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Pocket
Suits Against FRBanks - FRBANKS

Schmoll, Armand, Inc
vs FRB N.Y.

United States Court of Customs and Patent Appeals

Pocket

file date 7/7/49

CUSTOMS APPEAL No. 4600.

ARMAND SCHMOLL, INC.,

Appellant,

v.

THE UNITED STATES,

Appellee.

BRIEF OF FEDERAL RESERVE BANK OF NEW YORK, *AMICUS CURIAE.*

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United States Court of Customs and Patent Appeals

ARMAND SCHMOLL, INC., Appellant, *v.* THE UNITED STATES, Appellee.	Customs Appeal No. 4600.

BRIEF OF FEDERAL RESERVE BANK OF NEW YORK, *AMICUS CURIAE.*

Opinion Below.

The Federal Reserve Bank of New York is not a party to this proceeding (R. 47, 89; Appellant's Brief, p. 20). It was instituted by appellant under sections 514 and 515 of the Tariff Act of 1930 (c. 497; 46 Stat. 734; 19 U. S. C. 1514, 1515) upon appellant's protest against the action of the Collector at the port of New York in liquidating an entry of hides exported from Brazil. The entry was made on October 22, 1935 (R. 8). In the proceeding below a subpoena *duces tecum* was served on April 11, 1946, upon Federal Reserve Bank of New York pursuant to an order of the United States Customs Court (R. 17-18, 29). The subpoena (R. 16) was for the production of:

> "1. All of your records, correspondence, communications, and reports specifically involving the buying rate in the New York market for cable transfers payable in Brazilian milreis on October 1, 2, 3, 4, 5, and 7, 1935, and,
>
> "2. Particularly the correspondence addressed by the Commissioner of Customs, Treasury Department to the Federal Reserve Bank dated February 15, 1946, relating to the furnishing by the Bank to the Collector of Customs or the Customs Information

> Exchange of the buying rate for cable transfers payable in Brazilian milreis together with the original or copies of all correspondence passing between the Federal Reserve Bank and the Treasury Department or any of its bureaus relating to the certification by the Bank of the buying rates for cable transfers payable in Brazilian milreis between April, 1933 and August, 1936."

The Federal Reserve Bank of New York moved to quash the subpoena (R. 10), and the Customs Court granted the motion by order dated April 22, 1946 (R. 22). After trial, the Court entered judgment for the United States affirming the decision of the Collector (R. 192). The opinion of the Court is reported in C. D. 1097, T. D., April 8, 1948, Vol. 83, No. 15, p. 19 (R. 182-191).

Almost the entire argument in appellant's brief on this appeal is directed at the action of the Customs Court in quashing the subpoena. In view of the interest of the Federal Reserve Bank of New York in that action, and the importance of the issues to the Government of the United States, this brief is filed by the Federal Reserve Bank of New York as *amicus curiae* pursuant to permission of this Court granted on May 23, 1949.

Statement.

The hides were exported from Brazil on October 7, 1935. They were invoiced in Brazilian milreis (R. 7). On the date of exportation, the Federal Reserve Bank of New York, pursuant to section 522 of the Tariff Act of 1930 (46 Stat. 739; 31 U. S. C. 372), certified to the Secretary of the Treasury the rate of $.083740 for the Brazilian milreis. The certificate (Apl. Exh. 1, R. 38a) stated: "we have ascertained and hereby certify to you that the buying rates in the New York Market at noon today for cable transfers payable in the foreign currencies are as shown below". Then followed 41 rates for the currencies of foreign countries including the rate for the Brazilian milreis which, to-

gether with 9 other rates, was accompanied by the remark: "Nominal rate. Firm rates not available".

The Secretary of the Treasury published the rate for milreis so certified (T. D. 47910, Oct. 12, 1935) and directed that it be used by the Collectors (68 T. D. 344-345). The Collector of Customs at New York determined the dutiable value of the imported merchandise by converting the currency of the invoice at such rate, and computed the *ad valorem* duty, and liquidated the entry, accordingly. Appellant protested the Collector's action claiming that an erroneous rate had been used by him in the conversion of the currency of the invoice.

Section 522(c) of the Tariff Act of 1930 provides that the Federal Reserve Bank of New York shall determine the buying rates in the New York market for cable transfers payable in foreign currencies and "may in its discretion . . . if there is no market buying rate for such cable transfers, calculate such rate". A cable transfer may be defined as an order transmitted by cable to pay a certain sum of money to a designated payee. The section further provides that the Federal Reserve Bank of New York shall certify such rates daily to the Secretary of the Treasury to be used "to convert foreign currency into currency of the United States", "for the purpose of the assessment and collection of duties upon merchandise imported into the United States".

The section provides that the conversion of the foreign currency shall be made at the rate certified for the date of exportation of the merchandise. As the market rate for foreign exchange may fluctuate from hour to hour (R. 144), or minute to minute, the section requires the certification of a market buying rate at noon. Consequently, the rate so determined and certified by the Federal Reserve Bank of New York for the currency of a foreign country is the price at which cable transfers payable in the currency of such foreign country are bought, or bid for, in substantial amounts by dealers in foreign exchange exactly at noon (R. 106) in the foreign exchange market in New York. Since at that time there may be several simultaneous purchases

and bids, by the various dealers and traders in the New York market, all at different prices, the determination from them of the market price requires the exercise of expert knowledge, skill and judgment, and section 522(c) expressly provides that in its ascertainment the Federal Reserve Bank of New York "may in its discretion (1) take into consideration the last ascertainable transactions and quotations, whether direct or through exchange of other currencies, . . .". Such a market price may differ somewhat from the price in any of the individual transactions. If, in the words of the statute, "there is no market buying rate" exactly at noon for cable transfers payable in a particular currency, then the rate certified for such currency is a rate which the Federal Reserve Bank of New York calculates, in the exercise of its judgment and discretion, in accordance with the terms and intent of section 522(c), as the rate which would have been the market buying rate had there been transactions or firm bids at that time in an active, free and open market with adequate supply and demand.

In the present proceeding, the appellant sought to have the United States Customs Court find independently a new and different rate of exchange for the Brazilian milreis for use by the Collector in reliquidating the entry of hides (R. 2, pars. 6, 34), in lieu of the rate certified by the Federal Reserve Bank of New York to the Secretary of the Treasury and proclaimed by the latter (R. 152). Appellant's prayer on the present appeal is that this Court instruct the Customs Court so to find a different rate (Apl. Br., p. 28; R. 2, par. 3).

The Customs Court, after consideration of the decision and opinion of the United States Supreme Court in the case of *Barr* v. *United States,* 324 U. S. 83 (1945), quoted that opinion at length and held (R. 187-8):

> "The substance of plaintiff's contention, as urged in its brief, is that the Federal Reserve Bank failed to certify the proper rate of conversion under the statute. Plaintiff contends that the collector has failed in his duty in that he has adopted a rate which is not 'the buying rate for cable transfers'. This

contention fails to take into account the discretion granted to the Federal Reserve Bank by the terms of the statute, i. e., that it may:

> "(1) take into consideration the last ascertainable transactions and quotations, whether direct or through exchange of other currencies, and (2) if there is no market buying rate for such cable transfers, calculate such rate from actual transactions and quotations in demand or time bills of exchange.
>
> "* * * It is plain to the court that in denominating the rate certified as 'nominal' said Federal Reserve Bank indicated that such rate has been determined by calculation under the circumstances surrounding Brazilian currency transactions on the day of exportation of this merchandise. We know of no authority nor have we been furnished with citations holding that the judicial review of the collector's decisions provided in section 514 has been extended to include a review of the accuracy of the process by which the Federal Reserve Bank determines a buying rate. Section 522(c) gives the Federal Reserve Bank authority to determine a rate of exchange. This function is one that involves the use of executive skill and discretion. In the absence of an express statute permitting judicial review, the determination of the bank is final. This was indicated in the case of *Barr* v. *United States,* 324 U. S. 83, where the Supreme Court made the following statement:
>
> "* * * The determination of the rate is left exclusively to the Federal Reserve Bank of New York. It alone is given discretion in computing it."

The court referred (R. 189-90) to the case in this Court of *Amalgamated Textiles, Ltd.* v. *United States,* T. D. 48378, 24 C. C. P. A. (Customs) 74, 84 Fed. 2d 210 (1936), and further held (R. 190-1):

> "In the instant case we have the certification of the Federal Reserve Bank (Plaintiff's Exhibit 1) which expressly states that it is certifying to 'buying rates'.
>
> "After examining the record, briefs, statutes, and pertinent authorities upon the subject, we are satisfied that the Federal Reserve Bank of New York

in the proper exercise of its knowledge, judgment, and discretion, and within the spirit and meaning of section 522 (c), *supra,* determined a buying rate for the Brazilian milreis on October 7, 1935, which was duly certified by it to the Secretary of the Treasury. That rate was made public by the Secretary to such extent as he deemed necessary and was the rate employed by the collector of customs in the process of liquidating the entry herein. At this point judicial inquiry terminates.

"As was so aptly stated by the Supreme Court of the United States in *Barr* v. *United States, supra,* in discussing the extent of judicial review in a kindred case:

> "'* * * The exercise of the Bank's discretionary power under §522 (c) is in the category of administrative or executive action which this Court held non-reviewable in *Cramer* v. *Arthur, supra,* and in *Hadden* v. *Merritt,* 115 U. S. 25, 27-28. And see *United States* v. *Bush & Co.,* 310 U. S. 371, 380.

"Accordingly, the claim of the plaintiff that 'an erroneous and an improper' buying rate was used by the collector of customs in liquidating the entry herein is overruled and the decision of the collector is affirmed."

Questions Presented.

(1) Should this Court exercise appellate jurisdiction to review the action of the United States Customs Court in quashing its own subpoena *duces tecum* served upon the Federal Reserve Bank of New York?

(2) May the United States Customs Court review the rate for Brazilian milreis, which has been certified by the Federal Reserve Bank of New York to the Secretary of the Treasury and published by him, and, under instruction to it from this Court, lawfully find a new and different rate of foreign exchange (in lieu of the rate so certified) for use by the Collector in converting the milreis value of the imported merchandise into currency of the United States?

(3) Has the United States Customs Court lawful authority to compel the Federal Reserve Bank of New York to produce its confidential records, and the confidential correspondence of the Secretary of the Treasury and others with it, as demanded in the subpoena *duces tecum?*

POINT I.

Appellate jurisdiction should not be exercised by this Court to review the quashing by the Customs Court of its subpoena *duces tecum*.

(1) It is submitted that this Court does not have jurisdiction to review the action of the Customs Court in quashing its subpoena issued upon its Order since that action involved only the Customs Court's own process and procedure.

Unless authorized by statute, an appellate court does not have jurisdiction to review the action of a lower court in quashing its subpoena.

> *Earnshaw* v. *United States,* 146 U. S. 60 (1892);
> *Clyde* v. *Rogers,* 87 N. Y. 625 (1881);
> See *In re Donald,* 87 N. J. L. 691, 94 Atl. 580 (N. J. Ct. of E. & A., 1915);
> *City of Hoboken* v. *State Board of Tax Appeals,* 117 N. J. L. 119, 187 Atl. 164 (N. J. Ct. of E. & A., 1936).

As the court said in *Clyde* v. *Rogers, supra:*

> "Whether the subpoena *duces tecum* should be set aside was matter of discretion in the court below. * * * These are mere matters of practice with which we have no jurisdiction to interfere."

The quashing by a court of its subpoena does not involve an "appealable question".

> *Thomas French & Sons* v. *International Braid Co.,* 146 Fed. 2d 735 (C. C. A. 1st, 1945);

Palmuth v. *United States,* 107 Fed. 2d 975 (C. C. A. 9th, 1939); affd. 309 U. S. 323;
Tucker v. *Peiler,* 297 Fed. 570 (C. C. A. 2d, 1924); cert. den. 265 U. S. 587;
See *Webster Coal Co.* v. *Cassatt,* 207 U. S. 181 (1907).

Section 1541 of the new Judicial Code effective September 1, 1948 (Act of June 25, 1948, c. 646, §1541; 62 Stat. 992; 28 U. S. C. 1541), so far as material to this issue, limits the jurisdiction of this Court to the review of "appealable questions" and to the review of only such appealable questions as are "appealable questions as to the jurisdiction of the Customs Court and as to the laws and regulations governing the collection of the customs revenues".

See *United States* v. *Loeb & Schoenfeld, Inc.,* T. D. 36961, 7 Ct. Cust. App. 380, 384-5 (1917).

It is submitted that this shows a Congressional intention that this Court shall not review a non-appealable question even when it arises in a proceeding resulting in an appealable final decision. This seems particularly clear when one contrasts the express inclusion in the enumeration of the powers of the Customs Court of jurisdiction to review decisions of collectors "including all orders and findings entering into the same" (28 U. S. C. 1583).

(2) It is submitted that this Court does not have jurisdiction to review the quashing of a subpoena of the Customs Court the subject matter of which pertained solely to an amount of duty and to a dutiable value stated in United States currency.

In section 1541 of the new Judicial Code, Congress has specifically limited the appellate jurisdiction of this Court as follows (procedure being set forth in sections 2601-2):

"§1541. *Customs Court decisions.*

"The Court of Customs and Patent Appeals shall have jurisdiction to review by appeal final de-

> cisions of the Customs Court in all cases as to the construction of the law and the facts respecting the classification of merchandise, the rate of duty imposed thereon under such classifications, and the fees and charges connected therewith, and all appealable questions as to the jurisdiction of the Customs Court and as to the laws and regulations governing the collection of the customs revenues."

Appellate jurisdiction as to the *amount* of duties, which is conferred by section 1583 upon the Customs Court, is not included in the appellate jurisdiction of this Court. Therefore the amount of duty may not be reviewed by this Court unless a rate of duty or classification (appellate jurisdiction over which is expressly conferred upon this Court) is dependent thereon.

> See *E. C. Miller Cedar Lumber Co.* v. *United States,* 86 Fed. 2d 429, 434-6 (C. C. P. A., 1936).

Similarly, the right to review the dutiable value of imported merchandise, as distinguished from classifications thereof and rates of duty thereon, has not been conferred upon this Court.

> *Passavant* v. *United States,* 148 U. S. 214 (1892);
> See *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 79 (1936).

The *Passavant* case involved interpretation of section 15 of the Customs Administrative Act (Act of June 10, 1890, c. 407, Sec. 15; 26 Stat. 137), but no change in the terms of that section, enlarging the jurisdiction of the appellate court over dutiable values, has been made by any of the succeeding statutes (Payne-Aldrich Tariff Act of Aug. 5, 1909, c. 6, sec. 28; 36 Stat. 105; sec. 195 of the former Judicial Code and its amendments; 36 Stat. 1145; 38 Stat. 703; 39 Stat. 727; 43 Stat. 940; 28 U. S. C. 308; section 1541 of the new Judicial Code).

Under the new Judicial Code, therefore, this Court does not have appellate jurisdiction to review the amount of

duty involved in the case on this appeal, since neither classification of the imported merchandise, nor rate of duty thereon, is dependent upon the amount of duty. It necessarily follows that this Court does not have jurisdiction of any of the elements entering into the ascertainment of the amount of duty, other than classification and rate the jurisdiction to review which is given this Court. In the instant case the rate of foreign exchange in no way affected the classification of the hides or rate of duty thereon, but was used solely to convert the dutiable value of the hides, stated in foreign currency, into a dutiable value, stated in dollars, from which the amount of duty was computed. The rate so used is an element in the computation of the amount of duty.

> *United States* v. *J. Allston Newhall & Co.,* 91 Fed. 525, 532 (C. C., Mass., 1899); app. dis. 92 Fed. 1023; overruled on other points by *United States* v. *Whitridge,* 197 U. S. 135 (1905).

It follows that this Court, having no jurisdiction over amount of duty, lacks jurisdiction to review the decision of the Customs Court as to the rate of foreign exchange used in computing the amount of duty.

This Congressional intent would seem to find confirmation in the statutory treatment of dutiable value. The courts have recognized, under the various statutes conferring jurisdiction on this Court and its predecessors, that this Court has, as its predecessors had, no jurisdiction to review the dutiable value of merchandise. It would seem to be a necessary corollary that this Court may no more review the dutiable value when stated in dollars than when stated in foreign currency. The Supreme Court in the *Barr* case stated (p. 89) that the use of the "rate for the foreign exchange with which the imported goods are purchased . . . reflects values in United States currency which . . . serve as the measure of the valuation of the goods for purposes of the *ad valorem* tax", and (p. 91) that this dollar value is the actual valuation before the Collector.

"Dutiable value" is the value of an article for the assessment of customs duties which are based upon, or regulated by, value. It is a broader concept than appraisement, and the rate of conversion is a component in its determination.

> R. Elbertson Smith: "Customs Valuation in the United States", pp. 24, 26, The University of Chicago Press (1948) (and see p. 273, to the effect that the rate is also a factor in the amount of duty).

It would follow that this Court has no jurisdiction of the factor used in converting value stated in foreign currency in order to determine the dutiable value stated in dollars.

In *United States* v. *Klingenberg,* 153 U. S. 93 (1894) the determination by the Treasury of the value of the Austrian florin, and the collector's action in applying it, were held to be conclusive and not subject to review. The court, however, in what it clearly stated as dictum, based upon a supposititious premise to the contrary (*ibid.,* p. 101), expressed the view that the rate used in converting a value of merchandise from foreign currency into the dollar value upon which the *ad valorem* customs duty was assessed was not an element in determining dutiable value—as to which the Circuit Court had no jurisdiction; and that such rate was an element in determining the amount of duty—as to which the Circuit Court had jurisdiction. It based jurisdiction as to the amount of duty upon the theory that, except as to dutiable value, the Circuit Court had exactly the same appellate jurisdiction, under section 15 of the Customs Administrative Act of 1890 (26 Stat. 131), as the appellate jurisdiction of the board of general appraisers.

This theory would seem to have been inconsistent with the terms of the 1890 Act. Section 13 thereof provided that the decision as to dutiable value of the board of general appraisers, following appraisement, was final and conclusive. Section 14 provided for appeals to the *board* (from decisions of the Collector) as to *rates* and *amounts*

of duty. Section 15 provided the rights of appellants before the Circuit Courts respecting appeals from decisions of the board as to the classification of merchandise and the rate of duty imposed thereon under the classification (but not appeals from decisions of the board as to the amount of duty). These sections would seem to have made a decision of the board as to an amount of duty, following the liquidation of an entry, final and conclusive, just as a decision of the board as to dutiable value, following an appraisement, was final and conclusive. The Circuit Court of Appeals for the First Circuit has stated with respect to the opinion in the *Klingenberg* case (*United States* v. *Lucius Beebe & Sons,* 122 Fed. 762, 770 (C. C. A. 1st, 1903)):

> "Several things said in it may be disregarded as dicta; . . ."

The dictum in the *Klingenberg* case was accepted in some of the older cases such as *United States* v. *Knauth,* 77 Fed. 599 (C. C., N. Y., 1896) and *United States* v. *J. Allston Newhall & Co., supra.* But the opinions in these two cases, upon the principal issues involved therein, were completely overruled by a unanimous Supreme Court in *United States* v. *Whitridge, supra.*

> See *J. K. Clarke* v. *United States,* T. D. 43866, 17 C. C. P. A. (Cust.) 420, 423-4 (1930).

Whatever may have been the proper interpretation of the statutes preceding the new Judicial Code, it is submitted that under the present law it is clear that this Court has no jurisdiction over the amount of duty. The new Judicial Code, by its direct definition of appellate jurisdiction of this Court, in place of an indirect limitation by prescribing rights of appellants (as is still the case with the rights of appeal of American manufacturers, 19 U. S. C. 1516, not repealed by new Judicial Code, sec. 39), shows the intent of Congress to limit the jurisdiction of this Court to the precise terms of Section 1541. Moreover, this Court,

unlike its predecessor appellate courts, the Circuit Courts, which were constitutional courts of general jurisdiction, is a legislative court having an appellate jurisdiction strictly limited by Congress.

Ex parte Bakelite Corp., 279 U. S. 438 (1929).

By the express terms of the act creating this Court (as the Court of Customs Appeals) in 1909, its jurisdiction was "established and limited" by Congress (Act of Aug. 5, 1909, c. 6, sec. 28; former Judicial Code sections 188-199; 28 U. S. C. 301-311).

It is submitted, therefore, that this Court should follow its own reasoning in *E. C. Miller Cedar Lumber Co., supra,* and hold that it has no jursidiction to review the conversion rate used in computing the amount of duty. As a result of such holding, this Court must necessarily further hold that it is without jurisdiction to review the action of the Customs Court in quashing its subpoena *duces tecum* which called for evidence as to a factor the use of which was confined to the determination of the dutiable value stated in dollars, and of the amount of duty, over which this Court has no appellate jurisdiction.

POINT II.

The rates of foreign exchange determined and certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to Section 522(c) of the Tariff Act of 1930, are final and conclusive and not subject to judicial review.

The Federal Reserve Bank of New York was created by Act of Congress (Federal Reserve Act of December 23, 1913, ch. 6; 38 Stat. 251). It is not a New York corporation as the appellant's brief would seem to suggest (Apl. Br., p. 2; see R. 27, 177). It acts under the supervision and regulations of the Board of Governors of the Federal Reserve System which is composed exclusively of officers

of the United States (Fed. Res. Act, sec. 10; 12 U. S. C. 241), and performs numerous functions of the United States Government. For example, it issues currency of the United States, including Federal Reserve Notes which are obligations both of the bank and of the United States (Fed. Res. Act, sec. 16; 12 U. S. C. 411), and acts as depositary and fiscal agent of the United States (Fed. Res. Act, sec. 15; 12 U. S. C. 391). The function of determining and certifying rates of foreign exchange for use in the assessment and collection of customs duties is another instance where the Federal Reserve Bank of New York is acting in performance of a governmental duty in aid of the administration by the United States Government of one of its primary executive functions, namely, the collection of customs duties.

Prior to the enactment of the provisions of section 522(c) in the Emergency Tariff Act of 1921 (Act of May 27, 1921, c. 14, sec. 403; 42 Stat. 17), and under earlier statutes beginning with the Act of March 2, 1799 (c. XXII, sec. 61; 1 Stat. 673), United States consuls determined and certified the rates for conversion of depreciated foreign currencies, pursuant to regulation made by the President through the Secretary of the Treasury. The procedure under this regulation was superseded by the Tariff Act of 1921 which substituted the Federal Reserve Bank of New York to determine, and certify to the Secretary of the Treasury, the foreign exchange rates for currencies for use in the collection and assessment of customs duties. The Federal Reserve Bank of New York thereby became by statute the immediate successor to the United States consuls in determining and certifying the rates for conversion of foreign currencies.

The determination and certification of such rates of foreign exchange is the performance of an administrative or executive function of the Government of the United States requiring skill and the exercise of judgment and discretion. The rates so certified are not subject to judicial review.

Cramer v. *Arthur,* 102 U. S. 612 (1880).

In this leading case the Collector used a value certified by the consul and, as the court stated, "The plaintiff seeks to go behind this valuation". The court held (at p. 619):

> "This we think the plaintiff cannot be allowed to do. The proclamation of the Secretary and the certificate of the consul must be regarded as conclusive. In the estimation of the value of foreign moneys for the purpose of assessing duties, there must be an end to controversy somewhere. When Congress fixes the value by a general statute, parties must abide by that. When it fixes the value through the agency of official instrumentalities, devised for the purpose of making a nearer approximation to the actual state of things, they must abide by the values so ascertained. If the currency is a standard one, based on coin, the Secretary's proclamation fixes it; if it is a depreciated currency, the parties may have the benefit of a consular certificate. To go behind these and allow an examination by affidavits in every case would put the assessment of duties at sea. It would create utter confusion and uncertainty. If existing regulations are found to be insufficient, if they lead to inaccurate results, the only remedy is to apply to the President, through the Treasury Department, to change the regulations."

Inasmuch as rates of foreign exchange and values of foreign coins so determined and certified are conclusive upon customs-house officers and importers as well as others, no evidence of errors alleged to exist in them can be shown in a judicial proceeding to affect the rights of the Government or individuals.

Hadden v. *Merritt,* 115 U. S. 25 (1885).

The court held (at pp. 27-28):

> "The value of foreign coins, as ascertained by the estimate of the director of the mint and proclaimed by the Secretary of the Treasury, is conclusive upon custom-house officers and importers. No errors alleged to exist in the estimate, resulting from any cause, can be shown in a judicial proceeding, to affect the rights of the government or individuals. There

is no value, and can be none, in such coins, except as thus ascertained; and the duty of ascertaining and declaring their value, cast upon the Treasury Department, is the performance of an executive function, requiring skill and the exercise of judgment and discretion, which precludes judicial inquiry into the correctness of the decision. If any error, in adopting a wrong standard, rule, or mode of computation, or in any other way, is alleged to have been committed, there is but one method of correction. That is to appeal to the department itself. To permit judicial inquiry in any case is to open a matter for repeated decision, which the statute evidently intended should be annually settled by public authority; and there is not, as is assumed in the argument of the plaintiff in error, any such positive and peremptory rule of valuation prescribed in the statute, as serves to limit the discretion of the Treasury Department in making its published estimate, or would enable a court to correct an alleged mistake or miscalculation. The whole subject is confided by the law exclusively to the jurisdiction of the executive officers charged with the duty; and their action cannot be otherwise questioned.

"Such was the principle announced in the case of *Cramer* v. *Arthur,* 102 U. S. 612. It was there said, 'That valuation, so long as it remained unchanged, was binding on the collector and on importers—just as binding as if it had been in a permanent statute, like the statute of 1846, for example. Parties cannot be permitted to go behind the proclamation, any more than they would have been permitted to go behind the statute, for the purpose of proving, by parol or by financial quotations in gazettes, that its valuations are inaccurate. The government gets at the truth as near as it can, and proclaims it. Importers and collectors must abide by the rule as proclaimed. It would be a constant source of confusion and uncertainty if every importer could on every invoice, raise the question of the value of foreign moneys and coins,' pages 616, 617. . . ."

Later cases are to the same effect.

Amalgamated Textiles, Ltd. v. *United States,* T. D. 47931, Oct. 10, 1935, affd. 84 Fed. 2d 210 (Cust. & Pat. App. 1936);

J. S. Staedtler, Inc. v. *United States,* T. D. 49255, 25 C. C. P. A. (Cust.) 136 (1937);
See *Buttfield* v. *Stranahan,* 192 U. S. 470 (1904) as to other provisions of the tariff laws.

The Supreme Court of the United States has held that the rates of foreign exchange determined and certified by the Federal Reserve Bank of New York, pursuant to section 522(c) of the Tariff Act of 1930, fall within the rule of these cases.

Barr v. *United States of America,* 324 U. S. 83 (1945).

Thus the rule of law so established by the Supreme Court of the United States has been sustained by an uninterrupted line of decisions in that Court and this Court during the course of the past three-quarters of a century. The only argument offered by appellant against the rule is mere vituperation (Apl. Br., pp. 8, 19, 22, 24).

POINT III.

The United States Customs Court (a) properly declined to compel the Federal Reserve Bank of New York to disclose its files and records and other information taken into consideration by it in determining the rates of foreign exchange certified by it to the Secretary of the Treasury pursuant to Section 522(c) of the Tariff Act of 1930, and (b) properly affirmed the decision of the Collector.

(1) The evidence demanded is irrelevant and immaterial.

The only possible relevancy that the files and correspondence sought to be produced by the subpoena might have, if any, is to show some error in the rate certified by the Federal Reserve Bank of New York to the Secretary of the Treasury. Since, as set forth in POINT II of this brief, the rate certified by the bank is final and conclusive, no error

in such rate may be shown and the evidence sought is irrelevant and immaterial.

It follows that the Federal Reserve Bank of New York may not be required to produce in any court, or testify with respect to, its files, correspondence and other information which it took into consideration in determining and certifying rates of foreign exchange pursuant to Section 522(c) of the Tariff Act of 1930.

(2) The evidence demanded is confidential and immune from subpoena.

Another rule of law also conclusively required the quashing by the Customs Court of its subpoena *duces tecum*. The evidence sought to be produced by the subpoena consists of confidential files, records and correspondence of the United States of America and its agencies, which are immune from subpoena.

The subpoena served upon the Federal Reserve Bank of New York commands it to produce "the original or copies of all correspondence passing between the Federal Reserve Bank and the Treasury Department or any of its bureaus relating to the certification by the Bank of the buying rates for cable transfers payable in Brazilian milreis between April, 1933 and August, 1936".

As set forth in POINT II of this brief, the Federal Reserve Bank of New York, in determining and certifying the buying rates for cable transfers payable in foreign currencies, acts as an administrative or executive agency of the United States.

> *Armand Schmoll, Inc.* v. *Federal Reserve Bank of New York,* 286 N. Y. 503 (1941); cert. den. 315 U. S. 818 (1942); plaintiff's motion for reargument denied 294 N. Y. 839 (1945).

In that case the New York Court of Appeals held, as to the function of the Federal Reserve Bank of New York in determining and certifying such rates (286 N. Y. at page 503):

> "The Federal Reserve Bank is a Federal agency exercising powers conferred by Federal statute and performing duties imposed upon it by Federal statute in a field which, under the Constitution of the United States, is within the sole and exclusive jurisdiction of the Federal government."

It is also clear that when Congress confers upon a corporation the duty to perform a governmental function, the same immunities attach to that function when performed by the corporation as when performed by the government itself through its departments.

> *Pittman* v. *Home Owners' Loan Corp.,* 308 U. S. 21, 32 (1939);
> *Federal Land Bank* v. *Bismarck Lumber Co.,* 314 U. S. 95, 102 (1941).

Therefore, the immunity from subpoena of confidential records of the Government, its agencies and instrumentalities, attaches to the function performed by the Federal Reserve Bank of New York pursuant to section 522(c) of the Tariff Act of 1930.

The rule regarding the privileged character of confidential information in the hands of the Government, its officers, departments and agencies, has been enforced in the United States since the early days of the Republic. In *Marbury* v. *Madison,* 1 Cr. (5 U. S.) 137 (1803), cited by the appellant (Apl. Br., pp. 22, 24, 26), Mr. Lincoln, who had been Secretary of State and was then Attorney General, was subpoenaed into court and was asked whether certain papers had been in his office when he was Secretary of State, and what he had done with them. The following appears at pages 144, 145 of the report of the case:

> "The court said, that if Mr. Lincoln wished time to consider what answers he should make, they would give him time; but they had no doubt he ought to answer. There was nothing confidential required to be disclosed. *If there had been he was not obliged to answer it; and if he thought that any thing was communicated to him in confidence he was not bound*

> *to disclose it;* nor was he obliged to state any thing which would criminate himself; but that the fact whether such commissions had been in the office or not, could not be a confidential fact; it is a fact which all the world have a right to know. If he thought any of the questions improper, he might state his objections * * *." (Emphasis supplied.)

In an opinion of Attorney General Devens, 15 Op. Atty. Gen. 378 (1877), regarding a case in which a United States Attorney had been subpoenaed to appear in a private suit and bring correspondence with him, he stated the principles as follows:

> "Their exception from being made instruments of evidence in a suit between private parties rests upon the principle that where the production of an official paper would be injurious to those interests, the general public interest must be considered paramount to the individual interest of a suitor in a court of justice."

See 15 Op. Atty. Gen. 415 (1877).

In 1905 Attorney General Moody gave an opinion regarding a subpoena served upon the Secretary of Commerce (25 Op. Atty. Gen. 326, 331). He stated:

> "* * * I am of the opinion that under the authorities cited above you may properly decline to furnish official records of the Department, or copies thereof, or to give testimony in a cause pending in court, whenever in your judgment the production of such papers or the giving of such testimony might prove prejudicial for any reason to the Government or to the public interest. The records of your Department are executive documents acquired by the Government for the purpose of administering its own affairs; they are to a certain extent quasi-confidential in their nature, and must therefore be classed as privileged communications whose production cannot be compelled by a court without the express authority of a law of the United States."

In an opinion dated April 30, 1941 (40 Op. Atty. Gen. No. 8), on the same subject, Attorney General Jackson stated:

> "This discretion in the executive branch has been upheld and respected by the judiciary. The courts have repeatedly held that they will not and cannot require the executive to produce such papers when in the opinion of the executive their production is contrary to the public interests. The courts have held also that the question whether the production of the papers would be against the public interest is one for the executive and not for the courts to determine. *Marbury* v. *Madison,* 1 Cranch 137, 169; *Totten* v. *United States,* 92 U. S. 105; *Kilbourn* v. *Thompson,* 103 U. S. 168, 190; *Vogel* v. *Gruaz,* 110 U. S. 311; *In re Quarles and Butler,* 158 U. S. 532; *Boske* v. *Comingore,* 177 U. S. 459; *In re Huttman,* 70 Fed. 699; *In re Lambertson,* 124 Fed. 446; *In re Valecia Condensed Milk Co.,* 240 Fed. 310; *Elrod* v. *Moss,* 278 Fed. 123; *Arnstein* v. *United States,* 296 Fed. 946; *Gray* v. *Pentland,* 2 Sergeant & Rawle's (Pa.), 23, 28; *Thompson* v. *German Valley R. Co.,* 22 N. J. Equity 111; *Worthington* v. *Scribner,* 109 Mass. 487; *Appeal of Hartranft,* 85 Pa. 433, 445; 2 Burr Trials, 533-536; see also 25 Op. A. G. 326."

The doctrine has been reiterated by the Federal courts in other cases.

> *International C. M. T. Co.* v. *Wm. Cramp & Sons S. & E. B. Co.,* 176 Fed. 925 (C. C., Pa., 1910);
> *In re Grove,* 180 Fed. 62 (C. C. A. 3rd, 1910);
> *Firth Sterling Steel Co.* v. *Bethlehem Steel Co.,* 19 Fed. 353 (D. C., Pa., 1912);
> *Pollen* v. *Ford Instrument Co.,* 26 F. Supp. 583 (D. C., N. Y., 1939).

Perhaps the best statement of the basic rule has been made by the Board of General Appraisers (T. D. 32925-G. A. 7401, Nov. 4, 1912). A subpoena *duces tecum* was issued to the Secretary of the Treasury, calling for the production, in a reappraisement proceeding, of a report rendered by a

confidential agent in Germany. The Assistant Secretary wrote a letter stating that the report was confidential and that it would be against public policy to produce it. In holding that the subpoena should be discharged, the court said:

> "* * * the court can not compel a member of the President's Cabinet to do anything other than those ministerial acts which the law expressly enjoins upon him, and the probable reason that there are to be found no cases deciding the exact question arising in this case is that it is so clear upon reason and principle that the determination of what is and what is not a State secret, and whether a disclosure would or would not be prejudicial to Government interest and against public policy must of very necessity be lodged in the executive officer who is the repository of that secret. To compel a Cabinet officer to produce in court a letter or document which he asserts would be against public policy to disclose would be to defeat the very secrecy which the officer in the discharge of high public duties would have thrown around the letter or document in question, and without having it produced in court it would be impossible for the court to determine whether or not it was such a document * * *"

The rule has been recently enforced in *Klingerit Inc.* v. *United States,* T. D. 5734, 9 Customs Ct. Rep. 648 (1942).

The rule has also been clearly stated by the courts in England, which have long recognized the privileged character of confidential documents of the Government and its agencies. The rule was enforced in *Beatson* v. *Skene,* 5 H. & N. 838, 852-4, 157 Repr. 1415 (Exch., 1860), mentioned in appellant's brief (p. 23), which is a leading case, followed in *H. M. S. Bellerophon,* 31 L. T. 756 (1874).

Professor Wigmore ("Evidence", 3rd ed., 1940) recognizes that the doctrine of the *Beatson* case is the settled law, although as an academic commentator he expresses some disapproval of it in the quotation from him in appellant's brief (pp. 22-23). A New York court has referred to his premises for such disapproval as "dogmatic assertion", "bald assumption without basis in fact", and as

contrary to what the United States Supreme Court has decided.

> *Lewis* v. *Roux Trucking Corp.*, 222 A. D. 204, 226 N. Y. S. 70 at pp. 76-78 (N. Y. App. Div. 2d Dept., 1927).

The doctrine of *Beatson* v. *Skene* was reaffirmed in 1942 by the House of Lords in *Duncan* v. *Cammell, Laird & Company* [1942] App. Cas. 624 (cited in Apl. Br., p. 26). In holding that a ministerial objection was conclusive upon the court, the Lord Chancellor stated (at page 642):

> "The minister * * * ought not to take the responsibility of withholding production except in cases where the public interest would otherwise be damnified, for example, where disclosure would be injurious to national defense, or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service."

None of the cases cited by appellant (Apl. Br., pp. 22-26) derogates from the rule. Appellant relies particularly (Apl. Br., pp. 24-26) on *Bank Line* v. *United States,* 163 Fed. 2d 133 (C. C. A. 2nd, 1947). It was held in that case (p. 139) that a mandatory writ should not be granted against the issuance, by a lower court, of an order in the nature of a subpoena *duces tecum.* The court made clear that upon the return of any such order served on the Navy Department, the Secretary of the Navy had the right to decline to testify as to official records of the Department. The court quoted (p. 138) the opinion of Attorney General Moody, *supra,* and cited (p. 139) *Duncan* v. *Cammell, Laird & Co., supra,* as stating the law. The other cases cited on the point by appellant, in addition to *Duncan* v. *Cammell, Laird & Co., supra,* and *Marbury* v. *Madison, supra,* are in accord. In *Crosby* v. *Pacific S. S. Lines,* 133 Fed. 2d 470 (C. C. A. 9th, 1943) the proper official did not claim the privilege; the court held (p. 475): "* * * there is no showing that Walsh was authorized to claim the privilege

* * *''. In *McGlothan* v. *Pennsylvania R.R. Co.*, 170 Fed. 2d 121 (U. S. Ct. App. 3rd, 1948) a Federal statute provided for the disclosure of the information by the Veterans' Administration. In *Zimmerman* v. *Poindexter*, 74 Fed. Supp. 933 (D. C., Hawaii, 1947) the court stated (p. 934): ''* * * the Secretary of the Army, the lawful custodian of the files * * * for which the subpoena has issued, imposes no objection to the production of the subpoenaed material'', and held (p. 936) that the objection of the Department of Justice was not effective as to material voluntarily deposited by it in such files.

In the case on appeal to this Court the affidavit of the Vice President of Federal Reserve Bank of New York (R. 11-15) clearly demonstrates (R. 13-15) why it is prejudicial to the public interest to require the production of the files and documents specified in the subpoena. By a letter (R. 21) the Acting Secretary of the Treasury stated that it had been determined that the records and correspondence, sought to be produced by the subpoena, which had originated in the Treasury Department were confidential and that it would be inimical to the interests of the United States Government for any thereof to be disclosed.

(3) The Collector's decision was properly affirmed.

Since, as set forth in Point II of this brief, the rate certified by the Federal Reserve Bank of New York is final and conclusive, the United States Customs Court properly affirmed the action of the Collector in converting the currency of the invoice at such rate and computing the duty and liquidating the entry accordingly.

POINT IV.

The contentions of the appellant are not supported by the evidence.

(1) The appellant's position is ambiguous and the appellant confuses actual and nominal buying rates.

The Record is unquestionably clear that a rate was determined and certified, as a buying rate for cable transfers, by the Federal Reserve Bank of New York (Apl. Exh. 1, R. 38A), and that it was published by the Secretary of the Treasury as such a rate (T. D. 47910, Oct. 13, 1935). Appellant contends that in using that rate the Collector wrongfully disregarded the buying rate for cable transfers (Apl. Br., pp. 1, 5; R. 3, pars. 23-24, 9, 26, 27, 28, 32, 47, 74).

The position of the appellant is thus in its essence an ambiguous one. The ambiguity could readily have been avoided if the appellant had taken the position that a buying rate had been certified, but that it was an incorrect figure. The appellant, however, chooses to retain the ambiguity (see particularly questions 1 and 2, Apl. Br., p. 5 and p. 27; R. 2, pars. 9-11). As a consequence, numerous statements in appellant's brief need analysis in order that they may not be misleading.

Throughout appellant's brief there is, wittingly or unwittingly, confusion between an "actual" buying rate and a "nominal" or calculated buying rate (Apl. Br., pp. 1, 2, 4, 5, 8-10, 13, 14, 17, 18, 24, 27, 28; see R. 2, pars. 9-10, 41, 76, 128). This confusion is entirely artificial. The price in an actual purchase of a cable transfer payable in a foreign currency is an "actual" buying rate ("reflecting actual market transactions", Apl. Br., p. 2). For purposes of certification under Section 522(c), it would have to be the price in a transaction in the New York market exactly at noon. As made clear by the Supreme Court in the *Barr* case, it also must be a market price representing or

approximating the true value of the foreign currency in respect of merchandise imported into the United States (Apl. Br., p. 11) (see the second *Barr* case: *Barr* v. *United* States (C. C. P. A., 1947) 161 Fed. 2d 362, 366), which in turn requires it to be a price in a transaction in a free market having an adequate supply and demand (and not a price in an isolated transaction, see *Mamary Bros., Inc.* v. *United States,* C. D. 1142, T. D. Vol. 83, No. 52, p. 23, decided Dec. 8, 1948, nor a price for an insignificant amount). A "nominal" rate on the other hand is one calculated, as expressly required by section 522(c) (Apl. Br., p. 18), in the absence in the New York market exactly at noon of any such actual purchase, and of any firm bid offering to make such a purchase.

As the Supreme Court held in the *Barr* case (quoted in part in appellant's brief, pp. 11-12, and in the opinion of the Customs Court, *supra*), the performance of the duty imposed upon the Federal Reserve Bank of New York by section 522(c) requires skill and involves the exercise of judgment and discretion, and is not a mere arithmetical computation. (See *Hadden* v. *Merritt, supra,* at p. 27). Counsel for appellant is thus wrong in his claim that the performance of such duty is a mere ministerial duty involving only a "mathematical computation" (Apl. Br., pp. 21, 27; R. 3, par. 17). Congress delegated the function of determining the rates to the Federal Reserve Bank of New York realizing that it had the necessary technical knowledge, experience, and sources of information including its member banks (R. 93, 96, 104) and other dealers in foreign exchange, to discharge the duty imposed by the statute. As emphasized by the Supreme Court in the *Barr* case, the difficulties inherent in the performance of that duty are manifested in the history of the continuous efforts of our Government, since its founding and until the selection of the Federal Reserve Bank of New York in 1921, to discover the best means of resolving them.

(2) The certification of a "nominal" buying rate was proper.

With the important distinction between "actual" and "nominal" buying rates in mind, it is at once apparent that there is no evidence whatsover in this case that shows or even indicates that there was any actual buying rate, for cable transfers payable in Brazilian milreis in the New York market at noon on October 7, 1935. The trial court did not, as intimated by appellant (Apl. Br., pp. 8, 15), exclude such evidence, but on the contrary was "inclined to allow considerable leeway" in the introduction of evidence (R. 141, 150). No evidence as to any transactions on October 7, 1935 was excluded, but there was no evidence introduced of any transactions in cable transfers on that date. Appellant's first witness, Mr. Knoke, testified (R. 98, 101, 108, 109) only that he was not in a position to state from his personal recollection (R. 113) that there were or were not actual transactions by member banks in such cable transfers on that date (R. 111-112, 119-120). The meaning of his previous testimony (R. 108), quoted in appellant's brief (p. 9, R. 107; see Apl. Br., pp. 13, 18) is that the Federal Reserve Bank of New York did not certify an actual buying rate (R. 108-109) for October 7, 1935 (R. 107) because there were no actual transactions. He testified that the Bank certified a rate as a buying rate in compliance with Section 522(c) (R. 107-108) which was designated a "nominal" rate (R. 107, 119) since it was not a rate in an actual transaction in the New York market (R. 108-109), but was the "rate calculated to be the buying rate in the New York market for Brazilian milreis for October 7, 1935" (R. 108) taking into consideration "the last ascertainable transactions and quotations for Brazilian milreis, whether they were direct or through exchange of other currencies" (R. 110) and other relevant factors (R. 110). He further testified that when there were no actual transactions, the bank so calculated the rate (R. 109). Counsel for appellant admitted that Mr. Knoke's testimony was to the effect that there were no actual transac-

tions (R. 118, 136). Mr. Cameron, the officer who had signed the certifications on behalf of the Federal Reserve Bank of New York (R. 124), also called as appellant's witness (R. 88, 122), testified to the effect that the bank certified a buying rate in the New York market at noon October 7, 1935 for cable transfers payable in Brazilian milreis (R. 125-126; Apl. Exh. 1, R. 38A) in compliance with the statute (R. 132), which was a "nominal" rate (R. 129) because of the absence of an actual rate, the result of actual transactions (R. 129, 130, 131; see 139). In view of these circumstances, the Federal Reserve Bank of New York correctly certified a computed, or "nominal", buying rate as required by section 522(c) (see R. 134).

Contrary, therefore, to appellant's repeated statements to the effect that the Collector did not use "the buying rate in the New York market at noon on the date of exportation of the hides" (Apl. Br., pp. 1, 2, 4, 5, 8, 27; R. 26), the Collector did use such a rate, although it was necessarily a computed or nominal rate, not a rate involved in an actual transaction at that exact time. It was a duly certified rate, not one merely "shown in a letter from the Federal Reserve Bank of New York to the Secretary of the Treasury", as stated by appellant (Apl. Br., p. 1). It was not a rate "arbitrarily fixed" as asserted by appellant (Apl. Br., p. 2), for, although not a rate in an actual transaction in the New York market, appellant concedes that it was a rate in actual transactions in Brazil (Apl. Br., p. 13).

The appellant's intemperate characterizations of the action of the Federal Reserve Bank of New York as a "deliberate, wilful violation of the statute", a refusal "to perform its clear duty", an "official falsity", a "patent" wrong, a "conceded" wrong (Apl. Br., pp. 8, 19, 21), are completely without foundation.

(3) There is no evidence of any actual transaction in cable transfers payable in Brazilian milreis.

The appellant's counsel asks (Apl. Br., p. 5): "How more accurately could one find whether the Bank had acted arbitrarily in not finding a buying rate at noon than to sub-

poena the records of the Bank as to such buying rates?'' Disregarding the false implication that the bank did not determine a buying rate at noon—the indisputable fact being that it did so as set forth in its certification to the Secretary of the Treasury—the answer to counsel's question is clear that a more accurate method would be to subpoena the records of the commercial banks and other dealers in foreign exchange who customarily dealt in foreign exchange in the New York market. One of such banks is the Guaranty Trust Company of New York (a member bank having transactions in foreign exchange, Apl. Br., p. 10). Appellant's counsel asserts that many witnesses available to him had the requisite knowledge. He states that ''every employee of every member bank reporting transactions in Brazilian milreis, every business man purchasing in the market milreis for cable transfers, including newspapers, had knowledge of the facts sought to be produced by the subpoena *duces tecum* in this case'' (Apl. Br., p. 24; R. 28). He further states that they were ''public market transactions'' (Apl. Br., p. 21) at ''rates * * * known to everyone'' (Apl. Br., p. 8 and see p. 5; R. 73).

Appellant's witness Mr. O'Brien is an officer of the Guaranty Trust Company of New York (R. 135). Although he had the records of that bank examined for any transactions its foreign exchange department might have had in Brazilian milreis between October 1 and October 7, 1935 (R. 135, 144), and the records included the entries of any transactions on October 7 (R. 149, 162), he failed to testify to an actual transaction of any kind or amount in the New York market at any time during that period (or any other time), in cable transfers payable in Brazilian milreis (R. 159, 175). He testified only as to three credit tickets for checks issued showing sales of three drafts (R. 167), *i. e.*, Guaranty Trust Company checks, two on October 3 and one on October 5 (R. 168; Apl. Exhs. 2A, 2B, and 2C, for identification, R. 169A; not admitted in evidence as they did not represent transactions on October 7, R. 169); a few insignificant book entries of the Guaranty Trust Company (Apl. Exh. 4, R. 175A); and one of the Guaranty

Trust Company's own figures which did not represent actual transactions or even a firm bid (Apl. Exh. 3, R. 180; R. 141, 144, 165). Apparently all of these were unrelated to the importation of merchandise into the United States (R. 154-5, 157). Not only did Mr. O'Brien fail to testify to any transaction in cable transfers payable in milreis, but he admitted that he could not say that any such cable transfers could have been purchased in the New York market on October 7, 1935 (R. 155).

None of the three documents of appellant's Exhibit 4, which relate to book entries of October 7, 1935, is a record of a cable transfer payable in milreis (R. 170, 175). They are merely responses to entries that the Bank of Brazil had made in the account that the Guaranty Trust Company had with it (R. 169, 171, 173-4), one of which entries had been made three months earlier (Apl. Exh. 4A; R. 173) and the other two approximately three weeks earlier (Apl. Exh. 4B, 4C, R. 175A; R. 174). One of them was a reversal of a previous entry (Apl. Exh. 4A; R. 172) to correct a clerical error (R. 173). Even in the opinion of the witness the rates on these entries were selling not buying rates (R. 175). They had nothing to do with imports (Apl. Exh. 4; R. 176).

Thus after a decade of litigation beginning in March 1939 (in a proceeding by the appellant against the Federal Reserve Bank of New York in the Supreme Court of the State of New York in which judgment was entered in favor of the bank, affd. 260 A. D. 912, 23 N. Y. S. 2d 841 (1940); affd. 286 N. Y. 583 (1941); cert. den. 315 U. S. 818 (1942); rearg. den. 294 N. Y. 389 (1945); R. 28, 32, 56-7), and notwithstanding appellant's repeated assertions that the facts were public knowledge (R. 28, 73, 104; Apl. Br., pp. 8, 21, 24), the appellant has failed to offer a single item of evidence of any purchase of cable transfers payable in Brazilian milreis, on October 7, 1935 or any other date, at any rate other than that certified by the Federal Reserve Bank of New York. The utmost that appellant could produce was testimony as to three interbank transactions between two correspondent banks having nothing to do with payment

for imports. In contrast to the many millions in dollars of commercial transactions, one of the entries was for the sum of $3.82 (Apl. Exh. 4B; R. 177); another for forty-six cents (Apl. Exh. 4C; R. 177); and the other was for six cents (Apl. 4A; R. 176). This is eloquent of the fact that there was no actual transaction, *in cable transfers payable in Brazilian milreis,* in the New York market on October 7, 1935 at any rate other than the rate which was certified by the Federal Reserve Bank of New York. Notwithstanding the conflicting statements in the appellant's brief (see p. 10), counsel for appellant at one time in his argument admitted that there was no such transaction at noon on that date (R. 47).

In addition to the absence of evidence of any facts supporting the appellant's contentions, the absence of any legal authority which sustains its contentions is indicated by the quotation (R. 32-34) which appellant's counsel apparently relies upon as his primary and best authority (Apl. Br., pp. 3-4; R. 34, 74, 136, 151). This is an irrelevant and hypothetical passage taken from a brief, in a lower New York court (R. 32), which was filed in support of the motion to dismiss the petition in the above mentioned proceeding of March 1939. The *Barr* case confirmed that the argument contained in the passage was untenable.

(4) Summary.

Stated briefly, the appellant, without support in the Record or citation of controlling legal authority, seeks on this appeal (a) to nullify completely, as applicable to the facts presented in this case, the express provision of section 522(c) that the Federal Reserve Bank of New York shall calculate a rate of foreign exchange when there is no actual rate for cable transfers exactly at noon, and (b) to overrule the Supreme Court of the United States as to (1) the discretionary authority of the Federal Reserve Bank of New York, (2) the finality of the rates certified by it to the Secretary of the Treasury, and (3) (as held in *Marbury* v. *Madison, supra,* and later cases p. 21, *supra*)

the authority of executive officers of the Government and of its executive agencies to exclude from evidence records and correspondence the disclosure of which they conclude would be inimical to the interests of the Government.

Conclusion.

The decision of the United States Customs Court should be affirmed.

Respectfully submitted,

WALTER S. LOGAN,
Attorney for Federal Reserve Bank
of New York, Amicus Curiae.

RUFUS J. TRIMBLE,
LYON BOSTON,
Of Counsel.

Dated: July 8, 1949.

COURT OF APPEALS

OF THE STATE OF NEW YORK

In the Matter of the Application

of

ARMAND SCHMOLL, INC.,
Petitioner-Appellant,

against

THE FEDERAL RESERVE BANK OF NEW YORK,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO MOTION FOR REARGUMENT

More than three and one-half years ago, this Court decided that the courts of the State of New York were without jurisdiction to issue orders to respondent as a Federal agency performing a Federal governmental function under a Federal statute within a field from which the State government is excluded. In so holding, this Court followed the law as interpreted by an unbroken and time honored line of decisions of the Supreme Court of the United States. The Court handed down its decision in October, 1941.

Subsequently, the appellant sought a review of this Court's decision by the Supreme Court of the United States on petition for writ of certiorari. The petition was denied (315 U. S. 818).

Now comes the appellant—more than three years later—and asks permission to reargue the case before this Court. It bases its plea for reargument on the fact that there was decided by the

United States Supreme Court on February 5, 1945, the case of *Barr* v. *The United States of America* (see Law. ed. Advance Opinions, Vol. 89 —No. 8, pp. 515-524). It claims that the decision in the *Barr* case in some way now requires a different decision in the case at bar.

Even if the *Barr* case could be construed as changing the law as previously interpreted by this Court, that would not justify a re-argument or reopening of this case after the expiration of three and one-half years. It is a principle of general acceptance that a subsequent decision by a higher court inconsistent with a decision sought to be reviewed does not constitute grounds for a rehearing. See *Scotten* v. *Littlefield,* 235 U. S. 407; *Miller* v. *McCutcheon,* 117 N. J. Eq., 123, 175 Atl. 155; also, Note at 95 A. L. R. 708.

A mere reading of the Supreme Court's decision in the *Barr* case, however, will show that that decision had nothing whatever to do with the issue presented in the case at bar.

POINT I

The decision in the *Barr* case in no way affects or touches upon the jurisdictional question decided by this Court in the case at bar.

The question decided by this Court in the case at bar was solely a question of jurisdiction or power of the State court. This Court merely held that a State court has no jurisdiction to issue orders or directions to an instrumentality of the Federal Government in the performance of its Federal statutory duty. Under the United States Tariff Act, the Federal Reserve Bank is authorized and required to certify daily to the Secretary of the Treasury the "buying rate for cable trans-

fers'', which under the statute was thereupon to be published by the Secretary of the Treasury and used in the computation of the dollar value to be placed upon imports in computing customs duties. The appellant claimed that the Federal Reserve Bank had certified, on the occasions in question, the wrong rate for Brazilian milreis exchange, and brought a proceeding in the nature of *mandamus* under Article 78 of the Civil Practice Act, asking the New York State court to direct the Federal Reserve Bank to certify a different rate than the one it had certified. The Special Term held that the State court had no power to direct the Federal Reserve Bank in exercising this function as an instrumentality of the Federal Government. This decision was unanimously affirmed by the Appellate Division and then affirmed by this Court. The decision of this Court is clearly expressed as follows in the opinion written by Chief Judge Lehman:

> "Under the United States Tariff Act of 1930 (Ch. 497; 46 Stat. 739; U. S. Code, tit. 31, § 372), the Federal Reserve Bank of New York is authorized and required, under specified conditions, to determine and certify daily to the Secretary of the Treasury 'the buying rate for cable transfers.' The statute directs that such determination shall be made in manner defined in the statute. Claiming that the Federal Reserve Bank has failed to determine the buying rate in manner directed by the Federal statute, the appellant has brought proceedings under article 78 of the Civil Practice Act to compel the Federal Reserve Bank to make its determination in manner provided by law. The proceedings have been dismissed on the ground that the State courts have no jurisdiction to issue orders or directions to the Federal Reserve Bank in the performance of its statutory duty.

> "The Federal Reserve Bank is a Federal agency exercising powers conferred by federal statute and performing duties imposed upon it by federal statute in a field which, under the Constitution of the United States, is within the sole and exclusive jurisdiction of the federal government. In the case of *McClung* v. *Silliman* (6 Wheat. [U. S.] 598), the Supreme Court of the United States declared in unambiguous and emphatic language that the State court is without power to give such directions to a federal officer acting under a federal statute within a field from which the State government is excluded. No case has been cited to us where a State court has since that time assumed to give such directions. Nor has the Supreme Court of the United States in any opinion or decision cast doubt upon the scope of its decision in that case."

The Court will thus recall that the only question passed upon by this Court was the jurisdictional question, and this was decided in accordance with a long line of decisions of the Supreme Court of the United States.

The case of *Barr* v. *The United States of America,* on which the appellant now relies, has nothing whatever to do with this jurisdictional point. The *Barr* case was brought in the United States Customs Court and the point decided was briefly as follows:

There the Federal Reserve Bank, in view of the special circumstances, had certified to the Secretary of the Treasury two rates of exchange for the British pound—one a so-called "official" rate, and the other a so-called "free" rate. The Secretary of the Treasury had published only the "official" rate, and the Collector of the Customs had used that rate in assessing the customs duties. The Court held that on the facts of that case, including particularly the fact that the goods had been purchased with pounds sterling exchange

bought at the "free" rate, their value in dollars should be computed at the "free" rate rather than the "official" rate; that the Secretary of the Treasury and the Collector of Customs were acting illegally in insisting on the assessment at the "official" rate and that the importer had a right in the Customs Court to have the overassessment corrected. The only question involved was the propriety of the rate used in assessing the duty. No question of the jurisdiction of State courts was involved in the case, or referred to in any way in any opinion in any of the three courts which considered the case.

Appellant, however, resorts to the following argument on this motion: It contends that the Supreme Court decided in the *Barr* case that the Bank *must* certify two rates—namely, an "official" rate and a "free" rate,—and it then contends that the respondent in the case at bar having certified only one rate, the State court must now compel it to certify another rate. Both contentions are utterly fallacious.

1. First of all even if the Court in the *Barr* case had held that it was the duty of the Bank to certify the "free" rate as well as the "official" rate, there is nothing whatever in the decision or opinion to indicate that a State court has the power to compel the certification of the additional rate.

Starting from the fallacious premise that the *Barr* case holds that the Federal Reserve Bank was required to certify both the "official" and the "free" rate of exchange, appellant argues that the State court could order it to certify another rate than the one which it has already certified. It argues that this would be compelling it merely to perform, and not compelling the manner of performance. It then contends that the State

court is only without power to compel the *manner* of performance. We are unable to follow its reasoning. Even if there were any grounds for this distinction, certainly in compelling the Bank to certify another rate in addition to the one already certified, this Court would be compelling the manner of performance of this Federal function. Appellant made exactly the same argument on the previous appeal to this Court, and this Court rejected it. As we there pointed out, respondent had acted by certifying certain rates of exchange to the Secretary of the Treasury on the dates in question, and the appellant was asking the State court to direct it to act in a different manner and certify another rate of exchange (see pages 30-32 of Points of Respondent Federal Reserve Bank of New York filed with this Court on the appeal). Surely this is directing the *manner* of performance. If appellant's argument were accepted, that because respondent has acted wrongly (according to appellant's contention) it has not acted at all, such argument could be made and used as a basis to justify the State court's taking jurisdiction in any case where a Federal agent is claimed to have performed improperly. It would nullify the principle laid down by *McClung* v. *Silliman,* 6 Wheat. (U. S.) 598, relied upon by this Court, and the other cases which follow it. The fact is that, under the rule established by these cases, it is immaterial whether the respondent has not acted at all or has acted erroneously. In neither instance has the State court power to direct performance of a Federal function.

McClung v. *Silliman,* 6 Wheat. (U. S.) 598;
Tarble's Case, 13 Wallace 397;
Ex parte Shockley, 17 Fed. (2d) 133.

2. The fact is, however, that the Supreme Court in the *Barr* case did not hold that the Federal Reserve Bank *must* certify two rates. In that instance the Federal Reserve Bank had in fact certified two rates and the Supreme Court held that it was quite proper for it to do so. This is very different from holding that the Federal Reserve Bank was required to do so. The opinion indicates that, on the contrary, the Bank had entire discretion whether to certify one or two rates, and that its action in that respect was not reviewable even by the Federal court. The Supreme Court said:

> "Sec. 522(c) plainly gives discretion to the Bank to determine the buying rate. And for the reasons stated we cannot say that only one buying rate must be determined and certified. The exercise of the Bank's discretionary power under § 522(c) is in the category of administrative or executive action which this Court held non-reviewable in *Creamer* v. *Arthur, supra* (102 U. S. 612) and in *Hadden* v. *Merritt,* 115 U. S. 25, 27-28. And see *United States* v. *Bush & Co.,* 310 U. S. 371, 380."

3. Again, if the Supreme Court had held under the circumstances of the *Barr* case and the particular regulations of the British Government there involved that the Bank was required to certify two rates for the pound sterling, there is nothing in the record of the *Schmoll* case before this Court to indicate that the situation presented as to Brazilian milreis exchange was at all parallel or that the Bank was not entirely justified in exercising its discretion to certify the one rate which it did certify.

The *Schmoll* case involved exports of hides from Brazil in 1935 and 1936, whereas the *Barr* case involved exports of woolens from Great Britain in May, 1940.

The laws, regulations and practices affecting foreign exchange and export controls have varied greatly in different countries and in the same countries at different times. This is a matter of common knowledge and was recognized by the United States Supreme Court in the *Barr* case. As is said in the description of "exchange control" in an article by Mordecai Ezekiel, Economic Advisor to the Secretary of Agriculture, in "Commercial Pan America—A Monthly Review of Commerce and Finance" Volume X, Nos. 9 and 10, September and October 1941, at page 374:

> "Not only do the exchange control systems of the various countries where such are in force differ widely, but policies within each country change with bewildering rapidity".

Moreover, none of the essential facts which appeared in the *Barr* case appear in the *Schmoll* case. For example, it was not alleged in the *Schmoll* case that the imports were paid for by the use of Brazilian milreis exchange bought at the lower rate which petitioner sought to have certified; nor that certain categories of merchandise imported from Brazil could be paid for by the use of Brazilian milreis exchange purchased at one rate, and that other categories of goods imported from Brazil could be paid for by the use of such exchange purchased at another and different rate. These facts were all found by the United States Supreme Court in the *Barr* case with respect to the use of British pounds sterling exchange.

For the foregoing and other reasons it is apparent that, even if this Court were to disregard the jurisdictional ground on which it based its decision, the *Schmoll* case has no similarity to the *Barr* case on the facts.

Moreover, the appellant did not contend in the *Schmoll* case that the respondent bank should have certified both an "official" rate and a "free" rate, as was done in the *Barr* case. It contended that the bank had certified the wrong rate, that such certification was null and void and that the bank should now certify a different rate as the one and only effective rate in December, 1935, and January and February, 1936.

POINT II

The opinion of the United States Supreme Court in the *Barr* case affirms that the determination by the Federal Reserve Bank of foreign exchange rates under Section 522 (c) of the Tariff Act is not subject to judicial review in any court, and thus confirms the correctness of the result arrived at by this Court in the case at bar.

As an alternative ground for a dismissal of the petition in the case at bar, we urged on the appeal before this Court that under the decisions of the Supreme Court of the United States, the action required of the Federal Reserve Bank by this statute was of such an administrative or executive character as not to be subject to any judicial review. This Court did not find it necessary to pass upon this point, but dismissed the petition on the ground that the State court in any event did not have power to review or direct such administrative action by a Federal agency. Now comes the Supreme Court in the *Barr* case, corroborating our alternative contention above stated.

In the majority opinion, Mr. Justice Douglas states:

> "The exercise of the Bank's discretionary power under § 522 (c) is in the category of administrative or executive action which this Court held non-reviewable in *Cramer* v. *Arthur, supra* (102 U. S. 612) and in *Hadden* v. *Merritt,* 115 U. S. 25, 27-28. And see *United States* v. *Bush & Co.,* 310 U. S. 371, 380."

If the administrative act of the Federal Reserve Bank is not reviewable at all, that puts an end to the matter.

POINT III

If appellant is entitled to relief it is to be found in the tribunals established by the laws of Congress to grant relief in customs matters.

Appellant pleads that unless this Court grants the relief which it seeks it will be remediless. It made precisely the same argument to this Court on the original appeal. Even if the argument were valid this fact would not confer on the State court a jurisdiction which it does not under the law possess.

The fact is, however, as we pointed out on the appeal, that Congress in the Tariff Act itself has provided a very comprehensive system for review of all matters arising in connection with Customs levies. The Tariff Act of 1930 is a legislative enactment complete in its field and that statute contains in Sections 514 and 515 a complete system for review of the actions by the Collector in levying duties; first by the Collector himself, then by the United States Customs Court and

then by the United States Court of Customs and Patent Appeals. Section 514 specifically provides that the subjects for review shall be:

> "all decisions of the collector, including the legality of all orders and findings entering into the same, as to the rate and amount of duties chargeable, * * * "

Section 514 of the Tariff Act of 1930; 19 USCA, Section 1514.

The recent decision of the Supreme Court of the United States in the *Barr* case serves to emphasize the fact that the Customs courts are open to the appellant in which to seek relief. Mr. Justice Douglas, writing for the majority of the Supreme Court, states:

> "Congress has granted judicial review of the decisions of the collector including the legality of the orders and findings entering into the protested decision. Secs. 514-517. If the decision of the collector contravenes the statutory scheme and disregards rights which Congress has bestowed, the fact that he acts pursuant to the directions of the Secretary does not save his decision from review."

Surely if an erroneous direction from the Secretary of the Treasury "does not save" the Collector's decisions from review in the Customs courts, an erroneous determination by the Federal Reserve Bank will not save the Collector's decision in appellant's matter from review in the Customs courts—except to the extent that the determination of the Federal Reserve Bank is of such an administrative and executive nature as not to be reviewable by any court as we have discussed above.

POINT IV

The motion for reargument should be denied.

Respectfully submitted,

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Of Counsel.

May 11, 1945.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 928

IN THE MATTER OF

ARMAND SCHMOLL, INC., *Petitioner,*

v.

THE FEDERAL RESERVE BANK OF NEW YORK, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Opinions Below

The opinion of Mr. Justice Samuel I. Rosenman, rendered at Special Term, Part I, of the Supreme Court of New York, New York County, on June 12, 1939 (R. 28-29), is not officially reported. Mr. Justice Rosenman's decision was unanimously affirmed by the Appellate Division of the Supreme Court, First Department, without opinion, 260 App. Div. 912 (R. 32), on November 8, 1940. The Appellate Division granted leave to appeal to the New York Court of Appeals, 260 App. Div. 1006 (R. 32-33), which thereafter

affirmed the decision below. The opinion of the Court of Appeals (R. 34-51), rendered October 16, 1941, is reported in 286 N. Y. 503.

Jurisdiction

The order of the Supreme Court of New York on remittitur from the Court of Appeals was entered October 21, 1941 (R. 53). The petition for a writ of certiorari was filed February 6, 1942, time to apply for such writ having been extended by orders of this Court to February 7, 1942. The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925.

Respondent suggests that the basis for invoking the jurisdiction of this Court has not been established because it does not appear affirmatively from the record that a Federal question was actually decided by the New York Court of Appeals or that the judgment as rendered could not have been given without deciding it. The New York Court of Appeals is the ultimate authority as to what remedies are provided by the constitution and laws of New York State. The Court of Appeals has indicated in the prevailing opinion in this case, not only that it regarded as controlling the decisions of this Court to the effect that a State court does not have the power to mandamus a Federal officer, but also that it approved of this principle as a matter of governmental policy. The Court said (R. 37):

> "Assumption of such power would hamper orderly government and ignore the division of the fields of government of State and nation created by the Constitution."

Petitioner itself argues at page 50 of its brief that the question presented by the petition is in effect one of State law. The determination by the Court of Appeals of a question of State law is conclusive on all courts and peti-

tioner's contention that "This Court should say to the New York Supreme Court that it *must* determine and apply its own remedies" is fallacious. *Smith* v. *Adsit,* 16 Wall. 185, 189; *St. Louis, Iron Mountain and Southern Ry. Co.* v. *Taylor,* 210 U. S. 281, 285.

If, however, this Court should consider that a Federal question was necessarily decided by the New York Court of Appeals, the petition for a writ of certiorari in this case should be denied because the only question presented has heretofore been determined by this Court and the decision of the Court of Appeals is clearly in accord with applicable decisions of this Court which have stood over a period of many years without any express or implied dissent.

Statement

Section 522(c) of the Tariff Act of 1930 (Act of June 17, 1930, c. 497, Title IV; 46 Stat. 739; 31 U. S. C. A. § 372) provides that the Federal Reserve Bank of New York shall determine the buying rates in the New York market for cable transfers[1] payable in foreign currencies and, in any case where there are no market buying rates for such cable transfers, shall calculate such rates, and shall certify such buying rates daily to the Secretary of the Treasury who shall make them public at such times and to such extent as he deems necessary. Such rates are certified for use in converting foreign currency into currency of the United States for the purpose of the assessment and collection of duties upon merchandise imported into the United States.

On certain dates in 1935 and 1936, the Federal Reserve Bank of New York, acting under Section 522 of the Tariff Act of 1930, certified to the Secretary of the Treasury cer-

[1] A "cable transfer" may be defined as an order transmitted by cable to pay a certain sum of money to a designated payee. Djorup, "Foreign Exchange Accounting" 1926, ed., p. 44; *Oshinsky* v. *Taylor,* 172 N. Y. Supp. 231, 232 (App. Term 1st Dept. 1918); and see *Strohmeyer & Arpe Co.* v. *Guaranty Trust Co.,* 172 App. Div. 16, 19 (1st Dept. 1916).

tain rates of exchange for Brazilian milreis, which rates were published by the Secretary of the Treasury in Treasury Decisions 48064, 48100 and 48155 and were used by the Collector of Customs at the Port of New York, pursuant to this Section, in assessing the customs duties upon hides imported by the petitioner from Brazil. In March 1939 the petitioner sought to obtain an order of the courts of the State of New York in the nature of a writ of mandamus directing the bank to certify *nunc pro tunc* new and different rates of exchange for the milreis on the dates in question. Respondent did not answer the petition but applied for an order under Section 1293 of the New York Civil Practice Act dismissing the petition on four specific objections in point of law (R. 19-20). Although the properly pleaded statements of fact set forth in the petition were deemed admitted for the purpose of such application, the many conclusions of law and characterizations of respondent's acts which are included in the petition were not, of course, to be taken as true.

The New York Court of Appeals has affirmed the order dismissing the petition and held that the New York courts do not have jurisdiction of the subject of such a proceeding.

Question Presented

The only question presented is whether the courts of the State of New York have jurisdiction to direct or control by mandamus the performance by Federal Reserve Bank of New York, acting as a Federal agency, of its specific governmental function under Section 522(c) of the Tariff Act of 1930.

Statutes Involved

Section 522 of the Tariff Act of 1930 (Act of June 17, 1930, c. 497, Title IV; 46 Stat. 739; 31 U. S. C. A. § 372) is printed at pages 26-27 of the Petition for Writ of Certiorari, and at pages 6-7 of the Transcript of Record.

Argument

The only question here presented has heretofore been unequivocally determined by this Court, and the decision of the Court of Appeals of New York in this case is in complete accord with the applicable decisions of this Court.

POINT I

This Court has ruled conclusively that a governmental function such as that imposed upon respondent by Section 522(c) of the Tariff Act of 1930 may not be directed or controlled by a State Court.

The Constitution vests exclusively in Congress the power to impose customs duties and the power to regulate the value of foreign coin in terms of money of the United States (Art. I, §§8, 10). In order that the value of imported merchandise expressed in currencies of foreign countries may be converted into currency of the United States for the purpose of the assessment and collection of customs duties, Congress by Section 522 of the Tariff Act of 1930 has directed the Federal Reserve Bank of New York to determine the rates of exchange of the respective currencies of foreign countries daily and to certify such rates to the Secretary of the Treasury. In determining and certifying such rates, therefore, respondent is performing a governmental function pursuant to express direction of Congress in a field in which the Federal Government has exclusive jurisdiction.

This Court has decisively and consistently held that performance of such a function by a Federal agency may not be directed or controlled by a State court. This was first decided in the leading case of *M'Clung* v. *Silliman,* 6 Wheat. 598. The headnote gives the holding of that case as clearly as it could possibly be stated:

> "A State Court cannot issue a mandamus to an officer of the United States."

This decision has been repeatedly followed by this and other courts.

Tarble's Case, 13 Wall. 397 (1872);
Ex Parte Shockley, 17 F. (2d) 133 (D. C. N. D. Ohio 1926);
State ex rel. Wilcox v. *Curtis,* 35 Conn. 374 (1866);
Hinkle v. *Town of Franklin,* 118 W. Va. 586, 191 S. E. 291 (1937);
Goldstein v. *Somervell,* 170 Misc. 602, 10 N. Y. S. 2d 747 (1939);

See

Kendall v. *United States,* 12 Peters 524, 617 (1838);
Territory v. *Lockwood,* 3 Wall. 236, 239 (1866);
In re Blake, 175 U. S. 114, 119 (1899);
United States v. *Owlett,* 15 F. Supp. 736 (1936).

No case has been cited by the petitioner in any of the courts during any stage of this proceeding which has disputed its authority.

The authority of the *M'Clung* case has been consistently recognized and approved by writers of authoritative legal texts. *Willoughby on The Constitutional Law of the United States,* 1929 Edition, Volume I, page 201, says:

> "That a State court has no power to issue a mandamus or writ of certiorari to a Federal officer is not questioned."

See also

Merrill on Mandamus, p. 271;
High on Extraordinary Legal Remedies, (3d ed. 1896) p. 107;
Spelling on Injunctions and Other Extraordinary Remedies, (2d ed. 1901) p. 1268;
Rottschaefer on Constitutional Law, (1939) pp. 111-115.

The petitioner, in an elaborate discussion, undertakes to show that this point was not involved in the Court's holding

and that if it was involved it was a moot question. Any such contention is completely disproved by the unequivocal statement of this Court in *Kendall* v. *United States,* 12 Peters 524, at 617, that in the *M'Clung* case—

> "the only question directly before the Court was, whether a state court had authority to issue a mandamus to an officer of the United States, and this power was denied."

Moreover the mere reading of the opinion in the *M'Clung* case is a complete answer to the petitioner's argument. The majority of the Court of Appeals in its opinion by Chief Judge Lehman gives an analysis of that decision which needs no amplification. Twelve New York judges, including the Special Term judge, five judges in the Appellate Division, and six in the Court of Appeals, who heard this case, evidently concurred in this interpretation of the decision in *M'Clung* v. *Silliman.* So far as we know, only the one dissenting judge in the Court of Appeals and the petitioner have ever expressed a contrary view.

The principle of the *M'Clung* case applies even though the duty of the Federal agent is merely ministerial. In that case this Court clearly indicated that it regarded the duties of the register as ministerial by reference at three points in its opinion to "ministerial officers" (6 Wheaton 599, 600 and 605). Petitioner's repeated characterizations of the duties of respondent in this case as ministerial are therefore wholly immaterial. It seems clear, however, that the duties imposed upon respondent by Section 522(c) of the Tariff Act are not ministerial but require the exercise of judgment, discretion and special knowledge.

There is even more reason today for sustaining the principle laid down by *M'Clung* v. *Silliman* than there was at the time that case was decided. With the ever-increasing number of activities of the Federal Government, with the increase of its departments, bureaus and administrative agencies, utter confusion would result if every State court

in the land could undertake to mandamus Federal officials in the performance of their duties. Certainly no public policy requires a reversal of the principle today. Lehman, Ch. J., succinctly summarized the principle in the last paragraph of his opinion in this case (R. 37):

> "No case has been cited which holds that a State court may go outside that field and control the manner in which a federal agency performs or attempts to perform its functions and duties under the Tariff Act or other federal statute where the Federal government has exclusive jurisdiction. Assumption of such power would hamper orderly government and ignore the division of the fields of government of State and nation created by the Constitution. * * * "

POINT II

In view of the system of customs courts set up by Congress, there is particular reason for not permitting a State court to issue mandamus in this case.

Congress, of course, has exclusive jurisdiction with respect to tariff matters. Congress has set up a comprehensive system of customs courts. (Act of Oct. 10, 1940, c. 843, § 1, 54 Stat. 1101; 28 U. S. C. A. § 296; Act of June 17, 1930, c. 497, Title IV, §§ 514, 515; 46 Stat. 734; 19 U. S. C. A. §§ 1514, 1515; Act of March 3, 1911, c. 231, § 188, 36 Stat. 1143, as amended; 28 U. S. C. A. § 301; Act of August 5, 1909, c. 6, § 28, 36 Stat. 91, 105, as amended; 28 U. S. C. A. § 308.) Their jurisdiction over the administration of matters relating to customs appears to be exclusive. *Patchogue-Plymouth Mills Corporation* v. *Durning,* 101 F. (2d) 41 (C. C. A. 2d 1939); *Cottman Co.* v. *Dailey,* 94 F. (2d) 85, 88 (C. C. A. 4th 1938); *Riccomini* v. *United States,* 69 F. (2d) 480, 484 (C. C. A. 9th 1934); *Gulbenkian* v. *United States,* 186 Fed. 133, 135 (C. C. A. 2d 1911); *Nichols* v. *United States,* 7 Wall. 122, 129-131 (1869). Whether the jurisdiction of such courts is exclusive or not, the remedies

obviously intended to be afforded by them are so broad as to leave no basis for permitting the State courts to invoke the extraordinary remedy of mandamus. It is not only an elementary principle of law, but it is expressly provided in the New York statute, that mandamus cannot be resorted to if the determination can be adequately reviewed by some other court, body or officer (New York Civil Practice Act §1285).

POINT III

Petitioner's claim that if mandamus is not afforded by the State court no other remedy is available is no valid reason for granting this certiorari.

As we have pointed out, the jurisdiction of the customs courts in administering tariff matters is exceedingly broad. They are expressly given jurisdiction to review the validity of any orders or findings entering into the assessment of customs duties (Act of June 17, 1930, c. 497, Title IV, §§ 514, 515; 46 Stat. 734; 19 U. S. C. A. §§ 1514, 1515). The petitioner contends, however, that its only adequate remedy is in the State court. It asserts that the customs courts have no jurisdiction to consider the validity of the rates certified by respondent. There are, to be sure, decisions to the effect that a determination by an executive agency of the rate of exchange entering into a customs assessment is a matter that is nonjusticiable. But these decisions are to the effect that such a determination is nonjusticiable in any court.

Cramer v. *Arthur,* 102 U. S. 612, 616-617 (1880);
Hadden v. *Merritt,* 115 U. S. 25 (1885);
United States v. *Klingenberg,* 153 U. S. 93 (1894);
Amalgamated Textiles, Ltd. v. *United States,* 84 F. (2d) 210 (Cust. & Pat. App. 1936);
J. S. Staedtler, Inc. v. *United States,* T. D. 49255, 25 C. C. P. A. 136 (1937).

A determination which is nonjusticiable may not be reviewed whether the question is presented in a customs court or in a mandamus proceeding in a State court.

POINT IV

The authorities relied upon by petitioner are not in point.

This case is governed by the principle embodied in *M'Clung* v. *Silliman*. The authorities cited by petitioner have no bearing on that principle and are clearly distinguishable from the case at bar. *Armand Schmoll, Inc.* v. *The Federal Reserve Bank of New York*, 286 N. Y. 503, at 508-509 (R. 36-37).

Cases cited by petitioner hold that an action may be brought either in the State or in the Federal courts to enforce private rights created by Federal statute against a person performing no governmental function.[2] This case does not involve such a right. It involves a governmental function conferred by Congress upon an agency of the Federal Government, and none of the cases cited by petitioner even intimates that such a function may be the subject of a mandatory decree of a State court.

Cases involving the jurisdiction of State courts of a quo warranto proceeding[3] to test the right of national banks

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[2] *Claflin* v. *Houseman*, 93 U. S. 130; *Second Employers Liability Cases*, 223 U. S. 1; *Minn. & St. Louis R. R.* v. *Bombolis*, 241 U. S. 211; *St. Louis B. & M. Ry. Co.* v. *Taylor*, 266 U. S. 200; *Galveston etc. Ry. Co.* v. *Wallace*, 223 U. S. 481; *Panama R. R. Co.* v. *Vasquez*, 271 U. S. 557; *Hines* v. *Lowrey*, 305 U. S. 85; *People* v. *Welch*, 141 N. Y. 266; *Guthrie* v. *Harkness*, 199 U. S. 148; *Matter of Tuttle* v. *Iron National Bank*, 170 N. Y. 9; *Matter of Hurley* v. *National Bank of Middletown*, 252 App. Div. 272; *People ex rel. Lorge* v. *Consolidated National Bank*, 105 App. Div. 409; *Murray* v. *Walker*, 156 Ky. 536.

[3] *First National Bank* v. *Union Trust Co.*, 244 U. S. 416, 428.

to exercise fiduciary powers as provided in Section 11(k) of the Federal Reserve Act (Act of December 23, 1913, ch. 6, § 11(k); 38 Stat. 251, 262; 12 U. S. C. A. § 248), do not involve any governmental functions of national banks; and are distinguishable also on the ground that the statute permits national banks to exercise such powers only "when not in contravention of state or local law." The question in such cases is, as pointed out by this Court in the very case cited by petitioner, one of State law intended by Congress to be determined in the State courts.

Cases holding that State courts have jurisdiction to give redress for wrongs committed by Federal officers or agents claiming to act under authority granted by Federal statute,[4] or to prevent Federal officers or agents from going outside their Federal statutory authority and jurisdiction,[5] are clearly distinguishable from *M'Clung* v. *Silliman* and from the case at bar. In each of the cases falling in those categories the action of the State court was directed solely at the defendant's acts as an individual outside the scope of his Federal authority, and in no case did the court purport to assume jurisdiction over the acts of the defendant as a Federal officer or agent. In the *M'Clung* case and in the case at bar, on the other hand, the very hypothesis upon which the State court's power was invoked was that the act sought to be directed by order of the State court was an act which respondent should perform within its authority as a Federal instrumentality.

Cases holding that a mandamus proceeding against the holder of a public office abates upon the death or resignation of such officer,[6] do not support petitioner's assertion that

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[4] *Bates* v. *Clark*, 95 U. S. 204; *United States* v. *Lee*, 106 U. S. 196, *Teal* v. *Felton*, 12 How. 284; *Gelston* v. *Hoyt*, 3 Wheat. 246; *De Lima* v. *Bidwell*, 182 U. S. 1; *In re Fassett*, 142 U. S. 479; *Schall* v. *Newton*, 217 App. Div. 171, aff'd 245 N. Y. 576.

[5] *Northern Pacific Ry. Co. and Walker D. Hines, Director General of Railroads* v. *North Dakota*, 250 U. S. 135.

[6] *United States* v. *Boutwell*, 17 Wall. 604; *Warner Valley Stock Co.* v. *Smith*, 165 U. S. 28; *Pullman Co.* v. *Croom*, 231 U. S. 571.

this proceeding was not directed against respondent in its official capacity. The order sought in the case at bar would necessarily be directed to respondent in its capacity as agent of the Federal Government because it would require official performance of respondent's statutory duty. By the same token, any order of the State court directing respondent *nunc pro tunc* to certify new and different rates for Brazilian milreis on the dates in question, and therefore disregarding or annulling the action already taken by respondent in discharge of its statutory duty, would clearly constitute a direction of the manner of performance of that duty.

Cases in which petitioner claims Federal courts have issued the writ of mandamus to State officers or agents are not in point.[7] Those cases held simply that where under State practice the recognized method of enforcing a judgment obtained in a State court against a municipality was by mandamus directing an officer to levy a tax to pay the judgment, a nonresident suitor who obtained judgment against a municipality in a Federal court sitting in that State was entitled under the Acts of Congress (1 Stat. 93, 276; 4 Stat. 274; 5 Stat. 499, 789) to the same means of execution. *Amy* v. *The Supervisors*, 11 Wall. 136 (1870); *In re Copenhaver*, 54 Fed. 660 (D. C. W. D. Mo. 1893); *Riggs* v. *Johnson County*, 6 Wall. 166, at 197-198 (1867); *Defoe* v. *Town of Rutherfordton*, 122 F. (2d) 342 (C. C. A. 4th 1941); *Mayor, etc., of The City of Helena* v. *United States ex rel. Helena Waterworks Co.*, 104 Fed. 113, at 117 (C. C. A. 9th 1900). The cases stand for no such broad rule as petitioner contends. *Merrill on Mandamus*, §219.

Section 4 of the Federal Reserve Act (Act of December 23, 1913, ch. 6, §4, 38 Stat. 251; 12 U. S. C. A. §341)

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[7] *Riggs* v. *Johnson County*, 6 Wall. 166; *Supervisors* v. *United States*, 4 Wall. 435; *Von Hoffman* v. *City of Quincy*, 4 Wall. 535; *U. S. ex rel. Ranger* v. *New Orleans*, 98 U. S. 381; *Mobile* v. *Watson*, 116 U. S. 289; *Marion County Court* v. *Huidekoper*, 134 U. S. 332; *Arkansas* v. *St. Louis-S. F. Ry. Co.*, 269 U. S. 172.

which permits respondent and the other Federal Reserve Banks "To sue and be sued, complain and defend, in any court of law or equity", gives to the courts of the State of New York jurisdiction over the *person* of the Federal Reserve Bank of New York in a proper case. It does not, however, invest such courts with jurisdiction over an action or proceeding against the Federal Reserve Bank of New York involving a *subject matter* which is not within their jurisdiction. In an action in a State court to mandamus a Federal agency to perform a Federal function, the court may very well have jurisdiction over the person of the agency but its disability to act arises because of its lack of jurisdiction of the subject matter of the proceeding.

Conclusion

It is respectfully submitted that this Court has not been shown to have jurisdiction to review the decision of the New York Court of Appeals in this case. Even if this Court were shown to have jurisdiction, however, the petition for a writ of certiorari to the Supreme Court of New York should be denied because the decision of the Courts below is clearly in accord with the applicable decisions of this Court.

Respectfully submitted,

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Of Counsel.

Supreme Court of the United States

OCTOBER TERM 1941

No.

IN THE MATTER

of

ARMAND SCHMOLL, INC.,
Petitioner and Appellant Below,

v.

THE FEDERAL RESERVE BANK OF NEW YORK,
Respondent and Appellee Below.

PETITION AND SUPPORTING BRIEF FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK FOR NEW YORK COUNTY

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APPENDIX

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TO THE HONORABLE HARLAN FISKE STONE, CHIEF JUSTICE OF THE UNITED STATES AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner respectfully submits its petition for a writ of Certiorari to review the decision of the Court of Appeals of the State of New York, made on remittitur the judgment of the Supreme Court, affirming the decision of the Appellate Division of the Supreme Court for the First Department, which latter affirmed the resettled order of Mr. Justice Rosenman at Special Term for New York County, in this case, dismissing the Petition herein for an order in the nature of an order of mandamus against the Federal Reserve Bank of New York, and granting its,

the Respondent's, motion to dismiss as a matter of law only viz., upon the ground that the Supreme Court of the State of New York had no jurisdiction of the subject of the proceeding, and specifically excepting any exercise of discretion.

I

Summary statement of the matter involved.

This is a proceeding brought by Petitioner under Article 78, Sections 1288 and 1289, of the New York Civil Practice Act to obtain an order directing the Respondent, The Federal Reserve Bank of New York, a federal statutory agency, resident in, and subject to process in the courts of, New York, to perform a mandatory ministerial duty enjoined upon it by Section 522 (c) of the Tariff Act of 1930, Ch. 497 (46 Stat. 739), U. S. Code, Title 31, Section 372; viz., to determine and certify *nunc pro tunc* to the Secretary of the Treasury the buying rates in the New York market for cable transfers payable in Brazilian milreis on three specified dates, in the manner prescribed by that Section.

This Petitioner seeks a review of the decision of the Court of Appeals of the State of New York, made, on its remittitur, the order and judgment of the New York Supreme Court, affirming the decision of the latter Court, and also declaring it to be its own judgment, that, solely as matter of law, the Supreme Court of the State of New York was without jurisdiction to issue an order in the nature of mandamus running against the Federal Reserve Bank of New York to compel it to determine and certify such buying rates actually prevailing in the New York market for cable transfers of Brazilian milreis, in compliance with the mandatory and ministerial duty imposed upon that Bank by said Section 522 (c).

In January and February 1936, the Petitioner imported three lots of cattle hides from Brazil (R.* 5; Pet. par. 3),

which were subject to an *ad valorem* duty of 10% under Paragraph 1530 (a) of the Tariff Act of 1930. In accordance with Section 488 of that Act, they were appraised in Brazilian milreis as of the dates of exportation from Brazil, December 19, 1935, January 15 and February 8, 1936, at the respective sums of 166,214$400, 532,315$690 and 1,187,615$350 (R. 6; Pet. par. 5). Under that Tariff Act it was the duty of the Collector of Customs of the Port of New York, prior to liquidating the duties on the Petitioner's hides, to convert their appraised values from Brazilian milreis into United States currency, and in so doing to use the rates of exchange determined in the manner prescribed by Section 522 (c) of the Tariff Act of 1930. By that Section, when the value proclaimed quarterly by the Secretary of the Treasury "* * * varies 5 per centum or more from a value measured by the buying rate in the New York market at noon on the day of exportation, conversion shall be made at a value measured by such buying rate. * * * For the purposes of this subdivision such buying rate shall be the buying rate for cable transfers payable in the foreign currency so to be converted; and shall be determined by the Federal Reserve Bank of New York and certified daily to the Secretary of the Treasury, who shall make it public at such times and to such extent as he deems necessary. * * *" (Section 522, subdivision (c)).

On the dates in question there was a variance of more than 5% from the proclaimed values and, in liquidating the duties on Petitioner's hides, the Collector converted their appraised milreis value into United States currency at the rates certified by the Respondent-Appellee (R. 8; Pet. par. 10). As shown by the Petition (R. 7-11, 14-15) and the supporting affidavits (R. 17, 18, 19) the Respondent, purporting to comply with Section 522 (c), certified, as the buying rates for cable transfers payable in Brazilian mil-

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* Whenever "R", followed by numbers, appears herein it means the page number of the Record herein.

reis, amounts more than 40% in excess of the actual rates, not only on the days in question but throughout the months of December, 1935, January and February, 1936, at the same time admitting that they were not the actual rates and asserting that there were no New York market buying rates for such cable transfers by characterizing each rate it certified as: "Nominal rate. Firm rate not available" (R. 7-8; Pet. par. 9).

The Petition alleges that, as established by the affidavit of an officer of one of the largest New York trust companies (R. 9, 17, 18), an actual market existed in New York during the three months in which there were actual transactions in cable transfers payable in Brazilian milreis and in which firm quotations of the buying rates for such cable transfers were at all times obtainable; that the actual buying rates in the New York market on the three days in question were $0.0555, $0.0560 and $0.0585 per milreis, respectively; that the lowest market buying rate at noon on any day during these three months was $0.0550 and the highest was $0.0585 per milreis (R. 8, 9, 10). Schedules B and C (R. 16, 17) and Exhibit A to affidavit (R. 18-19, fol. 27) giving the actual rates, show stability and lack of fluctuation in them.

Respondent was fully informed of the actual market for such cable transfers, receiving daily reports from its member banks in New York of rates of milreis cable transfers (R. 10, 18, 19); and was required by law to keep "currently informed" as to all foreign exchange transactions and transfers of credits in its district. Every person having a principal place of business in Respondent's district who engaged in such transactions and transfers, with minor exceptions, was required by law to report "complete information relative thereto" to the Respondent. (See Executive Order No. 6560 of January 15, 1934, regulating transactions in foreign exchange, transfers of credit and the export of coin and currency, issued pursuant to Section 5 (b) of the Act of October 16, 1917 (40 Stat. 411), as amended by Section 2

of the Emergency Banking Act of March 9, 1933 (48 Stat. 1), and Regulations of the Secretary of the Treasury issued under said Executive Order on November 12, 1934.)

The actual market rates for the three months never exceeded $0.0585 per milreis, but the lowest rate certified by Respondent during December, 1935, and January and February, 1936, was $0.08250 and the highest was $0.084700 (R. 9, 14, 15). The rates unlawfully certified by Respondent exceeded the actual market rates by an average of more than two and three-quarters (2¾) cents, or some 50% higher than the actual market rates (R. 15, 16).

The Petition shows that the use of the rates actually certified will cause the assessment of duties on Petitioner's hides to exceed the actual duties imposable by law by approximately 40% (R. 12; Pet. par. 15); and that there is no way in which Respondent can be forced to certify correct and lawful rates, other than by an order in the nature of mandamus, which would finally determine the rights of the parties (R. 12; Pet. par. 16).

Petitioner on January 29, 1939 duly demanded of Respondent the lawful action which was refused (R. 12, 14). The present proceedings were thereafter, and within the statutory period of four months after such demand and refusal, commenced to compel Respondent to comply with Section 522 (c) (R. 13, 14, 20; see Section 1286, *infra,* p. 10). Respondent, not answering and so admitting the material allegations of the Petition, moved under section 1293 of the Civil Practice Act of the State of New York to dismiss the petition as matter of law on four objections in point of law (R. 19, 20), the principal and pertinent one and that upon which the decisions below are based being that; "(1) this Court (Supreme of New York) has no jurisdiction of the subject of the proceeding; * * *".

The Respondent's motion for dismissal of the Petition was heard by Mr. Justice Rosenman at the Special Term of the Supreme Court of New York who granted it as above for lack of jurisdiction, and by a resettled order (R. 2-4),

specifically excluded any exercise of discretion (R. 4). The other objections presented by Respondent were not passed upon (R. 29) and the opinion of Justice Rosenman shows the narrow and exclusive ground for his decision (R. 27, 28, 29). Justice Rosenman's decision was upon the theory that Petitioner sought to command the *manner* of performance (actually prescribed by the statute) of a federal duty by a federal agent in the administration of the customs laws, and that a state court possessed no such jurisdiction because this Court had so decided in *M'Clung* v. *Silliman* (6 Wheat. 598) by declaring "* * * that the official conduct of an officer or agent of the United States Government can only be controlled by the power that created him". And he also says that a state court may not "* * * issue an order in the nature of mandamus to an officer or agency of the federal government in relation to the exercise of a federal governmental function by such officer or agency". And he adds that the question is: "It is whether the manner of performance of a specific federal government statutory function by a federal statutory agency can be the subject of a decree of a state court."

The Special Term's exclusive holding of a lack of jurisdiction of the state court to prevent plain, unwarranted violation by Respondent of the federal statute, without consideration of the other objections, was unanimously affirmed without opinion by the Appellate Division of the First Department, which, however granted to Petitioner leave to appeal to the Court of Appeals. The Court of Appeals affirmed the dismissal on the jurisdictional ground, Chief Judge Lehman writing for the majority, all concurring except Conway, J., who dissented in a comprehensive opinion the effectiveness of which makes untenable, as matter of sound reasoning, the majority opinion. (*Armand Schmoll, Inc.* v. *Federal Reserve Bank,* 286 N. Y. 503, 37 N. E. (2nd) 225; R. 37-57.)

To the formal statement of reasons given by Justice Rosenman, Chief Judge Lehman adds the pure assumption

of exclusive power in the federal government, although not in terms given by the Tariff Act, by saying: "No case has been cited which holds that a State Court may go outside that field (that 'of its alleged jurisdiction') and control the manner in which a Federal agency performs or attempts to perform its functions and duties under the Tariff Act or other Federal statute where the Federal government has exclusive jurisdiction. Assumption of such power would hamper orderly government and ignore the division of the fields of government of State and nation created by the Constitution" (286 N. Y. 503, 509; R. 37).

II

This Court's jurisdiction to review.

The Judicial Code by Section 237 (b) (U. S. C. Title 28, Section 344 (b)) definitely provides for the review by this Court of the final judgment rendered in this matter by the Courts of New York. There are involved questions of the construction of the Tariff Act of 1930, as construed by the courts below, and of the validity under the State Constitution and local law of the Petitioner's substantive right to an order in the nature of mandamus, and of the forms of relief against the Respondent, and of the title, right, privilege and immunities of the Petitioner under the Federal Tariff Act of 1930 and the Constitution of the United States. These jurisdictional matters and rights are confirmed by Article VI, Clause 2, of the Federal Constitution providing that "the Laws of the United States" (including the Tariff Act of 1930) * * * "shall be * * * the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding." The courts below have decided these federal questions of substance in a way probably not in accord with the applicable decisions of this Court.

The Court of Appeals' decision is dated October 16, 1941, and the remittitur bears date October 17, 1941 (R. 52-3), and the order of the Supreme Court for New York County making the order of the Court of Appeals the order of that Court was entered on October 21, 1941 (R. 53-54). The time within which to petition to the Supreme Court of the United States for a writ of certiorari to the Court of Appeals or to the Supreme Court of the State of New York would have expired on January 21, 1942, but an order extending the Petitioner's time within which to apply for said writ of certiorari to February 3, 1942, was granted by Mr. Justice Jackson on January 16, 1942, and entered in the office of the Clerk of this Court (R. 54), and a copy served on the Respondent on January 21, 1942. An order further extending the Petitioner's time within which to apply for said writ of certiorari to February 7, 1942, was granted by Mr. Justice Jackson on January 29, 1942 and entered in the office of the Clerk of this Court (R. 55).

III

Statutes involved.

This case involves the interpretation and enforcement of Section 522 of the Tariff Act of 1930, Ch. 497 (46 Stat. 739) U. S. Code, Title 31, Section 372; R. 6, 7). The relevant provisions of this Act are contained in Section 522 (c). Under that Act, for the purpose of the assessment and collection of duties upon merchandise imported into the United States, wherever it is necessary to convert foreign currency of the United States under the conditions provided by Section 522 (c), conversion of such foreign currency shall be made at a value measured by the buying rate in the New York market, at noon on the date of exportation, for cable transfers payable in the foreign currency so to be converted. Section 522 (c) meticulously prescribes the method in which such determination shall be made. By that Section

the Federal Reserve Bank of New York is authorized and required to determine in the manner therein prescribed, and to certify daily to the Secretary of the Treasury, the buying rate for such cable transfers.

Section 522 (c) reads as follows:

> "(c) Market Rate When No Proclamation.—If no such value has been proclaimed, or if the value so proclaimed varies by 5 per centum or more from a value measured by the buying rate on the New York market at noon on the day of exportation, conversion shall be made at a value measured by such buying rate. If the date of exportation falls upon a Sunday or holiday, then the buying rate at noon on the last preceding business day shall be used. For the purposes of this subdivision such buying rate shall be the buying rate for the cable transfers payable in the foreign currency so to be converted; and shall be determined by the Federal Reserve Bank of New York and certified daily to the Secretary of the Treasury, who shall make it public at such times and to such extent as he deems necessary. In ascertaining such buying rate such Federal Reserve bank may in its discretion (1) take into consideration the last ascertainable transactions and quotations, whether direct or through exchange of other currencies, and (2) if there is no market buying rate for such cable transfers, calculate such rate from actual transactions and quotations in demand or time bills of exchange."

Title 12, U. S. C., Section 341, is also involved, which provides that the Federal Reserve Bank of New York "shall have power— * * * to sue and be sued, complain and defend, in any court of law or equity". That this includes state courts is confirmed by Section 632, of 12 U. S. C., which permits but does not require the removal to the federal courts of suits to which a Federal Reserve Bank is a party and provides that no attachment or execution shall issue against the respondent before final judgment in any suit, in any state, county, municipal or United States court (Appendix, p. 30).

Sections 1283, 1284, 1285, 1286, 1288, 1289, 1293, 1295, 1296, 1300 and 1306 of *Article 78* (L. 1937, Ch. 526) of the New York Civil Practice Act are also involved, as confirming and granting original jurisdiction to the Supreme Court of the State of New York to entertain proceedings in the nature of mandamus as part of the ordinary civil remedies in the courts of the state. The relevant portions of these sections are set out in the Appendix to the Petition at pages 27-29, *infra.*

Section 1283 of Article 78 provides that "the classifications, and writs and orders of certiorari to review, mandamus and prohibition are hereby abolished. The relief heretofore obtained by such writs or orders shall hereafter be obtained as provided in this article."

Section 1284, *inter alia,* provides (1) "The expression 'body or officer' includes every court, tribunal board, corporation, officer or other person, or aggregation of persons, whose action may be affected by the proceeding under this article"; * * * (3). "The expression 'to compel performance of a duty specifically enjoined by law' refers to all other relief heretofore available in a mandmus proceeding"; and (4) that "nothing in this article shall be deemed to continue or establish distinct remedies."

Section 1286 provides, as to "Limitations of Time," that "a proceeding under this article * * * to compel performance of a duty specifically enjoined by law, must be instituted by service of the petition and accompanying papers, as prescribed in Section twelve hundred and eighty-nine of this article within four months * * * after the respondent's refusal, upon the demand of the petitioner or the person whom he represents, to perform his duty * * *."

Section 1295 provides: "Upon the return day of the application, if no triable issue of fact is duly raised by the pleadings and accompanying papers, the court shall forthwith render such final order as the case requires * * *."

Section 1300 provides that "the court shall render a final order granting the petitioner the relief to which it deems he is entitled, or dismissing the proceeding, either on the merits or with leave to renew."

IV

The questions presented.

The questions fundamentally involved are as follows:

(1) Did the Courts below err in holding that Petitioner sought to direct the *manner* of performance by a federal agency of its statutory duties when the statute (Section 522 (c) of the Tariff Act of 1930) itself prescribed the manner of performance and that consisted of merely reporting the rates for cable transfers in the New York market, which market registered automatically those rates, with the prescribed duty and manner of performance being and becoming purely mandatory and non-discretionary?

(2) Did the Courts below err in holding that the Supreme Court of New York was without jurisdiction to restrain Respondent from violating Section 522 (c) of the federal Tariff Act or to compel it to comply with that Act when the Tariff Act did not exclude State power to act; and further err, with this held on the ground that this Court had so decided in *McClung* v. *Silliman,* 6 Wheaton 598?

(3) Did the Courts below err in holding that the incorrect and false reporting of the buying rates in the New York market for cable transfers by the Respondent, as a federal agent, in violation of Section 522 (c) of the federal Tariff Act of 1930, was a political and sovereign act of the federal government which the Supreme Court of New York was without jurisdiction to prevent or correct by mandamus or other remedy?

(4) Is the Supreme Court of New York State, acting under Article 78 of the New York Civil Practice Act, without jurisdiction, solely because it is a State court, to compel

the Respondent as a federal agent to perform the mandatory, ministerial duties imposed upon it by Section 522 (c) of the Tariff Act of 1930?

(5) Did the Courts below err in failing to hold that the Congress, by expressly investing Respondent with the power to "sue and be sued in any court of law or equity," withdrew, and intended to withdraw, from Respondent any immunity as a federal agent, from the jurisdiction of State Courts and intended to apply to it any of their usual civil remedies and process to compel Respondent to comply with Section 522 (c) of the Tariff Act of 1930?

(6) Did Congress by the Tariff Act of 1930 expressly or by necessary implication confer on the federal Collector or the Customs Courts having power to review his decisions or on any other federal agency, exclusive jurisdiction to enforce or to fail to enforce performance by the Respondent, The Federal Reserve Bank of New York, of the mandatory, ministerial duties imposed on it by Section 522 (c), or invest the Collector or any other federal agency with any jurisdiction or power whatever over Respondent to compel such performance?

(7) In the absence of any such statutory, exclusive jurisdiction conferred upon the federal Collector or the Customs Courts or any other federal agency, or of any adequate statutory remedy given to persons whose vested rights under Section 522 (c) have been violated by Respondent, has the Supreme Court of the State of New York, in proceedings brought under Sections 1288 and 1289 of Article 78 of the New York Civil Practice Act and under the decisions of the New York Court of Appeals in mandamus or similar proceedings, jurisdiction to compel Respondent to perform its mandatory, ministerial duties imposed upon it by Section 522 (c), or to restrain and otherwise correct palpable violations thereof?

(8) Did the Courts below err in holding, in effect, that the use in the instant case of the local New York substantive statutory proceedings and its ordinary remedies in a civil suit in the nature of mandamus under Article 78 of the New York Civil Practice Act, to compel by order the Respondent,—a federal governmental statutory agent resident in New York, subject "to sue and be sued" in the Supreme Court of the State of New York, and designated by Congress as such governmental agency for the sole and express purpose of effectuating the mandatory provisions of Section 522 (c) of the Tariff Act of 1930,—to comply with the terms of such section and to perform its mandatory, ministerial duties as prescribed therein, constitutes such a grave limitation by the New York Legislature and Supreme Court upon such federal agent's powers and ability to perform its mandatory, statutory duties and functions as not to have been intended by the Congress to have been included in its general statutory withdrawal of such governmental federal agent's immunity from suit under the "sue and be sued" provisions of Title 12, U. S. C. Section 341,—and so imposes an implied limitation upon the general withdrawal by Congress from the Respondent of any immunity from such suit and process?

V

The reasons relied upon for the allowance of certiorari.

The grounds which call for the granting of the Writ of Certiorari and of the relief sought by Petitioner are most adequately and competently set forth by Judge Conway in his careful and full dissenting opinion (286 N. Y. 503, at 509-525; R. 37-51). Those grounds there stated are hereby adopted and incorporated in this Petition as if fully set forth herein and are sufficient in themselves. However, in addition, Petitioner briefly states the reasons, and in con-

travention of those advanced by Chief Judge Lehman (286 N. Y. 506-509), in the following fashion:

Petitioner never sought to command the *manner* of performance of the duty of the federal agent, as declared by the majority below (286 N. Y. 508-509; R. 34, 37). That "manner" or rather method of performance is carefully prescribed by section 522 (c) of the Tariff Act itself, and Petitioner sought only to prevent the palpably unlawful act of Respondent in violating its mandatory, ministerial, statutory duty, and thus to compel compliance with the federal act. There is lack of jurisdiction in the State Court only in the event that its judicial order would gravely interfere with the performance of a governmental function or would impair the authority or efficiency of the federal agent. (*F. H. A.* v. *Burr,* 309 U. S. 242, 245, 249; *First National Bank* v. *Missouri,* 263 U. S. 640, 659; *Federal Land Bank* v. *Priddy,* 295 U. S. 229, 237; Compare *National Bank* v. *Commonwealth,* 9 Wall, 353, 361-2). Here neither objection is good for Petitioner seeks only to have Respondent perform its statutory duty and keep within the law rather than to permit it to clearly and intentionally violate it.

There is no language, either express or necessarily implied, in Section 522 (c) or in any other provision of the Tariff Act of 1930 by "* * * which the state government is excluded" (286 N. Y. at 506; R. 35); and *McClung* v. *Silliman* (6 Wheat. 598) does not hold "* * * that the state court is without power to give such directions to a federal officer acting under a federal statute * * *". The statutory duty to report the actual buying rates prevailing in the New York cable transfer market, even if misnamed a "governmental function", does not involve in any wise a political or sovereign act of the federal government. The rates are actually made by the New York market, by the transactions had daily between buyers and sellers of the exchange. No act of the sovereign makes them. Congress has required that what actually happens in the market be in effect automatically reported. There is no act of the sovereign in this and on the part of the federal

agent there is only a ministerial duty. *Kendall* v. *United States,* 12 Peters 524, at pp. 609-610; *Philadelphia* v. *Stimson,* 223 U. S. 605, 619, 620; *Lessin* v. *Board of Education,* 247 N. Y. 503, 510, 511; *People ex rel. Equitable Life Ass. Soc.* v. *Pierce,* 187 App. Div. 437, aff'd 229 N. Y. 514. When the sovereign acts by lowering, through a law of Congress, the rate of duty or the President under the flexible tariff law lowers a specific duty, a citizen in a particular industry may be severely injured or his business wholly destroyed. This, however, is without redress to him, for the sovereign or people is acting in its political capacity. This did not happen to the Petitioner, for its injury is due to an unlawful act, a failure by the federal agent to comply with the mandatory prescription of the federal law.

There is here no basis for exclusion of the State Court from administering the only effective remedy by mandamus to enforce the federal act. There is concurrent jurisdiction in the State to enforce federal laws by any appropriate form of action or civil remedy provided by the state laws, unless and until Congress by clear direction vests exclusive jurisdiction in federal authorities. *Claflin* v. *Houseman,* 93 U. S. 130, 136-7; *Second Employers Liability Cases,* 223 U. S. 1, 55-59; *Minn. & St. Louis R. R.* v. *Bombolis,* 241 U. S. 211, 221-2; *St. Louis B. & M. Ry. Co.* v. *Taylor,* 266 U. S. 200, 207-8; *Galveston etc. Ry. Co.* v. *Wallace,* 223 U. S. 481, 490; *Panama R. R. Co.* v. *Vasquez,* 271 U. S. 557; aff'g 239 N. Y. 590; *Hines* v. *Lowrey,* 305 U. S. 85; *People* v. *Welch,* 141 N. Y. 266, 272-3, 275.

In the *Taylor* case, 266 U. S. 200, Mr. Justice Brandeis said at page 208:

> "The origin of the right does not affect the manner of administering the remedy. The grant of concurrent jurisdiction implies that, in the first instance, the plaintiff shall have the choice of the Court. As an incident, he is entitled to whatever remedial advantage inheres in the particular forum. *Minneapolis & St. Louis, R. R. Co.* v. *Bombolis,* 241 U. S. 211, 221. * * *"

State courts, with the support of this Court, have been continually furnishing relief to suitors against federal agents for their violations of, or departures from, federal statutes. So far as state courts are concerned, the Courts below erroneously held that the only relief they cannot grant is to prevent plain violation of or to enforce compliance with a federal statute imposing a mandatory and ministerial duty. However, the federal courts of the District of Columbia may and do grant such specific relief merely because Congress has vested in them the same judicial power as exists in the State of Maryland under its Constitution and laws. *Kendall* v. *United States,* 12 Peters 524. That, of course, includes mandamus and New York must enjoy the same rights and power, unless clearly excluded by act of Congress (Conway, J., 286 N. Y. at 523, 524; R. 50, 51).

The case of *McClung* v. *Silliman,* upon the alleged authority of which the decisions below rest, does not hold that state courts are without authority to issue mandamus to federal agents. There the state court, on the Government's preliminary objection that there was no such jurisdiction, held to the contrary. On the later trial, on a stipulation of facts, it decided against the applicant on the merits. This Court affirmed the Ohio court's judgment on the merits, thereby upholding the latter's jurisdiction.

What the *McClung* case actually decided is challenged, of course. What the Court does by its mandate and judgment, rather than its opinion, must determine the true holding of the case. At the foot of the opinion the Supreme Court declares:

> "Judgment. This cause came on to be heard, on the transcript of the record of the Supreme Court of the State of Ohio, for Muskingum County, and was argued by counsel. On consideration whereof, it is *Adjudged and Ordered,* that the judgment of the said Supreme Court of the State of Ohio, be, and the same is hereby affirmed, with costs; it being the opinion

> of this Court, that the said Supreme Court of the State of Ohio, had no authority to issue mandamus in this case."

If it had intended to hold flatly that no state court has any power to issue an order or judgment against a federal agency, because only the creator may control the created, this Court would in terms have said so. Instead of dismissing for lack of jurisdiction, the mandate affirmed the Ohio court's judgment and the added language of lack of authority in the Ohio court "to issue a mandamus in this case", simply refers to the lack of merits warranting no mandamus "in this case". The full meaning of the phrasing of the Court's mandate, by which the holding in the *McClung* case must be determined, which directed an *affirmance* of the judgment of the Ohio Supreme Court dismissing on the merits McClung's motion for a mandamus, but adding "it being the *opinion* of this Court that the said Supreme Court of the State of Ohio, had no *authority* to issue a mandamus in this *case*" (italics supplied), is highly important. (See review of this case in dissenting opinion of Conway, J. (286 N. Y. at pp. 514-518; R. 42-45)). The meaning of such phrasing was early explained by Chief Justice Marshall in *Marbury* v. *Madison* (1 Cranch 137, at p. 172) where he said of another mandamus case:

> "When the subject was brought before the Court, the decision was, not that a mandamus would not lie to the head of a department directing him to perform an act, enjoined by law in the performance of which an individual had a vested interest; but that a *mandamus* ought not to issue in that case; the decision necessarily to be made if the report of the Commissioners did not confer on the applicant a legal right."

The McClung mandate necessarily means that the refusal of mandamus was for lack of merit and not for lack of jurisdiction. The affirmance of the Ohio court's judgment —a dismissal on the merits—is conclusive as to that Court's jurisdiction and means that, if on the merits the mandamus

had been awarded, it would have been affirmed and sustained by this Court. This has been confirmed in a later state court case, where, instead of dismissing for lack of jurisdiction, this Court reversed but remanded proceedings to the state court, thereby implying and affirming jurisdiction (*Northern Pac. Ry. Co.* v. *North Dakota,* 250 U. S. 135, 152.)

Moreover, if, as asserted by the Court of Appeals, there were any rule of exclusion laid down in the *McClung* case (286 N. Y. 506-509; R. 34-37), based on the claim of warring sovereignties rejected in *Claflin* v. *Houseman,* 93 U. S. 136-7, that the federal jurisdiction excludes state interference, such rule must be reciprocal and then state jurisdiction would preclude interference by federal authorities or courts with state duties and officers.

The Government, in its Brief in the Court of Appeals, at page 14, concedes this rule of reciprocity by saying: "Since the federal government and the state government represent separate jurisdictions, it is only natural that the governmental functions of the one are not subject to the control of the courts of the other, except for the limited control which federal courts may exercise to enforce the Constitution and statutes of the United States as the supreme law of the land." This Court has, however, on the contrary decided that federal courts might issue mandamus compelling state or county officers to levy and collect taxes under state laws the doing of which the state courts had theretofore enjoined. (*Riggs* v. *Johnson County* (1867), 6 Wall. 166; *Supervisors* v. *United States,* 4 Wall. 435; *Mobile* v. *Watson,* 116 U. S. 289; *Macon County* v. *Huidekoper,* 134 U. S. 332; *Arkansas* v. *St. Louis S. F. Ry. Co.,* 269 U. S. 172.) Of course, the relief sought by McClung, if granted, would have interfered with a matter committed by the statute exclusively to a federal officer invested with *quasi-judicial* powers (*Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316, 324) or required him to violate the law (*United States* v. *Stone,* 2 Wall. 525, 535; *Hoofnagle* v. *Anderson,*

7 Wheat. 214, 215; *Simmons* v. *Wagner,* 101 U. S. 260; *Smelting Co.* v. *Kemp,* 104 U. S. 636, 647; *Moore* v. *Robbins,* 96 U. S. 530); and so on the merits the decision was proper and supportable (286 N. Y. at 517; R. 44). As pointed out by Judge Conway (286 N. Y. at 517; R. 44): "The Register had no power or duty to do the act which McClung sought to force him to perform. (*Simmons* v. *Wagner,* 101 U. S. 260, 261, 262; *Borax Consolidated, Ltd.* v. *Los Angeles,* 296 U. S. 10, 17, 18.) For that reason no court, State or federal, had power to grant the relief sought in the *McClung* case."

This Court in the *McClung* case, on *his* writ of error, had no jurisdiction of the federal question of the claimed immunity of the Register, Silliman, as a federal officer, from the jurisdiction of the Ohio court, and the part of Justice Johnson's opinion relating thereto was, therefore, dictum and of no binding authority. No federal question is raised under the 25th section of the Judiciary Act and this Court is without appellate jurisdiction, unless the federal act alleged to create rights in plaintiff in error is shown by the record *to be applicable and to have been applied.* (*Miller* v. *Nichols* (1820), 4 Wheat. 311, 315; *William* v. *Norris,* 12 Wheat. 117, 124; *Hickie* v. *Starke,* 1 Pet. 98, 99; *Crowell* v. *Randell,* 10 Pet. 368, 391, 394-5; *Fisher's Lessee* v. *Cockerell,* 5 Pet. 248, 258.) Only the federal question of the construction of the Act of May 10, 1800 (2 Stat. 73), as to the validity of the prior sales of fractions separated by the navigable river Muskingum was raised by *McClung's* writ of error. (See Record in this Court, in *McClung* v. *Silliman,* 6 Wheat. 598 and, *infra,* pp. 57-60). McClung's writ gave this Court only appellate jurisdiction to construe the act as to the validity of those sales, but did not give it jurisdiction to pass upon Silliman's claimed immunity, as a federal officer, from the Ohio court's jurisdiction. No such federal question was before this Court on McClung's writ of error.

The Supreme Court of New York, under its Constitution and laws, always had general jurisdiction at law and in

equity, including power to issue mandamus or an order in the nature of mandamus, which is confirmed by the New York local law known as (new) Article 78 of the Civil Practice Act, and the mandamus decisions of the New York Court of Appeals, made applicable by the decision of this Court. (*Erie R. R. Co.* v. *Tompkins,* 304 U. S. 64.)

Article 78 contains no limitation upon a proceeding thereunder against a resident officer, agency or instrumentality of the United States to compel performance of a duty imposed upon it by law, under an Act of Congress. As Clause 2 of Article Sixth of the Constitution of the United States provides that acts of Congress "shall be the Supreme Law of the Land; and the Judges in every state shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding" (See *Hines* v. *Lowrey,* 305 U. S. 85, at p. 91), it follows that the performance of a duty specifically enjoined by Act of Congress upon a resident federal agency subject to suit in the Supreme Court of the State of New York, may be compelled under Article 78 of the New York Civil Practice Act. The Respondent is admitted to be such an agency. Congress has specifically provided (Title 12, U. S. C. A. § 341) that a Federal Reserve Bank shall have power— "* * * Fourth. To sue and be sued, complain and defend in any court of law or equity,".

In New York State, by the decisions of the Court of Appeals, governmental agencies performing a governmental duty not judicial in its nature are not immune from liability for their torts or from liability in mandamus. *Baird* v. *Supervisors Kings County,* 138 N. Y. 95, 115, 116 (mandamus); *Matter of Lewis* v. *Carter, et al., Individually and as the Board of Parole for State Prisons,* 220 N. Y. 8, 18 (mandamus); *People ex rel. Equitable Assurance Soc.* v. *Pierce,* 187 App. Div. 437, aff'd 229 N. Y. 514 (mandamus); *Matter of Potts* v. *Kaplan,* 264 N. Y. 110, 117 (mandamus); *People ex rel. Hilliker* v. *Pierce,* 64 Misc. 627 (mandamus); *Lessin* v. *Board of Education,* 247 N. Y. 503,

510, 511 (tort); *Herman* v. *Board of Education,* 234 N. Y. 196 (tort); *Jaked* v. *Board of Education,* 198 App. Div. 113, 118, aff'd 234 N. Y. 591 (tort). In the *Lessin* case, *supra,* Lehman, J., writing for an unanimous court, said:

> "The State has created the Board of Education as a corporate agent to discharge governmental functions. No exemption from responsibility for dereliction in the discharge of a corporate duty has been granted * * *. The Board has * * * failed to perform a duty imposed upon it by law, and liability may be predicated upon its own wrong."

Under the rule of *Erie R. R.* v. *Tompkins,* 304 U. S. 64, 78, the above decisions of the New York Court of Appeals are the equivalent of New York statutes, as setting out the local law that agencies performing a governmental duty not judicial in its nature are not immune from liability for their torts or immune from mandamus orders compelling them to perform mandatory, ministerial duties, and so are subject to proceedings under Article 78 of the Civil Practice Act.

In *People ex rel. Solomon* v. *Brotherhood of Painters,* 218 N. Y. 115, the Court of Appeals, by Seabury, J., said:

> "Mandamus was originally regarded as a prerogative writ. In modern times it has been somewhat assimilated to ordinary remedies. The power of the courts to grant a remedy by means of this writ is derived from the common law and from statutory enactments. The common law right to issue the writ is limited to the enforcement of some duty prescribed by law *as against persons and corporations within the jurisdiction."* (Italics ours.)

The Tariff Act of 1930 vests no power in any of the federal agencies, and especially not in the customs authorities and courts, to correct the violations (286 N. Y. at 513; R. 41) and the departures from the law committed by Respondent in exceeding its jurisdiction and openly failing

to perform the mandatory and ministerial duties prescribed by Section 522 (c) of the Tariff Act of 1930. Respondent claimed below that, notwithstanding their lack of such power, the Collector and the Customs Courts were given exclusive jurisdiction in customs matters. In answer Judge Conway, in his dissenting opinion in the Court of Appeals in this case, at page 513 of 286 N. Y. (R. 41), said:

> "To sustain this contention of respondent, would be to say that a Congressional statute by implication excluded State courts from exercising jurisdiction beyond the powers of the Collectors and the Customs Courts, although such jurisdiction had been conferred upon them by our laws. It is a sufficient answer to quote the following from *Dudley* v. *Mayhew* (3 N. Y. 9, 15):
>
> 'It is very clear that when a party is confined to a statutory remedy, he must take it as it is conferred; and that where the enforcing tribunal is specified, the designation forms a part of the remedy, and all others are excluded. *The rule is inapplicable, of course, where property or a right is conferred, and no remedy for its invasion is specified. Then the party may sustain his right or protect his property in the usual manner.* That is in such cases reasonably supposed to be the intention of the Legislature, *as it could not be the design to confer a barren property or a fruitless right, which could not be protected or enforced anywhere.*' (Italics supplied.)"

The Government, in its Brief in the Court of Appeals, urged that the action of Respondent "* * * is not subject to control by any court" (Point I, p. 17) and that it "* * * is not subject to control by a state court because such action is in performance of a government function of the United States" (Point II, p. 23), and that Congress has indicated an intent to restrict all reviews of customs questions to the United States Custom Court, "By the elaborate and comprehensive system for the administration of the customs laws which has been established, * * *" (Point III, pp. 32-33), conceding, however, that: "This limitation is

found, not in the words of any statute, but in the fact that Congress has established a comprehensive system * * *" (Brief, p. 15).

These points are sufficiently answered by Judge Conway in his dissent (See 286 N. Y. at 516-8, R. 45, 46; ib. at 512-3, R. 40, 41). Of course control by the federal courts has frequently been exercised. (*Waite* v. *Macy,* 246 U. S. 606, 608-10; *United States* v. *United States Tariff Commission,* 6 F. (2d) 491, reversed on ground case had become moot, in 274 U. S. 106; *Calf Leather Tanners' Ass'n* v. *Morgenthau,* 80 F. (2d) 536, 541-2, cert. den. 297 U. S. 718; *De Lima* v. *Bidwell* (assumpsit against Collector of Customs for exceeding his jurisdiction in exacting duties), 182 U. S. 1, 175-7, 179; *In re Fassett,* 142 U. S. 479, 486, 487 (libel); *Conklin* v. *Newton,* 2 Cir. 34 F. (2d) 612, 514 (conversion by Collector); *Giles* v. *Newton* (D. C. E. D. N. Y.), 21 F. (2d) 848 (conversion by Collector); Compare: *Hoyt* v. *Gelston* (1816), 13 Johns. R. 141, 151, aff'd 3 Wheat. 246, 334 (trespass against Collector of Customs for seizure of a ship); *Ripley* v. *Gelston* (1812), 9 Johns. R. 201 (assumpsit against Collector); *Schall* v. *Newton,* 217 App. Div. 171, aff'd 245 N. Y. 576 (conversion against Collector of Customs for breach of duty. Compare: *Blair* v. *United States,* 6 F. (2d) 481).) These cases necessarily uphold the jurisdiction (not exclusive of state court jurisdiction) of federal courts other than the Customs Courts to enforce by mandamus or injunction mandatory statutes involving the Tariff.

The fundamental rule of a court's existence that, where there is a right, it will find a remedy, has been ignored in an instance of a right explicitly accorded to importers, such as the Petitioner, by a federal statute flagrantly violated by a federal agent, the Respondent, to the great discrimination and grave injury of petitioner. (*Blair* v. *United States,* 6 Fed. (2d) 484, 486; *Richbourg Motor Co.* v. *U. S.,* 281 U. S. 528; *DeLima* v. *Bidwell,* 182 U. S. 1, 176-177, 179.)

The *DeLima* case, *supra,* was an action for money had and received brought by an importer against the Collector of the Port of New York, in the Supreme Court of the State of New York and subsequently removed to the Circuit Court, for duties illegally exacted on a cargo of sugar from Porto Rico that was held by this Court not to be "imported merchandise". There this Court said, at pages 176-177:

> "Conceding * * * that no remedy exists under the Customs Administrative Act, does it follow that no action will lie? If there be an admitted wrong, the courts will look far to supply an adequate remedy. * * * If the position of the Government be correct, the plaintiff would be remediless; and if a collector should seize and hold for duties goods brought from New Orleans, or any other concededly domestic port, to New York, there would be no method of testing his right to make such seizure. It is hardly possible that the owner could be placed in this position."

(See also review of the instant case in 55 Harvard Law Review at p. 674 (Feby. 1942) expressing the opinion that the decision of the New York Court of Appeals was erroneous.)

Not only was no power given to the Collectors or the Customs Courts by the Tariff Act of 1930, to compel the respondent to comply with the mandatory provisions of Section 522(c), and no adequate remedy was given by the Act to persons whose vested rights were violated by the refusal of the respondent so to comply, and consequently no basis whatever exists for the *implication* that Congress intended to confer exclusive jurisdiction upon the Collectors and the Customs Courts or any Courts having power to review their decisions, to enforce Section 522(c); but Congress, by investing Federal Reserve Banks with the power "to sue and be sued in any court of law or equity" expressly withdrew and intended to withdraw from the respondent any immunity from suit in State Courts and conferred upon persons so suing the right to make use of any appropriate state civil remedy to enforce the mandatory provisions of

Section 522(c). (*F. H. A.* v. *Burr,* 309 U. S. 242, 245, 249; *Keifer & Keifer* v. *R. F. C.,* 306 U. S. 381; *Federal Land Bank* v. *Priddy,* 295 U. S. 229, 237; Compare: *Claflin* v. *Houseman,* 93 U. S. 130; *St. Louis B. & M. R'y* v. *Taylor,* 266 U. S. 200, 207-8; *Minn. & St. Louis R. R. Co.* v. *Bombolis,* 241 U. S. 211, 218, 221.)

The annexed Brief, hereby made a part of this petition, as if fully set forth herein, presents thoroughly, in detail and with sufficient supporting cases, the grounds upon which petitioner relies in praying this Court for the allowance of a Writ of Certiorari in the above case.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of the State of New York for New York County, commanding such Court to certify and send to this Court for its review and determination, at a date to be therein named, a full and complete transcript of the record and all proceedings, in the case entitled on its docket Index No. 6886—1939, *In the Matter of Armand Schmoll, Inc., Petitioner* v. *The Federal Reserve Bank of New York, Respondent;* that said order of the said Supreme Court of the State of New York for New York County may be reversed by this Honorable Court; and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just and proper.

Respectfully submitted,

HERSEY EGGINTON of
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Attorneys for Armand Schmoll, Inc.,
Petitioner-Appellant.

Signed in behalf of the petitioner and its counsel on this 6th day of February, 1942.

By HERSEY EGGINTON.

Appendix

Statutes Involved

Relevant Provisions of Section 522 of The Tariff Act of 1930, as amended (U. S. C. Title 31 §372)

"Conversion of currency.

(a) Value of Foreign Coin Proclaimed by Secretary of Treasury.—The value of foreign coin as expressed in the money of account of the United States shall be that of the pure metal of such coin of standard value; and the values of the standard coins in circulation of the various nations of the world shall be estimated quarterly by the Director of the Mint and be proclaimed by the Secretary of the Treasury quarterly on the 1st day of January, April, July, and October in each year.

"(b) Proclaimed Value Basis of Conversion.—For the purpose of the assessment and collection of duties upon merchandise imported into the United States on or after June 17, 1930, wherever it is necessary to convert foreign currency into currency of the United States, such conversion, except as provided in subdivision (c), shall be made at the values proclaimed by the Secretary of the Treasury under the provisions of paragraph (a) of this section, for the quarter in which the merchandise was exported.

"(c) Market Rate When No Proclamation.—If no such value has been proclaimed, or if the value so proclaimed varies by 5 per centum or more from a value measured by the buying rate in the New York market at noon on the day of exportation, conversion shall be made at a value measured by such buying rate. If the date of exportation falls upon a Sunday or holiday, then the buying rate at noon on the last preceding business day shall be used. For the purposes of this subdivision such buying rate shall be the buying rate for cable transfers payable in the foreign currency so to be converted; and shall be determined by the Federal Reserve Bank of New York and certified daily to the Secretary of the Treasury, who shall make it public at such times and to such extent as he deems necessary.

In ascertaining such buying rate such Federal reserve bank may in its discretion (1) take into consideration the last ascertainable transactions and quotations, whether direct or through exchange of other currencies, and (2) if there is no market buying rate for such cable transfers, calculate such rate from actual transactions and quotations in demand or time bills of exchange. (June 17, 1930, c. 497, Title IV, §522, 46 Stat. 739.)"

Relevant Provisions Of Article 78 (L. 1937, Ch. 526) Of The New York Civil Practice Act

The relevant provisions of Sections 1283, 1284, 1285, 1286, 1288, 1289, 1293, 1295, 1300 and 1306 of Article 78 of (new) *Article 78,* (L. 1937, Ch. 526) of the New York Civil Practice Act, are as follows:

"§1283. *Classifications of certiorari to review, mandamus and prohibition abolished.* The classifications and writs and orders of certiorari to review, mandamus and prohibition are hereby abolished. The relief heretofore obtained by such writs or orders shall hereafter be obtained as provided in this article. Whenever in any statute reference is made to a writ or order of certiorari, mandamus or prohibition, such reference shall, so far as applicable, be deemed to refer to the proceeding authorized by this article. * * *"

"§1284. *Definitions.*

"1. The expression 'body or officer' includes every court, tribunal, board, corporation, officer, or other person, or aggregation of persons, whose action may be affected by the proceeding under this article."

"2. The expression 'to review a determination' refers to the relief heretofore available in a certiorari or a mandamus proceeding for the review of any act or refusal to act of a body or officer exercising judicial, quasi-judicial, administrative or corporate functions, which involves an exercise of judgment or discretion."

"3. The expression 'to compel performance of a duty specifically enjoined by law' refers to all other relief heretofore available in a mandamus proceeding."

"4. The expression 'to restrain a body or officer exercising judicial or quasi-judicial functions from proceeding without or in excess or jurisdiction' refers to the relief heretofore available in a prohibition proceeding."

"Nothing in this article shall be deemed to continue or establish distinct remedies."

"§1285. *When relief not available.* Except as otherwise expressly prescribed by statute, the procedure under this article shall not be available to review a determination in any of the following cases: * * *

"3. Where it does not finally determine the rights of the parties with respect to the matter to be reviewed.

"4. Where it can be adequately reviewed by an appeal to a court or to some other body or officer."

"§1286. *Limitations of time.* A proceeding under this article to review a determination or to compel performance of a duty specifically enjoined by law, must be instituted by service of the petition and accompanying papers, as prescribed in Section twelve hundred eighty-nine of this article, within four months after the determination to be reviewed becomes final and binding, upon the petitioner or the person whom he represents, either in law or in fact, or after the respondent's refusal, upon the demand of the petitioner or the person whom he represents, to perform his duty, as the case may be; * * *"

"§1288. *Application for relief by petition; contents.* The application for relief shall be founded upon a petition, verified as in an action, which shall contain a plain and concise statement of the material facts on which the petitioner relies, may be accompanied by affidavits and other written proof, and shall demand the relief to which the petitioner supposes himself entitled, in the alternative or otherwise."

"§1289. *Notice of application; service.* At least eight days' notice in writing of an application for relief under this article shall be served upon the respondent, unless a shorter time is prescribed by an order to show cause granted by the court to which application is made or a judge thereof. A copy of the petition and accompanying papers shall be served with the notice or order to show cause. Service shall be made in the manner provided for the personal service of a summons in an action, unless a different manner of service is provided by the order to show cause."

"§1293. *Objections in point of law.* The respondent may raise an objection in point of law warranting the dismissal of the petition, by setting the objection forth in his answer or by applying to the court on the return day for an order dismissing the petition as a matter of law. If the respondent intends to apply for such an order, he shall serve notice thereof upon the petitioner within the time allowed for answering. In the event of the denial of such application, the court may permit the respondent to answer, upon such terms as may be just. * * *"

"§1295. *Hearing upon the application.* Upon the return day of the application, if no triable issue of fact is duly raised by the pleadings and accompanying papers, the court shall forthwith render such final order as the case requires. * * *"

"§1300. *Final order.* The court shall render a final order granting the petitioner the relief to which it deems he is entitled, or dismissing the proceeding, either on the merits or with leave to renew. * * * The court may also award such restitution as may be just. In an appropriate case, the court may award the petitioner the damages which he has sustained."

"§1306. *Applicability of provisions governing actions.* Except as otherwise expressly or by plain implication prescribed by statute, the provisions of statute and rule applicable to practice or procedure in an action applied to the proceeding under this article so far as such provisions can be applied to its substance and subject matter without regard to its form."

Appendix.

Title 12, U. S. C., Section 341, provides as to the powers and duties of Federal Reserve Banks, the relevant provisions of which are as follows:

> "§341. *General enumeration of powers.* Upon the filing of the organization certificate with the Comptroller of the Currency, a Federal reserve bank shall become a body corporate, and as such, and in the name designated in such organization certificate, shall have power— * * * Fourth. To sue and be sued, complain and defend, in any court of law or equity."

The relevant provisions of Section 632, of Title 12, U. S. C. are as follows:

> "§632. * * *; Jurisdiction where Federal reserve bank a party. * * *
>
> "Notwithstanding any other provision of law, all suits of a civil nature at common law or in equity to which any Federal Reserve bank shall be a party shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of all such suits; and any Federal Reserve bank which is a defendant in any such suit may, at any time before the trial thereof, remove such suit from a State court into the district court of the United States for the proper district by following the procedure for the removal of causes otherwise provided by law. No attachment or execution shall be issued against any Federal Reserve bank or its property before final judgment in any suit, action, or proceeding in any State, county, municipal, or United States court. (Dec. 23, 1913, c. 6, §25 (b); June 16, 1933, c. 89, § 15, 48 Stat. 184.)"

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No.

ARMAND SCHMOLL, INC.,

Petitioner,

v.

THE FEDERAL RESERVE BANK OF NEW YORK.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK FOR NEW YORK COUNTY

BRIEF FOR PETITIONER

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of Counsel.

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IN THE MATTER

of

ARMAND SCHMOLL, INC.,
Petitioner and Appellant Below,

v.

THE FEDERAL RESERVE BANK OF
NEW YORK,
Respondent and Appellee Below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The official report of the opinions delivered in the Court of Appeals is contained in 286 N. Y. 503-525. A copy is printed at pages 34-52 of the Record. The opinion of Mr. Justice Rosenman at Special Term was not reported, but a copy appears at pages 28-29 of the Record.

The Statement of the grounds of this Court's "Jurisdiction to Review" the Summary Statement of the Matter Involved," the "Statement of Facts," the "Statutes Involved" and the "Questions Presented," contained in the annexed Petition, are hereby referred to and repeated with the same force as if herein set forth.

Questions Presented and Specification of Errors

The "Questions Presented" at pages 11, 12 and 13 of the annexed Petition for writ of certiorari are the Questions Presented and the assigned errors which Petitioner desires to urge.

Supplemental Statement

The facts in addition to those stated in the annexed Petition may in their essentials be put briefly as follows: By § 522(c), of the Tariff Act of 1930 (June 17, 1930, c. 497; IV, § 522(c) (46 Stat. 739); Title 31, U. S. C. § 372) it became the statutory ministerial duty of Respondent to certify daily to the Secretary of the Treasury the actual buying rates in the New York market for cable transfers payable in Brazilian milreis. The Petition shows that all the daily transactions were duly reported, as required, to the Respondent, and that the actual market rates, continuously prevailing throughout the three months covered by the Petition were in the official possession and knowledge of Respondent, and that it was an actual New York market and that such exchange could be had at firm rates constantly throughout this period (R. (fol. 8) 8-11, 16-19 (fol. 8)). It appears that notwithstanding Respondent's possession of its official evidence to the contrary (see annexed Petition for certiorari, pp. 4, 5), it certified daily a higher rate than the actual New York market rates, characterizing each rate it certified: "Nominal rate. Firm rate not available" (R. (fol. 8) 7-8, 9, 10). In substance the actual market rates did not exceed $0.585 per milreis in this period but the Respondent certified rates no lower than $0.08250 and as high as $0.084700 (R. 8, 9, 10, 14, 15, 16, 17, 18, 19).

Summary of Argument

(1) The Issues Really Involved.

(2) The Courts below erred in holding that the Supreme Court of New York was without jurisdiction to order respondent to comply with Section 522(c) of the Tariff Act of 1930, inasmuch as the Supreme Court, although a state court, can exercise its ordinary jurisdiction to compel respondent to comply with the federal law or to cease violation thereof, which, as the Supreme Law of the land, is also the law of the State of New York;

and this because its order directing respondent so to do would not in any way interfere with respondent's duty or destroy or impair its official ability to perform its mandatory statutory function, and so would not encroach in anywise upon the sovereignty of the federal government.

(A) Concurrent Jurisdiction of State Courts.

(B) The reporting of the market rates in compliance with the tariff act is not and should not be an exception to the rule of concurrent jurisdiction.

(C) The Congress has not granted exclusive jurisdiction over market rates to any federal authority.

(D) The local law, including substantive remedies, is made applicable by this Court.

(3) *McClung* v. *Silliman,* 6 Wheaton 598, relied upon by the Courts below, is not in point and, to the extent of any holding, is an affirmation by this Court of the jurisdiction of the state court in a proper case to issue mandamus running to a federal agent. As, on the stipulated facts of record in the case the act of May 10, 1800 (2 Stat. 73) was clearly not applicable to the lands in question and gave Silliman, as register, no authority over them and was not applied in this case, and as Silliman omitted to obtain a writ of error, this Court had no appellate jurisdiction under the 25th Section of the Judiciary Act to pass upon the question of the Register's immunity from the jurisdiction of the Ohio court. All statements in the opinion as to the immunity of a federal agent from the jurisdiction of a state court were, therefore, purely obiter.

So far as the plaintiff in error is concerned, he properly appealed from the judgment on the merits against him and the affirmance by this Court on the merits of the judgment of the Ohio State Court which had determined preliminarily it had jurisdiction to issue mandamus, necessarily affirmed that jurisdiction. The judgment and *holding* of the *McClung* case was proper and was necessarily and simply to the effect that no court, state or federal, has jurisdiction to compel a federal agent to exceed or disregard his plain, limited statutory authority.

(4) The order and judgment of the Supreme Court of the State of New York, as confirmed by the judgment of the Court of Appeals, denying Petitioner's application for lack of jurisdiction to issue an order in the nature of mandamus running to respondent, requiring compliance with Section 522(c) of the Tariff Act of 1930, should be reversed and the proceedings remanded to the Supreme Court of the State of New York with the direction to hear and decide the proceedings upon the merits.

ARGUMENT

POINT FIRST

The Issues Really Involved.

With the Respondent certifying rates on an average some 50% higher than the actual New York market rates prescribed, the issue in this case becomes and may be definitely stated:

It is whether the Supreme Court of New York, solely because it is a state court, is without jurisdiction to compel the Respondent, a resident corporation of New York, to perform the duties imposed upon it by a federal statute, § 522(c) of the Tariff Act of 1930, in the manner prescribed and directed by that Statute.

It appears from the Act and from the Petition that these duties were simply mandatory and ministerial. Respondent's only duty is to ascertain the buying rates in the New York market at noon on each day, a simple arithmetical calculation from market rates which at the time varied only a few hundredths of a cent every day and from day to day and report them to the Secretary of the Treasury. Respondent, by its motion to dismiss, admitted not only that the rates it certified were not the actual market rates and, accordingly, that it exceeded its powers under the statute, but that the actual New York market rates were as set forth in Schedule B of the Petition (R. 16 (fol. 23)).

Mandamus or its equivalent is the proper means to correct these abuses of statutory power and courts may direct compliance with a statutory mandate, even though their interpretation of the statute prescribing the agent's jurisdiction may have the effect of requiring the agent to act in a particular way. (*Baird* v. *Supervisors,* 138 N. Y. 95, 115, 116; *Matter of Lewis* v. *Carter, Individually and as the Board of Parole for State Prisons,* 220 N. Y. 8, 18; *People ex rel. Equitable Life Ass. Soc.* v. *Pierce,* 187 App. Div. 437, aff'd 229 N. Y. 514; *Matters of Potts* v. *Kaplan,* 264 N. Y. 111, 117-118; *Louisville Cement Co.* v. *I. C. C.,* 246 U. S. 638 642, 644; *Wilbur* v. *Krushnic,* 280 U. S. 306, 318; *Miguel* v. *McCarl,* 291 U. S. 442, 452, 456; *Payne* v. *Central Pacific Ry. Co.,* 255 U. S. 228, 238; *I. C. C.* v. *Northern Pacific Ry. Co.,* 216 U. S. 538, 544-5.) With a market for cable transfers actually continually existing in New York there is no discretion vested in Respondent by the Tariff Act. Respondent's duties prescribed by Section 522(c) are mandatory, and it is a jurisdictional limitation upon the Respondent's power that the rates it certifies must be the buying rates for cable transfers payable in the foreign currency in the New York market at noon on each day (*Waite* v. *Macy,* 246 U. S. 606, 608-10, aff'g *Macy* v. *Brown,* 225 Fed. 359, and cases there cited; *I. C. C.* v. *Northern Pacific Ry Co.,* 216 U. S. 538; *De Lima* v. *Bidwell,* 182 U. S. 1, 175-7). Thus the sole question is the validity of the Respondent's claim that, as a federal agent, he cannot be controlled by a state court. Under the federal Constitution, state courts have jurisdiction concurrently with the federal courts to protect and enforce rights created by federal statute. Congress may limit that concurrent jurisdiction by granting exclusive jurisdiction to the federal courts, but the question is always, "Has it done so?" The failure of the Congress to take that action as to the rights created by § 522(c) of the Tariff Act is a clear indication that its intention was not to limit the ordinary powers of the state courts to enforce those rights. That such was the

intention of the Congress is confirmed by the fact that, while it had withheld from the federal courts having personal jurisdiction over the Respondent the power to issue original writs of mandamus, it had already deprived the Respondent of its immunity from suit as a federal agent by specifically providing that a Federal Reserve Bank "shall have power * * * to sue and be sued, complain and defend in any court of law or equity" (12 U. S. C. § 341). Congress, by vesting Federal Reserve Banks with the power "to sue and be sued in any court of law or equity", expressly withdrew and intended to withdraw from Respondent any immunity from suit in the state courts and conferred upon persons so suing it the right to make use of any appropriate state civil remedy. This necessarily includes mandamus in the instant case. (*F. H. A.* v. *Burr,* 309 U. S. 242, 245, 249; *Keifer & Keifer* v. *R. F. C.,* 306 U. S. 281; *Northern Pacific Ry. Co.* v. *North Dakota,* 250 U. S. 135, 152; compare *Calf Leather Tanners' Ass'n* v. *Morgenthau,* 80 F. (2d) 536, cert. den. 297 U. S. 718.) Under the *expressio unius* rule, Congress, in Section 632 of Title 12, U. S. C. by specifically excepting Federal Reserve banks from attachment or execution before final judgment authorized all other state civil remedies to be applied against them. *F. H. A.* v. *Burr,* 309 U. S. 242.

The ordinary jurisdiction of the state courts is not to be defeated by implication (*Galveston, H. & S. A. Ry. Co.* v. *Wallace,* 223 U. S. 481-490; *People* v. *Welch,* 141 N. Y. 266, 272-3). The failure of Congress by the Tariff Act to vest power exclusively in federal courts is in effect an affirmation by Congress of the constitutional right of the state courts to use their ordinary powers and remedies to enforce those rights. This is confirmed by the fact that Congress had withheld from all federal courts having jurisdiction over Respondent the power to issue original writs of mandamus, but Congress had granted power for Respondent to sue and to be sued in state courts (Title 12, U. S. C. § 341). Of the federal district courts, only the Supreme Court of

the District of Columbia has original jurisdiction to issue mandamus (*Kendall* v. *United States,* 12 Pet. 524). Of course, the Customs Courts have no such power. This Court will be astute not to construe by implication the Act so as to preclude the ordinary jurisdiction of the state courts, especially when any such implication would leave the Petitioner without any remedy to enforce the rights created by the Congress, and would subject it and all other importers to the arbitrary whim of Respondent. (Dissent of Conway, J., 286 N. Y. at 523-525, R. 50, 51; *De Lima* v. *Bidwell,* 182 U. S. 1, 177; *Jones* v. *Securities Commission,* 298 U. S. 1, 23-24; *Garfield* v. *Goldsby,* 211 U. S. 249, 261-262; *First National Bank* v. *Missouri,* 263 U. S. 640, 659-60; *Blair* v. *United States,* 6 F. (2d) 484, 486; *People* v. *Welch,* 141 N. Y. 266, 272-3; *Dudley* v. *Mayhew,* 3 N. Y. 9, 15.)

POINT SECOND

The Courts below erred in holding that the Supreme Court of New York was without jurisdiction to order respondent to comply with Section 522(c) of the Tariff Act of 1930, inasmuch as the Supreme Court, although a state court, can exercise its ordinary jurisdiction to compel respondent to comply with the federal law or to cease violation thereof, which, as the Supreme Law of the land, is also the law of the State of New York; and this because its order directing respondent so to do would not in any way interfere with respondent's duty or destroy or impair its official ability to perform its mandatory statutory function, and so would not encroach in anywise upon the sovereignty of the federal government.

(A)

Concurrent Jurisdiction of State Courts.

The Supreme Court of New York has jurisdiction, concurrently with the federal courts, to enforce rights created by federal statutes, including Section 522(c) of the Tariff

Act of 1930, in the manner commanded by such statutes where, as here, Congress has not made the jurisdiction of the federal courts exclusive, and has in terms permitted the Respondent to be sued in the State Courts. In the exercise of that jurisdiction, the Supreme Court of New York may grant any appropriate relief afforded by the New York laws, including an order in the nature of mandamus. For over a century, in substantially every form of civil action, the courts of New York and of the other states have exercised personal control over federal statutory agents acting unlawfully under color of a federal statute or beyond the scope of their statutory authority.

A state court may exercise this concurrent jurisdiction to enforce the federal law, even as against a federal agent. For over one hundred years and in substantially every form of civil action, the courts of this and other states, with the continuous approval of this Court, have compelled federal agents, including collectors of customs, to respond in damages for their failure to comply with federal statutes prescribing ther duties. (*Bates* v. *Clark* (1877), 95 U. S. 204, 208, 209; *United States* v. *Lee* (1882, 106 U. S. 196, 219-20; *Teal* v. *Felton* (1848), 1 N. Y. 537, 545-9, aff'd in 12 How. 284, 291-2, (doctrine reaffirmed in *Claflin* v. *Hauseman* (1873), 93 U. S. 130, 142); *Gelston* v. *Hoyt* (1816), 3 Wheat. 246, 334, aff'g 13 Johns R. 141, 151 (trespass against collector of customs); *De Lima* v. *Bidwell* (1900), 182 U. S. 1, 175-177, 179 (assumpsit against collector of customs); *Schall* v. *Newton* (1927), 217 App. Div. 171, aff'd 245 N. Y. 576 (conversion against a collector of customs).)

State courts have been held by this Court to have jurisdiction by mandamus or injunction to require federal agents to keep within their federal statutory authority and jurisdiction. (*Northern Pac. Ry. Co. and Walker D. Hines, Director General of Railroads* v. *North Dakota* (1918), 250 U. S. 135, 152; *First Nat'l Bank* v. *Union Trust Co.* (1916), 244 U. S. 416.)

Thus it is clear that not only have state courts the jurisdiction to give judgments for damages against federal agents for violation of federal statutory duties and to require them to keep within the limitations of the authority and jurisdiction conferred upon them by the Congress, but also actually to order them to perform duties imposed by federal statute. (*Northern Pacific Ry. Co.* v. *North Dakota,* 250 U. S. 135, 152 (mandamus); *First National Bank* v. *Union Trust Co.,* 244 U. S. 416, (quo warranto); *Matter of Hurley* v. *Nat'l Bank of Middletown,* 252 App. Div. 272, 273 (mandamus); *Witnebel* v. *Loughman,* 2 Cir., 80 F. (2d) 222, 225, *cert. denied* 297 U. S. 716 (mandamus); *Murray* v. *Walker* (1913), 156 Ky. 536 (mandamus). Also see: *Guthrie* v. *Harkness,* 199 U. S. 148 (mandamus); *Matter of Tuttle* v. *Iron Nat'l Bank,* 170 N. Y. 9 (mandamus); *People ex rel. Lorge* v. *Consolidated Nat'l Bank,* 105 App. Div. 409 (mandamus).)

This doctrine of concurrent jurisdiction was completely adopted and fully expounded by this Court in *Claflin* v. *Hauseman,* 93 U. S. 130. In that case the objections urged by Respondent and the grounds given by the Courts below were urged with great precision by the late Judge William Henry Arnoux (93 U. S. at 132) and definitely rejected by this Court, relying upon *Houston* v. *Moore* (1820), 5 Wheat. 1, and applying the fundamental principles expressed in the eighty-second article of the Federalist. (93 U. S. at 141, 138 et seq.: The doctrine of the *Claflin* case was completely endorsed and restated in *Second Employers' Liability Cases* (1911), 223 U. S. 1, 55-59, and in *Minneapolis & St. Louis R. Co.* v. *Bombolis* (1915), 241 U. S. 211, 218, 221-2.) (See also *Hines* v. *Lowrey,* 305 U. S. 85, 91.)

This concurrent jurisdiction of state courts in respect of federal agents is completely confirmed by the Congressional grant of permission and power to sue Respondent (Title 12, U. S. C. § 341) with all that that implies (*F. H. A.* v. *Burr,* 309 U. S. 242, 245, 249), and by the tendency of Congress and recent decisions of this Court

sharply to minimize, if not wholly to abrogate, the immunity of federal agents acting under federal laws (*Keifer & Keifer* v. *R. F. C.,* 306 U. S. 38; *F. H. A.* v. *Burr,* 309 U. S. 242).

Until such time as the Congress acts to deprive state courts of their concurrent jurisdiction to enforce rights created by acts of the Congress, it is not only the right but the constitutional duty of the Supreme Court of New York to protect its citizens from the capricious and unlawful acts of federal agencies (*Claflin* v. *Houseman,* 93 U. S., 130, 133-143; *Second Employers Liability Cases,* 223 U. S., 1, 55-9; *Minn. & St. Louis RR. Co.* v. *Bombolis,* 241 U. S., 211, 218-221; *People* v. *Welch,* 141 N. Y. 266). Neither the Respondent nor the Government has been able to point to any provision of law either directly or impliedly depriving state courts of their ordinary concurrent jurisdiction to enforce rights created by § 522(c) of the Tariff Act of 1930. Furthermore, where, as with § 522(c), the federal statute fails to supply a remedy for its breach, the state court has power to grant such relief as its state laws may authorize in the manner and to the extent prescribed by its state laws even though a federal District Court might not have power to exercise a remedy open to the state court (*St. Louis B. & M. Ry.* v. *Taylor,* 266 U. S. 200, 207-8; *First National Bank* v. *Missouri,* 263 U. S. 640, 661; *Minn. & St. Louis RR. Co.* v. *Bombolis,* 241 U. S., 211, 218-221; *Dudley* v. *Mayhew,* 3 N. Y. 9, 15).

(B)

The reporting of the market rates in compliance with the tariff act is not and should not be an exception to the rule of concurrent jurisdiction.

There is no basis in law or reason for making this instance an exception to the general rule that, in the absence of Congressional restrictions, state courts have jurisdiction to enforce federal laws and protect rights arising under

them, in reason including the power to require federal agents to perform their statutory duties. This proceeding is against Respondent only individually to compel it to perform a personal statutory duty. An order directing it to comply or restraining it from violating that duty would not interfere with Respondent's official duties but would be in aid of the clear federal mandate. The description by the Courts below of the Respondent's incidental acts under §522(c) of the Tariff Act as "governmental functions" does not make them an exercise of the sovereign or political power of the federal government. Those prescribed duties are plainly mandatory and ministerial and their performance by federal agents should be ordered by state as well as Federal courts, which latter since Kendall v. *United States* (1838), 12 Pet. 524, *have exercised such jurisdiction for over one hundred years; for, otherwise and equally, federal courts would have no jurisdiction to require state agents to perform mandatory state so-called "governmental functions", which federal courts have compelled state agents to perform through the past seventy-five years.*

Mandamus or an order of that nature, like any other form of relief, is not directed to a statutory agent, such as the Respondent, in its "official," but in its "individual" capacity. It is the accepted remedy to compel a statutory agent to perform its statutory duties (*United States* v. *Boutwell,* 17 Wall. 604; *Warner Valley S. Co.* v. *Smith,* 165 U. S. 28, 32; *Pullman Co.* v. *Croom,* 231 U. S. 571, 575-6; *Marbury* v. *Madison,* 1 Cranch, 137, 166, 170; *Garfield* v. *Goldsby,* 211 U. S. 249, 261-2; *Wilbur* v. *Krushnic,* 280 U. S. 306, 318-9; *Matter of Lewis* v. *Carter,* 220 N. Y. 8, 18.

This Court, in *Northern Pac. Ry. Co. and Walker D. Hines, Director General of Railroads* v. *North Dakota,* 250 U. S. 135, 152, pointed out that such a suit is not against the United States when the federal agent is alleged to have exceeded his authority. The fact that the Respondent may be a "federal statutory agent," while acting within the scope of its statutory authority, is quite immaterial. When

acting outside the scope of his authority he is merely a trespasser or usurper (*Bates* v. *Clark,* 95 U. S. 204, 209; *United States* v. *Lee,* 106 U. S. 196, 219-20; *Western Union Tel. Co.* v. *Henderson,* 68 Fed. 588, 598).

When state court actions have been met with this objection, courts having generally disposed of the point upon finding that the state court's usual concurrent jurisdiction had not been taken away by Congress granting exclusive jurisdiction over the subject to the federal courts. (*Teal* v. *Felton,* 1 N. Y. 537, aff'd 12 How. 284, 392; *People* v. *Welch,* 141 N. Y. 266, 273, 275; *Claflin* v. *Houseman,* 93 U. S. 130—doctrine reaffirmed *Hines* v. *Lowrey,* 305 U. S. 85, 91; *First Nat'l Bank* v. *Missouri,* 263 U. S. 640, 656; *First Nat'l Bank* v. *Union Trust Co.,* 244 U. S. 416, 427-8.)

The order sought by Petitioner would not interfere with the performance of the federal agent's official duties and would not destroy or in any wise impair that agent's authority and efficiency. It would bring about performance of the non-discretionary statutory duties and thus vindicate the office and authority and secure efficiency. The Respondent seeks to apply to state courts alone a limitation which applies to all courts. No court, state or federal, has jurisdiction to "interfere" with the lawful performance by a federal agent of its federal statutory duties, "governmental" or otherwise. The test of whether an order directing a federal agent to perform its statutory duties "interferes" is whether the relief sought would seriously or gravely impair or destroy the efficiency of the federal agent to discharge the duties imposed upon it by the federal act or would encroach upon the sovereignty of the federal government. (*F. H. A.* v. *Burr,* 309 U. S. 242, 245. Compare: *National Bank* v. *Commonwealth,* 9 Wall. 353, 361-2 and *First National Bank* v. *Missouri,* applying the same rule to State legislation.) An order directing the Respondent merely to comply with the statute under which it is purporting to act, in this case Section 522(c), would not fall within this limitation. *Northern Pacific Ry. Co.* v. *North Dakota,* 250 U. S. 135, 152. Such an order would be in aid of, and not

an interference with, the Respondent's pre-existing personal statutory duty (Compare: *Penn Gas Co.* v. *Public Service Comm.*, 225 N. Y. 397, 406; *Western Union Tel. Co.* v. *Milling Co.*, 218 U. S. 406, 416-420; *Chicago, etc. Ry. Co.* v. *Solan*, 169 U. S. 133, 137-8; *Western Union Tel. Co.* v. *James*, 162 U. S. 650, 652). The only interference would be with Respondent's unlawful acts, which are not "official" and are nullities. (*Baird* v. *Supervisors*, 138 N. Y. 95, 115, 116; *Matter of Lewis* v. *Carter*, 220 N. Y. 8, 18). Since a federal court mandamus or injunction order, directing the Respondent to perform its mandatory ministerial, so-called "governmental" functions or duties, or restraining it from transgressing its authority and violating vested rights created by the act, would not be a prohibited "interference" (*Waite* v. *Macy*, 246 U. S. 606, 608-10; *Wilbur* v. *Krushnic*, 280 U. S. 306, 319), neither should a state court order in the same terms constitute such an "interference". In the words of Chief Justice Marshall in *Marbury* v. *Madison*, 1 Cranch. 137 at page 170:

> "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined."

The cases heretofore cited or to be cited against this position involve in each instance attempts to require the federal agent to do an act either beyond, or in violation of, his authority and so do not apply. (*McClung* v. *Silliman*, 6 Wheat. 598; *Ex parte Shockley*, 17 F. (2d) 133; *Ohio* v. *Thomas*, 173 U. S. 276).

If this relief were sought in a federal court having jurisdiction, the direction to the federal agent to perform its "governmental functions" would not be a prohibited "interference". By the same reasoning a state court judgment in the same terms would not be an interference. Respondent would be protected from any errors of the state court by its right to appeal to this Court, under Section 237 of the Judicial Code (28 U. S. C. A. 344, 861).

In reason it can make no difference whether the direction comes from a federal or a state court, as this Court has repeatedly declared that they are both courts of a common country and the laws of the state and the nation form one system of jurisprudence within the state (*Claflin* v. *Houseman,* 93 U. S. 130, 136-7; *Second Employees' Liability Cases,* 223 U. S. 1, 55-9; *Minneapolis & St. L. R. R.* v. *Bombolis,* 241 U. S. 211, 221-2; *Hines* v. *Lowrey,* 305 U. S. 85, 91). So long as the statutory duties are mandatory and ministerial and the statute prescribes even the terms of any discretion, these duties are enforcible. So long as the duty is mandatory and not discretionary it is immaterial that the duties sought to be enforced are so-called "governmental functions" and the courts have power to determine the correct construction of the statute and to compel the Respondent to proceed accordingly (*Kendall* v. *United States,* 12 Pet. 524; *Waite* v. *Macy,* 246 U. S. 606, affirming *Macy* v. *Browne,* 224 Fed. 359; *Merritt* v. *Welsh,* 104 U. S. 694; *Garfield* v. *Goldsby,* 211 U. S. 249, 261-2; *People ex rel. Hilliker* v. *Pierce,* 64 Misc. 627; *Lane* v. *Hoglund,* 244 U. S. 174, 37 S. Ct. 558, 61 L. Ed. 1066; *Louisville Cement Co.* v. *I. C. C. Commission,* 246 U. S. 638, 38 S. Ct. 408, 62 L. Ed. 914).

As is pointed out in the Petition for Certiorari (*supra,* pp. 14, 15), the Respondent's duty in reporting the rates actually registered by the New York market itself does not involve a "government function" in the sense of an act of the sovereign or an exercise of discretion or of political power.

Again, as pointed out in that Petition (*supra,* p. 18), the theory of exclusive governmental functions, if it really existed, would be mutual but this Court has negated that theory by holding that federal courts have jurisdiction to require state officers to perform governmental duties imposed upon them by state laws (*Riggs* v. *Johnson County,* 6 Wall. 166, 188 (73 U. S.); *Supervisors* v. *United States,* 4 Wall. 535; *Von Hoffman* v. *City of Quincy,* 4 Wall. 535; *U. S. ex rel. Ranger* v. *New Orleans,* 98 U. S. 381; *Mobile*

v. *Watson,* 116 U. S. 289; *Marion County Court* v. *Huidekoper,* 134 U. S. 332; *Arkansas* v. *St. Louis-S. F. Ry. Co.,* 269 U. S. 172). So, also, it is the established law that the courts of the United States have power to enjoin state officers from exceeding their statutory authority (*Board of Liquidation* v. *McComb,* 92 U. S. 531, 541; *Allen* v. *Balto. & O. R. R. Co.,* 114 U. S. 164; *Pennoyer* v. *McConnaughy,* 140 U. S. 1, 10, 13; *In re Tyler,* 149 U. S. 164; *Scott* v. *Donald,* 165 U. S. 107; *Reagan* v. *Farmers L. & T. Co.,* 154 U. S. 362; *Smythe* v. *Ames,* 169 U. S. 466; *ex parte Young,* 209 U. S. 123, 155, 158-9).

Surely, if the federal courts have jurisdiction to compel state agents to comply with the state law and would not "interfere" with state agents by commanding their performance, it must also be true that state courts have like jurisdiction over federal agents as to execution of federal statutes.

(C)

The Congress has not granted exclusive jurisdiction over market rates to any federal authority.

The Congress has not expressly vested exclusive jurisdiction over matters arising under Section 522(c) of the Tariff Act in the Collectors of Customs, in the Customs Courts having power to review their decisions or in any other federal court or authority. It cannot in reason be deemed that the Congress has established such exclusive jurisdiction by implication, inasmuch as neither the Collectors nor the Customs Courts, nor any other federal court having jurisdiction over Respondent has jurisdiction to bring it in as a party to the proceedings, or to compel it by any order or judgment, much less mandamus, to comply with § 522(c).

The Government has conceded in its briefs below that there is no direct language in the Tariff Act giving the federal customs authorities exclusive jurisdiction (At-

tached Petition, *supra* 22, 23). The claim is that this authority may be inferred from Sections 514 and 515 of the Tariff Act of 1930. These sections merely provide that all decisions of the Collectors, including the legality of all orders and findings entering into the same as to the rate and amount of duty chargeable, shall be final and conclusive upon all persons within sixty days thereafter, unless the importer shall file a protest in writing with the Collector; that, upon the filing of such protest, the Collector shall review his decision within ninety days; that, if he shall affirm the same, he shall forthwith transmit the matter to the Customs Court for determination as provided by law; and that the decisions of the Customs Court are reviewable by appeal to the Court of Customs and Patent Appeals.

Any inference from these provisions of exclusive jurisdiction is wholly unwarranted. No remedy is provided in terms by the Tariff Act for any failure on the part of the Respondent correctly to certify to the Secretary of the Treasury, or of the Customs authorities independently to apply, the actual buying rate. That rate is actually determined daily by the market and not by the customs authorities. These rates automatically registered in the New York market and directed to be certified daily by the Respondent, while they are a condition precedent to any use of them by the Collector in liquidating duties, are not any part of the ordinary customs process regulated by Section 514 (§ 1514, 31 U. S. C). Section 522(c) was a new section, creating new rights and, by implication, remedies, in addition to the older Section 514. This legislation, in the absence of specific exclusion, does not deprive the state courts of jurisdiction unless the remedy provided is adequate. *Waite* v. *Macy,* 246 U. S. 606; *Calf Leather Tanners Ass'n.* v. *Morgenthau,* 80 Fed. (2nd) 536, 542, *cert. den.* 297 U. S. 718; *Blair* v. *United States,* 6 F. (2d) 484, 486; *In re Fassett,* 142 U. S. 479, 487; *DeLima* v. *Bidwell,* 182 U. S. 1, 175-7; *Dudley* v. *Mayhew,* 3 N. Y. 9, 15; *Oneida Com. Ltd.* v. *Oneida Game Trap Co.,* 168 App. Div. 769, 771, 774-8. Certainly these bodies are not

vested with any general judicial powers and Respondent could neither be brought in as a party to their proceedings nor could such authorities enforce any adequate remedy such as mandamus.

It is clear that Collectors of Customs and federal courts having power to review their decisions do not have exclusive jurisdiction over issues arising under the Tariff Act where they have no power to give adequate relief (*Blair* v. *U. S.*, 6 Fed. (2nd) 484, 486). The mere fact that the Collector might hold that Respondent had not complied with the law, is not enough, for then the duties would not be liquidated and Petitioner's deposits at unlawful rates would be unrecoverable. There still would be no way to compel Respondent to comply with Section 522(c) by certifying the actual market rate, unless the courts below have jurisdiction to command Respondent, and the customs authorities and courts have no such power. Any remedy, other than mandamus, is inadequate and no bar to the relief sought by Petitioner. (*Kendall* v. *U. S.*, 12 Pet. 524; *Fremont* v. *Crippen,* 10 Cal. 211; *American Ry. Frog Co.* v. *Haven,* 101 Mass. 398; *Eureka Pipe Line Co.* v. *Riggs,* 75 W. Va. 353, 83 S. E. 1020, 93 A. L. R. 590-591, anno.) Judge Conway definitely stated it as follows (286 N. Y. at 524, 525, R. 51): "There is no other adequate remedy than mandamus. Recoverable damages are inadequate (*Kendall* v. *United States,* 12 Pet. at pp. 614, 615). There is no jurisdiction in the customs authorities or courts to consider the question and, if there were, the power could not be effectively or adequately exercised by customs authorities or courts, for respondent would not or could not be a proper party to those proceedings and, if it were, there exists no power in those customs authorities or courts to command compliance by respondent with the Tariff Act by certifying the actual market rates."

(D)

The local law, including substantive remedies, is made applicable by this Court.

Undoubtedly the right to mandamus is a substantive right, and the law of New York in its statutes and decisions giving mandamus or an order of its nature to prevent departures from mandatory statutory duties by governmental agents or officials is now plainly the local law to be applied in keeping with this Court's ruling in Erie R. R. Co. v. *Tompkins,* 304 U. S. 64.

It is sufficient under this subdivision to call this Court's attention to the fact that by its recent ruling in the *Erie R. R.* v. *Tompkins* case it has fully recognized the primacy of the local or state law, whether expressed in statutes or decisions of the highest state courts. Within this rule the right to mandamus, the only remedy which can possibly furnish petitioner with adequate relief, is a substantive and substantial right. The power to furnish an appropriate remedy is a state's right. The State of New York, however, by the Court of Appeals saying it was bound by the *McClung* case, disregarding the *Claflin* case and, not appreciating the *Tompkins* case, did not declare this right for itself, and so withheld mandamus. But this Court has very recently said: "This Court will review or independently determine all questions on which a federal right is necessarily dependent. *United States* v. *Ansonia Brass & Copper Co.,* 218 U. S. 452, 462-463, 471; *Ancient Egyptian Order* v. *Michaux,* 279 U. S. 737, 744-745; *Broad River Power Co.* v. *South Carolina,* 281 U. S. 537, 540; *Pierre* v. *Louisiana,* 306 U. S. 354, 358." (*United States, Petitioner* v. *Pink* (February 2, 1942), United States Law Week (Vol. 10, Sec. 4), p. 4173.) Now, in keeping with this Court's recently declared rule, this Court should say to the New York Supreme Court that it *must* determine and apply its own remedies and may do so in this case by an order in the nature of mandamus, if upon a hearing the facts and merits are found to warrant it.

POINT THIRD

McClung v. _Silliman,_ 6 Wheaton 598, relied upon by the Courts below, is not in point and, to the extent of any holding, is an affirmation by this Court of the jurisdiction of the state court in a proper case to issue mandamus running to a federal agent. As, on the stipulated facts of record in the case, the act of May 10, 1800 (2 Stat. 73) was clearly not applicable to the lands in question and gave Silliman, as register, no authority over them and was not applied in this case, and as Silliman omitted to obtain a writ of error, this Court had no appellate jurisdiction under the 25th Section of the Judiciary Act to pass upon the question of the Register's immunity from the jurisdiction of the Ohio court. All statements in the opinion as to the immunity of a federal agent from the jurisdiction of a state court were, therefore, purely _obiter_.

So far as the plaintiff in error is concerned, he properly appealed from the judgment on the merits against him and the affirmance by this Court on the merits of the judgment of the Ohio State Court, which had determined preliminarily it had jurisdiction to issue mandamus, necessarily affirmed that jurisdiction. The judgment and holding of the _McClung_ case was proper and was necessarily and simply to the effect that no court, state or federal, has jurisdiction to compel a federal agent to exceed or disregard his plain, limited statutory authority.

The Courts below have mistakenly relied upon the *McClung case* as controlling and conclusive authority on the unsound theory that this Court had there held that the federal and state governments were mutually exclusive jurisdictions and that the state court had no power to command or enforce performance by a federal agent of federal mandatory statutory duties, inasmuch as only the creator (the fed-

eral government) could control the acts of the created (the federal agent). This mistake is obvious, for any and all opinions there expressed by Judge Johnson as to the immunity of the federal agent from the order or direction of the state court of Ohio are purely *obiter,* for the Government and the federal agent had not appealed from the Ohio court judgment which also was in their favor and so this Court under the Judiciary Act was without any power to review and decide that question of federal immunity. That there was no intention to so decide that question appears from the fact that one year prior to the McClung case this Court, in *Houston* v. *Moore,* 5 Wheaton 1, 24 *et seq.* (with Judges Johnson and Story dissenting), had squarely decided that a state court had concurrent jurisdiction to execute and enforce the military law of the United States and to punish a violation of it. This jurisdiction of state courts was reaffirmed and reapplied by this Court in *Claflin* v. *Houseman,* 93 U. S. 130, 141-2, over the objection of counsel that the state court was without power even to "aid in enforcing" the federal law (See 93 U. S. at 132). This is made clear by Conway, J. (286 N. Y. at 517-522, R. 45-49).

On the part of *McClung,* the Petitioner for the writ, this Court had appellate jurisdiction under the Judiciary Act. Accordingly, that case is then definitely authority for the rule that the state court had jurisdiction in a proper case to issue mandamus, inasmuch as, instead of directing the Ohio state court to dismiss for lack of jurisdiction to issue a writ to a federal agent, this Court affirmed the judgment dismissing after trial and on the merits the application for mandamus. Clearly the further opinion of this Court "that the said supreme court of the State of Ohio had no authority to issue a *mandamus* in this case", refers simply to the lack of merits "in this case" and not to the inaccurate opinion expressed by the headnote that: "A state court cannot issue a mandamus to an officer of the United States." All this is again made clear by Conway, J. (286 N. Y. at 514 *et seq.,* R. 42).

The *McClung* Stipulation of Facts was made by stipulation in the Ohio Court, which is on file with, and made a part of the records of this Court (286 N. Y. at 515, R. 43), and is printed as an Appendix to this brief (pp. 57-60, *infra*).

The pertinent facts contained in the Stipulation of Facts and some of the Conclusions of law necessarily resulting therefrom are set out in the dissenting opinion of Conway, J., in the New York Court of Appeals (286 N. Y. at 516, 517, R. 44, 45) as follows:

> "* * * As appears from the stipulation of facts, prior to McClung's attempt to have the Register enter his application, a part of the land in question had been duly sold by a former Register of an earlier land office in another district and a United States patent had been issued; another part had also been sold by the same Register and the purchaser had made full payment although he had not received his patent; and the remainder of the land had been sold at private sale in accordance with the law. Accordingly, no part of the land McClung was seeking to preempt was a part of the public domain at the time he made his application. It had ceased to be within the jurisdiction of the land office and was no longer subject to entry or to disposition by the land officers. The Register had no power or duty to do the act which McClung sought to force him to perform. (*Simmons* v. *Wagner*, 101 U. S. 260, 261, 262; *Borax Consolidated, Ltd.* v. *Los Angeles*, 296 U. S. 10, 17, 18.) For that reason no court, State or federal, *had power* to grant the relief sought in the *McClung* case. * * *"

In addition, McClung's application, as appears by the record in this Court, was made under the Act of Congress of May 10, 1800 (2 Stat. 73) governing the sale of Public Lands in the Northwest Territory prior to the organization in 1804 of the Zanesville Land Office. The sales of the different parcels of land had been made either prior to or in 1803, and a United States Patent had been issued in 1803 to the purchasers of a large part of the lands. McClung's application to the Register Silliman to make his "entry" was made in 1810.

In addition to the foregoing, the following conclusions from the stipulated facts are briefly stated, as completely adequate to overcome and distinguish the *McClung* case as authority for the Courts below and for Respondent, and to confirm its holding as sufficient authority for Petitioner:

(1) That the Act of May 10, 1800 (2 Stat. 73), under which McClung sought his mandamus, was not applicable to the question of the Register's immunity as a federal officer, since the lands in question had been removed from the jurisdiction of the land office and of the Register by prior auction sales under the Act and issuance of a patent or a final certificate of purchase to the several purchasers, who thus obtained complete legal title which could not be attacked in an action at law.

(2) McClung, under the Act, had no "right of entry" to these sold lands.

(3) The Register Silliman had no statutory right or power to act and had refused to act for lack of such power, and therefore could not claim that he had exercised any "authority" under, or derived any immunity from an applicable statute.

(4) As the act was not applicable and was not applied, no federal question of the Register's immunity thereunder from the jurisdiction of the Ohio court was properly before this Court which, under the 25th Section of the Judiciary Act of 1789, had no appellate jurisdiction to pass upon the immunity of the defendant, as a federal officer, from the jurisdiction of the Ohio court (see cases on page 19 of Petition for certiorari).

(5) As the defendant Silliman failed to take out a writ of error, he could not raise before this Court the question of his immunity from the jurisdiction of the Ohio court.

(6) McClung's writ of error, on the other hand, raised only the question of the validity of the prior sales under

the act and of the existence or non-existence of a right of entry on his part, and this Court had appellate jurisdiction under his writ only to pass on those questions.

(7) The prior paid-up purchasers of the lands in question were the real parties in interest, and McClung's mandamus proceeding was fatally defective because of his failure to include these purchasers, who were the legal owners of the titles, as parties defendant (*Brady* v. *Work,* 263 U. S. 435; *New Mexico* v. *Lane,* 234 U. S. 58; *Lichfield* v. *Register and Receiver,* 9 Wall. 575, 577-8; *Garfield* v. *Goldsby,* 211 U. S. 249, 261, 262).

Further, as indicated by Mr. Justice Johnson (6 Wheat. 605), McClung had an adequate and immediate remedy against the patentees for the portion of the lands west of the Muskingum by action at law in ejectment or for damages, and after the issuance of a patent, by a bill in equity against the patentees for the land east of the Muskingum. *Marquez* v. *Frisbie,* 101 U. S. 473, 474-6.

(See also pages 5-7 and 16-19 of annexed Petition for Certiorari; also dissenting opinion of Conway, J., 286 N. Y. at pages 514-522.)

In Conclusion

The foregoing brief adequately supports the Petition for Certiorari in respect of the controlling or exclusive ground given by the Courts below for the dismissal of the Petition, that is: the lack of jurisdiction in the Supreme Court of New York to issue an order in the nature of mandamus against Respondent, The Federal Reserve Bank of New York; and this brief also shows that there is no power in the customs authorities and Courts or any other Court having jurisdiction over the Respondent to grant petitioner the needed relief and to make Respondent a party to its proceedings, or to render against it any enforceable judgment (286 N. Y. at 524, 525; R. 50, 51 (fol. 53)). Inasmuch as the Supreme Court of the District of Columbia, while not having jurisdic-

tion over the Respondent, has been held to have jurisdiction to mandamus the Secretary of the Treasury, or a Tariff Commission, to comply with a mandatory ministerial provision of a Tariff Act (*Calf Leather Tanners' Ass'n* v. *Morgenthau,* 80 Fed. (2d) 536, *cert. den.* 297 U. S. 718; *United States* v. *U. S. Tariff Commission,* 6 F. (2d) 491, rev'd in 274 U. S. 106, on ground that case had become moot), there is no good reason why the New York Supreme Court, under its concurrent jurisdiction, should not have the same power to mandamus the Respondent.

The other grounds presented by Respondent's objections in point of law (R. 20 (fol. 28)), call for no consideration by this Court, as they will be properly disposed of by the Court of original jurisdiction on any trial, if this Court reverse and remand.

POINT FOUR

The order and judgment of the Supreme Court of the State of New York, as confirmed by the judgment of the Court of Appeals, denying petitioner's application for lack of jurisdiction to issue an order in the nature of mandamus running to respondent, requiring compliance with Section 522(c) of the Tariff Act of 1930, should be reversed and the proceedings remanded to the Supreme Court of the State of New York with the direction to hear and decide the proceedings upon the merits.

Respectfully submitted,

LARKIN, RATHBONE & PERRY,
Attorneys for Petitioner-Appellant.

HERSEY EGGINTON,
GEORGE D. MUMFORD,
of Counsel.

Appendix

Stipulation of Facts from the Record in the Supreme Court of the United States in McClung v. Silliman, 6 Wheaton 598

(State of Ohio, Muskingum County)

Supreme Court October Term 1815

Monday 16th inst.

William McClung

vs.

Wyllis Silliman
Register of land office

Upon a rule to show cause why a mandamus should not be issued. By consent of the parties this rule is enlarged till tomorrow morning.—Supreme court October term 1815. Nineteenth Ins.

On motion for a rule to show cause why a mandamus should not issue against him to compel him to admit the entries of the application in the order of the last term made in this cause. It is agreed between the parties that on the second of August one thousand and eight hundred and ten the applicant regularly applied to the defendant to make entry of his application for entire section number Six Township twelve, Range thirteen, with the fraction number five same Township and range lying north of said section, also for entire section number twelve with the fraction number one north thereof in the township numbered sixteen Range fourteen, and produced the receivers receipts for the 1/20 part of the purchase money of each. That the defendant refuses to enter the said application,—first, because the said lands had been before sold at Marietta except that part of section number six lying east of the river, prior to

the time of the establishment of the land office of Zanesville and prior to the erection of the Zanesville district—second, because if not sold the said tracts had never been offered at Publick sale in the Zanesville district—third, because the part of number six lying east of the River had before the time of the plaintiffs application been offered for sale at Publick auction at Zanesville and afterwards and before such application had been sold at private sale according to law and was sold singly as fraction, and was one of the sales of fractions made according to the secretary's order, pursuant to the act of eighteen hundred and four. The parties agree as part of this case the Platt hereto annexed with all the notes, letters and figures thereon. They further agree that section twelve and the part of section six lying west of the river Muskingum, also the part of fraction number five lying west of the said river and the fraction number one, all appearing on the said Platt were sold together to Increase Mathews and Levi Whipple at the Publick sales at Marietta in the year eighteen hundred and one, for which a patent issued to Increase Mathews Levi Whipple & Rufus Putnam, dated the twenty first day of February one thousand eight hundred and three which Patent hereto annexed is agreed as part of this case.—They further agree that the fraction number five appearing on the said Platt was sold as a fraction united with another tract lying due east of it, and contained by the lines of the South Military boundary lines the north of said fraction, each produced east three hundred and four Poles and a line from these points parallel with the eastern Boundary of the said fraction number five was sold at Marietta to John McIntire together with that part or fraction number one which lies east of the Muskingum river by the description of east fraction number one, who has made full payment therefor but has not received his patent—the last purchase above mentioned was made in January one thousand eight hundred and three.—

The Parties further agree, the colours on said Platt to be true representations of the river Muskingum Licking and Zanes' Grant which was made in May one thousand seven hundred and ninety six by a law of that date. The parties agree that the river aforesaid is a navigable stream. The sales above stated to have been made at Marietta were returned by the surveyor General to the Zanesville office in one thousand eight hundred and four, before they proceeded to do business as having been sold at Marietta and therefore were never offered at Publick sale in the Zanesville District—they further agree that the surveyor General in executing the surveys of the publick lands Northwest of the river Ohio and above the mouth of the Kentucky river, returned the same from the south boundary of the Military lands appearing on the said Platts down to the Ohio company's purchase on the official platts all along the river in the manner appearing on the platts annexed in the entire townships numbered as such intersected by the river and has divided the townships intersected into entire sections, crossing the river, shewing the distance of each from its east and from its west boundary to the river, and distance, across the river and in the return of the quantity of each section intersected deducting the area of the river bed and describing the quantity of each tract on the different sides of the river in the manner appearing on the said Platt annexed which so far as the same goes is a true copy from the surveyor Generals record. The parties further agree that the sale of the property contained in the said patent made part of this case was made in Marietta in one entire Sale under the direction of the Surveyor General and the Governor of the Territory—they further agree that the section four being the tract before described lying east of the said fraction number five lies on the North side of the Township containing it, and is bounded on the north by the south bounds of the United States Military tract. They

agree that this agreed case shall not be considered on the defendants part as a waiver of the question of Jurisdiction, and that the case be now considered as on a motion for a preemptory Mandamus waiving preliminary proceedings. The parties further agree, that altho the law establishing the Zanesville district passed in March one thousand eight hundred and three, an office was not opened there until the twenty first day of May one thousand eight hundred and four.—And they lastly agree that all the official Platts and notes thereon or accompanying the platts now filed in the office of the treasury Department of the seventh Ranges and of the lands northwest of the river Ohio and above the mouth of Kentucky river be considered as parts of this case and to be referred to, by either party, in the Supreme court of the United States if this case shall be taken to that court without being copied into the record of this court.

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