gives to Congress no power to regulate the process of nomination. *United States* v. *Gradwell,* 243 U. S. 476, 487–489; *United States* v. *Blair,* 250 U. S. 273, 278–279; *United States* v. *O'Toole,* 236 F. 993, 996.

A nominating primary is not an election any more than the nominating convention, or its predecessor the caucus, is an "election."

What the term "elections" meant at the time of the adoption of the Article it means now. *Hawke* v. *Smith,* 253 U. S. 221.

The power exercised must be found within the definition of the power conferred. See *In re Debs,* 158 U. S. 564, 591.

The word "election" should be restricted to the well-defined meaning that it had when incorporated into the Constitution. Cf. the *Hawke* case, *supra,* concerning the word "Legislatures."

Other Articles of the Constitution show that the term "elections" has exclusive reference to elections for the office itself.

The opponents of § 4 of Art. I were in a measure appeased by the assurance given them to the effect that the clause was confined to the regulation of the times, places, and manner of holding elections. Story on the Constitution, §§ 815–828; The Federalist, LX.

Alexander Hamilton could never have defended the theory that the people were surrendering such rights to the Federal Government as would authorize supervising the methods that should be employed to enlist support of a candidacy.

If Congress has the power which appellant seeks to attribute to it, then it has the power to abolish all primary elections for Senators and Representatives in every State in the Union; the power to establish conventions, to overthrow conventions, to provide any sort of a primary that it may desire.

MR. JUSTICE STONE delivered the opinion of the Court.

Two counts of an indictment found in a federal district court charged that appellees, Commissioners of Elections, conducting a primary election under Louisiana law, to nominate a candidate of the Democratic Party for representative in Congress, willfully altered and falsely counted and certified the ballots of voters cast in the primary election. The questions for decision are whether the right of qualified voters to vote in the Louisiana primary and to have their ballots counted is a right "secured by the Constitution" within the meaning of §§ 19 and 20 of the Criminal Code, and whether the acts of appellees charged in the indictment violate those sections.

On September 25, 1940, appellees were indicted in the District Court for Eastern Louisiana for violations of §§ 19 and 20 of the Criminal Code, 18 U. S. C. §§ 51, 52. The first count of the indictment alleged that a primary election was held on September 10, 1940, for the purpose of nominating a candidate of the Democratic Party for

the office of Representative in Congress for the Second Congressional District of Louisiana, to be chosen at an election to be held on November 10th; that in that district nomination as a candidate of the Democratic Party is and always has been equivalent to an election; that appellees were Commissioners of Election, selected in accordance with the Louisiana law to conduct the primary in the Second Precinct of the Tenth Ward of New Orleans, in which there were five hundred and thirty-seven citizens and qualified voters.

The charge, based on these allegations, was that the appellees conspired with each other, and with others unknown, to injure and oppress citizens in the free exercise and enjoyment of rights and privileges secured to them by the Constitution and Laws of the United States, namely, (1) the right of qualified voters who cast their ballots in the primary election to have their ballots counted as cast for the candidate of their choice, and (2) the right of the candidates to run for the office of Congressman and to have the votes in favor of their nomination counted as cast. The overt acts alleged were that the appellees altered eighty-three ballots cast for one candidate and fourteen cast for another, marking and counting them as votes for a third candidate, and that they falsely certified the number of votes cast for the respective candidates to the chairman of the Second Congressional District Committee.

The second count, repeating the allegations of fact already detailed, charged that the appellees, as Commissioners of Election, willfully and under color of law subjected registered voters at the primary who were inhabitants of Louisiana to the deprivation of rights, privileges and immunities secured and protected by the Constitution and Laws of the United States, namely their right to cast their votes for the candidates of their choice and to have their votes counted as cast. It further charged

that this deprivation was effected by the willful failure and refusal of defendants to count the votes as cast, by their alteration of the ballots, and by their false certification of the number of votes cast for the respective candidates in the manner already indicated.

The District Court sustained a demurrer to counts 1 and 2 on the ground that §§ 19 and 20 of the Criminal Code, under which the indictment was drawn, do not apply to the state of facts disclosed by the indictment, and that, if applied to those facts, §§ 19 and 20 are without constitutional sanction, citing *United States* v. *Gradwell,* 243 U. S. 476, 488, 489; *Newberry* v. *United States,* 256 U. S. 232. The case comes here on direct appeal from the District Court under the provisions of the Criminal Appeals Act, Judicial Code, § 238, 18 U. S. C. § 682; 28 U. S. C. § 345, which authorize an appeal by the United States from a decision or judgment sustaining a demurrer to an indictment where the decision or judgment is "based upon the invalidity or construction of the statute upon which the indictment is founded."

Upon such an appeal our review is confined to the questions of statutory construction and validity decided by the District Court. *United States* v. *Patten,* 226 U. S. 525; *United States* v. *Birdsall,* 233 U. S. 223, 230; *United States* v. *Borden Co.,* 308 U. S. 188, 192–193. Hence, we do not pass upon various arguments advanced by appellees as to the sufficiency and construction of the indictment.

Section 19 of the Criminal Code condemns as a criminal offense any conspiracy to injure a citizen in the exercise "of any right or privilege secured to him by the Constitution or laws of the United States." Section 20 makes it a penal offense for anyone who, acting "under color of any law," "willfully subjects, or causes to be subjected, any inhabitant of any State . . . to the deprivation of any rights, privileges, and immunities secured and

protected by the Constitution and laws of the United States." The Government argues that the right of a qualified voter in a Louisiana congressional primary election to have his vote counted as cast is a right secured by Article I, §§ 2 and 4 of the Constitution, and that a conspiracy to deprive the citizen of that right is a violation of § 19, and also that the willful action of appellees as state officials, in falsely counting the ballots at the primary election and in falsely certifying the count, deprived qualified voters of that right and of the equal protection of the laws guaranteed by the Fourteenth Amendment, all in violation of § 20 of the Criminal Code.

Article I, § 2 of the Constitution, commands that "The House of Representatives shall be composed of members chosen every second Year by the People of the several States and the Electors in each State shall have the qualifications requisite for electors of the most numerous Branch of the State Legislature." By § 4 of the same article "The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." Such right as is secured by the Constitution to qualified voters to choose members of the House of Representatives is thus to be exercised in conformity to the requirements of state law subject to the restrictions prescribed by § 2 and to the authority conferred on Congress by § 4, to regulate the times, places and manner of holding elections for representatives.

We look then to the statutes of Louisiana here involved to ascertain the nature of the right which under the constitutional mandate they define and confer on the voter, and the effect upon its exercise of the acts with which appellees are charged, all with the view to determining,

first, whether the right or privilege is one secured by the Constitution of the United States, second, whether the effect under the state statute of appellees' alleged acts is such that they operate to injure or oppress citizens in the exercise of that right within the meaning of § 19 and to deprive inhabitants of the state of that right within the meaning of § 20, and finally, whether §§ 19 and 20 respectively are in other respects applicable to the alleged acts of appellees.

Pursuant to the authority given by § 2 of Article I of the Constitution, and subject to the legislative power of Congress under § 4 of Article I, and other pertinent provisions of the Constitution, the states are given, and in fact exercise, a wide discretion in the formulation of a system for the choice by the people of representatives in Congress. In common with many other states, Louisiana has exercised that discretion by setting up machinery for the effective choice of party candidates for representative in Congress by primary elections, and by its laws it eliminates or seriously restricts the candidacy at the general election of all those who are defeated at the primary. All political parties, which are defined as those that have cast at least 5 per cent of the total vote at specified preceding elections, are required to nominate their candidates for representative by direct primary elections. Louisiana Act No. 46, Regular Session, 1940, §§ 1 and 3.

The primary is conducted by the state at public expense. Act No. 46, *supra*, § 35. The primary, as is the general election, is subject to numerous statutory regulations as to the time, place and manner of conducting the election, including provisions to insure that the ballots cast at the primary are correctly counted, and the results of the count correctly recorded and certified to the Secretary of State, whose duty it is to place the names of the successful candidates of each party on the official

ballot.[1] The Secretary of State is prohibited from placing on the official ballot the name of any person as a candidate for any political party not nominated in accordance with the provisions of the Act. Act 46, § 1.

One whose name does not appear on the primary ballot, if otherwise eligible to become a candidate at the general election, may do so in either of two ways: by filing nomination papers with the requisite number of signatures or by having his name "written in" on the ballot on the final election. Louisiana Act No. 224, Regular Session 1940, §§ 50, 73. Section 87 of Act No. 46 provides "No one who participates in the primary election of any political party shall have the right to participate in a primary election of any other political party, with the view of nominating opposing candidates, nor shall he be permitted to sign any nomination for any opposing candidate or candidates; nor shall he be permitted to be himself a candidate in opposition to anyone nominated at or through a primary election in which he took part."

Section 15 of Article VIII of the Constitution of Louisiana as amended by Act 80 of 1934, provides that "no person whose name is not authorized to be printed on the official ballot, as the nominee of a political party or as

[1] The ballots are printed at public expense, § 35 of Act No. 46, Regular Session, 1940, are furnished by the Secretary of State, § 36 in a form prescribed by statute, § 37. Close supervision of the delivery of the ballots to the election commissioners is prescribed, §§ 43–46. The polling places are required to be equipped to secure secrecy, §§ 48–50; §§ 54–57. The selection of election commissioners is prescribed, § 61 and their duties detailed. The commissioners must swear to conduct the election impartially, § 64 and are subject to punishment for deliberately falsifying the returns or destroying the lists and ballots, §§ 98, 99. They must identify by certificate the ballot boxes used, § 67, keep a triplicate list of voters, § 68, publicly canvass the return, § 74 and certify the same to the Secretary of State, § 75.

an independent candidate, shall be considered a candidate" unless he shall file in the appropriate office at least ten days before the general election a statement containing the correct name under which he is to be voted for, and containing the further statement that he is willing and consents to be voted for for that office. The article also provides that "no commissioners of election shall count a ballot as cast for any person whose name is not printed on the ballot or who does not become a candidate in the foregoing manner." Applying these provisions, the Louisiana Court of Appeals for the Parish of Orleans has held, in *Serpas* v. *Trebucq,* decided April 7, 1941, 1 So. 2d 346, rehearing denied with opinion April 21, 1941, 1 So. 2d 705, that an unsuccessful candidate at the primary may not offer himself as a candidate at a general election, and that votes for him may not lawfully be written into the ballot or counted at such an election.

The right to vote for a representative in Congress at the general election is, as a matter of law, thus restricted to the successful party candidate at the primary, to those not candidates at the primary who file nomination papers, and those whose names may be lawfully written into the ballot by the electors. Even if, as appellees argue, contrary to the decision in *Serpas* v. *Trebucq, supra,* voters may lawfully write into their ballots, cast at the general election, the name of a candidate rejected at the primary and have their ballots counted, the practical operation of the primary law in otherwise excluding from the ballot on the general election the names of candidates rejected at the primary is such as to impose serious restrictions upon the choice of candidates by the voters save by voting at the primary election. In fact, as alleged in the indictment, the practical operation of the primary in Louisiana is, and has been since the primary election was established in 1900, to secure the election of the Democratic primary

nominee for the Second Congressional District of Louisiana.[2]

Interference with the right to vote in the Congressional primary in the Second Congressional District for the choice of Democratic candidate for Congress is thus, as a matter of law and in fact, an interference with the effective choice of the voters at the only stage of the election procedure when their choice is of significance, since it is at the only stage when such interference could have any practical effect on the ultimate result, the choice of the Congressman to represent the district. The primary in Louisiana is an integral part of the procedure for the popular choice of Congressman. The right of qualified voters to vote at the Congressional primary in Louisiana and to have their ballots counted is thus the right to participate in that choice.

We come then to the question whether that right is one secured by the Constitution. Section 2 of Article I commands that Congressmen shall be chosen by the people of the several states by electors, the qualifications of which it prescribes. The right of the people to choose, whatever its appropriate constitutional limitations, where in other respects it is defined, and the mode of its exercise is prescribed by state action in conformity to the Constitution, is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right. *Ex parte Yarbrough,* 110 U. S. 651; *United States* v. *Mosley,* 238 U. S. 383. And see *Hague* v. *C. I. O.,* 307 U. S. 496, 508, 513, 526, 527, 529, giving the same interpretation to the like phrase "rights" "secured by the

[2] For a discussion of the practical effect of the primary in controlling or restricting election of candidates at general elections, see, Hasbrouck, Party Government in the House of Representatives (1927) 172, 176, 177; Merriam and Overacker, Primary Elections (1928) 267–269; Stoney, Suffrage in the South; 29 Survey Graphic, 163, 164.

Constitution" appearing in § 1 of the Civil Rights Act of 1871, 17 Stat. 13. While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states, see *Minor* v. *Happersett,* 21 Wall. 162, 170; *United States* v. *Reese,* 92 U. S. 214, 217–218; *McPherson* v. *Blacker,* 146 U. S. 1, 38–39; *Breedlove* v. *Suttles,* 302 U. S. 277, 283, this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by § 2 of Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under § 4 and its more general power under Article I, § 8, clause 18 of the Constitution "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." See *Ex parte Siebold,* 100 U. S. 371; *Ex parte Yarbrough, supra,* 663, 664; *Swafford* v. *Templeton,* 185 U. S. 487; *Wiley* v. *Sinkler,* 179 U. S. 58, 64.

Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted at Congressional elections. This Court has consistently held that this is a right secured by the Constitution. *Ex parte Yarbrough, supra; Wiley* v. *Sinkler, supra; Swafford* v. *Templeton, supra; United States* v. *Mosley, supra;* see *Ex parte Siebold, supra; In re Coy,* 127 U. S. 731; *Logan* v. *United States,* 144 U. S. 263. And since the constitutional command is without restriction or limitation, the right, unlike those guaranteed by the Fourteenth and Fifteenth Amendments, is secured against the action of individuals as well as of states. *Ex parte Yarbrough, supra; Logan* v. *United States, supra.*

But we are now concerned with the question whether the right to choose at a primary election, a candidate for election as representative, is embraced in the right to choose representatives secured by Article I, § 2. We may

assume that the framers of the Constitution in adopting that section, did not have specifically in mind the selection and elimination of candidates for Congress by the direct primary any more than they contemplated the application of the commerce clause to interstate telephone, telegraph and wireless communication, which are concededly within it. But in determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses. Hence we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government. Cf. *Davidson* v. *New Orleans,* 96 U. S. 97; *Brown* v. *Walker,* 161 U. S. 591, 595; *Robertson* v. *Baldwin,* 165 U. S. 275, 281, 282. If we remember that "it is a Constitution we are expounding," we cannot rightly prefer, of the possible meanings of its words, that which will defeat rather than effectuate the constitutional purpose.

That the free choice by the people of representatives in Congress, subject only to the restrictions to be found in §§ 2 and 4 of Article I and elsewhere in the Constitution, was one of the great purposes of our constitutional scheme of government cannot be doubted. We cannot regard it as any the less the constitutional purpose, or its words as any the less guarantying the integrity of that choice, when a state, exercising its privilege in the absence of Congressional action, changes the mode of choice from a single step, a general election, to two, of which the first is the choice at a primary of those candidates

from whom, as a second step, the representative in Congress is to be chosen at the election.

Nor can we say that that choice which the Constitution protects is restricted to the second step because § 4 of Article I, as a means of securing a free choice of representatives by the people, has authorized Congress to regulate the manner of elections, without making any mention of primary elections. For we think that the authority of Congress, given by § 4, includes the authority to regulate primary elections when, as in this case, they are a step in the exercise by the people of their choice of representatives in Congress. The point whether the power conferred by § 4 includes in any circumstances the power to regulate primary elections was reserved in *United States* v. *Gradwell, supra,* 487. In *Newberry* v. *United States, supra,* four Justices of this Court were of opinion that the term "elections" in § 4 of Article I did not embrace a primary election, since that procedure was unknown to the framers. A fifth Justice, who with them pronounced the judgment of the Court, was of opinion that a primary, held under a law enacted before the adoption of the Seventeenth Amendment, for the nomination of candidates for Senator, was not an election within the meaning of § 4 of Article I of the Constitution, presumably because the choice of the primary imposed no legal restrictions on the election of Senators by the state legislatures to which their election had been committed by Article I, § 3. The remaining four Justices were of the opinion that a primary election for the choice of candidates for Senator or Representative were elections subject to regulation by Congress within the meaning of § 4 of Article I. The question then has not been prejudged by any decision of this Court.

To decide it we turn to the words of the Constitution read in their historical setting as revealing the purpose of its framers, and search for admissible meanings of its

words which, in the circumstances of their application, will effectuate those purposes. As we have said, a dominant purpose of § 2, so far as the selection of representatives in Congress is concerned, was to secure to the people the right to choose representatives by the designated electors, that is to say, by some form of election. Cf. the Seventeenth Amendment as to popular "election" of Senators. From time immemorial an election to public office has been in point of substance no more and no less than the expression by qualified electors of their choice of candidates.

Long before the adoption of the Constitution the form and mode of that expression had changed from time to time. There is no historical warrant for supposing that the framers were under the illusion that the method of effecting the choice of the electors would never change or that, if it did, the change was for that reason to be permitted to defeat the right of the people to choose representatives for Congress which the Constitution had guaranteed. The right to participate in the choice of representatives for Congress includes, as we have said, the right to cast a ballot and to have it counted at the general election, whether for the successful candidate or not. Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary is likewise included in the right protected by Article I, § 2. And this right of participation is protected just as is the right to vote at the election, where the primary is by law made an integral part of the election machinery, whether the voter exercises his right in a party primary which invariably, sometimes or never determines the ultimate choice of the representative. Here, even apart from the circumstance that the Louisiana primary is made by law an

integral part of the procedure of choice, the right to choose a representative is in fact controlled by the primary because, as is alleged in the indictment, the choice of candidates at the Democratic primary determines the choice of the elected representative. Moreover, we cannot close our eyes to the fact, already mentioned, that the practical influence of the choice of candidates at the primary may be so great as to affect profoundly the choice at the general election, even though there is no effective legal prohibition upon the rejection at the election of the choice made at the primary, and may thus operate to deprive the voter of his constitutional right of choice. This was noted and extensively commented upon by the concurring Justices in *Newberry* v. *United States, supra*, 263–269, 285, 287.

Unless the constitutional protection of the integrity of "elections" extends to primary elections, Congress is left powerless to effect the constitutional purpose, and the popular choice of representatives is stripped of its constitutional protection save only as Congress, by taking over the control of state elections, may exclude from them the influence of the state primaries.[3] Such an expedient would end that state autonomy with respect to elections which the Constitution contemplated that Congress should be free to leave undisturbed, subject only to such minimum regulation as it should find necessary to insure the freedom

[3] Congress has recognized the effect of primaries on the free exercise of the right to choose the representatives, for it has inquired into frauds at primaries as well as at the general elections in judging the "Elections Returns and Qualifications of its Own Members," Art. I, § 5. See Grace *v.* Whaley, H. Rept. No. 158, 63d Cong., 2d Sess.; Peddy *v.* Mayfield, S. Rept. No. 973, 68th Cong., 2d Sess.; Wilson *v.* Vare, S. Rept. No. 1858, 70th Cong., 2d Sess., S. Rept. No. 47, 71st Cong., 2d Sess., and S. Res. 111, 71st Cong., 2d Sess.

See also Investigation of Campaign Expenditures in the 1940 Campaign, S. Rept. No. 47, 77th Cong., 1st Sess., p. 48 *et seq.*

and integrity of the choice. Words, especially those of a constitution, are not to be read with such stultifying narrowness. The words of §§ 2 and 4 of Article I, read in the sense which is plainly permissible and in the light of the constitutional purpose, require us to hold that a primary election which involves a necessary step in the choice of candidates for election as representatives in Congress, and which in the circumstances of this case controls that choice, is an election within the meaning of the constitutional provision and is subject to congressional regulation as to the manner of holding it.

Not only does § 4 of Article I authorize Congress to regulate the manner of holding elections, but by Article I, § 8, Clause 18, Congress is given authority "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof." This provision leaves to the Congress the choice of means by which its constitutional powers are to be carried into execution. "Let the end be legitimate; let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." *McCulloch* v. *Maryland,* 4 Wheat. 316, 421. That principle has been consistently adhered to and liberally applied, and extends to the congressional power by appropriate legislation to safeguard the right of choice by the people of representatives in Congress, secured by § 2 of Article I. *Ex parte Yarbrough, supra,* 657, 658; cf. *Second Employers Liability Cases,* 223 U. S. 1, 49; *Houston & Texas Ry. Co.* v. *United States,* 234 U. S. 342, 350, 355; *Wilson* v. *New,* 243 U. S. 332, 346, 347; *First National Bank* v. *Union Trust Co.,* 244 U. S. 416, 419; *Selective Draft Law Cases,* 245 U. S. 366, 381; *United States* v. *Ferger,* 250 U. S. 199, 205; *Hamilton* v.

Kentucky Distilleries Co., 251 U. S. 146, 155, 163; *Jacob Ruppert* v. *Caffey*, 251 U. S. 264; *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180; *United States* v. *Darby*, 312 U. S. 100, and cases cited.

There remains the question whether §§ 19 and 20 are an exercise of the congressional authority applicable to the acts with which appellees are charged in the indictment. Section 19 makes it a crime to conspire to "injure" or "oppress" any citizen "in the free exercise or enjoyment of any right or privilege secured to him by the Constitution." [4] In *Ex parte Yarbrough, supra,* and in *United States* v. *Mosley, supra,* as we have seen, it was held that the right to vote in a congressional election is a right secured by the Constitution, and that a conspiracy to prevent the citizen from voting, or to prevent the official count of his ballot when cast, is a conspiracy to injure and oppress the citizen in the free exercise of a right secured by the Constitution within the meaning of § 19. In reaching this conclusion the Court found no uncertainty or ambiguity in the statutory language, obviously devised to protect the citizen "in the free exercise or enjoyment of any right or privilege secured to him by the Constitution," and concerned itself with the question whether the right to participate in choosing a representa-

[4] Section 19 of the Criminal Code (U. S. C., Title 18, § 51):

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than $5,000 and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States." (R. S. § 5508; Mar. 4, 1909, c. 321, § 19, 35 Stat. 1092.)

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tive is so secured.[5] Such is our function here. Conspiracy to prevent the official count of a citizen's ballot, held in *United States* v. *Mosley, supra,* to be a violation of § 19 in the case of a congressional election, is equally a conspiracy to injure and oppress the citizen when the ballots are cast in a primary election prerequisite to the choice of party candidates for a congressional election. In both cases the right infringed is one secured by the Constitution. The injury suffered by the citizen in the exercise of the right is an injury which the statute describes and to which it applies in the one case as in the other.

The suggestion that § 19, concededly applicable to conspiracies to deprive electors of their votes at congressional elections, is not sufficiently specific to be deemed applicable to primary elections, will hardly bear examination. Section 19 speaks neither of elections nor of primaries. In unambiguous language it protects "any right or privilege secured by the Constitution," a phrase which, as we have seen, extends to the right of the voter to have his vote counted in both the general election and in the primary election, where the latter is a part of the election machinery, as well as to numerous other constitutional rights which are wholly unrelated to the choice of a representative in Congress. *United States* v. *Waddell,* 112 U. S. 76; *Logan* v. *United States,* 144 U. S. 263; *In re Quarles,* 158 U. S. 532; *Motes* v. *United States,* 178 U. S. 458; *Guinn* v. *United States,* 238 U. S. 347.

In the face of the broad language of the statute, we are pointed to no principle of statutory construction

[5] In *United States* v. *Mosley,* 238 U. S. 383, 386, the Court thought that "Manifestly the words are broad enough to cover the case," it canvassed at length the objections that § 19 was never intended to apply to crimes against the franchise, and the other contention, which it also rejected, that § 19 had been repealed or so restricted as not to apply to offenses of that class. It is unnecessary to repeat that discussion here.

and to no significant legislative history which could be thought to sanction our saying that the statute applies any the less to primaries than to elections, where in one as in the other it is the same constitutional right which is infringed. It does not avail to attempt to distinguish the protection afforded by § 1 of the Civil Rights Act of 1871,[6] to the right to participate in primary as well as general elections secured to all citizens by the Constitution, see *Guinn* v. *United States,* 238 U. S. 347; *Nixon* v. *Herndon,* 273 U. S. 536; *Nixon* v. *Condon,* 286 U. S. 73; *Lane* v. *Wilson,* 307 U. S. 268, on the ground that in those cases the injured citizens were Negroes whose rights were clearly protected by the Fourteenth Amendment. At least since *Ex parte Yarbrough, supra,* and no member of the Court seems ever to have questioned it, the right to participate in the choice of representatives in Congress has been recognized as a right protected by Art. I, §§ 2 and 4 of the Constitution.[7] Differences of opinion have arisen as to the effect of the primary in particular cases on the choice of representatives. But we are troubled by no such doubt here. Hence, the right to participate through the primary in the choice of representatives in Congress—a right clearly secured by the Constitution—is within the words and

[6] Section 1 now reads, 8 U. S. C. § 43: "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[7] See e. g. *Guinn* v. *United States,* 238 U. S. 347; *United States* v. *O'Toole,* 236 F. 993, aff'd *United States* v. *Gradwell,* 243 U. S. 476; *Aczel* v. *United States,* 232 F. 652; *Felix* v. *United States,* 186 F. 685; *Karem* v. *United States,* 121 F. 250; *Walker* v. *United States,* 93 F. 2d 383; *Luteran* v. *United States,* 93 F. 2d 395.

purpose of § 19 in the same manner and to the same extent as the right to vote at the general election. *United States* v. *Mosley, supra.* It is no extension of the criminal statute, as it was not of the civil statute in *Nixon* v. *Herndon, supra,* to find a violation of it in a new method of interference with the right which its words protect. For it is the constitutional right, regardless of the method of interference, which is the subject of the statute and which in precise terms it protects from injury and oppression.

It is hardly the performance of the judicial function to construe a statute, which in terms protects a right secured by the Constitution, here the right to choose a representative in Congress, as applying to an election whose only function is to ratify a choice already made at the primary, but as having no application to the primary which is the only effective means of choice. To withdraw from the scope of the statute an effective interference with the constitutional right of choice, because other wholly different situations not now before us may not be found to involve such an interference, cf. *United States* v. *Bathgate,* 246 U. S. 220; *United States* v. *Gradwell,* 243 U. S. 476, is to say that acts plainly within the statute should be deemed to be without it because other hypothetical cases may later be found not to infringe the constitutional right with which alone the statute is concerned.

If a right secured by the Constitution may be infringed by the corrupt failure to include the vote at a primary in the official count, it is not significant that the primary, like the voting machine, was unknown when § 19 was adopted.[8] Abuse of either may infringe the right and

[8] No conclusion is to be drawn from the failure of the Hatch Act, 53 Stat. 1147, 18 U. S. C. § 61, to enlarge § 19 by provisions specifically applicable to primaries. Its failure to deal with the subject seems to be attributable to constitutional doubts, stimulated by

therefore violate § 19. See *United States* v. *Pleva,* 66 F. 2d 529, 530; cf. *Browder* v. *United States,* 312 U. S. 335. Nor does the fact that in circumstances not here present there may be difficulty in determining whether the primary so affects the right of the choice as to bring it within the constitutional protection, afford any ground for doubting the construction and application of the statute once the constitutional question is resolved. That difficulty is inherent in the judicial administration of every federal criminal statute, for none, whatever its terms, can be applied beyond the reach of the congressional power which the Constitution confers. *Standard Sanitary Mfg. Co.* v. *United States,* 226 U. S. 20; *Hoke* v. *United States,* 227 U. S. 308; *Nash* v. *United States,* 229 U. S. 373; *United States* v. *Freeman,* 239 U. S. 117; *United States* v. *Darby,* 312 U. S. 100.

The right of the voters at the primary to have their votes counted is, as we have stated, a right or privilege secured by the Constitution, and to this § 20 also gives protection.[9] The alleged acts of appellees were committed in the course of their performance of duties under the Louisiana statute requiring them to count the

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Newberry v. *United States,* 256 U. S. 232, which are here resolved. See 84 Cong. Rec., 76th Cong., 1st Sess., p. 4191; cf. Investigation of Campaign Expenditures in the 1940 Campaign, S. Rept. No. 47, 77th Cong., 1st Sess., p. 48.

[9] Section 20 of the Criminal Code (U. S. C., Title 18 § 52):

"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000, or imprisoned not more than one year, or both." (R. S. § 5510; Mar. 4, 1909, c. 321, § 20, 35 Stat. 1092.)

ballots, to record the result of the count, and to certify the result of the election. Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken "under color of" state law. *Ex parte Virginia,* 100 U. S. 339, 346; *Home Telephone & Telegraph Co.* v. *Los Angeles,* 227 U. S. 278, 287, *et seq.; Hague* v. *C. I. O.,* 307 U. S. 496, 507, 519; cf. 101 F. 2d 774, 790. Here the acts of appellees infringed the constitutional right and deprived the voters of the benefit of it within the meaning of § 20, unless by its terms its application is restricted to deprivations "on account of such inhabitant being an alien or by reason of his color, or race."

The last clause of § 20 protects inhabitants of a state from being subjected to different punishments, pains or penalties, by reason of alienage, color or race, than are prescribed for the punishment of citizens. That the qualification with respect to alienage, color and race, refers only to differences in punishment and not to deprivations of any rights or privileges secured by the Constitution, is evidenced by the structure of the section and the necessities of the practical application of its provisions. The qualification as to alienage, color and race, is a parenthetical phrase in the clause penalizing different punishments "than are prescribed for citizens," and in the common use of language could refer only to the subject-matter of the clause and not to that of the earlier one relating to the deprivation of rights to which it makes no reference in terms.

Moreover, the prohibited differences of punishment on account of alienage, color or race, are those referable to prescribed punishments which are to be compared with those prescribed for citizens. A standard is thus set up applicable to differences in prescribed punishments on account of alienage, color or race, which it would be diffi-

cult, if not impossible, to apply to the willful deprivations of constitutional rights or privileges, in order to determine whether they are on account of alienage, color or race. We think that § 20 authorizes the punishment of two different offenses. The one is willfully subjecting any inhabitant to the deprivation of rights secured by the Constitution; the other is willfully subjecting any inhabitant to different punishments on account of his alienage, color or race, than are prescribed for the punishment of citizens. The meager legislative history of the section supports this conclusion.[10]

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[10] The precursor of § 20 was § 2 of the Civil Rights Act of April 9, 1866, 14 Stat. 27, which reads:

"That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction shall be punished by fine. . . ."

This section, so far as now material, was in substance the same as § 20 except that the qualifying reference to differences in punishment made no mention of alienage, the reference being to "different punishment . . . on account of such person having at any time been held in a condition of slavery or involuntary servitude."

Senator Trumbull, the putative author of S. 61, 39th Cong., 1st Sess., the Civil Rights Bill of 1866, and Chairman of the Senate Judiciary Committee which reported the bill, in explaining it stated that the bill was "to protect all persons in the United States in their civil rights, and furnish the means of their vindication. . . ." Cong. Globe, 39th Cong., 1st Sess., p. 211. He also declared, "The bill applies to white men as well as black men." Cong. Globe, 39th Cong., 1st Sess., p. 599. Opponents of the bill agreed with this construction of the first clause of the section, declaring that it referred to the deprivation of constitutional rights of all inhabitants of the states of every race and color. Pp. 598, 601.

So interpreted, § 20 applies to deprivation of the constitutional rights of qualified voters to choose representatives in Congress. The generality of the section, made applicable as it is to deprivations of any constitutional right, does not obscure its meaning or impair its force within

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On February 24, 1870, Senator Stewart of Nevada, introduced S. 365, 41st Cong., 2d Sess., § 2 of which read:

"That any person who, under color of any law, statute, ordinance, regulation, or custom shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person being an alien, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor. . . ."

In explaining the bill he declared, Cong. Globe, 41st Cong., 2d Sess., p. 1536, that the purpose of the bill was to extend its benefits to aliens, saying, "It extends the operation of the Civil Rights Bill, which is well known in the Senate and to the country, to all persons within the jurisdiction of the United States." The Committee reported out a substitute bill to H. R. 1293, to which S. 365 was added as an amendment. As so amended the bill when adopted became the present § 20 of the Criminal Code which read exactly as did § 2 of the Civil Rights Act, except that the word "aliens" was added and the word "citizens" was substituted for the phrase "white persons."

While the legislative history indicates that the immediate occasion for the adoption of § 20, like the Fourteenth Amendment itself, was the more adequate protection of the colored race and their civil rights, it shows that neither was restricted to the purpose and that the first clause of § 20 was intended to protect the constitutional rights of all inhabitants of the states. H. R. 1293, 41st Cong., 2d Sess., which was later amended in the Senate to include § 2 of S. 365 as § 17 of the bill as it passed, now § 20 of the Criminal Code, was originally entitled "A bill to enforce the right of citizens of the United States to vote in the several States of this Union, who have hitherto been denied that right on account of race, color, or previous condition of servitude." When the bill came to the Senate its title was amended and adopted to read, "A bill to enforce the right of citizens of the United States to vote in the several States of this Union and for other purposes."

the scope of its application, which is restricted by its terms to deprivations which are willfully inflicted by those acting under color of any law, statute and the like.

We do not discuss the application of § 20 to deprivations of the right to equal protection of the laws guaranteed by the Fourteenth Amendment, a point apparently raised and discussed for the first time in the Government's brief in this Court. The point was not specially considered or decided by the court below, and has not been assigned as error by the Government. Since the indictment on its face does not purport to charge a deprivation of equal protection to voters or candidates, we are not called upon to construe the indictment in order to raise a question of statutory validity or construction which we are alone authorized to review upon this appeal.

Reversed.

The CHIEF JUSTICE took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, dissenting.

Free and honest elections are the very foundation of our republican form of government. Hence any attempt to defile the sanctity of the ballot cannot be viewed with equanimity. As stated by Mr. Justice Miller in *Ex parte Yarbrough*, 110 U. S. 651, 666, "the temptations to control these elections by violence and corruption" have been a constant source of danger in the history of all republics. The acts here charged, if proven, are of a kind which carries that threat and are highly offensive. Since they corrupt the process of Congressional elections, they transcend mere local concern and extend a contaminating influence into the national domain.

I think Congress has ample power to deal with them. That is to say, I disagree with *Newberry* v. *United States*, 256 U. S. 232, to the extent that it holds that Congress

has no power to control primary elections. Art. I, § 2 of the Constitution provides that "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States." Art. I, § 4 provides that "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." And Art. I, § 8, clause 18 gives Congress the power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Those sections are an arsenal of power ample to protect Congressional elections from any and all forms of pollution. The fact that a particular form of pollution has only an indirect effect on the final election is immaterial. The fact that it occurs in a primary election or nominating convention is likewise irrelevant. The important consideration is that the Constitution should be interpreted broadly so as to give to the representatives of a free people abundant power to deal with all the exigencies of the electoral process. It means that the Constitution should be read so as to give Congress an expansive implied power to place beyond the pale acts which, in their direct or indirect effect, impair the integrity of Congressional elections. For when corruption enters, the election is no longer free, the choice of the people is affected. To hold that Congress is powerless to control these primaries would indeed be a narrow construction of the Constitution, inconsistent with the view that that instrument of government was designed not only for contemporary needs but for the vicissitudes of time.

So I agree with most of the views expressed in the opinion of the Court. And it is with diffidence that I dissent from the result there reached.

The disagreement centers on the meaning of § 19 of the Criminal Code, which protects every right secured by the Constitution. The right to vote at a final Congressional election and the right to have one's vote counted in such an election have been held to be protected by § 19. *Ex parte Yarbrough, supra; United States* v. *Mosley,* 238 U. S. 383. Yet I do not think that the principles of those cases should be, or properly can be, extended to primary elections. To sustain this indictment we must so extend them. But when we do, we enter perilous territory.

We enter perilous territory because, as stated in *United States* v. *Gradwell,* 243 U. S. 476, 485, there is no common law offense against the United States; "the legislative authority of the Union must make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence." *United States* v. *Hudson,* 7 Cranch 32, 34. If a person is to be convicted of a crime, the offense must be clearly and plainly embraced within the statute. As stated by Chief Justice Marshall in *United States* v. *Wiltberger,* 5 Wheat. 76, 105, "probability is not a guide which a court, in construing a penal statute, can safely take." It is one thing to allow wide and generous scope to the express and implied powers of Congress; it is distinctly another to read into the vague and general language of an act of Congress specifications of crimes. We should ever be mindful that "before a man can be punished, his case must be plainly and unmistakably within the statute." *United States* v. *Lacher,* 134 U. S. 624, 628. That admonition is reëmphasized here by the fact that § 19 imposes not only a fine of $5,000 and ten years in prison, but also makes him who is convicted "ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States." It is not enough for us to find in the vague penumbra of a statute some offense about which Congress could have legislated, and then to particularize it as a crime because it is highly

offensive. Cf. *James* v. *Bowman*, 190 U. S. 127. Civil liberties are too dear to permit conviction for crimes which are only implied and which can be spelled out only by adding inference to inference.

Sec. 19 does not purport to be an exercise by Congress of its power to regulate primaries. It merely penalizes conspiracies "to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." Thus, it does no more than refer us to the Constitution [1] for the purpose of determining whether or not the right to vote in a primary is there secured. Hence we must do more than find in the Constitution the power of Congress to afford that protection. We must find that protection on the face of the Constitution itself. That is to say, we must in view of the wording of § 19 read the relevant provisions of the Constitution for the purposes of this case through the window of a criminal statute.

There can be put to one side cases where state election officials deprive negro citizens of their right to vote at a general election (*Guinn* v. *United States*, 238 U. S. 347), or at a primary. *Nixon* v. *Herndon*, 273 U. S. 536; *Nixon* v. *Condon*, 286 U. S. 73. Discrimination on the basis of race or color is plainly outlawed by the Fourteenth Amendment. Since the constitutional mandate is plain, there is no reason why § 19 or § 20 should not be applicable. But the situation here is quite different. When we turn to the constitutional provisions relevant to this case we find no such unambiguous mandate.

Art. I, § 4 specifies the machinery whereby the times, places and manner of holding elections shall be established and controlled. Art. I, § 2 provides that representatives shall be "chosen" by the people. But for purposes of the

[1] While § 19 also refers to "laws of the United States," § 19 and § 20 are the only statutes directly in point.

criminal law as contrasted to the interpretation of the Constitution as the source of the implied power of Congress, I do not think that those provisions in absence of specific legislation by Congress protect the primary election or the nominating convention. While they protect the right to vote, and the right to have one's vote counted, at the final election, as held in the *Yarbrough* and *Mosley* cases, they certainly do not *per se* extend to all acts which in their indirect or incidental effect restrain, restrict, or interfere with that choice. Bribery of voters at a general election certainly is an interference with that freedom of choice. It is a corruptive influence which for its impact on the election process is as intimate and direct as the acts charged in this indictment. And Congress has ample power to deal with it. But this Court in *United States* v. *Bathgate,* 246 U. S. 220, by a unanimous vote, held that conspiracies to bribe voters at a general election were not covered by § 19. While the conclusion in that case may be reconciled with the results in the *Yarbrough* and *Mosley* cases on the ground that the right to vote at a general election is personal while the bribery of voters only indirectly affects that personal right, that distinction is not of aid here. For the failure to count votes cast at a primary has by the same token only an indirect effect on the voting at the general election. In terms of causal effect, tampering with the primary vote may be as important on the outcome of the general election as bribery of voters at the general election itself. Certainly from the viewpoint of the individual voter there is as much a dilution of his vote in the one case as in the other. So, in light of the *Mosley* and *Bathgate* cases, the test under § 19 is not whether the acts in question constitute an interference with the effective choice of the voters. It is whether the voters are deprived of their votes in the general election. Such a test comports with the standards for construction of a criminal law, since it restricts § 19 to protection of

the rights plainly and directly guaranteed by the Constitution. Any other test entails an inquiry into the indirect or incidental effect on the general election of the acts done. But in view of the generality of the words employed, such a test would be incompatible with the criteria appropriate for a criminal case.

The *Mosley* case, in my view, went to the verge when it held that § 19 and the relevant constitutional provisions made it a crime to fail to count votes cast at a general election. That Congress intended § 19 to have that effect was none too clear. The dissenting opinion of Mr. Justice Lamar in that case points out that § 19 was originally part of the Enforcement Act of May 31, 1870, c. 114, § 6, 16 Stat. 140. Under another section of that act (§ 4), which was repealed by the Act of February 8, 1894 (28 Stat. 36), the crime charged in the *Mosley* case would have been punishable by a fine of not less than $500 and imprisonment for 12 months.[2] Under § 19 it carried, as it still does, a penalty of $5000 and ten years in prison. The Committee Report (H. Rep. No. 18, 53d Cong., 1st Sess.), which recommended the repeal of other sections, clearly indicated an intent to remove the hand of the Federal Government from such elections and to restore their conduct and policing to the states.

[2] Sec. 5506, Rev. Stat.: "Every person who, by any unlawful means, hinders, delays, prevents, or obstructs, or combines and confederates with others to hinder, delay, prevent, or obstruct, any citizen from doing any act required to be done to qualify him to vote, or from voting at any election . . . shall be fined not less than five hundred dollars, or be imprisoned not less than one month nor more than one year, or be punished by both such fine and imprisonment." Sec. 5511 provided: "If, at any election for Representative or Delegate in Congress, any person . . . knowingly receives the vote of any person not entitled to vote, or refuses to receive the vote of any person entitled to vote . . . he shall be punished by a fine of not more than five hundred dollars, or by imprisonment not more than three years, or by both . . ."

As the Report stated (p. 7): "Let every trace of the reconstruction measures be wiped from the statute books; let the States of this great Union understand that the elections are in their own hands, and if there be fraud, coercion, or force used they will be the first to feel it. Responding to a universal sentiment throughout the country for greater purity in elections many of our States have enacted laws to protect the voter and to purify the ballot. These, under the guidance of State officers, have worked efficiently, satisfactorily, and beneficently; and if these Federal statutes are repealed that sentiment will receive an impetus which, if the cause still exists, will carry such enactments in every State in the Union." In view of this broad, comprehensive program of repeal, it is not easy to conclude that the general language of § 19, which was not repealed, not only continued in effect much which had been repealed but also upped the penalties for certain offenses which had been explicitly covered by one of the repealed sections. Mr. Justice Holmes, writing for the majority in the *Mosley* case, found in the legislative and historical setting of § 19 and in its revised form a Congressional interpretation which, if § 19 were taken at its face value, was thought to afford voters in final Congressional elections general protection. And that view is a tenable one, since § 19 originally was part of an Act regulating general elections, and since the acts charged had a direct rather than an indirect effect on the right to vote at a general election.

But as stated by a unanimous court in *United States* v. *Gradwell, supra,* p. 486, the *Mosley* case "falls far short" of making § 19 "applicable to the conduct of a state nominating primary." Indeed, Mr. Justice Holmes, the author of the *Mosley* opinion, joined with Mr. Justice McReynolds in the *Newberry* case in his view that Congress had no authority under Art. I, § 4 of the Constitution to legislate on primaries. When § 19

was part of the Act of May 31, 1870, it certainly would never have been contended that it embraced primaries, for they were hardly known at that time.[3] It is true that "even a criminal statute embraces everything which subsequently falls within its scope." *Browder* v. *United States*, 312 U. S. 335, 340. Yet the attempt to bring under § 19 offenses "committed in the conduct of primary elections or nominating caucuses or conventions" was rejected in the *Gradwell* case, where this Court said that in absence of legislation by Congress on the subject of primaries it is not for the courts "to attempt to supply it by stretching old statutes to new uses, to which they are not adapted and for which they were not intended. . . . the section of the Criminal Code relied upon, originally enacted for the protection of the civil rights of the then lately enfranchised negro, cannot be extended so as to make it an agency for enforcing a state primary law." 243 U. S. pp. 488–489. The fact that primaries were hardly known when § 19 was enacted, the fact that it was part of a legislative program governing general elections, not primary elections, the fact that it has been in nowise implemented by legislation directed at primaries, give credence to the unanimous view in the *Gradwell* case that § 19 has not by the mere passage of time taken on a new and broadened meaning. At least it seems plain that the difficulties of applying the historical reason adduced by Mr. Justice Holmes in the *Mosley* case to bring general elections within § 19 are so great in case of primaries that we have left the safety zone of interpretation of criminal statutes when we sustain this indictment. It is one thing to say, as in the *Mosley* case, that Congress was legislating as respects general elections when it passed § 19. That was the fact. It is quite

[3] Merriam & Overacker, Primary Elections (1928) chs. I–III, V; Sait, American Parties & Elections (1927) ch. X; Brooks, Political Parties & Electoral Problems (1933) ch. X.

another thing to say that Congress by leaving § 19 unmolested for some seventy years has legislated unwittingly on primaries. Sec. 19 was never part of an act of Congress directed towards primaries. That was not its original frame of reference. Therefore, unlike the *Mosley* case, it cannot be said here that § 19 still covers primaries because it was once an integral part of primary legislation.

Furthermore, the fact that Congress has legislated only sparingly and at infrequent intervals even on the subject of general elections (*United States* v. *Gradwell, supra*) should make us hesitate to conclude that by mere inaction Congress has taken the greater step, entered the field of primaries, and gone further than any announced legislative program has indicated. The acts here charged constitute crimes under the Louisiana statute. La. Act No. 46, Reg. Sess. 1940, § 89. In absence of specific Congressional action we should assume that Congress has left the control of primaries and nominating conventions to the states—an assumption plainly in line with the Committee Report, quoted above, recommending the repeal of portions of the Enforcement Act of May 31, 1870 so as to place the details of elections in state hands. There is no ground for inference in subsequent legislative history that Congress has departed from that policy by superimposing its own primary penal law on the primary penal laws of the states. Rather, Congress has been fairly consistent in recognizing state autonomy in the field of elections. To be sure, it has occasionally legislated on primaries.[4] But even when dealing specifically with the nominating process, it has never made acts of the kind here in question a crime. In this connection it should be noted that the bill which became the Hatch Act (53 Stat. 1147; 18 U. S. C. § 61)

[4] Act of June 25, 1910, c. 392, 36 Stat. 822, as amended by the Act of August 19, 1911, c. 33, 37 Stat. 25; Act of October 16, 1918, c. 187, 40 Stat. 1013.

contained a section which made it unlawful "for any person to intimidate, threaten, or coerce, or to attempt to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the nomination of any party as its candidate" for various federal offices, including representatives, "*at any primary or nominating convention* held solely or in part" for that purpose. This was stricken in the Senate. 84 Cong. Rec., pt. 4, 76th Cong., 1st Sess., p. 4191. That section would have extended the same protection to the primary and nominating convention as § 1 of the Hatch Act [5] extends to the general election. The Senate, however, refused to do so. Yet this Court now holds that § 19 has protected the primary vote all along and that it covers conspiracies to do the precise thing on which Congress refused to legislate in 1939. The hesitation on the part of Congress through the years to enter the primary field, its refusal to do so [6] in 1939, and the restricted scope of such primary laws as it has passed, should be ample evidence

[5] "That it shall be unlawful for any person to intimidate, threaten, or coerce, or to attempt to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, or Member of the House of Representatives at any election held solely or in part for the purpose of selecting a President, a Vice President, a Presidential elector, or any Member of the Senate or any Member of the House of Representatives, Delegates or Commissioners from the Territories and insular possessions."

[6] Sec. 2 of the Hatch Act, however, does make unlawful certain acts of administrative employees even in connection with the nominations for certain federal offices. And see 54 Stat. 767, No. 753, ch. 640, 76th Cong., 3d Sess. As to the power of Congress over employees or officers of the government, see *United States* v. *Wurzbach*, 280 U. S. 396.

that this Court is legislating when it takes the initiative in extending § 19 to primaries.

We should adhere to the strict construction given to § 19 by a unanimous court in *United States* v. *Bathgate*, 246 U. S. 220, 226, where it was said: "Section 19, Criminal Code, of course, now has the same meaning as when first enacted . . . and considering the policy of Congress not to interfere with elections within a State except by clear and specific provisions, together with the rule respecting construction of criminal statutes, we cannot think it was intended to apply to conspiracies to bribe voters." That leads to the conclusion that § 19 and the relevant constitutional provisions should be read so as to exclude all acts which do not have the direct effect of depriving voters of their right to vote at general elections. That view has received tacit recognition by Congress. For the history of legislation governing Federal elections shows that the occasional Acts of Congress[7] on the subject have been primarily directed towards supplying detailed regulations designed to protect the individual's constitutional right to vote against pollution and corruption. Those laws, the latest of which is § 1 of the Hatch Act, are ample recognition by Congress itself that specific legislation is necessary in order to protect the electoral process against the wide variety of acts which in their indirect or incidental effect interfere with the voter's freedom of choice and corrupt the electoral process. They are evidence that detailed regulations are essential in order to reach acts which do not directly interfere with the voting privilege. They are inconsistent with the notions in the opinion of the

[7] See for example, Act of May 31, 1870, 16 Stat. 140; Act of July 14, 1870, 16 Stat. 254, 255–256; Act of Feb. 28, 1871, 16 Stat. 433; Act of June 25, 1910, 36 Stat. 822; Act of August 19, 1911, 37 Stat. 25; Act of August 23, 1912, 37 Stat. 360; Act of October 16, 1918, 40 Stat. 1013; Federal Corrupt Practices Act, 1925, 43 Stat. 1070; Hatch Act, August 2, 1939, 53 Stat. 1147.

Court that the Constitution, unaided by definite supplementary legislation, protects the methods by which party candidates are nominated.

That § 19 lacks the requisite specificity necessary for inclusion of acts which interfere with the nomination of party candidates is reëmphasized by the test here employed. The opinion of the Court stresses, as does the indictment, that the winner of the Democratic primary in Louisiana invariably carries the general election. It is also emphasized that a candidate defeated in the Louisiana primaries cannot be a candidate at the general election. Hence, it is argued that interference with the right to vote in such a primary is "as a matter of law and in fact an interference with the effective choice of the voters at the only stage of the election procedure when their choice is of significance," and that the "primary in Louisiana is an integral part of the procedure for the popular choice" of representatives. By that means, the *Gradwell* case is apparently distinguished. But I do not think it is a valid distinction for the purposes of this case.

One of the indictments in the *Gradwell* case charged that the defendants conspired to procure one thousand unqualified persons to vote in a West Virginia primary for the nomination of a United States Senator. This Court, by a unanimous vote, affirmed the judgment which sustained a demurrer to that indictment. The Court specifically reserved the question as to whether a "primary should be treated as an election within the meaning of the Constitution." But it went on to say that, even assuming it were, certain "strikingly unusual features" of the particular primary precluded such a holding in that case. It noted that candidates of certain parties were excluded from the primary, and that even candidates who were defeated at the primary could on certain conditions be nominated for the general election. It therefore concluded that whatever power Congress might have to control such primaries, it had not done so by § 19.

If the *Gradwell* case is to survive, as I think it should, we have therefore this rather curious situation. Primaries in states where the winner invariably carries the general election are protected by § 19 and the Constitution, even though such primaries are not by law an integral part of the election process. Primaries in states where the successful candidate never wins, seldom wins, or may not win in the general election are not so protected, unless perchance state law makes such primaries an integral part of the election process. Congress, having a broad control over primaries, might conceivably draw such distinctions in a penal code. But for us to draw them under § 19 is quite another matter. For we must go outside the statute, examine local law and local customs, and then, on the basis of the legal or practical importance of a particular primary, interpret the vague language of § 19 in the light of the significance of the acts done. The result is to make refined and nice distinctions which Congress certainly has not made, to create unevenness in the application of § 19 among the various states, and to make the existence of a crime depend, not on the plain meaning of words employed interpreted in light of the legislative history of the statute, but on the result of research into local law or local practices. Unless Congress has explicitly made a crime dependent on such facts, we should not undertake to do so. Such procedure does not comport with the strict standards essential for the interpretation of a criminal law. The necessity of resorting to such a circuitous route is sufficient evidence to me that we are performing a legislative function in finding here a definition of a crime which will sustain this indictment. A crime, no matter how offensive, should not be spelled out from such vague inferences.

MR. JUSTICE BLACK and MR. JUSTICE MURPHY join in this dissent.

HOLIDAY *v.* JOHNSTON, WARDEN.

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

No. 14, original. Argued May 5, 6, 1941.—Decided May 26, 1941.

1. The erroneous imposition of two sentences for a single offense of which the accused has been convicted, or as to which he has pleaded guilty, does not constitute double jeopardy. P. 349.
2. A prisoner while serving a valid sentence can not by habeas corpus attack a second sentence for the same offense timed to begin at the end of the first, although the second must be vacated before he can apply for parole under the first. P. 349.

   His remedy is to apply for vacation of the sentence and for a re-sentence in conformity with the statute under which he was adjudged guilty.
3. Petitions for habeas corpus are not to be regarded meticulously; and, even if insufficient in substance, may be amended in the interest of justice. P. 350.

   In the present instance, the district judge, by regarding the petition, traverse, and return as making issues of fact justifying the taking of evidence, did not abuse his discretion.
4. Under the habeas corpus statute, the district judge must himself hear the prisoner's testimony and in the light of it and other testimony must find the facts and base his disposition of the case upon his findings. P. 351.

   A practice of commanding that the prisoner be taken before a Commissioner to take evidence and report and of disposing of the case upon the record made before the Commissioner, can not be sustained because of its convenience or because it is a practice of long standing which has found its place in a rule of court.
5. Rule 53 of the Rules of Civil Procedure dealing with references to Masters, has no application to habeas corpus cases. P. 353.

Reversed.

CERTIORARI, 312 U. S. 673, to review an order refusing a petition for leave to appeal *in forma pauperis* from a judgment of the District Court discharging a writ of habeas corpus.

Mr. Charles A. Horsky for petitioner.

The Court has jurisdiction (*In re 620 Church Street Corp.*, 299 U. S. 24, 26), and also the power to proceed *in forma pauperis*. 28 U. S. C. 832. Even though the technical issue before the Court may be only whether the Circuit Court of Appeals abused its discretion in denying an appeal *in forma pauperis,* nevertheless, for many reasons, the Court should now pass on the merits of the issues raised.

The writ was not valid. It did not comply with the provisions of the statute requiring the production of the petitioner "before the judge who granted the writ," R. S. § 758, nor with the requirement that the judge shall determine the facts by hearing the testimony. R. S. § 761.

A United States commissioner has not a judge's authority. *Grin* v. *Shine,* 187 U. S. 181, distinguished.

The procedure of a commissioner's report is completely inconsistent with the policy expressed in recent decisions of this Court.

Rule 53 of the Rules of Civil Procedure is not applicable.

Even if the reference to a special master in *habeas corpus* proceedings is proper, the Court should not sanction the manner in which the device was utilized here. The hearing was held in prison—certainly not "judicial" procedure. The commissioner based his decision on plain errors of law, which are demonstrably prejudicial and not cured by the District Court. The District Court made no findings of fact. The hearing on the "approval" of the report was apparently *ex parte*.

On the facts stated, there is plainly a denial of the assistance of counsel guaranteed in the Fifth and Sixth Amendments to the Constitution.

The case is controlled by *Walker* v. *Johnston,* 312 U. S. 275, and *Johnson* v. *Zerbst,* 304 U. S. 458.

That the consecutive sentences punish petitioner twice for the same offense is admitted by the Government. The

question of which sentence is valid is properly before the Court, inasmuch as it must be determined in order to decide whether the petition is in this respect premature. That question must be resolved against the validity of the fifteen-year sentence on the second count.

Mr. Herbert Wechsler, with whom *Assistant Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Alfred B. Teton* were on the brief, for respondent.

The petition and traverse stated no case for the issuance of the writ. The petition for the writ attacked the legality of the detention on two grounds: (1) that the cumulative sentences on the two counts constituted double jeopardy; and (2) that the judgment was in conflict with the Sixth Amendment because the right to counsel was denied. The traverse alleges no new facts and makes no additional contentions. The petition was premature on the first ground; and, on the second, the facts alleged are legally insufficient to entitle the petitioner to relief. Hence, there was no occasion to issue a writ of *habeas corpus* (*Walker* v. *Johnston,* 312 U. S. 275) and the application was properly dismissed.

The procedure was equivalent to a reference to the commissioner to hear and report the testimony, with findings of fact and conclusions of law.

The procedure was in keeping with the historic practice of the federal courts for California. The reference of issues of fact arising in *habeas corpus* proceedings to a United States commissioner to hear the evidence and report findings originated long ago as a response to the tremendous number of petitions filed in Chinese exclusion cases. Decisions of the period refer to such references as "the established practice" of the District Court. We are not aware that it was ever questioned, though it was followed in at least two cases which reached this Court. Cf., *Nishimura Ekiu* v. *United States,* 142 U. S. 651, 652, 656; *United States* v. *Ju Toy,* 198 U. S. 253, 264.

The federal courts in California have referred issues of fact to commissioners in *habeas corpus* cases for more than fifty years and the issuance of a writ returnable before a commissioner is a traditional equivalent of such an order of reference.

The statutory command that the court "shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments" does not preclude a reference to a master to hear and report the testimony with his findings of fact and conclusions of law—so long as the actual adjudication is made by the court.

The equity practice is peculiarly persuasive in the present context because in England—at least since the Habeas Corpus Act (31 Car. II, c. 2)—the writ of *habeas corpus* issued out of chancery as well as the law courts. Cf. *People ex rel. Woodbury* v. *Hendrick,* 215 N. Y. 339, 346. The analogy of equity has been observed by this Court. *Storti* v. *Massachusetts,* 183 U. S. 138, 143; see also *Ex parte Royall,* 117 U. S. 241, 251. If a reference were impossible under the statute, it is difficult to see how this Court could ever practically exercise its power to issue an original writ of *habeas corpus* if issues of fact were involved. The mandate of the statute "is applicable to this Court whether it is exercising its original or appellate jurisdiction." *Storti* v. *Massachusetts, supra.*

There is English precedent, and prior to the federal statute, for ordering a reference (*The Case of the Hottentot Venus,* 13 East 194); the practice of taking the verdict of a jury appears to be more common. *In the Matter of Andrews,* 8 Q. B. 153, 160; *Re Guerin,* 60 L. T. 538, 542n.; *Re Gibson,* 15 Ont. L. R. 245, 247; see *In re Hakewill,* 12 C. B. 223, 228. Both practices have been followed in the state courts, especially, though not exclusively, in infant custody cases. Neither has been regarded as detracting from a judicial inquiry into the facts or the function of a *habeas corpus* hearing.

The use of a master or commissioner is not precluded in other proceedings which may terminate in punishment, notably in the case of contempt. Cf., *United States* v. *Shipp,* 214 U. S. 386; *Chin Bak Kan* v. *United States,* 186 U. S. 193, 200; *Ng Fung Ho* v. *White,* 259 U. S. 276, 279.

If a reference is not incompatible with the *habeas corpus* statute, the power to refer exists in the inherent power of federal courts "to provide themselves with appropriate instruments required for the performance of their duties" (*Ex parte Peterson,* 253 U. S. 300, 312), a power broadly articulated in Rule 53 (a) of the Rules of Civil Procedure.

There was no objection to the reference to the Commissioner either at the hearing or in court. Under these circumstances, it is certainly too late to challenge the action of the court on a matter peculiarly within its discretion.

Moreover, there is an "exceptional condition" well known to the District Court. From June 1, 1938 to April 1, 1941, there were 131 petitions for writs of *habeas corpus* filed in the Northern District of California by prisoners in Alcatraz Penitentiary, 75 based upon the decision in *Johnson* v. *Zerbst,* 304 U. S. 458, and 3 upon the decision in *Walker* v. *Johnston,* 312 U. S. 275. Prisoners are sent to Alcatraz only if they are regarded as custodial problems, requiring maximum security. The hazards of escape are great and require unusual precautions for safe custody. See Federal Offenders (1938) p. 95; *ibid.* (1939) p. 30; Annual Report of the Attorney General (1935) p. 151. These considerations constitute an "exceptional condition" and would, in our view, justify an order of reference. Nothing in Rule 53 (b) indicates that the "exceptional condition" must appear of record when it is within the knowledge of the court.

The procedure did not otherwise deprive the petitioner of any substantial right.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The petitioner applied to the District Court for the Northern District of California for a writ of *habeas corpus*. His petition alleged that he was unlawfully detained by the respondent in Alcatraz Penitentiary; that he had been indicted in the District Court for North Dakota under an Act of May 18, 1934, § 2,[1] the indictment being in two counts, one for robbery of an insured bank and the other for jeopardizing the lives of officials of the bank in the course of the robbery; that he pleaded guilty to both counts and was sentenced to ten years under the first and to fifteen years under the second, "commencing at the expiration of the sentence imposed under count one." The petition charged that he was unlawfully detained because he was tried without the advice and assistance of counsel, was ignorant of his right to have counsel although unable to pay for an attorney, was not advised by the court that he was entitled to counsel, and was unable to, and did not, intelligently waive his constitutional right to have counsel. The petition alleged that the two counts of the indictment charged but one offense and that the petitioner was placed in double jeopardy by the imposition of the consecutive sentences.

The court issued a rule on the respondent to show cause why a writ should not issue. The respondent made return showing that the petitioner was held under a commitment issued pursuant to his conviction upon the indictment in question. He attached a certificate of the judge who imposed the sentence, attesting to his uniform practice of inquiring of prisoners charged with felony whether they wanted counsel and his firm belief that he so inquired of the petitioner, and the affidavit of a deputy marshal to the effect that petitioner said he did not desire counsel.

Petitioner filed a traverse in which he denied that the

[1] 48 Stat. 783, 12 U. S. C. § 588b.

trial judge had interrogated him as stated and denied that he had made the alleged statement to the deputy marshal. The district judge issued a writ commanding the respondent to produce the petitioner before a commissioner of the District Court at the Alcatraz prison on a day named. This was done and the commissioner there took the petitioner's testimony and later received the depositions of two witnesses on behalf of the respondent. The commissioner submitted a report in which he recited his proceedings, summarized the asserted grounds for relief, made findings of fact, stated conclusions of law, and recommended that the application be denied. After hearing argument on the report the judge entered an order discharging the writ.

The petitioner applied for leave to appeal *in forma pauperis*. This was denied by an order which recited that, so far as the petition was based on the alleged invalidity of the sentence on the second count of the indictment it was premature and, so far as it was grounded on the deprivation of the assistance of counsel, the evidence sustained the finding of the commissioner that the petitioner had competently and intelligently waived his right to such assistance. Accordingly, the judge denied an appeal for want of merit in the application.

The petitioner moved the Circuit Court of Appeals for leave to appeal *in forma pauperis*, which was denied. He then petitioned this Court for certiorari [2] and for leave to proceed *in forma pauperis*. Both petitions were granted and counsel was appointed to represent him in this Court.

The burden of petitioner's complaint is that the procedure adopted by the District Court—that of a hearing before a commissioner and the disposition of the cause on the record made before him—is a plain violation of

[2] We have jurisdiction under § 262 of the Judicial Code, 28 U. S. C. § 377; *In re 620 Church Street Corporation*, 299 U. S. 24.

the Acts of Congress regulating the practice in *habeas corpus* cases. In addition, he seeks a reversal of the judgment on the ground that the sentence on the second count is void. He insists that he is entitled to a decision to this effect so that he may apply for parole under the sentence imposed on the first count.

The respondent argues that we need not consider the question of the regularity of the hearing in *habeas corpus,* since the petition should have been denied as premature so far as it rested on the asserted illegality of the sentence, and since the District Court should have dismissed the petition for insufficiency of the allegations concerning the denial of assistance of counsel.

1. The respondent admits that § 2 of the Act of May 18, 1934, *supra,* does not create two separate crimes but prescribes alternative sentences for the same crime depending upon the manner of its perpetration. This concession, however, does not aid the petitioner. The erroneous imposition of two sentences for a single offense of which the accused has been convicted, or as to which he has pleaded guilty, does not constitute double jeopardy. And if, as the petitioner contends, the first sentence of ten years is valid and the second void, he is no better off. Conceding, without deciding, that he is right in saying the first sentence is the only valid one, he has not served that sentence and is not entitled now to be discharged from custody under it. He urges that if the second sentence is adjudged void he will now be entitled to apply for parole under the first. But we have recently decided that *habeas corpus* cannot be awarded to afford a prisoner such an opportunity.[3] His remedy is to apply for vacation of the sentence and a resentence in conformity to the statute under which he was adjudged guilty.

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[3] *McNally* v. *Hill,* 293 U. S. 131.

2. The respondent's contention that we should affirm the judgment because the petition for the writ insufficiently alleges a denial of constitutional right and fails to rebut the presumption of regularity which attaches to the record of petitioner's trial and conviction may be shortly answered. A petition for *habeas corpus* ought not to be scrutinized with technical nicety. Even if it is insufficient in substance it may be amended in the interest of justice. In the present instance, moreover, the judge, by calling on the respondent to show cause, adjudged that, in his view, the petition was sufficient and, by referring the cause to a master, evinced a judgment that the petition, the return, and the traverse made issues of fact justifying the taking of evidence. These decisions did not constitute an abuse of discretion and we will not review them.

3. The respondent insists that the petition was premature if the petitioner's claim that he was denied the assistance of counsel is without merit, but the contention is pressed only if we find that no question as to such denial is presented.

4. We come then to the serious question in the case. Was the method of trial of the fact issues presented by the pleadings in accordance with law?

Revised Statutes §§ 757, 758, and 761 [4] prescribe the procedure to be followed. The first requires that "The person to whom the writ is directed shall certify to the court, or justice, or judge before whom it is returnable the true cause of the detention of such party"; and the second that: "The person making the return shall at the same time bring the body of the party before the judge who granted the writ." [5] The third provides that: "The

[4] 28 U. S. C. §§ 457, 458, 461.

[5] Both these sections are derived from the Habeas Corpus Act of February 5, 1867, c. 28, 14 Stat. 385. In the codification the language of the original statute was altered to indicate that the return might

court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

It is plain, as the respondent concedes, that a commissioner is not a judge and that the command of the court's writ that the petitioner appear before that officer was not a literal compliance with the statute. The respondent argues, however, that the writ in effect referred the cause to the commissioner as a master whose function was to take the testimony and submit it, together with his findings and conclusions, for such action as the court might take upon such submission. The argument runs that this practice is in substance equivalent to a hearing before the judge in his proper person, has long been followed in the district courts in California, has not incurred the criticism of this court in cases brought here where it was followed, is a convenient procedure, tends to expedite the disposition of such cases, is in accordance with long standing equity practice and is countenanced by Rule 53 (a) (b) of the Rules of Civil Procedure.[6]

We cannot sanction a departure from the plain mandate of the statute on any of the grounds advanced. We have recently emphasized the broad and liberal policy adopted by Congress respecting the office and use of the writ of *habeas corpus* in the interest of the protection of individual freedom to the end that the very truth and substance of the cause of a person's detention may be disclosed and justice be done.[7] The Congress has seen fit to lodge in

be made to the court, justice, or judge, whereas, in the original statute, the provision is that the respondent "shall make return of said writ and bring the party before the judge who granted the writ, and certify the true cause of the detention of such person . . ." 14 Stat. 386. Nothing in this case turns on the diversity between the language employed in the statute and that found in the revision.

[6] 28 U. S. C. following § 723c.

[7] *Johnson* v. *Zerbst*, 304 U. S. 458; *Walker* v. *Johnston*, 312 U. S. 275.

the judge the duty of investigation. One of the essential elements of the determination of the crucial facts is the weighing and appraising of the testimony. Plainly it was intended that the prisoner might invoke the exercise of this appraisal by the judge himself. We cannot say that an appraisal of the truth of the prisoner's oral testimony by a master or commissioner is, in the light of the purpose and object of the proceeding, the equivalent of the judge's own exercise of the function of the trier of the facts.

The circumstance that the practice has grown up of referring such causes to a commissioner, has long been indulged in in the federal courts of California, and has found a place in a rule of court, cannot overcome the plain command of the statute. It is true that the practice was followed in certain deportation cases which were reviewed by this Court, but, so far as appears, no point was made as to the procedure followed in those cases and the matter was passed without notice.

It may be that the practice is a convenient one, but, if so, that consideration is for Congress. In view of the plain terms in which the Congressional policy is evidenced in the Habeas Corpus Act, the courts may not substitute another more convenient mode of trial.

It is said that the procedure tends to expedite the disposition of *habeas corpus* cases. The record in this case would seem to contradict the argument.[8] And when it is remembered that R. S. 756[9] required that the return

[8] The petition was filed May 8, 1939. The order to show cause issued June 29, 1939. The return was presented July 10, 1939; the traverse July 31, 1939. The writ issued December 14, 1939. The commissioner held hearings on December 16, 1939, and April 30, 1940. He filed his report May 23, 1940, and the judge entered an order confirming the report and discharging the writ July 1, 1940. No explanation is vouchsafed for what seems, in view of the peremptory terms of the statute, an inordinate protraction of the proceeding.

[9] 28 U. S. C. § 456.

in this case be made within three days of the issue of the writ, and that R. S. 758, *supra,* required the respondent to produce the body at the same time he made the return; that R. S. 759 [10] commands that the hearing shall be set not more than five days after the return; and that R. S. 761, *supra,* enjoins the judge to proceed in a summary way to hear the cause and dispose of the petitioner, it is difficult to see how the comparatively cumbersome and time-consuming procedure of reference, report, and hearing upon the report, can be thought a more expeditious method than that prescribed by the statute.

The practice of referring equity causes to masters presents no persuasive analogy. The scope and purpose of the two proceedings are obviously different. Moreover, when Congress prescribed the procedure in *habeas corpus* the practice of reference to masters in chancery was well known to it. The legislature, nevertheless, saw fit to require a different procedure in *habeas corpus* cases.

Finally, the sanction by Rule 53 of the Rules of Civil Procedure of references to masters does not aid in the decision of the question presented. Rule 81 (a) (2) provides that appeals in *habeas corpus* cases are to be governed by the rules, but that the rules are not applicable "otherwise than on appeal" in *habeas corpus* cases "except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity . . ." Since the practice in *habeas corpus* is set forth in plain terms in the Revised Statutes, to which reference has been made, Rule 53 has no application.

In summary, we hold that the provisions of the *habeas corpus* act, as embodied in the Revised Statutes, are too plain to be disregarded for any of the reasons advanced. The District Judge should himself have heard the pris-

[10] 28 U. S. C. § 459.

oner's testimony and, in the light of it and the other testimony, himself have found the facts and based his disposition of the cause upon his findings. The petitioner has not been afforded the right of testifying before the judge, which the statute plainly accords him. In order that he may have that right we reverse the judgment and remand the cause to the District Court for further proceedings in conformity to this opinion. We express no opinion as to the weight or sufficiency of the evidence heretofore adduced. The issues of fact will be for solution by the District Court upon a further hearing.

Reversed.

BROOKS *v.* DEWAR ET AL.

CERTIORARI TO THE SUPREME COURT OF NEVADA.

No. 718. Argued May 1, 1941.—Decided May 26, 1941.

1. The judgment being erroneous on the merits, the Court abstains from inquiring whether this suit to enjoin a subordinate federal officer from alleged invasion of plaintiff's rights under color of a federal statute but without authority, is a suit against the United States, or whether the Secretary of the Interior should have been joined as a necessary party defendant, or whether the state court was without power to enjoin a federal officer. P. 359.
2. In administering the Taylor Grazing Act of June 28, 1934, the Secretary of the Interior, relying on the broad powers conferred by § 2, issued temporary licenses to stockowners, for the grazing of their livestock upon the public lands within grazing districts, and charged a uniform price per head, rather than have the grazing lands go unregulated pending the lengthy period required for instituting the plan, contemplated by § 3, of renewable term permits at reasonable fees adjusted to each case, etc. With full knowledge of this, Congress repeatedly appropriated part of the money thus brought into the Treasury for expenditure by the Secretary in improvement of the ranges. *Held*, that the Secretary's construction of the statute was thereby confirmed and his action as agent of

Congress in the administration of the Act was thereby ratified. P. 360.

60 Nev. 219; 106 P. 2d 755, reversed.

CERTIORARI, 312 U. S. 674, to review the affirmance of a decree of injunction, entered upon the overruling of a demurrer to the bill.

Mr. Warner W. Gardner, with whom *Solicitor General Biddle, Assistant Attorney General Littell,* and *Mr. Vernon L. Wilkinson* were on the brief, for petitioner.

Mr. Milton B. Badt, with whom *Messrs. William J. Donovan, R. R. Irvine,* and *John Howley* were on the brief, for respondents.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The respondents brought suit in a Nevada District Court to enjoin the petitioner from barring, or threatening to bar, them from grazing their livestock within Nevada Grazing District No. 1 in default of the payment of certain grazing fees and in default of their holding a license permitting such use of the public lands by them. The bill alleged that the respondents were, and for years had been, in the business of breeding, raising, grazing, and selling livestock within Nevada and within the district; that it was impossible for them to own or lease all the land needed for their business and they owned or leased a small portion of the required land and used vacant unappropriated and unreserved public lands of the United States to satisfy the remainder of their grazing requirements; that their financial and business necessities made it impossible to continue to operate if their ability to graze their livestock on the public range were seriously impaired or interfered with. They averred that, until May 31, 1935, they had been impliedly li-

censed by the United States to graze livestock on portions of the public range in Nevada.[1] They recited the passage by Congress of an Act of June 28, 1934,[2] and alleged that, on April 8, 1935, the Secretary of the Interior, in accordance with the provisions of the Act, established a grazing district known as Nevada Grazing District No. 1, which included portions of the public range upon which the respondents had theretofore grazed their livestock and that, on May 31, 1935, the Director of Grazing, with the approval of the Secretary, had promulgated rules which required all persons grazing within the district to obtain temporary licenses so to do, for which no fees were to be paid; that, pursuant to the rules, the respondents obtained temporary licenses; that, on March 2, 1936, after an investigation by the Secretary, the Director of Grazing, with the approval of his superior, purporting to act under the authority of § 2 of the Act of June 28, 1934, promulgated rules for the administration of grazing districts, which provided for the issue of temporary licenses to expire on a date named in 1937 or upon the issue of permits provided for by § 3 of the Act, for which licenses graziers were to pay a fee of five cents per month for each head of cattle and a fee of one cent per month for each head of sheep for the privilege of grazing; that the rules further provided that, after issue of the temporary licenses, no stockman should graze livestock upon, nor drive them across, the public range within a grazing district without a license. The complaint recited that, about May 1, 1936, the respondents were notified by the Register of the District Land Office that licenses would be granted them upon payment of the first installment of the grazing fees, and that

[1] See *Buford* v. *Houtz*, 133 U. S. 320; *Omaechevarria* v. *Idaho*, 246 U. S. 343.

[2] c. 865, 48 Stat. 1269, as amended by Act of June 26, 1936, c. 842, 49 Stat. 1976, 43 U. S. C. Supp. V, § 315 *et seq.*

shortly thereafter the defendant, Brooks, who was acting as Regional Grazier of the United States, notified the respondents that unless they paid the installments and obtained licenses by June 15th they would be considered in trespass under the terms of the Act of 1934 and would be punished by fine as provided in the Act. The respondents alleged with particularity the urgent necessity in the conduct of their business that they be permitted to graze their cattle on public lands and that, unless they can do so, they will suffer irreparable and serious damage due to the destruction of their businesses. The bill charges that although the Secretary in promulgating the rules with respect to temporary licenses purported to act under the authority of § 2 of the Act of 1934, that section confers upon him no power so to do and that grazing fees specified by the rules were fixed without any attempt to determine their amounts as required by § 3 of the Act and in violation of conditions prescribed by § 3.

The petitioner demurred and assigned as reasons that the complaint failed to state facts sufficient to constitute a cause of action against him; that there was a defect of parties defendant for failure to join the Secretary of the Interior; that as the United States, an indispensable party, had not consented to be sued, the court was without jurisdiction; and that the subject matter of the complaint was exclusively within the political power of the United States and not subject to judicial review. The court overruled the demurrer, with leave to answer. The petitioner elected to stand upon his demurrer, and the court thereupon entered a decree in favor of the respondents, which the Supreme Court of Nevada affirmed.[3] We granted certiorari because of the importance of the questions involved.

By § 1 of the Act of 1934, the Secretary of the Interior is authorized to establish grazing districts not exceeding

[3] 60 Nev. 219; 106 P. 2d 755.

in the aggregate an area of 80,000,000 acres out of certain unappropriated and unreserved public lands of the United States[4] if the lands, in his opinion, are chiefly valuable for grazing and raising forage crops. Before any district is created a hearing is to be held after notice at which officials and persons interested are to be heard. Section 2 provides:

"The Secretary of the Interior shall make provision for the protection, administration, regulation, and improvement of such grazing districts as may be created under the authority of the foregoing section, and he shall make such rules and regulations and establish such service, enter into such cooperative agreements, and do any and all things necessary to accomplish the purposes of this Act and to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range; . . . and any willful violation of the provisions of this Act or of such rules and regulations thereunder after actual notice thereof shall be punishable by a fine of not more than $500."

Section 3 authorizes the Secretary to issue permits to graze livestock in grazing districts "upon the payment annually of reasonable fees in each case to be fixed or determined from time to time." It commands that preference be given, in the issue of permits, to certain persons described in the section and that no permittee who complies with the rules and regulations of the Secretary shall be denied the renewal of his permit if such denial will impair the value of the permittee's grazing unit when such unit is pledged as security for any bona fide loan. The permits are to be for a period of not more

[4] Increased to an aggregate of 142,000,000 acres by the amendatory Act of June 26, 1936, *supra*, Note 2.

than ten years, subject to the preferential right of the permittee to renewal in the discretion of the Secretary. There are other provisions for adjustment of the amount of grazing to be permitted under the permits, and a corresponding adjustment of the grazing fees in the case of the occurrence of range depletion due to natural causes.

By § 10 it is provided that all moneys received under the authority of the Act are to be deposited in the Treasury of the United States, and twenty-five per cent. of such moneys received from any district in a fiscal year is made available, when appropriated by the Congress, for expenditure by the Secretary for range improvements, and fifty per cent. of such money received from a district in any fiscal year is to be paid, at the end of the year, by the Secretary of the Treasury, to the State in which the grazing district is situated, to be expended by the State for the benefit of the counties in which the district lies.[5]

The petitioner asserts that the judgment below should be reversed because the suit is one against the United States; because the Secretary of the Interior is an indispensable party, and because the state court was without power to enjoin a federal officer. He admits that earlier cases in this Court are against his contention but relies on others which he says sustain his view. As this Court remarked nearly sixty years ago respecting questions of this kind, they "have rarely been free from difficulty" and it is not "an easy matter to reconcile all the decisions of the court in this class of cases."[6] The statement applies with equal force at this day. We are not disposed to attempt a critique of the

[5] By § 11 provision is made for disposition of moneys received from districts located on Indian lands. Twenty-five per cent. is made available, when appropriated, for expenditure by the Secretary for range improvement.

[6] *Cunningham* v. *Macon & Brunswick R. Co.*, 109 U. S. 446, 451.

authorities. Since the jurisdiction and the procedure of the court below are sustained by decisions of this Court, we are unwilling to base our judgment upon a resolution of asserted conflict touching issues of so grave consequence, where, as here, the bill fails to make a case upon the merits.

The respondents say that, under the Act of 1934, the Secretary is powerless to grant temporary licenses and charge fees therefor; that his sole authority is to issue permanent permits for specified periods not to exceed ten years, at fees adjusted to the circumstances of individual permittees, and with preferential rights of renewal. If this view be correct, it might well be years before the Secretary could place the users of lands in any district under permits. The petitioner asserts that it was not the intent of Congress that the grazing lands should go unregulated and without license for any such extensive period as would be required for the issue of permits under § 3. He relies on the broad powers conferred by § 2, and points out that the section is a replica of the statute involved in *United States* v. *Grimaud*, 220 U. S. 506, and there held to authorize similar rules and regulations.

With knowledge that the Department of the Interior was issuing temporary licenses instead of term permits and that uniform fees were being charged and collected for the issue of temporary licenses, Congress repeatedly appropriated twenty-five per cent. of the money thus coming into the Treasury for expenditure by the Secretary in improvements upon the ranges.[7] The information in

[7] Act of June 22, 1936, c. 691, 49 Stat. 1757, 1758; Act of August 9, 1937, c. 570, 50 Stat. 564, 565; Act of May 9, 1938, c. 187, 52 Stat. 291, 292; Act of May 10, 1939, c. 119, 53 Stat. 685, 687; Act of June 18, 1940, c. 395, 54 Stat. 406. The form of the Appropriations Act of June 22, 1936, is typical. It is: "For construction, purchase, and maintenance of range improvements within grazing districts, pur-

the possession of Congress was plentiful and from various sources. It knew from the annual reports of the Secretary of the Interior that a system of temporary licensing was in force.[8] The same information was furnished the Appropriations Committee at its hearings.[9] Not only was it disclosed by the annual report of the Department that no permits were issued in 1936, 1937, and 1938, and that permits were issued in only one district in 1939, but it was also disclosed in the hearings that uniform fees were being charged and collected for the issue of temporary licenses. And members from the floor informed the Congress that the temporary licensing system was in force and that as much as $1,000,000 had been or would be collected in fees for such licenses.[10] The repeated appropriations of the proceeds of the fees thus covered, and to be covered, into the Treasury, not only confirms the departmental construction of the statute,[11] but constitutes a ratification of the action of the Secretary as the agent of Congress in the administration of the act.[12]

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suant to the provisions of sections 10 and 11 of the Act of June 28, 1934 (48 Stat., p. 1269), and not including contributions under section 9 of said Act, $250,000: *Provided,* That expenditures hereunder in any grazing district shall not exceed 25 per centum of all moneys received under the provisions of said Act from such district during the fiscal years 1936 and 1937."

[8] Annual Report Secretary of the Interior 1936, pp. 16–17. *Id.,* 1937, pp. xii, 102, 105–107. *Id.,* 1938, pp. xv, 107.

[9] Hearings Subcommittee of House Committee on Appropriations on H. R. 10,630, 74th Cong., 2d Sess., pp. 13–15; Hearings Subcommittee of House Committee on Appropriations on H. R. 6958, 75th Cong., 1st Sess., pp. 80, 83, 89; Hearings Subcommittee of House Committee on Appropriations on H. R. 9621, 75th Cong., 3d Sess., pp. 65, 70, 71; Hearings Subcommittee of Senate Committee on Appropriations on H. R. 9621, 75th Cong., 3d Sess., pp. 3, 28, 29.

[10] 81 Cong. Rec., part 4, pp. 4570–4571; 83 Cong. Rec., part 11, p. 2376; 84 Cong. Rec., part 13, pp. 2931, 2932, 2933.

[11] *Wells* v. *Nickles,* 104 U. S. 444, 447.

[12] *Isbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139, 147.

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

Reversed.

WOOD ET AL. *v.* LOVETT.

APPEAL FROM THE SUPREME COURT OF ARKANSAS.

No. 709. Submitted April 2, 1941.—Decided May 26, 1941.

Where a State has sold land under a tax title which is valid with the help of a statute curing irregularities in the tax proceeding, but invalid without it, a repeal of the curative statute impairs the obligation of the contract between the State and its vendee, in violation of the contract clause of the Federal Constitution. P. 371.

201 Ark. 129; 143 S. W. 2d 880, reversed.

APPEAL from a decree affirming a decree quieting title in Lovett, relying on a deed from a former owner, against Wood et al., relying on a tax title.

Mr. J. G. Burke submitted for appellants.

The effect of Act 142 was to cure all defects in the tax sale and vest a valid title in the State of Arkansas.

Appellants acquired vested rights by their deeds from the State of Arkansas. *Holland* v. *Rogers,* 33 Ark. 251; *Campbell* v. *Holt,* 115 U. S. 620; *Pearsall* v. *Great Northern Ry. Co.,* 161 U. S. 644; *St. Louis, I. M. & S. Ry. Co.* v. *Alexander,* 49 Ark. 190; 4 S. W. 753; *Walker* v. *Ferguson,* 176 Ark. 625; 3 S. W. 2d 694; *Smith* v. *Spillman,* 135 Ark. 279; 205 S. W. 107; *Massa* v. *Nastri,* 125 Conn. 144; 3 A. 2d 839; *Kosek* v. *Walker,* 196 Ark. 656; 118 S. W. 2d 575.

The repeal of the Act impaired the obligation of appellants' contracts with the State, in violation of Art. I, § 10, of the Constitution.

Act 264 of the General Assembly of 1937, Vol. 1, page 933, approved March 17, 1937; *Berry* v. *Davidson,* 199 Ark. 96; 133 S. W. 2d 442; *Fletcher* v. *Peck,* 6 Cranch 87; *Pacific Mail Steamship Co.* v. *Joliffe,* 2 Wall. 450;

Poindexter v. *Greenhow,* 114 U. S. 270; *W. B. Worthen Co.* v. *Kavanaugh,* 295 U. S. 56; *Barnitz* v. *Beverly,* 163 U. S. 118; *Hans* v. *Louisiana,* 134 U. S. 1; *Osborn* v. *Nicholson,* 13 Wall. 654; *New Jersey* v. *Wilson,* 7 Cranch 164; *Davis* v. *Gray,* 16 Wall. 203; *Terrett* v. *Taylor,* 9 Cranch 41; *Ettor* v. *Tacoma,* 228 U. S. 148; *Pennoyer* v. *McConnaughy,* 140 U. S. 1; *Reid* v. *Federal Land Bank of New Orleans,* 166 Miss. 39; 148 So. 392; *State* v. *Osten,* 91 Mont. 76; 5 P. 2d 562; *State* v. *Gether Co.,* 203 Wis. 311; 234 N. W. 331.

The repeal deprived appellants of their property without due process of law, and denied them equal protection of the laws in violation of the Fourteenth Amendment. *Blair* v. *Chicago,* 201 U. S. 400, 484; *Beavers* v. *Myar,* 68 Ark. 333; 58 S. W. 40; *Missouri Pacific Ry. Co.* v. *Nebraska,* 164 U. S. 403; *Noble* v. *Union River Logging R. Co.,* 147 U. S. 165; *Ettor* v. *Tacoma,* 228 U. S. 148; *Campbell* v. *Holt,* 115 U. S. 620; *Rhodes* v. *Cannon,* 112 Ark. 6; 164 S. W. 752; *Carle* v. *Gehl,* 193 Ark. 1061; 104 S. W. 2d 445.

Mr. Walter G. Riddick submitted for appellee.

The construction of Act 142 presents a question exclusively within the power and jurisdiction of the Supreme Court of Arkansas. *Fidelity Union Trust Co.* v. *Field,* 311 U. S. 169; *Erie R. Co.* v. *Tompkins,* 304 U. S. 64.

We may concede for the argument that appellants purchased from the State in the belief that the effect of Act 142 was to make impervious to attack a tax title conveyed by the State and to vest such title in the State's grantees. But even so, appellants purchased at their peril and under the risk that the Supreme Court of Arkansas might disagree with them as to the effect of the Act upon which they relied, and might place upon it another and entirely different construction. This is what has been done, and all that has been done, in the present case.

In *Carle* v. *Gehl*, 193 Ark. 1061, the Supreme Court of Arkansas held that Act 142 was not a statute of limitations. In *Kosek* v. *Walker*, 196 Ark. 656, the court held that the Act was of no avail to purchasers from the State in litigation over such titles arising after the repeal of the Act by Act 264 of 1937.

In *Union Trust Co.* v. *Watts*, 75 Ark. L. R. 30, the court again held that Act 142 was not a confirmation act and that it was not effective to cure defective tax titles nor to vest title during the time it was in force.

Before this litigation was instituted, the Supreme Court of Arkansas had authoritatively determined the meaning of the Act in question. The fact that this determination was made after appellants had bought from the State, relying upon another interpretation of the Act, is unimportant.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This appeal presents the question whether an Arkansas Act of March 17, 1937, as construed and applied, violates Article I, § 10, of the Constitution.

March 20, 1935, an act of the legislature of Arkansas [1] took effect which provided:

"Whenever the State and County Taxes have not been paid upon any real or personal property within the time provided by law, and publication of the notice of the sale has been given under a valid and proper description, as provided by law, the sale of any real or personal property for the non-payment of said taxes shall not hereafter be set aside by any proceedings at law or in equity because of any irregularity, informality or omission by any officer in the assessment of said property, the levying of said taxes, the making of the assessor's or tax book,

[1] Act 142 of 1935.

the making or filing of the delinquent list, the recording thereof, or the recording of the list and notice of sale, or the certificate as to the publication of said notice of sale; provided, that this Act shall not apply to any suit now pending seeking to set aside any such sale, or to any suit brought within six months from the effective date of this Act for the purpose of setting aside any such sale."

Certain land in Desha County, Arkansas, was sold to the State in 1933 for non-payment of 1932 taxes. The land was not redeemed and was certified to the State, as owner. In 1936 the Commissioner of State Lands, on behalf of the State, by deeds reciting his statutory authority so to do, conveyed to the appellants all the right, title, and interest of the State in two parcels of the land.

By an Act of March 17, 1937, the Act of March 20, 1935, was repealed.[2]

January 10, 1939, the corporation which owned the land when sold for non-payment of taxes conveyed to the appellee, and, on January 21, he brought suit against the appellants to cancel the State's deeds, to quiet his title, and for mesne profits or rents. He alleged that there were irregularities in the proceedings prior to the sale to the State which rendered it void. The appellants admitted the irregularities. It was agreed on all hands that though these irregularities would have constituted grounds for avoiding the sale but for the provisions of the Act of 1935, they would not have been available to the appellee if the Act were still in force. The trial court entered a decree in favor of the appellee which the Supreme Court affirmed.[3]

The appellants contended in the courts below, and con-

[2] Act 264 of 1937.

The words of the Act are: "That Act 142 of the Acts of 1935 be and the same is hereby repealed."

[3] 201 Ark. 129; 143 S. W. 2d 880.

tend here, that if the Act of 1937 be given the effect of divesting them of title confirmed in them by the Act of 1935 the later Act impairs the obligation of their contracts with the State. The Supreme Court of Arkansas held that "the Act [of 1935] does not profess to cure tax sales, but only [provides] that tax sales shall not be set aside by the courts because of certain irregularities and informalities, naming them." It said that the appellants acquired no greater vested interest or title than the State had and the repeal of the Act of 1935 "violated no constitutional right of theirs to a defense" thereunder. We are of opinion that the decision was erroneous.

For present purposes it is unnecessary to recite the statutory procedure for assessment, levy, and collection of real estate taxes in Arkansas. If the taxes levied become delinquent, a sale by the Collector is authorized. If no person bids the amount of the delinquent taxes, penalty, and costs, the Collector is to bid in the property in the name of the State.[4] The State is not required to pay the amount bid in its name.[5] The Clerk of the County Court is required to make a record of the sale to the State and send a certificate thereof to the Auditor of State.[6] Lands thus sold to the State may be redeemed within two years of the sale.[7] After expiration of the period of redemption, the County Clerk executes a certificate of sale and causes the same to be recorded in the County Recorder's office. Thereupon the lands vest in the State. The certificate, after recordation, is sent by the Clerk to the Commissioner of State Lands and thereupon the lands are subject to disposal according to law.[8]

[4] Pope's Digest 1937, § 13849.
[5] *Id.*, § 13853.
[6] *Id.*, § 13855.
[7] *Id.*, § 13868.
[8] *Id.*, § 13876.

The Commissioner is authorized to sell them and to make deeds to purchasers.[9]

As the Supreme Court has indicated in this case, Act 142 of 1935 was one of a series of statutes adopted to prevent the setting aside of tax sales and titles based upon them, for informalities and irregularities in the assessment and levy of taxes and the sale of property for delinquent taxes, which had seriously impeded the effective collection of taxes and diminished the State's revenue.

In *Berry* v. *Davidson,* 199 Ark. 276, 280; 133 S. W. 2d 442, the court, after referring to several similar acts, said:

". . . we now think it apparent that the legislature was endeavoring to find and put into effect a remedy or means to correct the evils growing out of nonpayment of taxes, to prevent tax evasion. For many years it was a recognized proposition that tax forfeitures and sales of land on account thereof were well nigh universally held ineffectual to convey title, and there is perhaps at this time, no doubt, that there was a general recognition of the futility of taxing laws; that it was thought by many that people need not pay taxes if they were willing to meet the worry and expenses of litigation in regard thereto."

. . . . .

"Act 142, above mentioned, while it was still in force, was another evidence of the legislature's effort and struggle to correct or cure these well grounded and long established practices illustrating the futility of the law requiring payment of taxes. Out of all this has come Act 119 of the Acts of 1935 construed and upheld in the last cited case. [*Fuller* v. *Wilkinson,* 198 Ark. 102, 128 S. W. 2d 251.] According to the terms of that statute, when it shall have been invoked in regard to such tax sales, we must, and do, hold that the decree of confirmation of a sale to the state 'operates as a complete bar against any and all persons,

[9] *Id.,* §§ 8610, 8620.

firms, corporations, quasi-corporations, associations who may claim said property' sold for taxes subject only to the exceptions set forth and stated in the act, none of which is applicable to aid the appellant."

It is evident from these statements that the purpose of Act 142 was definitely to assure purchasers from the State that the land bought by them could not be taken away from them on grounds theretofore available to the delinquent taxpayer.

In its opinion in the present case, the court lays stress on the fact that Act 142 was not a curative act, although in earlier decisions it had repeatedly so designated it.[10] But we do not deem the name or label of the legislation important. The fact is, as the court below holds, that the purpose and effect of the statute were to render unavailing to the owner whose property had been sold for taxes, as grounds of attack on the title of the purchaser from the State, irregularities and informalities in the performance of acts by state officers in connection with the assessment, levy, and sale which the legislature could, in its discretion, have omitted to prescribe as essentials to the passing of a valid title.

The Act of 1935 must be viewed in the setting of the statutory scheme of taxation, sale of forfeited lands to the State, and sale in turn by the State. Its purpose was to assure one willing to purchase from the State a title immune from attack on grounds theretofore available. By its legislation the State said, in effect, to the pro-

[10] *Carle* v. *Gehl,* 193 Ark. 1061; 104 S. W. 2d 445; *Deaner* v. *Gwaltney,* 194 Ark. 332; 108 S. W. 2d 600; *Lambert* v. *Reeves,* 194 Ark. 1109; 110 S. W. 2d 503; 112 S. W. 2d 33; *Gilley* v. *Southern Corporation,* 194 Ark. 1134; 110 S. W. 2d 509; *Foster* v. *Reynolds,* 195 Ark. 5; 110 S. W. 2d 689; *Wallace* v. *Todd,* 195 Ark. 134; 111 S. W. 2d 472; *Burbridge* v. *Crawford,* 195 Ark. 191; 112 S. W. 2d 423; *Kansas City Life Ins. Co.* v. *Moss,* 196 Ark. 553; 118 S. W. 2d 873; *Sanderson* v. *Walls,* 200 Ark. 534; 140 S. W. 2d 117.

spective purchaser of lands acquired for delinquent taxes, that if he would purchase he should have the immunity. Under the settled rule of decision in this court, the execution of the State's deeds to the appellants constituted the execution or consummation of a contract, the rights arising from which are protected from impairment by Article I, § 10 of the Constitution; and the obligation of the State arising out of such a grant is as much protected by Article I, § 10, as that of an agreement by an individual. *Fletcher* v. *Peck,* 6 Cranch 87, 136, 137, 139. The Act of 1935, taken in connection with the other statutes regulating the acquirement by the State, and the disposition by it, of lands sold for delinquent taxes, constituted, in effect, an offer by the State to those who might become purchasers of such lands, and the protection it afforded to the title acquired by such purchasers necessarily inured to every purchaser acting under it and constituted a contract with him.[11]

The federal and state courts have held, with practical unanimity, that any substantial alteration by subsequent legislation of the rights of a purchaser at tax sale, accruing to him under laws in force at the time of his purchase, is void as impairing the obligation of contract.[12]

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[11] *Woodruff* v. *Trapnall,* 10 How. 190, 205.

[12] *Corbin* v. *Commissioners,* 3 F. 356; *Marx* v. *Hanthorn,* 30 F. 579 (see 148 U. S. 172, 182); *Tracy* v. *Reed,* 38 F. 69; *Walker* v. *Ferguson,* 176 Ark. 625, 3 S. W. 2d 694; *Chapman* v. *Jocelyn,* 182 Cal. 294, 187 P. 962; *Hull* v. *Florida,* 29 Fla. 79, 11 So. 97; *State Adjustment Co.* v. *Winslow,* 114 Fla. 609, 154 So. 325; *Morris* v. *Interstate Bond Co.,* 180 Ga. 689, 180 S. E. 819; *Bruce* v. *Schuyler,* 9 Ill. 221; *Solis* v. *Williams,* 205 Mass. 350, 91 N. E. 148; *Curry* v. *Backus,* 156 Mich. 342, 120 N. W. 796; *Rott* v. *Steffens,* 229 Mich. 241, 201 N. W. 227; *State* v. *McDonald,* 26 Minn. 145, 1 N. W. 832; *Blakeley* v. *L. M. Mann Land Co.,* 153 Minn. 415, 190 N. W. 797; *Price* v. *Harley,* 142 Miss. 584, 107 So. 673; *State* v. *Osten,* 91 Mont. 76, 5 P. 2d 562; *Pace* v. *Wight,* 25 N. M. 276, 181 P. 430; *Dikeman* v. *Dikeman,* 11 Paige (N. Y.) 484; *State* v. *Stephens,* 182 Wash. 444,

Appellee relies upon the circumstance that the State's deed is a quitclaim. From this it is inferred that no contract was made that the terms of the Act of 1935 were to bind the State with respect to the title conveyed. But "the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms." [13] This court has held that the terms of a statute according rights and immunities to a vendee of the State are a part of the obligation of the deed made pursuant to it. The grant of the State of Georgia involved in *Fletcher* v. *Peck, supra,* was a patent of the public lands of the State and, of course, contained no warranty of title save such as is implied from the fact that the State purports to grant its own lands. In *Pennoyer* v. *McConnaughy,* 140 U. S. 1, the rights of the plaintiff held to be protected by Art. 1, § 10, arose out of his application for a patent filed pursuant to a state statute. The impairment was worked out by a subsequent statute seeking to destroy the right of the plaintiff to the patent pursuant to his compliance with the earlier act. No warranty was involved. In *Appleby* v. *New York City,* 271 U. S. 364, it appeared that the legislature had fixed the shore line of the City of New York along the Hudson River and that the land inside that line had been granted to the city with the consequent right to convey it. The city had conveyed land under water, on the landward side of the line, to Appleby by a quitclaim deed.[14] By subsequent

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47 P. 2d 837; *Milkint* v. *McNeeley,* 113 W. Va. 804, 169 S. E. 790; *State* v. *Gether Co.,* 203 Wis. 311, 234 N. W. 331. Compare *McNee* v. *Wall,* 4 F. Supp. 496; *Moore* v. *Branch,* 5 F. Supp. 1011.

[13] *Home Building & L. Assn.* v. *Blaisdell,* 290 U. S. 398, 429.

[14] The phraseology of the deed is: "And it is hereby further agreed by and between the parties to these presents, and the true intent and meaning hereof, is that this present grant and every word or thing in the same contained shall not be construed or taken to be a covenant

statutes the State granted the city authority to use the land in question for municipal purposes and the city proceeded to improve it. This court held that the city's grant, made with full legislative sanction, could not be impaired by the subsequent legislation.

As in the cases cited, so here, the question is whether the State granted a valuable right which it subsequently essayed to take away. The Supreme Court of Arkansas sustained the constitutional validity of Act 142 of 1935 on the obvious ground that a taxpayer has no vested right in any given form of procedure for forfeiture of lands for non-payment of taxes. As that court has held, the extent of his right is that he shall have notice of the sale and a fair opportunity to prevent forfeiture for default. It is suggested that the act of the State in depriving the taxpayer of the right to set aside a sale for technical procedural defects is of like quality with the State's attempt to restore the taxpayer's rights against the appellants who purchased from the State. But obviously the two acts are not of the same quality. The taxpayer had neither a contract nor any other constitutional right as against the State to insist upon any given form of procedure, so long as what was done in forfeiting his lands was not arbitrary or unfair. But the appellants, as purchasers from the State, were given, by the Act of 1935, an important assurance that the State would not itself take away or authorize others to destroy the estate which it had granted, by reason of technical defects in procedure cured by the Act of 1935.

The appellee suggests that it is significant that the State was not a party to this suit, and was not, therefore, seeking to take back what it had granted. But, as *Fletcher* v. *Peck*,

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or covenants of warranty or of seizin, of said parties of the first part or their successors or to operate further than to pass the estate right, title or interest they may have or may lawfully claim in the premises hereby conveyed by virtue of their several charters and the various acts of the Legislature of the People of the State of New York."

supra, shows, this is not important; for that suit was between two private parties, as is this, one claiming rights conferred by the earlier state action and the other claiming superseding rights under later legislation.

It begs the question to say that the State may not abdicate its police power. In the exercise of the policy committed to the legislature it is competent for the State to enter into a contract which it intends as an assurance of protection to its grantee.[15] This we think the State has plainly done in the present instance. The judgment is

Reversed.

MR. JUSTICE BLACK, dissenting:

There is far more involved here than a mere litigation between rival claimants to a few hundred acres of Arkansas land. In my view, the statute here stricken down is but one of many acts adopted both by Congress and by state legislatures in an effort to meet the baffling economic and sociological problems growing out of a nation-wide depression. These problems—among them the owners' loss of homes and farms, chiefly through mortgage sales and tax forfeitures and the states' concomitant loss of tax revenues—challenged the wisdom and capacity of the nation's legislators.

Among the efforts of Arkansas' legislators to meet these problems was the legislation adopted by Act 142 of 1935 and repealed by Act 264 of 1937—the repealing act being the statute here held invalid. It is quite apparent that considerations of public policy induced the Arkansas legislature to pass the 1935 act whereby Arkansas courts were prohibited from setting aside certain types of defective tax sales "by any proceedings at law or in equity." At the time that act was passed, more than

[15] *Indiana ex rel. Anderson* v. *Brand,* 303 U. S. 95.

25% of the real property in the state was tax delinquent.[1] Loss of revenue from so substantial a portion of the state's total acreage was a serious matter. In the eyes of some people, the land could be sold and the lost revenues recouped if some of the formal grounds on which tax titles could be invalidated were rendered unavailing.[2] It seems clear that the 1935 legislature was persuaded of the wisdom of such a step. But it also seems clear that the 1935 act was repealed in 1937 because the legislature became convinced that the law had worked directly contrary to the state's policy of obtaining the benefits believed to flow from continuity of possession by home owners and farmers,[3] that it had accomplished inequitable results, that it had thereby "operated injuriously to the interests of the State, and that sound policy dictated its repeal."[4] This is apparent from reading that part of § 2 of the repealing act of 1937 which declared that "said Act 142, Acts 1935, ignores jurisdictional prerequisites to effect valid sales of tax delinquent lands, as prescribed by law, and has brought the laws of

[1] Ark. Acts 1935, No. 119, § 12. In Desha County, where the lands here involved are located, tax delinquency as of December 31, 1933, amounted to 57.5%. This was the highest figure reported for any county in the state. Realty Tax Delinquency (Bureau of the Census, 1934) Vol. I, part II, Arkansas, pp. 3–4. And see Brannen, Tax Delinquent Rural Lands in Arkansas (University of Arkansas, College of Agriculture, Bulletin No. 311, 1934) *passim.*

[2] Brannen, Tax Delinquency in Arkansas, 15 Southwestern Social Science Quarterly 201, 206–207 (1934); Brannen, Tax Delinquent Rural Lands in Arkansas, *supra,* p. 35. And see *Berry* v. *Davidson,* 199 Ark. 276, 280; 133 S. W. 2d 442.

[3] Arkansas has expressed its continuing solicitude in this regard by numerous acts of its legislature. For example, by such an act Arkansas taxpayers were permitted to retain title to their real property for three years by paying taxes for only one year. See Third Biennial Report, Arkansas State Tax Commission (1931–32) p. 6.

[4] *Ochiltree* v. *Railroad Co.,* 21 Wall. 249, 251.

the State incident thereto into doubt and confusion . . ."

Both the 1935 act and the 1937 act repealing it touch on Arkansas' policy as to taxation, tax forfeiture, and land ownership—matters of public policy which are of vital interest to the state and all its citizens. It was a matter of serious moment to Arkansas that 25% of the state's privately owned land—homes, farms, and other property—was in jeopardy of being taken from its owners because of inability to pay taxes. If only 50% of the forfeitures were homes and farms, simultaneous ouster of so many citizens could result in forced migrations and discontents disastrous in their consequences. The manifestations of financial distress revealed by the widespread delinquency spotlighted conditions which called for the best in legislative statesmanship. To seek a rational and fair solution to the problem was not only within the power of Arkansas' lawmakers, but was also their imperative duty. Without attempting to judge the wisdom or equities of either act, it is easy to see that both the 1935 and the 1937 act represented rational and understandable attempts to achieve such a solution. To hold that the contract clause of the Federal Constitution is a barrier to the 1937 attempt to restore to the distressed landowners the remedy partly taken away by the 1935 act is, in my view, wholly inconsistent with the spirit and the language of that Constitution.

As already stated, Arkansas was not faced with a problem peculiar to that state alone. At the depth of the depression, over 20% of all real property in the United States was tax delinquent.[5] Nor was Arkansas alone in seeking to do something about the situation. "Since 1928

[5] Realty Tax Delinquency (Bureau of the Census, 1934) Vol. 1, pp. 6–7. By states, tax delinquency varied from a low of 6% in Massachusetts to a high of 40.5% in Michigan. North Dakota (37.5%), Illinois (37%) and Florida (36%) followed close after Michigan.

nearly every state in the Union has enacted legislation dealing with the problem of delinquent taxes and a number of states have completely remodeled their systems of tax delinquency laws. This legislative activity has been called forth by the unprecedented increase just before and during the depression in the amount of unpaid property taxes and by the consequent threat both to the financial stability of state and local governments and to the security of private property." [6] By acts passed in the single year of 1933, twelve states extended the time for paying taxes already due, eleven states postponed sales for taxes, twenty-six states (among them Arkansas) waived or reduced penalties and interest on taxes already delinquent or for which property had already been sold, nine states (among them Arkansas) lengthened the period of redemption on property already sold, and sixteen states permitted payment of already delinquent taxes in installments spread over a period of years.[7]

The states, and the federal government also, were faced with a "financial crisis [which had] the same results as if it were caused by flood, earthquake, or disturbance in nature." [8] The federal government greatly expanded facilities for farm loans; set up the Home Owners Loan Corporation; practically underwrote the nation's banking system; passed the Frazier-Lemke Act; widened the scope of bankruptcy jurisdiction; and embarked on a system of nationwide relief. In the states,

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[6] Putney, Tax Delinquency in the United States, in Editorial Research Reports (Vol. II, 1935) 327. And see Fairchild, The Problem of Tax Delinquency (1934) 24 American Economic Review 140, 144.

[7] Proceedings of the National Tax Association (1933) 28–30; cf. *id.* (1934) 30–31. For a complete list of changes in tax collection procedure made during the 1930–1934 period, see Realty Tax Delinquency (Bureau of the Census, 1934) Vol. 1, pp. Ia–IIi.

[8] Justice Olsen of the Minnesota Supreme Court, as quoted in *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 423.

part of the effort to meet the crisis took the form of mortgage and tax moratoria; part took other forms, including that of the legislation now before us. All may well be considered parts of the larger and over-all effort to avert cataclysmic changes which were thought to threaten the equilibrium and tranquility of our society. This Court, in its notable decision in *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, upheld that phase of the Minnesota effort which took the form of a mortgage moratorium. In the course of the opinion, the Court quoted the state Attorney General, who in his argument here had stated: " 'Tax delinquencies were alarmingly great, rising as high as 78% in one county of the state. In seven counties of the state the tax delinquency was over 50%. Because of these delinquencies many towns, school districts, villages and cities were practically bankrupt' . . . [and] serious breaches of the peace had occurred." [9] The policy behind mortgage moratoria and the policy behind tax leniency to landowners are inextricably intertwined.[10] The basic philosophy of the two types of legislation is identical. For encouragement of home and farm ownership has always been treated as a major objective of our social and governmental policy. And therefore what was said in the *Blaisdell* case with reference to the contract clause is equally applicable here: "Not only is the constitutional provision qualified by the measure of control which the State retains over remedial processes, but the State also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect.' *Stephenson* v. *Binford,* 287 U. S. 251, 276. Not only are existing laws

[9] *Home Building & Loan Assn.* v. *Blaisdell, supra,* at 424.

[10] Cf. The Farm Debt Problem, Letter from the Secretary of Agriculture (73rd Cong., 1st Sess., House Doc. No. 9) pp. 26–29.

read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order." [11]

So much for the general setting which gave rise to the law here held invalid. In order better to understand the effect that law had on the appellants and the appellee, it is necessary to consider other provisions of Arkansas law.

At the time appellants secured from the state a quitclaim deed to the lands here in question, the law provided two alternative means of assuring purchasers of tax forfeited lands against loss:

(1) Such purchasers, under certain circumstances, could hold on to the land through the protection afforded by the remedial processes of the courts; [12]

(2) In case they could not hold on to the land, such purchasers were afforded the protection of a judicially enforceable right to be reimbursed by the landowner for the amount paid out for purchase price and subsequent taxes, with interest, as well as for improvements—all in the event that the former owners of the land should for any reason be able to prove that the lands had never been validly forfeited. Ark. Dig. Stats. (Pope, 1937) §§ 4663–4665, 13881.

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[11] *Home Building & Loan Assn.* v. *Blaisdell, supra,* at 434–435.

[12] There were three principal ways by which purchasers of tax titles could hold on to the land:

(1) By acquiring a valid tax deed. (The tax deeds here were admittedly invalid under the laws existing at the time of forfeiture.)

(2) By two years open and adverse possession. (Though over two years had elapsed between the date of purchase and the beginning of this litigation, the courts below found that the purchasers had not availed themselves of this remedy.)

(3) By failure of the former landowner to compensate the purchaser for his expenditures. (The order of the court below provided that such compensation be paid.)

The Arkansas legislature, by Act 264 of 1937, narrowed the circumstances under which purchasers might hold on to the land. But the second alternative assurance remained intact.

From my study of the case I am of opinion that:

(1) The 1937 Arkansas statute here attacked neither impaired nor sought to repudiate any contractual agreement or obligation expressly or impliedly assumed by the state;

(2) The 1937 Arkansas statute was enacted well within the state's general legislative powers and is in no way inconsistent with the true intent and fair interpretation of the federal constitutional prohibition which commands that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ."

First. The state, by quitclaim deeds, without any express warranty whatever, conveyed the lands in question to appellants. It is appellants' claim that an "obligation of the contract created by the grant of the State" has been impaired by the Arkansas statute. Stripped of surplus verbiage, appellants' naked contention is that Arkansas, by its quitclaim sale and conveyance, obligated itself to refrain from thereafter passing a general legislative enactment if such enactment would affect in any manner any of the legal means provided to protect tax sale purchasers against loss. We need not here consider whether under the Arkansas Constitution the legislature could have thus bargained away the state's legislative power in setting up a scheme for the sale of tax forfeited land. For there was no attempt on the part of the state officials who made the sale to exercise any such extraordinary authority.

A deed to property without warranty is an agreement to transfer whatever title the grantor has. And even without express language to that effect in the conveyance, it is reasonable to say that a valid quitclaim con-

veyance carries along with it an implied obligation that the grantor will not repudiate the grant and attempt to reassert title in himself, for such a reassertion of title would be contrary to the express purpose which actuated the parties in reaching the agreement which ended in the conveyance. The implied obligation not to reassert title was the basis of the decision in *Fletcher* v. *Peck,* 6 Cranch 87, a decision which this Court relies on in the case at bar. Cf. *Satterlee* v. *Matthewson,* 2 Pet. 380, 414–415. In *Fletcher* v. *Peck,* the court said: "A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract, not to reassert that right. A party is, therefore, always estopped by his own grant." [13] What the State of Georgia did in that case was to seek to reassert title to land which the court found it had conveyed for a consideration under what the court deemed to be a valid contract. True, Georgia was not a party to the actual litigation, but by purporting to convey to one purchaser land which had already been conveyed by it to another purchaser the state clearly attempted to assert that it still had title to the land. Here the State of Arkansas has not repudiated any implied obligation by attempting to reassert title in the lands whose ownership is now in issue. There is no litigation here between the state and its grantees, and none, as in *Fletcher* v. *Peck,* between rival grantees of the state. Appellee claims title through an owner whose estate Arkansas had purportedly forfeited for unpaid taxes. Neither in the facts of this case nor in the legislation attacked is there any kind of challenge to the validity of

[13] 6 Cranch 87, 137. In that case Mr. Justice Johnson denied that the impairment of contract clause was intended to apply to contracts already fully executed. *Id.,* at 145. That question, however, is not material to the point here under discussion.

the state's conveyance of all the title the state possessed. As pointed out above, *Fletcher* v. *Peck* rested upon the assumption that there was a continuing obligation on the part of the state, as on the part of any other grantor, not to repudiate a valid conveyance and attempt to reassert a claim to property which had been sold. Such a ruling offers no support to the contention that Arkansas, in quitclaiming all its interest to appellants, thereby assumed a continuing contractual obligation that its legislative department would in no way alter the procedural rules to be followed by the Arkansas courts in adjudicating controversies between the state's grantees and the original owners whom the state had attempted to divest of their property by the drastic method of forfeiture. "The trouble at the bottom of the . . . case is that the supposed promise . . . on which it is founded does not exist. If such a promise had been intended it was far too important to be left to implication." *Knoxville Water Co.* v. *Knoxville,* 189 U. S. 434, 436. "The patent [here, the quitclaim deed] contains no covenant to do or not to do any further act in relation to the land; and we do not, in this case, feel at liberty to create one by implication." *Jackson* v. *Lamphire,* 3 Pet. 280, 289. "A contract binding the State is only created by clear language, and is not to be extended by implication beyond the terms of the statute. . . . In the case at bar . . . the act . . . operated in no manner as a restraint on the legislature or as a contract upon its part that the State would not act whenever in its judgment it perceived the necessity for an additional ferry. . . . No promise made by the legislature by the first act is broken by the second." *Williams* v. *Wingo,* 177 U. S. 601, 603, 604. "There is no undertaking on the part of the State with the purchaser that the remedy prescribed in this statute, and no other, shall be pursued, unless it is to be implied from the mere presence of the provision in the statute,

and we think it is well settled that no such implication arises." *Wilson* v. *Standefer,* 184 U. S. 399, 410.

In this case Arkansas has fully complied with the express terms of its contract. For there was certainly no express obligation on the part of Arkansas that its general laws concerning forfeiture of property and sale of land should remain static. Nor do I believe that any such obligation can properly be implied. Arkansas did not agree with the appellants that it would keep on its statute books legislation which in effect forfeited its citizens' lands in a way and manner which was directly in the teeth of what had been the Arkansas law at the time the alleged forfeitures occurred. And I do not believe that we should compel the accomplishment of such a result by what I conceive to be a stretching of the contract clause of the Federal Constitution.

Second. Measured either by the constitutional provision itself or by that provision as construed by prior decisions of this Court, I am of opinion that the Arkansas statute is consistent with what was referred to in *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 438–439, as the true intent and fair interpretation of the contract clause.

Writing in 1817, Judge Livingston, of the Federal Circuit Court of New York, had this to say of the contract clause: "There is not, perhaps, in the Constitution any article of more ambiguous import, or which has occasioned, and will continue to occasion, more discussion and disagreement, . . . or the application of which to the cases which occur will be attended with more perplexity and embarrassment. . . . and it will not be surprising if, in the discharge of it, great diversity of opinion should arise." *Adam* v. *Storey,* Fed. Cas. No. 66; 1 Paine's Rep. 79, 88–89. In *Home Building & Loan Assn.* v. *Blaisdell, supra,* written in 1933, appears a resumé of previous decisions which

substantiate the accuracy of Judge Livingston's prophecy. And in the *Blaisdell* case this Court quoted a statement originally made by Justice Johnson in *Ogden* v. *Saunders*, 12 Wheat. 213, 286: "But to assign to contracts, universally, a literal purport, and to exact for them a rigid literal fulfilment, could not have been the intent of the constitution. It is repelled by a hundred examples. Societies exercise a positive control as well over the inception, construction, and fulfilment of contracts as over the form and measure of the remedy to enforce them." The accuracy of this statement cannot be questioned by one who reflects upon the extent to which contracts and agreements are a part of the daily activities of our society. For, so nearly universal are contractual relationships that it is difficult if not impossible to conceive of laws which do not have either direct or indirect bearing upon contractual obligations. Therefore, it would go far towards paralyzing the legislative arm of state governments to say that no legislative body could ever pass a law which would impair in any manner any contractual obligation of any kind. Upon a recognition of this basic truth rests the decision in the *Blaisdell* case. Such recognition was made clear by the use of the following expressions, either quoted and implicitly approved, or used for the first time: "the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula"; "No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances"; "In all such cases the question becomes, therefore, one of reasonableness, and of that the legislature is primarily the judge"; "The question is not whether the legislative action affects contracts incidentally, or directly or indirectly, but

whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end"; "If it be determined, as it must be, that the contract clause is not an absolute and utterly unqualified restriction of the State's protective power, this legislation is clearly so reasonable as to be within the legislative competency." 290 U. S. 398, 430, 438, 447.

The *Blaisdell* decision represented a realistic appreciation of the fact that ours is an evolving society and that the general words of the contract clause were not intended to reduce the legislative branch of government to helpless impotency. See *Veix* v. *Sixth Ward Building & Loan Assn.*, 310 U. S. 32, 38. Whether the contract clause had been given too broad a construction in judicial opinions prior to the *Blaisdell* decision is not now material. And whether I believe that the language quoted from the *Blaisdell* opinion constitutes the ultimate criteria upon which legislation should be measured I need not now discuss. For I am of opinion that the Arkansas statute, passed in pursuance of a general public policy of that state, comes well within the permissible area of state legislation as that area is defined by the *Blaisdell* case and the decisions upon which that case rests.[14]

[14] The only part of the *Blaisdell* decision mentioned by the Court in the case at bar is a passage quoting a statement which in *Blaisdell* the Chief Justice quoted from *Von Hoffman* v. *City of Quincy*, 4 Wall. 535, 550, 552: "the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms." The Court now quotes this language as the governing law. In the *Blaisdell* case, however, the Chief Justice followed the quotation with this statement: "But this broad language cannot be taken without qualification. Chief Justice Marshall pointed out the distinction between obligation and remedy. *Sturges* v. *Crowninshield, supra* [4 Wheat. 122], p. 200. Said he: 'The distinction between the obligation of a contract, and the remedy given

As has already been pointed out, the forfeiture in the case at bar was wholly invalid under what was the governing law at the time of such forfeiture. That invalidity was rendered unavailing to the land's former owners—and to all other owners similarly situated—by the 1935 act. As has also been pointed out, experience evidently demonstrated to the legislature that the best interest of all the people of the state was not served by the change effected by the 1935 act; hence its repeal in 1937. In Arkansas, as appellants argue here, "these actions to cancel tax deeds are in their essential nature nothing more or less than suits to redeem the property . . ." And it has long been recognized as the law in Arkansas that "the right to redeem lands from a tax sale depends upon the statute in force at the date of the sale." *Thompson* v. *Sherrill*, 51 Ark. 453, 458; 11 S. W. 689; *Groves* v. *Keene*, 105 Ark. 40, 43; 150 S. W. 575. At the time of the forfeiture and sale to the state, Arkansas law protected the purchaser by providing that he should be reimbursed and made whole in case his tax purchase was set aside for irregularity. That protection is today afforded to the full extent that it was when ap-

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by the legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct.'" *Home Building & Loan Assn.* v. *Blaisdell, supra,* at 430. And Chief Justice Marshall, elaborating his views of this same subject in his dissenting opinion in *Ogden* v. *Saunders*, 12 Wheat. 213, 343, 353, said: "We have, then, no hesitation in saying that, however law may act upon contracts, it does not enter into them, and become a part of the agreement. The effect of such a principle would be a mischievous abridgment of legislative power over subjects within the proper jurisdiction of States, by arresting their power to repeal or modify such laws with respect to existing contracts." "We think, that obligation and remedy are distinguishable from each other. That the first is created by the act of the parties, the last is afforded by government."

pellants bought the land; the repealing act of which appellants complain did not take away any part of that right. From all of this it is manifest that the entire plan of the state in connection with tax sales, both before and after the repealing act of 1937, shows a scrupulous desire to provide compensation for the purchaser in order that he may not suffer pecuniary loss, whatever may be the consequences of a suit for the land. And the whole course of legislation in Arkansas shows a desire to be fair both to the purchaser of tax forfeited land and to the former owners whose land is about to be lost by reason of the drastic device of forfeiture. Cf. *Curtis* v. *Whitney,* 13 Wall. 68, 71. I cannot believe that the true intent and interpretation of the contract clause prohibits Arkansas from making such an effort to preserve the rights of both the landowner and the one who claims the landowner's forfeited property. Arkansas has not here taken away appellants' "entire remedy" but has done so "in part only." *Mason* v. *Haile,* 12 Wheat. 370, 378. I am willing to concede that there may be a "vast disproportion between the value of the land and the sum for which it is usually bid off at such sales." *Curtis* v. *Whitney, supra,* at 70. But assuming that the tax forfeited land here was obtained at such a bargain, I am still of the opinion that these appellants—who have the right to their money, with interest—have been denied no right guaranteed by the contract clause. And in this connection it is not to be forgotten that appellants could have obtained a perfect title by openly and adversely holding possession of the land for two years—a privilege which the state courts finally and authoritatively found had not been exercised. Tax sold properties are undoubtedly bought with the knowledge on the part of those who speculate [15] in them that states ordinarily

[15] *Treat* v. *Orono,* 26 Me. 217; *Lisso & Bro.* v. *Natchitoches,* 127 La. 283; 53 So. 566; *Lynde* v. *Melrose,* 10 Allen (Mass.) 49. And

adopt a liberal policy in order to protect property owners from tax forfeiture. And even granting that we could enter into questions of policy, I would be unable to reach the conclusion that Arkansas, by repealing its 1935 statute, acted "without . . . reason or in a spirit of oppression." *W. B. Worthen Co.* v. *Kavanaugh,* 295 U. S. 56, 60. It would seem to me to be difficult to support an argument that Arkansas was acting either unreasonably, unjustly, oppressively, or counter to sound public policy in adopting a law which, without depriving purchasers of the right to recover their money outlay, with interest, sought to make the way easy for former home owners and property owners of all types to reacquire possession and ownership of forfeited property. If under the contract clause it is justifiable to seek to find "a rational compromise between individual rights and public welfare," *Home Building & Loan Assn.* v. *Blaisdell, supra,* at 442, then it seems to me that this is a case for the application of that principle. I do not believe that the Arkansas legislature is prohibited by the Federal Constitution from adopting the public policy which the decision of the Arkansas Supreme Court has upheld in this case. "Especial respect should be had to such decisions when the dispute arises out of general laws of a State, regulating its exercise of the taxing power, or relating to the State's disposition of its public lands." [16]

MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY concur in this opinion.

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see Upson, Local Government Finance in the Depression, 24 National Municipal Review 503, 506. ("Ordinarily, in important communities tax-title buying has been in the hands of professional buyers interested in securing a quick turnover of investments and by no means desiring to get into the real estate business through the actual acquisition of properties.")

[16] *Wilson* v. *Standefer,* 184 U. S. 399, 412.

WATSON, ATTORNEY GENERAL OF FLORIDA, ET AL. *v.* BUCK ET AL.*

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

No. 610. Argued April 29, 30, 1941.—Decided May 26, 1941.

1. A federal court, upon finding unconstitutional some parts of a state statute embracing many provisions, is not justified in declaring it void *in toto*, upon the ground that the legislature intended to form a harmonious whole, where parts whose validity standing alone was not passed upon are complete in themselves and where the statute declares that the invalidity of any part shall not affect the others. P. 395.
2. Criminal proceedings to enforce a state statute, even though it be unconstitutional, are not to be enjoined by a federal court in the absence of a definite threat of prosecution and of a clear showing of great and immediate danger of irreparable loss. P. 400.
3. As a rule, the constitutionality of state statutes containing many separate and distinct provisions, which have not been passed upon by the supreme court of the State, should be determined as cases arise from specific applications of the statute, and preferably by the state courts. P. 401.
4. The copyright laws do not grant to copyright owners the privilege of combining in violation of otherwise valid state laws. P. 404.
5. Section 1 of the Florida Laws of 1937, c. 17807, which defines as an unlawful combination an aggregation of authors, composers, publishers, and owners of copyrighted vocal or instrumental musical compositions who form any society, association, or the like, and the members of which constitute a substantial number of the persons, firms or corporations within the United States who own or control such musical compositions, "when one of the objects of such combination is the determination and fixation of license fees or other exactions required by such combination for itself or its members or other interested parties," and which makes it an offense for such combinations to act within the State in violation of the terms

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*Together with No. 611, *Buck et al.* v. *Watson, Attorney General of Florida, et al.*, also on appeal from the District Court of the United States for the Northern District of Florida.

of the statute, does not contravene the copyright laws or the Federal Constitution. P. 404.

34 F. Supp. 510, reversed in part; affirmed in part.

APPEAL and cross-appeal from a decree of the District Court, constituted of three judges, which enjoined the prosecuting officers of the State of Florida from enforcing a Florida statute of 1937 defining and forbidding unlawful combinations of authors, composers, publishers, and owners of copyrighted vocal or instrumental musical compositions, etc., and which granted the injunction also, but only as to certain sections, against enforcement of an act on the same subject passed in 1939. The case was considered by this Court in earlier aspects in *Gibbs* v. *Buck*, 307 U. S. 66. Attorney General Watson was substituted for his predecessor Mr. Gibbs.

Messrs. Thomas G. Haight and *Frank J. Wideman*, with whom *Messrs. Louis D. Frohlich, Herman Finkelstein*, and *Manley P. Caldwell* were on the brief, for appellees in No. 610 and appellants in No. 611.

Organization of the Society was necessary to meet the evil of wholesale infringement of copyrighted musical works by unauthorized public performances for profit. The nature of the right of "public performance for profit" requires collective action on the part of creators and publishers.

Coöperative licensing is necessary because of divided and diverse ownership of performing rights. The blanket license is the only feasible method of licensing the "small right." It is impossible to assign in advance a separate price for each performance of specified compositions; nor is it possible to bargain separately for each use. The blanket license overcomes these obstacles. It enables the Society to issue licenses at a very low cost to the user.

The Society controls only a small part of available music.

The statutes violate the copyright clause of the Federal Constitution. (1) They invade a field delegated to Congress, nullifying the most vital provisions of the 1909 revision of the copyright laws, and confiscating plaintiffs' right of public performance for profit by barring them from licensing their copyrighted musical compositions in the only manner that is commercially feasible; and (2) they discriminate against owners of copyrighted works.

The 1937 Act contains no legislative finding as to any existing evil requiring its passage. Nor was any established at the trial. The court below found that the Act was not a reasonable exercise of the police power of the State and that its true purpose was to deprive plaintiffs of their copyrighted compositions for the private benefit of 410 commercial users in Florida.

The 1939 Act does not purport to regulate or penalize combinations in restraint of trade. It requires virtual duplication of all data filed with the Register of Copyrights under the Act of 1909 for the alleged purpose of enabling Florida users to avoid innocent infringement. It bars two or more copyright owners from issuing blanket licenses in Florida unless they give all users in the State an option to have a license to perform each separate composition at a price fixed independently in advance by each owner for each user in the State, and stated in a schedule filed at least seven days prior to the issuance of the license if the price charged is to differ from any price previously scheduled. Whether a blanket license or any other form of license is issued by a single person or by many, the license fee must not be based in whole or in part upon a program not using such composition. In other words, the license fee must be computed solely upon the value of the composition in the particular program even though it may be established that the use of the composition in the particular program enhances the value of the preceding and succeeding programs which do

not actually employ the licensed composition. A tax of three per cent. is imposed on gross license fees collected.

The action of Congress in fully covering the field in the 1909 revision of the Copyright Act bars the States from making any regulations in that field. H. R. Rept. No. 2222, 60th Cong., 2d Sess., 1909; *Napier* v. *Atlantic Coast Line Ry. Co.*, 272 U. S. 605; *Jennings* v. *U. S. Fidelity & Guaranty Co.*, 294 U. S. 216, 226.

All rights granted under the 1909 Copyright Law were expressly made exclusive (§ 1). This Court had many times previously passed upon the exclusive nature of those rights. *Burrows-Giles Lithograph Co.* v. *Sarony*, 111 U. S. 53, 56, 59; *American Tobacco Co.* v. *Werckmeister*, 207 U. S. 284, 291; *Caliga* v. *Inter Ocean Newspaper Co.*, 215 U. S. 182, 188.

Not even the United States may invade the exclusive rights of owners of copyrights or patents. *United States* v. *Dubilier Condenser Corp.*, 289 U. S. 178, 186, 189; *James* v. *Campbell*, 104 U. S. 356, 358; *United States* v. *Bell Telephone Co.*, 167 U. S. 224, 249–50.

Copyright owners cannot be compelled to grant licenses except upon their own terms and at prices fixed by such owners. *F. A. D. Andrea, Inc.* v. *Radio Corp.*, 88 F. 2d 474; *Buck* v. *Hillsgrove Country Club, Inc.*, 17 F. Supp. 643. The several States may not pass laws to the contrary. *Henry Bill Pub. Co.* v. *Smythe*, 27 F. 914, 917.

The exclusive performing rights (§ 1 (e) of the Act) include performances by live musicians in hotels, restaurants and night clubs (*Herbert* v. *Shanley*, 242 U. S. 591); performances by means of radio broadcasting or rebroadcasting (*Buck* v. *Jewell-LaSalle Realty Co.*, 283 U. S. 191); and by means of radio receiving sets in hotel rooms operated from a master-controlled set. *Society of European Authors* v. *New York Statler Hotel, Inc.*, 19 F. Supp. 1.

The Copyright Law permits a purchaser of a phonograph record or electrical transcription to perform it pri-

vately, but he may not perform it publicly for profit without the express consent of the copyright owner. *Irving Berlin, Inc.* v. *Daigle,* 31 F. 2d 832; *Lutz* v. *Buck,* 40 F. 2d 501.

The state statutes confiscate plaintiffs' right of public performance for profit; abridge and regulate rights granted them under the Copyright Act and bar them from separately licensing the several rights granted to them by Congress; discriminate against owners of copyrighted musical works by failing to include, and thereby exempting, owners of musical works protected under the common law.

The penalties and forfeitures imposed for violation are far more severe than those imposed under other Florida laws on combinations actually monopolizing or restraining trade.

The state statutes discriminate against copyright owners by denying them the right to show the reasonableness of their Association and the fact that they do not actually monopolize or restrain trade.

The statutes fall squarely within the condemnation of *McFarland* v. *American Sugar Refining Co.,* 241 U. S. 79, by creating arbitrary presumptions making plaintiffs *prima facie* guilty. *Morrison* v. *California,* 291 U. S. 82, 90.

Both the 1937 and 1939 Acts discriminate in favor of those who have not copyrighted their compositions pursuant to the statute of 1909, but rely upon their common law right, as against those who have availed themselves of the 1909 Act.

The 1937 Act discriminates in favor of copyright owners residing outside of the United States, as against those who reside within the United States.

The statutes discriminate between owners of copyrighted musical compositions and other copyright owners.

The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. *Lawton* v. *Steele,* 152 U. S. 133, 137.

National and state anti-trust laws are designed to regulate marketing, and may not be used as a screen to destroy it. Such laws are necessarily based upon the assumption that there is a right way and a wrong way of marketing property. There is only one way by which the owners of copyrighted musical compositions may obtain revenue for the public performance for profit of such compositions, and that way is by collective action. Without such collective action the exclusive right of public performance for profit becomes unenforceable.

The statutes impair obligations under existing contracts.

The statutes violate the Fourteenth Amendment by interfering with plaintiffs' right to do business outside of the State, and interfere with interstate commerce by requiring prices to be fixed on sheets of music and phonograph records coming from outside of the State and prescribing the uses that can be made of such compositions and records, as well as by the provisions respecting broadcasting.

The Society is not an unlawful combination in restraint of trade; but even if it were, the State may not deprive the members of the rights secured to them by their copyrights, and a court of equity may not deny them the means of protecting those rights.

The statutes must fall as a whole, and their various sections can not be separated. *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 316; *Williams* v. *Standard Oil Co.*, 278 U. S. 235, 243; *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 362; *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79, 87.

Messrs. Lucien H. Boggs and *Tyrus A. Norwood*, Assistant Attorney General of Florida, with whom *Messrs J. Tom Watson*, Attorney General, and *Andrew W. Bennett* were on the brief, for appellants in No. 610 and appellees in No. 611.

The plaintiffs came into court with "unclean hands," seeking aid in perpetuating their monopolistic activities. Injunctive relief should not have been granted.

The provisions of the 1937 Act were severable, and the court should not have struck down the whole merely because it found certain sections void.

The 1937 statute is a valid exercise of the police power of the State in the prevention of monopoly and restraint of trade.

Neither the Federal Constitution nor Congress has bestowed upon the holders of copyrights any right to combine for price-fixing purposes.

Where Congress, in exercising a constitutional power, has not shown an intention to cover the field completely, a State is free to act. *Carey* v. *South Dakota,* 250 U. S. 118, 122; *Savage* v. *Jones,* 225 U. S. 501, 533; *M., K. & T. Ry. Co.* v. *Haber,* 169 U. S. 613, 623.

A State may enact reasonable regulations affecting commercial dealings in patents and copyrights within its borders. *Allen* v. *Riley,* 203 U. S. 347; *Albright* v. *Teas,* 106 U. S. 613; *Patterson* v. *Kentucky,* 97 U. S. 501; *John Woods & Sons* v. *Carl,* 203 U. S. 358; *Ozan Lumber Co.* v. *Union County Nat. Bank,* 207 U. S. 251; *Carbice Corp.* v. *American Patents Corp.,* 283 U. S. 27; *Fox Film Corp.* v. *Doyal,* 286 U. S. 123.

Patents and copyrights are no more immune from anti-monopoly legislation than other kinds of property. *Standard Sanitary Mfg. Co.* v. *United States,* 226 U. S. 20, 49; *Straus* v. *American Publishers Assn.,* 231 U. S. 222, 234, 235; *Virtue* v. *Creamery Package Mfg. Co.,* 227 U. S. 8, 32; *United Shoe Machinery Co.* v. *United States,* 258 U. S. 451; *Standard Oil Co.* v. *United States,* 283 U. S. 163, 174; *Interstate Circuit* v. *United States,* 306 U. S. 208; *National Harrow Co.* v. *Hench,* 83 F. 36, 38.

Section 4–A of the 1939 Act constitutes a valid regulation of price-fixing combinations.

Section 4–C is not invalid because it limits compensation for licensing the use of musical copyrights to programs actually using the licensed music.

The public entertainment business is affected with a public interest. *Motion Picture Patents Co.* v. *Universal Film Co.*, 243 U. S. 502, 517.

The right to charge for use of a copyright or patent does not embrace a right to compensation for the use of other than the protected work or invention. *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 456.

Mr. Justice Black delivered the opinion of the Court.

In broad outline, these cases involve the constitutionality of Florida statutes regulating the business of persons holding music copyrights and declaring price-fixing combinations of "authors, composers, publishers, [and] owners" of such copyrights to be illegal and in restraint of trade.

The American Society of Composers, Authors and Publishers (ASCAP), one of the appellants in No. 611 and one of the appellees in No. 610, is a combination which controls the performance rights of a major part of the available supply of copyrighted popular music. The other appellants in No. 611 (appellees in No. 610) are individual composers, authors and publishers of music controlled by ASCAP. The appellees in No. 611 (appellants in No. 610) are the Attorney General and all the state prosecuting attorneys of Florida, who are charged with the duty of enforcing certain parts of the statutes in question.

These two cases were originally a single action, in which ASCAP and its co-parties sought to enjoin the state officials from enforcing a 1937 Florida statute.[1] A

[1] Fla. Laws 1937, ch. 17807.

federal district court, composed of three judges under § 266 of the Judicial Code, granted a temporary injunction, and this Court affirmed without passing upon the merits of the constitutional questions involved. *Gibbs* v. *Buck*, 307 U. S. 66. A supplemental bill of complaint was then filed, asking that the three-judge court enjoin a 1939 Florida statute relating to the same subject.[2] On final hearing, the three-judge court again enjoined the state officials from enforcing any part of the 1937 statute, but granted the injunction only as to certain sections of the 1939 act. 34 F. Supp. 510. No. 611 is an appeal by ASCAP and its co-complainants from the refusal to enjoin the state officials from enforcing the remainder of the 1939 act. No. 610 is an appeal by the state officials from the order granting the injunction as to the 1937 act and as to certain sections of the 1939 act.

The court below, without passing at all upon the validity of thirteen out of the twenty-one sections and subsections of the 1937 act, held that the remaining eight sections deprived copyright owners of rights granted them by the federal copyright laws, and that the statute must fall in its entirety. This it did upon the premise that the sections held invalid and the other parts of the bill were intended by the Florida legislature to form "a harmonious whole" and to "stand or fall together." The ultimate questions involved are such that we must first determine whether this ruling was correct. We hold that it was not, for the following reasons.

The Florida legislature expressed a purpose directly contrary to the District Court's finding. For what the legislature intended in this regard was spelled out in § 12 of the Act in the clear and emphatic language of the legislature itself. That section reads:

"If any section, sub-section, sentence, clause or any part of this Act, is for any reason, held or declared to be

[2] Fla. Laws 1939, ch. 19653.

unconstitutional, imperative [sic] or void, such holding or invalidity shall not affect the remaining portions of this Act; and it shall be construed to have been the legislative intent to pass this Act without such unconstitutional, inoperative or invalid part therein; and, the remainder of this Act, after the exclusion of such part or parts, shall be held and deemed to be valid as if such excluded parts had not been included herein."

This is a flat statement that the Florida legislature intended that the act should stand and be enforced "after the exclusion of such part or parts" as might be held invalid. Unless a controlling decision by Florida's courts compels a different course, the federal courts are not justified in speculating that the state legislature meant exactly the opposite of what it declared "to have been the legislative intent." But the Supreme Court of Florida recognizes and seeks to carry out the legislative intent thus expressed. Speaking of a similar severability clause of another statute, that court said: "The Act as a whole evinces a purpose on the part of the Legislature to impose a license tax on chain stores and Section fifteen provides that if any section, provision or clause thereof, or if the Act as applied to any circumstance, shall be declared invalid or unconstitutional such invalidity shall not affect other portions of the Act held valid nor shall it extend to other circumstances not held to be invalid. Under the liberal terms of Section fifteen it may be reasonably discerned that the Legislature intended that the Act under review should be held good under any eventuality that did not produce an unreasonable, unconstitutional or an absurd result. . . . The test to determine workability after severance and whether the remainder of the Act should be upheld rests on the fact of whether or not the invalid portion is of such import that the valid part would be incomplete or would cause results not contemplated by the Legisla-

ture." *Louis K. Liggett Co.* v. *Lee,* 109 Fla. 477, 481; 147 So. 463; 149 So. 8. Measured by this test the court below was in error, for there can be no doubt that § 1 and the other sections upon which the court failed to pass are complete in themselves; they are not only consistent with the statute's purpose but are in reality the very heart of the act, comprising a distinct legislative plan for the suppression of combinations declared to be unlawful. For, as pointed out by the court below, the sections that were not passed on are those which outlaw combinations to fix fees and prescribe the means whereby the legislative proscription against them can be made effective.[3] Since, therefore, that phase of the act which aimed at unlawful combinations is complete in itself and capable of standing alone, we must consider it as a separable phase of the statute in determining whether the injunction was properly issued against the state officials.

As a matter of fact, as the record stands, the right of ASCAP and its co-complainants to an injunction depends upon this phase of the statute and is not to be determined at all by the validity or invalidity of the particular sections which the court below thought inconsistent with the Federal Constitution and the copyright laws passed pursuant to it. The ultimate determinative question, therefore, is whether Florida has the power it

[3] The Court said:

"There remain: Sections 1, 2–C and 3, in effect declaring ASCAP and similar societies illegal associations, outlawing its arrangements for license fees, and proscribing and making an offense, attempts to collect them; Section 7–B making persons, acting for such a combination, agents for it and liable to the penalties of the Act; Section 8 fixing the penalties; Section 9 giving the state courts jurisdiction to enforce the Act, civilly and criminally; and Sections 10–A, 10–B, 11–A and 11–B, prescribing procedure under it." 34 F. Supp. 516. With the possible exception of § 3, nowhere in the course of the opinion were any of these sections held invalid.

exercised to outlaw activities within the state of price-fixing combinations composed of copyright owners. But before considering that question, it is necessary that we explain why we do not discuss, and why an injunction could not rest upon, any other phase of Florida's statutory plan.

Defendants in the injunction proceedings are the state's Attorney General, who is charged with the responsibility of enforcing the state's criminal laws, and all of the state's prosecuting attorneys, who are subject to the Attorney General's authority in the performance of their official duties.[4] Under the statutes before us, it is made the duty of the state's prosecuting attorneys, acting under the Attorney General's direction, to institute in the state courts criminal or civil proceedings. The original bill alleged that the defendants had threatened to—and would, unless restrained—enforce the 1937 statute "in each and all of its terms and the whole thereof, and particularly against these complainants and others similarly situated . . .," and that as a consequence complainants would suffer irreparable injury and damages. The supplemental bill contained similar allegations as to the 1939 act. Both bills were drawn upon the premise that complainants were entitled to an injunction restraining all the state's prosecuting officers from enforc-

[4] The Secretary of State and the State Comptroller were added as parties defendant by a "Further Supplemental Bill of Complaint" filed October 19, 1939. The ground given by the complainants for adding parties was that certain duties were imposed on these officials by the 1939 act. The duties, however, required only that certain fees be collected, and not that actions be brought to enforce the law.

In the course of this litigation, Florida has had three Attorneys General. The present Attorney General took office on January 7, 1941, and all the parties have joined in a motion to substitute him as a defendant in place of his predecessor in office. There is no objection to the substitution, and the motion is granted.

ing any single part of either of the lengthy statutes, under any circumstances that could arise and in respect to each and every one of the multitudinous regulations and prohibitions contained in those laws. In their answers, the state's representatives specifically denied that they had made any threats whatever to enforce the acts against complainants or any one else. In their answer to the supplemental bill, however, they said that they would perform all duties imposed upon them by the 1939 act. The findings of the court on this subject were general, and were to the effect that "Defendants have threatened to and will enforce such State Statutes against these Complainants and others similarly situated in the event that such Complainants and others similarly situated refuse to comply with said State Statutes or do any of the acts made unlawful by said State Statutes." It is to be noted that the court did not find any threat to enforce any specific provision of either law. And there is a complete lack of record evidence or information of any other sort to show any threat to prosecute the complainants or any one else in connection with any specific clause or paragraph of the numerous prohibitions of the acts, subject to a possible exception to be discussed later. The most that can possibly be gathered from the meager record references to this vital allegation of complainants' bill is that though no suits had been threatened, and no criminal or civil proceedings instituted, and no particular proceedings contemplated, the state officials stood ready to perform their duties under their oath of office should they acquire knowledge of violations. And as to the 1937 act, the state's Attorney General took the position from the very beginning, both below and in this Court, that under his construction of the earlier act no duties of any kind were imposed upon him and his subordinates except with relationship to prohibited combinations of the type defined in § 1.

Federal injunctions against state criminal statutes, either in their entirety or with respect to their separate and distinct prohibitions, are not to be granted as a matter of course, even if such statutes are unconstitutional. "No citizen or member of the community is immune from prosecution, in good faith, for his alleged criminal acts. The imminence of such a prosecution even though alleged to be unauthorized and hence unlawful is not alone ground for relief in equity which exerts its extraordinary powers only to prevent irreparable injury to the plaintiff who seeks its aid." *Beal* v. *Missouri Pacific Railroad Corp.*, 312 U. S. 45, 49. A general statement that an officer stands ready to perform his duty falls far short of such a threat as would warrant the intervention of equity. And this is especially true where there is a complete absence of any showing of a definite and expressed intent to enforce particular clauses of a broad, comprehensive and multi-provisioned statute. For such a general statement is not the equivalent of a threat that prosecutions are to be begun so immediately, in such numbers, and in such manner as to indicate the virtual certainty of that extraordinary injury which alone justifies equitable suspension of proceedings in criminal courts. The imminence and immediacy of proposed enforcement, the nature of the threats actually made, and the exceptional and irreparable injury which complainants would sustain if those threats were carried out are among the vital allegations which must be shown to exist before restraint of criminal proceedings is justified. Yet from the lack of consideration accorded to this aspect of the complaint, both by complainants in presenting their case and by the court below in reaching a decision, it is clearly apparent that there was a failure to give proper weight to what is in our eyes an essential prerequisite to the exercise of this equitable power. The clear import of this record is that the court below thought that if a federal court finds a many-sided state criminal

statute unconstitutional, a mere statement by a prosecuting officer that he intends to perform his duty is sufficient justification to warrant the federal court in enjoining all state prosecuting officers from in any way enforcing the statute in question. Such, however, is not the rule. "The general rule is that equity will not interfere to prevent the enforcement of a criminal statute even though unconstitutional. . . . To justify such interference there must be exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights. . . . We have said that it must appear that 'the danger of irreparable loss is both great and immediate'; otherwise the accused should first set up his defense in the state court, even though the validity of a statute is challenged. There is ample opportunity for ultimate review by this Court of federal questions." *Spielman Motor Sales Co.* v. *Dodge,* 295 U. S. 89, 95–96.

Such "exceptional circumstances" and "great and immediate" danger of irreparable loss were not here shown. Tested by this rule, therefore, and with the possible exception of that phase of the statute outlawing Florida activities by combinations declared unlawful in § 1 of the 1937 act (which we shall later consider separately), neither the findings of the court below nor the record on which they were based justified an injunction against the state prosecuting officers.

In addition to the fact that the situation here does not meet the tests laid down in the decided cases, the very scope of these two statutes illustrates the wisdom of a policy of judicial self-restraint on the part of federal courts in suspending state statutes in their entirety upon the ground that a complainant might eventually be prosecuted for violating some part of them. The Florida Supreme Court, which under our dual system of government has the last word on the construction and meaning of statutes of that state, has never yet passed upon

the statutes now before us. It is highly desirable that it should have an opportunity to do so.[5] There are forty-two separate sections in the two acts. While some sections are repetitious, and while other sections are unimportant for present purposes, there are embraced within these two acts many separate and distinct regulations, commands and prohibitions. No one can foresee the varying applications of these separate provisions which conceivably might be made. A law which is constitutional as applied in one manner may still contravene the Constitution as applied in another. Since all contingencies of attempted enforcement cannot be envisioned in advance of those applications, courts have in the main found it wiser to delay passing upon the constitutionality of all the separate phases of a comprehensive statute until faced with cases involving particular provisions as specifically applied to persons who claim to be injured. Passing upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions is analogous to rendering an advisory opinion upon a statute or a declaratory judgment upon a hypothetical case. It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it. It is sufficient to say that the statutes before us are not of this type. Cases under the separate sections and paragraphs of the acts can be tried as they arise—preferably in the state courts. Any federal questions that are properly presented can then be brought here. But

[5] Cf., e. g., *Arkansas Corporation Commission* v. *Thompson, ante,* 132, 144; *Railroad Commission of Texas* v. *Pullman Co.,* 312 U. S. 496, 499; *Railroad Commission of Texas* v. *Rowan & Nichols Oil Co.,* 311 U. S. 570, 575; *Thompson* v. *Magnolia Petroleum Co.,* 309 U. S. 478, 483; *Ex parte Baldwin,* 291 U. S. 610, 619; *Gilchrist* v. *Interborough Rapid Transit Co.,* 279 U. S. 159, 207.

at this time the record does not justify our passing upon any part of the statute except, possibly, that phase which prohibits activities in Florida by combinations declared unlawful. While the proof and findings in this regard are not as clear and specific as they might and should be, we nevertheless, under the circumstances of this case, proceed to this ultimate and decisive question.

In the consideration of this case, much confusion has been brought about by discussing the statutes as though the power of a state to prohibit or regulate combinations in restraint of trade was identical with and went no further than the power exercised by Congress in the Sherman Act. Such an argument rests upon a mistaken premise.[6] Nor is it within our province, in determining whether or not this phase of the state statute comes into collision with the Federal Constitution or laws passed pursuant thereto, to scrutinize the act in order to determine whether we believe it to be fair or unfair, conducive to good or evil for the people of Florida, or capable of protecting or defeating the public interest of the state.[7] These questions were for the legislature of Florida and it has decided them. And, unless constitutionally valid federal legislation has granted to individual copyright owners the right to combine, the state's power validly to prohibit the proscribed combinations cannot be held non-existent merely because such individuals can pre-

[6] We have been referred to a recent consent decree against ASCAP in the federal district court for the Southern District of New York, the theory being that the decree might have some bearing upon the state's power to pass the legislation now under attack. But it has not. In matters relating to purely intrastate transactions, the state might pass valid regulations to prohibit restraint of trade even if the federal government had no law whatever with reference to similar matters involving interstate transactions.

[7] The court below concluded as a matter of law that "enactment of the said Statute was not necessary to protect, nor does it serve the public interest of the State of Florida. . . ."

serve their property rights better in combination than they can as individuals. We find nothing in the copyright laws which purports to grant to copyright owners the privilege of combining in violation of otherwise valid state or federal laws. We have, in fact, determined to the contrary with relation to other copyright privileges.[8] But complainants urge that there is a distinction between our previous holdings and the question here. This contention is based on the idea that Congress has granted the copyright privilege with relation to public performances of music, and that with reference to the protection of this particular privilege, combination is essential. We are therefore asked to conclude from the asserted necessities of their situation that Congress intended to grant this extraordinary privilege of combination. This we cannot do. We are pointed to nothing either in the language of the copyright laws or in the history of their enactment to indicate any congressional purpose to deprive the states, either in whole or in part, of their long-recognized power to regulate combinations in restraint of trade. Compare *Waters-Pierce Oil Co.* v. *Texas* (No. 1), 212 U. S. 86, 107.

Under the findings of fact of the court below, ASCAP comes squarely within the definition of the combinations prohibited by § 1 of the 1937 act. Section 1 defines as an unlawful combination an aggregation of authors, composers, publishers, and owners of copyrighted vocal or instrumental musical compositions who form any society, association, or the like, and the members of which constitute a substantial number of the persons, firms or corporations within the United States who own or control such musical compositions, and "when one of the objects of such combination is the determination and fix-

[8] *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208. Cf. *Fashion Originators' Guild of America* v. *Federal Trade Commission*, 312 U. S. 457; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436.

ation of license fees or other exactions required by such combination for itself or its members or other interested parties." Section 8 of the 1937 act makes it an offense for such combinations "to act within this State in violation of the terms of this Act." The court below found that there were 1425 composers and authors who were members of ASCAP; that the principal music publishers of the country are members; that the Society controls the right of performance of 45,000 members of similar societies in foreign countries; and that the Board of Directors of ASCAP have "absolute control over the fixing of prices to be charged for performance licenses . . ." Since under the record and findings here ASCAP is an association within the meaning of § 1 of the 1937 act, we are not called upon at its instance to pass upon the validity of other provisions contained in the numerous clauses, sentences, and phases of the 1937 or 1939 act which might cover other combinations not now before us. It is enough for us to say in this case that the phase of Florida's law prohibiting activities of those unlawful combinations described in § 1 of the 1937 act does not contravene the copyright laws or the Federal Constitution; that particular attacks upon other specified provisions of the statutes involved are not appropriate for determination in this proceeding; that the court below erred in granting the injunction; and that the bill should have been dismissed. All other questions remain open for consideration and disposition in appropriate proceedings. For the reasons given, the judgment below in No. 610 is reversed and the cause is remanded to the lower court with instructions to dismiss the bill. The judgment in No. 611 is affirmed.

No. 610 reversed.
No. 611 affirmed.

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

MARSH, SECRETARY OF STATE OF NEBRASKA, ET AL. *v.* BUCK ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

No. 312. Argued April 29, 1941.—Decided May 26, 1941.

Decided upon the authority of *Watson* v. *Buck, ante,* p. 387. P. 407. 33 F. Supp. 377, reversed.

APPEAL from a decree of the District Court of three judges which enjoined enforcement of the Nebraska Anti-Monopoly Act of May 17, 1937, against the plaintiffs-appellees, who were members of the American Society of Composers, Authors and Publishers, an unincorporated association recognized by the laws of the State of New York, consisting of approximately 1,425 composers and authors and 131 publishers of music.

Mr. William J. Hotz, with whom *Messrs. Walter R. Johnson,* Attorney General of Nebraska, *John Riddell,* Assistant Attorney General, *Gordon Diesing* and *William F. Dalton* were on the brief, for appellants.

Mr. Thomas G. Haight, with whom *Messrs. Louis D. Frohlich* and *Herman Finkelstein* were on the brief, for appellees.

MR. JUSTICE BLACK delivered the opinion of the Court.

Most of the questions presented by this case are the same as those that were raised in *Watson* v. *Buck, ante,* p. 387. Here, as there, at the request of ASCAP and its co-complainants a federal District Court composed of three judges enjoined various state officials from enforcing a state statute [1] aimed primarily at price-fixing com-

[1] Neb. Laws 1937, ch. 138.

binations operating in the field of public performance of copyright music.[2] Here, as there, the complainants alleged, and the defendants denied, that enforcement of the act had been threatened. Here, as there, the court below found that threats had been made, that some of the sections of the act were invalid, that the invalidity of those sections permeated the whole, and that the state officials should be enjoined from enforcing any of the numerous provisions of the act. But, as in the Florida case, the court below proceeded on a mistaken premise as to the rôle a federal equity court should play in enjoining state criminal statutes. Here, there was no more of a showing of exceptional circumstances, specific threats, and irreparable injury than in the Florida case. In his brief in this Court, the Attorney General of Nebraska stated that "Appellants, as law enforcement officers, sincerely hope that no action under this law will be required. None was threatened before nor since the suit was started." With one possible exception, the record bears out the statement of the Attorney General; there was no evidence whatever that any threats had been made, but in his answer the Attorney General stated that he would "enforce the act against the complainant Society . . . [if] the complainant Society would operate in the State of Nebraska in violation of the terms of the statute by conniving and conspiring to fix and determine prices for public performance of copyrighted musical compositions . . ." As we have just held in *Watson* v. *Buck,* it was error to issue an injunction under these circumstances.

In other material respects also, this case is like the Florida case. The court below failed to pass on what we consider the heart of the statute because of what it regarded as the pervading vice of the invalid sections.

[2] 33 F. Supp. 377.

But § 12 of the Nebraska statute is similar to § 12 of the Florida statute and provides that "If any section, subdivision, sentence or clause in this Act shall, for any reason, be held void or non-enforceable, such decision shall in no way affect the validity or enforceability of any other part or parts of this Act." The legislative will is respected by the Supreme Court of Nebraska,[3] and the court below should have followed state law in this regard. That part of the statute on which the court did not pass—and the part which the Attorney General said he stood willing to enforce if violated—set up a complete scheme for the regulation of combinations controlling performing rights in copyright music. On the authority of *Watson* v. *Buck*, the decision below is reversed and the cause is remanded with instructions to dismiss the bill.

Reversed.

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

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[3] See *Petersen* v. *Beal*, 121 Neb. 348, 353; 237 N. W. 146, quoting and approving the following excerpt from *Scott* v. *Flowers*, 61 Neb. 620, 622–623; 85 N. W. 857: "The general rule upon the subject is that, where there is a conflict between an act of the legislature and the Constitution of the state, the statute must yield to the extent of the repugnancy, but no further [Citing authorities]. If, after striking out the unconstitutional part of a statute, the residue is intelligible, complete, and capable of execution, it will be upheld and enforced, except, of course, in cases where it is apparent that the rejected part was an inducement to the adoption of the remainder. In other words, the legislative will is, within constitutional limits, the law of the land, and when expressed in accordance with established procedure, must be ascertained by courts and made effective."

UNITED STATES ET AL. *v.* MORGAN, ADMINISTRATRIX, ET AL.

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

No. 640. Argued April 10, 1941.—Decided May 26, 1941.

1. The function of the Secretary of Agriculture, when determining under the Packers and Stockyards Act reasonable rates for services rendered by market agencies during a period of years past, is not merely to compare their actual expenditures and incomes, but involves consideration of the extent to which the services properly should be charged to the public. P. 414.
2. As a basis for distribution of funds paid into the registry of the District Court by market agencies pursuant to an order granting an interlocutory injunction in their suit to enjoin the enforcement of an order of the Secretary of Agriculture purporting to fix their rates, which ultimately was adjudged void for defects of procedure, the Secretary of Agriculture reopened the proceeding and found and fixed for the impounding period, rates which were on the level of those fixed by the original order. *Held:*

   (1) A contention that the Secretary based his judgment on conditions existing at the date of the original order without considering subsequent changes, is disproved by the record. P. 416.

   (2) A contention that the Secretary's findings are without support in the evidence, is without merit. P. 417.

   (3) Quite different considerations may properly have influenced the Secretary in fixing rates for the impounding period from those by which he determined a schedule of rates for the future. P. 419.

   (4) A motion that the Secretary be disqualified for bias was properly overruled by him. P. 420.

   The charge of bias grew out of his criticism of the decision of this Court declaring his original order void (304 U. S. 1), in a letter which he wrote to a newspaper while in the mistaken belief that the decision meant return of the impounded funds to the market agencies. In overruling the motion, he explained the mistake, denied bias and added that, as a matter of expediency, he might have disqualified himself but for the fact that, while the market agencies were pressing his disqualification, they were simultaneously urging that none other than the Secretary had legal authority to make the rate order.

(5) The fact that the Secretary not merely held but expressed strong views on matters believed by him to have been in issue in the earlier stage of the case, did not unfit him for exercising his duty in the subsequent proceedings. P. 421.

3. In a suit by market agencies attacking rates fixed by the Secretary of Agriculture, it was improper for the District Court, over the Government's objection, to authorize the plaintiffs to take the Secretary's deposition, and improper, upon his appearing at the trial, to examine him regarding the process by which he reached his conclusions, including the manner and extent of his study of the record and his consultation with subordinates. P. 422.
4. Administrative and judicial processes are collaborative instrumentalities of justice, and the appropriate independence of each should be respected by the other. P. 422.

32 F. Supp. 546, reversed.

APPEAL from a decree of the District Court, of three judges, which adjudged invalid an order of the Secretary of Agriculture, fixing rates, and directed that funds in the registry that had been paid in by the plaintiffs be returned to them. The history of this protracted litigation is summed up in the first paragraph of the opinion.

Attorney General Jackson, with whom *Assistant Attorney General Berge,* and *Messrs. Hugh B. Cox, Warner W. Gardner, James C. Wilson, S. R. Brittingham, Jr.,* and *G. N. Dagger* were on the brief, for appellants.

The court below compelled the Secretary to testify as to the manner in which he reached his decision, although the record was in all respects regular on its face. This was error, and fatal to the decision, which rests in substantial part upon the testimony of the Secretary.

The finding that the Secretary was not an "impartial trier of the facts" is an accusation supported only by a letter published by the Secretary, after his order had been held invalid because of procedural irregularity, which stated that the impounded funds "rightfully" belong to the farmers. (1) This statement simply reflected the fact that the Secretary's order had been upheld by the

only court which had considered its merits, and cannot reasonably be construed to indicate that his mind would be closed to the force of new evidence and new arguments. (2) But even if the factual basis of the decision below were correct, there yet would be no disqualification. It may be assumed that the Act holds the administrative tribunal to the same criteria of impartiality as obtains for the judiciary. But § 21 of the Judicial Code disqualifies only for a *personal* bias, with which the Secretary was not charged. And, as in the case of a court, if the Secretary chose to sit there can be no disqualification.

The Secretary properly reopened the proceedings by service of the 1933 findings and order. As he explained, the summarization of the voluminous evidence there contained would "prove very helpful as a working basis for this hearing," and would be revised according to any additional evidence which the parties might introduce.

The court below found further evidence of an improper proceeding in the failure of the Government to introduce new evidence. The ruling is unwarranted. In the circumstances of this case the evidence supporting the 1933 order was sufficient to support the 1939 order and, even if it were not, the burden of going forward could be assumed to rest upon the appellees. The Secretary properly assumed that the existing record might be taken as satisfactory except so far as the parties wished to supplement it.

If the old record, supplemented by the new evidence introduced by the appellees, is insufficient to support the 1939 order of the Secretary, this objection goes to the merits and does not establish procedural irregularity. Under the Packers and Stockyards Act, in contrast to public utility regulation, the reasonable rates have no necessary relationship to actual costs.

The necessity of taking evidence as to changed conditions was simply a question for administrative determination.

The finding of the court below that the Secretary did not personally weigh or appraise the evidence is wholly without support in the evidence.

There was substantial evidence to support the order of the Secretary.

The changes during the impounding period did not make the rates inadequate.

Messrs. John B. Gage and *Frederick H. Wood,* with whom *Mr. Thomas T. Cooke* was on the brief, for appellees.

An administrative tribunal is required to grant a full, fair and impartial hearing before an impartial trier of the facts.

The order of June 20, 1939, is invalid because the reopened proceedings were conducted by the Secretary, and the order resulting therefrom was based upon an erroneous conception of the nature of the proceedings before him, of the status of the invalidated findings of June 14, 1933, of the prior opinions of this Court in this case, and upon a misconception of the powers and duties of the Secretary in respect of the reopened proceedings.

The order is invalid because the purpose of the Secretary throughout the reopened proceedings was to procure the validation *nunc pro tunc* of the invalidated order of June 14, 1933.

The District Court did not err in permitting the Secretary to be called as a witness. Respondents were denied a hearing before the only tribunal authorized to hear the matter, to-wit, the Secretary himself.

The order of June 20, 1939 is invalid because it was arrived at without considering relevant and material facts and circumstances.

The finding of the court below, that the findings and order of June 20, 1939 are not supported by substantial evidence, should not be disturbed, (1) because it is not

clearly erroneous, and (2) because it is fully supported by the record.

In fixing rates which are non-compensatory to any representative firm or group of representative firms, however efficient, the order has not only violated the standards of the statute but has violated standards as expressed in the order itself.

The order of June 20, 1939 is invalid because the findings and order contain no legally sufficient finding that the existing rates were unreasonably high.

The court below properly discharged its "duty to use broad discretion" to attain a just and lawful result, in holding that, in equity and good conscience, the impounded funds should be distributed to the market agencies.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This case originated eleven years ago. As a result of proceedings begun in April, 1930 under the Packers and Stockyards Act, 42 Stat. 159, 7 U. S. C. § 181 *et seq.*, the Secretary of Agriculture in June, 1933, issued an order setting maximum rates to be charged by market agencies for their services at the Kansas City Stockyards. The market agencies brought suit to set aside his order. The district court issued a temporary restraining order, under which amounts charged in excess of the rates fixed by the order were impounded, and later it upheld the order. 8 F. Supp. 766. On appeal here, 7 U. S. C. § 217; 28 U. S. C. §§ 44, 47a, the case was sent back to the district court in order to determine on the issues raised by the pleadings whether the agencies had been denied the "full hearing" demanded by § 310 of the Act. 298 U. S. 468. The district court thereupon decided that this requirement of the statute had been satisfied. 23 F. Supp. 380. The case was again brought here and the order of the Secretary

was held invalid because of procedural defects. 304 U. S. 1. Prior to this decision, the Secretary and the market agencies had agreed upon a higher schedule of rates to become effective on December 1, 1937. However, under the impounding order, which had continued in effect until that date, over half a million dollars had been deposited. The disposition of this fund was made a ground for a petition for rehearing after the second *Morgan* decision, but the petition was denied because that question was for the district court. 304 U. S. 23, 26. The Secretary then reopened the original proceedings to determine reasonable rates during the impounding period. Before the Secretary had made a new order, the district court directed that the impounded moneys be turned over to the market agencies. 24 F. Supp. 214. The case came here for the third time, and we reversed the district court and required its retention of the fund "until such time as the Secretary, proceeding with due expedition, shall have entered a final order in the proceedings before him." 307 U. S. 183, 198. This decision was rendered on May 15, 1939. A month later, the Secretary issued a new schedule of rates for the impounding period based on elaborate findings. Accordingly, the Government moved the district court to distribute the funds in accordance with the Secretary's order, but that court, with one of its three judges dissenting, held the order invalid and directed that the funds be given to the market agencies. 32 F. Supp. 546. The case is now here for the fourth time.

The validity of the Secretary's order has undergone the closest scrutiny in elaborate briefs and extended oral arguments. Nothing has been overlooked. However, in the final stage of this long drawn out litigation, critical examination reveals only a few issues demanding attention.

When the matter was last here we defined the duty of the Secretary. He was to determine reasonable rates for the impounding period so that there could be just dis-

tribution of the funds which the court below had taken into its registry. The nature of the problem before the Secretary was a guide to its solution. The Secretary's task was not the usual enterprise of fixing rates for the future, so largely an exercise in prophecy. Unique circumstances made him, in 1939, the arbiter of rates for a period between 1933 and 1937. But even such a retrospective determination does not present a mathematical problem. Doubts and difficulties incapable of exact resolution confront judgment. More than that, since the Secretary is the guardian of the public interest in regulating a business of public concern it is not for him merely to reflect the items on a profit and loss statement. He must consider whether these represent services which properly should be charged to the public. While, therefore, the Secretary in determining rates for the past could not deny himself the benefit of hindsight, he was not merely a bookkeeper posting items into a ledger. Rates to which these public agencies were entitled were not to be derived merely from their expenditures and actual income.

This Court defined the duty of the Secretary in its decision in the 307th U. S. The record leaves no doubt that the Secretary, when he filed his order a month after that decision, appropriately discharged the duty. He served upon the market agencies the order of June 14, 1933, and the findings underlying it as the starting point of the inquiry. The market agencies protested against any order "*nunc pro tunc* as of June 14, 1933," alleged that conditions had changed much since 1933, and asked for the appointment of an examiner to take new evidence. Because he deemed the earlier findings illuminating and helpful "as a working basis for this hearing," the Secretary refused to withdraw them. But he appointed an examiner to hear new evidence and denied "any intention of depriving the respondents of the opportunity of offering evidence concerning conditions affecting the reasonableness of their

rates during the period subsequent to June 14, 1933." He further stated that the "forecasts of conditions" in the 1933 order "can now be checked in light of subsequent events." He neither purported to make nor did he make a *nunc pro tunc* order. The Secretary thus adopted a procedure which admitted whatever light was shed by change of circumstances after 1933. The market agencies freely availed themselves of this procedure; and the Secretary's findings leave no room for doubt that his conclusions represent a judgment of 1939 and not a prophecy of 1933. Having overruled the contention of Government counsel that evidence of conditions after 1933 was irrelevant, he took note of the fact that fewer livestock came to the market after 1933; that a larger number came by truck, thereby causing a decrease in the number of animals in an average consignment; that specific as well as general economic factors touching the market at Kansas City had changed; that statistics relevant in 1933 had become outmoded; and that he had before him evidence of expenses for "business getting and maintaining" and salesmanship not before him in 1933. The Secretary thus unequivocally avowed his intention to consider conditions after 1933 and his findings carry out his purpose.[1] We must therefore reject the claim that the Secretary's judgment was founded on the misconception that he must shut his mind to everything that happened after 1933 and in 1939 fix rates in the imaginary world of 1933.

Another attack upon the Secretary's order is the con-

[1] Attention is called to the title page of the tentative findings, on which appeared, opposite the docket number of the case and the names of the formal parties, the words "Tentative Findings of Fact, Conclusions and Proposed Order, issued as of June 14, 1933." This formal caption is not an unnatural description of the starting point of the Secretary's new inquiry. It clearly is not descriptive of his final findings and order, let alone a denial of the proper theory on which he avowedly proceeded.

ventional objection that the findings were not rooted in proof. To reëxamine here with particularity the extensive findings made by the Secretary, and to test them by a record of 1340 printed pages and thousands of pages of additional exhibits, would in itself go a long way to convert a contest before the Secretary into one before the courts. Compare *Litchfield* v. *Register and Receiver,* 9 Wall. 575, 578. We have canvassed too fully in the past the duties respectively allotted to the Secretary of Agriculture and the courts in the enforcement of the Packers and Stockyards Act to justify extended discussion of the governing principles. *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420; *Acker* v. *United States,* 298 U. S. 426; see also *United States* v. *Morgan,* 307 U. S. 183, 190–91. We are in the legislative realm of fixing rates. This is a task of striking a balance and reaching a judgment on factors beset with doubts and difficulties, uncertainty and speculation. On ultimate analysis the real question is whether the Secretary or a court should make an appraisal of elements having delusive certainty. Congress has put the responsibility on the Secretary and the Constitution does not deny the assignment.

The objection that the proof does not support the findings is really a repetition in disguise of the unfounded claim that the Secretary misconceived his duty and made his order in 1939 as though he were acting in 1933. The bedrock of these variously phrased attacks upon the order is the contention that the Secretary was indifferent to events occurring after 1933. The short answer is that he was not. The conclusion which he drew from these events is another matter.[2]

[2] That inferences from facts and contentions regarding their significance are the real stuff of these rate determinations is well illustrated by the phase of the problem before the Secretary that was most strongly pressed upon us. It is undisputed that since 1933 the arrival of animals by truck has increased, thereby causing a decrease

Specifically, it is urged that by the increase of rates for the future, to which the market agencies and the Secretary agreed in 1937, changes in circumstances were recognized, while the present order ignored these changes because its rates are at the same level as the original order. But the Secretary did not disregard changed market conditions during the impounding period. Evidence showing these changes was submitted by the market agencies.[3] He was thus duly apprised of the changes and

in the average number of animals in a consignment. And since the consignment is the unit of cost, a decrease in the number of animals results in an increase in cost per head in the consignment. Hence, formal logic concludes, the present order in setting the same rates as those of 1933 fails to reflect this increase in per head cost, and on that ground is invalid. But both the 1933 and 1939 schedules recognize that there are minimal costs unrelated to the number of animals in a consignment. Both orders, therefore, were graduated according to the number of animals in a consignment. The Secretary found that this graduated scale which "produces an increasing per head revenue as the number of head in the consignment decreases" would "give recognition to the changing method of arrival of livestock." Moreover, the decrease in the size of consignments may well have been reflected in the increased estimate of salesmanship cost. All these considerations only illustrate that we are moving in a difficult and specialized realm of judgment which has been entrusted to the Secretary of Agriculture and not to the courts. The Secretary's judgment must prevail since his finding had the support of inferences fairly drawn from the entire evidence, including all that the market agencies saw fit to introduce bearing on their operations after 1933.

[3] An objection to an exclusion of evidence by the examiner requires but slight comment. Two coöperative commission companies had accepted the rates of the Secretary's order of 1933, and the market agencies asked that the annual reports of these companies for the impounding period be produced by the division of the Department of Agriculture with which they were filed. The examiner refused to order production of the reports on the ground that he had no authority to do so, basing his ruling on a section which the Packers and Stockyards Act incorporates from the Federal Trade Commission Act and which provides that it shall be a misdemeanor for any

they entered into the findings. To be sure, in ascertaining the reasonable rates for the impounding period he did not attach to them the significance which the market agencies drew from them. As a result of an elaborate study of conditions prior to 1933 and evidence indicating no essential change in those conditions for the purpose at hand during the later years, the Secretary concluded that the market was overstaffed and that in the competitive setting of the business amounts had been spent not justified by that public interest which he is charged to protect. Actual expenses for salesmen's salaries and "business getting," the items chiefly in controversy, he found, did not furnish an adequate guide to the ascertainment of reasonable rates. Had the lower rates originally set by the Secretary in 1933 been tested by experience, audits of the market agencies under these rates would have reflected the practical operation of the policy of lowering costs under controlled conditions. But this source of experience was unavailable because the agencies throughout the impounding period continued to operate under the higher rates. Quite different considerations may properly have influenced the Secretary in fixing rates for the impounding period from those by which he determined a schedule of rates for the future. The existence of the differences is recognized in the agreement between the Secretary and the market agencies whereby the higher rates of the 1937 schedule were to be "without prejudice" either to the Government or to the agencies

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officer of the regulatory agency to make public any information which the agency has obtained "without its authority, unless directed by a court." 7 U. S. C. § 222, 15 U. S. C. § 50. We need not determine whether the reports should properly have been admitted. If they should have been, the statute provides an orderly way for having this done during the course of the hearing by seeking the Secretary's authorization. Having failed to pursue the way of the statute, the market agencies were debarred from raising the matter at a later time.

in the present litigation. It was further agreed in 1937 that after six months, and unless the rate order of 1933 was found invalid, the Secretary could at any time "without further hearing" reduce the rates for the future to the 1933 level. There were very great complexities in determining rates for an industry affected by the unstable conditions which surrounded the Kansas City market in 1937. And the expert tribunal charged with the task may well have felt a need for flexibility in the prophecy involved in setting future rates which did not enter the judgment required in fixing rates for a past period. It is not for us to try to penetrate the precise course of the Secretary's reasoning. Our duty is at an end when we find, as we do find, that the Secretary was responsibly conscious of conditions at the market during the years following 1933, that he duly weighed them, and nevertheless concluded that rates similar to those in the 1933 order were proper.

But the market agencies go beyond saying that the record did not warrant what the Secretary found. They say that bias disqualified him. This serious charge derives from a letter written by the Secretary to the *New York Times* immediately following the decision of this Court in the second *Morgan* case, 304 U. S. 1. By that decision, the Court had upset the order of 1933 because of procedural defects. Largely because of his assumption that this meant the return of the impounded funds to the market agencies, the Secretary in his letter vigorously criticized the decision. The market agencies in due course moved to disqualify the Secretary in the proceedings started by him to fix new rates. In denying their motion the Secretary wrote a patently sincere denial of bias. He stated that he had complained against a return of the impounded funds to the market agencies prior to a determination of the rates on the merits, that the denial of the petition for rehearing, 304 U. S. 23, 26, had shown him the error of his assumption, that in his letter of criticism he

made no prejudgment about the rates to be fixed, and that his only concern was to "see that the substantive rights of the parties are fairly determined." He added that "as a matter of expediency" he might have disqualified himself but for the fact that, while the market agencies were pressing his disqualification, they were simultaneously urging that none other than the Secretary had legal authority to make the rate order. Plainly enough, when it was thus suggested that he create a situation in which no order could be made, the Secretary was offered no escape from his duty even had he preferred to consult the comforts of personal convenience.

But, intrinsically, the letter did not require the Secretary's dignified denial of bias. That he not merely held, but expressed, strong views on matters believed by him to have been in issue, did not unfit him for exercising his duty in subsequent proceedings ordered by this Court. As well might it be argued that the judges below, who had three times heard this case, had disqualifying convictions. In publicly criticizing this Court's opinion the Secretary merely indulged in a practice familiar in the long history of Anglo-American litigation, whereby unsuccessful litigants and lawyers give vent to their disappointment in tavern or press. Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances. Nothing in this record disturbs such an assumption.

And so we conclude that the order of the Secretary furnishes "the appropriate basis for action in the district court in making distribution of the fund in its custody." *United States* v. *Morgan,* 307 U. S. 183, 198. But, finally, a matter not touching the validity of the order requires consideration. Over the Government's objection the dis-

trict court authorized the market agencies to take the deposition of the Secretary. The Secretary thereupon appeared in person at the trial. He was questioned at length regarding the process by which he reached the conclusions of his order, including the manner and extent of his study of the record and his consultation with subordinates. His testimony shows that he dealt with the enormous record in a manner not unlike the practice of judges in similar situations, and that he held various conferences with the examiner who heard the evidence. Much was made of his disregard of a memorandum from one of his officials who, on reading the proposed order, urged considerations favorable to the market agencies. But the short of the business is that the Secretary should never have been subjected to this examination. The proceeding before the Secretary "has a quality resembling that of a judicial proceeding." *Morgan* v. *United States,* 298 U. S. 468, 480. Such an examination of a judge would be destructive of judicial responsibility. We have explicitly held in this very litigation that "it was not the function of the court to probe the mental processes of the Secretary." 304 U. S. 1, 18. Just as a judge cannot be subjected to such a scrutiny, compare *Fayerweather* v. *Ritch,* 195 U. S. 276, 306–07, so the integrity of the administrative process must be equally respected. See *Chicago, B. & Q. Ry. Co.* v. *Babcock,* 204 U. S. 585, 593. It will bear repeating that although the administrative process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other. *United States* v. *Morgan,* 307 U. S. 183, 191.

Reversed.

MR. JUSTICE REED did not participate in the consideration or decision of this case.

MR. JUSTICE ROBERTS:

With much that is said in the opinion of the Court I agree, but I am compelled to dissent from the conclusion. Despite the fact that this litigation has extended over many years, I still think that not only the rights of the market agencies but the principles involved require the Court to take care that the litigation is disposed of in accordance with the principles it has laid down. The result now reached is not in accordance with those principles. A recital of the course of the litigation is necessary for an understanding of the case as now presented.

Rates for the market agencies at Kansas City were fixed by the Secretary of Agriculture [1] July 24, 1923. By virtue of the statute these became the legal rates and the agencies were bound not to exceed them until the further order of the Secretary. April 7, 1930, the Secretary instituted an inquiry into the existing rates. June 14, 1933, he issued an order reducing them.

July 19, 1933, the market agencies brought suit to enjoin and set aside the order. The District Court entered a temporary injunction July 22, 1933, in connection with which it provided that the difference between the rates being charged by the agencies and those fixed by the order under attack should be impounded pending the outcome of the litigation. Upon the trial of the cause the court refused to consider an issue tendered by the agencies as to whether the Secretary had granted them a full hearing. Upon examination of the record, it held the order was supported by substantial evidence and, on October 29, 1934, dismissed the bill.[2] This Court reversed, on May 25, 1936, holding that the District Court should have con-

[1] Several incumbents of the office acted in the case at successive dates. The term Secretary is used to designate the official who acted in any instance.

[2] 8 F. Supp. 766.

sidered and decided the question whether the agencies had been afforded a full hearing.[3]

On a further trial the District Court again upheld the order by a decree of July 2, 1937.[4] The United States appealed from this decree. In the meantime, however, a significant thing occurred. On November 14, 1937, the Secretary approved new rates, effective November 1, 1937, in recognition of changed conditions existing in the business at Kansas City. The impounding order, therefore, ceased to operate November 1, 1937.

This Court reversed the second decree of the District Court because it found that the agencies had been denied a full hearing in the proceedings which eventuated in the order of 1933. Its decision was rendered April 25, 1938, and a rehearing was denied May 31, 1938.[5]

The Secretary and his legal advisers evidently believed, and, as I think, correctly, that the old rates authorized in 1923 stood until a new order, lawfully made, superseded them for the future. The rates fixed for the future by the order of 1933 had not become effective and the Act contained no provision for altering rates charged in the past under authority of the existing and outstanding order of 1923, or granting reparation in respect of them. The Secretary seems to have thought that he could reach this situation by the entry of a *nunc pro tunc* order *as of* July 14, 1933. On June 2, 1938, therefore, he directed that the proceeding be reopened and that the "proceedings, findings of fact, conclusion and order" issued on June 14, 1933, be served upon the agencies as the "Tentative Findings of Fact, Conclusion and Proposed Order" of the Secretary, and he denominated them as "Tentative Findings of Fact, Conclusion, and Proposed Order" *issued as of June 14, 1933*. It is plain that he proposed thus to cure what had

[3] 298 U. S. 468.

[4] 23 F. Supp. 380.

[5] 304 U. S. 1, 23.

been found to be the defect in the order, by affording the market agencies an opportunity to file and argue exceptions, in an effort to show any infirmity in the findings and conclusion on which the 1933 order was based. If none was made to appear, he proposed to issue the order *nunc pro tunc* as of its original date. It is true that after exceptions were filed, and upon the hearing before an examiner, the agencies were permitted to offer evidence to show changed conditions supervening in the period between 1933 and 1937. It is also true that, while the examiner retained all of the findings previously made as the foundation for the order of 1933, he added certain findings, but he did not, in any material respect, alter the ultimate findings and, indeed, he retained the exact rates fixed in the earlier order and left undisturbed every finding as to cost (with one immaterial exception), even to the fourth decimal place, as it had stood in the original report.

Immediately after the reopening of the proceeding consequent upon the decision of this Court of May 31, 1938, the Secretary, on June 12, 1938, applied to the District Court for an order staying the distribution of the impounded funds, pending his further decision and order. In his petition he said: "After a full hearing the Secretary will determine by an order as of June 14, 1933, what rates may reasonably be charged by petitioners to their clients for the services rendered them." The District Court denied the application.[6]

The United States appealed from the decree. In its brief it stated "The only purpose and effect . . . [of the reopened proceeding] is to determine whether and to what extent the appellees have been prejudiced by the procedural defect in the earlier proceeding."

Before the case had been decided here, the reopened proceeding before the Secretary had so progressed that

[6] 24 F. Supp. 214.

the evidence had been closed, a tentative report made by an examiner, exceptions filed, and argument heard by the Secretary. The record plainly discloses that, up to the time of our final decision on this last appeal, the Secretary had been content to take the data disclosed by his investigation of the market agencies' activities in the years 1929, 1930 and 1931 as the basis of any order, and this was natural if, as he then supposed, he was justified in entering an order *nunc pro tunc* as of the date of his original 1933 order.

This Court rendered its opinion in the last appeal May 15, 1939.[7] Speaking by a majority, the Court there held that, as the District Court was acting as a court of equity in the premises, the impounded funds should be disbursed according to the equities of the situation. It adverted to the fact that the rates fixed by the Secretary October 14, 1937, governed for the future until altered in accordance with law, but it held that the equities of the case required an investigation as to whether the rates charged in the interval between 1933 and 1937 had been unreasonable and, as a result, whether it would be inequitable to withhold from the market agencies' customers and return to the market agencies all or any part of the impounded fund. The court was of the view that the Secretary was in a peculiarly favorable position to find the facts and advise the court upon this subject and that the court ought to coöperate with the Secretary to attain a just result.

At this juncture the reopened proceeding was under submission before the Secretary. It is to be noted that he had refused to consider the data in his own possession with respect to the actual experience of two of the market agencies which had conformed to the rates he fixed in 1933. It is further to be noted that the existence of

[7] 307 U. S. 183.

changed conditions not only is shown by the uncontradicted evidence offered by the agencies but by the fact that the Secretary recognized such change in making his order of October 14, 1937.

The court below has found that conditions in the business had substantially, and in some respects radically, changed since the completion of the original record on which the 1933 order was based. The court found the facts as to the changes which had increased the cost of doing the business. The government does not question the correctness of these findings. I think these increased costs cannot be ignored or dismissed with the comment that the Secretary considered them, when it is plain he did not. This Court did not intend by its decision in 1939 that the Secretary should shut his eyes to these changed conditions, and make a forecast in 1939 *as of 1933* and upon the data available in 1933, as if he had before him only the experience prior to 1933 and were then acting. Of a similar situation this Court has said: "A forecast gives us one rate. A survey gives another. To prefer the forecast to the survey is an arbitrary judgment." [8]

The Secretary had made a careful investigation of the operations of the market agencies in the years prior to 1933. The same data were available to him in 1939 for the period 1933 to 1937, but were not considered. What he should have done, in the light of this Court's decision, was again to reopen the cause and to investigate the fairness and reasonableness of the charges exacted from 1933 to 1937, in the light of actual experience. To assert that he did in fact pursue this course is to place an unjustified gloss upon the record now before the Court.

We ought not to conclude the parties by a strained construction of the record facts, or by applying to this

[8] *West Ohio Gas Co.* v. *Public Utilities Commission,* 294 U. S. 79, 82.

inquiry technical rules of evidence and procedure which have no place in such a proceeding. On the contrary, we should require that to be done which the broad equities of the case demand. No less, it seems to me, will satisfy the mandate of this Court in its earlier pronouncement. I should, therefore, reverse the decree and direct that the Secretary ascertain the facts upon all available evidence, in accordance with the decisions of this Court when the case was last here.

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

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

No. 684. Argued April 30, May 1, 1941.—Decided May 26, 1941.

1. Under § 113 (a) (5) of the Revenue Act of 1934, which provides that where property is "acquired by bequest, devise, or inheritance" the basis for computing gain or loss shall be its value "at the time of such acquisition," and under Treasury Regulations 86 construing that provision, the basis in the case of securities that were owned by the testator *in specie* and that were delivered to the taxpayer in pursuance of a testamentary trust, and sold by him, is their value at the time of the testator's death, although the taxpayer's interest at that time, under the will was a contingent remainder. P. 431.

   The fact that the Regulation was not promulgated until some time after the transactions occurred which gave rise to the tax, is immaterial.

2. The rule that re-enactment implies a legislative adoption of administrative or judicial construction of the language re-enacted is no more than an aid in statutory construction. It does not mean that the prior construction becomes so imbedded in the law that only Congress can change it; it gives way before changes in the prior rule or practice through exercise by the administrative agency of its continuing rule-making power. P. 432.

3. Under the Revenue Act of 1934, where securities delivered by a testamentary trustee to a legatee who derived ownership through a bequest of a contingent remainder, were securities purchased by

the trustee, the basis for computing gain or loss was their cost to the trustee. P. 434.
114 F. 2d 804, reversed.

CERTIORARI, 312 U. S. 672, to review a judgment overruling a decision of the Board of Tax Appeals, 41 B. T. A. 59, sustaining a tax assessment.

Mr. Thomas I. Emerson, with whom *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Newton K. Fox* were on the brief, for petitioner.

Mr. J. Gilmer Körner, Jr. (with whom *Mr. H. G. Hudson* was on the brief) and *Mr. Erwin N. Griswold* for respondent.

Messrs. Orville Smith and *Erwin N. Griswold* filed a brief, as *amici curiae,* urging affirmance.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Respondent's father died in 1918, leaving him a remainder interest in a testamentary trust, an interest which the court below found to be contingent under North Carolina law. He received his share of the trust, including securities, from the trustee on April 4, 1934. Some of the securities so distributed had been received by the trustee from the decedent's estate and others had been purchased by the trustee between 1918 and 1934. During the year 1934 respondent sold some of the securities in each group. In computing his gains and losses he used as the basis the value on April 4, 1934, when he received the securities from the trustee. The Commissioner determined that the proper basis under the Revenue Act of 1934 (48 Stat. 680) was the value of the securities at the time of decedent's death in the case of those then held by decedent and their cost to the trus-

tee in the case of those which the trustee had purchased. The Board of Tax Appeals sustained the Commissioner. 41 B. T. A. 59. The Circuit Court of Appeals reversed. 114 F. 2d 804. We granted the petition for certiorari (exclusive of the question whether the remainder was vested or contingent under the law of North Carolina) because of a conflict among the circuits.[1]

Sec. 113 (a) (5) of the 1934 Act provided: "If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition." The government places considerable stress on *Maguire* v. *Commissioner, ante,* p. 1; *Helvering* v. *Gambrill, ante,* p. 11; and *Helvering* v. *Campbell, ante,* p. 15, decided under the 1928 and 1932 Acts, in support of its contention that as respects securities owned by decedent the proper basis was their value at his death even though respondent's interest was then contingent. And it also relies on Treasury Regulations 86, promulgated under the 1934 Act, Art. 113 (a) (5)–1 (b) of which provided that "all titles to property acquired by bequest, devise, or inheritance relate back to the death of the decedent, even though the interest of him who takes the title was, at the date of death of the decedent, legal, equitable, vested, contingent, general, specific, residual, conditional, executory, or otherwise." Respondent, on the other hand, urges that the phrase "at the time of such acquisition," when it was included in the 1934 Act, had acquired by construction a definite meaning which excluded contingent remainders, and therefore that Congress must be presumed to have used those words in that sense. In that connection he points out that the phrase

[1] Opposed to the decision below are *Van Vranken* v. *Helvering,* 115 F. 2d 709; *Cary* v. *Helvering,* 116 F. 2d 800; *Archbold* v. *Helvering,* 115 F. 2d 1005—all from the Second Circuit; and *Augustus* v. *Commissioner,* 118 F. 2d 38, from the Sixth Circuit.

"at the time of such acquisition" had appeared in the 1921, 1924, and 1926 Acts [2] and that certain office decisions of the Treasury,[3] and certain decisions of the lower federal courts [4] under those acts, made prior to the enactment of the 1934 Act, had held that a beneficiary did not acquire property when his interest was merely contingent. Respondent emphasizes that the legislative history of the 1934 Act shows no mention of the prior administrative and judicial treatment of contingent remainders and makes no complaint with the practice of the bureau or with the decisions. He insists that the words "acquired" or "acquisition" are not vague or ambiguous words but mean to obtain "as one's own," as held in *Helvering* v. *San Joaquin Fruit & Investment Co.*, 297 U. S. 496, 499. By these arguments and related ones, respondent seeks to demonstrate that the earlier rule had become embedded in the law so that it could be changed not by administrative rules or regulations but by Congress alone. On the basis of such reasoning and the difference in wording between the 1934 Act and the 1928 and 1932 Acts, he seeks to distinguish the *Maguire, Gambrill,* and *Campbell* cases. And since Art. 113 (a) (5)–1 (b) was promulgated on February 11, 1935, respondent insists that to make it applicable to transactions occurring in 1934 would be to give it a retroactive effect contrary to *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U. S. 110.

Respondent's position is not tenable. We are not dealing here with a situation where the meaning of statutory

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[2] Sec. 202 (a) (3), Revenue Act of 1921 (42 Stat. 229); § 204 (a) (5), Revenue Act of 1924 (43 Stat. 258); § 204 (a) (5), Revenue Act of 1926 (44 Stat. 14).

[3] O. D. 727, 3 Com. Bull. 53 (1920); G. C. M. 10260, XI–1 Cum. Bull. 79, 80 (1932).

[4] See, for example, *Pringle* v. *Commissioner*, 64 F. 2d 863; *Hopkins* v. *Commissioner*, 69 F. 2d 11. Cf. *Lane* v. *Corwin*, 63 F. 2d 767.

language is resolved by reference to explicit statements of Congressional purpose. *Maguire* v. *Commissioner, supra; Helvering* v. *Campbell, supra.* Here, the Committee Reports [5] on the 1934 Act are wholly silent as to whether a taxpayer has acquired property within the meaning of § 113(a)(5) at a time when he has obtained only a contingent remainder interest. And we need not stop to inquire whether, in absence of the Treasury Regulations under the 1934 Act, the administrative construction of "acquisition" under the earlier Acts was of such a character (*Higgins* v. *Commissioner,* 312 U. S. 212) and the prior judicial decisions had such consistency and uniformity that Congressional reënactment of the language in question was an adoption of its previous interpretation, within the rule of such cases as *United States* v. *Dakota-Montana Oil Co.,* 288 U. S. 459. That rule is no more than an aid in statutory construction. While it is useful at times in resolving statutory ambiguities, it does not mean that the prior construction has become so embedded in the law that only Congress can effect a change. *Morrissey* v. *Commissioner,* 296 U. S. 344, 355. And see *Murphy Oil Co.* v. *Burnet,* 287 U. S. 299. It gives way before changes in the prior rule or practice through exercise by the administrative agency of its continuing rule-making power. *Helvering* v. *Wilshire Oil Co.,* 308 U. S. 90, 100–101. Nor is Art. 113(a)(5)–1(b) of the Regulations condemned by *Helvering* v. *R. J. Reynolds Tobacco Co., supra.* That case turned on its own special facts. The transactions there in question took place at a time when a regulation was in force which expressly negatived any tax liability. The regulation remained outstanding for a long time and was followed by several reënactments of the statute. About five years after the transactions in question took

[5] H. Rep. No. 704, 73d Cong., 2d Sess., pp. 27–28; S. Rep. No. 558, 73d Cong., 2d Sess., pp. 34–35.

place, the prior regulation was amended so as to impose a tax liability. There are no such circumstances here. No relevant regulation was in force at the time respondent sold the securities in 1934. The regulation here in question was promulgated under the very Act which determines respondent's liability. The fact that the regulation was not promulgated until after the transactions in question had been consummated is immaterial. Cf. *Manhattan General Equipment Co.* v. *Commissioner*, 297 U. S. 129. The magnitude of the task of preparing regulations under a new act may well occasion some delay. To hold that respondent had a vested interest in a hypothetical decision in his favor prior to the advent of the regulations, would introduce into the scheme of the Revenue Acts refined notions of statutory construction which would, to say the least, impair an important administrative responsibility in the tax collecting process.

Hence the regulation governs this case if the word "acquisition" as used in § 113 (a) (5) was susceptible of this administrative interpretation. We think it was. However unambiguous that word might be as respects other transactions (*Helvering* v. *San Joaquin Fruit & Investment Co., supra*), its meaning in this statutory setting was far from clear as respects property passing by bequest, devise, or inheritance. The definition of "acquisition" contained in the regulation is not a strained or artificial one. Admittedly, the date of death would be the proper basis if respondent's interest under the testamentary trust had been a vested remainder. But even a vested remainderman does not have all of the attributes of ownership. So the test in this type of case is not whether respondent had full enjoyment of the property prior to the delivery of the securities to him, but whether he earlier had acquired an interest which ultimately ripened into complete ownership. Respondent has become the taxpayer because he has obtained full ownership of

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the property and has sold it. The tax is on gains, if any, realized by him in that transaction. Hence, as we indicated in the *Maguire* and *Campbell* cases, to carry into that computation the value of the property at the time the taxpayer had only a contingent remainder interest in it is not to tax him on values which he never received. The statute as thus interpreted "merely provides a rule of thumb in alleviation of a tax which would be computed by reference to the entire amount of the original inheritance were it to be based on cost to the taxpayer." *Helvering* v. *Campbell, supra,* p. 22. As stated by Judge Arant in *Augustus* v. *Commissioner,* 118 F. 2d 38, 43, the regulation was an "apt interpretation to make this part of the statute fit efficiently and consistently into the scheme of the revenue system as a whole." See *Maguire* v. *Commissioner, supra.*

Respondent's suggestion that the regulation does not cover this case will not stand analysis. It has a broad sweep and embraces all interests which have their origin in a bequest, devise, or inheritance.

For the reasons stated, the proper basis as to the securities owned by the decedent was their value at his death.

There remains the question as to the proper basis for securities purchased by the trustee. In the *Maguire* case we held that "cost" was the proper basis as provided in § 113 (a) of the 1928 Act, since securities purchased by a trustee were not "acquired . . . by will" within the meaning of § 113 (a) (5) of that Act. While § 113 (a) (5) of the 1934 Act substitutes "acquired by bequest, devise, or inheritance" for "acquired either by will or intestacy" in the 1928 Act, that change does not call for a result different from that reached in the *Maguire* case. For the reasons there stated, we hold that as respects securities purchased by the trustee the proper basis is the cost to him. That makes it unnecessary to examine the validity of the holding of the court below that Art. 113 (a) (5)–

1 (d) of the Regulations [6] is inapplicable because decedent did not die before March 1, 1913.

Reversed.

MR. JUSTICE ROBERTS:

I disagreed with the decisions of the Court in *Maguire* v. *Commissioner, ante,* p. 1, *Helvering* v. *Gambrill, ante,* p. 11, and *Helvering* v. *Campbell, ante,* p. 15, construing the meaning of the phrase "time of distribution to the taxpayer," as used in § 113a (5) of the Revenue Acts of 1928 and 1932. My dissent was bottomed upon the view that to construe that phrase as meaning the time of the distribution to a trustee, in a case where the taxpayer could neither receive nor enjoy the property, was to disregard the unambiguous words of the statute. I recognize the binding force of those decisions but think that the Court's disposition of the present cases constitutes an even looser and less admissible construction, amounting, in effect, to legislation.

In all the revenue acts from that of 1921 to that of 1926, inclusive, the cognate provision was that if the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis should be the fair market value of such property at the time of such acquisition. In the Revenue Act of 1928 a new provision was substituted making the basis in the case of a general or a specific devise or of intestacy the

[6] "*Property acquired before March 1, 1913; reinvestments by fiduciary.*—If the decedent died before March 1, 1913, the fair market value on that date is taken in lieu of the fair market value on the date of death, but only to the same extent and for the same purposes as the fair market value on March 1, 1913, is taken under section 113 (a) (14).

"If the property is an investment by the fiduciary under a will (as, for example, in the case of a sale by a fiduciary under a will of property transmitted from the decedent, and the reinvestment of the proceeds), the cost or other basis to the fiduciary is taken in lieu of the fair market value at the time when the decedent died."

fair market value at the time of the death of the decedent. The same basis was provided if property was acquired by the decedent's estate from the decedent. In all other cases, if the property was acquired by will or by intestacy, the basis was made value at the time of the distribution to the taxpayer. The language was retained in the Act of 1932. In the Revenue Act of 1934, § 113a (5) was again cast in the exact language in which the cognate sections had appeared in all the acts prior to that of 1928.

The meaning of the provision is plain. What Congress was dealing with was the "property." It did not specify a right inchoate or otherwise, or an interest less than ownership, but used the colloquial term "property." And Congress employed a word in common and ordinary use, and not a technical expression of conveyancers, when it spoke of the time of "acquisition" of the property. Anyone reading the sentence would be justified in concluding that if he sold property which came to him from a decedent's estate he must take as his basis of value the market value as of the date when he became the owner of the property; when he became able to enjoy it and dispose of it at his will.

The present decision finds that Congress did not intend any such thing; that, on the contrary, by a circumlocution, it meant that the taxpayer must take as his basis the fair value at the date of the decedent's death if his ultimate acquisition of the property is traceable to a decedent's will. Thus, though he had no use or benefit of the property, could not dispose of it, and might never enjoy it, he is to be treated as having acquired it.

A contrary conclusion is required by *Helvering* v. *San Joaquin Fruit & Investment Co.*, 297 U. S. 496. There the Court, in applying the same section here involved, held that the term "acquired" was not a word of art; and though the acquisition had its origin in an option which

the taxpayer exercised, as here the acquisition had its origin in a will, agreed with the Government's contention that the time of full enjoyment as one's own is the date of acquisition, not the time of obtaining some inchoate interest which may or may not ripen into ownership.

But if there were doubt as to the meaning of Congress, the legislative history should preclude the strained construction now adopted. In the *Maguire* and related cases, administrative construction and legislative history were meagre and inconclusive. Here, violence must be done to a substantial volume of such aids to construction to reach the announced result.

In 1920 the Treasury ruled that

"Where in a bequest of property the remaindermen have only a contingent interest prior to the death of the life tenant, the basis for determining gain or loss from a sale of such property by the remaindermen is its value as of the date of death of the life tenant." [1]

There is no dispute that between 1920 and 1935 the Treasury uniformly so interpreted the statutory provision now otherwise construed. In 1930 this Court held that in the case of a residuary legatee whose property rights attached at the moment of death, and who was in contemplation of law and in fact the owner of the property bequeathed to him from the date of death, the time of acquisition was the date of death.[2] The decision obviously did not touch a situation such as that disclosed in the present cases and the Treasury so understood. In 1932 the General Counsel of the Bureau of Internal Revenue rendered an exhaustive opinion in which he referred to, and analyzed, our decision and summarized the administrative practice by saying:

". . . the position of this office has been that one who has a mere contingent interest does not 'acquire' the

[1] O. D. 727, 3 C. B. 53.

[2] *Brewster* v. *Gage*, 280 U. S. 327.

property in question until his interest becomes vested. (O. D. 727, C. B. 3, 53; S. M. 4640, C. B. V–1, 60.) See also I. T. 1622, C. B. II–1, 135; S. O. 35, C. B. 3, 50."
The judicial construction was uniform to the same effect.[3]

That the Treasury thought the distinction between the acquisition date of vested and contingent interests improper is attested by the fact that in its briefs on applications for certiorari in several of the cases cited in Note 4 it so stated; and in the *Pringle* case it strenuously contended for a reversal of the judgment on that ground. In its brief in the *San Joaquin* case, *supra,* which arose under the very section now in question, the Government said: "It is quite generally recognized that the holder of a contingent estate in property does not acquire the same within the meaning of the revenue acts until the estate becomes vested." (Citing several of the cases found in the note.) Of course that statement supported the position of the Government in that case. But a new view has apparently emerged, which better serves the Government's interest here.

It seems plain that when, in 1934, Congress decided to re-adopt the language used in the revenue acts from 1921 to 1926, inclusive, it should be taken as having adopted it not only with a sense of its plain meaning but with a recognition of its uniform interpretation. We are not left, however, without light shed by the legislative history, and that history furnishes confirmation of the view that Congress did not intend to give any strained, extraordinary, or unusual meaning to its language or to disregard its accepted significance.

The revenue acts have always treated estates as taxpayers for purposes of income tax. From the adoption of the Revenue Act of 1918 the Treasury Regulations

[3] *Lane* v. *Corwin,* 63 F. 2d 767; *Pringle* v. *Commissioner,* 64 F. 2d 863; *Hopkins* v. *Commissioner,* 69 F. 2d 11; *Becker* v. *Anchor Realty & Investment Co.,* 3 F. Supp. 22, aff'd 71 F. 2d 355; *Warner* v. *Commissioner,* 72 F. 2d 225; *Beers* v. *Commissioner,* 78 F. 2d 447.

uniformly provided that if an executor sold estate property he must take as a basis the value of the property at the time of the decedent's death for calculating taxable gain.[4] The Treasury treated the estate's time of acquisition as the date of the decedent's death within the meaning of the sections of the revenue acts from 1921 to 1926. In 1926 the Court of Claims held that when Congress used the terms "acquired" and "acquisition" it meant that the executor might take, as the basis date, the date of acquisition by the decedent.[5] This decision upset the uniform practice of the Treasury and required an amendment of the regulations to conform to it. Congress was confronted with this situation when it came to pass the Revenue Act of 1928. The history of what happened in this respect is most enlightening. The Joint Committee on Internal Revenue, in its report,[6] referred to the difficulty created by the *McKinney* decision, and the doubt the decision had thrown on the meaning of acquisition, and stated, with respect to the proposed section: "The 'date of death' is recommended to make the basis certain and definite." The Ways and Means Committee also rendered a report to accompany that of the Joint Committee. In this it said: [7] "It is believed that the basis should be the value of the property on the date of the decedent's death, and this rule is incorporated in section 113(a)(5)." It continued: "It is also provided, in the same paragraph, that the basis *in case of a sale by a beneficiary shall be the value of the property on the date of the decedent's death.*" (Italics supplied.)

It is thus abundantly clear that Congress knew how to write a statute to accomplish what the opinion of the Court holds totally different language accomplishes.

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[4] See *Hartley* v. *Commissioner*, 295 U. S. 216, 220.

[5] *McKinney* v. *United States*, 62 Ct. Cls. 180.

[6] House Document No. 139, 70th Cong., 1st Sess., pp. 17–18.

[7] H. R. No. 2, 70th Cong., 1st Sess., p. 18.

The Senate Committee on Finance rewrote the subsection as embodied in the House Bill, altering it to read as it does in the Revenue Act of 1928.[8] This was the section which was construed in *Maguire* v. *Commissioner* and related cases.[9] It thus appears that Congress rejected the verbiage intended to specify the date of the decedent's death as the basis date to be taken by a beneficiary under the decedent's will.

With this background, Congress, in adopting the 1934 act, discarded the various basis dates prescribed by the Acts of 1928 and 1932 and harked back to the language which had been used in earlier revenue acts, which had uniformly been construed by the Treasury to mean that the basis date was the date when the taxpayer actually acquired as his own the property whose disposition gave rise to a taxable gain or a deductible loss. The reason for the change, as shown by the Committee Reports on the Revenue Act of 1934, was not a desire to alter the settled administrative construction of the phrase "time of acquisition" but to do away with the diversity between the basis dates for real and personal property which had been created by the provisions of the 1928 and the 1932 acts. No other purpose is shown by the reports.[10]

Regulations 86 were approved by the Secretary of the Treasury February 11, 1935, and were later promulgated as applicable to the Act of 1934. By these regulations it is provided: "Pursuant to this rule of law, [i. e. the doctrine of relation] section 113 (a) (5) prescribes a single uniform basis rule applicable to all property passing from a decedent by will or under the law governing the

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[8] Senate Report No. 960, 70th Cong., 1st Sess., p. 26.

[9] For the language of the section see Note 5, *Maguire* v. *Commissioner, ante,* p. 3.

[10] Report of Subcommittee on Ways and Means of December 4, 1933, p. 17; Report of the Ways and Means Committee H. R. 704, 73d Cong., 2d Sess., pp. 27–28; Senate Report No. 558, 73d Cong. 2d Sess., pp. 34–35.

descent and distribution of the property of decedents. Accordingly, the time of acquisition of such property is the death of the decedent, and its basis is the fair market value at the time of the decedent's death, regardless of the time when the taxpayer comes into possession and enjoyment of the property." It is upon this regulation that the Court relies to justify its construction of the statute.

I think the regulation plainly unjustified, as an attempt on the part of the Treasury to legislate when Congress has failed to do so. The hearings on the Revenue Act of 1934 show that the Treasury was not satisfied with the provision the Committee recommended Congress should adopt and which Congress did adopt. It evidently attempted to rewrite the Congressional language to carry out what it thought Congress should have provided. It needs no citation of authority to demonstrate that such is not the function of a regulation and that the attempt should fail.

The CHIEF JUSTICE joins in this opinion.

CARY v. COMMISSIONER OF INTERNAL REVENUE.*

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

No. 734. Argued May 1, 1941.—Decided May 26, 1941.

Decided upon the authority of *Helvering* v. *Reynolds, ante*, p. 428.
P. 443.
116 F. 2d 800, affirmed.

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*Together with No. 735, *Flagler* v. *Commissioner of Internal Revenue;* No. 736, *Estate of Flagler* v. *Commissioner of Internal Revenue;* and No. 737, *Matthews* v. *Commissioner of Internal Revenue,* also on writs of certiorari, 312 U. S. 675, 676, to the Circuit Court of Appeals for the Second Circuit.

CERTIORARI, 312 U. S. 675, to review judgments which affirmed decisions of the Board of Tax Appeals sustaining income tax assessments.

Mr. Roswell L. Gilpatric, with whom *Mr. Joseph C. White* was on the brief, for petitioners.

Mr. Thomas I. Emerson, with whom *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Newton K. Fox* were on the brief, for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Henry M. Flagler died on May 20, 1913. Petitioners are legatees under a testamentary trust created under his will. The trust continued for a period of ten years from his death and terminated on May 20, 1923. As of that time, the trustees delivered to petitioners [1] certain securities which were sold by them in 1934 and 1936. The question presented is whether the basis for computing gain or loss on such sales under § 113 (a) (5) of the Revenue Acts of 1934 (48 Stat. 680) and 1936 [2] (49 Stat. 1648) is the value of the securities when delivered to the legatees, or their value on the date of death of the decedent. Petitioners make substantially the same

[1] Some securities had previously been delivered to Harry Harkness Flagler, petitioner in No. 735, on April 26, 1921. Annie L. Flagler, whose estate is the petitioner in No. 736, received the securities here involved as a gift from her husband, Harry Harkness Flagler. The situation therefore is the same as to both these parties since it is stipulated that he had received the securities as indicated above.

[2] Sec. 113 (a) (5) of the 1936 Act is the same as § 113 (a) (5) of the 1934 Act. Art. 113 (a) (5)–1 of Treasury Regulations 94, promulgated under the 1936 Act, contains provisions identical with those of Art. 113 (a) (5)–1 of Regulations 86 under the 1934 Act. The relevant portions of that section and regulation under the 1934 Act are set forth in *Helvering* v. *Reynolds, ante,* p. 428.

argument for application of the former criterion as did respondent in *Helvering* v. *Reynolds, ante,* p. 428. And they contend that under Florida law they had at the date of death only contingent interests. But assuming they are correct in the latter contention, it is of no avail. For the reasons stated in *Helvering* v. *Reynolds, supra,* the proper basis was the value of the securities at the death of the decedent. Accordingly, the judgments of the court below (116 F. 2d 800) must be

Affirmed.

The CHIEF JUSTICE and MR. JUSTICE ROBERTS dissent for the reasons stated in their dissent in *Helvering* v. *Reynolds, ante,* p. 435.

UNITED STATES *v.* A. S. KREIDER CO.

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

No. 853. Argued May 7, 1941.—Decided May 26, 1941.

1. Section 24 (20) of the Judicial Code, which gives the District Courts jurisdiction concurrent with the Court of Claims over certain suits against the United States, provides that no suit shall be allowed thereunder unless the same shall have been brought within six years after the right accrued for which the claim is made. *Held,* that the six-years period is an outside limit consistent with the five-years limit on suits for the recovery of internal revenue taxes set by § 1113 (a) of the Revenue Act of 1926, amending R. S. § 3226. P. 446.
2. In response to a claim of tax refund, the Commissioner of Internal Revenue found an overpayment in the amount claimed and sent the taxpayer a certificate of overassessment in that amount bearing notation that a stated part of it was barred by limitations and enclosed a check for the difference, which the taxpayer accepted. *Held,* that there was no account stated upon which the taxpayer could ground an action for the part not repaid and thus avoid the five-years limitation of § 1113 (a) of the Revenue Act of 1926 on suits to recover internal revenue taxes. *Bonwit Teller & Co.* v. *United States,* 283 U. S. 258, distinguished. P. 448.

3. To establish an account stated there must be a balance struck in such circumstances as to import a promise of payment on the one side and of acceptance on the other. P. 448.

117 F. 2d 133, reversed.

CERTIORARI, *post*, p. 552, to review the affirmance of a judgment sustaining a claim for a refund of taxes. See 97 F. 2d 387; 30 F. Supp. 722.

Mr. Arnold Raum, with whom *Assistant Solicitor General Fahy*, *Assistant Attorney General Clark*, and *Mr. Sewall Key* and *Miss Helen R. Carloss* were on the brief, for the United States.

Mr. Alexander Levene, with whom *Mr. Donald Horne* was on the brief, for respondent.

MR. JUSTICE MURPHY delivered the opinion of the Court.

In 1921, respondent filed its income tax return for 1920, disclosing tax liability of $52,481.97, which it paid in full. Thereafter, and prior to June 15, 1926, it executed a waiver extending until December 31, 1926, the time for audit and possible additional assessment of taxes. On July 26, 1926, respondent paid a deficiency assessment of $1,362.50. Almost three years later, on March 23, 1929, respondent filed a claim for refund of $53,844.47, the entire amount of taxes paid for 1920.

The Commissioner found that respondent had overpaid its 1920 taxes in the sum of $14,833.68. In October, 1929, he sent respondent a certificate of overassessment which noted that there had been an overpayment in that amount but that $13,471.18 was "barred by statute of limitations." Accompanying the certificate was a check for the difference, $1,362.50, which respondent apparently accepted. In thus computing the refund owing to respondent, the Commissioner assumed that subsections (b) (1), (b) (2),

and (g) of § 284 [1] of the Revenue Act of 1926 (44 Stat. 9, 66, 67) authorized him to remit only that part of the 1920 tax which was paid in 1926.

On March 7, 1932, respondent brought the present action in a United States District Court to recover the sum withheld. At the close of the trial, petitioner moved for judgment on the ground that the action was barred by § 1113 (a) of the Revenue Act of 1926 (44 Stat. 9, 116). The District Court granted the motion and entered judgment for petitioner. 30 F. Supp. 722. The Circuit Court of Appeals reversed, one judge dissenting, holding that the general six-year limitation in § 24 (20) of the Judicial Code [28 U. S. C. § 41 (20)] rather than the limitations in § 1113 (a) determined the timeliness of respondent's action. 97 F. 2d 387.

The cause was returned to the District Court. Over the renewed contention of petitioner that the action was barred by § 1113 (a), the District Court proceeded to the merits. It held, in effect, that § 284 (b) (2) did not limit the refund sanctioned by § 284 (g) to the portion of the

[1] Sec. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed [by specified Acts], the amount of such overpayment shall [subject to enumerated conditions] be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions . . . (g) of this section—

(1) No such credit or refund shall be allowed or made after . . . four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the . . . four years . . . immediately preceding the filing of the claim. . . .

(g) . . . If the taxpayer has, on or before June 15, 1926, filed such a waiver in respect of the taxes due for the taxable year 1920 or 1921, then such credit or refund relating to the taxes for the taxable year 1920 or 1921 shall be allowed or made if claim therefor is filed either on or before April 1, 1927, or within four years from the time the tax was paid. . . .

tax paid within four years of respondent's claim, and entered judgment as prayed in the complaint. 30 F. Supp. 724. The Circuit Court of Appeals affirmed, accepting as the law of the case its earlier decision that the action was timely, despite petitioner's argument to the contrary. 117 F. 2d 133. On April 14, 1941, we granted certiorari.

Relying principally on *Bonwit Teller & Co.* v. *United States,* 283 U. S. 258, respondent maintains that its action was commenced well within the applicable period of limitation. Further, respondent contends that both courts below correctly refused to regard § 284 (b) (2) as a limitation on the Commissioner's duty to make refunds under § 284 (g). We find it unnecessary to examine the latter contention, for we are of opinion that respondent sued too late.

Insofar as material here, § 1113 (a) provides: ". . . No [suit or proceeding for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected] shall be begun . . . after the expiration of five years from the date of the payment of such tax . . . unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates."

Undoubtedly, respondent has failed to begin its action within either of the periods specified in § 1113 (a). See *United States* v. *A. S. Kreider Co.,* 97 F. 2d 387, 388. The suit was not instituted until March 7, 1932, although the last tax payment was made on July 26, 1926, and the claim for refund was disallowed in October, 1929.[2] But as al-

[2] It should be noted that this action seeks recovery of money which was paid in 1921. We assume, so far as this decision is concerned, that the phrase "such tax" in the quoted language refers to the total tax for the year in question whenever determined and assessed; or stated differently, that "payment" within the meaning of this statute does not occur until the entire tax for 1920 is paid, including deficiency assessments made several years later. Compare *Union Trust Co.* v. *United States,* 70 F. 2d 629.

ready stated, the court below held that the action was not barred because the Tucker Act (24 Stat. 505), later incorporated in § 24 (20) of the Judicial Code, rather than § 1113 (a) prescribed the period within which respondent was bound to bring suit. We view the statutes differently.

Section 24 (20) gives the district courts jurisdiction concurrent with the Court of Claims of certain suits against the United States. To equate the right thus conferred to the existing right to sue in the Court of Claims (see 28 U. S. C. § 262), the statute provides: "No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made."

We think the quoted language was intended merely to place an outside limit on the period within which all suits might be initiated under § 24 (20). Clearly, nothing in that language precludes the application of a different and shorter period of limitation to an individual class of actions even though they are brought under § 24 (20). Phrasing the condition negatively, Congress left it open to provide less liberally for particular actions which, because of special considerations, required different treatment. See *Christie-Street Commission Co.* v. *United States,* 136 F. 326, 332–333.

Section 1113 (a) is precisely that type of provision. Recognizing that suits against the United States for the recovery of taxes impeded effective administration of the revenue laws, Congress allowed only five years from payment of the tax for the commencement of such actions, unless specified circumstances extended the period. That this specific provision is entirely consistent with the general provision in § 24 (20) is plain. Indeed, the limita-

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We assume also that the Commissioner's refusal in 1929 to make the refund was a "disallowance" of respondent's claim. Compare *Bonwit Teller & Co.* v. *United States,* 283 U. S. 258, 265, with *United States* v. *Bertelsen & Petersen Engineering Co.,* 306 U. S. 276, 280.

tion in § 1113 (a) has no meaning whatever unless the limitation in § 24 (20) is construed not to govern proceedings for the recovery of "internal-revenue tax alleged to have been erroneously or illegally assessed or collected." [3]

Bonwit Teller & Co. v. *United States, supra,* does not remove the bar of § 1113 (a) here. There we held under the peculiar facts disclosed that the taxpayer could evade the limitations of that section by grounding its action on a subsequent "account stated" rather than on the original, wrongful overassessment. But the instant case is plainly distinguishable, for, assuming that familiar doctrines of contracts furnish the test (*Daube* v. *United States,* 289 U. S. 367, 370), we are unable to find the requisites of an account stated in the transactions on which respondent relies.

To establish an account stated, respondent must show that a balance was struck "in such circumstances as to import a promise of payment on the one side and acceptance on the other." *R. H. Stearns Co.* v. *United States,* 291 U. S. 54, 65; see also, *Toland* v. *Sprague,* 12 Pet. 300, 325; *Nutt* v. *United States,* 125 U. S. 650. But plainly, "no such promise is a just or reasonable inference from the certificate of overassessment delivered to this taxpayer, if the certificate is interpreted in the setting of the occasion." *R. H. Stearns Co.* v. *United States, supra.* In fact, a contrary inference is the only legitimate supposition respondent could make. At most, respondent could assume that the United States prom-

[3] Apparently the applicability of a specific limitation instead of the general Tucker Act limitation has not been challenged for 35 years. See *Christie-Street Commission Co.* v. *United States,* 136 F. 326. The specific limitation has been assumed to apply in numerous cases. See, e. g., *United States* v. *Bertelsen & Petersen Engineering Co.,* 306 U. S. 276; *Bates Mfg. Co.* v. *United States,* 303 U. S. 567; *R. H. Stearns Co.* v. *United States,* 291 U. S. 54; *Daube* v. *United States,* 289 U. S. 367.

ised to pay $1,362.50; the check was there in fulfillment. Obviously, refusal to refund the balance did not and could not imply a promise to pay the amount withheld.

Acceptance by respondent, another essential of an account stated, is equally lacking. By accepting the check for $1,362.50 respondent agreed only to a partial account stated (compare *Sturm* v. *Boker,* 150 U. S. 312, 340), thereby converting that much of the statement into an account settled. The institution of this suit is ample proof that respondent never intended to accept the certificate in its entirety as a correct computation of the amount which it claimed was due.

We conclude that respondent's suit is barred by the limitations of § 1113 (a). The judgment is reversed, and the cause is remanded with directions to dismiss the petition.

Reversed.

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UNION PACIFIC RAILROAD CO. ET AL. *v.* UNITED STATES ET AL.

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

No. 594. Argued April 9, 10, 1941.—Decided June 2, 1941.

1. The Interstate Commerce Acts condemn favoritism among shippers, however brought about. P. 462.
2. Under § 1 of the Elkins Act, which forbids "any person, persons or corporation" to give or receive any concession "in respect to transportation" in interstate commerce, and which provides that any person, "whether carrier or shipper," who gives or receives such a concession, is guilty of a misdemeanor, payment of a bonus to a prospective shipper to induce him to locate on a carrier's line is unlawful, though made by a person who is neither a carrier nor a shipper, if it be a payment "in respect to transportation." P. 462.

   The words "whether carrier or shipper" were added to § 1 of the Elkins Act by the Hepburn Act to make clear that the phrase "any person, persons, or corporation" includes shippers as well as carriers; they did not restrict the ordinary meaning of the words "any person."
3. Action by any person to bring about discrimination in respect to interstate transportation by a carrier subject to the Interstate Commerce Acts, is unlawful under the Elkins Act. P. 463.
4. A city, under the dominating influence and with the financial assistance of an interstate carrier seeking competitive advantages, established a new terminal market for foodstuffs, on land owned by the city on the carrier's line. In order to secure tenants for this market, carrier and city sought to obtain, and obtained, agreements with dealers (interstate shippers) who marketed such produce in a nearby municipality to move to the new market, under the stimulus of concessions offered to them by the city alone, in the way of rental reductions and cash payments, which were characterized as compensation for their losses in moving, but which in some cases were excessive. The United States, at the request of the Interstate Commerce Commission, filed a bill to enjoin. *Held:*

   (1) That the concessions were "in respect to transportation" and contrary to § 1 of the Elkins Act. P. 464.

(2) While it is the result and not the purpose which determines the illegal character of advantages granted shippers, when there is a purpose or plan for securing traffic, developed coöperatively by a carrier and others, the purpose makes clear that the concessions offered are in respect to transportation. P. 467.

(3) The injunction should require that rates to dealers for space in the new market shall be the fair rental value of the facilities leased. P. 471.

5. Criteria of "fair rental value." P. 473.

32 F. Supp. 917, affirmed with modification.

APPEAL from a decree of the District Court enjoining violation of prohibitions of the Interstate Commerce Acts in respect of discriminatory concessions to shippers.

Mr. Blake A. Williamson for Kansas City, Kansas, and *Messrs. Henry N. Ess* and *Thomas W. Bockes* for the Union Pacific Railroad Co. *Messrs. Alton H. Skinner, Arthur C. Spencer,* and *Robert F. Maguire* were with them on the brief for appellants.

Mr. James C. Wilson, with whom *Solicitor General Biddle, Assistant Attorney General Arnold,* and *Messrs. Richard H. Demuth* and *Burt L. Smelker* were on the brief, for the United States. *Mr. William E. Kemp* for Kansas City, Missouri, and *Mr. Jonathan C. Gibson* for the Atchison, Topeka & Santa Fe Ry. Co. et al.—with whom *Messrs. Hale Houts, Leslie R. Welch, Andrew C. Scott, Roland J. Lehman, John N. Monteith,* and *Christopher B. Garnett* were on the brief for the appellees other than the United States. *Mr. Walter R. McFarland* entered an appearance for the Chicago, Burlington & Quincy Railroad Co.

MR. JUSTICE REED delivered the opinion of the Court.

This appeal involves the legality, under the Elkins Act, of appellants' activities and course of conduct with respect to the new Food Terminal at Kansas City, Kansas. That city and Kansas City, Missouri, are both part

of a district known as Greater Kansas City, which for over three-quarters of a century had been served by a produce market located in Kansas City, Missouri. In 1937 the Union Pacific Railroad, acting upon the suggestion of two promoters, DeOreo and Fean, formulated a plan for the construction of a new market in Kansas City, Kansas. The Union Pacific in turn induced the City of Kansas City, Kansas, to undertake the development of such a market, which the City was to construct, operate and own. Union Pacific became interested in the development in order to increase the volume of its traffic; for, unlike the situation in the Missouri market, it was, with a minor exception, the only railroad with tracks serving the proposed Kansas site. Because business in the Greater Kansas City area was believed insufficient to support a split market, partly in Kansas and partly in Missouri, the plan included taking steps to persuade dealers on the Missouri side to move to Kansas. These negotiations will appear more fully below, but in general they contemplated certain concessions and free rents by the City of Kansas City, Kansas, to those dealers who decided to make the transfer. Ostensibly this was to compensate the dealers for their costs of removal, but actually, at least in some instances, it went somewhat beyond. Throughout the promotion, financing and leasing of the new market facilities, Union Pacific took a leading and dominant part. The market opened for operation on December 4, 1939.

On December 29, 1939, at the request of the Interstate Commerce Commission, the Government filed a bill to enjoin the Union Pacific, the City of Kansas City, Kansas, certain of their officers and agents, and thirty-three produce dealers, from violating the Interstate Commerce Act, 49 U. S. C. § 1 *et seq.*, and the Elkins Act, 49 U. S. C. §§ 41–45, which prohibit rebates, concessions and discriminations in respect to the transportation of property by railroad

in interstate commerce.[1] Under the provisions of § 3 of the Elkins Act,[2] four other railroads and the City of Kansas

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[1] Section 1 (1) of the Elkins Act (32 Stat. 847; 34 Stat. 587; 49 U. S. C. § 41 (1)), so far as pertinent here, provides:

"Anything done or omitted to be done by a corporation common carrier, subject to chapter 1 of this title, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said chapter or under sections 41, 42, or 43 of this title, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said chapter or by sections 41, 42, or 43 of this title, with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said chapter to file and publish the tariffs or rates and charges as required by said chapter, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than $1,000 nor more than $20,000 for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said chapter whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said chapter, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000: *Provided,* That any person, or any officer or director of any corporation subject to the provisions of sections 41, 42, or 43 of this title or of chapter 1 of this title, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. . . ."

[2] 32 Stat. 848; 36 Stat. 1167; 49 U. S. C. § 43:

"Whenever the Interstate Commerce Commission shall have reason-

City, Missouri, were permitted to intervene as parties plaintiff. The district court issued a temporary restraining order, held hearings, and on April 10, 1940, granted a temporary injunction. After further hearings a permanent injunction was entered on July 13. The appeal comes direct to this Court by virtue of the Expediting Act, 49 U. S. C. § 45, under § 238 (1) of the Judicial Code.[3]

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able ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the district court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law. It shall be the duty of the several district attorneys of the United States, whenever the Attorney General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided for by sections 41, 42, or 43 of this title shall not preclude the bringing of suit for the recovery of damages by any party injured, or any other action provided by chapter 1 of this title. . . . *Provided,* That the provisions of sections 44 and 45 of this title shall apply to any case prosecuted under the direction of the Attorney General in the name of the Interstate Commerce Commission."

[3] Cf. *United States* v. *Chicago North Shore R. Co.*, 288 U. S. 1, an appeal from a one-judge court from decree on a petition under § 12 (1) of the Interstate Commerce Act as amended, 49 U. S. C. § 12 (1); *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 446.

The facts set forth in the findings and opinion of the district court, 32 F. Supp. 917, together with the supporting record references specified by the district judge, give a clear statement of the origin and development of the Kansas City, Kansas, project:

Appellants DeOreo and Fean, before 1937, had promoted various metropolitan terminals with wholesale produce market and rail facilities. In December, 1936, they suggested to Union Pacific the feasibility of such a terminal to be served by its line at Greater Kansas City, and a plan was soon formulated for the construction of facilities on the Public Levee, property of Kansas City, Kansas; Union Pacific's aim was to increase its traffic and revenues from perishable food products. The plan contemplated that ownership of the terminal be vested in the City, which would be eligible for a PWA grant from the United States to cover part of the construction costs. A further consideration was that a city-owned market would be tax-free, and thus able to offer dealers the inducement of especially low rentals. Union Pacific presented engineering and cost estimates to officials of the City of Kansas City, Kansas, who became interested in the project and determined that plans should go forward. Thereafter, Union Pacific and the City participated jointly in the promotion and financing of the terminal; and the court below found after a careful review of the evidence that Union Pacific took "a leading and dominant part." Union Pacific suggested the plan that financing be accomplished by a PWA grant and by revenue bonds of the City, secured only by revenue from the terminal and other levee property. Union Pacific suggested that the City make DeOreo and Fean exclusive leasing agents of the terminal for a period of ten years; when this contract was disapproved by PWA officials, the two promoters were persuaded to consent to its cancellation, and Union Pacific later caused sub-

stantial payments to be made to them by its subsidiary, the Kansas City Industrial Land Company. The City's first application for a PWA grant, which it prepared with Union Pacific's assistance, was denied, but a later application for $1,710,000 won approval in October, 1938. This supplied 45% of the cost of structures the City was to build; the remaining 55% was to be obtained by selling revenue bonds to investment bankers. Union Pacific helped the City secure state legislation authorizing the bonds; the bankers, however, declined to purchase them when Union Pacific refused to guarantee income sufficient to meet fixed charges. Union Pacific then decided to buy the bonds for itself, paying $3,000,000 plus accrued interest; $1,033,000 of this was used to retire outstanding revenue bonds, and the remainder made available for construction of the terminal. The bonds, which were held valid in *State ex rel. Beck* v. *Kansas City,* 149 Kan. 252; 86 P. 2d 476, are secured solely by the revenues accruing from the terminal and other property on the Public Levee; they constitute no claim against the City's general revenues, and the district court found that they "were and are speculative and were not then salable in the ordinary course of the commercial investment business."

Union Pacific also caused its officers, employees and agents, and those of its subsidiary, the Kansas City Industrial Land Company, and its affiliate, the Pacific Fruit Express Company, to render various services related to the promotional, leasing and financing activities; it advanced money for financing preliminary expenses; and together with the City it supervised the actual construction. The terminal as completed consists of railroad facilities, owned by Union Pacific, for which it spent $603,000; and the City's wholesale produce market, with a cold storage plant, produce dealers' buildings, a farmers' market, and some terminal trackage, all constructed with

funds derived from the PWA grant and the revenue bonds sold to Union Pacific.[4] The Food Terminal is a unitary enterprise, with the market and the railroad facilities integral parts of a unified whole. Union Pacific has the only tracks reaching the terminal, except that the Missouri Pacific jointly serves the cold-storage plant.

Active solicitation of the Missouri dealers to move to Kansas began in June, 1937. As early as August, 1937, Union Pacific contemplated the necessity of giving inducements to dealers, either by making direct payments or by buying from them "unwanted properties." In the summer and fall of that year, DeOreo and Fean induced five of the Missouri dealers to serve on a committee for the promotion of the Kansas terminal, agreeing to pay each of them $5000 "in consideration of the services rendered . . . and the occupancy of the food terminal" as tenant. By August, 1938, Union Pacific's employees and agents had negotiated with other dealers with respect to cash payments and other inducements. As opposition developed on the Missouri side, the district court found that the campaign for enlistment of the Missouri dealers became "open and intense." Union Pacific, however, was anxious to avoid violating the Elkins Act, and sought the advice of its legal department, which rendered an opinion that payments made by the City to dealers would be lawful. With the assistance of a committee of prominent citizens, the City was persuaded to undertake such payments; in December, 1939, it passed Resolution 11275 authorizing use of the Public Levee Revenue Fund for settlements either with cash or credits on rental, or both, to cover costs incurred by prospective tenants, "due to rental obligations on present places of business and costs due to abandonment of equipment and facilities

[4] The City spent an additional $149,000 from its general revenues for street and sewer improvements in the terminal area.

now located in, and the good will of said established places of business." The legality under state law of such payments by the City was promptly established in a test suit at least partially directed by Union Pacific. *State ex rel. Parker* v. *Kansas City*, 151 Kan. 1 and 2; 97 P. 2d 104; 98 P. 2d 101.

The City, although now willing to make payments to prospective tenants where necessary, was lacking funds. In arranging for refrigerator service at the market, Union Pacific contracted to buy its entire Kansas City and Omaha ice requirements from the City Ice & Fuel Company. This company leased the market's cold-storage unit for fifteen years at $37,500 per year; Union Pacific now urged the company to pay the City $80,000 as advance rent. The City Ice & Fuel Company did this and also, at Union Pacific's and the City's suggestion, deposited $25,000 with a bank as collateral for proposed unsecured and inadequately secured loans to Missouri produce dealers, although such loans, while offered, were never actually made.

In the negotiations with the Missouri dealers, Union Pacific's representatives took an active part. The district court found that it and the City acted together to induce prospective tenants "by means of offers, agreements, payments, and gifts to such defendant produce dealers and other produce dealers of free rents, reduced rents, free refrigeration, cash payments and rental credits purporting to be for the purpose of paying such produce dealers' cost of removal from Kansas City, Missouri . . . and the value of furniture and fixtures in their Kansas City, Missouri, places of business and the liability on unexpired leases in Kansas City, Missouri, but in some cases in excess of any such costs, values or liabilities." The opinion adds that "The testimony of several dealers with whom negotiations were conducted warrants the conclusion that the primary objective of those

who conducted or took part in the negotiations was not the ascertainment of the loss or expense to the dealer of moving, but was the ascertainment of the amount necessary to be paid to bring about the move."

The record fully supports the trial court's conclusion that the concessions offered were not confined to fair compensation for the costs of removal, as a brief review of the instances specified by the judge will show. Mallin Produce Company, the largest apple concern in the market, claimed $17,300 as its costs of removal, $7,300 for moving its apples, and $10,000 as the "value of existing lease to be abandoned." However, Mallin made no claim that he had any obligations under his Missouri lease; [5] he merely said that he had been assured by his landlord that he could continue the lease as long as he lived, and that he would continue to lease the property "in order to keep a competitor from securing it." Union Pacific's representative nevertheless offered him $15,000 from the City, and then raised the offer to $20,000 when Mallin agreed to take two units instead of one at the terminal. The O. C. Evans Company, which made no statement of the amount of its Missouri investment, was offered $5,000; when it demanded $10,000, the offer was increased to $7,000. The negotiators increased Cherrito's claim from $900 to $1,450 by raising the cost figures for his Missouri fixtures above the amounts he had specified. Garrett-Holmes & Company, which had claimed only about $20,000 in the summer of 1939 without presenting definite figures, in December demanded an adjustment of $35,000, and accepted $30,500 in cash and one year's free refrigeration. Settlement was reached on a claim for unexpired rentals of $15,000 and cost of irremovable business fixtures, $20,000. Litman Produce Company was given $15,000 in

[5] Further, Mallin had sublet part of the property, and at the time had a net rental expense of no more than $25 per month.

cash and advance rent after asserting an obligation to pay six years' rent on an unexpired Missouri lease, when in fact the lease was to expire in a few months and merely contained an option to renew for four years; Litman had not exercised the option, though after the injunction he entered into a new lease with his Missouri lessor. Robinson was allowed to put in a claim for $600 for several unexpired months of an asserted six months' lease, when the tenancy was in fact on a month-to-month basis. Winnick Brothers, a banana firm, was allowed more than $7,000 as the unamortized cost of fixtures and equipment that had apparently cost them less than a thousand dollars.

The proposed cash payments to dealers totalled $111,000, and the proposed credits on rent more than $30,000. When negotiations with a dealer resulted in a tentative understanding or agreement, he would be told that Union Pacific could not pay him but that the matter would be submitted to the City. The district court's injunction intervened before more than one of the adjustments had been formally agreed to by the City Board and none of these payments had actually been made.

In addition to these circumstances, the standard form lease contained express provisions for free rents and reduced rents. The standard rental adopted was $150 per month per unit, but for the first three months after the official completion date only $50 was charged. Moreover, the terminal opened for business on December 4, 1939; dealers began moving in then and enjoyed rent-free occupation until February 1, 1940, which was announced as the official completion date.

Union Pacific also made available a certain amount of free advertising by interviewing the terminal's tenants on its radio program and allowing them to describe the kind and quality of their produce.

Throughout all phases of these activities, Union Pacific's principal and compelling motive has been to divert pro-

duce traffic from other railroads to its own. By tariffs filed with the Interstate Commerce Commission, charges for handling are collected by the Union Pacific for cars originating on or destined to other lines. If the market shifts from Missouri to Kansas, it is estimated that Union Pacific stands to gain traffic revenues of several hundred thousand dollars annually from the development of the market, due largely to the fact that a railroad on whose line a shipper is located enjoys a substantial advantage in soliciting competitive traffic, and comparable losses may be reasonably expected by the railroads now serving the Missouri market.

The Applicable Statutes. The Elkins Act is a part of the federal statutory system for the regulation of interstate carriers of commerce. As with other portions of that system a chief purpose for its enactment was to eliminate rebates, concessions or discriminations from the handling of commerce, to the end that persons and places might carry on their activities on an equal basis. With the adoption of prohibition against open rate-cutting, various devices were resorted to.[6] The railroads sought control over competitors to escape rate wars and, despite abhorrence of monopolies even in the utility field, strong in the early years of this century, such concentrations of carrier control were thought to have one advantage at least, the reduction of discriminatory practices.[7] Concealment of the receipt or payment of rebates was made manifest. Strengthening of the enforcement provisions was sought. This effort finally culminated in the legislative authorization of the injunction as the simplest and most summary legal instrument to destroy discrimination.[8] The courts have found the statutes effective to accomplish the de-

[6] 1897 Annual Report, I. C. C., 47.

[7] 1900 Annual Report, I. C. C., 13.

[8] 1902 Annual Report, I. C. C., 8–10; 32 Stat. 848.

struction of discriminatory practices, whatever their form. Violation of the commerce acts through receipt of advantages is to be tested by actual results, not by intention.[9] Any and all means to accomplish the prohibited end are banned.[10] We recently said that under competitive conditions existing in the New York area the action of the Commission in attacking discrimination by an order against furnishing non-transportation services below cost to the carrier was valid, although there was no showing that the charges were below fair value.[11] Contribution to a shipper's construction cost is forbidden.[12] In fact, favoritism which destroys equality between shippers, however brought about, is not tolerated. Of course, no party to this appeal disputes this broad principle.

Difficulties in statutory construction arise upon further analysis of the statute. Section 1, quoted in note 1, has a provision making it unlawful for any person to give or receive any concession in respect to transportation. A subsequent clause makes the act of giving or receiving a concession a misdemeanor and punishes its violation by "every person or corporation, whether carrier or shipper." Obviously a bonus paid by a railway to induce a prospective shipper to locate along its line would be as much a concession under the statute as a reduction in tariff applicable only to the favored shipper. We are of the opinion that such a payment by a person who is not a carrier, if it is a payment "in respect to transportation," would be equally violative of the section in question.

The first prohibition makes it unlawful "for any person or corporation" to give or receive the concession.

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[9] *New York, N. H. & H. R. Co.* v. *Interstate Commerce Comm'n,* 200 U. S. 361, 398.

[10] *Armour Packing Co.* v. *United States,* 209 U. S. 56, 72.

[11] *Baltimore & Ohio R. Co.* v. *United States,* 305 U. S. 507, 524.

[12] *United States* v. *Union Stock Yard Co.,* 226 U. S. 286.

The appellants' argument that only carriers or shippers are covered is based on the clause stating the punishment to be applicable whether the alleged violator is "carrier or shipper." Such an argument assumes that the carrier and shipper clause restricts the ordinary meaning of "any person." No reason is advanced for such a restriction. As has been set out, there has been a well-defined and continuous purpose to eliminate preferences to shippers from our system of transportation for reasons of fairness and to avoid rate wars, detrimental to the efficiency of the carriers. The words stressed by appellants as restrictive were added by the Hepburn Act as an amendment to § 1 of the Elkins Act to make clear that the earlier phrase "any person, persons or corporation" included shippers as well as carriers.[13] In our view, action by any person to bring about discriminations in respect to the transportation of property is rendered unlawful by the Elkins Act. Any other conclusion would do violence to a dominant purpose of carrier legislation.

This conclusion is buttressed by other language in the Elkins Act and by decisions in other courts which have dealt with the question. Section 3 authorizes such suits as this against a carrier and such other persons "as the court may deem necessary" when a carrier is "committing any discriminations," and the court may enforce its orders "as well against the parties interested in the traffic" as against the carrier. For example, in *Spencer Kellogg & Sons* v. *United States*, 20 F. 2d 459, a grain elevator owner, without carrier affiliation or coöperation, was convicted for sharing its allowance for elevation service with a shipper.[14]

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[13] 34 Stat. 584, 588; 40 Cong. Rec. 7022.

[14] See *Interstate Commerce Commission* v. *Reichmann*, 145 F. 235, 240, rebate by non-carrier private car company to shipper, decided prior to the addition of the clause "whether carrier or shipper" by the act of June 29, 1906; *United States* v. *Milwaukee Refrigerator*

The statute specifically requires that the concession given or received shall be "in respect to the transportation of any property in interstate or foreign commerce by any common carrier." As the language of the section covers indisputably the carrier and the freight involved in movement into and out of a metropolitan terminal market,[15] only the phrase "in respect to the transportation" requires analysis. What has been said shows its meaning connotes more than discrimination in payment of tariffs. Offering or soliciting the concessions explicitly violates the section. So does a building bonus granted on condition that the favored industry use the carrier's facilities.[16] The concessions are none the less illegal, if made for non-transportation services,[17] as long as they result in lowering directly or indirectly transportation costs to a shipper. That other inducements may also have influenced the concessions is not important when a materially effective purpose is the securing of traffic for an interstate carrier. Where traffic is an object, and discriminatory advantage the means employed in attempting to obtain or actually obtaining it, there is a violation of the section in respect to transportation.

Validity of the Plan. Appellants urge that the City's action in making arrangements for payments to dealers located in the Missouri city was taken solely in furtherance of its municipal interests and without intention to influence traffic and consequently not "in respect to the transportation of property." It is pointed out that it is quite permissible and indeed desirable for a railroad,

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Co., 145 F. 1007, 1012, likewise decided before the amendment; *Dye* v. *United States*, 262 F. 6; *United States* v. *Koenig Coal Co.*, 270 U. S. 512, 520.

[15] *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498.

[16] *United States* v. *Union Stock Yard Co.*, 226 U. S. 286, 308.

[17] *Baltimore & Ohio R. Co.* v. *United States*, 305 U. S. 507.

largely dependent as its prosperity is upon the prosperity of the communities reached by its tracks, to take part in furthering civic development. Certainly there can be no objection on the score of illegality under federal transportation acts for a city, anxious to make its market house profitable, to adopt business practices, normal for real estate operators, if the practices do not involve discriminations "in respect to transportation" by interstate carriers. Thus it is understandable that city and railroad might individually and even coöperatively work hand in hand to promote the city's economic welfare without violating the Elkins Act. But the promotion of civic advancement may not be used as a cloak to screen the granting of discriminatory advantages to shippers. Consequently in the present case the things done are to be appraised by the standards of the statutes, heretofore examined. For this purpose we may lay aside as of small importance the action of the Union Pacific in advancing funds for the expenses of an inspection tour to other cities by the Missouri merchants, who were thus made familiar with markets similar to the proposed market on the Kansas side of the Missouri River. The use of the railroad's radio time to advertise shippers' available stock in trade, while unlawful, seems too minor for further comment in a suit to enjoin discriminations through cash bonuses and free rent. Further, while it would be a violation of the Elkins Act for a carrier to offer a shipper a concession to be paid to the shipper by a non-carrier, we do not find it necessary to rest the decision here upon the carrier's alleged action in offering payments to shippers by the City. For in this case invalidity of the carrier's action would follow *a fortiori* from the invalidity of the City's action. Therefore we examine the City's situation.

Enough has heretofore been stated to support fully the conclusion that some shippers obtained agreements from

the City committee on negotiations for concessions in return for moving into the new market. In determining whether the concessions were in respect to transportation, the coöperative functioning of railway and City, transportation and municipal officers, becomes significant. The phrase "in respect to transportation" has not a technical connotation. It differs from intent or purpose to affect transportation. It is broader than "in reduction of tariffs" though, as appears from the act, it is such a discrimination as results in transportation "at a less rate than that named in the tariffs . . . or whereby any other advantage is given . . ." Our attention is not called to any legislative history as to the purpose of the inclusion of the words in the Elkins Act or as to their meaning. We have found none. We are of the view that the phrase limits the "rebate, concession or discrimination" to advantages or disadvantages in transportation but has no further effect. As the discrimination is limited to transportation matters, normally one would find involved in the discrimination not only a user or prospective user of the facilities of the carrier but also the carrier itself. This is true in this instance. Carrier and City, through a committee of employees of each and through DeOreo and Fean and their aides, worked together to bring into the terminal tenants whose business as found below was "shipping into and out of the Food Terminal products transported in interstate commerce upon which the dealers pay the freight." Where concessions are offered to such dealers by the City in a plan worked out coöperatively by the City and carrier, as here, these concessions are necessarily in respect to transportation. The Union Pacific is charged with the public duty of and is interested in transportation. The promoters brought the scheme for the market first to the railway company. It was impressed with the possibilities and worked earnestly to convince first a few city officials, and then the Board, of the desirability of action

by the City. Money for the preliminary expenses was advanced by the Union Pacific. No objection was made to the use by the City of prepaid rents from the City Ice & Fuel Company to further the removal of the dealers in the manner "conceived and devised," in the words of a finding, by the Union Pacific. The railroad was the "leading and dominant" influence in the entire transaction. If the City was not completely "subservient to the competitive needs" of the carrier, as we said of the warehousing corporations in *Baltimore & Ohio R. Co.* v. *United States,* 305 U. S. 507, 516–17, at least the encouragement and cooperation given by the railroad was of a kind to make it plain that the City's action looked specifically towards gaining traffic for the road. While, as has been stated, it is the result and not the purpose which determines the illegal character of advantages granted shippers, when there is a purpose or plan for securing traffic, developed coöperatively by a carrier and others, the purpose makes clear that the concessions offered are in respect to transportation.

The power of the City to make the concessions and the question of whether any money to be used by the City was contributed directly or indirectly by the Union Pacific do not affect this conclusion. The judgment of the Supreme Court of Kansas in *State ex rel. Parker* v. *Kansas City,*[18] that the City, in its proprietary capacity, under Kansas law has "authority to pay such sums as are necessary . . . to carry out . . . such policies and transactions as may be to the best interest of said city in securing tenants . . . for said Terminal" is not reviewable here. But the opinions in these Kansas cases do not consider or decide whether the proposed payments are a part of a plan to grant advantages to shippers contrary to the Elkins Act. Even if the City's action had

[18] 151 Kan. 1 and 2, 8; 97 P. 2d 104, 105; 98 P. 2d 101.

been discussed from that standpoint, the result would not conclude this Court. It is our duty to determine finally the effect of acts or plans plainly under that federal statute.[19] It is impossible, and in our view immaterial, to determine from the evidence and findings whether the Union Pacific contributed indirectly to the fund for making payments to shippers. The railroad owned a three million dollar bond issue which carries a covenant to apply all revenues of the properties involved, after operating expenses, to the bond liquidation. By acquiescing in the application of the revenues to secure tenants, the railway did contribute financially, if there was a failure to earn enough to meet expenses. The estimates as to earnings are necessarily uncertain. From its finding that the projected net return was compensatory, the district court was apparently of the view that the Terminal would pay out.[20]

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[19] *Houston & Texas Ry. Co.* v. *United States,* 234 U. S. 342, 351; *United States* v. *California,* 297 U. S. 175; *Palmer* v. *Massachusetts,* 308 U. S. 79, 84; *New York* v. *United States,* 257 U. S. 591, 600–01; *United States* v. *Holt Bank,* 270 U. S. 49, 55–56; *Morgan* v. *Commissioner,* 309 U. S. 78, 80–81; *Chicago Board of Trade* v. *Johnson,* 264 U. S. 1, 10; *City of New York* v. *Feiring, ante,* p. 283.

[20] The difficulty is shown by the district court's language in finding 34:

"The City's forecast of its ability to pay off the bonds in twenty-two years is based upon a ninety percent occupancy of the market facilities as compared with an actual percentage of occupancy of less than thirty-five percent at the present time, and there is assumed an ability to exact the same level of rentals when the market buildings become twenty-five or thirty years old as at the present time when they are new. The City's estimate of operating expenses is unduly low by reason of the omission of any sums to cover the annual loss due to depreciation and obsolescence not made good by current maintenance.

"The defendant City will derive no immediate direct financial benefit from the operation of the Kansas City Food Terminal. The Union Pacific, by reason of the anticipated improvement of the vol-

Injunction. One provision of the permanent injunction entered by the district court enjoined the Union Pacific and Kansas City, Kansas, and their officers or agents from giving cash or rental credits to produce dealers to move into or remain in quarters in the Kansas City Food Terminal.[21] The appellants assign as error the action of the district court in entering any prohibition against payments "in such amounts as its [the City's] governing body may determine" and "against use of its Public Levee revenues" for the payment of "damages sustained by produce dealers moving" to the Terminal.

Resolution 11275 was construed by the Supreme Court of Kansas to authorize disbursements of available market funds for such purposes "as in the judgment of said governing body will be to the best interests of the city." [22] By the resolution these expenditures were limited to the dealers' actual costs of removal, including loss of good will.

In prior sections of this opinion, it has been pointed out that any concession by any person or corporation in respect to transportation is forbidden by the federal transportation statutes. The paragraph of the injunction now

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ume of its traffic in perishable produce and consequent increase in its revenues, will receive an immediate and continuing benefit from the project."

[21] This provision reads: "(1) From offering, granting, or giving, or assisting, joining, or co-operating in offering, granting, or giving cash payments or rental credits, free rents, and reduced rents, unsecured or inadequately secured loans constituting concessions, or other valuable considerations to defendant produce dealers or other produce dealers, or produce brokers or other persons, firms, or corporations shipping produce by railroad in interstate commerce to move or for moving to the Kansas City Food Terminal or for leasing space or remaining as tenants in said food terminal."

[22] *State ex rel. Parker* v. *Kansas City,* 151 Kan. 2, 8; 98 P. 2d 101, 105.

under examination undertakes to apply this rule so that no cash payments or rental credits may be given. It is clear that in so far as such cash or credit is a "rebate, concession or discrimination" such an injunction is proper, but do all payments to induce dealers to rent space in the Terminal fall in these classifications? The trial court said,

"The proposed payments to Missouri dealers to induce them to move to the new market not being made to all tenants at the new market and being in the nature of bonuses the amount of which was not based on actual loss or expense, fall within the classification of discriminations prohibited by the Elkins Act."

The words of the injunction, however, go farther and forbid payments even though the payments are in all fairness and strictness limited to actual and necessary expenses and losses in moving an establishment. Consequently, in deciding the form of the injunction, we need to determine the breadth of language necessary "to suppress the unlawful practices" and preclude their revival.[23] The district court summarized in findings of fact and conclusions of law the constant activity of the Union Pacific in pressing forward the idea of the Terminal. It had before it the testimony that the road sought, meticulously, to avoid conflict with the Elkins Act and yet gain the installation of the market; that the railway representatives acted with the City committees and talked with prospective tenants. Railroad influence pervaded each City action and, in those circumstances, the decree must be molded to meet the danger of subtle moves against the equality between shippers guaranteed by the Elkins Act.

Where, as here, the action of the City in giving cash and rental credits is, as we have decided, a part of a plan in re-

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[23] *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436, 461. Cf. *National Labor Relations Board* v. *Express Publishing Co.,* 312 U. S. 426, 435.

spect to transportation resulting in an advantage to shippers, we conclude that the giving of any cash, rental credit, free or reduced rents, to induce leasing of space in the Terminal is contrary to the Elkins Act. Even if we assume that nothing will be given except the actual costs of removal, the receipt of those costs would put the shipper in a preferred position to all other shippers using the facilities of an interstate carrier who did not receive such concessions. The act condemns any device "whereby any other advantage [than lower tariffs] is given. . . ." The wording of paragraph (1) is approved.

Another prohibition of the injunction determines that the rates for space shall be such "which will yield a proper rate of return upon the full value of the market facilities as a whole, after making provision for all expenses of operation, including maintenance and depreciation." [24] Identical language in paragraph Third (2) of the injunc-

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[24] The full paragraph enjoins the Union Pacific and the City of Kansas City, Kansas, and their officers and employees,

"(2) From permitting defendant produce dealers or other produce dealers, or produce brokers or other persons, firms, or corporations shipping or receiving traffic by railroad in interstate commerce to occupy or remain as tenants of the wholesale produce buildings or of other facilities at the Kansas City Food Terminal unless said produce dealers, produce brokers, or other persons, firms, or corporations—(a) shall pay rental for past occupancy of such facilities under the provisions of the temporary restraining order and the preliminary injunction heretofore entered in this cause, and (b) shall pay rental hereafter for such facilities at the same rate charged all other shippers occupying similar facilities at said Terminal, which does not amount to a rebate or concession to any tenant, and which will yield a proper rate of return upon the full value of the market facilities as a whole, after making provision for all expenses of operation, including maintenance and depreciation. Provided further that nothing contained in this decree shall be construed to limit the City in the renting of said facilities to a unit basis; but in no event shall the rates of rental and charges prescribed for such facilities aggregate less than is hereinabove provided."

tion forbids produce dealers, of whom many were parties to this proceeding, and their agents from being tenants of the Terminal at rental rates which are not adequate to yield the required amount. The inclusion of this requirement is in our opinion erroneous. The words quoted in the text should be stricken and the injunction amended by inserting in lieu of the stricken words the following: "which is a fair rental value for the facilities occupied." The reasons for the deletion follow.

The preliminary injunction referred to in the excerpt from the final injunction quoted in note 24 set the rentals at not less than certain definite amounts per month and per annum for operating units and office space. There were allowances for uncompleted facilities not now important. No issue is raised here as to whether the sums fixed were or were not a fair rental value. Adequate findings determined the values of the facilities, the estimated gross and net revenues and rates of return. With these findings before it, the district court further found in its final order that the rates fixed in the preliminary injunction were compensatory and did not amount "to a gift of any part of the value of the use of the Food Terminal to the tenant shippers." [25] This result is not

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[25] These ultimate findings are as follows:

"41. The uniform or standard rates of rental adopted and approved by Kansas City, Kansas, for lease of warehouse space and office space at the Kansas City Food Terminal are $150.00 per month per unit and $1.10 per square foot per annum, respectively, and the average rate of rental adopted or approved by Kansas City, Kansas, for lease of the cold storage plant and appurtenant facilities at said Food Terminal is $38,497 per annum. Such rentals are intended to provide sufficient funds to amortize the principal and pay the interest on the Public Levee Revenue Bonds purchased by the defendant Union Pacific Railroad Company, representing 55 percent of the total cost of construction of the said Food Terminal, and to compensate the City for the use of the facilities for the purpose to which they are dedicated.

questioned. It may therefore be concluded that this scale of charges meets the requirements of the decree for aggregate rates which do not amount to concessions. Since the adequacy of these rates was reached in considering the full value of the properties, including the land furnished by the City and the grant from the Public Works Administration, it may be assumed that they are not less than a fair rental value. The last paragraph of the order provides a method for modification by application to the court should either side be of opinion that this assumption is incorrect. As will immediately appear from this opinion, it is unnecessary to give consideration to the contention that the district court erred in adding the value of the City's land and the amount of the grant to the cost of the facilities. If the correct test is fair rental value, cost of facility is only persuasive, not determinative. Consequently it may be shown as a material factor in determining the fair rental value of the properties but the rates are not required to be upon a level which will give a return upon the value of the investment as a whole.

Fair rental value rather than a compensatory return upon full value of the market facilities is the standard by which the City's schedule of rates is to be judged. To determine fair rental value, the going rates of rental for similar facilities in the community are significant, as are the rentals prospective tenants are willing to pay. Likewise, evi-

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"42. The net return, while low as compared to the fair return of many privately owned utilities devoted to the service of the public, is compensatory and, in view of the purpose of the City to bring about industrial improvement and the incidental advantage to the City for that purpose and the return generally obtained from investments in utilities of like or similar nature, the present rental rates and the consequent return to the City are not so low that the use of the Food Terminal by tenants in interstate commerce at those rentals will amount to a gift of any part of the value of the use of the Food Terminal to the tenant shippers."

dence of the over-all cost and the over-all value of the properties would be material. The cost of furnishing the facilities, including the normal return on capital employed in like enterprises would have weight. Other pertinent factors would doubtless emerge in a controversy to have determined judicially whether certain rentals received are or are not fair. When enough evidence is offered to justify a conclusion based upon judgment and not guesswork, the requirements of the judicial process are met.[26]

This is not the case for a rigid rule that aggregate rentals are to equal costs, such as was applied in *Baltimore & Ohio R. Co.* v. *United States,* 305 U. S. 507, 523–524, where this Court approved an order of the Interstate Commerce Commission designed to root out competitive evils in discriminatory warehousing indulged in by carriers in an effort to acquire traffic. The City is entitled to develop its properties and location in accordance with the laws of Kansas for civic advantage, so long as it does not utilize its facilities in furtherance of a scheme to obtain customers for a carrier by the offering of concessions, contrary to the Elkins Act. It was recognized in *Baltimore & Ohio R. Co.* v. *United States* that a charge of fair rental value for services accessorial to transportation would adequately protect even a carrier under proper circumstances. We are of the view that rental charges fixed upon that concept will avoid the discriminatory evils proscribed by the Elkins Act.

With the modifications directed in this opinion, the order of the district court is

Affirmed.

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

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[26] Cf. *Palmer* v. *Connecticut Ry. & Lighting Co.,* 311 U. S. 544, 559, and cases cited.

MR. JUSTICE ROBERTS:

I cannot agree with the judgment in this case. In last analysis the question presented is whether the Elkins Act proscribes financial transactions by a city with proposed occupants of a city-owned building because those occupants will be shippers in interstate commerce from such building, where the city is to furnish no facilities or services of transportation, where the transactions involve no payments, concessions or discriminations on the part of any interstate carrier, are authorized by state law and are for the city's benefit. A subsidiary question is whether in fact the proposed transactions amount to discriminations in favor of such occupants. A further question is presented with respect to the decree to be entered.

I find it unnecessary to discuss the evidence in detail, or narrowly to examine the findings. I shall endeavor, for the purpose of reaching the legal questions, to consider the case in the light most favorable to the appellees.

The defendants DeOreo and Fean are not philanthropists but promoters who had more or less successfully promoted produce terminals in various cities. They conceived the plan of establishing one in Kansas City, Kansas. They expected a profit out of the venture. Their original idea was that they should become lessees of the terminal and make their profit by sub-renting space in it. When this purpose was abandoned they sought to be made exclusive rental agents. Objection by the P. W. A. rendered this proposal impracticable. They have received considerable payments from Union Pacific for their efforts in connection with the establishment of the terminal.

DeOreo and Fean presented their plan to Union Pacific. That company took an interest, not eleemosynary but practical, in the project. Inasmuch as its tracks would serve the proposed terminal, the railroad naturally desired that the plan go through so that it might get in-

creased business and obtain a competitive advantage over other railroads serving the area known as Greater Kansas City and particularly the food terminal at Kansas City, Missouri. But the railroad did not desire to erect the terminal. It sought to interest the officials of Kansas City, Kansas, in the scheme, and succeeded in doing so.

Some years ago Kansas City, Kansas, had been given a large tract of water-front land which, until recently, had been unused. Through a P. W. A. grant and a loan from Reconstruction Finance Corporation, the city had made some improvements and had erected a grain elevator and docks on the tract which were served by the lines of Union Pacific and Missouri Pacific. The balance of the tract was available for a produce terminal. The establishment of such an instrumentality would obviously be of great benefit to the city in both financial and civic aspects. The plan evolved was that the city should erect such a terminal; that Union Pacific would construct a large team track and switching yard on the ground adjacent to the terminal to be leased by Union Pacific from the city and that the terminal should be financed by the city through a P. W. A. grant and income bonds.

DeOreo and Fean, Union Pacific, and the city officials all struggled earnestly to obtain a grant from P. W. A. An investigation by the Department of Agriculture disclosed that the terminal would be highly beneficial to the producers tributary to the Kansas City market. Investigation by the P. W. A. disclosed that the scheme was desirable and practicable. A grant of not to exceed $1,700,000 was made, conditioned on the financing of the remainder of the project.

Union Pacific and the city officials negotiated with an underwriting house for the sale, by the city, of $3,000,000 of income bonds, $1,033,000 of which were to be used to pay off the outstanding bonds, and the balance for the erection of the terminal. Although a firm commitment

had been obtained, the bond house, at the last moment, receded from the proposition, thus leaving the whole project in jeopardy. In this situation Union Pacific asserted its willingness to buy the bonds. A bidding was held and Union Pacific was the successful bidder. No question is made of the legality of this investment by the railroad, and its intention to take the bond issue was approved by P. W. A. and was certified to the Interstate Commerce Commission. The city had no power to pledge its property and its general revenues as security for the bonds. It had full authority to issue income bonds, interest, and principal to be paid from the receipts of the terminal.[1]

The condition precedent to the P. W. A. grant having been fulfilled, the city proceeded with the erection of the terminal with the fullest aid and coöperation of Union Pacific. That company had advanced some $22,000 for preliminary expenses, which the city proposed to repay it. Under a ruling of P. W. A. the city could not do so with funds procured for construction, and if the sum is repaid the funds must come out of income. The railroad, not unnaturally, retained an architect to collaborate with the city's architect respecting the construction and exerted every effort to bring the plan to fruition.

In Kansas City, Missouri, there was an existing wholesale produce market. This needed extensive alterations and additions and the expectation was that many of the tenants would move to the new and more convenient terminal in Kansas City, Kansas. All who were interested in the latter realized that tenants of the old one in Missouri might incur expense in giving up their quarters and moving to the new. They realized also that, in order promptly to fill the new building, some concessions in

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[1] *State ex rel. Beck* v. *Kansas City,* 149 Kan. 252; 86 P. 2d 476.

the amount of early-accruing rentals might have to be made. An ice manufacturing and cold storage plant was part of the project. A tenant was obtained for this unit at a substantial rental. The city authorities negotiated an arrangement with the tenant for payment of some $80,000 in advance rental. With this money, and other advance rents it might obtain, the city felt that it could arrange to reimburse persons who might become tenants for losses incident to their removal. The question arose, however, as to the city's authority so to do. The matter was referred to a committee of lawyers and ultimately to the Attorney General of Kansas. That officer thought the matter should be settled by court decision. Accordingly a proceeding was instituted in the Supreme Court of Kansas and that court held the city had power, in the circumstances, to use advance rents in the manner proposed.[2]

As was expected, tenants of the old market in Missouri, when solicited to move to the new, raised questions of losses due to unexpired leases, abandonment of fixtures, etc. Everybody interested in the new terminal, including DeOreo and Fean, employes of Union Pacific, and representatives of the city, negotiated with these prospective tenants in respect of what would be a fair recompense for their losses due to removal and reestablishment. None of these negotiators had authority to do more than ascertain the claims of such proposed tenants, which were to be submitted to, and adjusted by, a committee representing and acting for Kansas City, Kansas. The evidence is uncontradicted and overwhelming that Union Pacific's employes, and everyone else concerned, made it clear that any adjustment of these losses would have to be made by the city, and by the city only; that the railroad could not, and would not, pay a cent towards any such expense.

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[2] *State ex rel. Parker* v. *Kansas City*, 151 Kan. 2; 98 P. 2d 101.

When this suit was brought nothing had been paid to any claimant. One claim had been approved by the committee. It turns out that although that claim was supported by affidavit it was in an unjustifiably large amount with respect to the cancellation of an existing lease, but there is no evidence that the city officials, in approving the claim, knew this or would have approved the claim had they known it, and there is no finding that the claim was made in bad faith. Moreover, neither with respect to this claim nor to any other which was under consideration at the time suit was instituted, is there evidence, and there is no finding by the court below or by this court, except by innuendo, that if the claims made were paid any payee would have even been made whole for losses consequent on moving and establishing himself in the new location, or that he would thereby have had any preference or advantage over other tenants to whom no such payments were made.

At an early day in the development of the project, Union Pacific expressed its willingness to switch all consignments in and out of the terminal to and from other railroads at a uniform and fair charge. It filed a switching tariff with the Interstate Commerce Commission which has been accepted and is concurred in by the other railroads. The tariff is the same as that which has been in force for similar service in Kansas City, Missouri. Thus, all railroads and shippers are to be served indifferently and at a uniform and fair rate for the transportation services involved.

On these facts the question is whether the actions of the railroad, those of the city, or those of the two jointly, constitute a rebate or a discrimination within the meaning of the Elkins Act.[3]

1. It has always been understood that one of the purposes of the interstate commerce law was to prevent a

[3] 49 U. S. C. § 41 (1).

carrier from giving, and a shipper from receiving, transportation services at less than the published tariff rates, and to preclude what is equivalent, namely, the furnishing of a service at tariff rates to one shipper which is withheld from others. The sections of the Elkins Act here relied upon were merely intended to implement this Congressional aim and more efficiently to provide against evasion. Thus it is made unlawful for any person or corporation to offer, to grant, to give, or to solicit, to accept, or to receive, any rebate, concession or discrimination in respect of the transportation of any property in interstate commerce by any common carrier subject to the Interstate Commerce Act, whereby any such property shall by any device whatever be transported at a less rate than the published tariff rate, or whereby any other advantage is given or discrimination is practiced. The language seems too clear to be misunderstood. It is only the carrier, or someone acting in its behalf, who can give or grant a concession. It is only the shipper, or someone acting in his behalf, who can receive or solicit one. The section as originally enacted goes on to provide: "Every person or corporation who shall knowingly offer, grant, or give, or solicit, accept, or receive any such rebate, concession or discrimination" shall be deemed guilty of a misdemeanor and punished by fine. As amended, it imposes a further punishment by fine or imprisonment upon any officer of a corporation or any person "acting for or employed by" any corporation, who is convicted of violating the provisions of the Act. Until the present time no one has supposed that a third party who is neither carrier nor shipper and neither furnishes nor receives transportation service, in making a business deal with a man who happens to be a shipper over an interstate carrier's line, may render himself liable criminally if, and merely because, the result of his transaction will be beneficial when reckoned up in the year's profit and loss statement of the other party to the transaction.

There seems to have been some question, although it is hard to understand why, whether the penal provisions of the Act applied to a shipper or his agents. When the Act was amended by the Hepburn Act the phrase "every person or corporation" was supplemented by an epexegetical clause "whether carrier or shipper." The legislative record shows that the amendment was intended to make sure that shippers who received rebates should be guilty equally with carriers who gave them. It had no other purpose.

Every decision applying the relevant provisions of the Interstate Commerce Act and the Elkins Act has turned upon the fact that someone furnishing a service of transportation covered by a tariff has remitted a part of the tariff charge, or has rendered a free service, or a service below cost to some shippers which others did not enjoy; and where one not a carrier has been held guilty of a violation of the Act it has been because he returned to the shipper, through one performing a part of the transportation service covered by the carrier's tariff, part of the published rate, or has induced the carrier to perform a service for the shipper covered by the tariff at less than the published rate, or has induced the carrier to perform a transportation service for a shipper to which the shipper was not entitled under the published tariff and which, therefore, the carrier failed to perform for others.

The District Court, sensible of this unbroken line of authority, thought it necessary to attribute the proposed payments in some way to Union Pacific. To reach this result, it held that in the terminal enterprise Union Pacific and Kansas City were joint adventurers. Obviously the conclusion is incorrect. Union Pacific was in no sense a partner and did not stand to make a profit from the conduct of the enterprise. It was a lessee of a part of the property for its freight yard at an adequate rental. It

was the owner of bonds lawfully acquired, and, as such, dealt at arm's length with the city. Although the Government seeks to sustain the conclusion of the District Court this court apparently discards it as unjustifiable.

In the second place, the District Court held that Union Pacific and the city were in a conspiracy to grant compensation to prospective tenants. But this is not equivalent to finding that the purpose of the conspiracy was to grant transportation to these tenants at less than the tariff rates of Union Pacific. Inasmuch as it is conceded that there was no purpose to grant any shipper any service not granted to others, or to give any shipper a rebate from the published tariff rates, it seems plain that the latter sort of conspiracy is not made out.

Finally, the District Court sought to spell out a financial contribution by Union Pacific for the benefit of proposed tenants by what it denominated the waiver of the lien of the bonds held by the railroad on the terminal property. An examination of the decision of the Supreme Court of Kansas [4] makes it clear that, under the law of that State, the railroad had no lien, in any proper sense of the term. The state court held that the obligation of the city under the bonds was to devote the net profits of the enterprise to the payment of the principal and interest, but that it was at liberty to pay all necessary operating expenses, including the expenses of obtaining tenants. I do not understand that the opinion of this court approves the finding and conclusion of the District Court in this respect.

The ruling here is much broader, and does not condition violation of the law on any payment or concession by Union Pacific. It is that if the city, which is not a shipper, nor a carrier, and not a furnisher of any transportation service, in dealing with its own property not

[4] Note 2, *supra*.

devoted to any service of transportation, sees fit to make an advantageous financial arrangement with a proposed tenant of its property, that transaction, otherwise legal, at once becomes illegal and subjects the city, or its officers, to criminal penalties and to an injunction if it happens that the party with whom it deals becomes, in virtue of the transaction, a shipper over the lines of an interstate carrier, and is benefited by the transaction. The distinction sought to be made between benefits applicable to transportation and benefits generally seems to me illusory. The court expressly holds that intent is immaterial; that if the result is advantageous to the shipper, a rebate, concession, or discrimination from the tariffs of the carrier has been accomplished, within the meaning of the Elkins Act.

I venture to think that no one will be more surprised than the members of the Congress at the attribution of the statutory phrase "every person" who gives or receives, grants or solicits rebates or discriminatory service, to states and municipal corporations and their officers who, in promoting lawful municipal purposes, incidentally bring additional business to an interstate carrier. We know that it is a common practice for chambers of commerce and city authorities to offer to manufacturing and business concerns lands and sites on favorable terms, such as low purchase price, reduced rentals, exemption from taxation for a given period, in an effort to induce such concerns to locate within the limits of a municipality.

We know that, in order to induce men to move their plants from one location to another, it is a practical necessity to offer them some recompense for the expense involved and for the loss which may result from doing business in a new location. Under the decision now announced, citizens or city officials connected with such a transaction, though their purpose be wholly remote from any benefit to a railroad, are guilty of a criminal offense.

We also know that in the competitive effort of railroads to obtain business they have assisted municipalities to establish industries along their lines. It has never been thought that such activity on the part of the railroad, where it gave nothing in money and rebated nothing from its published tariffs in service or rates, constituted a violation of the Elkins Act. To hold that, by this statute, Congress intended to paralyze lawful effort, well within the powers conferred by the states on their municipalities, in the view that such effort constitutes a rebate from a carrier's tariff rate, seems to me to place a forced and unreasonable construction upon the words of the Act.

The opinions of the court below and of this court point out that, as a result of the consummation of the plan for a terminal, Union Pacific expected to carry greatly increased traffic into and out of Kansas City and that this increase necessarily would inflict losses upon its competitors. But the Elkins Act and the Interstate Commerce Act were aimed at specific abuses, and were not general prohibitions of all forms of competition between carriers or limitations on the increase of a carrier's traffic by any sort of competition. In fact, the Congressional policy is to foster and encourage competition between railroads, and to prohibit agreements or conspiracies to suppress it.[5] It is common knowledge that carriers customarily advertise the advantages of sites lying along their lines in the hope of encouraging shippers to locate thereon. It seems to me that the circumstance so pointedly noticed is irrelevant to any question involved in this case. Of course, Union Pacific was actuated by the legitimate desire of increased traffic in all its efforts towards the establishment of the terminal. That avowed motive was, in my judgment, innocent and lawful. Moreover,

[5] *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290, 312, 325.

in truth, this controversy has its roots in the competition of two cities, rather than that of railroads.

2. Assuming, as the opinion does, that the city and its officers were, within the meaning of the Act, persons "acting for" Union Pacific, the proof fails to disclose that the sum proposed to be paid to any produce merchant in connection with his moving to the new terminal was in fact more than fair compensation for loss or was a discrimination against any other tenant. There is no proof, and indeed it would be very difficult to furnish any, that at the end of one, two, or three years of business at the new terminal,—considering the attendant expense of moving and reëstablishing the business at the new location, the incident loss of good will and custom, and the necessity of finding new custom to take the place of that lost,—the balance sheet of any of the tenants would disclose that he was better off than if he had stayed in his old location. And it would be even more difficult to determine that a sum paid him to cover such loss and damage is reflected upon his books in the transportation charges paid by him, rather than in the other items of expense connected with his business. How shall any such allocation be made? None such is necessary where the carrier itself, or someone representing it, grants a concession from the published rate or renders a service not comprehended in its tariff. In such case the fact speaks for itself. In this case the court assumes the fact and, by a blanket and sweeping decree, bans any compensation, however just, to anyone for removing from an old location to the new terminal on the suspicion that the payee may have some advantage over another tenant who did not incur any such expense. Thus the decree will render it impossible for Kansas City to make what it deems legitimate and proper arrangements for the prosecution of a business enterprise in no sense consisting of the service of transportation. It seems clear that Congress never had any such intent in adopting the

Elkins Act. This is to reach into the peculiarly local affairs of the states and to lay the dead hand upon the otherwise lawful activities of states and their subdivisions. Certainly a far more specific mandate should be required to persuade us that Congress had any such purpose.

3. Another feature of the decree seems to me to be equally unjustified. The record discloses that the city adopted a standard form of lease which fixed a uniform rental per unit of space. In order to fill the building promptly, this lease provided that for the first three months the monthly rental should be one-third of the standard monthly rental. Thus a tenant who, after the three months, would pay $150 a unit would get the use of that unit for the first three months for $50. It is again common knowledge that, in a competitive situation, the owner often has to make rental concessions for a brief time at the beginning of the lease term. There is nothing unlawful about this and the decision of the Supreme Court of Kansas sanctions it. The court below swept aside all these arrangements and, although it found "the present rental rates and the consequent return to the City are not so low that the use of the Food Terminal by tenants in interstate commerce at those rentals will amount to a gift of any part of the value of the use of the Food Terminal to the tenant shippers," it nevertheless required that the rentals must be such as to allow a fair return to the city on the total value of the premises including the product of the money granted by P. W. A. and the land acquired by free gift. Under the law, the city was at liberty to turn this land to account in such manner and at such rate of return as it might see fit. While the opinion of the court holds this provision of the decree erroneous, it substitutes what I think an equally improper rule. The city is to be prohibited from leasing its own publicly owned property, in the prosecution of an enterprise which it deems beneficial to the community, at rates it deems proper and rates

which are otherwise within its lawful power. It is told that it must get a fair rental value, and various criteria of fairness are suggested. Thus, the court holds that Congress intended in such a situation to shackle the municipal arm of a sovereign state, for the indefinite future, and compel it to conduct its business contrary to what the law of its own state permits. This result cannot be justified in the guise of preventing an alleged rebate of tariff rates by a carrier, unconnected with and neither controlled by the city nor exerting any legal control over the city, whose only function is that of serving those who use the city's facilities.

I am of opinion that the bill should have been dismissed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS join in this opinion.

KLAXON COMPANY *v.* STENTOR ELECTRIC MANUFACTURING CO., INC.

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

No. 741. Argued May 1, 2, 1941.—Decided June 2, 1941.

1. In diversity of citizenship cases, the federal courts, when deciding questions of conflict of laws, must follow the rules prevailing in the States in which they sit. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64. P. 496.
2. In an action in a federal court in Delaware, for breach of a New York contract, the applicability of a New York statute directing that interest be added to the recovery in contract cases is a question of conflict of laws, which the federal court must determine by the law of Delaware. P. 496.
3. The Full Faith and Credit Clause does not require that a State, contrary to its own policy, shall give effect in actions brought locally on contracts made in other States, to laws of those States relating, not to the validity of such contracts, but to the right to add interest to the recovery as an incidental item of damages.

§ 480 N. Y. Civ. Prac. Act. *John Hancock Mutual Life Ins. Co.* v. *Yates*, 299 U. S. 178, distinguished. P. 497.
115 F. 2d 268, reversed.

CERTIORARI, 312 U. S. 674, to review the affirmance of a judgment recovered for breach of a contract, 30 F. Supp. 425. The review in this Court was limited to the question whether § 480 of the New York Civil Practice Act is applicable to an action in the federal court in Delaware.

Mr. John Thomas Smith for petitioner.

Section 480 of the New York Civil Practice Act relates to procedure and remedy rather than to substantive right. *Funkhouser* v. *J. B. Preston Co.*, 290 U. S. 163; *Standard Oil Co.* v. *United States*, 107 F. 2d 402, 418.

This Court's decision in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, and the adoption of the Federal Rules of Civil Procedure, make it of paramount importance that the distinction between substantive law and procedure be kept clear.

The New York legislature regarded § 480 as a regulation of its own adjective law and not as a grant of substantive right entitled to enforcement in foreign jurisdictions. See *Matter of 1610 P, Inc.*, 168 Misc. 918; cf., *Fidelity-Phenix Fire Ins. Co.* v. *Cortez Cigar Co.*, 92 F. 2d 882; *Kline Bros.* v. *Royal Ins. Co.*, 192 F. 378.

There appears to be no Delaware decision as to whether interest is substantive or procedural. It is doubtful whether such a decision would be of binding force on a federal court sitting in Delaware. Cf., *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202; E. E. Cheatham, Sources of Rules for Conflict of Laws (1941), 89 U. of Pa. L. R. 430, 446–7; Note (1939), 52 Harv. L. R. 1002.

By the preponderance of authority the matter of interest is deemed procedural and governed by the *lex fori*. *Board of County Commissioners* v. *United States*, 308

U. S. 343, 349, 350; *Standard Oil Co.* v. *United States,* 107 F. 2d 402; *Goddard* v. *Foster,* 17 Wall. 123; *Mather* v. *Stokely,* 218 F. 764; *George M. Jones Co.* v. *Canadian Nat. Ry. Co.,* 14 F. 2d 852; *Mitchell* v. *Reolds Farms Co.,* 256 N. W. 445, 449; *Butte, A. & P. Ry. Co.* v. *United States,* 61 F. 2d 587; *Massachusetts Benefit Assn.* v. *Miles,* 137 U. S. 689.

Inconvenience and delay in the trial of cases involving conflict of laws will result from a determination that interest is substantive; controlling considerations of convenience and flexibility in judicial administration require that interest be classified as procedural. Clark, Procedural Aspects of the New State Independence (1940), 8 Geo. Wash. L. Rev. 1230, 1234; "The Tompkins Case and the Federal Rules" (1941), 24 J. Am. Jurid. Soc. 158, 160.

In every such case in the federal District Court on a cause of action arising elsewhere than at the forum the court must determine the *lex loci* as a step preliminary to the award or denial of interest as well as the rate thereof and the period covered thereby. This must be done even though the *locus* of the cause of action may be unimportant for any other purpose in the case.

The conclusion of law as to the controlling *locus* must be based on proof of facts frequently difficult to ascertain, *e. g.,* in a contract action, the intention of the parties as to where performance of the obligation involved should take place.

It would be intolerable to have the *lex loci* determined as it was in the case at bar. Here the place of performance was not considered an issue in the case until after the verdict was rendered. The District Court considered that interest was governed by the *lex loci contractus.* It remained for the Circuit Court to find that the law of the place of performance controlled the question. Under these circumstances, naturally, no evidence was offered by petitioner to show that New York was not the in-

tended place of performance. The conclusion of the courts below that New York was the place of performance of petitioner's obligation to use its best efforts to exploit the patents rests on no factual support other than collateral evidence offered on other issues.

The *locus* will often be a distant State. Its statute books may be unavailable at the forum, especially if, as here, the relevant provision is found in a Code of Procedure. Or there may be no statutory provision whatever, in which event the court must examine the state decisions including those of the inferior courts if the matter has not been settled by the State Supreme Court. See *West* v. *American Tel. & Tel. Co.*, 311 U. S. 223.

Delay will be the concomitant of the research and inquiry thus necessitated. Moreover, as the law of interest in many States is obscure and confused, frequent appeals with respect to the denial or award of interest pursuant to state law must be expected.

A collateral effect of a determination that interest is "substantive" is to cast doubt upon the validity of certain of the Federal Rules of Civil Procedure. Clark, "The Tompkins Case and the Federal Rules," 24 J. Am. Jurid. Soc. 158, 161.

An independent federal rule regarding the allowance of interest may be promulgated either by Congress, or by this Court, or by the District Courts.

Pending the adoption of such a rule or as an alternative thereto, the District Courts are guided by the principles as to the allowance of interest which the federal courts themselves have formulated. See *Jones* v. *Foster*, 70 F. 2d 200; *Companhia de Navagacao Lloyd Brasileiro* v. *C. G. Blake Co.*, 34 F. 2d 616.

Mr. Murray C. Bernays, with whom *Messrs. Paul Leahy, Henry Gale*, and *Abraham Friedman* were on the brief, for respondent.

No matter by what law the question is tested, the courts below were right to apply the New York statute in adding interest to the amount of the verdict. Under *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, the Delaware conflicts rule governs. The rule is (Restatement, Conflict of Laws, § 584; accord, 3 Beale, Conflict of Laws, § 584.2, p. 1601) that "The court at the forum determines according to its own Conflict of Laws rule whether a given question is one of substance or procedure." The doctrine of conflicts, however, is "purely a question of local common law." *Kryger* v. *Wilson,* 242 U. S. 171, 176; cf., 1 Beale, Conflict of Laws, X, and § 5.1, p. 51. When this conflict question is presented, the federal court is bound to decide it according to the law of conflicts of the State in which it is sitting. *Sampson* v. *Channell,* 110 F. 2d 754, 760–2, cert. den., 310 U. S. 650; *Waggaman* v. *General Finance Co.,* 36 F. Supp. 85, 87; Goodrich, Conflict of Laws, 2d Ed., p. 24; Comment, 4 Federal Rules Service Cases 1.3, Case 1.

The Delaware conflicts rule is that damages for breach of contract and the measure thereof are governed by the *lex loci*—in our case the law of New York. *Mackenzie* v. *Omar,* 4 Harr. (Del.) 435, 457; *Canadian Industrial Alcohol Co.* v. *Nelson,* 8 Harr. (Del.) 26, 58.

Moreover, it has been held in Delaware that the rate of interest is governed by the *lex loci. Barstow* v. *Thatcher,* 3 Houst. (Del.) 32; *Mackenzie* v. *Omar,* 4 Harr. (Del.) 435, 458–9.

It follows that the right to interest as an element of damages is similarly governed. Cf., *Curtis* v. *Campbell,* 76 F. 2d 84, cert. den., 295 U. S. 737.

The same result would have been reached if the courts below had gone directly to the New York law, since the measure of damages and the right to interest are substantive under New York law. *Dyke* v. *Erie R. Co.,* 45

N. Y. 113, 118; *Keifer* v. *Grand Trunk R. Co.*, 12 App. Div. 28; *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, 109; *Preston Co.* v. *Funkhouser*, 261 N. Y. 140, 145.

The classic distinction is between the nature, the obligation, and the interpretation of a contract, all of which are the substance (*Liverpool & Great Western Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 458), and "procedural" matters—such as, for example, the form of the action, as to whether it shall be assumpsit, covenant, or debt; all process, both mesne and final; pleadings; and rules of evidence. *Pritchard* v. *Norton*, 106 U. S. 124, 133–5.

The Delaware conflicts rule, that the measure of damages and interest are substantive and referable to the *lex loci*, is supported by the weight of federal and other authority. Restatement, Conflict of Laws, § 413; 2 Beale, Conflict of Laws, § 412.1, p. 1332; *Chesapeake & Ohio Ry.* v. *Kelly*, 241 U. S. 485; Robertson, Characterization in the Conflict of Laws (Harv. Univ. Press, 1940) 270.

On the right to interest as part of the damages the following federal decisions hold that the *lex loci* governs. *Freygang* v. *Vera Cruz & P. R. Co.*, 154 F. 640; *Wynne* v. *McCarthy*, 97 F. 2d 964, 970; *U. S.* v. *Garland*, 271 F. 14; cf., *Curtis* v. *Campbell*, 76 F. 2d 84; *Bell* v. *Lamborn*, 2 F. 2d 205.

The prevailing rule is that the *lex loci* governs. *Scudder* v. *Union National Bank of Chicago*, 91 U. S. 406; *Pana* v. *Bowler*, 107 U. S. 529, 546; *Scotland County* v. *Hill*, 132 U. S. 107, 117; *Sloss-Sheffield Steel & Iron Co.* v. *Tacony Iron Co.*, 183 F. 645, aff'd 188 F. 896; 91 American State Reports 741; Restatement, Conflict of Laws, § 418; 2 Beale, Conflict of Laws, § 418.1, p. 1335; 16 Am. & Eng. Encyc. of Law (2d Ed.), 1090; Note, Conflict of Laws—Interest as Damages—What Law Governs, 25 Mich. L. Rev. 537, 538; Note, Law Governing the Measure of Damages for Breach of Contract, 78 U. of Pa. L. Rev. 640, 644.

Sound reason and policy support the rule that the right to interest is governed by the *lex loci*. *Western Union Tel. Co.* v. *Brown,* 234 U. S. 542, 547; cf., *Slater* v. *Mexican Nat. Ry.,* 194 U. S. 120; *Curtis* v. *Campbell,* 76 F. 2d 84, 85; Restatement, Conflict of Laws, p. 699.

Since the New York statute is held substantive by controlling New York decisions, the courts below would, in any event, have been bound to apply that statute and add interest to the amount of the verdict, under the full faith and credit clause of the Constitution.

Bradford Elec. Co. v. *Clapper,* 286 U. S. 145, 155; *John Hancock Ins. Co.* v. *Yates,* 299 U. S. 178, 183.

Even before the amendment of § 480, N. Y. Civ. Pr. Act, it had been held that the measure of damages and the right to interest were of substance. The amendment acted upon a substantive right—the obligation of the contract; it accomplished its purpose by making mandatory the addition of interest to damages for breach of contract, whether theretofore liquidated or unliquidated. *Stentor Electric Mfg. Co.* v. *Klaxon Co.,* 30 F. Supp. 432; *Preston Co.* v. *Funkhouser,* 261 N. Y. 140; *Funkhouser* v. *J. B. Preston Co.,* 290 U. S. 163.

The construction placed upon § 480 by the New York courts, and the New York rule that the right to interest for breach of contract is a substantive right, are part of the statute, as much so as though they were found in appropriate words in its text. *Georgia Ry. & Elec. Co.* v. *Decatur,* 295 U. S. 165, 170; *West* v. *American Tel. & Tel. Co.,* 311 U. S. 223.

The statute as thus construed is a substantive provision of every New York contract to which it is applicable, such as the contract in the case at bar. The contractual rights established thereby are rights of property, enforceable wherever the contract is sued upon. *Loucks* v. *Standard Oil Co.,* 224 N. Y. 99; *Curtis* v. *Campbell,* 76 F. 2d 84.

To deprive a party of the benefit of such property right by refusing to give full faith and credit to the statute, would be a violation of the constitutional rights of such party. *Bradford Elec. Co.* v. *Clapper,* 286 U. S. 145; *John Hancock Ins. Co.* v. *Yates,* 299 U. S. 178; *Broderick* v. *Rosner,* 294 U. S. 629; *cf. Sampson* v. *Channell,* 110 F. 2d 754, 759.

Mr. Justice Reed delivered the opinion of the Court.

The principal question in this case is whether in diversity cases the federal courts must follow conflict of laws rules prevailing in the states in which they sit. We left this open in *Ruhlin* v. *New York Life Insurance Co.,* 304 U. S. 202, 208, n. 2. The frequent recurrence of the problem, as well as the conflict of approach to the problem between the Third Circuit's opinion here and that of the First Circuit in *Sampson* v. *Channell,* 110 F. 2d 754, 759–62, led us to grant certiorari.

In 1918, respondent, a New York corporation, transferred its entire business to petitioner, a Delaware corporation. Petitioner contracted to use its best efforts to further the manufacture and sale of certain patented devices covered by the agreement, and respondent was to have a share of petitioner's profits. The agreement was executed in New York, the assets were transferred there, and petitioner began performance there although later it moved its operations to other states. Respondent was voluntarily dissolved under New York law in 1919. Ten years later it instituted this action in the United States District Court for the District of Delaware, alleging that petitioner had failed to perform its agreement to use its best efforts. Jurisdiction rested on diversity of citizenship. In 1939 respondent recovered a jury verdict of $100,000, upon which judgment was entered. Respondent then moved to correct the judgment by adding in-

terest at the rate of six percent from June 1, 1929, the date the action had been brought. The basis of the motion was the provision in § 480 of the New York Civil Practice Act directing that in contract actions interest be added to the principal sum "whether theretofore liquidated or unliquidated." [1] The District Court granted the motion, taking the view that the rights of the parties were governed by New York law and that under New York law the addition of such interest was mandatory. 30 F. Supp. 425, 431. The Circuit Court of Appeals affirmed, 115 F. 2d 268, and we granted certiorari, limited to the question whether § 480 of the New York Civil Practice Act is applicable to an action in the federal court in Delaware. 312 U. S. 674.

The Circuit Court of Appeals was of the view that under New York law the right to interest before verdict under § 480 went to the substance of the obligation, and that proper construction of the contract in suit fixed New York as the place of performance. It then concluded that § 480 was applicable to the case because "it is clear by what we think is undoubtedly the better view of the law that the rules for ascertaining the measure of damages are not a matter of procedure at all, but are

[1] Section 480, New York Civil Practice Act:

"Interest to be included in recovery. Where in any action, except as provided in section four hundred eighty-a, final judgment is rendered for a sum of money awarded by a verdict, report or decision, interest upon the total amount awarded, from the time when the verdict was rendered or the report or decision was made to the time of entering judgment, must be computed by the clerk, added to the total amount awarded, and included in the amount of the judgment. In every action wherein any sum of money shall be awarded by verdict, report or decision upon a cause of action for the enforcement of or based upon breach of performance of a contract, express or implied, interest shall be recovered upon the principal sum whether theretofore liquidated or unliquidated and shall be added to and be a part of the total sum awarded."

matters of substance which should be settled by reference to the law of the appropriate state according to the type of case being tried in the forum. The measure of damages for breach of a contract is determined by the law of the place of performance; Restatement, Conflict of Laws § 413." The court referred also to § 418 of the Restatement, which makes interest part of the damages to be determined by the law of the place of performance. Application of the New York statute apparently followed from the court's independent determination of the "better view" without regard to Delaware law, for no Delaware decision or statute was cited or discussed.

We are of opinion that the prohibition declared in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, against such independent determinations by the federal courts, extends to the field of conflict of laws. The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts.[2] Otherwise, the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side. See *Erie R. Co.* v. *Tompkins, supra,* at 74–77. Any other ruling would do violence to the principle of uniformity within a state, upon which the *Tompkins* decision is based. Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent "general law" of conflict of laws. Subject only to review by this Court

[2] An opinion in *Sampson* v. *Channell,* 110 F. 2d 754, 759–62, reaches the same conclusion, as does an opinion of the Third Circuit handed down subsequent to the case at bar, *Waggaman* v. *General Finance Co.,* 116 F. 2d 254, 257. See also Goodrich, Conflict of Laws, § 12.

on any federal question that may arise, Delaware is free to determine whether a given matter is to be governed by the law of the forum or some other law. Cf. *Milwaukee County* v. *White Co.*, 296 U. S. 268, 272. This Court's views are not the decisive factor in determining the applicable conflicts rule. Cf. *Funkhouser* v. *J. B. Preston Co.*, 290 U. S. 163. And the proper function of the Delaware federal court is to ascertain what the state law is, not what it ought to be.

Besides these general considerations, the traditional treatment of interest in diversity cases brought in the federal courts points to the same conclusion. Section 966 of the Revised Statutes, 28 U. S. C. § 811, relating to interest on judgments, provides that it be calculated from the date of judgment at such rate as is allowed by law on judgments recovered in the courts of the state in which the court is held. In *Massachusetts Benefit Association* v. *Miles*, 137 U. S. 689, this Court held that § 966 did not exclude the allowance of interest on verdicts as well as judgments, and the opinion observed that "the courts of the state and the federal courts sitting within the state should be in harmony upon this point" (p. 691).

Looking then to the Delaware cases, petitioner relies on one group to support his contention that the Delaware state courts would refuse to apply § 480 of the New York Civil Practice Act, and respondent on another to prove the contrary. We make no analysis of these Delaware decisions, but leave this for the Circuit Court of Appeals when the case is remanded.

Respondent makes the further argument that the judgment must be affirmed because, under the full faith and credit clause of the Constitution, the state courts of Delaware would be obliged to give effect to the New York statute. The argument rests mainly on the decision of this Court in *John Hancock Mutual Life Ins. Co.* v. *Yates*,

299 U. S. 178, where a New York statute was held such an integral part of a contract of insurance, that Georgia was compelled to sustain the contract under the full faith and credit clause. Here, however, § 480 of the New York Civil Practice Act is in no way related to the validity of the contract in suit, but merely to an incidental item of damages, interest, with respect to which courts at the forum have commonly been free to apply their own or some other law as they see fit. Nothing in the Constitution ensures unlimited extraterritorial recognition of all statutes or of any statute under all circumstances. *Pacific Employers Insurance Co.* v. *Industrial Accident Comm'n,* 306 U. S. 493; *Kryger* v. *Wilson,* 242 U. S. 171. The full faith and credit clause does not go so far as to compel Delaware to apply § 480 if such application would interfere with its local policy.

Accordingly, the judgment is reversed and the case remanded to the Circuit Court of Appeals for decision in conformity with the law of Delaware.

Reversed.

GRIFFIN, ADMINISTRATOR, *v.* McCOACH, TRUSTEE.

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

No. 755. Argued May 2, 1941.—Decided June 2, 1941.

1. The rules of conflict of laws which govern a federal court in diversity of citizenship cases are those of the State in which the federal court sits. *Klaxon Co.* v. *Stentor Mfg. Co., ante,* p. 487. P. 503.
2. A State may constitutionally decline to enforce in its courts, as contrary to its policy, a contract insuring the life of its citizen in favor of beneficiaries who have no insurable interest, though made in another State and valid where made; and such rule or policy binds the federal court exercising diverse citizenship jurisdiction in the State adopting it. P. 506.

3. In an action in a federal court in Texas to collect the amount of a life insurance policy which had been made in New York and later changed by instruments assigning beneficial interests, *held:* That the questions (1) whether the contract, notwithstanding the changes, remained a contract governed by the law of New York with respect to the rights of assignees, rather than by the law of Texas; and (2) whether the public policy of Texas permits of recovery by one named as beneficiary who has no beneficial interest in the life of the insured; and (3) whether lack of insurable interest becomes immaterial when the insurer acknowledges liability and pays the money into court—were questions of Texas law, to be decided according to Texas decisions. Pp. 504 *et seq.*

116 F. 2d 261, reversed.

CERTIORARI, 312 U. S. 676, to review a decree which affirmed a distribution of the proceeds of a life insurance policy among several contending claimants.

Mr. Charles J. Shaeffer, with whom *Mr. Jos. W. Bailey, Jr.* was on the brief, for petitioner.

Mr. Carl B. Callaway for respondent.

MR. JUSTICE REED delivered the opinion of the Court.

This is an action, begun in the United States District Court for the Northern District of Texas, by the personal representatives substituted for the heirs at law of Colonel Robert D. Gordon, who died a citizen and resident of Texas, against the Prudential Insurance Company of America to collect an insurance policy on the life of the decedent. The Company filed a bill of interpleader (49 Stat. 1096; 28 U. S. C. § 41 (26)) making the respondent John D. McCoach, Trustee, and other alleged claimants parties, and tendering the net amount due under the policy. The interpleader was allowed, the Company discharged from the litigation, and the interests of all parties to the suit, other than petitioner and respondent, disposed of by the decree in a manner to which no one objects here. The controversy still to be decided is as to whether the estate

or the Trustee is entitled to certain portions of the insurance. The circumstances giving rise to the issue follow.

Colonel Gordon, the insured, interested seven persons in Texas oil developments, including McCoach, the Trustee, in his individual capacity. They operated as a New York common law association called the Middleton Tex Oil Syndicate. The record here shows that "Prior to the issuing of the policy and thereafter, the members advanced considerable money to Gordon, and the premiums on the policy were paid by the members of the syndicate at Gordon's request, upon his agreement to repay the syndicate. Premiums were paid on the policy by the syndicate, in accordance with this agreement and were never repaid by Gordon." A term insurance policy was taken out by Gordon with the Syndicate named as beneficiary. When the policy was issued, and at all times subsequent until his death, Gordon was a citizen of Texas. The Syndicate originally had physical possession of the policy. Two years after its issuance the Syndicate ceased operations. In 1924, due to financial reverses, it ceased to do business and the members formed a new association called the Protection Syndicate. McCoach became and continues as Trustee of the Syndicate. It was organized "for the sole purpose" of paying the premiums on the policy and receiving and distributing the proceeds among the members. This it did until the insured's death. The beneficiary in the policy was changed to make the members of the Protection Syndicate the beneficiaries. By arrangement between the decedent and the members of the Protection Syndicate in 1934 a further change of beneficaries was made by which, in consideration of the insured's release of the right to change beneficiaries on presentation of the policy for endorsement, hitherto retained, one-eighth of the disability proceeds of the policy were to be paid the insured, and one-eighth of the death proceeds to his wife, and the remaining seven-eighths to the Trustee for the members of the Protection Syndicate.

"The application for the policy was signed by Gordon in the State of New York, and forwarded to the home office of the Prudential Insurance Company in the State of New Jersey, and there acted upon, and the policy was delivered in the State of New York." The later arrangement, by which Gordon and his wife became beneficiaries of one-eighth of the proceeds, was consummated by certain forms furnished by the Prudential and "transmitted . . . from Middletown, N. Y., to Tyler, Texas, for Colonel Gordon's signature. They were there executed by Colonel Gordon before a notary public in Tyler, Texas, and returned to Middletown, N. Y., where they were executed by the parties residing there, from whence they were sent by Schweiger [an agent of the Prudential and a member of the Syndicate], with the policy, to the home office at Newark, N. J., and subsequently the forms were indorsed on the policy and it was returned directly from New Jersey to the beneficiaries in New York."

Thereafter, three of the members of the Protection Syndicate separately assigned their interests in the policy to three individuals not previously interested in the transaction. These assignees paid their proportion of the premiums after the respective assignments.

The District Court decreed that Mrs. Gordon should receive her one-eighth and that the balance of the proceeds should be paid the Trustee for the benefit of the cross-defendants, members of the Protection Syndicate. The decree was based on a finding that the policy was a New York contract and that the subsequent changes were made in New Jersey and delivered in New York. Further, the District Court concluded that the relation of debtor and creditor existed between the members of the Syndicate and their assignees upon the one hand and the insured upon the other, and that therefore all the *cestuis que trustent* had an insurable interest in Colonel Gordon's life.

An appeal limited to the "correctness of the judgment of the trial court concerning the persons entitled to receive the assigned interests" was prosecuted on an agreed statement of the record under Rule 76 of the Rules of Civil Procedure. In the statement, petitioner sets out two points now relied upon for reversal. First: That the assignment and change of beneficiary was governed by the law of Texas; that the Trustee claimed only under the assignment; that beneficiaries must have an insurable interest under Texas law and that the assignees had none. Hence, the personal representative was entitled to recover their portions of the policy for the estate. *Wilke* v. *Finn,* 39 S. W. 2d 836. Second: That if the whole transaction was governed by the law of another state than Texas, in which other state an insurable interest was not required, the United States District Court sitting in Texas was bound by the public policy of Texas which forbids persons without an insurable interest to collect in Texas, as beneficiaries, the proceeds of insurance policies.

The Circuit Court of Appeals affirmed. 116 F. 2d 261. It held too that the policy was a New York policy, governed by the law of that state, and that, as the subsequent changes were made pursuant to agreements contained in the original policy, they did not amount to new contracts or change the governing law. Cf. *Aetna Life Insurance Co.* v. *Dunken,* 266 U. S. 389. The Court said:

"Under the terms of the policy, a New York contract, no restrictions were placed upon assignments relating to insurable interest. None was created by the laws of New York. Each of the assignments was executed and delivered in New York by residents of that state to other residents. They were New York contracts and valid under its laws. To apply the laws of Texas to the New York contracts would constitute an unwarranted extra-territorial control of contracts and regulation of business out-

side of Texas in disregard of the laws of New York; this is not changed by the trial of the suit in a court sitting in Texas."

As to the violation of the claimed public policy of Texas against beneficiaries with non-insurable interests, the Court of Appeals decided that the rule could not be applied where, as here, a "fair and proper insurable interest" existed when the policy was issued. 116 F. 2d 261, 264. Certiorari was sought and allowed, 312 U. S. 676, on the ground, among others, of a conflict between the instant case and *Sampson* v. *Channell,* 110 F. 2d 754, 759–62, where the First Circuit held that a United States court must apply the conflict of laws rules of the state where it sits.

For the reasons given in *Klaxon Company* v. *Stentor Electric Manufacturing Co., ante,* p. 487, we are of the view that the federal courts in diversity of citizenship cases are governed by the conflict of laws rules of the courts of the states in which they sit. In deciding that the changes made in the insurance contract left its governing law unaffected [1] and that the laws of Texas could not be applied to a foreign contract in Texas courts,[2] the federal courts were applying rules of law in a way which may or may not have been consistent with Texas decisions. Likewise it is for Texas to say whether its public policy permits a beneficiary of an insurance policy on the life of a Texas citizen to recover where no insurable interest in the decedent exists in the beneficiary. The opinion does not rest its conclusions upon its appraisal of Texas law or Texas decisions, but upon decisions of this Court inapplicable to this situation in the light of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, and *Ruhlin* v. *New York Life Insurance Co.,* 304 U. S. 202, 205.[3] The statement in the opinion "that it is im-

[1] Cf. *Miller* v. *Campbell,* 140 N. Y. 457; 35 N. E. 651.

[2] Cf. *Union Trust Co.* v. *Grosman,* 245 U. S. 412.

[3] Compare *Grigsby* v. *Russell,* 222 U. S. 149; *Connecticut Mutual Life Ins. Co.* v. *Schaefer,* 94 U. S. 457, relied upon below.

material, in so far as the decision of this case is concerned, whether the law of Texas or the law of New York be applied," we understand, from a reading of the whole opinion, to mean that, while an insurable interest is required in Texas and not in New York, the lack of insurable interest is immaterial in this case even in Texas because "the insurer acknowledged liability and paid the money into court. This being so, not only does the objection of wagers disappear, but also the claimed principle of public policy." But this is something to be decided according to Texas decisions, to none of which the opinion refers. Cf. *Wilke* v. *Finn,* 39 S. W. 2d 836; *Cheeves* v. *Anders,* 87 Texas 287; 28 S. W. 274. The decision must be reversed and remanded to the Circuit Court of Appeals for determination of the law of Texas as applied to the circumstances of this case.

In view of the holding quoted from the opinion below, *ante,* p. 502, that to apply the laws of Texas to New York contracts when Texas citizens were parties would constitute an unwarranted extraterritorial control of contracts and regulation of business, it seems necessary to examine that position, as it may be determined upon remand that these are foreign contracts and under Texas law unenforceable as contrary to the public policy of Texas, because the assignees have no insurable interest. It would then be necessary to decide whether the courts of Texas could constitutionally apply Texas law to a foreign contract, valid where made, because such contract is contrary to the state's public policy.[4] If the Circuit Court of Appeals was correct in its view that the Constitution foreclosed application of such a Texas public policy to this case, the only question open on remand would be whether the contract sued upon was a Texas contract.

But the cases relied upon in the Court of Appeals to

[4] Cf. *Sampson* v. *Channell,* 110 F. 2d 754, 759.

support its holding [5] do not in our opinion decide this question. *Overby* v. *Gordon* holds that the adjudication of a probate court of Georgia that the decedent was a resident of that state was a proceeding *in rem* and did not bind the courts of the District of Columbia in a suit to determine anew decedent's domicile. *New York Life Insurance Co.* v. *Head* passed upon the application, by Missouri courts, of Missouri statutes, providing for an extension of insurance on default of premium, to an insurance contract assumed as of Missouri, though the insured at the time of issue and thereafter was a citizen of New Mexico. A New York loan agreement subsequent to the issuance of the policy between the insured and the Company, a citizen of New York, provided for extension after default, which was contrary to the Missouri statutes. This Court held the Missouri statutes were ineffective because the New York loan agreement was beyond Missouri's jurisdiction. The point that Missouri might refuse enforcement because the agreement, valid in New York, was contrary to the public policy of the former, was not discussed. In *Bond* v. *Hume,* a few years later, this Court reserved the principle here in question.[6] The *Aetna* case denied the constitutional power of the Texas courts to apply a Texas statute allowing a penalty and attorneys' fees against the company in a suit on an insurance contract made in a foreign jurisdiction with a person then a citizen of Tennessee, because

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[5] *Overby* v. *Gordon,* 177 U. S. 214, 222; *New York Life Insurance Co.* v. *Head,* 234 U. S. 149; *Bond* v. *Hume,* 243 U. S. 15; *Aetna Life Insurance Co.* v. *Dunken,* 266 U. S. 389, 399.

[6] 243 U. S. at 25: "And of course we must not be understood as deciding whether the mere existence of a state statute punishing one who in bad faith, and because of such bad faith, had made an agreement to deliver in a contract of sale which would be otherwise valid, could become the basis of a public policy preventing the enforcement in Texas of contracts for sale and delivery made in another State which were there valid although one of the parties might have made the agreement to deliver in bad faith."

the "effect of such application would be to regulate business outside the State of Texas and control contracts made by citizens of other States in disregard of their laws under which penalties and attorney's fees are not recoverable." 266 U. S. at 399. The freedom from penalty and fee was deemed a part of the foreign contract and its effect on the public policy of Texas was not appraised.[7]

If upon examination of the Texas law it appears that the courts of Texas would refuse enforcement of an insurance contract where the beneficiaries have no insurable interest, on the ground of its interference with local law, such refusal would be, in our opinion, within the constitutional power of the Texas courts. Rights acquired by contract outside a state are enforced within a state, certainly where its own citizens are concerned; but that principle excepts claimed rights so contrary to the law of the forum as to subvert the forum's view of public policy. Cf. *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, 110; 120 N. E. 198. It is "rudimentary" that a state "will not lend the aid of its courts to enforce a contract founded upon a foreign law where to do so would be repugnant to good morals, would lead to disturbance and disorganization of the local municipal law, or in other words, violate the public policy of the State where the enforcement of the foreign contract is sought." *Bond* v. *Hume*, 243 U. S. 15, 21. Applying that reasoning, this Court affirmed the federal court in following Texas' decisions which refused to enforce a valid foreign contract of guarantyship against a married woman. *Union Trust Co.* v. *Grosman*, 245 U. S. 412. Likewise, state courts have been upheld in refusing to lend their aid to enforce

[7] Before *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, this Court decided as a matter of general law that where time of notice is important the foreign law governs. *Boseman* v. *Insurance Co.*, 301 U. S. 196, 202.

valid foreign contracts which required the doing of prohibited acts within the state of the forum. *Bothwell* v. *Buckbee, Mears Co.*, 275 U. S. 274, 278. Where this Court has required the state of the forum to apply the foreign law under the full faith and credit clause or under the Fourteenth Amendment, it has recognized that a state is not required to enforce a law obnoxious to its public policy. *Bradford Electric Co.* v. *Clapper*, 286 U. S. 145, 160, 161; *Hartford Indemnity Co.* v. *Delta Co.*, 292 U. S. 143, 150. The rule was not applied where the parties to the contract acquired rights beyond the state's borders with no relation to anything done or to be done within the borders. *Home Insurance Co.* v. *Dick*, 281 U. S. 397, 410.

In the *Head* case the foreign and local law differed as to the manner of extending insurance; in the *Aetna* case the difference arose from a local provision for attorney's fees and penalty; in the *Delta* case the time for notice varied in the two jurisdictions. In *New York Life Insurance Co.* v. *Dodge*, 246 U. S. 357, it was said that a statute of the state of the forum, regulating the application of insurance reserves in case of default of premium, was not effective, even though the insurance contract was a local contract and the insured a citizen of the state, to govern rights under a loan agreement made in a foreign jurisdiction. But these fall short of a public policy which protects citizens against the assumed dangers of insurance on their lives held by strangers. It is for the state to say whether a contract contrary to such a statute or rule of law is so offensive to its view of public welfare as to require its courts to close their doors to its enforcement.

Reversed.

MR. JUSTICE FRANKFURTER concurs in the result.

OKLAHOMA EX REL. PHILLIPS, GOVERNOR, *v.* GUY F. ATKINSON CO. ET AL.

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

No. 832. Argued May 6, 7, 1941.—Decided June 2, 1941.

1. The Denison Dam and Reservoir Project on the Red River in Oklahoma and Texas, authorized by the Act of June 28, 1938, is a valid exercise of the commerce power by Congress. P. 516.

   This is a multi-purpose project—part of a comprehensive scheme for controlling floods in the Mississippi River through reservoir control of its tributaries, of which the Red River is one of the more important. It aims also to protect and improve navigation of the Red River itself on its navigable stretches (which lie below the State of Oklahoma) by averting damaging floods and by regulating stream-flow; and it provides means for creating hydro-electric power, the disposition of which will offset some of the costs of the flood-control and of the stream-flow regulation.
2. The fact that portions of a navigable stream are no longer used for commerce does not dilute the power of Congress over them. P. 523.
3. Congress may control non-navigable parts of a river in order to preserve and promote commerce on the navigable parts. P. 523.
4. The power of Congress, under the Commerce Clause, to protect a navigable river from floods extends to the control of waters of its tributaries. P. 525.
5. The exercise of the granted power to regulate interstate commerce may be aided by appropriate and needful control of activities and agencies which, though intrastate, affect that commerce. P. 526.
6. It is for Congress alone to decide whether a particular project, by itself or as part of a more comprehensive scheme, will have such a beneficial effect on the arteries of interstate commerce as to warrant it. P. 527.

   It is not for the Court to determine whether the resulting benefits to commerce will outweigh the costs of the project. Nor may the Court inquire into the considerations or objectives which moved members of Congress to vote for the project.
7. Inclusion of the water-power feature in the Denison project, thereby increasing the height of the dam and the area of land to be

taken for the reservoir, did not exceed the authority of Congress. The project is basically one of flood-control including river-flow, and those functions are interrelated with the power function. P. 529.

8. Whether the work of flood-control would be better done by a dam of one design or another, was for Congress to determine. P. 533.
9. As respects the authority of Congress to adopt a plan for flood-control, it is not an objection that it will also serve other ends which may be relatively more important. P. 534.
10. The Tenth Amendment does not deprive the National Government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end. P. 534.
11. Construction of the Denison Dam and Reservoir does not interfere with the sovereignty of Oklahoma. P. 534.
12. The facts that land included in a federal reservoir project is owned by a State, or that its taking may impair the tax revenue of the State, and that the reservoir will obliterate part of the State's boundary, and that the State's own project for water development and conservation will be interfered with—constitute no barrier to condemnation of the land by the United States under its superior power of eminent domain. P. 534.

37 F. Supp. 93, affirmed.

APPEAL from a decree dismissing on motion a bill through which the State of Oklahoma sought to enjoin the construction, pursuant to an Act of Congress, of a dam and reservoir, upon the ground that the Act and the project exceeded the power of Congress and were contrary to the sovereign and proprietary rights of the State.

Messrs. C. C. Hatchett and *Randell S. Cobb,* First Assistant Attorney General of Oklahoma, with whom *Messrs. Mac Q. Williamson,* Attorney General, and *William O. Coe* were on the brief, for appellant.

Assistant Solicitor General Fahy, with whom *Assistant Attorney General Littell* and *Messrs. Warner W. Gardner* and *Richard H. Demuth* were on the brief, for respondents.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case involves primarily the constitutionality of the Act of June 28, 1938 (52 Stat. 1215) insofar as it authorizes the construction of the Denison Reservoir on Red River in Texas and Oklahoma.[1]

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[1] The Act provides in part:

"Sec. 4. That the following works of improvement for the benefit of navigation and the control of destructive floodwaters and other purposes are hereby adopted and authorized to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers in accordance with the plans in the respective reports hereinafter designated: *Provided*, That penstocks or other similar facilities adapted to possible future use in the development of hydroelectric power shall be installed in any dam herein authorized when approved by the Secretary of War upon the recommendation of the Chief of Engineers and of the Federal Power Commission.

. . . . . .

"The Denison Reservoir on Red River in Texas and Oklahoma for flood control and other purposes as described in House Document Numbered 541, Seventy-fifth Congress, third session, with such modifications thereof as in the discretion of the Secretary of War and the Chief of Engineers may be advisable, is adopted and authorized at an estimated cost of $54,000,000. . . .

. . . . . .

"The Government of the United States acknowledges the right of the States of Oklahoma and Texas to continue to exercise all existing proprietary or other rights of supervision of and jurisdiction over the waters of all tributaries of Red River within their borders above Denison Dam site and above said dam, if and when constructed, in the same manner and to the same extent as is now or may hereafter be provided by the laws of said States, respectively, and all of said laws as they now exist or as same may be hereafter amended or enacted and all rights thereunder, including the rights to impound or authorize the retardation or impounding thereof for flood control above the said Denison Dam and to divert the same for municipal purposes, domestic uses, and for irrigation, power generation, and other beneficial uses, shall be and remain unaffected by or as a result hereof. All such rights

The bill in equity was filed by the State of Oklahoma seeking to enjoin the construction of any dam across Red River within the domain of Oklahoma which would impound the waters of the Red River (or its tributary, Washita River) so as to inundate and destroy any of the lands, highways or bridges belonging to or under the jurisdiction and control of the state, or which would obliterate or interfere with its boundaries. The bill also seeks to restrain the institution or conduct in any court in Oklahoma of proceedings to condemn lands for the purpose of the dam or reservoir.[2]

The bill alleges that Oklahoma will be injured in the following manner by construction of the project: The greater part of the dam will rest on Oklahoma soil and will form a reservoir inundating about 150,000 acres of land, of which 100,000 acres are located in Oklahoma. Of those acres about 3,800 are owned by the state. The United States will acquire title to the inundated land. The land owned by the state is used for school purposes, for a prison farm, for highways, rights of way, and bridges. The basin to be inundated is inhabited by about 8,000 Oklahoma citizens. Much of the land is rich soil in a high state of

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are hereby saved and reserved for and to the said States and the people and the municipalities thereof, and the impounding of any such waters for any and all beneficial uses by said States or under their authority may be as freely done after the passage hereof as the same may now be done."

In October, 1939, the State of Oklahoma filed with this Court a motion for leave to file a bill of complaint seeking an injunction against the then Secretary of War from proceeding with the construction of this project. The motion for leave to file was denied by an equally divided court. *Oklahoma* v. *Woodring*, 309 U. S. 623.

[2] Appellees are Guy F. Atkinson Co., alleged to be constructing the dam under a contract with the War Department; and Cleon A. Summers and Curtis P. Harris, who as attorneys for the government are alleged to have instituted numerous condemnation suits for the purposes of the proposed reservoir.

cultivation. Much of it has large potential oil reserves. On some of it there are large producing oil wells and on other parts there are drilling operations and exploration for oil and gas. At least 15,000 acres will be highly productive oil lands and at least 50,000 acres are underlaid with oil and gas. There are thirty-nine school districts and townships in the four counties in which the affected area is located. Those governmental units are largely supported by *ad valorem* taxes. The taking of the 100,000 acres will decrease the taxable property in each of the counties and take virtually all of the taxable property in many of the townships and school districts. Each of these governmental units has a large bonded indebtedness payable from an annual levy of taxes. Inundation of the land will deprive those units of much of the tax revenue, so that many will be practically destroyed and the remainder seriously hampered. Since the state derives much of its revenue from a gross production tax on oil and gas, it will suffer great losses in tax revenues from the inundation of the oil and gas lands. The "annual wealth production" to the citizens of Oklahoma from the lands in the reservoir basin is about $1,500,000. Aside from such losses and losses from oil revenues and personal property taxation, the net taxable loss to the counties, townships and school districts will be about $40,000 annually.

It is also alleged that the construction of the dam will be a "direct invasion and destruction" of the sovereign and proprietary rights of Oklahoma in that: the boundary of Oklahoma will be obliterated for approximately 40 miles (see *Oklahoma* v. *Texas*, 260 U. S. 606); there will be a "forcible reduction of the area of plaintiff as one of the United States"; lands owned by it will be taken; its highways and bridges will be destroyed causing an interruption in communication between various parts of the state; the waters to be impounded belong to Oklahoma but will be taken from it without payment of just compensation;

those waters will be diverted from Oklahoma and will be run through turbines located in Texas for the generation of power for sale principally in Texas; the removal of citizens from the 100,000 acres of land will create a "serious social and economic problem," the burden of which will fall on Oklahoma for which no compensation is afforded.

The bill incorporates H. Doc. No. 541, 75th Cong., 3d Sess. (hereinafter called the Report), which contains the War Department's survey and recommendations on the Denison Reservoir and which served as the broad definition of the project which was authorized by the Act of June 28, 1938. The bill alleges that under the statutory scheme flood control and power purposes are "inextricably and inseverably involved." It alleges that, as described in the Report, the first 110 feet of the dam are to be used "solely and exclusively for the development of waterpower," while 40 feet "superimposed" on the power reservoir are to be used "solely and exclusively" for flood control. That is to say, from elevation 510 feet (sea level) to 590 feet there is to be a dead storage pool for waterpower head, from 595 feet to 620 feet there is to be a water power reservoir, and from 620 feet to 660 feet there is to be a flood-control reservoir. It is alleged that those purposes are "functionally separate and neither is the incidental or necessary result of the other"; that the same part of the reservoir will not and cannot be used for both flood control and waterpower purposes; and that the power portion of the dam is created at the expense of its utilization for flood control. The bill further alleges that as a result of the modification of the statutory plan set forth in the Report the dam is being constructed so as to provide dead storage for water head from 510 feet to 567 feet, a power pool reservoir from 587 feet to 617 feet, and a flood-control reservoir from 617 feet to 640 feet. It is alleged that by reason of that modification the reservoir

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will inundate 3,080,000 acre feet for power and 2,745,000 acre feet for flood control, as contrasted to 3,400,000 acre feet for power and 5,900,000 acre feet for flood control under the original plan;[3] and that, as a result, the statutory

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[3] In this connection it is alleged that under the statutory scheme 75% of the height of the dam is for power and 25% for flood control, and 37% of the acre feet inundated is for water storage for power and 63% for flood control, while under the modified plan 82% of the height of the dam is for power and 18% for flood control, and 53% of the acre feet inundated is for water storage for power and 47% for flood control.

The original plan or statutory scheme as set forth in the Report (H. Doc. No. 541, 75th Cong., 3d Sess., p. 45) was described therein as follows:

"The project plan as designed for the combined flood control and power-development scheme with top of dam at elevation 695 is based upon the following allocation of reservoir capacity, the volumes being given in round figures.

"(a) Dead storage.—Stream bed elevation 505 to lower power pool elevation 595, 1,400,000 acre feet.

"(b) Power pool storage.—Elevation 595 to elevation 620, 2,000,000 acre-feet.

"(c) Flood pool storage.—Elevation 620 to crest of spillway, elevation 660, 5,900,000 acre feet.

"(d) Detention flood storage.—Storage above the spillway crest, elevation 660, to the maximum reservoir surface reached by the impounded floodwaters, which in the case of the project flood would be 6,400,000 acre-feet for elevation 687."

Under § 4 of the Act of June 28, 1938, the Secretary of War and the Chief of Engineers were authorized to modify the project as it was described in the Report. A modification has been made. Definite Project for Denison Dam & Reservoir, Red River, Corps of Engineers, U. S. Army (not printed). Those changes were reported to a committee of Congress. Hearings, S. Subcom. on Appropriations, H. R. 6260, 76th Cong., 1st Sess., pp. 25–26, 201. Under the Definite Project (pp. 10–14) the following allocation of reservoir capacity has been made:

(a) *Dead Storage.* Stream bed elevation 505 to lower power pool elevation 587, 1,020,000 acre feet.

scheme has been changed from one preponderantly for flood control to one preponderantly for water power. It is also alleged that no part of the Red River in Oklahoma is navigable.

The bill alleges that the Act under which appellees are proceeding is unconstitutional in that it violates the Tenth Amendment, that it is not within the powers of Congress conferred by Art. I, § 8 of the Federal Constitution, and that since appellees are acting under a void and unconstitutional statute they should be enjoined. By an amendment to its bill, the State of Oklahoma also challenges the constitutionality of § 4 of the Act of October 17, 1940, c. 895, 54 Stat. 1198.[4] The amended bill alleges that the project "does not in any way protect or improve the navigable portions of the lower reaches of Red river or of the Mississippi river either by enriching the lower water flow . . . as the incidental result of the operation of said flood control and hydroelectric power project, except in the intangible, indirect, inconsequential and unsubstantial way" set forth in the Report; and that such inconsequential and intangible benefits to navigation as may result will flow from the flood control, not the power feature, of the project.

(b) *Power pool storage.* Elevation 587 to elevation 617, 2,060,000 acre feet.

(c) *Flood pool storage.* Elevation 617 to spillway crest, elevation 640, 2,745,000 acre feet.

(d) *Detention flood storage.* Elevation spillway crest, 640, to crest of dam, 670. Appellees on the basis of Definite Project, Appendix A, Plate A–23, place the acre feet at approximately 3,300,000 for elevation 662—the condition which, it is asserted, will exist in case of the maximum probable flood.

[4] That section provides: "The project for the Denison Reservoir on Red River in Texas and Oklahoma, authorized by the Flood Control Act approved June 28, 1938, is hereby declared to be for the purpose of improving navigation, regulating the flow of the Red River, controlling floods, and for other beneficial uses."

By motions to dismiss, the appellees asserted, *inter alia,* that the Acts of Congress so challenged were constitutional and valid. The case was heard by a three-judge court (Act of August 24, 1937, c. 754, § 3, 50 Stat. 751, 28 U. S. C. § 380a) which sustained the Act authorizing the project. 37 F. Supp. 93. From a judgment dismissing the complaint and denying the injunction, a direct appeal was taken to this Court.

We are of the view that the Denison Dam and Reservoir project is a valid exercise of the commerce power by Congress.

This project is a part of a rather recent chapter in the long history of flood control on the Mississippi River.[5] The Federal Government had concerned itself with the problems of navigation and flood control on that river long before [6] the establishment of the Mississippi River Commission (21 Stat. 37) in 1879. Earlier efforts towards a more comprehensive flood-control program on a national scale [7] were accelerated by the disastrous Mis-

[5] For a summary of various flood-control projects on the lower Mississippi, see Report of the Mississippi Valley Committee of the Public Works Administration (1934), pp. 207 *et seq.;* Elliott, The Improvement of the Lower Mississippi River for Flood Control & Navigation (1932), pp. 1–21; Frank, The Development of the Federal Program of Flood Control on the Mississippi River (1930); Beman, Flood Control (1928).

And see H. Doc. No. 541, 75th Cong., 3d Sess., p. 3; Fly, The Role of the Federal Government in the Conservation and Utilization of Water Resources, 86 U. Pa. L. Rev. 274; Kerwin, Federal Water-Power Legislation (1926).

For bibliography, see H. Com. Doc. No. 4, 70th Cong., 1st Sess.

[6] See Elliott, *op. cit.,* pp. 1–21; S. Ex. Doc. No. 20, 32d Cong., 1st Sess.; S. Ex. Doc. No. 8, 40th Cong., 1st Sess.; H. Ex. Doc. No. 127, 43 Cong., 2d Sess. For the history and work of the Mississippi River Commission, see H. Rep. No. 1072, 70th Cong., 1st Sess., pp. 334–354.

[7] See, for example, the so-called First Flood Control Act of March 1, 1917, c. 144, 39 Stat. 948.

sissippi flood in 1927. The agitation and concern over that disaster [8] led to the enactment of the Flood Control Act of May 15, 1928 (45 Stat. 534), § 10 of which provided that the Secretary of War should submit to Congress "at the earliest practicable date projects for flood control on all tributary streams of the Mississippi River system subject to destructive floods which projects shall include: The Red River and tributaries . . ." That section of the Act also required a report on the effect on flood control of the lower Mississippi to be attained through the use of a reservoir system, the "benefits that will accrue to navigation and agriculture" from the prevention of siltage and erosion, the "prospective income from the disposal of reservoired waters," and "inquiry as to the return flow of waters placed in the soils from reservoirs, and as to their stabilizing effect on stream flow as a means of preventing erosion, siltage, and improving navigation." Pursuant to that authorization and direction, a report (H. Doc. No. 378, 74th Cong., 2d Sess.) was submitted on December 2, 1935, dealing at great length with the problems of the Red River and its tributaries, and their relationship with the Mississippi.

On June 22, 1936, there was enacted [9] the Flood Control Act of 1936 (49 Stat. 1570). Sec. 1 of that Act set

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[8] H. Rep. No. 1072, 70th Cong., 1st Sess.; H. Doc. No. 90, 70th Cong., 1st Sess.; Hearings, H. Comm. on Flood Control, 70th Cong., 1st Sess., on The Mississippi River and its Tributaries; Hearings, S. Comm. on Commerce, 70th Cong., 1st Sess., on Flood Control of the Mississippi River.

And see Hoover, The Improvement of our Mid-West Waterways, 135 Annals, No. 224, p. 15.

[9] See Hearings, S. Subcom. on Commerce, 74th Cong., 2d Sess., on S. 3531; Hearings, H. Comm. on Flood Control, 74th Cong., 2d Sess., on S. 3531; Hearings, S. Comm. on Commerce, Ex. Sess. 74th Cong., 2d Sess., on H. R. 8455; S. Rep. No. 1963, 74th Cong., 2d Sess.; H. Rep. No. 2918, 74th Cong., 2d Sess.; H. Rep. No. 2583, 74th Cong., 2d Sess.; S. Rep. No. 1662, 74th Cong., 2d Sess.

forth a broad Congressional policy, stating, *inter alia*, that "the Federal Government should improve or participate in the improvement of navigable waters or their tributaries, including watersheds thereof, for flood-control purposes if the benefits to whomsoever they may accrue are in excess of the estimated costs, and if the lives and social security of people are otherwise adversely affected" and that "destructive floods upon the rivers of the United States, upsetting orderly processes and causing loss of life and property, including the erosion of lands, and impairing and obstructing navigation, highways, railroads, and other channels of commerce between the States, constitute a menace to national welfare." That Act authorized the construction of various flood-control projects. By § 7 of that Act the Secretary of War was authorized and directed to continue the investigation of other projects, including the Denison Reservoir, where "opportunities appear to exist for useful flood-control operations with economical development of hydroelectric power whenever sufficient markets to absorb such power become available."

Following the disastrous Ohio River flood in January, 1937, the House Committee on Flood Control requested [10] the Chief of Engineers to submit "comprehensive plans for protective works against floods in the Ohio Valley" and plans "to further insure protection in the Mississippi Valley." He submitted a report pursuant to that direction, and recommended the construction of 45 flood-control reservoirs on the tributaries of the Ohio and 24 on other tributaries of the Mississippi, including the Red River.[11] As to the proposed Denison Reservoir, he stated that it "would remove the threat of the coincidence of a

[10] The resolution is set forth in Com. Doc. No. 1, H. Comm. on Flood Control, 75th Cong., 1st Sess., p. 1.

[11] Com. Doc. No. 1, *op. cit.*, p. 11.

large flood from the Red with a flood in the Mississippi, and would also afford highly desirable protection to the fertile bottom lands in the lower Red River Valley. Besides its flood-control benefits, it has valuable potentiality for power purposes." [12] And he added: "On the Red River . . . investigations indicate that a flood far exceeding any of record is distinctly possible. The Denison Reservoir would prevent such a flood from reaching disastrous proportions in the valley below it." [13]

On March 12, 1938, the Acting Secretary of War transmitted to Congress a report from the Chief of Engineers, United States Army, pursuant to the direction contained in § 7 of the Flood Control Act of 1936. That Report, being the one here involved, (H. Doc. No. 541, 75th Cong., 3d Sess.) recommended the construction of a dam near Denison, Texas, for the combined purpose of flood control and development of hydroelectric power. After hearings,[14] Congress passed the Flood Control Act of 1938, here challenged, which authorized,[15] *inter alia,* the Denison project on the basis of the Report and at an estimated cost of $54,000,000. This was followed by appropriations for the construction work [16] and by the

[12] Com. Doc. No. 1, *op. cit.*, pp. 7–8.

[13] Com. Doc. No. 1, *op. cit.*, p. 8. The Chief of Engineers, United States Army, on February 12, 1935, had submitted a special report to the House Committee on Flood Control, entitled Flood-Control Works in the Alluvial Valley of the Mississippi River, Com. Doc. No. 1, 74th Cong., 1st Sess. And see the Message by President Roosevelt to Congress June 3, 1937, 81 Cong. Rec., pt. 5, 75th Cong., 1st Sess., p. 5280.

[14] Hearings, House Comm. on Flood Control on H. R. 10618, 75th Cong., 3d Sess., pp. 605–686.

[15] Sec. 4 of that Act is set forth in part in note 1, *supra.*

[16] Act of June 28, 1939, c. 246, 53 Stat. 856; Act of June 24, 1940, c. 415, 54 Stat. 505. See H. Rep. No. 604, 76th Cong., 1st Sess., p. 4; Hearings, S. Subcom. on Appropriations on H. R. 6260, 76th Cong., 1st Sess., p. 13.

Act of October 17, 1940, also challenged by appellant, declaring the Denison Reservoir to be "for the purpose of improving navigation, regulating the flow of the Red River, controlling floods, and for other beneficial uses." [17] Thus, while the Report spoke of the dam as a "dual purpose" project, Congress did not so limit it but authorized it for multiple purposes.

From this history it is plain that this project, which is part of a comprehensive flood-control plan, is designed to control the watershed of one of the principal tributaries of the Mississippi in alleviation of floods in the lower Red River and Mississippi valleys. The Red River, sixth in length among rivers in the United States, has one of the largest watersheds in the country, draining an area about 50 per cent larger than New England—an area of 91,430 square miles, of which 38,291 square miles are above the dam site.[18] It rises near the east edge of New Mexico, flows easterly about 850 miles across the Texas Panhandle and between the States of Oklahoma and Texas to Fulton, Arkansas. From there it flows south and southeast some 460 miles and enters the Mississippi at Red River Landing. The site of the Denison dam is 228 miles up the river from Fulton. The contribution which the Red River makes to disastrous floods in its basin and in the lower Mississippi has long been recognized. Huge crop damage, the loss of buildings, bridges and livestock, pollution of fertile fields, the erosion of rich farm lands, bank cavings, interruption of navigation, injury of port facilities, the creation of sand bars in the channels, interruption or stoppage of interstate transportation by rail, truck and motorcar, disease, pestilence and death, relief of the homeless and destitute—all these are now familiar costs of the floods on the Missis-

[17] See note 4, *supra*.

[18] Report, p. 17.

sippi.[19] And the history of the Red River valley shows that it has long been plagued by such disasters and burdened by their costs.[20]

Floods pay no respect to state lines.[21] Their effective control in the Mississippi valley has become increasingly a subject of national concern,[22] in recognition of the fact

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[19] As respects the January, 1937 Ohio River flood, the Chief of Engineers reported in April, 1937: "The river rose to a height of 80 feet above low water at Cincinnati, being nearly 9 feet above any flood heretofore of record. The resulting damage was enormous. Practically every community along the entire river suffered heavy loss. Water, electricity, and gas services were discontinued in many cities. More than 500,000 persons were driven from their homes and suffered great discomfort and distress. Highway and railway communications were severed and business and industrial activities were completely disrupted for several weeks. Relief agencies were taxed to the utmost to provide for the flood refugees. Although the direct damages have not yet been fully ascertained, they may conservatively be estimated at more than $400,000,000. The War Department expended more than $5,000,000 in relief work and in providing supplies and materials for the flood areas, and approximately $5,000,000 for emergency work to protect existing structures. The Works Progress Administration provided labor and services. The relief activities of the American Red Cross aggregated more than $7,500,000. The expenditures of the Federal Government and of the Red Cross for rehabilitation will add greatly to the expenditures already made." Com. Doc. No. 1, H. Comm. on Flood Control, 75th Cong., 1st Sess., p. 3. And see H. Doc. No. 90, 70th Cong., 1st Sess., p. 2; H. Rep. No. 1072, 70th Cong., 1st Sess.; H. Doc. No. 455, 76th Cong., 1st Sess.; H. Doc. No. 91, 76th Cong., 1st Sess.; H. Rep. No. 616, 64th Cong., 1st Sess.; Thomas, Hungry Waters (1937).

[20] See H. Doc. No. 378, 74th Cong., 2d Sess., pp. 372 *et seq.;* Report, pp. 29, 70–71, 84–87, 88, 94.

[21] The flood protection afforded by Denison Reservoir will accrue to four states: two-fifths to Louisiana, and one-fifth each to Oklahoma, Texas, and Arkansas. Report, p. 11. And see Report of the Mississippi Valley Committee of the Public Works Administration (1934).

[22] National Resources Board, Report 1934, pp. 26–30, 325–329; National Resources Committee, Drainage Basin Problems and Programs

that single states are impotent to cope with them effectively. The methods of dealing with them have elicited a contrariety of views.[23]

The idea of reservoir control on the tributaries of the Mississippi is not new. The Ellet report[24] to the War Department in 1852 urged the making of surveys for the installation of reservoirs on the Red River and other tributaries which would serve the "double purpose" of "keeping back the floods" and relieving "summer navigation from obstruction, by allowing the surplus so retained, to pass down in the season of low water."[25] The emergence in recent years of comprehensive plans for reservoirs in the Mississippi river basin[26] marks the development of an integrated system designed not only to alleviate, ultimately, flood conditions on the Mississippi itself, but also to avoid or reduce local flood disasters. A part of the local benefits of flood control is frequently

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(1936), pp. 73–77; H. Doc. No. 306, Ohio River, 74th Cong., 1st Sess.; S. Rep. No. 891, 64th Cong., 2d Sess.

On forest and flood relationships in the Mississippi river watershed, see H. Doc. No. 573, 70th Cong., 2d Sess., pp. 57 *et seq.* S. Doc. No. 12, 73d Cong., 1st Sess., pp. 299 *et seq.*; pp. 1509 *et seq.*

[23] H. Rep. No. 1072, 70th Cong., 1st Sess., pp. 5–16. And see *United States* v. *Sponenbarger*, 308 U. S. 256; H. Doc. No. 90, 70th Cong., 1st Sess.; S. Doc. No. 1094, 62d Cong., 3d Sess.; S. Rep. No. 1662, 74th Cong., 2d Sess.; H. Rep. No. 2583, 74th Cong., 2d Sess.

[24] S. Ex. Doc. No. 20, 32d Cong., 1st Sess., pp. 13, 99, *et seq.* And see the review of the ideas for reservoirs contained in Final Report, National Waterways Commission, S. Doc. No. 469, 62d Cong., 2d Sess., App. II; National Waterways Comm., Doc. No. 14, Jan. 1910; H. Doc. No. 1289, 62d Cong., 3d Sess.

[25] S. Ex. Doc. No. 20, 32d Cong., 1st Sess., p. 102.

[26] See H. Doc. No. 259, 74th Cong., 1st Sess.; Nat. Res. Com., Drainage Basin Problems and Programs (1938); H. Doc. No. 798, 71st Cong., 3d Sess., Vol. 2; H. Rep. No. 1072, 70th Cong., 1st Sess., pp. 101–109; H. Doc. No. 395, 73d Cong., 2d Sess., Pt. 5; H. Rep. No. 1100, 70th Cong., 1st Sess., p. 14; H. Rep. No. 1120, 75th Cong., 1st Sess.

protection of navigation in the tributary itself. That is present here to a degree. It is true that "no part of the [Red] river within Oklahoma is navigable." *Oklahoma* v. *Texas,* 258 U. S. 574, 591. Though appellant alleged that the stream is not now a navigable river of the United States, it has heretofore been authoritatively determined that in years past "the usual head of navigation" was Lanesport, Arkansas, near the Oklahoma boundary. *Id.,* p. 589. At the present time, commerce on the Red River is limited to the section below Alexandria, Louisiana, 122 miles above its mouth.[27] The fact that portions of a river are no longer used for commerce does not dilute the power of Congress over them. *Economy Light & Power Co.* v. *United States,* 256 U. S. 113, 123; *United States* v. *Appalachian Power Co.,* 311 U. S. 377, 409–410. And it is clear that Congress may exercise its control over the non-navigable stretches of a river in order to preserve or promote commerce on the navigable portions. *United States* v. *Rio Grande Dam & Irrigation Co.,* 174 U. S. 690, 703, 706, 708; *United States* v. *Utah,* 283 U. S. 64, 90. It is obvious that, at least incidentally, Congress has done precisely that in this case. Congress was not unmindful of the effect of this project on the navigable capacity of the river. In authorizing it, Congress exercised all the power it possessed to control navigable waters. The Acts in question contain a declaration that one of their purposes is to improve navigation. And the Report clearly shows that the Denison Reservoir will have at least an incidental effect in protecting or improving the navigability of portions of the Red River. The District Engineer reported that "Inasmuch as any new navigation system for the Red River would require flow regulation to furnish a dependable navigable improvement, the Denison

[27] Report, pp. 2–3; and see p. 65.

Reservoir would be of considerable benefit." [28] In his view, it would decrease bank caving and silt carriage, substitute "moderately high stages of long durations for high-flood stages of short duration," "furnish more dependable navigable stages especially in the upper portions of the navigation pools," [29] and have a "favorable effect on open-channel navigation by reducing flood stages and increasing low-water flows." [30] The Division Engineer expressed the view that a "dependable low-water flow of 2,200 to 3,000 cubic feet per second which would result from construction and operation of the power project at Denison would be of distinct benefit to the small commerce now developed upon those reaches of the lower Red River which are included in approved navigation projects, and might have a material bearing upon future studies of the Red River with a view to its further improvement. In the present state of knowledge upon this point, it is necessary to classify these benefits among the intangibles. But there is no doubt that a dependable low water supply would simplify, perhaps materially, such future development of the river as may be undertaken." [31] Thus the effect on the river is tangible, though the value may be uncertain [32] since it de-

[28] Report, p. 67. And see p. 72.

[29] *Id.*, p. 67.

[30] *Id.*, p. 68.

[31] Report, pp. 79–80. The initial project for improvement of navigation on the Red River was authorized in 1828. Federal expenditures to June 30, 1936, exceeded $4,000,000. *Id.*, p. 3.

[32] As to the intangible benefits from flood control see H. Doc. No. 455, 76th Cong., 1st Sess., entitled Value of Flood Height Reduction from Tennessee Valley Authority Reservoirs to the Alluvial Valley of the Lower Mississippi River; H. Doc. No. 91, 76th Cong., 1st Sess., pp. 22 *et seq.*, entitled The Chattanooga Flood Control Problem; Cooke, On the Relations of Engineering Science to Flood Control, 84 Science (Supp.) 40.

pends in part on future action of Congress. But that is not our concern.

We would, however, be less than frank if we failed to recognize this project as part of a comprehensive flood-control program for the Mississippi itself. But there is no constitutional reason why Congress or the courts should be blind to the engineering prospects of protecting the nation's arteries of commerce through control of the watersheds. There is no constitutional reason why Congress cannot, under the commerce power, treat the watersheds as a key to flood control on navigable streams and their tributaries. Nor is there a constitutional necessity for viewing each reservoir project in isolation from a comprehensive plan covering the entire basin of a particular river. We need no survey to know that the Mississippi is a navigable river. We need no survey to know that the tributaries are generous contributors to the floods of the Mississippi. And it is common knowledge that Mississippi floods have paralyzed commerce [33] in the affected areas and have impaired navigation itself. We have recently recognized that "Flood protection, watershed development, recovery of the cost of improvements through utilization of power are . . . parts of commerce control." *United States* v. *Appalachian Power Co., supra,* p. 426. And we now add that the power of flood control extends to the tributaries of navigable streams. For, just as control over the non-navigable parts of a river may be essential or desirable in the interests of the navigable portions,

[33] As respects benefits from flood height reduction to railroads and highways, see H. Doc. No. 455, 76th Cong., 1st Sess., pp. 21–27; Report, App. H. (not printed) §§ 8–10, 16; H. Doc. No. 378, 74th Cong., 2d Sess., pp. 35–36, 264–265, 372–373; H. Rep. No. 1072, 70th Cong., 1st Sess., pp. 224–228, 246–248; Hearings, S. Comm. on Commerce, Ex. Sess., 74th Cong., 2d Sess., on H. R. 8455, pp. 71–72, 307. For a full account of flood damage to railroads see: Bull., Amer. Ry. Eng. Assn. (1928) Vol. 29, No. 303, pt. 2.

so may the key to flood control on a navigable stream be found in whole or in part in flood control on its tributaries. As repeatedly recognized by this Court from *M'Culloch* v. *Maryland*, 4 Wheat. 316, to *United States* v. *Darby*, 312 U. S. 100, the exercise of the granted power of Congress to regulate interstate commerce may be aided by appropriate and needful control of activities and agencies which, though intrastate, affect that commerce.

It is, of course, true that the extent to which this project will alleviate flood conditions in the lower Mississippi is somewhat conjectural. The District Engineer estimated that the Denison project would cause a reduction of 35,000 cubic feet per second in the lower Mississippi in case the May, 1908, flood were repeated; 8,000 cubic feet per second, in case of the May, 1935, flood; and 100,000 cubic feet per second, in case of the estimated maximum probable flood.[34] But the Division Engineer pointed out that "the magnitude of the effect would depend upon the size and origin of the concurrent flood in Red River, and upon the basis of reservoir operation." [35] In his view, a reduction in flow of 35,000 cubic feet per second in case of such a flood as 1908 "if long enough sustained, would imply a reduction in stage averaging 1.3 feet between Alexandria and Moncla, and a reduction of 0.15 foot in the flow lines of the Atchafalaya Basin and the main river below Old River, provided they were at peak stage. At lower stages the effect would be greater, but less necessary." [36] This matter was again reviewed in the Definite Project and the following observations were made:[37] "Floods in the Missis-

[34] Report, p. 74. Cf. H. Doc. No. 798, 71st Cong., 3d Sess., Vol. 2, Annex 18, pp. 1496–1498.

[35] Report, p. 86.

[36] *Id.*, p. 86.

[37] Definite Project, App. D., p. 7. As respects the relation of the Mississippi River as a commerce carrier to flood control, see H. Rep. No. 1072, 70th Cong., 1st Sess., p. 359.

sippi River usually occur in the spring as a result of flood flows out of the Ohio River. The coincidence of flood flows out of the Red River with the Mississippi River spring floods is rare. However, the early summer floods out of the Missouri River occasionally coincide in the Mississippi River with the summer floods out of the Red River. The control provided by the proposed Denison Dam and Reservoir on the Red River summer floods has been estimated to produce a reduction of approximately 0.6 foot at the mouth of Old River on the Mississippi. This reduction, while not substantial with respect to Mississippi flood stages, is important when flood crests seriously tax the Mississippi levee system."

Such matters raise not constitutional issues but questions of policy. They relate to the wisdom, need, and effectiveness of a particular project. They are therefore questions for the Congress, not the courts. For us to inquire whether this reservoir will effect a substantial reduction in the lower Mississippi floods would be to exercise a legislative judgment based on a complexity of engineering data. It is for Congress alone to decide whether a particular project, by itself or as part of a more comprehensive scheme, will have such a beneficial effect on the arteries of interstate commerce as to warrant it. That determination is legislative in character. Cf. *United States* v. *Appalachian Power Co., supra,* p. 424. The nature of the judgment involved is reëmphasized if this project is viewed not in isolation but as part of a comprehensive, integrated reservoir system in the Mississippi River basin. A War Department survey in 1935 reveals promising engineering prospects in a system of 157 reservoirs[38] throughout the tributaries of the Mississippi. To say that no one of those projects could be constitutionally authorized because its separate effect on floods in

[38] H. Doc. No. 259, 74th Cong., 1st Sess.

the Mississippi would be too conjectural would be to deny the actual or potential aggregate benefits of the integrated system as a whole. That reveals the necessity, from the constitutional viewpoint, of leaving to Congress the decision as to what watersheds should be controlled (and what methods should be employed) in order to protect the various arteries of interstate commerce from the disasters of floods.

Nor is it for us to determine whether the resulting benefits to commerce as a result of this particular exercise by Congress of the commerce power outweigh the costs of the undertaking. *Arizona* v. *California,* 283 U. S. 423, 456–457; *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 329–330. Nor may we inquire into the motives of members of Congress who voted for this project, in an endeavor to ascertain whether their concern over the great national loss from soil erosion, the enormous crop damages, the destruction of homes, the loss of life and other like ravages of floods, overshadowed in their minds the desirability of protecting the Mississippi and other arteries of commerce. *Arizona* v. *California, supra,* p. 455, and cases cited. It is sufficient for us that Congress has exercised its commerce power, though other purposes will also be served. *Id.,* p. 456.

But Oklahoma points out that the Denison Reservoir is a multiple-purpose project,[39] combining functionally and physically separate and unrelated purposes. It says that only the top 40 feet of the dam is set apart for flood control and that the lower portions of the dam are designed for the power project and are neither useful nor necessary for flood control. It points out from the Report[40] that a reservoir for flood control only would have

[39] On functional aspects of multiple-purpose dams, see note 45, *infra.*

[40] P. 42. In this connection, it should be noted that the District Engineer recommended that a dam for flood control only would be

a maximum height of 165 feet, while a reservoir for flood control and power development would require a maximum height of 185 feet. It therefore earnestly contends that the additional 20 feet in height of the dam requires a very much greater acreage of appellant's domain than would a project for flood control only. And it insists that Congress is without authority to authorize a taking of Oklahoma's domain for the construction of the water power feature of the project.

There are several answers to these contentions. We are not concerned here with the question as to the authority of the federal government to establish on a nonnavigable stream a power project which has no relation to, or is not a part of, a flood-control project. While this reservoir is a multiple-purpose project, it is basically one for flood control. There is no indication that but for flood control it would have been projected. It originated as part of a comprehensive program for flood control. And the recommendation in the Report that a dual purpose dam be constructed was based "on the assumption that the flood-control project is to be built in any event." [41] See *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 73. Furthermore, it is plain from the Report that the construction of the project so as to accommodate power will increase or augment some of the flood-control benefits, including river flow, which would accrue were the dam to be erected for flood control only. Thus, the District Engineer stated: "If it were con-

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at elevation 675, while the multiple-purpose dam would be at elevation 695. Report, p. 42. The Division Engineer, however, stated that a restudy indicated "that in the case of the flood-control-only project greater economy would result from narrowing the spillway to 1500 feet and raising the crest of the dam to elevation 681 feet." *Id.*, p. 80.

[41] P. 94.

structed solely for flood control it would have beneficial effects in reducing floods, decreasing bank caving and silt carriage, and in substituting moderately high stages of long durations for high-flood stages of short duration. If the Denison Reservoir were constructed for the dual purposes of flood control and power development, these beneficent effects would be augmented by those resulting from the regulated power discharge which would increase low-water flows and furnish more dependable navigable stages especially in the upper portions of the navigation pools." [42]

It is true that the power phase of this project in purpose and effect will carry some of the costs of flood control. The Division Engineer estimated that the annual deficit of $287,000 from flood control would be offset by an annual profit of $404,310 from power, leaving an annual net profit of $117,000.[43] But the fact that Congress has introduced power development into this project as a paying partner [44]

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[42] Report, p. 67.

[43] *Id.*, p. 94.

[44] As stated in Report of the Mississippi Valley Committee of the Public Works Administration (1934), p. 23:

"Navigation is particularly benefited by reduction of flood crests, and all of the possibilities of water use are improved by increases in flow at extreme low stages. Under certain favorable circumstances it may be possible to release water from flood-control reservoirs to satisfy requirements for hydroelectric power development at the dam, or to regulate the flow down stream to the advantage of a variety of water uses. In such cases equitable distribution of costs among the several purposes served may even sufficiently reduce the costs chargeable to flood protection to warrant the construction of flood-control reservoirs which could not be justified for flood protection alone."

And see Fly, The Role of the Federal Government in the Conservation and Utilization of Water Resources, 86 U. Pa. L. Rev. 274, 286 *et seq.;* Message by President Taft, August 24, 1912, 48 Cong. Rec., pt. 11, 62d Cong., 2d Sess., p. 11796, vetoing a bill authorizing the building of a dam across Coosa River, Alabama, by a private company; S. Doc. No. 246, 64th Cong., 1st Sess.

does not derogate from the authority of Congress to construct the dam for flood control, including river flow. The power project is not unrelated to those purposes.[45] The allocations of cost [46] and storage between power and flood control, however significant for some purposes, cannot conceal the flood-control realities of this total project. Cost of the power project, roughly speaking, was determined by the cost of the multiple-purpose dam less the cost of a dam for flood control only.[47] On that basis the Report points out that the cost of storage for flood control only (5,800,000 acre-feet) is about $6.60 per acre-foot, while the cost of the 3,500,000 acre-feet in the so-called power pool is around $2 per acre-foot, exclusive of the cost of the powerhouse and appurtenant construction.[48] In this connection, the Definite Project states that the "amount of storage which can be economically allocated to the production of power depends on the ability of the power market to absorb the power during the useful life of the project." [49] But the Division Engineer observed that

[45] On the relationships between the multiple purposes of water control see Report of the Mississippi Valley Committee of the Public Works Administration (1934), pp. 20–24; Alvord & Burdick, Relief from Floods (1918), pp. 28–36; Clemens, The Reservoir as a Flood-Control Structure (1935), 100 Am. Soc. of Civ. Engs. 879; H. Doc. No. 1792, 64th Cong., 2d Sess., p. 5.

And see Nat. Res. Com., Water Planning (1938); Nat. Res. Com., Energy Resources & National Policy (1939), p. 306.

[46] Cf. Hamilton, Cost as a Standard for Price, 4 Law & Cont. Problems (1937), 321, 325.

[47] Report, pp. 60, 64.

[48] Report, p. 82.

[49] Definite Project, p. 11. The District Engineer stated in the Report, p. 32: "A hydroelectric development alone at the Denison Reservoir site could not absorb all of the reservoir costs and produce power in competition with that from fuel-consuming plants. However, the combination of flood control and power development in the Denison Reservoir presents certain promise of favorable economic feasibility.

"In actual operation of the dual-purpose project this cheap storage would be dedicated to flood control, whereas in the financial set-up it is credited to power." [50] It is clear from the Report [51] and the Definite Project, that the bottom pool of dead storage is designed to take care of the deposit of silt "which would otherwise reduce the efficiency and economic worth of the flood control storage." [52] At the same time, it will effectively provide waterpower head. And so far as the power storage is concerned, the Definite Project makes plain that it is functionally related to the broad objectives of flood control. The operation of the reservoir will involve a consideration of its multiple purposes.[53] Its operation in periods of drought so as to regularize the flow below the dam;[54] the reduction in reservoir outflow in case of floods down the valley; the increase of the outflow, in case of impending floods from above the dam, to the maximum "bank full capacity downstream of the dam, so that the maximum amount of flood control storage will be available when the peak of the

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Although this reservoir would approach economic justification if constructed exclusively for flood control, the income from power developed in conjunction with flood control would in part absorb this deficiency since the value of the available power would be somewhat in excess of its cost. It is apparent that the relative amounts of annual return, flood benefits, or power revenues, from each of the two functions of a dual-purpose development are quantitively dependent upon the manner in which storage potentialities of the site are apportioned between these two functions. It is believed, however, that an increased allocation of such storage to flood control at the expense of power would not materially alter the above conclusion except perhaps to show economic deficiencies for both phases of the development."

[50] Report, p. 82.

[51] *Id.*, pp. 45–46.

[52] Definite Project, pp. 10–11, App. F., p. 5. And see Hearings, H. Comm. on Flood Control, 75th Cong., 3d Sess., p. 641.

[53] Definite Project, p. 26.

[54] *Id.*, App. F., p. 7; Report, p. 67.

flood reaches the reservoir, thereby reducing the peak outflow of the reservoir to a minimum" [55]—these are ample evidence that the power features and the flood-control features of the dam, including river flow, are not unrelated. They demonstrate that, in operation of the dam, the several functions will be interdependent, and that the conflicts between the respective requirements of flood control and power development are here more apparent than real.[56] They show that this is nonetheless a flood-control project which will "fully control the maximum flood of record," [57] though power, it is hoped, will pay the way. Whether the work of flood-control, including river flow, would be better done by a dam of one design or another is for Congress to determine. And, as we have said, the

[55] Definite Project, pp. 26, 12.

[56] It was noted in Nat. Res. Com., Energy Resources & National Policy (1939), p. 276, that:

"The most obvious and most discussed conflict of purpose in use of water resources relates to flood control and power. Since flood control is of great urgency in so many basins, one may appear to demolish all concept of wisdom in production of water power by the pat observation that an empty reservoir will not run turbines and a full reservoir will not catch floods. With respect to a particular reservoir, the observation is in point, but it is not thereby conclusive. That one reservoir might be reserved for flood control and another on the same stream used for power probably stumps no one. Neither should it stump anyone that part of a single reservoir be reserved for flood and part be used for power. Indeed, it would often cost less to provide flood-control space in the same reservoir with power space than to build a separate reservoir. And it should not be forgotten that storage to prevent the ordinarily low flow of dry seasons is itself flood prevention in that better sustained ordinary flow tends to maintain clear channels. If the conflict really were irreconcilable, we should be forced to abolish private water-power plants on every stream system requiring flood control. If private power and public flood control may harmonize, one may believe the same of public power and public flood control."

And see The Norris Project (1940), ch. 8.

[57] Report, p. 88.

fact that ends other than flood control will also be served, or that flood control may be relatively of lesser importance, does not invalidate the exercise of the authority conferred on Congress. *Kaukauna Water Power Co.* v. *Green Bay & Mississippi Canal Co.*, 142 U. S. 254, 275, 276; see *In re Kollock*, 165 U. S. 526, 536; *Weber* v. *Freed*, 239 U. S. 325, 329–330; *Arizona* v. *California*, *supra*, p. 456.

The Tenth Amendment does not deprive "the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." *United States* v. *Darby*, *supra*, p. 124, and cases cited. Since the construction of this dam and reservoir is a valid exercise by Congress of its commerce power, there is no interference with the sovereignty of the state.[58] *United States* v. *Appalachian Power Co.*, *supra*, p. 428. The fact that land is owned by a state is no barrier to its condemnation by the United States. *Wayne County* v. *United States*, 53 Ct. Cls. 417, aff'd 252 U. S. 574. There is no complaint that any property owner will not receive just compensation for the land taken. The possible adverse effect on the tax revenues of Oklahoma as a result of the exercise by the Federal Government of its power of eminent domain is no barrier to the exercise of that power. "Whenever the constitutional powers of the federal government and those of the state come into conflict, the latter must yield." *Florida* v. *Mellon*, 273 U. S. 12, 17. Nor can a state call a halt to the exercise of the eminent domain power of the federal government because the subsequent flooding of the land taken will obliterate its boundary. And the suggestion that this project interferes with the state's own program for water development and conserva-

[58] The government concedes that there will be no loss of political jurisdiction over the lands taken except with the consent of the state. Art. 1, § 8, clause 17 of the Constitution.

tion is likewise of no avail. That program must bow before the "superior power" of Congress. *United States* v. *Rio Grande Dam & Irrigation Co., supra,* p. 703; *New Jersey* v. *Sargent,* 269 U. S. 328, 337; *Arizona* v. *California,* 298 U. S. 558, 569; *United States* v. *Appalachian Power Co., supra.*

Affirmed.

DECISIONS PER CURIAM, ETC., FROM APRIL 1, 1941, THROUGH JUNE 2, 1941.*

No. 14, original. HOLIDAY *v.* JOHNSTON, WARDEN. April 2, 1941. It is ordered that Charles A. Horsky, Esquire, of Washington, D. C., a member of the bar of this Court, be appointed to serve as counsel for the petitioner in this case.

No. 54. BERNARDS ET AL. *v.* JOHNSON ET AL. Certiorari, 310 U. S. 616, to the Circuit Court of Appeals for the Ninth Circuit. Argued December 11, 1940. Decided April 7, 1941. *Per Curiam:* The judgment is affirmed by an equally divided Court. *Mr. William Lemke* for petitioners. *Mr. Harrison G. Platt,* with whom *Mr. A. D. Platt* was on the brief, for M. R. Johnson et al., respondents. *Mr. Wm. L. Brewster* submitted for Catherine Collins, respondent. Reported below: 103 F. 2d 567.

Nos. 133 and 134. LISENBA *v.* CALIFORNIA. Certiorari, 311 U. S. 617, to the Supreme Court of California. Argued February 6, 1941. Decided April 7, 1941. *Per Curiam:* The judgment is affirmed by an equally divided Court. *Mr. Morris Lavine* for petitioner. *Messrs. Everett W. Mattoon,* Assistant Attorney General of California, and *Eugene D. Williams,* with whom *Messrs. Earl Warren,* Attorney General, and *Frank Richards,* Deputy Attorney General, were on the brief, for respondent. Reported below: 14 Cal. 2d 403; 94 P. 2d 569.

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*For decisions on applications for certiorari, see *post,* pp. 551, 558; for rehearing, *post,* p. 596. For cases disposed of without consideration by the Court, *post,* p. 601.

No. 586. NEW YORK, CHICAGO & ST. LOUIS RAILROAD CO. *v.* FRANK. Appeal from the Supreme Court of the State of New York. Argued April 2, 1941. Decided April 7, 1941. *Per Curiam:* The judgment is affirmed by an equally divided Court. *Mr. William J. Donovan,* with whom *Messrs. John H. Agate, Ralstone R. Irvine,* and *Harry S. Ridgely* were on the brief, for appellant. *Mr. Louis J. Vorhaus,* with whom *Messrs. David Vorhaus* and *Joseph Fischer* were on the brief, for appellee. Reported below: 175 Misc. 902; 24 N. Y. S. 2d 846, 854. See *post,* p. 596.

No. 587. TOUCEY *v.* NEW YORK LIFE INSURANCE CO. Certiorari, 311 U. S. 643, to the Circuit Court of Appeals for the Eighth Circuit. Argued March 12, 1941. Decided April 7, 1941. *Per Curiam:* The judgment is affirmed by an equally divided Court. *Samuel R. Toucey* submitted, *pro se. Mr. Richard S. Righter,* with whom *Messrs. Samuel W. Sawyer, Horace F. Blackwell, Jr.,* and *Louis H. Cooke* were on the brief, for respondent. Reported below: 112 F. 2d 927. See *post,* p. 596.

No. 697. WHITE *v.* JOHNSTON, WARDEN. On petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. April 7, 1941. *Per Curiam:* The Solicitor General having confessed error, the motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted, the judgment is reversed, and the cause is remanded to the District Court with directions to find the facts specially and state separately its conclusions of law in accordance with Rule 52 (a) of the Rules of Civil Procedure. *Samuel White, pro se.* Reported below: 116 F. 2d 936.

No. 839. UNITED STATES *v.* BUILDING & CONSTRUCTION TRADES COUNCIL ET AL. Appeal from the District Court of the United States for the Eastern District of Louisiana. April 7, 1941. *Per Curiam:* The judgment is affirmed. *United States* v. *Hutcheson,* 312 U. S. 219. MR. JUSTICE MURPHY took no part in the consideration or decision of this case. *Solicitor General Biddle* and *Mr. James C. Wilson* for the United States. *Mr. Joseph A. Padway* for the Building & Construction Trades Council et al., and *Messrs. Joseph O. Carson II, Thomas E. Kerwin, Joseph O. Carson,* and *Charles H. Tuttle* for the United Brotherhood of Carpenters & Joiners et al., appellees.

No. 840. UNITED STATES *v.* UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA ET AL. Appeal from the District Court of the United States for the Northern District of Illinois. April 7, 1941. *Per Curiam:* The judgment is affirmed. *United States* v. *Hutcheson,* 312 U. S. 219. MR. JUSTICE MURPHY took no part in the consideration or decision of this case. *Solicitor General Biddle* and *Messrs. Leo F. Tierney* and *J. Albert Woll* for the United States. *Messrs. Joseph O. Carson II, Thomas E. Kerwin, Joseph O. Carson,* and *Charles H. Tuttle* for appellees.

No. 841. UNITED STATES *v.* INTERNATIONAL HOD CARRIERS & COMMON LABORERS' DISTRICT COUNCIL ET AL. Appeal from the District Court of the United States for the Northern District of Illinois. April 7, 1941. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *United States* v. *Hutcheson,* 312 U. S. 219. MR. JUSTICE MURPHY took no part in the consideration or decision of this cause. *Solicitor General Biddle* and

Messrs. J. Albert Woll and *Leo F. Tierney* for the United States. *Messrs. Thomas D. Nash* and *Michael J. Ahern* for appellees.

No. 845. A. F. & G. Realty Corporation et al. *v.* City of New York. Appeal from the Supreme Court of the State of New York. April 7, 1941. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. (1) *Violet Trapping Co.* v. *Grace,* 297 U. S. 119, 120; *Ingraham* v. *Hanson,* 297 U. S. 378, 381; *Schenebeck* v. *McCrary,* 298 U. S. 36, 37; (2) *Perley* v. *North Carolina,* 249 U. S. 510, 514; *Puget Sound Co.* v. *Seattle* 291 U. S. 619, 624. *Messrs. Bernard L. Bermant* and *John B. Marsh* for appellants. *Messrs. William C. Chanler* and *Paxton Blair* for appellee. Reported below: 259 App. Div. 552; 284 N. Y. 48, 701; 20 N. Y. S. 2d 53; 29 N. E. 2d 465; 30 N. E. 2d 729.

No. —. Ex parte Samuel Lesser. April 7, 1941. Application denied.

No. —, original. Ex parte Charles H. Knight;
No. —, original. Ex parte Charles Von Glahn; and
No. —, original. Ex parte Jack Shearer. April 7, 1941. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 449. Vernon *v.* Alabama. April 7, 1941. The order denying certiorari, 311 U. S. 694, is vacated and the petition for writ of certiorari to the Supreme Court of Alabama is granted. The motion for leave to proceed *in forma pauperis* is granted. It is ordered that execution of the judgment and sentence of the Supreme Court of

Alabama in this case be, and the same hereby is, stayed pending the final determination of this cause by this Court.

No. 671. KINNEY, SECRETARY OF LABOR, *v.* NEBRASKA EX REL. WESTERN REFERENCE & BOND ASSOCIATION, INC. ET AL. April 8, 1941. O. M. Olsen, Secretary of Labor, substituted as the party petitioner herein on motion of *Mr. Don Kelley* for the petitioner.

No. 629. HARRIS, ADMINISTRATOR, *v.* ZION'S SAVINGS BANK & TRUST CO. Certiorari, 312 U. S. 670, to the Supreme Court of Utah. Argued March 31, 1941. Decided April 14, 1941. *Per Curiam:* Upon appeal from an order of the Probate Court of Salt Lake County, Utah, purporting to authorize an administrator of a deceased farmer to file a petition for relief under § 75 of the Bankruptcy Act, the Supreme Court of Utah has held that under the Probate Code of the State the Probate Court had no power to make the order. The decision thus rests upon an adequate non-federal ground, and as the federal question, whether in such circumstances a District Court of the United States sitting in bankruptcy could entertain a petition of the personal representative of the deceased farmer under § 75 of the Bankruptcy Act, was not necessarily involved, the writ of certiorari is dismissed. *Mr. J. D. Skeen* for petitioner. *Mr. Hadlond P. Thomas* for respondent. Reported below: 99 Utah 464; 105 P. 2d 461.

No. 584. COMMERCIAL MOLASSES CORP. *v.* NEW YORK TANK BARGE CORP. Certiorari, 311 U. S. 643, to the Circuit Court of Appeals for the Second Circuit. Argued March 13, 14, 1941. Decided April 14, 1941. *Per Cu-*

riam: The judgment is affirmed by an equally divided Court. *Mr. T. Catesby Jones,* with whom *Messrs. D. Roger Englar, Leonard J. Matteson,* and *Ezra G. Benedict Fox* were on the brief, for petitioner. *Mr. Robert S. Erskine,* with whom *Messrs. Cletus Keating, L. de Grove Potter,* and *Richard Sullivan* were on the brief, for respondent. Reported below: 114 F. 2d 248. See *post,* p. 596.

No. 678. Baltimore & Ohio Railroad Co. *v.* Kepner. Certiorari, 312 U. S. 671, to the Supreme Court of Ohio. Argued April 2, 3, 1941. Decided April 14, 1941. *Per Curiam:* The judgment is affirmed by an equally divided Court. *Messrs. Morison R. Waite* and *Harry H. Byrer,* with whom *Mr. William A. Eggers* was on the brief, for petitioner. *Mr. Samuel T. Gaines,* with whom *Mr. Edward M. Ballard* was on the brief, for respondent. Reported below: 137 Ohio St. 206, 409; 28 N. E. 2d 586; 30 N. E. 2d 982. See *post,* p. 596.

No. 686. Reitz *v.* Mealey, Commissioner of Motor Vehicles. Appeal from the District Court of the United States for the Northern District of New York. Argued April 3, 1941. Decided April 14, 1941. *Per Curiam:* The judgment is affirmed by an equally divided Court. *Mr. Harry A. Allan,* with whom *Mr. Daniel H. Prior* was on the brief, for appellant. *Mr. Jack Goodman,* Assistant Attorney General of New York, with whom *Messrs. John J. Bennett, Jr.,* Attorney General, and *Henry Epstein,* Solicitor General, were on the brief, for appellee. Reported below: 34 F. Supp. 532.

No. 922. Connor *v.* California et al. Appeal from the Supreme Court of California. April 14, 1941. *Per*

Curiam: The appeal is dismissed for the want of jurisdiction. Section 237 (a), Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari, as required by § 237 (c) of the Judicial Code (43 Stat. 936, 938), certiorari is denied. The motion for leave to proceed further herein *in forma pauperis* is also denied. *Frank S. Connor, pro se.* Reported below: 16 Cal. 2d 701; 108 P. 2d 10.

No. —. JONES *v.* JACKSON, ATTORNEY GENERAL; and No. —. EX PARTE ELLERT L. MCGRATH. April 14, 1941. Applications denied.

No. —, original. EX PARTE EDWARD KEPFORD. April 28, 1941. The motion for leave to file petition for writ of habeas corpus is denied.

No. 535. UNITED STATES *v.* CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD CO. ET AL. April 28, 1941. It is ordered that the opinion filed March 31, 1941, be amended by inserting in the first paragraph on page 6, after the word "question," the following: "not only are above ordinary high water mark but also claim that they". Opinion reported as amended, 312 U. S. 592.

No. 312. SWANSON, SECRETARY OF STATE OF NEBRASKA, ET AL. *v.* BUCK ET AL. April 29, 1941. Frank Marsh et al. substituted as parties appellant in the place and stead of Harry R. Swanson et al., on motion of *Mr. William J. Hotz* for the appellants.

No. 729. LOMAX *v.* TEXAS. Certiorari, 312 U. S. 674, to the Court of Criminal Appeals of Texas. Argued May 1, 1941. Decided May 5, 1941. *Per Curiam:* The judgment is reversed. *Chambers* v. *Florida,* 309 U. S. 227; *White* v. *Texas,* 310 U. S. 530. *Mr. F. S. K. Whittaker* for petitioner. *Messrs. Geo. W. Barcus,* Assistant Attorney General of Texas, and *Lloyd Davidson,* with whom *Mr. Gerald C. Mann,* Attorney General, was on the brief, submitted for respondent. Reported below: 144 S. W. 2d 555.

No. 827. ODOM ET AL. *v.* UNITED STATES. On petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. May 5, 1941. *Per Curiam:* The Solicitor General having confessed error, the motion for leave to proceed *in forma pauperis* is granted, the petition for writ of certiorari is granted, the judgment is reversed, and the cause is remanded to the District Court for further proceedings. *Mr. Hall Etter* for petitioners. Reported below: 116 F. 2d 996.

No. 934. NORTHWEST LINSEED CO. *v.* MINNESOTA. Appeal from the Supreme Court of Minnesota. May 5, 1941. *Per Curiam:* The motion to dismiss is granted, and the appeal is dismissed for want of a substantial federal question. *Euclid* v. *Amber Realty Co.,* 272 U. S. 365; *Fischer* v. *St. Louis,* 194 U. S. 361; *Pierce Oil Corp.* v. *City of Hope,* 248 U. S. 498. *Mr. Josiah E. Brill* for appellant. *Messrs. R. S. Wiggin* and *John F. Bonner* for appellee. Reported below: 209 Minn. 422; 297 N. W. 635.

No. 54. BERNARDS ET AL. *v.* JOHNSON ET AL.; and

Nos. 133 and 134. LISENBA *v.* CALIFORNIA. See *post,* p. 597.

No. 588. EDWARDS *v.* CALIFORNIA. Appeal from the Superior Court, County of Yuba, California. May 5, 1941. Reargument is ordered. The case is set for oral argument on Monday, October 13, next, and the Attorney General of California is requested to appear either in person or by his representative to present the views of the State with particular reference to the judicial or administrative interpretation by State authorities of the statute involved.

No. 869. TINKOFF ET AL. *v.* GOLD, TRUSTEE, ET AL. On petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit. May 12, 1941. *Per Curiam:* The motion to proceed *in forma pauperis* is granted. It appears that on a motion to vacate an order approving a supersedeas bond given on the appeal to the Circuit Court of Appeals, the appeal was dismissed for failure of appellants to produce the surety on the bond as required by the court, and later the Circuit Court of Appeals denied appellants' motion to vacate that order of dismissal. The petition for certiorari is granted and the order of dismissal is reversed upon the ground that while the failure to produce the surety for examination was an adequate reason for vacating the approval of the supersedeas bond, it did not justify the dismissal of the appeal. *Ella H. Tinkoff* and *Paysoff Tinkoff, pro se.*

No. 919. STEELEY *v.* KURN ET AL., TRUSTEES. On petition for writ of certiorari to the Supreme Court of Missouri. May 12, 1941. *Per Curiam:* The petition for writ of certiorari is granted, and the judgment is reversed. *Jamison* v. *Encarnacion,* 281 U. S. 635. *Mr. Harry G. Waltner, Jr.,* for petitioner. Reported below: 347 Mo. 74; 146 S. W. 2d 578.

Nos. 907 and 908. SAFE HARBOR WATER POWER CORP. *v.* UNITED STATES ET AL. Appeals from the District Court of the United States for the Eastern District of Pennsylvania. May 12, 1941. *Per Curiam:* The motion to dismiss is granted, and the appeals are dismissed for want of jurisdiction. *Stratton* v. *St. Louis S. W. Ry. Co.*, 282 U. S. 10, 15–16; *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 671–672; *Ex parte Atlantic Coast Line R. Co.*, 279 U. S. 822. See Federal Power Act, § 313 (b) (Act of August 26, 1935, c. 687, Title II, § 213, 49 Stat. 847, 860, 16 U. S. C., § 825L (b)). *Messrs. Charles Markell* and *Edwin M. Sturtevant* for appellant. *Solicitor General Biddle* for appellees. Reported below: 37 F. Supp. 9.

No. 938. ORWITZ *v.* BOARD OF DENTAL EXAMINERS. Appeal from the District Court of Appeal, 1st Appellate District, of California. May 12, 1941. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a properly presented substantial federal question. (1) *Semler* v. *State Board of Dental Examiners*, 294 U. S. 608; *Brown* v. *Massachusetts*, 308 U. S. 504. (2) *Cleveland & Pittsburgh R. Co.* v. *Cleveland*, 235 U. S. 50, 53; *Hiawassee Power Co.* v. *Carolina-Tenn. Co.*, 252 U. S. 341, 344; *White River Co.* v. *Arkansas*, 279 U. S. 692, 700. *Mr. Thos. D. Aitken* for appellant. *Mr. H. E. Lindersmith* for appellee. Reported below: 41 Cal. App. 2d 253; 107 P. 2d 407.

No. —, original. CALIFORNIA *v.* UNITED STATES. On motion for leave to file complaint. May 12, 1941. *Per Curiam:* The motion for leave to file complaint is denied. *Kansas* v. *United States*, 204 U. S. 331; *Williams* v. *United States*, 289 U. S. 553, 573; *Principality of Monaco* v. *Mississippi*, 292 U. S. 313, 321. *Messrs. Burton Smith, John L. McNab*, and *Edw. D. Hays* for plaintiff.

No. —, original. EX PARTE PAUL WESLEY PARKER. May 12, 1941. The motion for leave to file petition for writ of habeas corpus is denied.

No. 2, original. WISCONSIN ET AL. *v.* ILLINOIS ET AL.;
No. 3, original. MICHIGAN *v.* ILLINOIS ET AL.; and
No. 4, original. NEW YORK *v.* ILLINOIS ET AL. On Exceptions to the Report of the Special Master. Argued May 2, 5, 1941. Decided May 26, 1941. *Per Curiam:* The exceptions to the report of the Special Master are overruled and the report is confirmed. The petition and the modified petition of the State of Illinois are dismissed with costs. MR. JUSTICE MURPHY took no part in the consideration and decision of this case. MR. JUSTICE BLACK dissents. *Mr. Albert J. Meserow,* Assistant Attorney General of Illinois, with whom *Messrs. George F. Barrett,* Attorney General, and *William C. Clausen,* Assistant Attorney General, were on the brief for the State of Illinois. *Messrs. Herbert H. Naujoks, Timothy F. Cohan,* Assistant Attorney General of New York, and *Thomas J. Herbert,* Attorney General of Ohio, with whom *Messrs. John E. Martin,* Attorney General of Wisconsin, *J. A. A. Burnquist,* Attorney General of Minnesota, *Claude T. Reno,* Attorney General of Pennsylvania, *Harrington Adams,* Deputy Attorney General of Pennsylvania, *Herbert J. Rushton,* Attorney General of Michigan, *James W. Williams,* Assistant Attorney General of Michigan, and *John J. Bennett, Jr.,* Attorney General of New York, were on the brief, for complainants. See 311 U. S. 107.

No. 449. VERNON *v.* ALABAMA. Certiorari, *ante,* p. 540, to the Supreme Court of Alabama. Argued May 5, 1941. Decided May 26, 1941. *Per Curiam:* The judgment is reversed. *Chambers* v. *Florida,* 309 U. S. 227; *White* v.

Texas, 310 U. S. 530. *Mr. Walter S. Smith* for petitioner. *Mr. Thomas S. Lawson,* Attorney General of Alabama, with whom *Mr. William H. Loeb,* Assistant Attorney General, was on the brief, for respondent. Reported below: 240 Ala. 577; 200 So. 560.

No. —. Ex parte Charles N. Williams; and

No. —. Ex parte Joseph Poresky. May 26, 1941. Applications denied.

No. —, original. Ex parte Emmet H. Bozel. May 26, 1941. The motion for leave to file a petition for habeas corpus is denied without prejudice to a further application to the United States District Court for the District of Kansas, and for proceedings thereon in accordance with the decisions in *Walker* v. *Johnston,* 312 U. S. 275, and *Holiday* v. *Johnston, ante,* p. 342.

No. —, original. Ex parte Ernest J. Anderson;

No. —, original. Ex parte Clarence M. Brummitt; and

No. —, original. Ex parte John W. Meyers. May 26, 1941. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 901. Bakery & Pastry Drivers & Helpers Local 802 of the International Brotherhood of Teamsters et al. *v.* Wohl et al. On petition for writ of certiorari to the Court of Appeals of the State of New York. June 2, 1941. *Per Curiam:* The petition for rehearing is granted. The order denying certiorari, *post,* p. 572, is vacated and the petition for writ of certiorari is granted. The judgment is reversed. *American Federation of Labor*

v. *Swing*, 312 U. S. 321. *Mr. Edward C. Maguire* for petitioners. *Hyman Wohl* and *Louis Platzman, pro se.* Reported below: 284 N. Y. 788; 31 N. E. 2d 765.

No. 1063. PEARL ASSURANCE CO., LTD., ET AL. *v.* HARRINGTON, COMMISSIONER OF INSURANCE. Appeal from the District Court of the United States for the District of Massachusetts. June 2, 1941. *Per Curiam:* The judgment is affirmed. MR. JUSTICE FRANKFURTER took no part in the consideration and decision of this case. *Mr. Basil O'Connor* for appellants. Reported below: 38 F. Supp. 411.

No. 1066. DARNALL TRUCKING CO., INC., ET AL. *v.* SIMPSON, STATE ROAD COMMISSIONER, ET AL. Appeal from the Supreme Court of Appeals of West Virginia. June 2, 1941. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Maurer* v. *Hamilton*, 309 U. S. 598. *Messrs. Robert G. Kelly* and *Edmund M. Brady* for appellants. *Messrs. Clarence W. Meadows*, Attorney General of West Virginia, and *Robert S. Spilman* for appellees. Reported below: 122 W. Va. 656; 12 S. E. 2d 516.

No. 1067. ALROPA CORPORATION *v.* KIRCHWEHM. Appeal from the Supreme Court of Ohio. June 2, 1941. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a properly presented substantial federal question. (1) *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; (2) *Zadig* v. *Baldwin*, 166 U. S. 485, 488; *Live Oak Water Users' Assn.* v. *Railroad Commission*, 269 U. S. 354, 357–358; (3) *Kryger* v. *Wilson*, 242 U. S. 171, 176; *Finney* v. *Guy*, 189 U. S. 335,

340; *Johnson* v. *New York Life Ins. Co.*, 187 U. S. 491, 496. *Mr. Sigmund H. Steinberg* for appellant. *Mr. Aloys C. Link* for appellee. Reported below: 138 Ohio St. 30; 33 N. E. 2d 655.

No. —. Ex parte Walter Wisniewski. June 2, 1941. Application denied.

No. —, original. Ex parte Cleio Hull. June 2, 1941. The motion for leave to file petition for writ of habeas corpus is denied.

No. 14, original. Holiday *v.* Johnston, Warden. June 2, 1941. Paragraph numbered 3 on page 4 of the opinion is amended to read as follows:

"The respondent insists that the petition was premature if the petitioner's claim that he was denied the assistance of counsel is without merit, but the contention is pressed only if we find that no question as to such denial is presented."

The first sentence of the last paragraph on page 6 is amended to read as follows:

"Finally, the sanction by Rule 53 of the Rules of Civil Procedure of references to masters does not aid in the decision of the question presented."

Opinion reported as amended, *ante*, p. 342.

No. 32. Fidelity Union Trust Co. et al., Executors, *v.* Field. June 2, 1941. The motion for leave to file a second petition for rehearing is granted. 311 U. S. 730.

DECISIONS GRANTING CERTIORARI, FROM APRIL 1, 1941, THROUGH JUNE 2, 1941.

No. 697. WHITE *v.* JOHNSTON, WARDEN. See *ante*, p. 538.

No. 449. VERNON *v.* ALABAMA. See *ante*, p. 540.

No. 761. CRENSHAW *v.* UNITED STATES. See *post*, p. 596.

No. 796. GLASSER *v.* UNITED STATES;

No. 797. KRETSKE *v.* UNITED STATES; and

No. 798. ROTH *v.* UNITED STATES. April 7, 1941. 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 granted. The petitions for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit are granted. *Messrs. Homer Cummings* and *William D. Donnelly* for petitioner in No. 796. *Mr. Edward M. Keating* for petitioner in No. 797. *Mr. Alfred E. Roth, pro se. Solicitor General Biddle, Assistant Attorney General Berge,* and *Messrs. George F. Kneip, Fred E. Strine,* and *W. Marvin Smith* for the United States. *Mr. Ralph M. Snyder* filed a brief, as *amicus curiae,* in support of petitioner in No. 796. Reported below: 116 F. 2d 690.

No. 781. CLOVERLEAF BUTTER CO. *v.* PATTERSON, COMMISSIONER OF AGRICULTURE AND INDUSTRIES OF ALABAMA, ET AL. April 7, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. Horace C. Wilkinson* and *Erle Pettus* for petitioner. *Messrs. Thomas L. Lawson,* Attorney General

of Alabama, and *William H. Loeb,* Assistant Attorney General, for respondents. Reported below: 116 F. 2d 227.

No. 803. UNITED STATES *v.* EMORY ET AL. April 7, 1941. Petition for writ of certiorari to the Springfield Court of Appeals, of Missouri, granted. *Solicitor General Biddle* for the United States. Reported below: 143 S. W. 2d 318.

No. 817. ROYAL INDEMNITY CO. *v.* UNITED STATES. April 7, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Harry S. Hall* and *Nathaniel E. Wheeler* for petitioner. *Solicitor General Biddle* for the United States. Reported below: 116 F. 2d 247.

No. 853. UNITED STATES *v.* A. S. KREIDER CO. April 14, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General Biddle* for the United States. *Mr. Donald Horne* for respondent. Reported below: 117 F. 2d 133.

No. 863. CITY OF NEW YORK *v.* FEIRING, TRUSTEE IN BANKRUPTCY. April 14, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. William C. Chanler, Paxton Blair,* and *Sol Charles Levine* for petitioner. *Mr. Benjamin Siegel* for respondent. Reported below: 118 F. 2d 329.

No. 833. PIERCE *v.* UNITED STATES. April 14, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. MR. JUSTICE BLACK

took no part in the consideration or decision of this application. *Mr. L. E. Gwinn* for petitioner. *Solicitor General Biddle, Assistant Attorney General Berge,* and *Messrs. George F. Kneip, Fred E. Strine,* and *W. Marvin Smith* for the United States. Reported below: 115 F. 2d 399.

No. 851. CUNO ENGINEERING CORPORATION *v.* AUTOMATIC DEVICES CORPORATION. April 14, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted, limited to the question whether claims 2, 3, and 11, of the Mead patent No. 1,736,544 are valid. *Mr. Roberts B. Larson* for petitioner. Reported below: 117 F. 2d 361.

No. 826. UNITED STATES *v.* KALES. April 28, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. MR. CHIEF JUSTICE HUGHES took no part in the consideration and decision of this application. *Solicitor General Biddle* for the United States. *Mr. Hal H. Smith* for respondent. Reported below: 115 F. 2d 497.

No. 827. ODOM ET AL. *v.* UNITED STATES. See *ante,* p. 544.

No. 903. UNITED STATES *v.* PINK, SUPERINTENDENT OF INSURANCE, ET AL. May 5, 1941. Petition for writ of certiorari to the Supreme Court of New York granted. MR. JUSTICE REED and MR. JUSTICE MURPHY took no part in the consideration and decision of this application. *Solicitor General Biddle* for the United States. *Mr. John M. Downes* for respondents. *Mr. Albert G. Avery* filed a brief on behalf of Frederick H. Cattley et al.,

as *amici curiae,* in support of respondents. Reported below: 259 App. Div. 871, 886; 284 N. Y. 555; 20 N. Y. S. 2d 665, 983; 32 N. E. 2d 552.

No. 869. TINKOFF ET AL. *v.* GOLD, TRUSTEE, ET AL. See *ante,* p. 545.

No. 919. STEELEY *v.* KURN ET AL., TRUSTEES. See *ante,* p. 545.

No. 686. REITZ *v.* MEALEY, COMMISSIONER OF MOTOR VEHICLES. See *post,* p. 597.

No. 906. UNITED STATES *v.* TEXAS ET AL. May 12, 1941. Petition for writ of certiorari to the Court of Civil Appeals, 2nd Judicial District, of Texas, granted. *Solicitor General Biddle* for the United States. Reported below: 138 S. W. 2d 924.

No. 909. UNITED STATES *v.* KANSAS FLOUR MILLS CORP. May 12, 1941. Petition for writ of certiorari to the Court of Claims granted. *Solicitor General Biddle* for the United States. *Mr. Phil D. Morelock* for respondent. Reported below: 92 Ct. Cls. 390.

No. 926. PARKER, DEPUTY COMMISSIONER, *v.* MOTOR BOAT SALES, INC. May 12, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Solicitor General Biddle* for petitioner. *Mr. Minitree Jones Fulton* for respondent. Reported below: 116 F. 2d 789.

No. 932. PINK, SUPERINTENDENT OF INSURANCE, *v.* A. A. A. HIGHWAY EXPRESS, INC., ET AL. May 26, 1941. Petition for writ of certiorari to the Supreme Court of Georgia granted. *Messrs. M. F. Goldstein, Alfred C. Bennett,* and *Arthur G. Powell* for petitioner. *Messrs. Allen Post, A. O. B. Sparks,* and *T. Baldwin Martin* for respondents. Reported below: 191 Ga. 502; 13 S. E. 2d 337.

No. 710. MASSACHUSETTS BONDING & INSURANCE CO. *v.* WEBBER ET AL. May 26, 1941. Petition for writ of certiorari to the Supreme Court of Ohio granted. *Mr. Frank Harrison* for petitioner. *Mr. Charles A. Rogers* for respondents. Reported below: 137 Ohio St. 324; 29 N. E. 2d 565.

No. 946. MORTON SALT CO. *v.* G. S. SUPPIGER CO. May 26, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Clarence E. Mehlhope* for petitioner. *Messrs. Lawrence C. Kingsland, Edmund C. Rogers,* and *Robert H. Wendt* for respondent. Reported below: 117 F. 2d 968.

No. 1004. WHITE ET AL., FORMER COLLECTORS OF INTERNAL REVENUE, *v.* WINCHESTER COUNTRY CLUB. May 26, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Assistant Solicitor General Fahy* for petitioners. *Mr. Charles W. Mulcahy* for respondent. Reported below: 117 F. 2d 146.

No. 1043. RILEY ET AL., EXECUTORS, *v.* NEW YORK TRUST CO., ADMINISTRATOR, ET AL. May 26, 1941. Petition for writ of certiorari to the Supreme Court of Delaware granted. *Messrs. Dan MacDougald* and *James A.*

Branch for petitioners. *Messrs. Hiram C. Todd, Clarence A. Southerland, Daniel O. Hastings,* and *Marion Smith* for respondents. Reported below: 16 A. 2d 772.

No. 991. DISTRICT OF COLUMBIA *v.* MURPHY; and

No. 992. DISTRICT OF COLUMBIA *v.* DEHART. May 26, 1941. Petitions for writs of certiorari to the Court of Appeals for the District of Columbia granted. MR. JUSTICE STONE and MR. JUSTICE ROBERTS took no part in the consideration and decision of these applications. *Messrs. Richmond B. Keech, Vernon E. West,* and *Glenn Simmon* for petitioner. *Mr. Harry Raymond Turkel* for respondents. Reported below: 73 App. D. C. 345, 347; 119 F. 2d 449, 451.

No. 1035. FEDERAL LAND BANK OF SAINT PAUL *v.* BISMARCK LUMBER CO. ET AL. May 26, 1941. Petition for writ of certiorari to the Supreme Court of North Dakota granted. *Solicitor General Biddle* for petitioner. Reported below: 70 N. D. 607; 297 N. W. 42.

No. 746. SOUTHERN RAILWAY CO. *v.* PAINTER, ADMINISTRATRIX. May 26, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. Sidney S. Alderman, H. O'B. Cooper, Rudolph J. Kramer, Bruce A. Campbell,* and *S. R. Prince* for petitioner. Reported below: 117 F. 2d 100.

No. 901. BAKERY & PASTRY DRIVERS & HELPERS LOCAL 802 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS ET AL. *v.* WOHL ET AL. See *ante,* p. 548.

No. 1008. HYSLER *v.* FLORIDA. June 2, 1941. The motion for leave to proceed *in forma pauperis* is granted. The petition for writ of certiorari to the Supreme Court of Florida is also granted. *Clyde Hysler, pro se. Messrs. J. Tom Watson,* Attorney General of Florida, and *Nathan Cockrell,* Assistant Attorney General, for respondent. Reported below: 136 Fla. 563; 187 So. 261; 1 So. 2d 628.

No. 974. UNITED STATES *v.* RAGEN;

No. 975. UNITED STATES *v.* ARNOLD W. KRUSE; and

No. 976. UNITED STATES *v.* LESTER A. KRUSE. June 2, 1941. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Assistant Solicitor General Fahy* for the United States. *Messrs. John L. McInerney* and *Matthias Concannon* for respondent in No. 974. *Mr. George K. Bowden* for respondents in Nos. 975 and 976. Reported below: 118 F. 2d 128.

No. 981. SCAIFE COMPANY *v.* COMMISSIONER OF INTERNAL REVENUE. June 2, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Samuel Kaufman, S. Leo Rushlander,* and *James M. Magee* for petitioner. *Solicitor General Biddle* for respondent. Reported below: 117 F. 2d 572.

No. 1024. NATIONAL LABOR RELATIONS BOARD *v.* P. LORILLARD CO. June 2, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Assistant Solicitor General Fahy* and *Mr. Robert B. Watts* for petitioner. *Messrs. Charles W. Milner* and *Chas. G. Middleton* for respondent. Reported below: 117 F. 2d 921.

No. 1033. B. B. CHEMICAL CO. *v.* ELLIS ET AL. June 2, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. Harrison F. Lyman* for petitioner. *Mr. Robert Cushman* for respondents. Reported below: 117 F. 2d 829.

No. 1012. SOUTHPORT PETROLEUM CO. *v.* NATIONAL LABOR RELATIONS BOARD. June 2, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted, limited to the question of the correctness of denial by the Circuit Court of Appeals of the petitioner's motion to remand to the National Labor Relations Board for further evidence. *Mr. Morris D. Meyer* for petitioner. *Solicitor General Biddle* and *Messrs. Arnold Raum, Robert B. Watts, Laurence A. Knapp,* and *Mortimer B. Wolf* for respondent. Reported below: 117 F. 2d 90.

DECISIONS DENYING CERTIORARI, FROM APRIL 1, 1941, THROUGH JUNE 2, 1941.

No. 692. MACOMBER *v.* HUDSPETH, WARDEN. April 7, 1941. 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. *Ora B. Macomber, pro se.* Reported below: 115 F. 2d 114.

No. 802. BOONE ET AL. *v.* EQUITABLE HOLDING CO. ET AL. April 7, 1941. 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. *Messrs. Samuel Biern* and *Connor Hall* for petitioners. *Mr. Christopher B. Garnett* for respondents.

No. 811. GALE ET AL. *v.* UNION BAG & PAPER CORP. April 7, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. John J. Hennessy* for petitioners. *Mr. David S. Atkinson* for respondent. Reported below: 116 F. 2d 27.

No. 814. VERNON *v.* WILSON, WARDEN. April 7, 1941. Petition for writ of certiorari to the Supreme Court of Alabama, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Walter S. Smith* for petitioner. *Messrs. Thomas S. Lawson,* Attorney General of Alabama, and *William H. Loeb,* Assistant Attorney General, for respondent. Reported below: 240 Ala. 577; 200 So. 560.

No. 799. HACKNER ET AL. *v.* GUARANTY TRUST CO. ET AL. April 7, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE ROBERTS and MR. JUSTICE DOUGLAS took no part in the consideration and decision of this application. *Mr. Meyer Abrams* for petitioners. *Mr. Ralph M. Carson* for respondents. Reported below: 117 F. 2d 95.

No. 784. SUPERIOR TANNING CO. *v.* NATIONAL LABOR RELATIONS BOARD. April 7, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Lewis F. Jacobson* and *David Silbert* for petitioner. *Solicitor General Biddle* and *Messrs. Thomas E. Harris, Robert B. Watts, Laurence A. Knapp,* and *Mortimer B. Wolf* for respondent. Reported below: 117 F. 2d 881.

No. 785. WENZEL & HENOCK CONSTRUCTION CO. *v.* METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA. April 7, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Arthur E. Moreton* for petitioner. *Messrs. James H. Howard, Charles C. Cooper, Jr.,* and *James S. Bennett* for respondent. Reported below: 115 F. 2d 25.

No. 804. PARKER *v.* ILLINOIS. April 7, 1941. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Irving Breakstone* for petitioner. *Messrs. George F. Barrett,* Attorney General of Illinois, *Albert E. Hallett, Jr.,* and *James W. Breen,* Assistant Attorneys General, for respondent. Reported below: 374 Ill. 524; 30 N. E. 2d 11.

No. 806. HOUSTON LIGHTING & POWER CO. *v.* CITY OF WEST UNIVERSITY PLACE ET AL. April 7, 1941. Petition for writ of certiorari to the Supreme Court of Texas denied. *Messrs. W. P. Hamblen* and *Frank G. Coates* for petitioner. *Mr. Sam Davis* for respondents. Reported below: 135 Tex. 463; 138 S. W. 2d 520; 143 S. W. 2d 923.

No. 807. EDWARD J. DARBY & SON, INC. *v.* ROTHENSIES, COLLECTOR OF INTERNAL REVENUE. April 7, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. G. Plantou Middleton* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Mr. Sewall Key* for respondent. Reported below: 116 F. 2d 268.

No. 808. CLAPP *v.* STEWART-WARNER CORPORATION. April 7, 1941. Petition for writ of certiorari to the Cir-

cuit Court of Appeals for the Seventh Circuit denied. *Messrs. Bruce B. Krost* and *Albert J. Fihe* for petitioner. *Messrs. Lynn A. Williams* and *Warren C. Horton* for respondent. Reported below: 116 F. 2d 68.

No. 809. McDONELL *v.* GAREE ET AL. April 7, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Frank K. Lemon* for petitioner. *Mr. Howard L. Doyle* for respondents. Reported below: 116 F. 2d 78.

No. 810. CONSOLIDATED FREIGHTWAYS, INC. *v.* RAILROAD COMMISSION OF CALIFORNIA. April 7, 1941. Petition for writ of certiorari to the Supreme Court of California denied. *Mr. Herbert W. Erskine* for petitioner. *Mr. Ira H. Rowell* for respondent.

No. 823. JAX ICE & COLD STORAGE CO., TRADING AS JAX BREWING CO., *v.* COE, U. S. COMMISSIONER OF PATENTS, ET AL. April 7, 1941. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. Thomas L. Meade, Jr.* and *Nelson J. Jewett* for petitioner. *Assistant Attorney General Shea* and *Messrs. Newman A. Townsend, Melvin H. Siegel,* and *J. F. H. Mothershead* for the Commissioner of Patents; and *Messrs. Herbert H. Porter, Robert F. Whitehead,* and *Eugene G. Mason* for the Jackson Brewing Co., respondents. Reported below: 118 F. 2d 12.

No. 824. COLUMBIAN NATIONAL LIFE INSURANCE CO. *v.* RODGERS. April 7, 1941. Petition for writ of certiorari

to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. F. H. Nash* for petitioner. *Mr. Robert Stone* for respondent. Reported below: 116 F. 2d 705.

No. 828. SEGALL *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 829. TANT *v.* COMMISSIONER OF INTERNAL REVENUE. April 7, 1941. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Don M. Harlan* for petitioners. *Assistant Attorney General Clark* and *Messrs. N. A. Townsend, Sewall Key, Thomas E. Harris,* and *Maurice J. Mahoney* for respondent. Reported below: 114 F. 2d 706.

No. 830. STEIN, DOING BUSINESS AS STEIN BROKERAGE CO., *v.* ALABAMA. April 7, 1941. Petition for writ of certiorari to the Supreme Court of Alabama denied. *Mr. Marion R. Vickers* for petitioner. *Messrs. Thomas S. Lawson,* Attorney General of Alabama, *John W. Lapsley,* and *J. Edward Thornton,* Assistant Attorneys General, for respondent. Reported below: 29 Ala. App. 565; 240 Ala. 324; 199 So. 11, 13.

No. 837. LEIBY ET AL. *v.* CITY OF MANCHESTER ET AL. April 7, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Joseph F. Rutherford* and *Hayden Covington* for petitioners. *Mr. J. Vincent Broderick* for respondents. Reported below: 117 F. 2d 661.

No. 856. TEXAS ET AL. *v.* MISSION INDEPENDENT SCHOOL DISTRICT. April 7, 1941. Petition for writ of cer-

tiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Gerald C. Mann,* Attorney General of Texas, and *Messrs. Geo. W. Barcus, Clarence E. Crowe, Claud O. Boothman,* and *Ocie Speer,* Assistant Attorneys General, for petitioners. *Messrs. Vernon B. Hill* and *Ireland Graves* for respondent. Reported below: 116 F. 2d 175.

No. 629. HARRIS, ADMINISTRATOR, *v.* ZION'S SAVINGS BANK & TRUST CO. See *ante,* p. 541.

No. 922. CONNOR *v.* CALIFORNIA ET AL. See *ante,* p. 542.

No. 844. MYERS *v.* AMERICAN WELL WORKS. April 14, 1941. 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. *Warren G. Myers, pro se.* Reported below: 114 F. 2d 252.

No. 852. CAHILL *v.* STATE OF NEW YORK. April 14, 1941. Petition for writ of certiorari to the Court of Appeals of the State of New York, and motion for leave to proceed further *in forma pauperis,* denied. *James Cahill, pro se.* Reported below: 266 N. Y. 546, 285 N. Y. 547; 195 N. E. 193; 32 N. E. 2d 833.

No. 815. SEMINOLE NATION *v.* UNITED STATES. April 14, 1941. Petition for writ of certiorari to the Court of Claims denied. *Mr. Paul M. Niebell* for petitioner. *Solicitor General Biddle* for the United States. Reported below: 92 Ct. Cls. 210.

No. 818. DAVISON-PAXON COMPANY *v.* CALDWELL. April 14, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Houston White* for petitioner. Reported below: 115 F. 2d 189.

No. 825. FOWER ET AL. *v.* PROVO BENCH CANAL & IRRIGATION CO. ET AL. April 14, 1941. Petition for writ of certiorari to the Supreme Court of Utah denied. *Mr. Wm. A. Hilton* for petitioners. *Mr. H. A. Rich* for respondents. Reported below: 99 Utah 267; 101 P. 2d 375.

No. 843. HERMAN, DOING BUSINESS AS HERMAN OIL CO., *v.* TRAVELERS MUTUAL CASUALTY CO. April 14, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Robert Stone* for petitioner. Reported below: 116 F. 2d 151.

No. 846. STANDARD GAS & ELECTRIC CO. *v.* DEEP ROCK OIL CORP. ET AL.; and

No. 847. STANDARD GAS & ELECTRIC CO. *v.* DEEP ROCK OIL CORP. April 14, 1941. Petition for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. A. Louis Flynn, Jacob K. Javits, Wilbur J. Holleman,* and *Selig J. Levitan* for petitioner. *Mr. Jason L. Honigman* for John M. Taylor et al.; *Messrs. William P. Sidley* and *James F. Oates, Jr.* for the Reorganization Committee; *Messrs. George S. Ramsey* and *Villard Martin* for H. N. Greis, Trustee; and *Solicitor General Biddle* and *Messrs. Richard H. Demuth, Chester T. Lane, Bernard D. Cahn,* and *Homer Kripke* for the Securities & Exchange Commission. Reported below: 117 F. 2d 615.

No. 862. McQuay-Norris Manufacturing Co. *v.* National Labor Relations Board. April 14, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Alan W. Boyd, Kurt F. Pantzer,* and *Charles M. Wells* for petitioner. *Solicitor General Biddle* and *Mr. Robert B. Watts* for respondent. Reported below: 116 F. 2d 748.

No. 769. Walsh *v.* Johnston, Warden. April 28, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. A. W. Boyken* for petitioner. Reported below: 115 F. 2d 806.

No. 835. Mangiaracino *v.* Laclede Steel Co. April 28, 1941. Petition for writ of certiorari to the Supreme Court of Missouri 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. Leo Lyng* for petitioner. *Mr. Lyle M. Allen* for respondent. Reported below: 347 Mo. 36; 145 S. W. 2d 388.

No. 854. Phillips Petroleum Co. *v.* Taylor et al. April 28, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. Mr. Justice Douglas took no part in the consideration and decision of this application. *Messrs. H. D. Emery* and *Rayburn L. Foster* for petitioner. Reported below: 116 F. 2d 994.

No. 855. Hirson, Permanent Receiver, *v.* Koch. April 28, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. Mr.

JUSTICE DOUGLAS took no part in the consideration and decision of this application. *Messrs. Milton C. Weisman* and *Max L. Rothenberg* for petitioner. *Mr. Ralph G. Albrecht* for respondent. *Messrs. John J. Bennett, Jr.*, Attorney General of the State of New York, *Ambrose V. McCall,* and *John R. O'Hanlon,* and *Bertha Schwartz,* Assistant Attorneys General, filed a brief on behalf of the State of New York, as *amicus curiae,* in support of the petitioner. Reported below: 116 F. 2d 243.

No. 872. GOCHENOUR ET AL. *v.* GEORGE AND FRANCES BALL FOUNDATION ET AL. April 28, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. MR. JUSTICE DOUGLAS took no part in the consideration and decision of this application. *Messrs. Meyer Abrams* and *Joseph L. Stern* for petitioners. *Messrs. William H. Thompson, Perry E. O'Neal,* and *Patrick J. Smith* for respondents. Reported below: 117 F. 2d 259.

No. 743. MCKAY ET AL. *v.* RETAIL AUTOMOBILE SALESMEN'S LOCAL UNION No. 1067 ET AL. April 28, 1941. Petition for writ of certiorari to the Supreme Court of California denied. *Mr. C. Fenton Nichols* for petitioners. *Mr. Joseph C. Sharp* for respondents. Reported below: 16 Cal. 2d 311; 106 P. 2d 373.

No. 834. CITIES SERVICE OIL CO. *v.* DUNLAP ET AL. April 28, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Clayton L. Orn, David B. Trammell,* and *Hayes McCoy* for petitioner. *Mr. Angus G. Wynne* for respondents. Reported below: 117 F. 2d 31.

No. 848. CONTINENTAL CASUALTY CO. *v.* GILLER CONCRETE CO., INC., ET AL. April 28, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. T. J. Blackwell* for petitioner. Reported below: 116 F. 2d 431.

No. 849. CITY OF MILWAUKEE *v.* CITY OF WEST ALLIS. April 28, 1941. Petition for writ of certiorari to the Supreme Court of Wisconsin denied. *Mr. Walter J. Mattison* for petitioner. *Messrs. Louis Quarles* and *John C. Doerfer* for respondent. Reported below: 236 Wis. 371; 294 N. W. 625.

No. 850. ULM *v.* MOORE-McCORMACK LINES, INC. April 28, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Joseph S. Robinson* for petitioner. *Mr. John C. Crawley* for respondent. Reported below: 117 F. 2d 222.

No. 864. ARCADE-SUNSHINE CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. April 28, 1941. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. Irving G. McCann* and *Alvin L. Newmyer* for petitioner. *Solicitor General Biddle* and *Messrs. Thomas E. Harris, Robert B. Watts,* and *Laurence A. Knapp* for respondent. Reported below: 118 F. 2d 49.

No. 865. HAFFENREFFER BREWING CO. *v.* COMMISSIONER OF INTERNAL REVENUE. April 28, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Lawrence E. Green* for petitioner. *Solicitor General Biddle, Assistant Attorney*

General Clark, and *Messrs. Sewall Key, Richard H. Demuth,* and *Morton K. Rothschild* for respondent. Reported below: 116 F. 2d 465.

No. 816. KALB *v.* FEUERSTEIN ET AL. April 28, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Elmer McClain* and *William Lemke* for petitioner. *Mr. J. Arthur Moran* for respondents. Reported below: 116 F. 2d 775.

No. 831. TEGTMEYER *v.* TEGTMEYER ET AL. April 28, 1941. Petition for writ of certiorari to the Appellate Court, First District, of Illinois, denied. *Mr. Joseph Heller* for petitioner. *Mr. L. Duncan Lloyd* for respondents. Reported below: 306 Ill. App. 169; 28 N. E. 2d 303.

No. 860. THE ARIOSA *v.* THE SEGUNDO; and

No. 861. THE ARIOSA *v.* A/S IRAVANS REDERI, OWNER OF THE SEGUNDO. April 28, 1941. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles W. Hagen* for petitioner. *Mr. John W. Griffin* for respondents. Reported below: 116 F. 2d 492.

No. 867. CURTIS *v.* UTAH FUEL CO. ET AL. April 28, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Nicholas J. Curtis, pro se.*

Nos. 873, 881, and 887. LEHIGH VALLEY RAILROAD CO. *v.* MARTIN, STATE TAX COMMISSIONER OF NEW JERSEY, ET AL.;

Nos. 874, 879, and 885. DELAWARE, LACKAWANNA & WESTERN RAILROAD CO. *v.* SAME;

Nos. 875, 880, and 886. ERIE RAILROAD CO. *v.* SAME;

Nos. 876, 882, and 888. NEW JERSEY & NEW YORK RAILROAD CO. *v.* SAME;

Nos. 877, 883, and 889. NEW YORK CENTRAL RAILROAD CO. *v.* SAME; and

Nos. 878, 884, and 890. NEW YORK & LONG BRANCH RAILROAD CO. *v.* SAME. April 28, 1941. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Maximilian M. Stallman, Maurice Bower Saul, Richard W. Barrett, Jacob Aronson, Herbert A. Taylor,* and *Douglas Swift* for petitioners. *Messrs. David T. Wilentz,* Attorney General of New Jersey, and *Duane E. Minard* for respondents. Reported below: 115 F. 2d 968.

No. 898. INDEPENDENT WAREHOUSES, INC. *v.* DIMINO ET AL. April 28, 1941. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. John Ross Lauer* for petitioner. *Messrs. John J. Bennett, Jr.,* Attorney General of New York, *Henry Epstein,* Solicitor General, *Joseph A. McLaughlin,* and *Roy Wiedersum,* Assistant Attorneys General, for the Industrial Board of the State of New York; and *Mr. William L. F. Gardiner* for Regina C. Dimino, respondents. Reported below: 259 App. Div. 942; 284 N. Y. 481; 19 N. Y. S. 2d 846; 31 N. E. 2d 911.

No. 905. NORTHWESTERN BREWERS SUPPLY CO. ET AL. *v.* SCHMIT, TRUSTEE. April 28, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. David Charness* for petitioners. *Mr. Herbert J. Rushton* for respondent. Reported below: 117 F. 2d 738.

No. 915. CITIZENS NATIONAL BANK *v.* FIDELITY & DEPOSIT COMPANY OF MARYLAND. April 28, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. J. Blanc Monroe* and *Monte M. Lemann* for petitioner. *Mr. Albert B. Hall* for respondent. Reported below: 117 F. 2d 852.

No. 921. FUNKS GROVE GRAIN CO. *v.* ALTON RAILROAD CO. April 28, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Thomas P. Lantry* for petitioner. *Messrs. Silas H. Strawn, Frank H. Towner, Guy A. Gladson,* and *Bryce L. Hamilton* for respondent. Reported below: 117 F. 2d 210.

No. 857. TINKOFF *v.* KLEIN-EXEL, TRUSTEE; and

No. 858. TINKOFF *v.* MCMANUS, TRUSTEE IN BANKRUPTCY. On petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit. May 5, 1941. The motion for leave to proceed further *in forma pauperis* is denied for the reason that the Court, upon examination of the papers herein submitted, finds that the application for the writs of certiorari was not filed within the time provided by law. Section 8 (a), Act of February 13, 1925 (43 Stat. 936, 940). The petition for writs of certiorari is therefore also denied. *Paysoff Tinkoff, pro se.* Reported below: 101 F. 2d 660.

No. 767. SABIN ET AL. *v.* HOME OWNERS' LOAN CORPORATION. May 5, 1941. The motion to proceed on typewritten papers is granted. The petition for writ of certiorari to the Supreme Court of Oklahoma is denied. *Milton Roe Sabin* and *Bertha Florence Sabin, pro se.* Reported below: 187 Okla. 504; 105 P. 2d 245.

No. 866. McLAUGHLIN LAND & LIVESTOCK CO. *v.* BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSN. May 5, 1941. Petition for writ of certiorari to the District Court of Appeal, 1st Appellate District, of California, denied. MR. JUSTICE DOUGLAS took no part in the consideration and decision of this application. *Mr. George Thomas Davis* for petitioner. *Mr. Herbert W. Erskine* for respondent. Reported below: 40 Cal. App. 2d 620; 105 P. 2d 607.

No. 871. NIAGARA HUDSON POWER CORP. *v.* HOEY, COLLECTOR OF INTERNAL REVENUE. May 5, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE DOUGLAS took no part in the consideration and decision of this application. *Messrs. Horace R. Lamb* and *Randall J. Le Boeuf, Jr.* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Richard H. Demuth,* and *Joseph M. Jones* for respondent. Reported below: 117 F. 2d 414.

No. 894. NATIONAL LABOR RELATIONS BOARD *v.* E. I. DUPONT DE NEMOURS & CO.; and

No. 895. NATIONAL LABOR RELATIONS BOARD *v.* ASSOCIATION OF CHEMICAL EMPLOYEES AT BELLE WORKS OF E. I. DUPONT DE NEMOURS & CO. May 5, 1941. Petition for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. MR. JUSTICE ROBERTS took no part in the consideration and decision of this application. *Solicitor General Biddle* and *Mr. Robert B. Watts* for petitioner. *Mr. Robert S. Spilman* for E. I. Du Pont de Nemours & Co., and *Mr. Charles S. Rhyne* for the Association of Chemical Employees, respondents. Reported below: 116 F. 2d 388.

Nos. 899 and 900. HAMBURGER *v.* DYER, TRUSTEE, ET AL. May 5, 1941. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. MR. JUSTICE MURPHY took no part in the consideration and decision of this application. *Mr. Meyer Abrams* for petitioner. *Messrs. Harry H. Mead* and *Isadore Levin* for respondents. Reported below: 117 F. 2d 932.

No. 901. BAKERY & PASTRY DRIVERS & HELPERS LOCAL 802 ET AL. *v.* WOHL ET AL. On petition for writ of certiorari to the Court of Appeals of the State of New York. May 5, 1941. It does not appear from the record that the federal question presented by the petition was necessarily decided by the Court of Appeals. The petition for certiorari is denied, *Lynch* v. *New York ex rel. Pierson*, 293 U. S. 52; *Honeyman* v. *Hanan*, 300 U. S. 14, 18. *Mr. Edward C. Maguire* for petitioners. *Hyman Wohl* and *Louis Platzman, pro se.* Reported below: 284 N. Y. 788; 31 N. E. 2d 765.

No. 891. LAYTON ET AL. *v.* THAYNE ET AL. May 5, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. J. D. Skeen* for petitioners. *Mr. John Jenson* for respondents. Reported below: 116 F. 2d 796.

No. 892. BUTTARS *v.* UTAH MORTGAGE LOAN CORP. May 5, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. J. D. Skeen* for petitioner. *Mr. Hadlond P. Thomas* for respondent. Reported below: 116 F. 2d 622.

No. 893. PAYNE FURNACE & SUPPLY CO., INC. *v.* WILLIAMS-WALLACE COMPANY. May 5, 1941. 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. *Mr. A. Donham Owen* for respondent. Reported below: 117 F. 2d 823.

No. 896. CAMPBELL *v.* AMERICAN FOREIGN STEAMSHIP CORP. May 5, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Ruth Gottdiener* for petitioner. *Mr. Corydon B. Dunham* for respondent. Reported below: 116 F. 2d 926.

No. 902. ARMATURE EXCHANGE INCORPORATED *v.* UNITED STATES. May 5, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Edwin A. Meserve* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Thomas E. Harris,* and *Newton K. Fox* for the United States. Reported below: 116 F. 2d 969.

No. 923. MCGURREN *v.* MCVEIGH ET AL. May 5, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Charles H. Soelke* for petitioner. *Messrs. Thomas Dodd Healy* and *Bernhardt Frank* for respondents. Reported below: 117 F. 2d 672.

No. 925. MORROW *v.* SCOFIELD, COLLECTOR OF INTERNAL REVENUE. May 5, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Harry C. Weeks* and *Benj. L. Bird* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Richard H. Demuth* for respondent. Reported below: 116 F. 2d 17.

No. 930. CHESAPEAKE & OHIO RAILWAY CO. *v.* RICHARDSON. May 5, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Ben B. Wickham* for petitioner. *Mr. M. C. Harrison* for respondent. Reported below: 116 F. 2d 860.

No. 929. ROLAND *v.* PORT COMPRESS CO. May 12, 1941. Petition for writ of certiorari to the County Court of Nueces County, Texas, and motion for leave to proceed further *in forma pauperis*, denied. *James W. Roland, pro se.* *Mr. Frank M. Kemp* for respondent.

No. 910. SHUSHAN *v.* UNITED STATES;
No. 911. NEWMAN ET AL. *v.* UNITED STATES;
No. 912. MILLER *v.* UNITED STATES; and
No. 913. WAGUESPACK *v.* UNITED STATES. May 12, 1941. The motion for leave to file a supplemental petition in No. 911 is granted. The petitions for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit are denied. MR. JUSTICE MURPHY took no part in the consideration and decision of these applications. *Mr. Hugh M. Wilkinson* for petitioner in No. 910. *Messrs. Morris L. Ernst, James J. Magner, David V. Cahill, Isaac S. Heller, Theodore S. Jaffin,* and *Benjamin Kaplan* for petitioners in No. 911. *Messrs. Warren O. Coleman* and *Edward R. Schowalter* for petitioner in No. 912. *Mr. W. J. Waguespack, Jr.* for petitioner in No. 913. *Assistant Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Oscar A. Provost, Harold Rosenwald,* and *Fred E. Strine* for the United States. Reported below: 117 F. 2d 110.

No. 916. WEIL ET AL. *v.* UNITED STATES. May 12, 1941. 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. Eugene J. Morris* for petitioners. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Thomas E. Harris,* and *Newton K. Fox* for the United States. *Messrs. Harold L. Smith* and *John F. Caskey* filed a brief on behalf of the Mortgage Corporation of New York, as *amicus curiae,* in support of the petition. Reported below: 115 F. 2d 999.

No. 935. FIRST NATIONAL BANK OF TEMPLE *v.* CONTINENTAL CASUALTY CO. May 12, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Walker Saulsbury* for petitioner. *Mr. Allen Wight* for respondent. Reported below: 116 F. 2d 885.

No. 936. WILLIAM DAVIES CO., INC. *v.* ILLINOIS EX REL. TOMAN, COUNTY TREASURER. May 12, 1941. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Charles M. Haft* for petitioner. *Messrs. Thomas J. Courtney, Barnet Hodes,* and *J. Herzl Segal* for respondent. Reported below: 375 Ill. 397; 31 N. E. 2d 602.

No. 937. EQUITABLE LIFE ASSURANCE SOCIETY *v.* MARSHALL, ADMINISTRATOR. May 12, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Ferris D. Stone, Cleveland Thurber,* and *William J. Shaw* for petitioner. *Mr. David I. Hubar* for respondent. Reported below: 116 F. 2d 901.

No. 940. UNITED STATES EX REL. JUMP ET AL. *v.* ICKES, SECRETARY OF THE INTERIOR. May 12, 1941. Petition

for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. Neal E. McNeill* and *Seth W. Richardson* for petitioners. *Assistant Solicitor General Fahy, Assistant Attorney General Littell,* and *Messrs. Thomas E. Harris* and *Vernon L. Wilkinson* for respondent. Reported below: 117 F. 2d 769.

No. 949. TRAVELERS INSURANCE CO. *v.* WILKINS. May 12, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Francis M. Holt* and *Sam R. Marks* for petitioner. *Mr. Herman Ulmer* for respondent. Reported below: 117 F. 2d 646.

No. 951. CANTERBURY ET AL. *v.* BARNHART ET AL.; and

No. 952. JAMES *v.* BARNHART ET AL. May 26, 1941. Petitions for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit, and motions for leave to proceed *in forma pauperis,* denied. *Mr. Harvey H. Smith* for petitioners. *Mr. Urban C. Stover* for respondents. Reported below: 117 F. 2d 604.

No. 954. SPRUILL *v.* BALLARD ET AL. May 26, 1941. 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. *Georgia M. Spruill, pro se.*

No. 955. WAGNER *v.* CALIFORNIA ET AL.; and

No. 956. MELENDEZ *v.* CALIFORNIA ET AL. May 26, 1941. Petitions for writs of certiorari to the Supreme Court of California, and motions for leave to proceed further *in forma pauperis,* denied. *Ray Wagner* and *George Melendez, pro se.*

No. 939. PHILBROOK ET AL. *v.* UNITED STATES. May 26, 1941. 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. Eugene D. O'Sullivan* for petitioners. Reported below: 117 F. 2d 632.

No. 995. SHAPIRO *v.* STATE OF NEW YORK. May 26, 1941. Petition for writ of certiorari to the County Court, County of Kings, New York, and motion for leave to proceed further *in forma pauperis*, denied. *Mr. Copal Mintz* for petitioner. *Mr. Henry J. Walsh* for respondent. Reported below: 260 App. Div. 930; 23 N. Y. S. 2d 56.

Nos. 1006 and 1007. WARNER COMPANY *v.* LOVERICH. May 26, 1941. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. MR. JUSTICE ROBERTS took no part in the consideration and decision of this application. *Mr. Everett H. Brown, Jr.* for petitioner. Reported below: 118 F. 2d 690.

No. 983. BRUNET *v.* S. S. KRESGE CO. May 26, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. MR. JUSTICE STONE and MR. JUSTICE ROBERTS took no part in the consideration and decision of this application. *Messrs. Samuel A. Rinella* and *Harry G. Fins* for petitioner. *Mr. Carl E. Abrahamson* for respondent. Reported below: 115 F. 2d 713.

No. 1045. NICHOLS ET AL. *v.* TODD, TRUSTEE, ET AL. May 26, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. MR. JUS-

TICE DOUGLAS took no part in the consideration and decision of this application. *Mr. James V. Hayes* for petitioners. Reported below: 116 F. 2d 979.

No. 914. NALDER *v.* FEDERAL LAND BANK OF BERKELEY ET AL. May 26, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. J. D. Skeen* for petitioner. *Solicitor General Biddle* and *Messrs. Thomas E. Harris* and *Robert K. McConnaughey* for respondents. Reported below: 116 F. 2d 1004.

No. 920. WRIGHTSMAN PETROLEUM CO. *v.* UNITED STATES. May 26, 1941. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Charles D. Hamel* and *John Enrietto* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Mr. Sewall Key* for the United States. Reported below: 92 Ct. Cls. 217; 35 F. Supp. 86.

No. 933. MUTUAL LIFE INSURANCE CO. OF NEW YORK *v.* MENIN, TRUSTEE IN BANKRUPTCY, ET AL. May 26, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. G. Bowdoin Craighill* for petitioner. *Mr. Gerson C. Young* for Abraham I. Menin, Trustee in Bankruptcy, and *Mr. J. Arthur Leve* for Parke-Bernet Galleries, Inc., respondents. Reported below: 115 F. 2d 975.

No. 941. CONTINENTAL CASUALTY CO. *v.* UNITED STATES. May 26, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Robert B. McCormick* for petitioner. *Solicitor General Biddle, Assistant Attorney General Shea,*

and *Messrs. Melvin H. Siegel, Thomas E. Harris,* and *Paul A. Sweeney* for the United States. Reported below: 117 F. 2d 506.

No. 950. SUPERIOR COURT OF CALIFORNIA *v.* CAMINETTI, INSURANCE COMMISSIONER. May 26, 1941. Petition for writ of certiorari to the Supreme Court of California denied. *Mr. U. S. Webb* and *Hester Webb* for petitioner. Reported below: 16 Cal. 2d 838; 108 P. 2d 911.

No. 953. KEARNS COAL CORP. *v.* UNITED STATES FIDELITY & GUARANTY CO. May 26, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Henry B. Twombly* and *Lemuel Skidmore* for petitioner. *Mr. William Dike Reed* for respondent. Reported below: 118 F. 2d 33.

No. 960. GARDNER, TRUSTEE IN BANKRUPTCY, *v.* DOETHLAFF, BANKRUPT; and

No. 961. GARDNER, TRUSTEE IN BANKRUPTCY, *v.* PENN MUTUAL LIFE INSURANCE CO. May 26, 1941. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Charles Auerbach* for petitioner. *Mr. Walter T. Kinder* for respondents. Reported below: 117 F. 2d 582.

No. 964. MELLON ET AL., EXECUTORS, *v.* DRISCOLL, COLLECTOR OF INTERNAL REVENUE. May 26, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Wm. S. Moorhead* for petitioners. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Samuel H. Levy* for respondent. Reported below: 117 F. 2d 477.

No. 973. LANE ET AL. *v.* HAYTIAN CORPORATION OF AMERICA. May 26, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Sydney Krause* for petitioners. *Mr. Henry M. Wise* for respondent. Reported below: 117 F. 2d 216.

No. 988. NEW YORK & CUBA MAIL STEAMSHIP CO. *v.* CONTINENTAL INSURANCE CO. May 26, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Roscoe H. Hupper* and *Chauncey I. Clark* for petitioner. *Messrs. Cletus Keating, Arthur M. Boal,* and *James H. Herbert* for respondent. Reported below: 117 F. 2d 404.

No. 928. CUTLER MAIL CHUTE CO. *v.* CAPITAL MAIL CHUTE CORP. May 26, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Carl P. Geopel* for petitioner. *Mr. Robert I. Dennison* for respondent. Reported below: 118 F. 2d 63.

No. 931. FRANKLIN LIFE INSURANCE CO. *v.* UNITED STATES. May 26, 1941. Petition for writ of certiorari to the Court of Claims denied. *Mr. Warren W. Grimes* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Richard H. Demuth* for the United States. Reported below: 93 Ct. Cls. 259; 37 F. Supp. 155.

No. 942. VAUGHN ET UX. *v.* CONTINENTAL ROYALTY CO. May 26, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs.*

Ben D. Clower and *Frank Bezoni* for petitioners. *Mr. Robert Gerald Storey* for respondent. Reported below: 116 F. 2d 72.

No. 943. COLLINS *v.* MOSHER ET AL.; and

No. 944. LOUNT *v.* MOSHER ET AL. May 26, 1941. Petition for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John J. McCullough* for petitioners. *Mr. J. L. Gust* for respondents. Reported below: 115 F. 2d 900, 903.

No. 945. COLLINS ET AL. *v.* SOCONY-VACUUM OIL CO., INC. May 26, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Hall Etter* for petitioners. *Mr. Robert Eikel, Jr.* for respondent. Reported below: 116 F. 2d 8.

No. 947. WHITE ET UX. *v.* THOMAS, COLLECTOR OF INTERNAL REVENUE. May 26, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Wm. A. Blakley* for petitioners. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Richard H. Demuth* for respondent. Reported below: 116 F. 2d 147.

No. 957. CREEK NATION *v.* UNITED STATES. May 26, 1941. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Paul M. Niebell* and *W. W. Spalding* for petitioner. *Solicitor General Biddle* and *Assistant Attorney General Littell* for the United States. Reported below: 92 Ct. Cls. 269.

No. 958. KETTLEMAN HILLS ROYALTY SYNDICATE No. 1 *v.* COMMISSIONER OF INTERNAL REVENUE. May 26, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Robert Holland Eckhoff* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *William L. Cary* for respondent. Reported below: 116 F. 2d 382.

No. 967. BRYAN ET AL., EXECUTORS, *v.* BALL ET AL. May 26, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Daniel Bartlett* and *Arthur F. Freund* for petitioners. Reported below: 116 F. 2d 950.

No. 969. SOUTH ATLANTIC STEAMSHIP CO. *v.* NATIONAL LABOR RELATIONS BOARD. May 26, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Edward Brennan* for petitioner. *Solicitor General Biddle,* and *Messrs. Richard H. Demuth, Robert B. Watts, Laurence A. Knapp,* and *Bertram Edises* for respondent. Reported below: 116 F. 2d 480.

No. 972. ROBERTS *v.* BOARD OF PUBLIC INSTRUCTION. May 26, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Stuart B. Warren* for petitioner. *Mr. John D. Kennedy* for respondent. Reported below: 117 F. 2d 943.

No. 978. COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., ET AL. *v.* ROBERTO HERNANDEZ, INC. May 26, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Burton*

H. White and *Roscoe H. Hupper* for petitioners. *Mr. Joseph K. Inness* for respondent. Reported below: 116 F. 2d 849.

No. 979. BOWEN *v.* NEW YORK LIFE INSURANCE CO. May 26, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. J. L. London* for petitioner. Reported below: 117 F. 2d 298.

No. 982. COHAN *v.* ELDER ET UX. May 26, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Burnett Wolfson* for petitioner. *Mr. Allan J. Carter* for respondents. Reported below: 118 F. 2d 850.

No. 984. SANITARY DISTRICT OF CHICAGO *v.* GUTHARD ET AL. May 26, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Ernst Buehler, Edmund D. Adcock, Ralph M. Snyder, Arthur C. Denison,* and *Wallace R. Lane* for petitioner. *Messrs. Lynn A. Williams* and *Warren C. Horton* for respondents. Reported below: 118 F. 2d 899.

No. 985. PHILLIPS, TRUSTEE, *v.* ARNOLD. May 26, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Gaius G. Gannon* for petitioner. *Mr. John H. Crooker* for respondent. Reported below: 117 F. 2d 497.

No. 986. SOMA PETO *v.* HOWELL. May 26, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. J. Robert Cohler* for

petitioner. *Messrs. Amos C. Miller, Edward R. Adams,* and *Robert W. Wales* for respondent. Reported below: 117 F. 2d 249.

No. 989. POTASH ET AL. *v.* UNITED STATES. May 26, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Kenneth E. Walser* for petitioners. *Solicitor General Biddle, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for the United States. Reported below: 118 F. 2d 54.

No. 990. UNITED STATES *v.* NUNNALLY INVESTMENT CO. May 26, 1941. Petition for writ of certiorari to the Court of Claims denied. *Assistant Solicitor General Fahy* for the United States. *Mr. W. A. Sutherland* for respondent. Reported below: 92 Ct. Cls. 358; 36 F. Supp. 332.

No. 1001. ERNEST E. MARKS CO. *v.* UNITED STATES. May 26, 1941. Petition for writ of certiorari to the Court of Customs and Patent Appeals denied. *Mr. Delbert A. Clithero* for petitioner. *Solicitor General Biddle* and *Messrs. Charles D. Lawrence* and *John R. Benney* for the United States. Reported below: 117 F. 2d 542.

No. 792. RICHARD ARCHBOLD *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 793. ADRIAN ARCHBOLD *v.* SAME;

No. 794. JOHN ARCHBOLD *v.* SAME; and

No. 795. VAN BEUREN *v.* SAME. May 26, 1941. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. William R. Spofford* for petitioners. *Solicitor General Biddle* for respondent. Reported below: 115 F. 2d 1005.

No. 819. AUGUSTUS *v.* COMMISSIONER OF INTERNAL REVENUE. May 26, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Orville Smith* and *Erwin N. Griswold* for petitioner. *Solicitor General Biddle* for respondent. Reported below: 118 F. 2d 38.

No. 836. VAN VRANKEN *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. May 26, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Lee McCanliss* for petitioner. *Solicitor General Biddle* for respondent. Reported below: 115 F. 2d 709.

No. 959. CHADWICK ET AL. *v.* UNITED STATES. June 2, 1941. 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. Maxwell Shapiro* for petitioners. *Solicitor General Biddle, Assistant Attorney General Berge*, and *Messrs. Oscar A. Provost* and *Fred E. Strine* for the United States. Reported below: 117 F. 2d 902.

No. 966. BELAND *v.* UNITED STATES. June 2, 1941. The motion to proceed on the typewritten record is granted. The petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit is denied. *Mr. J. Forest McCutcheon* for petitioner. *Solicitor General Biddle, Assistant Attorney General Berge*, and *Messrs. Oscar A. Provost* and *Fred E. Strine* for the United States. Reported below: 117 F. 2d 958.

No. 1021. SHERWIN *v.* UNITED STATES; and

No. 1022. SHERIDAN *v.* UNITED STATES. On petition for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit. June 2, 1941. The motion to use the record in Nos. 319 and 320 is granted. The petition for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit, and the motion for leave to proceed further *in forma pauperis,* are denied. *Mr. Earl C. Demoss* for petitioners. Reported below: 118 F. 2d 828.

No. 917. FARNSWORTH *v.* SANFORD, WARDEN. June 2, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. John F. Finerty* for petitioner. Reported below: 115 F. 2d 375.

No. 1003. GLASS *v.* RYAN, WARDEN. June 2, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Harold Glass, pro se.*

No. 1040. WEITLAUF *v.* UNITED STATES. June 2, 1941. 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. Jordan R. Bentley* for petitioner. Reported below: 118 F. 2d 394.

No. 1049. RILEY ET AL. *v.* ILLINOIS. June 2, 1941. 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 petitioners.

Mr. George F. Barrett, Attorney General of Illinois, for respondent. Reported below: 376 Ill. 364; 33 N. E. 2d 872.

No. 1053. PEARSON *v.* CALIFORNIA. June 2, 1941. Petition for writ of certiorari to the District Court of Appeal, Second Appellate District, of California, and motion for leave to proceed further *in forma pauperis,* denied. *Clarence Pearson, pro se.* Reported below: 41 Cal. App. 2d 614; 107 P. 2d 463.

No. 1060. BOERNER *v.* UNITED STATES. June 2, 1941. 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. C. Joseph Danahy* for petitioner. Reported below: 117 F. 2d 387.

No. 1081. BECK *v.* UNITED STATES. June 2, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied for the reason that application therefor was not made within the time provided by law. Rule XI of the Criminal Appeals Rules, 292 U. S. 665–666. MR. JUSTICE DOUGLAS took no part in the consideration and decision of this application. *Christian W. Beck, pro se.* Reported below: 118 F. 2d 178.

No. 838. MUNICIPALITY OF GUAYANILLA *v.* PUBLIC SERVICE COMMISSION OF PUERTO RICO ET AL. June 2, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Ismael Soldevila* and *Pedro M. Porrata* for petitioner. *Messrs. William Cattron Rigby, George A. Malcolm,* and *Nathan R. Margold* for the Public Service Commission; and *Mr. C.*

Dominguez Rubio for J. Stella Rodríguez, respondents. Reported below: 116 F. 2d 15.

No. 962. MARTIN M. GOLDMAN *v.* UNITED STATES;

No. 963. SHULMAN *v.* UNITED STATES; and

No. 980. THEODORE GOLDMAN *v.* UNITED STATES. June 2, 1941. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Jacob W. Friedman* for petitioners in Nos. 962 and 980. *Mr. Jeremiah T. Mahoney* for petitioner in No. 963. *Solicitor General Biddle, Assistant Attorney General Berge,* and *Messrs. Oscar A. Provost* and *Louis B. Schwartz* for the United States. Reported below: 118 F. 2d 310.

No. 965. BURK BROTHERS *v.* NATIONAL LABOR RELATIONS BOARD. June 2, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Walter T. Fahy* for petitioner. *Solicitor General Biddle* and *Messrs. Richard H. Demuth, Robert B. Watts, Laurence A. Knapp,* and *Morris P. Glushien* for respondent. Reported below: 117 F. 2d 686.

No. 977. LLOYD-SMITH *v.* COMMISSIONER OF INTERNAL REVENUE. June 2, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John P. Ohl* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Arnold Raum,* and *Samuel H. Levy* for respondent. Reported below: 116 F. 2d 642.

No. 987. SABINE TOWING CO., INC. *v.* CONTINENTAL INSURANCE CO., INC. June 2, 1941. Petition for writ of

certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. M. A. Grace* for petitioner. *Messrs. Arthur M. Boal* and *H. C. Hughes* for respondent. Reported below: 117 F. 2d 694.

No. 994. WONG YIM *v.* UNITED STATES. June 2, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. James M. Hanley* for petitioner. *Solicitor General Biddle, Assistant Attorney General Berge,* and *Messrs. George F. Kneip* and *W. Marvin Smith* for the United States. Reported below: 118 F. 2d 667.

No. 996. WOMEN'S CATHOLIC ORDER OF FORESTERS *v.* CITY OF ENNIS ET AL. June 2, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Thomas C. Hall* for petitioner. *Mr. James G. Martin* for respondents. Reported below: 116 F. 2d 270.

No. 998. BIELSKI *v.* SAMUELS. June 2, 1941. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *Messrs. William S. Doty* and *Thomas A. Thornton* for petitioner. Reported below: 340 Pa. 528; 17 A. 2d 616.

No. 1000. ARNOLD, JUDGE OF THE PROBATE COURT, *v.* WYERS. June 2, 1941. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Mr. Julius T. Muench* for petitioner. Reported below: 347 Mo. 413; 147 S. W. 2d 644.

No. 1002. FISKE ET AL. *v.* WALLACE. June 2, 1941. Petition for writ of certiorari to the Circuit Court of Ap-

peals for the Eighth Circuit denied. *Messrs. Oscar E. Buder* and *G. A. Buder, Jr.* for petitioners. *Messrs. James C. Jones, Lon O. Hocker,* and *Frank Y. Gladney* for respondent. Reported below: 117 F. 2d 149.

No. 1005. TAYLOR *v.* COMMISSIONER OF INTERNAL REVENUE. June 2, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. John S. Miller* and *James J. Magner* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *J. Louis Monarch* for respondent. Reported below: 117 F. 2d 189.

No. 1011. PESNELL *v.* DEPARTMENT OF INDUSTRIAL RELATIONS. June 2, 1941. Petition for writ of certiorari to Supreme Court of Alabama denied. *Messrs. Rossie Rogers, Hugh A. Locke,* and *Yelverton Cowherd* for petitioner. *Messrs. Frank R. Broadway* and *James A. Simpson* for respondent. Reported below: 240 Ala. 457; 199 So. 726.

No. 1014. VALLEY MOULD & IRON CORP. *v.* NATIONAL LABOR RELATIONS BOARD. June 2, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Ernest S. Ballard* for petitioner. *Solicitor General Biddle* and *Messrs. Arnold Raum, Robert B. Watts, Laurence A. Knapp,* and *Morris P. Glushien* for respondent. Reported below: 116 F. 2d 760.

No. 1015. CHENILLE MANUFACTURING CO., INC., ET AL. *v.* SCHIFRIN. June 2, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second

Circuit denied. *Mr. Robert J. Blum* for petitioners. *Mr. Meyer Schifrin* for respondent. Reported below: 117 F. 2d 92.

No. 1017. MILLER *v.* UNITED STATES. June 2, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Warren E. Miller* and *Stephen A. Cross* for petitioner. *Solicitor General Biddle* and *Messrs. Julius C. Martin, Wilbert C. Pickett, Fendall Marbury,* and *W. Marvin Smith* for the United States. Reported below: 117 F. 2d 256.

No. 1020. PRISCILLA BAKING CO. ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. June 2, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. O. Walker Taylor* for petitioners. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *F. E. Youngman* for respondent. Reported below: 117 F. 2d 375.

No. 1023. PICKETT, GENERAL CHAIRMAN OF THE BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, ETC., *v.* UNION TERMINAL CO. June 2, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Charles M. Hay* and *S. D. Flanagan* for petitioner. *Solicitor General Biddle* and *Messrs. Richard H. Demuth, Gerald D. Reilly,* and *Irving J. Levy* filed a brief on behalf of the Administrator of the Wage and Hour Division, U. S. Department of Labor, as *amicus curiae,* in support of petitioner. Reported below: 118 F. 2d 328.

No. 1025. ATCHISON, TOPEKA & SANTA FE RAILWAY CO. *v.* COOPER. June 2, 1941. Petition for writ of cer-

tiorari to the Supreme Court of Missouri denied. *Messrs. Cyrus Crane, Geo. J. Mersereau, John N. Monteith,* and *Horace F. Blackwell, Jr.* for petitioner. *Mr. C. A. Randolph* for respondent. Reported below: 347 Mo. 555; 148 S. W. 2d 773.

No. 1028. NETZEL *v.* MICHIGAN. June 2, 1941. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Mr. Odin H. Johnson* for petitioner. *Messrs. Herbert J. Rushton,* Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor General, and *Glenn C. Gillespie* for respondent. Reported below: 295 Mich. 353; 294 N. W. 708.

No. 1030. COWAN ET AL., TRUSTEES, *v.* HAMILTON NATIONAL BANK, TRUSTEE. June 2, 1941. Petition for writ of certiorari to the Supreme Court of Tennessee denied. *Messrs. M. W. Egerton* and *James L. Clarke, Jr.* for petitioners. *Mr. Frank Montgomery* for respondent. Reported below: 177 Tenn. 94; 146 S. W. 2d 359.

No. 1034. PEARL ET AL. *v.* COUNTY OF GARFIELD. June 2, 1941. Petition for writ of certiorari to the Supreme Court of Nebraska denied. *Messrs. J. A. C. Kennedy* and *Geo. L. De Lacy* for petitioners. *Mr. William F. Manasil* for respondent. Reported below: 138 Neb. 810; 295 N. W. 820.

No. 1042. NIMERICK *v.* UNITED STATES. June 2, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Arthur R. Seelig* for petitioner. *Solicitor General Biddle, Assistant Attor-*

ney General Berge, and *Messrs. Oscar A. Provost* and *Louis B. Schwartz* for the United States. Reported below: 118 F. 2d 464.

No. 1019. CENTRAL NATIONAL BANK, TRUSTEE, *v.* O'BRIEN, EXECUTOR. June 2, 1941. Petition for writ of certiorari to the Court of Appeals, Franklin County, Ohio, denied. *Mr. Orlin F. Goudy* for petitioner. *Messrs. Fred C. Rector* and *Richard T. Rector* for respondent. Reported below: 62 Ohio App. 413; 24 N. E. 2d 607.

No. 1041. THOMAS ET AL. *v.* ROSSETTER ET AL. June 2, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Lloyd C. Whitman* for petitioners. *Mr. Isaac E. Ferguson* for respondents. Reported below: 117 F. 2d 639.

No. 1050. VAN AUKEN, ADMINISTRATOR, ET AL. *v.* SECOND NATIONAL BANK & TRUST CO., TRUSTEE, ET AL. June 2, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Howell Van Auken* and *William Lucking* for petitioners. *Messrs. Frank A. Rockwith* and *George R. Effler* for respondents. Reported below: 117 F. 2d 938.

No. 1051. DIAMANTOPOULOS, MINISTER TO THE UNITED STATES FOR THE KINGDOM OF GREECE, *v.* AMERICAN TOBACCO CO. ET AL. June 2, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Carver W. Wolfe* for petitioner. *Messrs. T. Catesby Jones* and *Henry N. Longley* for respondents. Reported below: 119 F. 2d 1022.

No. 1054. VAN AUKEN, ADMINISTRATOR, ET AL. *v.* SECOND NATIONAL BANK & TRUST CO., TRUSTEE, ET AL. June 2, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Howell Van Auken* and *William Lucking* for petitioners. *Messrs. Frank A. Rockwith* and *George R. Effler* for respondents. Reported below: 117 F. 2d 1009.

No. 1031. BROOKS ET AL. *v.* UNITED STATES ET AL. June 2, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Merritt C. Mechem* and *Arthur T. Hannett* for petitioners. *Solicitor General Biddle, Assistant Attorney General Littell,* and *Messrs. Richard H. Demuth* and *Vernon L. Wilkinson* for respondents. Reported below: 119 F. 2d 636.

No. 1032. MARLIN-ROCKWELL CORPORATION *v.* NATIONAL LABOR RELATIONS BOARD. June 2, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Dana B. Hellings* for petitioner. *Solicitor General Biddle* and *Messrs. Arnold Raum, Robert B. Watts,* and *Laurence A. Knapp* for respondent. Reported below: 116 F. 2d 586.

No. 1058. RAND *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. June 2, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Daniel N. Kirby* and *Harry W. Kroeger* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *L. W. Post* for respondent. Reported below: 116 F. 2d 929.

No. 924. TOM WING ART *v.* CARMICHAEL, DISTRICT DIRECTOR OF THE U. S. IMMIGRATION AND NATURALIZATION SERVICE. June 2, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. William H. Wylie* for petitioner. *Solicitor General Biddle, Assistant Attorney General Berge,* and *Messrs. Oscar A. Provost* and *W. Marvin Smith* for respondent. Reported below: 117 F. 2d 158.

No. 1046. THE PRESS CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. June 2, 1941. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Mr. Elisha Hanson* for petitioner. *Solicitor General Biddle* and *Messrs. Arnold Raum, Robert B. Watts, Laurence A. Knapp,* and *Mortimer B. Wolf* for respondents. Reported below: 118 F. 2d 937.

No. 1052. REED & PRINCE MANUFACTURING CO. *v.* NATIONAL LABOR RELATIONS BOARD. June 2, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Charles B. Rugg* for petitioner. *Solicitor General Biddle* and *Messrs. Richard H. Demuth, Robert B. Watts, Laurence A. Knapp,* and *Mortimer B. Wolf* for respondent. Reported below: 118 F. 2d 874.

No. 1056. SINGER MANUFACTURING CO. *v.* NATIONAL LABOR RELATIONS BOARD. June 2, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Frederick H. Wood* for petitioner. *Solicitor General Biddle* and *Messrs. Arnold Raum, Robert B. Watts, Laurence A. Knapp,* and *Morris P. Glushien* for respondent. Reported below: 119 F. 2d 131.

No. 1071. AMERICAN-WEST AFRICAN LINE, INC. *v.* LYDECKER, EXECUTOR. June 2, 1941. Petition for writ of certiorari to the Supreme Court of the State of New York denied. *Mr. Geo. Whitefield Betts, Jr.* for petitioner. *Messrs. Silas B. Axtell* and *Dominick Blasi* for respondent. Reported below: 261 App. Div. 817; 25 N. Y. S. 2d 798.

No. 1074. SOLVAY PROCESS CO. *v.* NATIONAL LABOR RELATIONS BOARD. June 2, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. J. Justin Moore; Charles Vernon Porter,* and *Edmund M. Preston* for petitioner. Reported below: 117 F. 2d 83.

PETITIONS FOR REHEARING GRANTED, FROM APRIL 1, 1941, THROUGH JUNE 2, 1941.

No. 761. CRENSHAW *v.* UNITED STATES. April 7, 1941. The petition for rehearing is granted. The order denying certiorari, 312 U. S. 703, is vacated and the petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit is granted. *Messrs. L. E. Gwinn* and *Charles C. Grassham* for petitioner. *Solicitor General Biddle, Assistant Attorney General Berge,* and *Mr. George F. Kneip* for the United States. Reported below: 116 F. 2d 737.

No. 584. COMMERCIAL MOLASSES CORP. *v.* NEW YORK TANK BARGE CORP.;

No. 586. NEW YORK, CHICAGO & ST. LOUIS RAILROAD CO. *v.* FRANK;

No. 587. TOUCEY *v.* NEW YORK LIFE INSURANCE CO.;

No. 603. GRAY, DIRECTOR OF THE BITUMINOUS COAL DIVISION OF THE DEPARTMENT OF THE INTERIOR, ET AL. *v.* POWELL ET AL., RECEIVERS; and

No. 678. BALTIMORE & OHIO RAILROAD CO. *v.* KEPNER. April 28, 1941. The petitions for rehearing in these cases are granted. The judgments are vacated and the cases are restored to the docket for reargument. (No. 584, *ante*, p. 541; No. 586, *ante*, p. 538; No. 587, *ante*, p. 538; No. 603, 312 U. S. 666; No. 678, *ante*, p. 542.)

No. 54. BERNARDS ET AL. *v.* JOHNSON ET AL.; and Nos. 133 and 134. LISENBA *v.* CALIFORNIA. May 5, 1941. The petitions for rehearing in these cases are granted. The judgments are vacated and the cases are restored to the docket for reargument. See *ante*, p. 537.

No. 686. REITZ *v.* MEALEY, COMMISSIONER OF MOTOR VEHICLES. May 12, 1941. The petition for rehearing is granted. The judgment is vacated and the case is restored to the docket for reargument. See *ante*, p. 542.

No. 901. BAKERY & PASTRY DRIVERS & HELPERS LOCAL 802 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS ET AL. *v.* WOHL ET AL. See *ante*, p. 548.

PETITIONS FOR REHEARING DENIED, FROM APRIL 1, 1941, THROUGH JUNE 2, 1941.*

No. 342. KIMMICH *v.* NEW YORK CLEARING HOUSE ASSOCIATION ET AL. April 7, 1941. Motion for leave to file petition for rehearing denied. 311 U. S. 653.

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*See Table of Cases Reported for references to earlier orders in these cases, unless otherwise indicated.

No. 212. HURON HOLDING CORP. ET AL. *v.* LINCOLN MINE OPERATING CO. April 14, 1941. 312 U. S. 183.

No. 15, original. EARLEY *v.* CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD CO. April 28, 1941. 312 U. S. 694.

No. 346. MAGUIRE ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. April 28, 1941.

No. 472. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* GAMBRILL;

No. 473. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* CAMPBELL;

No. 474. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* KNOX; and

No. 475. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* ROGERS. April 28, 1941.

No. 549. PUBLIC SERVICE COMMISSION OF MISSOURI ET AL. *v.* BRASHEAR FREIGHT LINES, INC., ET AL. April 28, 1941. 312 U. S. 621.

No. 776. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* NEBRASKA BRIDGE SUPPLY & LUMBER CO. April 28, 1941. 312 U. S. 666.

No. 789. CANTEY *v.* MCLAIN LINE, INC. ET AL. April 28, 1941. 312 U. S. 667.

No. 805. SUN-MAID RAISIN GROWERS ASSOCIATION ET AL. *v.* UNITED STATES ET AL. April 28, 1941. 312 U. S. 667.

No. 813. LEWIS *v.* LOUISIANA. April 28, 1941. 312 U. S. 705.

No. 729, October Term, 1939. GOLDSMITH *v.* UNITED STATES. May 5, 1941. The motion for leave to file a second petition for rehearing is denied. 310 U. S. 657.

No. 810. CONSOLIDATED FREIGHTWAYS, INC. *v.* RAILROAD COMMISSION OF CALIFORNIA. May 5, 1941.

No. 896, October Term, 1939. McCAMPBELL *v.* WARRICH CORPORATION ET AL. May 26, 1941. Motion for leave to file a second petition for rehearing denied. 310 U. S. 631.

No. 776. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* NEBRASKA BRIDGE SUPPLY & LUMBER CO. May 26, 1941. Motion for leave to file a second petition for rehearing denied.

No. —. EX PARTE CECIL L. SNYDER. May 26, 1941. 312 U. S. 663.

No. 523. CRYSTAL CITY GLASS WORKERS' UNION *v.* NATIONAL LABOR RELATIONS BOARD. May 26, 1941. *Ante*, p. 146.

No. 658. SKIRIOTES *v.* FLORIDA. May 26, 1941. *Ante*, p. 69.

No. 816. KALB *v.* FEUERSTEIN ET UX. May 26, 1941.

No. 893. PAYNE FURNACE & SUPPLY CO., INC. *v.* WILLIAMS-WALLACE COMPANY. May 26, 1941.

No. 936. WILLIAM DAVIES CO., INC. *v.* ILLINOIS EX REL. TOMAN, COUNTY TREASURER. May 26, 1941.

No. 876, October Term, 1938. SWEET ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. June 2, 1941. The motion for leave to file petition for rehearing is denied. 307 U. S. 627.

No. 882, October Term, 1939. FRETWELL *v.* GILLETTE SAFETY RAZOR CO. June 2, 1941. The motion for leave to file a second petition for rehearing is denied. 311 U. S. 724.

No. 601. SAMPSELL, TRUSTEE, *v.* IMPERIAL PAPER & COLOR CORP. June 2, 1941.

No. 655. DEPARTMENT OF TREASURY OF INDIANA ET AL. *v.* INGRAM-RICHARDSON MANUFACTURING CO. OF INDIANA, INC. June 2, 1941.

No. 708. PHILADELPHIA-DETROIT LINES, INC. *v.* SIMPSON, STATE ROAD COMMISSIONER, ET AL. June 2, 1941. 312 U. S. 655.

No. 857. TINKOFF *v.* KLEIN-EXEL, TRUSTEE; and

No. 858. TINKOFF *v.* MCMANUS, TRUSTEE. June 2, 1941.

No. 921. FUNKS GROVE GRAIN CO. *v.* ALTON RAILROAD CO. June 2, 1941.

No. 767. SABIN ET AL. *v.* HOME OWNERS' LOAN CORPORATION. June 2, 1941.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM APRIL 1, 1941, THROUGH JUNE 2, 1941.

No. 918. LIBERTY MUTUAL INSURANCE CO. *v.* LEE. On petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. May 12, 1941. Dismissed on motion of counsel for petitioner. *Mr. T. J. Blackwell* for petitioner. Reported below: 117 F. 2d 735.

No. 6, original. KENTUCKY *v.* INDIANA. May 26, 1941. An order is entered striking this case from the docket pursuant to stipulation of counsel. *Messrs. Hubert Meredith,* Attorney General of Kentucky, and *A. E. Funk,* Assistant Attorney General, for complainant. *Messrs. George N. Beamer,* Attorney General of Indiana, *Joseph W. Hutchinson,* and *Urban C. Stover,* Deputy Attorneys General, for defendants. See 281 U. S. 163.

APPOINTMENT OF MEMBER OF ADVISORY COMMITTEE.

ORDER.

It is ordered by this Court that George F. Longsdorf, of Oakland, California, be, and he hereby is, appointed a member of the Advisory Committee appointed February 3, 1941, to assist the Court in the preparation of rules of pleading, practice, and procedure with respect to proceedings prior to and including verdict, or finding of guilty or not guilty, in criminal cases in district courts of the United States.

May 26, 1941.

AMENDMENT OF RULES OF THIS COURT.

ORDER.

It is ordered that paragraph 7 of Rule 32 of the Rules of this Court be amended so as to read as follows:

"7. In pursuance of the Act of March 3, 1883, authorizing and empowering this court to prepare a table of fees to be charged by the clerk of this court the following table is adopted:

"For docketing a case and filing and indorsing the transcript of the record, fifteen dollars.

"For entering an appearance, twenty-five cents.

"For entering a continuance, twenty-five cents.

"For filing a motion, order, or other paper, twenty-five cents.

"For entering any rule or for making or copying any record or other paper, twenty cents per folio of each one hundred words.

"For transferring each case to a subsequent docket and indexing the same, one dollar.

"For entering a judgment or decree, one dollar.

"For every search of the records of the court, one dollar.

"For a certificate and seal, two dollars.

"For receiving, keeping, and paying money in pursuance of any statute or order of court, two per cent. on the amount so received, kept, and paid.

"For an admission to the bar and certificate under seal, including filing of preliminary certificate and statements, fifteen dollars.

"For preparing the record or a transcript thereof for the printer, in all cases, including records presented with petitions for certiorari, indexing the same, supervising the printing and distributing the printed copies to the justices, the reporter, the law library, and the parties or their counsel, ten cents per folio of each one hundred words; but where the necessary printed copies of the record as printed for the use of the court below are furnished, charges under this item will be limited to any additions printed here under the clerk's supervision.

"For making a manuscript copy of the record, when required under Rule 13, fifteen cents per folio of each one hundred words, but nothing in addition for supervising the printing.

"For preparing, on filing, for the printer, petitions for writs of certiorari, briefs, jurisdictional statements, or motions when required by the Rules, or at the request of counsel when, in the opinion of the clerk, circumstances require, indexing the same, changing record references to conform to the pagination of the printed record, and supervising the printing, five dollars for each such petition, brief, jurisdictional statement, or motion. Neither the expense of printing nor the clerk's supervising fee shall be allowed as costs in the case.

"For a mandate or other process, ten dollars.

"For an order on petition for writ of certiorari, five dollars.

"For filing briefs, ten dollars for each party appearing.

"For every printed copy of any opinion of the court or any justice thereof, certified under seal, two dollars."

It is further ordered that this order shall apply to all cases docketed on or after July 1, 1941.

May 26, 1941.

STATEMENT SHOWING CASES ON DOCKETS, CASES DISPOSED OF, AND CASES REMAINING ON DOCKETS FOR THE OCTOBER TERMS 1938, 1939, AND 1940

	ORIGINAL			APPELLATE			TOTALS		
Terms	1938	1939	1940	1938	1939	1940	1938	1939	1940
Total cases on dockets	13	15	15	1,007	1,063	1,094	1,020	1,078	1,109
Cases disposed of during terms	1	4	6	922	942	979	923	946	985
Cases remaining on dockets	12	11	9	85	121	115	97	132	124

	TERMS		
	1938	1939	1940
Distribution of cases disposed of during terms:			
Original cases	1	4	6
Appellate cases on merits	246	252	286
Petitions for certiorari	676	690	693
Cases remaining on dockets:			
Original cases	12	11	9
Appellate cases on merits	48	76	67
Petitions for certiorari	37	45	48

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2. *Id. Primary Elections.* Primary election which is necessary step in choice, or effectively controls choice, of Representative, is "election" subject to regulation by Congress as to manner of holding. *Id.*

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4. *Federal Question.* Whether obligation to State is tax entitled to priority under Bankruptcy Act is federal question. *New York* v. *Feiring*, 283.

5. *Id.* Amount of interest by way of damage for delayed payment of obligation to United States is for federal courts to determine. *Royal Indemnity Co.* v. *U. S.*, 289.

6. *Removal.* Non-citizen plaintiff in state court without right of removal though citizen defendant interpose counterclaim involving jurisdictional amount. *Shamrock Oil Corp.* v. *Sheets*, 100.

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