

injunction and were therefore properly stricken with that prayer. The allegations are not essential to or a proper part of the cause of action for an accounting and recovery of the royalties alleged to be due.

Since the allegations were stricken, appellee Federal has answered setting up as a separate defense the royalty adjustment orders prohibiting payment of the royalties to appellant. Upon that issue appellant will be free to contest the constitutional validity of the orders. The judgment below is accordingly

Affirmed.

McCULLOUGH v. KAMMERER CORPORATION

ET AL.

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

No. 46. Argued December 11, 1944.—Decided January 2, 1945.

Since the only question for the review of which certiorari was granted in this case is one which was not properly raised, litigated, or passed upon below, the writ is dismissed. P. 328.

138 F. 2d 482, dismissed.

CERTIORARI, 322 U. S. 766, to review the affirmance of a decree for the plaintiffs, respondents here, in a suit for infringement of a patent, 39 F. Supp. 213. See also 143 F. 2d 595.

Mr. A. W. Boyken, with whom *Messrs. R. Welton Whann* and *Robert M. McManigal* were on the brief, for petitioner.

Mr. Leonard S. Lyon, with whom *Mr. Frederick S. Lyon* was on the brief, for respondents.

Solicitor General Fahy and *Assistant Attorney General Berge* filed a brief on behalf of the United States, as *amicus curiae*, in support of petitioner.

PER CURIAM.

In this case both the District Court and the Circuit Court of Appeals for the Ninth Circuit have held valid and infringed the Reilly and Stone Patent, No. 1,625,391, of April 19, 1927, for a pipe cutting tool, of which patent respondent Kammerer Corporation is assignee. The patent expired on April 18, 1944, only damage for infringement is involved, and there is no conflict of decision with respect to the patent. This Court granted certiorari only because the petition for certiorari presented as a ground of defense to the suit, that respondent Kammerer Corporation had licensed to respondent Baash-Ross Tool Company the use of the patented device in suit, by an agreement which stipulated for restrictions on such use which are asserted to be unauthorized by the patent monopoly, contrary to public policy, and unlawful.

On oral argument and submission of the cause it appears that although petitioner by its amended answer alleged generally that respondents "do not come into . . . court with clean hands," the answer made no mention of the restrictions contained in the license agreement. The District Court made no findings of fact or law with respect to them. On appeal to the Circuit Court of Appeals petitioner assigned no error with reference to them and the Circuit Court of Appeals did not consider them, saying: "We affirm the judgments of the District Court, considering here only the appellant's claim of error." 138 F. 2d 482.

Thus the only question for which we granted certiorari is one not properly raised, litigated or passed upon below. *Duignan v. United States*, 274 U. S. 195, 200; *Burnet v. Commonwealth Improvement Co.*, 287 U. S. 415, 418; *Zellerbach Paper Co. v. Helvering*, 293 U. S. 172, 182; *United States v. Classic*, 313 U. S. 299, 329. The grounds

asserted for the allowance of certiorari are inadequately supported by the record, and the writ is therefore

Dismissed.

CITY OF CLEVELAND v. UNITED STATES ET AL.

NO. 68. APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.*

Argued December 6, 1944.—Decided January 2, 1945.

1. Under § 266 of the Judicial Code, the jurisdiction of a district court of three judges was properly invoked to hear and determine a suit to restrain county and municipal officials from assessing and collecting allegedly unconstitutional taxes, where such officials were acting in the interest of the State and pursuant to a state law of statewide application. P. 332.
2. The United States Housing Act of September 1, 1937, providing for the use of federal funds and credit to improve housing conditions, was a valid exercise of the power of Congress to provide for the general welfare. Const., Art. I, § 8, cl. 1. P. 333.
3. It was within the power of Congress to exempt from state taxation property acquired and owned by the United States, or an instrumentality thereof, pursuant to the United States Housing Act. P. 333.

52 F. Supp. 906, affirmed.

143 Ohio St. 251, 55 N. E. 2d 265, reversed.

APPEALS, in Nos. 68 and 69, from a decree of a district court of three judges enjoining assessment and collection of state taxes; and, in No. 388, from a judgment sustaining the denial of an application for exemption from a state tax.

*Together with No. 69, *Boyle, County Treasurer of Cuyahoga County, et al. v. United States et al.*, also on appeal from the District Court of the United States for the Northern District of Ohio—argued December 6, 1944; and No. 388, *Federal Public Housing Authority (formerly United States Housing Authority) v. Guckenberger, Auditor, Hamilton County, et al.*, on appeal from the Supreme Court of Ohio—argued December 6, 7, 1944.