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UNITED STATES REPORTS

VOLUME 312

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1940

FROM JANUARY 7, 1941, TO AND INCLUDING (IN PART) MARCH 31, 1941

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ERRATA.

311 U. S. 361, footnote 39: "Op. A. G. 498" should be "29 Op. A. G. 498".

311 U. S. 654, No. 357: The name of *James P. O'Brien* should have appeared among those of counsel for petitioner.

295 U. S. 753, No. 865: Citation below should be 74 F. 2d 1015.

295 U. S. 770, No. 635: Delete citations following 73 F. 2d 272.

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JUSTICES
OF THE
SUPREME COURT

DURING THE TIME OF THESE REPORTS

CHARLES EVANS HUGHES, Chief Justice.
JAMES CLARK McREYNOLDS, Associate Justice.[1]
HARLAN FISKE STONE, Associate Justice.
OWEN J. ROBERTS, Associate Justice.
HUGO L. BLACK, Associate Justice.
STANLEY REED, Associate Justice.
FELIX FRANKFURTER, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
FRANK MURPHY, Associate Justice.

RETIRED

WILLIS VAN DEVANTER, Associate Justice.[2]
JAMES CLARK McREYNOLDS, Associate Justice.[1]
LOUIS D. BRANDEIS, Associate Justice.
GEORGE SUTHERLAND, Associate Justice.

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

---

[1] Mr. Justice McReynolds retired from active service on February 1, 1941, as authorized by Act of March 1, 1937, c. 21, 50 Stat. 24. See *post*, p. v.

[2] Mr. Justice Van Devanter, who retired from active service on June 2, 1937 (302 U. S. III), died in Washington, D. C., on February 8, 1941, and was buried in Rock Creek Cemetery, in that city, on February 11, 1941. See *post*, p. vi.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the Circuits, agreeably to the Acts of Congress in such case made and provided, and that such allotment be entered of record, viz:

For the First Circuit, FELIX FRANKFURTER, Associate Justice.

For the Second Circuit, HARLAN F. STONE, Associate Justice.

For the Third Circuit, OWEN J. ROBERTS, Associate Justice.

For the Fourth Circuit, CHARLES EVANS HUGHES, Chief Justice.

For the Fifth Circuit, HUGO L. BLACK, Associate Justice.

For the Sixth Circuit, JAMES C. MCREYNOLDS, Associate Justice.

For the Seventh Circuit, FRANK MURPHY, Associate Justice.

For the Eighth Circuit, STANLEY REED, Associate Justice.

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

For the Tenth Circuit, STANLEY REED, Associate Justice.

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

February 12, 1940.

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

2 675°

RETIREMENT OF MR. JUSTICE McREYNOLDS.

SUPREME COURT OF THE UNITED STATES.

MONDAY, FEBRUARY 3, 1941.

Present: The CHIEF JUSTICE, MR. JUSTICE STONE, MR. JUSTICE ROBERTS, MR. JUSTICE BLACK, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, MR. JUSTICE DOUGLAS, and MR. JUSTICE MURPHY.

The CHIEF JUSTICE said:

"On February 1, 1941, Mr. Justice James Clark McReynolds retired from active service as Associate Justice of this Court. Forthright, independent, maintaining with strength and tenacity of conviction, his conceptions of constitutional right, he has served with distinction upon this bench for upwards of twenty-six years and has left a deep impress upon the jurisprudence of the Court. It is hoped that, relieved of the burden of active service, he will long enjoy his accustomed vigor of body and mind."

MR. JUSTICE VAN DEVANTER.

SUPREME COURT OF THE UNITED STATES.

MONDAY, FEBRUARY 10, 1941

Present: The CHIEF JUSTICE, MR. JUSTICE STONE, MR. JUSTICE ROBERTS, MR. JUSTICE BLACK, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, MR. JUSTICE DOUGLAS, and MR. JUSTICE MURPHY.

The CHIEF JUSTICE said:

"It is with deep grief that I announce the passing on Saturday last of our brother, Mr. Justice Willis Van Devanter, who was in active service as an Associate Justice of this Court for upwards of 26 years. Learned in the law, he brought to this bench the special qualifications of a wide judicial experience and his service here was of exceptional distinction. He was a man of sterling character and of rare sagacity, a wise counselor and a faithful friend.

"The funeral services will be held tomorrow (Tuesday) at 2:30 o'clock in the afternoon at the Church of the Epiphany. The members of the Court will be in attendance.

"At the conclusion of the arguments in the case now being heard and in a companion case, in which counsel have come from a distance, the Court will rise and in tribute to the memory of our late brother will stand adjourned until Wednesday noon."

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1940

SIBBACH *v.* WILSON & CO., INC.

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

No. 28. Argued December 17, 1940.—Decided January 13, 1941.

1. Congress has power to regulate the practice and procedure of federal courts, and may exercise it by delegating to the Supreme or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States. P. 9.
2. The Act of June 19, 1934, empowering the Supreme Court to prescribe rules for the District Courts of the United States in civil actions, was restricted in its operation to matters of pleading, practice and procedure. P. 10.
3. In so far as they are within the authority granted by Congress, the Rules of Civil Procedure prescribed by the Supreme Court under authority of the Act of June 19, 1934 repeal the Conformity Act. P. 10.
4. Rule 35 of the Rules of Civil Procedure for the District Courts of the United States, which provides that, in a suit in which the physical or mental condition of a party is in controversy, the court may order the party to submit to a physical or mental examination by a physician, *held* within the authority granted by Congress in the Act of June 19, 1934, and consistent with the limitation of that Act that the rules prescribed shall not abridge, enlarge or modify the "substantive rights" of any litigant. P. 14.
5. *Union Pacific Ry. Co.* v. *Botsford,* 141 U. S. 250, and *Camden & Suburban Ry. v. Stetson,* 177 U. S. 172, explained. P. 11.
6. Rules 35 and 37 of the Rules of Civil Procedure are rules of procedure, and their prescription did not exceed the authority granted by the Act of June 19, 1934 merely because they involve "important" or "substantial" rights. P. 13.

301335°—41——1

7. That Congress reserved the power to examine, before they should become effective, rules proposed pursuant to the Act, and took no adverse action in respect of Rule 35, indicates that no transgression of legislative policy was found. P. 15.
8. Refusal to obey an order under Rule 35 requiring a party to submit to a physical or mental examination is exempted by Rule 37 (b) (2) (iv) from punishment as for a contempt. The remedies for such refusal are those enumerated in Rule 37 (b) (2) (i), (ii), and (iii). P. 16.
9. The action of the District Court in this case, punishing as for contempt a refusal to obey an order under Rule 35 requiring a plaintiff to submit to a physical examination, was such plain error as this Court may notice, although not assigned or specified either in the Circuit Court of Appeals or here. P. 16.

108 F. 2d 415, reversed.

CERTIORARI, 309 U. S. 650, to review the affirmance of an order committing for contempt.

Mr. James A. Velde, with whom *Messrs. Royal W. Irwin* and *Lambert Kaspers* were on the brief, for petitioner.

It may be that an order compelling the plaintiff to submit to a physical examination does not determine the right which the plaintiff seeks to have adjudicated in the litigation, and in that aspect involves "procedure" and not "substantive law." Nevertheless, the order invades "substantive rights."

Does the field of "rights" excluded from the rule-making power include only the rights that determine the outcome of litigation, the ultimate rights sought to be adjudicated by the litigants? Clearly, Congress may not delegate to the courts the power to declare by rule what rights of this character exist.

Procedural devices may invade human rights that the common law has long sought to protect. The doctrine of the separation of powers alone, apart from other constitutional limitations, forbids Congress to delegate rule-making power as to a procedural device of this character.

The question is whether the particular matter is "exclusively legislative" or "judicial."

If the matter involves a general principle or a question of public policy that the legislature is able to pass upon, it should not be dealt with by a rule of court, but by a legislative enactment.

Obvious examples of procedural devices that affect important rights, and so involve broad questions of policy, are those that violate constitutional limitations, such as the due process clause. See *Kring* v. *Missouri,* 107 U. S. 221.

Common law privileges and inhibitions against testifying—such as the disability of a party to testify or of one spouse to testify for or against the other—are a part of the law of evidence and so within the field of "procedure." Yet, whether or not they should have a place in our legal system is of great public interest,—an important question of public policy. May Congress delegate to the courts the power to determine such questions by court rule?

Apparently Congress believed, since procedure may extend to the line where "substantive law" begins, it was desirable not to delegate to the Court the power to make rules that abridge, enlarge, or modify some important rights involved in procedure. It is significant that the Act uses the words "substantive rights" rather than "substantive law."

If rules of "procedure" could not be construed to involve "substantive rights," the second sentence in the Act would be surplusage.

Decisions of this Court indicate that an order for a physical examination modifies substantive rights. *Union Pacific Ry. Co.* v. *Botsford,* 141 U. S. 250; *Camden & Suburban Ry. Co.* v. *Stetson,* 177 U. S. 172.

Rule 35 is grouped with others under the heading "Depositions and Discovery." While it may seem to

involve merely a question of discovery, in fact it differs markedly from the other rules, which merely permit a litigant to obtain before trial the discovery of matters that have always been provable at the trial by testimony obtainable by a *subpoena ad testificandum* or a *subpoena duces tecum.* This shift does not involve a change in substantive rights. Also, litigants have been able to obtain in equity some of the same remedies that are provided by Rules 26, 33, and 34, which thus do not effect a change in rights. Rule 35, in providing a method of physical examination before trial, would permit what has not been heretofore permitted at the trial or at any other stage of the proceeding. Also, as pointed out in the *Stack* case, 177 Mass. 155, an order for a physical examination was not procurable in equity. These considerations show why Rule 35 abridges substantive rights while Rules 26, 33, and 34 do not.

As a discovery device Rule 35 is of little value, at least in a court sitting in Illinois, where communications between patient and physician are not privileged. By taking the deposition of the plaintiff and the plaintiff's physician, the defendant is able to discover all that the plaintiff knows about the plaintiff's own case.

The law of Indiana is inapplicable. An order for a physical examination is governed by the law of the forum.

Mr. J. F. Dammann, with whom *Mr. K. F. Montgomery* was on the brief, for respondent.

Under the law of Indiana, where this cause of action arose, the courts have the power to enter an order directing a physical examination. *City of South Bend* v. *Turner,* 156 Ind. 418; *Aspy* v. *Botkins,* 160 Ind. 170; *Kokomo M. & W. Co.* v. *Walsh,* 58 Ind. App. 182; *Lake Erie & W. R. Co.* v. *Griswold,* 72 Ind. App. 265; *City of Valparaiso* v. *Kinney,* 75 Ind. App. 660. That matters of substantive law are controlled by the law of the State

where the cause of action arose was settled by this Court in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64.

If the matter involved in the order is one of procedure, then it is controlled by the Rules of Civil Procedure.

Congress has the power and duty to prescribe the procedure in the federal courts, and that power can be validly delegated to the courts. *Wayman* v. *Southard,* 10 Wheat. 1; *Beers* v. *Haughton,* 9 Pet. 328; *Bank of U. S.* v. *Halstead,* 10 Wheat. 22, 27.

The Act authorizes rules covering the entire field of practice and procedure.

Rule 35 does not involve substantive law, nor abridge or modify a substantive right established by substantive law. The substantive rights in this case are those out of which the right of action arose. The rule affects merely the procedure whereby that right of action is sought to be determined; it is a part of the means whereby the court determines the facts upon which the right of action is based.

The facts and opinion in *Union Pacific Ry. Co.* v. *Botsford,* 141 U. S. 250, demonstrate that the matter is procedural.

Camden & Suburban Ry. Co. v. *Stetson,* 177 U. S. 172, does not hold that the matter is one of substantive law. There was no question before the Court requiring any distinction between substantive and procedural law.

The contention that the term "substantive rights" means rights that are important or of substance is untenable. No litigant has a substantive right in any kind of procedure. *Luria* v. *United States,* 231 U. S. 9; *Ochoa* v. *Hernandez,* 230 U. S. 139; *Bronson* v. *Kinzie,* 1 How. 311; *McCracken* v. *Hayward,* 2 How. 608; *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398.

The court is asked to adopt an entirely new theory and to place the dividing line with reference to the rule-making power, not between substantive law and procedural

law but between two classes of procedural law. One of these would include ordinary matters and be within the rule-making power. The other would include substantial and important matters and not be within the rule-making power. Such a theory would make the practice and procedure of the federal courts far more confusing than it was before the rules were promulgated.

Moreover, any such theory would nullify many of the rules. A casual review of merely the headings will show that many deal with "substantial" and "important" matters.

Rule 35 does not discriminate against plaintiffs.

Mr. William D. Mitchell filed a brief, as *amicus curiae*, urging that Rules 35 and 37 do not authorize arrest or imprisonment for refusal to obey an order for physical examination; and, so construed, are valid.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This case calls for decision as to the validity of Rules 35 and 37 of the Rules of Civil Procedure for District Courts of the United States.[1]

In an action brought by the petitioner in the District Court for Northern Illinois to recover damages for bodily injuries, inflicted in Indiana, respondent answered denying the allegations of the complaint, and moved for an order requiring the petitioner to submit to a physical examination by one or more physicians appointed by the court to determine the nature and extent of her injuries. The court ordered that the petitioner submit to such an examination by a physician so appointed.

Compliance having been refused, the respondent obtained an order to show cause why the petitioner should

[1] 28 U. S. C., following § 723c.

not be punished for contempt. In response the petitioner challenged the authority of the court to order her to submit to the examination, asserting that the order was void. It appeared that the courts of Indiana, the state where the cause of action arose, hold such an order proper,[2] whereas the courts of Illinois, the state in which the trial court sat, hold that such an order cannot be made.[3] Neither state has any statute governing the matter.

The court adjudged the petitioner guilty of contempt, and directed that she be committed until she should obey the order for examination or otherwise should be legally discharged from custody. The petitioner appealed.

The Circuit Court of Appeals decided that Rule 35, which authorizes an order for a physical examination in such a case, is valid, and affirmed the judgment.[4] The writ of certiorari was granted because of the importance of the question involved.

The Rules of Civil Procedure were promulgated under the authority of the Act of June 19, 1934,[5] which is:

"Be it enacted . . . That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive

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[2] *South Bend* v. *Turner,* 156 Ind. 418; 60 N. E. 271; *Aspy* v. *Botkins,* 160 Ind. 170; 66 N. E. 462; *Lake Erie & W. R. Co.* v. *Griswold,* 72 Ind. App. 265; 125 N. E. 783; *Valparaiso* v. *Kinney,* 75 Ind. App. 660; 131 N. E. 237.

[3] *Chicago* v. *McNally,* 227 Ill. 14; 81 N. E. 23; *Mattice* v. *Klawans,* 312 Ill. 299; 143 N. E. 866; *Illinois* v. *Scott,* 326 Ill. 327; 157 N. E. 247.

[4] 108 F. 2d 415.

[5] c. 651, 48 Stat. 1064; 28 U. S. C. § 723 b, c.

rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.

"Sec. 2. The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: *Provided, however,* That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session."

The text of the relevant portions of Rules 35 and 37 is:

"Rule 35. Physical and Mental Examination of Persons.

"(a) Order for Examination. In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made."

"Rule 37. Refusal to Make Discovery: Consequences.

"(a) Refusal to Answer. . . .

"(b) Failure to Comply With Order.

(1) *Contempt.* If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in the district in which the deposition is being taken, the refusal may be considered a contempt of that court.

(2) *Other Consequences.* If any party . . . refuses to obey . . . an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that . . . the physical or mental condition of the party, . . . shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order . . . prohibiting [the disobedient party] from introducing . . . evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination."

The contention of the petitioner, in final analysis, is that Rules 35 and 37 are not within the mandate of Congress to this court. This is the limit of permissible debate, since argument touching the broader questions of Congressional power and of the obligation of federal courts to apply the substantive law of a state is foreclosed.

Congress has undoubted power to regulate the practice and procedure of federal courts,[6] and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes

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[6] *Wayman* v. *Southard,* 10 Wheat. 1, 21; *Bank of the United States* v. *Halstead,* 10 Wheat. 51, 53; *Beers* v. *Haughton,* 9 Pet. 329, 359, 361.

or constitution of the United States; [7] but it has never essayed to declare the substantive state law, or to abolish or nullify a right recognized by the substantive law of the state where the cause of action arose, save where a right or duty is imposed in a field committed to Congress by the Constitution. On the contrary it has enacted that the state law shall be the rule of decision in the federal courts.[8]

Hence we conclude that the Act of June 19, 1934, was purposely restricted in its operation to matters of pleading and court practice and procedure. Its two provisos or caveats emphasize this restriction. The first is that the court shall not "abridge, enlarge, nor modify substantive rights," in the guise of regulating procedure. The second is that if the rules are to prescribe a single form of action for cases at law and suits in equity, the constitutional right to jury trial inherent in the former must be preserved. There are other limitations upon the authority to prescribe rules which might have been, but were not mentioned in the Act; for instance, the inability of a court, by rule, to extend or restrict the jurisdiction conferred by a statute.[9]

Whatever may be said as to the effect of the Conformity Act [10] while it remained in force, the rules, if they are within the authority granted by Congress, repeal that statute, and the District Court was not bound to follow the Illinois practice respecting an order for physical examination. On the other hand if the right to be exempt from such an order is one of substantive law, the Rules

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[7] *Wayman* v. *Southard, supra,* 42; *Bank of the United States* v. *Halstead, supra,* 61; *Beers* v. *Haughton, supra,* 359.

[8] R. S. 721, 28 U. S. C. § 725.

[9] *Hudson* v. *Parker,* 156 U. S. 277, 284; *Venner* v. *Great Northern Ry. Co.,* 209 U. S. 24, 35; *Davidson Marble Co.* v. *Gibson,* 213 U. S. 10, 18; *Meek* v. *Centre County Banking Co.,* 268 U. S. 426, 434.

[10] R. S. 914; 28 U. S. C. § 724.

of Decision Act [11] required the District Court, though sitting in Illinois, to apply the law of Indiana, the state where the cause of action arose, and to order the examination. To avoid this dilemma the petitioner admits, and, we think, correctly, that Rules 35 and 37 are rules of procedure. She insists, nevertheless, that by the prohibition against abridging substantive rights, Congress has banned the rules here challenged. In order to reach this result she translates "substantive" into "important" or "substantial" rights. And she urges that if a rule affects such a right, albeit the rule is one of procedure merely, its prescription is not within the statutory grant of power embodied in the Act of June 19, 1934. She contends that our decisions and recognized principles require us so to hold.

The petitioner relies upon *Union Pacific Ry. Co.* v. *Botsford,* 141 U. S. 250, and *Camden & Suburban Ry. Co.* v. *Stetson,* 177 U. S. 172. But these cases in reality sustain the validity of the rules. In the *Botsford* case an action to recover for a personal injury suffered in the territory of Utah [12] was instituted in the United States Circuit Court for Indiana, which refused to order a physical examination. This court affirmed, on the ground that no authority for such an order was shown. There was no suggestion that the question was one of substantive law. The court first examines the practice at common law and finds that it never recognized such an order. Then, acknowledging that a statute of the United States authorizing an order of the sort would be valid, the opinion finds there is none. Thus the matter is treated as one of procedure, for Congress has not, if it could, declared by statute the substantive law of a state. After

[11] *Supra,* note 8.

[12] The opinion does not so state, but the record filed in this court so shows.

stating that the decision law of Indiana on the subject appeared not to be settled, and that a cited statute of that State was not in point, the court added that the question was not one of the law of Indiana but of the law of the United States and that the federal statutes by their provisions as to proof in actions at law precluded the application of the Conformity Act. Again, therefore, the opinion recognized that the matter is one of procedure, for both the cited federal statutes, concerning the mode of proof in federal courts, and the Conformity Act, deal solely with procedure.

In fine, the decision was only that the making of such an order is regulable by statute, that the federal statutes forbade it, and hence the Conformity Act could not be thought to authorize the practice by reference to and incorporation of state law.

In the *Stetson* case the action was brought in the District Court for New Jersey by a citizen of Pennsylvania, who, while a citizen of New Jersey, had been injured in the latter state. A statute of New Jersey authorized the state courts to order a physical examination of a plaintiff in an action for damages pending therein. The District Court refused to order such an examination on the ground that it lacked power so to do. After a verdict and judgment for plaintiff the defendant appealed to the Circuit Court of Appeals, assigning the refusal as error. That court certified the question, and this court answered that the District Court had power to order the examination.

The court stated that in the *Botsford* case there was no statute authorizing such an order, but said that here there was a state statute which by the Rules of Decision Act was made a law of the United States and must be given effect in a trial in a federal court. While it is true the court referred to the Rules of Decision Act (R. S. 721) and not to the Conformity Act (R. S. 914) the

entire discussion goes upon the assumption that the matter is procedural. In any event, the distinction between substantive and procedural law was immaterial, for the cause of action arose and the trial was had in New Jersey.[13]

In the instant case we have a rule which, if within the power delegated to this court, has the force of a federal statute, and neither the *Botsford* nor the *Stetson* case is authority for ignoring it.

The remaining case on which petitioner leans is *Stack* v. *New York, N. H. & H. R. Co.*, 177 Mass. 155; 58 N. E. 686, where the court agreed with the view expressed in the *Botsford* case that common-law practice did not warrant the entry of such an order and said it was for the legislature rather than the courts to alter the practice. But if Rule 35 is within the authority granted, the federal legislature sanctioned it as controlling all district courts.

We are thrown back, then, to the arguments drawn from the language of the Act of June 19, 1934. Is the phrase "substantive rights" confined to rights conferred by law to be protected and enforced in accordance with the adjective law of judicial procedure? It certainly embraces such rights. One of them is the right not to be injured in one's person by another's negligence, to redress infraction of which the present action was brought. The petitioner says the phrase connotes more; that by its use Congress intended that in regulating procedure this court should not deal with important and substantial rights theretofore recognized. Recognized where and by whom? The state courts are divided as to the power in the absence of statute to order a physical examination.[14] In a number such an order is author-

[13] As above pointed out, if the matter is one of substantive law, R. S. 721 requires the application of the law of Indiana, which authorizes an order for examination.

[14] See Wigmore on Evidence (3d Ed.) § 2220, note 13.

ized by statute or rule.[15] The rules in question accord with the procedure now in force in Canada and England.[16]

The asserted right, moreover, is no more important than many others enjoyed by litigants in District Courts sitting in the several states, before the Federal Rules of Civil Procedure altered and abolished old rights or privileges and created new ones in connection with the conduct of litigation. The suggestion that the rule offends the important right to freedom from invasion of the person ignores the fact that, as we hold, no invasion of freedom from personal restraint attaches to refusal so to comply with its provisions. If we were to adopt the suggested criterion of the importance of the alleged right we should invite endless litigation and confusion worse confounded. The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them. That the rules in question are such is admitted.

Finally, it is urged that Rules 35 and 37 work a major change of policy and that this was not intended by Congress. Apart from the fact already stated, that the policy of the states in this respect has not been uniform, it is to be noted that the authorization of a comprehensive system of court rules was a departure in policy, and that the new policy envisaged in the enabling act of 1934 was that the whole field of court procedure be regulated in the interest of speedy, fair and exact determination of the truth. The challenged rules comport with this policy. Moreover, in accordance with the Act, the rules were sub-

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[15] See Notes to the Rules of Civil Procedure, printed by the Advisory Committee March 1938, p. 32.

[16] Wigmore on Evidence (3d Ed.) § 2220, note 13; 31 & 32 Vict. c. 119, § 26.

mitted to the Congress so that that body might examine them and veto their going into effect if contrary to the policy of the legislature.

The value of the reservation of the power to examine proposed rules, laws and regulations before they become effective is well understood by Congress. It is frequently, as here, employed to make sure that the action under the delegation squares with the Congressional purpose.[17] Evidently the Congress felt the rule was within the ambit of the statute as no effort was made to eliminate it from the proposed body of rules, although this specific rule was attacked and defended before the committees of the two Houses.[18] The Preliminary Draft of the rules called attention to the contrary practice indicated by the *Botsford* case, as did the Report of the Advisory Committee and the Notes prepared by the Com-

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[17] An analogy is found in the organic acts applicable to some of the territories, before their admission to statehood, which provided that laws passed by the territorial legislature should be valid unless Congress disapproved. § 5 of the Ordinance of 1787; see *Pease* v. *Peck*, 18 How. 595. Territory of Florida, § 5 of the Act of March 30, 1822 (3 Stat. 655); territory of Louisiana, § 4 of the Act of March 26, 1804 (2 Stat. 284), and § 3 of the Act of March 3, 1805 (2 Stat. 331); territory of Minnesota, § 6 of the Act of March 3, 1849 (9 Stat. 405); territory of New Mexico, § 7 of the Act of September 9, 1850 (9 Stat. 449); territory of Oregon, § 6 of the Act of August 14, 1848 (9 Stat. 326); territory of Utah, § 6 of the Act of September 9, 1850 (9 Stat. 455); territory of Washington, § 6 of the Act of March 2, 1853 (10 Stat. 175); territory of Wisconsin, § 6 of the Act of April 20, 1836 (5 Stat. 13). Similar provisions are now applicable to Alaska, Puerto Rico, the Virgin Islands and the Philippines. 48 U. S. C. §§ 90, 826, 1405(o), 1054.

Cf. the provisions for lying over before Congress in § 407 of the Act of March 3, 1933 (47 Stat. 1519), and § 5 of the Reorganization Act of 1939 (53 Stat. 562).

[18] Hearings before the Committee on the Judiciary, House of Representatives, 75th Cong., 3rd Sess., pp. 117, 141; Hearings before a Subcommittee of the Committee on the Judiciary, U. S. Senate, 75th Cong., 3rd Sess., pp. 36–37, 39, 51.

mittee to accompany the final version of the rules.[19] That no adverse action was taken by Congress indicates, at least, that no transgression of legislative policy was found. We conclude that the rules under attack are within the authority granted.

The District Court treated the refusal to comply with its order as a contempt and committed the petitioner therefor. Neither in the Circuit Court of Appeals nor here was this action assigned as error. We think, however, that in the light of the provisions of Rule 37 it was plain error of such a fundamental nature that we should notice it.[20] Section (b) (2) (iv) of Rule 37 exempts from punishment as for contempt the refusal to obey an order that a party submit to a physical or mental examination. The District Court was in error in going counter to this express exemption. The remedies available under the rule in such a case are those enumerated in § (b) (2) (i) (ii) and (iii). For this error we reverse the judgment and remand the cause to the District Court for further proceedings in conformity to this opinion.

Reversed.

MR. JUSTICE FRANKFURTER, dissenting:

Union Pacific Ry. Co. v. *Botsford,* 141 U. S. 250, denied the power of the federal courts in a civil action to compel a plaintiff suing for injury to the person to submit to a physical examination. Nine years later, in *Camden & Suburban Ry. Co.* v. *Stetson,* 177 U. S. 172,

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[19] Preliminary Draft (May, 1936) of Rules of Civil Procedure for the District Courts of the United States and the Supreme Court of the District of Columbia, Advisory Committee on Rules for Civil Procedure, p. 71; Notes to the Rules of Civil Procedure for the District Courts of the United States (March, 1938), p. 32.

[20] Supreme Court Rule 27, par. 6; *Mahler* v. *Eby,* 264 U. S. 32, 45; *Kessler* v. *Strecker,* 307 U. S. 22, 34.

the *Botsford* decision was treated as settled doctrine. The present issue is whether the authority which Congress gave to this Court to formulate rules of civil procedure for the district courts allows displacement of the law of the *Botsford* case. Stated more particularly, is Rule 35, authorizing such physical examination, valid under the Rules Enabling Act of June 19, 1934; 48 Stat. 1064; 28 U. S. C. § 723b-c. It is urged that since this Rule pertains to procedure, it is valid because outside the limitations of that Act, whereby "said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."

Speaking with diffidence in support of a view which has not commended itself to the Court, it does not seem to me that the answer to our question is to be found by an analytic determination whether the power of examination here claimed is a matter of procedure or a matter of substance, even assuming that the two are mutually exclusive categories with easily ascertainable contents. The problem seems to me to be controlled by the policy underlying the *Botsford* decision. Its doctrine was not a survival of an outworn technicality. It rested on considerations akin to what is familiarly known in the English law as the liberties of the subject. To be sure, the immunity that was recognized in the *Botsford* case has no constitutional sanction. It is amenable to statutory change. But the "inviolability of a person" was deemed to have such historic roots in Anglo-American law that it was not to be curtailed "unless by clear and unquestionable authority of law." In this connection it is significant that a judge as responsive to procedural needs as was Mr. Justice Holmes, should, on behalf of the Supreme Judicial Court of Massachusetts, have supported the *Botsford* doctrine on the ground that "the common law was very slow to sanction any viola-

tion of or interference with the person of a free citizen." *Stack* v. *New York, N. H. & H. R. Co.,* 177 Mass. 155, 157; 58 N. E. 686.

So far as national law is concerned, a drastic change in public policy in a matter deeply touching the sensibilities of people or even their prejudices as to privacy, ought not to be inferred from a general authorization to formulate rules for the more uniform and effective dispatch of business on the civil side of the federal courts. I deem a requirement as to the invasion of the person to stand on a very different footing from questions pertaining to the discovery of documents, pre-trial procedure and other devices for the expeditious, economic and fair conduct of litigation. That disobedience of an order under Rule 35 cannot be visited with punishment as for contempt does not mitigate its intrusion into an historic immunity of the privacy of the person. Of course the Rule is compulsive in that the doors of the federal courts otherwise open may be shut to litigants who do not submit to such a physical examination.

In this view little significance attaches to the fact that the Rules, in accordance with the statute, remained on the table of two Houses of Congress without evoking any objection to Rule 35 and thereby automatically came into force. Plainly the Rules are not acts of Congress and can not be treated as such. Having due regard to the mechanics of legislation and the practical conditions surrounding the business of Congress when the Rules were submitted, to draw any inference of tacit approval from non-action by Congress is to appeal to unreality. And so I conclude that to make the drastic change that Rule 35 sought to introduce would require explicit legislation.

Ordinarily, disagreement with the majority on so-called procedural matters is best held in silence. Even in the present situation I should be loath to register dissent did

the issue pertain merely to diversity litigation. But Rule 35 applies to all civil litigation in the federal courts, and thus concerns the enforcement of federal rights and not merely of state law in the federal courts.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY agree with these views.

GORIN *v.* UNITED STATES.*

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

No. 87. Argued December 19, 1940.—Decided January 13, 1941.

1. In order to constitute the crimes denounced by §§ 1 (b) and 2 of the Espionage Act—the obtaining of documents connected with or relating to the national defense and their delivery to an agent of a foreign country with an intent, or reason to believe, in each case, that they are to be used to the injury of the United States or to the advantage of a foreign nation—it is not necessary that the documents contain information concerning the places or things (such as vessels, aircraft, forts, signal stations, codes or signal books) which are specifically mentioned in § 1 (a) of the Act. P. 25.
2. "National defense" as used in §§ 1 (b) and 2 of the Espionage Act refers to the military or naval establishments and to related activities of national preparedness for war. P. 28.
3. With this meaning of "national defense" and with the elements of *scienter* and bad faith which must be present, the sections are sufficiently definite to apprise the public of the activities they prohibit; and they accord with due process. P. 27.
4. Information taken from reports in the files of the Naval Intelligence, giving a detailed picture of counter-espionage work, *held* capable of use to the injury of the United States or to the advantage of a foreign nation, within the meaning of §§ 1 and 2 of the Espionage Act. P. 29.

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*Together with No. 88, *Salich* v. *United States*, also on certiorari, 310 U. S. 622, to the Circuit Court of Appeals for the Ninth Circuit.

5. In establishing violations of §§ 1 (b) and 2 of the Espionage Act, where it was proved that the forbidden information was to be used to the advantage of a foreign nation, it was not necessary to prove also that it was to be used to the injury of the United States. P. 29.
6. In a prosecution under §§ 1 (b) and 2 of the Espionage Act the jury determines whether the acts of the defendants were connected with or related to the national defense, under proper tests laid down by the instructions. P. 30.

The function of the court is to instruct as to the kind of information which is violative of the statute, and that of the jury to decide whether the information secured is of the defined kind. It is not the function of the court, where reasonable men may differ, to determine whether the acts do or do not come within the ambit of the statute. The question of the connection of the information with national defense is a question of fact to be determined by the jury as negligence upon undisputed facts is determined.

111 F. 2d 712, affirmed.

CERTIORARI, 310 U. S. 622, to review the affirmance of sentences for violations of the Espionage Act of June 15, 1917.

Mr. Donald R. Richberg, with whom *Messrs. Seth W. Richardson, Isaac Pacht, Clore Warne,* and *Harry Graham Balter* were on the brief, for petitioners.

Mr. Warner W. Gardner, with whom *Solicitor General Biddle, Assistant Attorney General Rogge,* and *Mr. Louis B. Schwartz* were on the brief, for the United States.

MR. JUSTICE REED delivered the opinion of the Court.

This certiorari brings here a judgment of the Circuit Court of Appeals affirming the sentences of the two petitioners who were convicted of violation of the Espionage Act of June 15, 1917. 111 F. 2d 712. As the affirmance turned upon a determination of the scope of the Act and its constitutionality as construed, the petition

was allowed because of the questions, important in enforcing this criminal statute.

The joint indictment in three counts charged in the first count violation of § 1 (b) by allegations in the words of the statute of obtaining documents "connected with the national defense"; in the second count violation of § 2 (a) in delivering and inducing the delivery of these documents to the petitioner, Gorin, the agent of a foreign nation; and in the third count of § 4 by conspiracy to deliver them to a foreign government and its agent, just named. The pertinent statutory provisions appear below.[1] A third party, the wife of Gorin, was joined in

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[1] Espionage Act of June 15, 1917, c. 30, 40 Stat. 217:

"Title I. Espionage. Section 1. That (a) whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning any vessel, aircraft, work of defense, navy yard, naval station, submarine base, coaling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, or other place connected with the national defense, . . . or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war are being made, prepared, repaired, or stored, . . .; or (b) whoever for the purpose aforesaid, and with like intent or reason to believe, copies, takes, makes, or obtains, or attempts, or induces or aids another to copy, take, make, or obtain, any sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense; . . . shall be punished by a fine of not more than $10,000, or by imprisonment for not more than two years, or both.

"Sec. 2. (a) Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to, or aids or induces another to, communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecog-

and acquitted on all three counts. The petitioners were found guilty on each count and sentenced to various terms of imprisonment to run concurrently and fines of $10,000 each. The longest term of Gorin is six years and of Salich four years.

The proof indicated that Gorin, a citizen of the Union of Soviet Socialist Republics, acted as its agent in gathering information. He sought and obtained from Salich for substantial pay the contents of over fifty reports relating chiefly to Japanese activities in the United States. These reports were in the files of the Naval Intelligence branch office at San Pedro, California. Salich,

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nized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by imprisonment for not more than twenty years: *Provided*, That whoever shall violate the provisions of subsection (a) of this section in time of war shall be punished by death or by imprisonment for not more than thirty years; and (b) whoever, in time of war, with intent that the same shall be communicated to the enemy, shall collect, record, publish, or communicate, or attempt to elicit any information with respect to the movement, numbers, description, condition, or disposition of any of the armed forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct, or supposed plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense, which might be useful to the enemy, shall be punished by death or by imprisonment for not more than thirty years.

. . . . . .

"Sec. 4. If two or more persons conspire to violate the provisions of sections two or three of this title, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in the case of the doing of the act the accomplishment of which is the object of such conspiracy. . . ."

a naturalized, Russian-born citizen, had free access to the records as he was a civilian investigator for that office. Speaking broadly the reports detailed the coming and going on the west coast of Japanese military and civil officials as well as private citizens whose actions were deemed of possible interest to the Intelligence Office. Some statements appear as to the movements of fishing boats, suspected of espionage and as to the taking of photographs of American war vessels.

Petitioners object to the convictions principally on the grounds (1) that the prohibitions of the act are limited to obtaining and delivering information concerning the specifically described places and things set out in the act, such as a vessel, aircraft, fort, signal station, code or signal book; and (2) that an interpretation which put within the statute the furnishing of any other information connected with or relating to the national defense than that concerning these specifically described places and things would make the act unconstitutional as violative of due process because of indefiniteness.

The philosophy behind the insistence that the prohibitions of §§ 1 (b) and 2 (a), upon which the indictment is based, are limited to the places and things which are specifically set out in § 1 (a) relies upon the traditional freedom of discussion of matters connected with national defense which is permitted in this country. It would require, urge petitioners, the clearest sort of declaration by the Congress to bring under the statute the obtaining and delivering to a foreign government for its advantage of reports generally published and available which deal with food production, the advances of civil aeronautics, reserves of raw materials or other similar matters not directly connected with and yet of the greatest importance to national defense. The possibility of such an interpretation of the terms "connected with" or "relating to" national defense is to be avoided by construing

the act so as "to make it a crime only to obtain information as to places and things specifically listed in section 1 as connected with or related to the national defense." Petitioners argue that the statute should not be construed so as to leave to a jury to determine whether an innocuous report on a crop yield is "connected" with the national defense.

Petitioners rely upon the legislative history to support this position.[2] The passage of the Espionage Act[3] during the World War year of 1917 attracted the close scrutiny of Congress and resulted in different bills in the two Houses which were reconciled only after a second conference report. Nothing more definite appears in this history as to the Congressional intention in regard to limiting the act's prohibitions upon which this indictment depends to the places and things in § 1 (a), than that a House definition of "national defense" which gave it a broad meaning was stricken out[4] and the conference report stated as to the final form of the present act: "Section 1 sets out the places connected with the national defense to which the prohibitions of the section apply." Neither change seems significant on this inquiry. The House bill had not specified the places under surveillance. The Conference change made them definite. The fact that the clause "or other place connected with the national defense" is also included in § 1 (a) is

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[2] H. R. 291, 65th Cong., 1st Sess.; Conference Report No. 69, 55 Cong. Rec. 3301.

[3] Other titles such as neutrality, foreign commerce and at one time censorship, 55 Cong. Rec. 2097, 2102; 2109–2111; 2262; 2265; 3145; 3259; 3266, added to the difficulties.

[4] That definition read: "Section 1202. The term 'national defense' as used herein shall include any person, place, or thing in anywise having to do with the preparation for or the consideration or execution of any military or naval plans, expeditions, orders, supplies, or warfare for the advantage, defense, or security of the United States of America."

not an unusual manner of protecting enactments against inadvertent omissions. With this specific designation of prohibited places, the broad definition of § 1202 of the House was stricken as no longer apt and, as stated in Conference Report No. 69, § 6 of the act was therefore adopted. Obviously the purpose was to give flexibility to the designated places.[5] We see nothing in this legislative history to affect our conclusion which is drawn from the meaning of the entire act.[6]

An examination of the words of the statute satisfies us that the meaning of national defense in §§ 1 (b) and 2 (a) cannot be limited to the places and things specified in § 1 (a). Certainly there is no such express limitation in the later sections. Section 1 (a) lays down the test of purpose and intent and then defines the crime as going upon or otherwise obtaining information as to named things and places connected with the national defense. Section 1 (b) adopts the same purpose and intent of 1 (a) and then defines the crime as copying, taking or picturing certain articles such as models, appliances, documents, and so forth of anything connected with the national defense. None of the articles specified in 1 (b) are the same as the things specified in 1 (a). Apparently the draftsmen of the act first set out the places to be protected, and included in that connotation ships and planes, and then in 1 (b) covered much of the contents of such places in the nature of plans and documents. Section 2 (a), it will be observed, covers in much the same way the delivery of these movable articles or information to a foreign nation or its agent. If a govern-

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[5] 55 Cong. Rec. 3306. Subsequent legislation relating to the protection of national defense information is not important. The act of January 12, 1938, 52 Stat. 3, is to protect against innocent disclosures. S. Rep. 108, 75th Cong., 2nd Sess.

Public No. 443, 76th Cong., 3d Sess., is merely an increase of penalties.

[6] Cf. *United States* v. *American Trucking Ass'ns,* 310 U. S. 534, 543.

ment model of a new weapon were obtained or delivered there seems to be little logic in making its transfer a crime only when it is connected in some undefined way with the places catalogued under 1 (a). It is our view that it is a crime to obtain or deliver, in violation of the intent and purposes specified, the things described in §§ 1 (b) and 2 (a) without regard to their connection with the places and things of 1 (a).

In each of these sections the document or other thing protected is required also to be "connected with" or "relating to" the national defense. The sections are not simple prohibitions against obtaining or delivering to foreign powers information which a jury may consider relating to national defense. If this were the language, it would need to be tested by the inquiry as to whether it had double meaning [7] or forced anyone, at his peril, to speculate as to whether certain actions violated the statute.[8] This Court has frequently held criminal laws deemed to violate these tests invalid. *United States* v. *Cohen Grocery Co.*,[9] urged as a precedent by petitioners, points out that the statute there under consideration forbade no specific act,[10] that it really punished acts "detrimental to the public interest when unjust and unreasonable" in a jury's view. In *Lanzetta* v. *New Jersey* [11] the statute was equally vague. "Any person not engaged in any lawful occupation, known to be a member of any gang . . . , who has been convicted at least three times of being a disorderly person, or who has been convicted

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[7] *United States* v. *Reese*, 92 U. S. 214.

[8] *Lanzetta* v. *New Jersey*, 306 U. S. 451.

[9] 255 U. S. 81, 89.

[10] "That it is hereby made unlawful for any person willfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries." Act of October 22, 1919, c. 80, § 2, 41 Stat. 297.

[11] 306 U. S. 451.

of any crime in this or any other State, is declared to be a gangster . . ." We there said that the statute "condemns no act or omission"; that the vagueness is such as to violate due process.[12]

But we find no uncertainty in this statute which deprives a person of the ability to predetermine whether a contemplated action is criminal under the provisions of this law.[13] The obvious delimiting words in the statute are those requiring "intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign

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[12] Criminal statutes deemed vague: *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 221–224 (raising prices above "market value under fair competition, and under normal market conditions"); *Collins* v. *Kentucky*, 234 U. S. 634 (same); *Weeds, Inc.* v. *United States*, 255 U. S. 109 (exacting "excessive prices for any necessaries"); *Stromberg* v. *California*, 283 U. S. 359, 369 (displaying any "symbol or emblem of opposition to organized government"); *Smith* v. *Cahoon*, 283 U. S. 553, 564–565 (such provisions regulating common carriers as could constitutionally be applied to private carriers); *Herndon* v. *Lowry*, 301 U. S. 242, 261–264 (distribution of pamphlets intended at any time in the future to lead to forcible resistance to law).

[13] Cf. Adequately definite criminal statutes: *Lloyd* v. *Dollison*, 194 U. S. 445, 450 (liquor restrictions varying according to sale at "wholesale" or "retail"); *Waters-Pierce Oil Co.* v. *Texas* (*No. 1*), 212 U. S. 86, 108–111 (contracts "reasonably calculated" or which "tend" to fix prices); *Nash* v. *United States*, 229 U. S. 373, 376–378 (unreasonable or undue restraints of trade); *Omaechevarria* v. *Idaho*, 246 U. S. 343, 345, 348 ("any cattle range previously . . . or . . . usually occupied by any cattle grower"); *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, 501–503 (meat represented to be "kosher"); *Miller* v. *Oregon*, 273 U. S. 657 (dangerous rate of speed; see 274 U. S. at 464–465); *United States* v. *Alford*, 274 U. S. 264, 267 (building fires "near" any forest or inflammable material); *United States* v. *Wurzbach*, 280 U. S. 396, 399 (receiving contributions for "any political purpose whatever"); *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 81–82 ("reasonable variations" in weight or measure); *Kay* v. *United States*, 303 U. S. 1, 8–9 ("ordinary fees . . . for services actually rendered").

nation." This requires those prosecuted to have acted in bad faith. The sanctions apply only when *scienter* is established.[14] Where there is no occasion for secrecy, as with reports relating to national defense, published by authority of Congress or the military departments, there can, of course, in all likelihood be no reasonable intent to give an advantage to a foreign government. Finally, we are of the view that the use of the words "national defense" has given them, as here employed, a well understood connotation. They were used in the Defense Secrets Act of 1911.[15] The traditional concept of war as a struggle between nations is not changed by the intensity of support given to the armed forces by civilians or the extension of the combat area. National defense, the Government maintains, "is a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness." We agree that the words "national defense" in the Espionage Act carry that meaning. Whether a document or report is covered by §§ 1 (b) or 2 (a) depends upon its relation to the national defense, as so defined, not upon its connection with places specified in § 1 (a). The language employed appears sufficiently definite to apprise the public of prohibited activities and is consonant with due process.

At the conclusion of all the evidence petitioners sought a directed verdict of acquittal because (1) the innocuous character of the evidence forbade a conclusion that petitioners had intent or reason to believe that the informa-

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[14] Cf. *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, 501.

[15] 36 Stat. 1084: "That whoever, for the purpose of obtaining information respecting the national defense, to which he is not lawfully entitled, goes upon any vessel, or enters any navy-yard, naval station, fort, battery, torpedo station, arsenal, camp, factory, building, office, or other place connected with the national defense, owned or constructed or in process of construction by the United States . . ."

tion was to be used to the injury of the United States or the advantage of a foreign nation and (2) the evidence failed to disclose that any of the reports related to or was connected with the national defense. As a corollary to this second contention, reversal is sought on the ground that the trial court overruled the petitioners' objection that as a matter of law none of the reports dealt with national defense. That is, as the trial court stated the objection, that "the jury has no privilege in determining whether or no any of these reports have to do with the national defense, that that is a matter for the Court and not for the jury, as a matter of law."

To justify a court's refusing to permit a jury to consider a defendant's intent in obtaining and delivering these reports, one would be compelled to conclude that nothing in them could be violative of the law. As they gave a detailed picture of the counter-espionage work of the Naval Intelligence, drawn from its own files, they must be considered as dealing with activities of the military forces. A foreign government in possession of this information would be in a position to use it either for itself, in following the movements of the agents reported upon, or as a check upon this country's efficiency in ferreting out foreign espionage. It could use the reports to advise the state of the persons involved of the surveillance exercised by the United States over the movements of these foreign citizens. The reports, in short, are a part of this nation's plan for armed defense. The part relating to espionage and counter-espionage cannot be viewed as separated from the whole.

Nor do we think it necessary to prove that the information obtained was to be used to the injury of the United States. The statute is explicit in phrasing the crime of espionage as an act of obtaining information relating to the national defense "to be used . . . to the advantage of any foreign nation." No distinction

is made between friend or enemy. Unhappily the status of a foreign government may change. The evil which the statute punishes is the obtaining or furnishing of this guarded information, either to our hurt or another's gain. If we accept petitioners' contention that "advantage" means advantage as against the United States, it would be a useless addition, as no advantage could be given our competitor or opponent in that sense without injury to us.

An examination of the instructions convinces us that no injustice was done petitioners by their content. Weighed by the test previously outlined of relation to the military establishments, they are favorable to petitioners' contentions. A few excerpts will make this clear:

"You are instructed that the term 'national defense' includes all matters directly and reasonably connected with the defense of our nation against its enemies. . . . As you will note, the statute specifically mentions the places and things connected with or comprising the first line of defense when it mentions vessels, aircraft, works of defense, fort or battery and torpedo stations. You will note, also, that the statute specifically mentions by name certain other places or things relating to what we may call the secondary line of national defense. Thus some at least of the storage of reserves of men and materials is ordinarily done at naval stations, submarine bases, coaling stations, dock yards, arsenals and camps; all of which are specifically designated in the statute. . . . You are instructed in the first place that for purposes of prosecution under these statutes, the information, documents, plans, maps, etc., connected with these places or things must directly relate to the efficiency and effectiveness of the operation of said places or things as instruments for defending our nation. . . . You are instructed that in the second place the information, documents or notes must relate to those an-

gles or phrases of the instrumentality, place or thing which relates to the defense of our nation; thus if a place or thing has one use in peacetime and another use in wartime, you are to distinguish between information relating to the one or the other use. . . .

"The information, document or note might also relate to the possession of such information by another nation and as such might also come within the possible scope of this statute. . . . For from the standpoint of military or naval strategy it might not only be dangerous to us for a foreign power to know our weaknesses and our limitations, but it might also be dangerous to us when such a foreign power knows that we know that they know of our limitations.

"You are, then, to remember that the information, documents or notes, which are alleged to have been connected with the national defense, may relate or pertain to the usefulness, efficiency or availability of any of the above places, instrumentalities or things for the defense of the United States of America. The connection must not be a strained one nor an arbitrary one. The relationship must be reasonable and direct."

Petitioners' objection, however, is that after having given these instructions, the court instead of determining whether the reports were or were not connected with national defense, left this question to the jury in these words:

"Whether or not the information, obtained by any defendant in this case, concerned, regarded or was connected with the national defense is a question of fact solely for the determination of this jury, under these instructions."

These quotations show that the trial court undertook to give to the jury the tests by which they were to determine whether the acts of the petitioners were connected with or related to the national defense. We are

of the opinion this was properly left to the jury. If we assume, as we must here after our earlier discussion as to the definiteness of the statute, that the words of the statute are sufficiently specific to advise the ordinary man of its scope, we think it follows that the words of the instructions give adequate definition to "connected with" or "relating to" national defense. The inquiry directed at the instructions is whether the jury is given sufficient guidance to enable it to determine whether the acts of the petitioners were within the prohibitions. These instructions set out the definition of national defense in a manner favorable and unobjectionable to petitioners. When they refer to facts connected with or related to defense, however, petitioners urge that the connection should be determined by the court. Instructions can, of course, go no farther than to say the connection must be reasonable, direct and natural. Further elaboration would not clarify. The function of the court is to instruct as to the kind of information which is violative of the statute, and of the jury to decide whether the information secured is of the defined kind. It is not the function of the court, where reasonable men may differ, to determine whether the acts do or do not come within the ambit of the statute. The question of the connection of the information with national defense is a question of fact to be determined by the jury as negligence upon undisputed facts is determined.[16]

In a trial under an indictment for violation of § 3[17] of this same Espionage Act, this Court had occasion to con-

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[16] *Grand Trunk Ry. Co.* v. *Ives,* 144 U. S. 408, 417; *Gunning* v. *Cooley,* 281 U. S. 90, 94. Cf. *Dunlop* v. *United States,* 165 U. S. 486, 500–501.

[17] 40 Stat. 217, 219, c. 30:

"Sec. 3. Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and who-

sider a similar question as to the function of the jury. A pamphlet was introduced as evidence of making false statements with the intent to cause insubordination. To the objection that the pamphlet could not legitimately be construed as tending to produce the prohibited consequences this Court said: "What interpretation ought to be placed upon the pamphlet, what would be the probable effect of distributing it in the mode adopted, and what were defendants' motives in doing this, were questions for the jury, not the court, to decide. . . . Whether the printed words would in fact produce as a proximate result a material interference with the recruiting or enlistment service, or the operation or success of the forces of the United States, was a question for the jury to decide in view of all the circumstances of the time and considering the place and manner of distribution." [18]

Viewing the instructions as a whole, we find no objection sufficient to justify reversal.

The Circuit Court of Appeals properly refused to consider the errors alleged with respect to the conspiracy count.[19]

Affirmed.

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

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ever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United Staes, shall be punished by a fine of no more than $10,000 or imprisonment for not more than twenty years, or both."

[18] *Pierce* v. *United States,* 252 U. S. 239, 250. Justices Brandeis and Holmes dissented, largely on the ground that the jury should not be left to decide whether statements in the pamphlet were facts or conclusions. *Id.,* p. 269.

[19] *Brooks* v. *United States,* 267 U. S. 432, 441.

UNITED STATES *v.* COWDEN MANUFACTURING CO.

CERTIORARI TO THE COURT OF CLAIMS.

No. 188. Argued December 20, 1940.—Decided January 13, 1941.

A contract with the United States for furnishing a quantity of garments stipulated that the price payable to the contractor should be increased to the extent of such subsequently imposed federal taxes as are "made applicable directly upon the production, manufacture, or sale of the supplies covered by this contract and are paid by the contractor on the articles herein contracted for . . ." *Held* not to obligate the United States in respect to taxes subsequently imposed under the Agricultural Adjustment Act on the processing of materials sold to the contractor and used in the manufacture of the garments, for which taxes the processors were reimbursed by the contractor pursuant to agreements between them. P. 36.

The taxes in question were not "directly" applicable to the manufacture of the "supplies covered by this contract," nor "paid by the contractor," within the meaning of the contract.

91 Ct. Cls. 75; 32 F. Supp. 141, reversed.

CERTIORARI, 311 U. S. 624, to review a judgment against the United States in a suit upon a contract.

Mr. Andrew D. Sharpe, with whom *Solicitor General Biddle, Assistant Attorney General Clark,* and *Mr. J. Louis Monarch* were on the brief, for the United States.

Mr. Phil D. Morelock for respondent.

MR. JUSTICE MURPHY delivered the opinion of the Court.

Respondent seeks reimbursement from the United States of the amounts paid to processors to compensate them for processing taxes paid on cotton goods sold to respondent. The suit is based on a contract between respondent and the United States, rather than on Title

VII of the Revenue Act of 1936 (49 Stat. 1648, 1747), which authorizes refunds to processors, under certain circumstances, of processing taxes illegally collected under the Agricultural Adjustment Act (48 Stat. 31). The question is whether the "federal taxes" clause of the contract obligates the United States to make the reimbursement.

Prior to June 6, 1933, the War Department called for bids on a contract to furnish a certain kind of mechanic's suit. On June 6, 1933, respondent submitted its bid, and on June 24, 1933, executed a contract with the United States whereby respondent agreed to furnish a specified number of the suits at a stated price. The contract provided, in the "federal taxes" clause, that: "Prices set forth herein include any Federal Tax heretofore imposed by the Congress which is applicable to the material purchased under this contract. If any sales tax, processing tax, adjustment charge, or other taxes or charges are imposed or changed by the Congress after the date set for the opening of the bid upon which this contract is based and made applicable directly upon the production, manufacture, or sale of the supplies covered by this contract and are paid by the contractor on the articles or supplies herein contracted for, then the prices named in this contract will be increased or decreased accordingly. . . ."

To perform its contract with the United States, respondent contracted to purchase cotton cloth, thread, and labels from subcontractors who were liable, as processors, to pay any processing taxes levied on the articles sold to respondent. At the time these contracts were made no taxes were in effect on the processing of cotton, but in anticipation of such taxes respondent and the subcontractors agreed that respondent would reimburse them for any taxes they were required to pay on the processing of goods sold to respondent, the taxes to be billed as a sepa-

rate item. Thereafter, respondent received the goods covered by these contracts and compensated the subcontractors for the taxes they were later required to pay on the processing of the cotton. It has performed its contract with the United States and now claims that the quoted provision obligates the United States to pay respondent the amounts it has paid its subcontractors to compensate them for the processing taxes they have paid. Because the Comptroller General rejected its claim, respondent brought this suit in the Court of Claims and obtained judgment. 91 Ct. Cls. 75; 32 F. Supp. 141. We granted certiorari on October 14, 1940, to resolve the uncertainty as to the correct construction of the "federal taxes" clause which appears in a large number of government contracts.

The only question is whether the United States, in the "federal taxes" clause, has agreed to pay respondent the amount respondent paid its subcontractors to reimburse them for taxes paid on the processing of the goods sold to respondent. We hold that it has not.

We are of opinion that the "federal taxes" clause does not obligate the United States to reimburse its contractor for taxes which the latter has borne merely as a matter of contract with its subcontractors. On the contrary, the fair import of the clause is that the United States must make reimbursement only for such taxes as the contractor has paid pursuant to an obligation imposed upon him by the statute which exacts the tax.

The language of the clause is precise. It provides only for reimbursement of those taxes which are "made applicable directly upon the production, manufacture, or sale of the supplies covered by this contract." The supplies "covered by this contract" are the mechanics' suits, the completed articles furnished to the United States. Since the clause further provides in exact language that the tax must be "directly" applicable, we cannot agree that a tax on the cloth, thread, and labels is a tax on the

"supplies covered by this contract." Compare *Telescope Folding Furniture Co.* v. *United States,* 31 F. Supp. 780, 784; *United States* v. *Glenn L. Martin Co.,* 308 U. S. 62.

Moreover, the clause stipulates for reimbursement of taxes "paid by the contractor." It is reasonable to conclude that this phrase also contemplates payment of taxes to the United States in consequence of an obligation imposed by statute upon respondent. For while in a sense, perhaps, respondent "paid" these processing taxes, it is more accurate to say that they were "paid" by the subcontractors who merely shifted their burden to respondent as a separate item of the contract price. The clause as a whole indicates that this was the sense to be attributed to the phrase quoted.

A contrary construction of the "federal taxes" clause introduces difficulties not contemplated by the parties. It would force them to trace the taxes back to the one upon whom the obligation first rested, whether the subsequent transactions were simple or complex. For if it could be said in this case that the processing taxes were imposed on the supplies covered by the contract and were paid by the contractor, it would be immaterial how far the contractor were removed from the original processor if the former could show that the burden of the tax had been shifted as the processed articles had changed hands and perhaps form. We can find nothing which suggests that the parties intended to draft a clause that would operate in such fashion.

We conclude that the quoted clause does not obligate the United States to compensate respondent for taxes which were paid by its subcontractors and were merely shifted to respondent pursuant to their subcontract. The judgment of the Court of Claims is reversed and the cause is remanded with directions to dismiss the petition.

Reversed.

A. C. FROST & CO. *v.* COEUR D'ALENE MINES CORP.

CERTIORARI OF THE SUPREME COURT OF IDAHO.

No. 78. Argued December 18, 1940.—Decided January 20, 1941.

1. The judgment of the state supreme court in this case was based wholly upon an interpretation of the Securities Act of 1933 and is reviewable here. P. 40.
2. A contract of a corporation granting an option to purchase at a stipulated price a specified number of shares of its treasury stock, *held*—assuming that a "public offering" was involved—not unenforceable although the optioned shares were not registered under the Securities Act of 1933 as amended. P. 42.

61 Idaho 21; 98 P. 2d 965, reversed.

CERTIORARI, 311 U. S. 624, to review a judgment denying recovery upon a contract on the ground of invalidity under the Securities Act of 1933.

Messrs. Ernest L. Wilkinson and *John W. Cragun,* with whom *Mr. Charles J. Kappler* was on the brief, for petitioner.

Messrs. W. H. Langroise and *James A. Wayne* for respondent.

Solicitor General Biddle and *Messrs. Edwin E. Huddleson, Jr., Chester T. Lane,* and *Christopher M. Jenks* filed a brief on behalf of the Securities & Exchange Commission, as *amicus curiae,* presenting the views of the Commission as to the interpretation of certain provisions of the Securities Act of 1933, as amended.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

September 10, 1934, respondent, by a written contract, gave to one Boland "the sole and exclusive right and option to purchase the whole or any part" of 1,300,000

shares of its treasury stock at 10 cents per share, payments to be made in installments. He immediately assigned the contract to petitioner, Frost & Company. April 26, 1935, this was modified as to time and amount of payments. May 15, 1935, another modification authorized respondent to sell optioned stock and credit petitioner with the proceeds above 10 cents per share.

Petitioner obtained 165,000 shares and paid therefor $16,500. Respondent sold many at prices above 10 cents and gave petitioner credits amounting to $16,306. None of the corporation's shares were registered under the Securities Act of 1933 as amended, c. 38, 48 Stat. 74; c. 404, 48 Stat. 881, 905. And upon that alleged ground, in June 1935, respondent refused delivery of the remaining optioned ones—855,150.

By complaint filed in an Idaho state court, March 26, 1937, petitioner charged that respondent had repudiated the option and asked judgment for $16,306, also damages consequent upon breach of the agreement.

The Answer denied liability upon the ground, among others, that the contract "was entered into in violation of law, and particularly in violation of . . . the Security Act of 1933, approved May 27, 1933, and Acts of Congress amendatory thereof and supplemental thereto, and particularly in this that the 1,300,000 shares of stock attempted to be sold by the defendant to the said W. J. Boland under said instrument was the treasury stock of the defendant corporation, and had never been registered for sale under said National Securities Act, or Acts amendatory thereof or supplemental thereto, with the Securities and Exchange Commission, and that the said W. J. Boland knew these facts and knew that the defendant could not legally sell to him the said stock or any part thereof; and defendant alleges that said contract was void ab initio."

The cause was tried without a jury. Some evidence tended to show that both parties purposed that petitioner

would sell acquired shares to sundry parties through use of the mails and instrumentalities of interstate commerce.

The trial court held the option unenforceable so far as not executed because contrary to law; that petitioner could recover the $16,306 credit; also that there could be no recovery for respondent's failure to deliver.

Upon appeal, the supreme court ruled that, as intended, petitioner sold acquired shares to sundry purchasers, directed deliveries to brokers for resale and "that all stock offered for sale amounted to public offerings and that interstate means of communication and transportation were used in connection therewith." Consequently it declared the agreement void ab initio. Further that the parties must be left in the situation where found. It ordered final judgment for respondent. 61 Idaho 21; 98 P. 2d 965, 967. This action was based wholly on interpretation and application of the Securities Act. Thus a federal question arose which demands determination. *Awotin* v. *Atlas Exchange Bank,* 295 U. S. 209, 213.

The essential purpose of the statute is to protect investors by requiring publication of certain information concerning securities before offered for sale.

Some of its relevant provisions are in the margin.[1]

Petitioner maintains that the record shows there was no public offering of optioned stock within the meaning of the statute and § 4 (1) is controlling. Considering the interpretation which we adopt it is unnecessary now

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[1] Securities Act of 1933 as amended, 48 Stat. 74, 78, in 1934, 48 Stat. 881, 905–6.

"Sec. 2. [15 U. S. C. § 77b]. When used in this title, unless the context otherwise requires—

"(3) The term 'sale,' 'sell,' 'offer to sell,' or 'offer for sale' shall include every contract of sale or disposition of, attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a

to pass upon the point. The Supreme Court of Idaho thought the evidence sufficient to show a public offering and, for present purposes only, we may accept that view.

No provision of the Act declares that in the absence of registration, contracts in contemplation of or having relation to a public offering shall be void. If there has

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security, for value; except that such terms shall not include preliminary negotiations or agreements between an issuer and any underwriter. . . ."

"Sec. 4 [15 U. S. C., § 77d]. The provisions of section 5 shall not apply to any of the following transactions:

"(1) Transactions by any person other than an issuer, underwriter, or dealer; transactions by an issuer not involving any public offering; . . ."

"Sec. 5 [15 U. S. C., § 77e]. (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

"(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or

"(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

"(b) It shall be unlawful for any person, directly or indirectly—

"(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security registered under this title, unless such prospectus meets the requirements of section 10; or

"(2) to carry or cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of section 10."

Section 11 [15 U. S. C., § 77k] permits security holders to sue specified persons who, in some way, make, permit or use an untrue statement in a registration statement, etc.

"Sec. 12. [15 U. S. C., § 77l]. Any person who—

"(1) sells a security in violation of section 5, or

"(2) sells a security (whether or not exempted by the provisions of section 3, other than paragraph (2) of subsection (a) thereof),

been no registration, it penalizes the doing of certain designated things—use of the mails, instrumentalities of interstate commerce, etc. It also declares that those who participate in proscribed action shall become liable to purchasers of the securities "who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security." These are the sanctions which Congress has definitely provided in order to insure obedience to the statute. When invoked they must be given effect.

Although the challenged contract bears no evidence of criminality and is fair upon its face, we are asked to apply a sanction beyond that specified by declaring it

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by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security."

"Sec. 24 [15 U. S. C., § 77x]. Any person who willfully violates any of the provisions of this title, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully in a registration statement filed under this title, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both."

null and void because of relationship to a public offering. The basis for this demand is a supposed federal public policy which requires such annulment in order to secure observance, effectuate the legislative purpose and prevent noxious consequences.

Courts have often added a sanction to those prescribed for an offense created by statute where the circumstances fairly indicated this would further the essential purpose of the enactment; but we think where the contrary definitely appears—actual hindrance indeed of that purpose—no such addition is permissible. The latter situation is beyond the reason which supports the doctrine now relied upon.

Here the clear legislative purpose was protection of innocent purchasers of securities. They are given definite remedies inconsistent with the idea that every contract having relation to sales of unregistered shares is absolutely void; and to accept the conclusion reached by the supreme court below would probably seriously hinder rather than aid the real purpose of the statute.

The Securities & Exchange Commission, by permission, has filed a memorandum pointing out how this purpose may be thwarted and the investing public injured if the ruling below is approved. An excerpt from this is copied below.[2]

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[2] Excerpt from Memorandum of the Securities and Exchange Commission: "The fundamental purpose of the Securities Act of 1933, as we stated under Point A, is to protect the investing public. The Act furnishes one form of protection by insisting that 'every issue of new securities to be sold in interstate commerce shall be accompanied by full publicity and information' to the end that 'no essentially important element attending the issue shall be concealed from the buying public.' Message of the President to the Congress, March 29, 1933. It is obvious that the purposes of the Act would be defeated by any judicial doctrine which prevented the issuing corporation from recovering from the underwriter, and putting to the intended use in its business, the

The rule that contracts in contravention of public policy are not enforceable came under discussion in *Steele* v. *Drummond,* 275 U. S. 199 and *Twin City Co.* v. *Harding Glass Co.,* 283 U. S. 353, 356, 357. In the latter the opinion declares, the principle "should be applied with caution and only in cases plainly within the reasons on which that doctrine rests. It is only because of the dominant public interest that one who, like respondent, has had the benefit of performance by the other party will be permitted to avoid his own promise."

The protean basis underlying this doctrine has often been stated thus—No one can lawfully do that which tends to injure the public or is detrimental to the public good. If it definitely appears that enforcement of a contract will not be followed by injurious results, generally, at least, what the parties have agreed to ought not to be struck down.

Kimen v. *Atlas Exchange Bank,* 295 U. S. 215 and *Dietrick* v. *Greaney,* 309 U. S. 190, pointed out that whether a contract shall be enforced required consideration of the broad purposes of relevant statutes and the

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money invested by the public in the issuer. And it would be anomalous to rest such an injury to the investors upon the fact that the transaction in which the securities were distributed violated the Act, which was designed to protect those investors. Compare Sections 11 and 12 which, by implication, permit a purchaser to affirm a sale in violation of the Act. It can scarcely be assumed that any court would render such an unfortunate decision. Yet this would be the logical consequence of applying literally the broad language used by the Supreme Court of Idaho in stating the proposition that the courts will not lend their aid to the parties to a contract that is prohibited by law or is against public policy.

"It appears to us to be entirely immaterial whether in such a case, the agreement is labelled 'void' or the parties are held to be 'in pari delicto.' There, labels, as often is the case, merely state the conclusion reached, but do not aid in solution of the problem. The ultimate issue is whether the result in the particular case would effectuate or frustrate the purposes of the Act."

probable effect upon this. In both causes the end which Congress intended to accomplish was treated as the controlling factor.

The Supreme Court of Idaho, we think, misinterpreted and improperly applied the Securities Act. Its judgment must be

Reversed.

MR. JUSTICE STONE concurs in the result.

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

BEAL, COUNTY ATTORNEY OF DOUGLAS COUNTY, NEBRASKA, ET AL. *v.* MISSOURI PACIFIC RAILROAD CORP.

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

No. 72. Argued December 17, 1940.—Decided January 20, 1941.

1. Federal courts of equity should not interfere with the processes of the criminal law in state courts or determine questions of criminal liability under those laws, unless in most exceptional circumstances and upon clear showing that an injunction is necessary in order to prevent an irreparable loss. P. 50.
2. A suit by a railroad company to restrain state officers from prosecuting under a state "Full Train Crew" law, the plaintiff alleging that its trains are manned in accordance with the statute when rightly construed, but that it stands in danger of irreparable injury from multiplicity of prosecutions and possible fines, should not be entertained by a federal court of equity when it appears as a fact that only a single test prosecution is in contemplation, involving only one alleged violation for the purpose of obtaining a construction of the statute by the state courts. P. 50.
3. Upon a motion for judgment on the pleadings denials and allegations of the answer which are well pleaded must be taken as true. P. 51.

108 F. 2d 897, reversed.

CERTIORARI, 311 U. S. 623, to review the affirmance of a decree enjoining the present petitioners, state prosecuting officers, from prosecuting the railroad company's agents for alleged criminal violations of a state "Full Train Crew" law.

Messrs. H. Emerson Kokjer and *Edwin Vail,* Assistant Attorneys General of Nebraska, with whom *Mr. Walter R. Johnson,* Attorney General, was on the brief, for petitioners.

Mr. G. L. DeLacy, with whom *Messrs. J. A. C. Kennedy, R. E. Svoboda,* and *E. J. Svoboda* were on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

The question is whether respondent, plaintiff in the district court below, has established a cause of action in equity entitling it to a decree enjoining petitioners, the Attorney General of Nebraska and other state officers from prosecuting respondent's agents and officers in the state courts for criminal violations of the Nebraska Full Train Crew Law, § 74–519 Comp. Stat. of Nebraska, 1929.

The statute makes it unlawful for any railroad in Nebraska to operate any passenger train of more than five cars "with a crew consisting of less than one engineer, one fireman, one conductor, one brakeman and one flagman." Passenger trains of five cars or less are required to be operated with a like crew, except that only "one brakeman or flagman" is required instead of the one brakeman and one flagman required in the case of trains of more than five cars. By § 74–522 officers or agents of railroads dispatching trains in violation of the statute are guilty of a misdemeanor punishable by fine of not less than $100 nor more than $1,000 for each offense, and

the railroad is made liable for any damage caused by violations.

Respondent's bill of complaint invoked the jurisdiction of the district court on grounds of diversity of citizenship. The facts alleged, so far as now material, are as follows. Respondent operates two trains in Nebraska, on which it assigns for the performance of the duties of a brakeman or flagman required by the statute, colored employees who are fully qualified to perform and do perform those duties, but who are designated as "brakemen-porters" and paid lower wages than are respondent's white "brakemen."

On complaint lodged with the State Railway Commission by an officer of the Brotherhood of Railroad Trainmen, it was alleged that respondent violated the statute, by employing brakemen-porters to perform the services of brakemen or flagmen. The Commission twice dismissed the complaint, but upon rehearing it ruled that although respondent's brakemen-porters, in addition to the duties of brakemen, when performance of such duties permit, render some services as porters, they competently perform the duties to which they are assigned, namely those of brakemen or flagmen, and that respondent's trains, so far as the public safety is concerned, are adequately manned. The Commission declined to pass upon the question whether their employment in the manner alleged complied with the Full Train Crew Law of the state and ordered that the records in the case be made available to the state attorney general for his use, if so advised, in prosecuting respondent for violation of any criminal statute of the state.

The bill of complaint also alleges that employment of white brakemen for the services now performed by respondent's brakemen-porters will compel it to pay an increase of wages in excess of the jurisdictional amount, and that as each train movement involves an alleged vio-

lation of the statute, numerous prosecutions for violations, which petitioners threaten, will result in imposing on respondent the burden of many litigations in the state criminal courts. Such prosecutions, if successful, it is alleged, will result in the imposition of aggregate fines in excess of $1,000,000 a year. The relief prayed is that the threatened prosecutions be declared to be unauthorized by the statute, and that petitioners be enjoined from interfering with the operation of respondent's trains through criminal prosecution or otherwise.

After denial by the district court of petitioners' motion to dismiss the bill of complaint for want of equity, petitioners answered denying among others the allegations that respondent is threatened with multiplicity of criminal suits or that petitioners intended to proceed with prosecutions for violation of the statute, except as specifically stated in the answer. The answer sets up affirmatively that the attorney general has under consideration the question of respondent's compliance with the statute, and in the event that he should determine that it is "necessary and proper to do so" in order to obtain a judicial determination of the question, he would cause a single test suit to be instituted in the state courts for some one alleged violation of the act by respondent, so conducted as to cause a minimum of financial expense to respondent and without seeking to inflict financial penalties or loss on respondent prior to a final determination of the suit in the state courts.

The district court, without trial of any issue of fact, gave its decree for respondent, on the pleadings, for an injunction as prayed. The Court of Appeals for the Eighth Circuit affirmed. 108 F. 2d 897. We granted certiorari, 311 U. S. 623, on a petition which challenged the equity jurisdiction of the district court to enjoin, in the circumstances, a criminal proceeding in the state courts, the question being of public importance since it

involves the appropriate relationship of the federal to the state courts.

The court of appeals, construing the statute, held that the crews on respondent's trains conform to the statutory requirements; that criminal prosecution of respondent's officers is unauthorized by the Act and unlawful. It supported the exercise of the equity powers of the court to restrain the prosecutions on the ground that the attempted enforcement of the statute as construed by petitioners would subject respondent to a multiplicity of such prosecutions and to the risk, if petitioners' construction of the statute should be sustained, that fines or penalties aggregating a large amount would be imposed.

It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. *In re Sawyer,* 124 U. S. 200, 211; *Davis & Farnum Mfg. Co.* v. *Los Angeles,* 189 U. S. 207; *Hygrade Provision Co.* v. *Sherman,* 266 U. S. 497, 500. No citizen or member of the community is immune from prosecution, in good faith, for his alleged criminal acts. The imminence of such a prosecution even though alleged to be unauthorized and hence unlawful is not alone ground for relief in equity which exerts its extraordinary powers only to prevent irreparable injury to the plaintiff who seeks its aid. *Terrace* v. *Thompson,* 263 U. S. 197, 214; *Packard* v. *Banton,* 264 U. S. 140, 143; *Tyson* v. *Banton,* 273 U. S. 418, 428; *Cline* v. *Frink Dairy Co.,* 274 U. S. 445, 452.

This is especially the case where the only threatened action is the prosecution in the state courts by state officers of an alleged violation of state law, with the resulting final and authoritative determination of the disputed question whether the act complained of is lawful or unlawful. *Harkrader* v. *Wadley,* 172 U. S. 148; *Spielman Motor Co.* v. *Dodge,* 295 U. S. 89, 95. The federal courts are without jurisdiction to try alleged

criminal violations of state statutes. The state courts are the final arbiters of their meaning and appropriate application, subject only to review by this Court if such construction or application is appropriately challenged on constitutional grounds. *Hygrade Provision Co.* v. *Sherman, supra; Fenner* v. *Boykin,* 271 U. S. 240.

Hence interference with the processes of the criminal law in state courts, in whose control they are lodged by the Constitution, and the determination of questions of criminal liability under state law by federal courts of equity, can be justified only in most exceptional circumstances, and upon clear showing that an injunction is necessary in order to prevent irreparable injury. Cf. *Hygrade Provision Co.* v. *Sherman, supra; Cline* v. *Frink Dairy Co., supra; Spielman Motor Co.* v. *Dodge, supra.* And in the exercise of the sound discretion, which guides the determination of courts of equity, scrupulous regard must be had for the rightful independence of state governments and a remedy infringing that independence which might otherwise be given should be withheld if sought on slight or inconsequential grounds. *Di Giovanni* v. *Camden Insurance Assn.,* 296 U. S. 64, 73, and cases cited.

Here the court below found danger of irreparable injury in the threatened multiplicity of prosecutions and risk that the aggregate fines which might be imposed would be very large. But whether more than one criminal prosecution is threatened was by the pleadings made an issue of fact which the district court did not resolve. If it had found after a hearing, as the answer alleges, that only a single suit is contemplated, we could not say that any such irreparable injury is threatened as would justify staying the prosecution and withdrawing the determination of the legal question from the state courts, whose appointed function is to decide it. *Boise Artesian*

Water Co. v. *Boise City,* 213 U. S. 276, 287; *Spielman Motor Co.* v. *Dodge, supra,* 96.

If its decision should be favorable to respondent no reason is shown for anticipating further prosecutions. If it were adverse, penalties in large amount, it is true, might be incurred, but they may well be the consequence of violations of state law. No question is here presented of the constitutional validity of the statute because the penalties which it inflicts are so great as to prevent recourse to the courts for the adjudication of respondent's rights under it. See *Ex parte Young,* 209 U. S. 123, 144; *Missouri Pacific Ry. Co.* v. *Tucker,* 230 U. S. 340, 349.

It does not appear that any motion was made by the parties for judgment on the pleadings. But the record shows that the trial court entered the decree in respondent's favor on its own motion. Upon such a motion denials and allegations of the answer which are well pleaded must be taken as true. So taken the decree for respondent cannot be sustained and must be reversed. The majority of the Court are of opinion [1] that in view of the state of the record and certain concessions made by counsel on the argument here any further hearing of the issue of irreparable injury to respondent from a threatened multiplicity of suits has been waived. The reversal will accordingly be with instructions to the district court to dismiss the bill of complaint.

It is so ordered.

[1] The CHIEF JUSTICE, MR. JUSTICE MCREYNOLDS and MR. JUSTICE STONE are of opinion that the case should be remanded to the district court for further proceedings.

HINES, SECRETARY OF LABOR AND INDUSTRY OF PENNSYLVANIA, ET AL. *v.* DAVIDOWITZ ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

No. 22. Argued December 10, 11, 1940.—Decided January 20, 1941.

1. Applicable legislation enacted while the case was pending on appeal will be enforced by the appellate court. P. 60.
2. Whatever power a State may have to restrict, limit, regulate and register aliens as a distinct group, is subject to the national legislative and treaty-making powers. P. 68.
3. The Federal Alien Registration Act of 1940 forms, with the immigration and naturalization laws, a comprehensive and integrated scheme for the regulation of aliens, and precludes the enforcement of state alien registration Acts such as that adopted by Pennsylvania in 1939. P. 74.

The Pennsylvania Act requires every alien 18 years or over, with certain exceptions, to register once each year; provide such information as is required by the statute, plus any "other information and details" that the Department of Labor and Industry may direct; pay $1 as an annual registration fee; receive an alien identification card and carry it at all times; show the card whenever it may be demanded by any police officer or agent of the Department of Labor and Industry; and exhibit the card as a condition precedent to registering a motor vehicle in his name or obtaining a license to operate one. The Department of Labor and Industry is charged with the duties of classifying the registrations for "the purpose of ready reference," and furnishing a copy of the classification to the Pennsylvania Motor Police. Non-exempt aliens who fail to register are subject to a fine of not more than $100 or imprisonment for not more than 60 days, or both. For failure to carry an identification card or for failure to show it upon proper demand, the punishment is a fine of not more than $10, or imprisonment for not more than 10 days, or both. P. 59.

The federal Act provides for a single registration of aliens 14 years of age and over; detailed information specified by the Act, plus "such additional matters as may be prescribed by the Commissioner, with the approval of the Attorney General"; fingerprinting of all registrants; and secrecy of the federal files, which

can be "made available only to such persons or agencies as may be designated by the Commissioner, with the approval of the Attorney General." No requirement that aliens carry a registration card to be exhibited to police or others is embodied in the law, and only the wilful failure to register is made a criminal offense; punishment is fixed at a fine of not more than $1000, imprisonment for not more than 6 months, or both. P. 60.

30 F. Supp. 470, affirmed.

APPEAL from a decree of a District Court of three judges which restrained officials of the Commonwealth of Pennsylvania from enforcing against an alien provisions of the Pennsylvania Alien Registration Act of 1939.

Mrs. M. Louise Rutherford and *Mr. William S. Rial,* Deputy Attorneys General of Pennsylvania, with whom *Mr. Claude T. Reno,* Attorney General, was on the brief, for appellants.

The Act does not encroach upon a field reserved to federal action. The right of the Federal Government to control immigration, naturalization or interstate and foreign commerce is not impaired by the registration of aliens resident within the State, required by the Pennsylvania law.

It does not infringe the power to regulate interstate and foreign commerce nor interfere with power over immigration and naturalization.

In general, the States may exercise any power possessed by them prior to the adoption of the Constitution, unless the exercise of such power is expressly or by necessary implication prohibited thereby, or interferes with the exercise of some power delegated to the United States. Congress has no general power to enact police regulations operative within the territorial limits of the State. That power has been left with the individual States and can not be taken from them either wholly or in part. *United States* v. *Cruikshank,* 92 U. S. 542.

The power of the State in this field is unqualified and exclusive, so long as its regulations do not invade the sphere of national sovereignty, obstruct or impede the exercise of any authority which the Constitution has confided to the Nation, or deprive a citizen of rights guaranteed to him thereunder.

The Pennsylvania Act simply requires that certain aliens, who have not declared their intention to become citizens, register, pay $1.00 for such registration, and carry a registration card.

The State enacted this law in order to secure information in regard to aliens within its own boundaries. The penalties and the carrying of the card are necessary in order to enforce the law and to prevent evasion.

Compliance by an alien with the state statute does not interfere in any way with his compliance with the naturalization statute. If he files his declaration of intention, he is no longer subject to the state Act, even if he does not complete his application.

It is obvious that there is no inconsistency and no conflict between the alien registering with the State and also with the United States. Legislation under the police power of the State will not be stricken down unless it plainly and palpably conflicts with some authority granted to the Federal Government. *Plumley* v. *Massachusetts,* 155 U. S. 461, 479, 480.

A State may pass a law which aids or coöperates with the Federal Government in the exercise of its federal power. *Halter* v. *Nebraska,* 205 U. S. 34; *Gilbert* v. *Minnesota,* 254 U. S. 325.

Appellants concede that immigration and naturalization under Art. I, § 8, Cl. 3, of the Constitution are within the exclusive power of Congress; but this provision does not place entire jurisdiction over aliens under Congress, and the States under the police power can

place restrictions and limitations upon aliens. Even if control of aliens were within the exclusive power of Congress, the State still has the right, as a local police measure, to regulate aliens resident within its borders, so long as such regulations are not repugnant to or inconsistent with federal enactments.

State insolvency laws, liquor laws, inspection laws and quarantine laws have been upheld. See *International Shoe Co.* v. *Pinkus,* 278 U. S. 261; *Potts* v. *Smith Mfg. Co.,* 25 Pa. Super. Ct. 206.

It should be noted that Pennsylvania passed its law to register aliens on June 21, 1939, but it was not until June 28, 1940, that the federal Act was passed. The Pennsylvania Act does not restrict aliens coming into the State nor expel them from the State. Until the federal Act, there was no conflict with the general power delegated to the Federal Government covering the subject of naturalization and immigration. See also *New York, N. H., & H. R. Co.* v. *New York,* 165 U. S. 628.

There is no question about the right of the State to act in the absence of federal legislation. The Alien Registration Act was constitutional when passed, since it does not impinge on any power granted to Congress, for it does not relate to the entrance of aliens into the State, nor to their deportation; nor does it interfere in any way with naturalization or with foreign or interstate relations. It represents simply a local police measure to obtain information regarding aliens resident within the State's borders for the protection of its citizens, law-abiding aliens and property. The only question is whether the state Act is in abeyance or whether the state and federal Governments have concurrent jurisdiction to register aliens for the protection of inhabitants and property.

The Act does not deny equal protection of the laws to aliens.

Mr. Isidor Ostroff, with whom *Mr. Herman Steerman* was on the brief, for appellees.

The Act is discriminatory, unreasonable, inconsistent and capricious. The Act encroaches upon a field reserved to federal action. *People* v. *Baum*, 251 Mich. 187; *Truax* v. *Raich*, 239 U. S. 33, 39; *Arrowsmith* v. *Voorhies*, 55 F. 2d 310; *Henderson* v. *Mayor of New York*, 92 U. S. 259; *Chy Lung* v. *Freeman*, 92 U. S. 275.

The Act denies equal protection of the laws to aliens in Pennsylvania.

By special leave of Court, *Solicitor General Biddle*, with whom *Assistant Attorney General Shea* and *Messrs. Melvin H. Siegel, Richard H. Demuth*, and *Oscar H. Davis* were on the brief, for the United States, as *amicus curiae*.

The federal Act of 1940 has superseded the Pennsylvania statute. The one is a comprehensive law on the subject of the registration and identification of aliens; the other, rather than complementing the federal law, covers almost the same ground.

The enactment by Congress of this comprehensive and integrated alien registration system precludes the exercise of any concurrent authority by the States. *People* v. *Compagnie Generale Transatlantique*, 107 U. S. 59, 63; *Reid* v. *Colorado*, 187 U. S. 137, 146–147; *Easton* v. *Iowa*, 188 U. S. 220, 231, 238; *Oregon-Washington R. & Nav. Co.* v. *Washington*, 270 U. S. 87, 99–101; *Erie R. Co.* v. *New York*, 233 U. S. 671; *Adams Express Co.* v. *Croninger*, 226 U. S. 491, 505–506; *Northern Pacific Ry. Co.* v. *Washington*, 222 U. S. 370; *New York Central R. Co.* v. *Winfield*, 244 U. S. 147; *Second Employers' Liability Cases*, 223 U. S. 1, 55; *Lindgren* v. *United States*, 281 U. S. 38, 45–46; *New York Central & Hudson River R.* v. *Hudson County*, 227 U. S. 248, 263–264; *Southern Ry. Co.* v. *Railroad Commission*, 236 U. S. 439; *International*

Shoe Co. v. *Pinkus,* 278 U. S. 261, 265–266; Gavit, The Commerce Clause, § 117. It is immaterial that the obligations of the alien under the two enactments are not necessarily incompatible. *Charleston & Western Carolina Ry. Co.* v. *Varnville Furniture Co.,* 237 U. S. 597, 604; *New York Central & Hudson R. Co.* v. *Tonsellito,* 244 U. S. 360; *Southern Ry. Co.* v. *Railroad Commission,* 246 U. S. 439, 446–448; *Pennsylvania R. Co.* v. *Public Service Comm'n,* 250 U. S. 566, 569; *Missouri Pacific R. Co.* v. *Porter,* 273 U. S. 341, 346; *Gilvary* v. *Cuyahoga Valley Ry.,* 292 U. S. 57, 60–61; cf., *Gulf, C. & S. F. Ry.* v. *Hefley,* 158 U. S. 98, 103. And it is likewise immaterial that the state law was enacted before the federal law. *Southern Ry. Co.* v. *Railroad Comm'n, supra,* 446, 447; *People* v. *Compagnie Generale Transatlantique,* 107 U. S. 59, 63; *Port Richmond Ferry Co.* v. *Board of Chosen Freeholders,* 234 U. S. 317, 330; *Southern Ry. Co.* v. *Reid,* 222 U. S. 424.

The case of *Gilbert* v. *Minnesota,* 254 U. S. 325, can have no application to a situation like that here presented where enforcement of the federal statute requires continuous centralized administration and any independent and uncoördinated effort by state officials to aid in its enforcement could only result in confusion.

The Pennsylvania statute is also unenforceable because it is in conflict with the Congressional policy embodied in the federal law. Congress provided various safeguards to protect the civil liberties of aliens and to guard them against the vexation of intrusive police surveillance. The Pennsylvania statute contains no similar safeguards; to the contrary, it is fraught with the very dangers which Congress sought to prevent.

The Act provides that the registration and fingerprinting shall be done at the Post Office, thus avoiding any suggestion of police administration. There is no provision for the issuance of an identification card and no

requirement that the alien shall carry with him proof of registration. The Pennsylvania statute contains no similar protection of aliens.

Enforcement of the Congressional purpose to protect the civil liberties of aliens requires that the federal government retain the power to control and coördinate all activities with respect to registration and surveillance; this policy can not be enforced if the States are permitted to enact and administer independent registration systems, whether for purely local ends or for some purpose which the States share in common with the Nation.

If the States were permitted to administer independent statutes, the probable consequence would be to confuse the aliens as to their duties under each of the separate enactments, with their different provisions, different regulations, and different methods of administration.

Nothing in the debates in Congress or in the committee reports illumines the legislative intention concerning state action. But the President disclosed his understanding that the field had been completely occupied, in a statement issued contemporaneously with his signing of the bill, and the officials charged with administering the Act have taken the same position. A formal statement issued by the President upon completing his share in the legislative process is of importance in determining the legislative intention to preclude or permit state action. See Jones, Statutory Doubts and Legislative Intention, 40 Col. L. Rev. 957, 968, n. 40; cf., *United States* v. *Dickerson,* 310 U. S. 554.

There is no occasion to consider to what extent the States retain the power to enact census legislation for local purposes. Cf., *City of New York* v. *Miln,* 11 Pet. 102.

Apart from the effect of the Alien Registration Act of 1940, the States may not require the registration of alien residents without the express consent of Congress.

The Pennsylvania Act is in conflict with § 16 of the Civil Rights Act of 1870.

MR. JUSTICE BLACK delivered the opinion of the Court.

This case involves the validity of an Alien Registration Act adopted by the Commonwealth of Pennsylvania.[1] The Act, passed in 1939, requires every alien 18 years or over, with certain exceptions,[2] to register once each year; provide such information as is required by the statute, plus any "other information and details" that the Department of Labor and Industry may direct; pay $1 as an annual registration fee; receive an alien identification card and carry it at all times; show the card whenever it may be demanded by any police officer or any agent of the Department of Labor and Industry; and exhibit the card as a condition precedent to registering a motor vehicle in his name or obtaining a license to operate one. The Department of Labor and Industry is charged with the duties of classifying the registrations for "the purpose of ready reference," and furnishing a copy of the classification to the Pennsylvania Motor Police. Nonexempt aliens who fail to register are subject to a fine of not

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[1] Pa. Stats. Ann. (Purdon, Supp. 1940) tit. 35, §§ 1801–1806.

[2] The exceptions are: aliens who are the "father or mother of a son or daughter who has served in the service of the United States during any war"; aliens who have resided in the United States continuously since December 31, 1908, without acquiring a criminal record; and aliens who have filed their application for citizenship. The latter exception is qualified by the proviso that aliens in that category must still register if they "shall not have become naturalized within a period of three years" after applying for citizenship. Since federal law requires five years residence before citizenship can be acquired (8 U. S. C. § 382), this exception means that aliens may be exempt under the Pennsylvania statute for the first three years after their arrival but subject to the statute for the two years immediately preceding their eligibility for citizenship.

more than $100 or imprisonment for not more than 60 days, or both. For failure to carry an identification card or for failure to show it upon proper demand, the punishment is a fine of not more than $10, or imprisonment for not more than 10 days, or both.

A three-judge District Court enjoined enforcement of the Act, holding that it denied aliens equal protection of the laws, and that it encroached upon legislative powers constitutionally vested in the federal government.[3] It is that judgment we are here called upon to review.[4] But in 1940, after the court had held the Pennsylvania Act invalid, Congress enacted a federal Alien Registration Act.[5] We must therefore pass upon the state Act in the light of the Congressional Act.[6]

The federal Act provides for a single registration of aliens 14 years of age and over; detailed information specified by the Act, plus "such additional matters as may be prescribed by the Commissioner, with the approval of the Attorney General"; finger-printing of all registrants; and secrecy of the federal files, which can be "made available only to such persons or agencies as may be designated by the Commissioner, with the approval of the Attorney General." No requirement that aliens carry a registration card to be exhibited to police or

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[3] 30 F. Supp. 470. One alien and one naturalized citizen joined in proceedings filed against certain state officials to enjoin enforcement of the Act. The answer of the defendants admitted the material allegations of the petition and defended the Act on the ground that it was within the power of the state. Plaintiffs moved for judgment on the pleadings under Rule 12(c). The requested relief was denied as to the naturalized citizen but granted as to the alien.

[4] The case is here on appeal under § 266 of the Judicial Code, as amended (28 U. S. C. § 380). We noted probable jurisdiction on March 25, 1940.

[5] Act of June 28, 1940, c. 439, 54 Stat. 670.

[6] Cf. *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538. And see *United States* v. *Schooner Peggy*, 1 Cranch 103, 110, and *Carpenter* v. *Wabash Ry. Co.*, 309 U. S. 23, 26–27.

others is embodied in the law, and only the wilful failure to register is made a criminal offense; punishment is fixed at a fine of not more than $1000, imprisonment for not more than 6 months, or both.

The basic subject of the state and federal laws is identical—registration of aliens as a distinct group. Appellants urge that the Pennsylvania law "was constitutional when passed," and that "The only question is whether the state act is in abeyance or whether the state and Federal Government have concurrent jurisdiction to register aliens for the protection of inhabitants and property." Appellees, on the other hand, contend that the Pennsylvania Act is invalid, for the reasons that it (1) denies equal protection of the laws to aliens residing in the state; (2) violates § 16 of the Civil Rights Act of 1870; [7] (3) exceeds Pennsylvania's constitutional power in requiring registration of aliens without Congressional consent. Appellees' final contention is that the power to restrict, limit, regulate and register aliens as a distinct group is not an equal and continuously existing concurrent power of state and nation, but that even if the state can legislate on this subject at all, its power is subordinate to supreme national law. Appellees conclude that by its adoption of a comprehensive, integrated scheme for regulation of aliens—including its 1940 registration act—Congress has precluded state action like that taken by Pennsylvania.[8]

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[7] 16 Stat. 140, 144, 8 U. S. C. § 41: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

[8] Pennsylvania is not alone among the states in attempting to compel alien registration. Several states still have dormant on their statute books laws passed in 1917–18, empowering the governor to require reg-

In the view we take it is not necessary to pass upon appellees' first, second, and third contentions, and so we pass immediately to their final question, expressly leaving open all of appellees' other contentions, including the argument that the federal power in this field, whether exercised or unexercised, is exclusive. Obviously the answer to appellees' final question depends upon an analysis of the respective powers of state and national governments in the regulation of aliens as such, and a determination of whether Congress has, by its action, foreclosed enforcement of Pennsylvania's registration law.

First. That the supremacy of the national power in the general field of foreign affairs, including power over immigration, naturalization and deportation, is made clear by the Constitution, was pointed out by the authors of The Federalist in 1787,[9] and has since been given continuous recognition by this Court.[10] When the national government by treaty or statute has established rules and

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istration when a state of war exists or when public necessity requires such a step. E. g., Conn. Gen. Stats. (1930) tit. 59, § 6042; Fla. Comp. Gen. Laws (1927) § 2078; Iowa Code (1939) § 503; La. Gen. Stats. (Dart, 1939) tit. 3, § 282; Me. Rev. Stats. (1930) ch. 34, § 3; N. H. Pub. Laws (1926) ch. 154; N. Y. Cons. Laws (Executive Law) § 10. Other states, like Pennsylvania, have passed registration laws more recently. E. g., S. C. Acts (1940) No. 1014, § 9, p. 1939; N. C. Code (1939) §§ 193 (a)-(h). In several states, municipalities have recently undertaken local alien registration.

Registration statutes of Michigan and California were held unconstitutional in *Arrowsmith* v. *Voorhies,* 55 F. 2d 310, and *Ex parte Ah Cue,* 101 Cal. 197, 35 P. 556.

[9] The importance of national power in all matters relating to foreign affairs and the inherent danger of state action in this field are clearly developed in Federalist papers No. 3, 4, 5, 42 and 80.

[10] E. g., *Henderson* v. *Mayor of New York,* 92 U. S. 259; *People* v. *Compagnie Generale Transatlantique,* 107 U. S. 59; *Fong Yue Ting* v. *United States,* 149 U. S. 698, 711. Cf. *Z. & F. Assets Realization Corp.* v. *Hull,* 311 U. S. 470.

regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land. No state can add to or take from the force and effect of such treaty or statute, for Article VI of the Constitution provides that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, 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 Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties. "For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power." [11] Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference. As Mr. Justice Miller well observed of a California

[11] *Chinese Exclusion Case,* 130 U. S. 581, 606. Thomas Jefferson, who was not generally favorable to broad federal powers, expressed a similar view in 1787: "My own general idea was, that the States should severally preserve their sovereignty in whatever concerns themselves alone, and that whatever may concern another State, or any foreign nation, should be made a part of the federal sovereignty." Memoir, Correspondence and Miscellanies from the Papers of Thomas Jefferson (1829), vol. 2, p. 230, letter to Mr. Wythe. Cf. James Madison in Federalist paper No. 42: "The *second* class of powers, lodged in the general government, consist of those which regulate the intercourse with foreign nations. . . . This class of powers forms an obvious and essential branch of the federal administration. If we are to be one nation in any respect, it clearly ought to be in respect to other nations."

statute burdening immigration: "If [the United States] should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union?" [12]

One of the most important and delicate of all international relationships, recognized immemorially as a responsibility of government, has to do with the protection of the just rights of a country's own nationals when those nationals are in another country. Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government.[13] This country, like other nations, has entered into numerous treaties of amity and commerce since its inception—treaties entered into under express constitutional authority, and binding

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[12] *Chy Lung* v. *Freeman*, 92 U. S. 275, 279. Cf. Alexander Hamilton in Federalist paper No. 80: "The peace of the *whole* ought not to be left at the disposal of a *part*. The Union will undoubtedly be answerable to foreign powers for the conduct of its members." That the Congress was not unaware of the possible international repercussions of registration legislation is apparent from a study of the history of the 1940 federal Act. Congressman Coffee, speaking against an earlier version of the bill, said: "Are we not guilty of deliberately insulting nations with whom we maintain friendly diplomatic relations? Are we not humiliating their nationals? Are we not violating the traditions and experiences of a century and a half?" 84 Cong. Rec. 9536.

[13] For a collection of typical international controversies that have arisen in this manner, see Dunn, The Protection of Nationals (1932), pp. 13 *et seq.* Cf. John Jay in Federalist paper No. 3: "The number of wars which have happened or will happen in the world will always be found to be in proportion to the number and weight of the causes, whether *real* or *pretended*, which *provoke* or *invite* them. If this remark be just, it becomes useful to inquire whether so many *just* causes of war are likely to be given by *United America* as by *disunited* America; for if it should turn out that United America will probably give the fewest, then it will follow that in this respect the Union tends most to preserve the people in a state of peace with other nations."

upon the states as well as the nation. Among those treaties have been many which not only promised and guaranteed broad rights and privileges to aliens sojourning in our own territory, but secured reciprocal promises and guarantees for our own citizens while in other lands. And apart from treaty obligations, there has grown up in the field of international relations a body of customs defining with more or less certainty the duties owing by all nations to alien residents—duties which our State Department has often successfully insisted foreign nations must recognize as to our nationals abroad.[14] In general, both treaties and international practices have been aimed at preventing injurious discriminations against aliens. Concerning such treaties, this Court has said: "While treaties, in safeguarding important rights in the interest of reciprocal beneficial relations, may by their express terms afford a measure of protection to aliens which citizens of one or both of the parties may not be able to demand against their own government, the general purpose of treaties of amity and commerce is to avoid injurious discrimination in either country against the citizens of the other." [15]

Legal imposition of distinct, unusual and extraordinary burdens and obligations upon aliens—such as subjecting

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[14] "In consequence of the right of protection over its subjects abroad which every State enjoys, and the corresponding duty of every State to treat aliens on its territory with a certain consideration, an alien . . . must be afforded protection for his person and property. . . . Every State is by the Law of Nations compelled to grant to aliens at least equality before the law with its citizens, as far as safety of person and property is concerned. An alien must in particular not be wronged in person or property by the officials and courts of a State. Thus the police must not arrest him without just cause. . . ." 1 Oppenheim, International Law (5th ed., 1937), pp. 547–548. And see 4 Moore, International Law Digest, pp. 2, 27, 28; Borchard, The Diplomatic Protection of Citizens Abroad (1928), pp. 25, 37, 73, 104.

[15] *Todok* v. *Union State Bank*, 281 U. S. 449, 454–455.

them alone, though perfectly law-abiding, to indiscriminate and repeated interception and interrogation by public officials—thus bears an inseparable relationship to the welfare and tranquillity of all the states, and not merely to the welfare and tranquillity of one. Laws imposing such burdens are not mere census requirements, and even though they may be immediately associated with the accomplishment of a local purpose, they provoke questions in the field of international affairs. And specialized regulation of the conduct of an alien before naturalization is a matter which Congress must consider in discharging its constitutional duty "To establish an Uniform Rule of Naturalization . . ." It cannot be doubted that both the state and the federal registration laws belong "to that class of laws which concern the exterior relation of this whole nation with other nations and governments." [16] Consequently the regulation of aliens is so intimately blended and intertwined with responsibilities of the national government that where it acts, and the state also acts on the same subject, "the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it." [17] And where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or aux-

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[16] *Henderson* v. *Mayor of New York*, 92 U. S. 259, 273.

[17] *Gibbons* v. *Ogden*, 9 Wheat. 1, 211; see *Charleston & Western Carolina Ry. Co.* v. *Varnville Furniture Co.*, 237 U. S. 597. Cf. *People* v. *Compagnie Générale Transatlantique*, 107 U. S. 59, 63, where the Court, speaking of a state law and a federal law dealing with the same type of control over aliens, said that the federal law "covers the same ground as the New York statute, and they cannot co-exist."

iliary regulations.[18] There is not—and from the very nature of the problem there cannot be—any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress. This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference.[19] But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[20] And in

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[18] Cf. *Nielsen* v. *Johnson*, 279 U. S. 47; *Asakura* v. *Seattle*, 265 U. S. 332; *International Shoe Co.* v. *Pinkus*, 278 U. S. 261, 265, and cases there cited. And see *Savage* v. *Jones*, 225 U. S. 501, 539. Appellant relies on *Gilbert* v. *Minnesota*, 254 U. S. 325, and *Halter* v. *Nebraska*, 205 U. S. 34, but neither of those cases is relevant to the issues here presented.

[19] E. g., *Hauenstein* v. *Lynham*, 100 U. S. 483, 489; *Geofroy* v. *Riggs*, 133 U. S. 258, 267; *Asakura* v. *Seattle*, 265 U. S. 332, 340, 342; *Nielsen* v. *Johnson*, 279 U. S. 47, 52; *Todok* v. *Union State Bank*, 281 U. S. 449, 454; *Santovincenzo* v. *Egan*, 284 U. S. 30, 40; *United States* v. *Belmont*, 301 U. S. 324, 331 (but compare the affirmance by an equally divided Court in *United States* v. *Moscow Fire Ins. Co.*, 309 U. S. 624); *Kelly* v. *Washington*, 302 U. S. 1, 10, 11; *Maurer* v. *Hamilton*, 309 U. S. 598, 604; *Bacardi Corporation* v. *Domenech*, 311 U. S. 150, 157, 167.

[20] Cf. *Savage* v. *Jones*, 225 U. S. 501, 533: "For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power."

that determination, it is of importance that this legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority. Any concurrent state power that may exist is restricted to the narrowest of limits; the state's power here is not bottomed on the same broad base as is its power to tax.[21] And it is also of importance that this legislation deals with the rights, liberties, and personal freedoms of human beings, and is in an entirely different category from state tax statutes or state pure food laws regulating the labels on cans.[22]

Our conclusion is that appellee is correct in his contention that the power to restrict, limit, regulate, and register aliens as a distinct group is not an equal and continuously existing concurrent power of state and nation, but that whatever power a state may have is subordinate to supreme national law.[23] We proceed there-

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[21] Express recognition of the breadth of the concurrent taxing powers of state and nation is found in Federalist paper No. 32.

[22] It is true that where the Constitution does not of itself prohibit state action, as in matters related to interstate commerce, and where the Congress, while regulating related matters, has purposely left untouched a distinctive part of a subject which is peculiarly adapted to local regulation, the state may legislate concerning such local matters which Congress could have covered but did not. *Kelly* v. *Washington,* 302 U. S. 1, 9, 10, 11, 12, 13, 14 (inspection for seaworthiness of hull and machinery of motor-driven tugs). And see *Reid* v. *Colorado,* 187 U. S. 137, 147 (prohibition on introduction of diseased cattle or horses); *Savage* v. *Jones,* 225 U. S. 501, 529, 532 (requirement that certain labels reveal package contents); *Carey* v. *South Dakota,* 250 U. S. 118, 121 (prohibition of shipment by carrier of wild ducks); *Dickson* v. *Uhlmann Grain Co.,* 288 U. S. 188, 199 (prohibition of margin transactions in grain where there is no intent to deliver); *Mintz* v. *Baldwin,* 289 U. S. 346, 350–352 (inspection of cattle for infectious diseases); *Maurer* v. *Hamilton,* 309 U. S. 598, 604, 614 (prohibition of car-over-cab trucking).

[23] As supporting the contention that the state can enforce its alien registration legislation, even though Congress has acted on the identical

fore to an examination of Congressional enactments to ascertain whether or not Congress has acted in such manner that its action should preclude enforcement of Pennsylvania's law.

Second. For many years Congress has provided a broad and comprehensive plan describing the terms and conditions upon which aliens may enter this country, how they may acquire citizenship, and the manner in which they may be deported. Numerous treaties, in return for reciprocal promises from other governments, have pledged the solemn obligation of this nation to the end that aliens residing in our territory shall not be singled out for the imposition of discriminatory burdens. Our Constitution and our Civil Rights Act have guaranteed to aliens "the equal protection of the laws [which] is a pledge of the protection of equal laws." [24] With a view to limiting prospective residents from foreign lands to those possessing the qualities deemed essential to good and useful citizenship in America, carefully defined qualifications are required to be met before aliens may enter our country. These qualifications include rigid requirements as to health, education, integrity, character, and adaptability to our institutions. Nor is the alien left free from the

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subject, appellant relies upon a number of previous opinions of this Court. *Ohio ex rel. Clarke* v. *Deckebach,* 274 U. S. 392, 395, 396; *Frick* v. *Webb,* 263 U. S. 326, 333; *Webb* v. *O'Brien,* 263 U. S. 313, 321, 322; *Terrace* v. *Thompson,* 263 U. S. 197, 223, 224; *Heim* v. *McCall,* 239 U. S. 175, 193, 194. In each of those cases this Court sustained state legislation which applied to aliens only, against an attack on the ground that the laws violated the equal protection clause of the Constitution. In each case, however, the Court was careful to point out that the state law was not in violation of any valid treaties adopted by the United States, and in no instance did it appear that Congress had passed legislation on the subject. In the only case of this type in which there was an outstanding treaty provision in conflict with the state law, this Court held the state law invalid. *Asakura* v. *Seattle,* 265 U. S. 332.

[24] *Yick Wo* v. *Hopkins,* 118 U. S. 356, 369.

application of federal laws after entry and before naturalization. If during the time he is residing here he should be found guilty of conduct contrary to the rules and regulations laid down by Congress, he can be deported. At the time he enters the country, at the time he applies for permission to acquire the full status of citizenship, and during the intervening years, he can be subjected to searching investigations as to conduct and suitability for citizenship.[25] And in 1940 Congress added to this comprehensive scheme a complete system for alien registration.

The nature of the power exerted by Congress, the object sought to be attained, and the character of the obligations imposed by the law, are all important in considering the question of whether supreme federal enactments preclude enforcement of state laws on the same subject.[26] Opposition to laws permitting invasion of the personal liberties of law-abiding individuals, or singling out aliens as particularly dangerous and undesirable groups, is deep-seated in this country. Hostility to such legislation in America stems back to our colonial history,[27] and champions of freedom for the individual have always vigorously opposed burdensome registration systems. The drastic requirements of the alien Acts of 1798[28] brought about a political upheaval in this country the repercussions from which have not even yet wholly subsided.[29] So violent was the reaction to the 1798 laws that almost a century elapsed before a second registration

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[25] 8 U. S. C. §§ 152, 373, 377(c), 382, 398, 399(a).

[26] Cf. *Prigg* v. *Pennsylvania*, 16 Pet. 539, 622, 623.

[27] As early as 1641, in the Massachusetts "Body of Liberties," we find the statement that "Every person within this Jurisdiction, whether inhabitant or forreiner, shall enjoy the same justice and law that is generall for the plantation . . ."

[28] 1 Stat. 570, 577.

[29] See Field, J., dissenting in *Fong Yue Ting* v. *United States*, 149 U. S. 698, 746–750. Cf. 84 Cong. Rec. 9534.

act was passed. This second law, which required Chinese to register and carry identification cards with them at all times, was enacted May 5, 1892. An opponent of this legislation, speaking in the Senate of the requirement that cards be carried, said: "[The Chinese covered by the Act] are here ticket-of-leave men; precisely as, under the Australian law, a convict is allowed to go at large upon a ticket-of-leave, these people are to be allowed to go at large and earn their livelihood, but they must have their tickets-of-leave in their possession. . . . This inaugurates in our system of government a new departure; one, I believe never before practised, although it was suggested in conference that some such rules had been adopted in slavery times to secure the peace of society." [30]

For many years bills have been regularly presented to every Congress providing for registration of aliens. Some of these bills proposed annual registration of aliens, issuance of identification cards containing information about and a photograph of the bearer, exhibition of the cards on demand, payment of an annual fee, and kindred requirements.[31] Opposition to these bills was based upon charges that their requirements were at war with the fundamental principles of our free government, in that they would bring about unnecessary and irritating restrictions upon personal liberties of the individual, and would subject aliens to a system of indiscriminate questioning similar to the espionage systems existing in other lands.[32]

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[30] Quoted in *Fong Yue Ting* v. *United States, supra,* 743.

[31] E. g., H. R. 9101 and H. R. 9147, 71st Cong., 2nd Session; see 72 Cong. Rec. 3886.

[32] The requirement that cards be carried and exhibited has always been regarded as one of the most objectionable features of proposed registration systems, for it is thought to be a feature that best lends itself to tyranny and intimidation. Congressman Celler, speaking in

When Congress passed the Alien Registration Act of 1940, many of the provisions which had been so severely criticized were not included.[33] The Congressional purpose, as announced by the chairman of the Senate subcommittee which drafted the final bill, was to "work . . . the new provisions into the existing [immigration and naturalization] laws, so as to make a harmonious whole." [34] That "harmonious whole" included the "Uniform Rule of Naturalization" the Constitution empow-

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1928 of the repeated defeat of registration bills and of an attempt by the Secretary of Labor to require registration of incoming aliens by executive order, said: "But here is the real vice of the situation and the core of the difficulty: 'The admitted alien,' as the order states, 'should be cautioned to present [his card] for inspection if and when subsequently requested so to do by an officer of the Immigration Service.'" 70 Cong. Rec. 190.

[33] Congressman Smith, who introduced the original of the bill that as finally adopted became the 1940 Act, said in Committee: "The drafting of the bill is . . . a codification of measures that have been offered from time to time. . . . I have tried to eliminate from the bills that have been offered on the subject those which seemed to me would cause much controversy." Hearings before Subcommittee No. 3 of the House Judiciary Committee, H. R. 5138, April 12, 1939, p. 71.

[34] Cong. Rec., June 15, 1940, p. 12620. Senator Connally made this statement in explaining why it had been found necessary to substitute a new bill for the bill originally sent to the Senate by the House. In detailing the care that had been taken in the drafting of the new measure, he said: "We regretted very much that we had to discard entirely the bill passed by the House and substitute a new bill after the enacting clause. However, we called in Mr. Murphy, of the Drafting Service, who worked with us some 2 weeks every day . . . We called on the Department of Justice, and had the Solicitor General with us. We called in the Commissioner of Immigration and Naturalization, and together we went over all the existing laws, and worked the new provisions into the existing laws, so as to make a harmonious whole." This Senate version was substantially the Act as finally adopted; the alien registration provisions are title III of a broader Act dealing with deportable offenses and advocacy of disloyalty in the armed forces.

ered the Congress to provide.[35] And as a part of that "harmonious whole," under the federal Act aliens need not carry cards, and can only be punished for wilful failure to register.[36] Further, registration records and fingerprints must be kept secret and cannot be revealed except to agencies—such as a state—upon consent of the Commissioner and the Attorney General.

We have already adverted to the conditions which make the treatment of aliens, in whatever state they may be located, a matter of national moment. And whether or not registration of aliens is of such a nature that the Constitution permits only of one uniform national system, it cannot be denied that the Congress might validly conclude that such uniformity is desirable. The legislative history of the Act indicates that Congress was trying to steer a middle path, realizing that any registration requirement was a departure from our traditional policy of not treating aliens as a thing apart, but also feeling that the Nation was in need of the type of information to

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[35] In Federalist paper No. 42, the reasons for giving this power to the federal government are thus explained: "By the laws of several States, certain descriptions of aliens, who had rendered themselves obnoxious, were laid under interdicts inconsistent not only with the rights of citizenship but with the privilege of residence. What would have been the consequence, if such persons, by residence or otherwise, had acquired the character of citizens under the laws of another State . . .? Whatever the legal consequences might have been, other consequences would probably have resulted, of too serious a nature not to be provided against. The new Constitution has accordingly, with great propriety, made provision against them, and all others proceeding from the defect of the Confederation on this head, by authorizing the general government to establish a uniform rule of naturalization throughout the United States."

[36] That the Congressional decision to punish only wilful transgressions was deliberate rather than inadvertent is conclusively demonstrated by the debates on the bill. E. g., Cong. Rec., June 15, 1940, p. 12621. And see note 37, *infra*.

be secured.[37] Having the constitutional authority so to do, it has provided a standard for alien registration in a single integrated and all-embracing system in order to obtain the information deemed to be desirable in connection with aliens. When it made this addition to its uniform naturalization and immigration laws, it plainly manifested a purpose to do so in such a way as to protect the personal liberties of law-abiding aliens through one uniform national registration system, and to leave them free from the possibility of inquisitorial practices and police surveillance that might not only affect our international relations but might also generate the very disloyalty which the law has intended guarding against. Under these circumstances, the Pennsylvania Act cannot be enforced. Accordingly, the judgment below is

Affirmed.

MR. JUSTICE STONE, dissenting:

I think the judgment below should be reversed.

Undoubtedly Congress, in the exercise of its power to legislate in aid of powers granted by the Constitution to the national government may greatly enlarge the exercise of federal authority and to an extent which need not now be defined, it may, if such is its will, thus subtract from the powers which might otherwise be exercised by

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[37] Congressman Celler, ranking member of the House Judiciary Committee which reported out the bill, said in stating his intention of voting for the 1940 Act: "Mr. Speaker, judging the temper of the Nation, I believe this compromise report is the best to be had under the circumstances and I shall vote for it . . . Furthermore, I think the conferees have done a good job because the punishment is not too great . . . There must be proof . . . that the alien willfully refuses to register . . . I drew the minority report against this bill originally, because it provided some very harsh provisions against aliens. Some of the harshness and some of the severity of the original bill have been eliminated . . . I must admit that it is the best to be had under the circumstances." Cong. Rec., June 22, 1940, pp. 13468–9.

the states. Assuming, as the Court holds, that Congress could constitutionally set up an exclusive registration system for aliens, I think it has not done so and that it is not the province of the courts to do that which Congress has failed to do.

At a time when the exercise of the federal power is being rapidly expanded through Congressional action, it is difficult to overstate the importance of safeguarding against such diminution of state power by vague inferences as to what Congress might have intended if it had considered the matter or by reference to our own conceptions of a policy which Congress has not expressed and which is not plainly to be inferred from the legislation which it has enacted. Cf. *Graves* v. *O'Keefe*, 306 U. S. 466, 479, 480, 487. The Judiciary of the United States should not assume to strike down a state law which is immediately concerned with the social order and safety of its people unless the statute plainly and palpably violates some right granted or secured to the national government by the Constitution or similarly encroaches upon the exercise of some authority delegated to the United States for the attainment of objects of national concern.

The opinion of the Court does not deny, and I see no reason to doubt that the Pennsylvania registration statute, when passed, was a lawful exercise of the constitutional power of the state. With exceptions not now material it requires aliens resident in the state, who have not declared their intention to become citizens, to register annually, to pay a registration fee of $1.00, and to carry a registration identification card. It affords to the state a convenient method of ascertaining the number and whereabouts of aliens within the state, which it is entitled to know, and a means of their identification. It is an available aid in the enforcement of a number of statutes of the state applicable to aliens whose constitu-

tional validity has not been questioned, one of which has been held by this Court not to infringe the Fourteenth Amendment. *Patsone* v. *Pennsylvania,* 232 U. S. 138.[1]

The national government has exclusive control over the admission of aliens into the United States but, after entry, an alien resident within a state, like a citizen, is subject to the police powers of the state and, in the exercise of that power, state legislatures may pass laws applicable exclusively to aliens so long as the distinction taken between aliens and citizens is not shown to be without rational basis. *Patsone* v. *Pennsylvania, supra; Terrace* v. *Thompson,* 263 U. S. 197; *Cockrill* v. *California,* 268 U. S. 258; *Ohio* v. *Deckebach,* 274 U. S. 392, 396, and cases cited. The federal government has no general police power over aliens and, so far as it can exercise any control over them, it must be in the pursuance of a power granted to it by the Constitution.

The opinion of the Court does not support its conclusion upon the ground that in the absence of federal legislation on the subject there is any want of power in the state to pass the present statute. It does not suggest, nor could it well do so, that in the absence of Congressional action the Pennsylvania statute either by its own terms or in its operation interferes with or obstructs the author-

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[1] Tit. 34 § 1311.1001, Purdon's Penn. Stat. Ann., prohibiting hunting by aliens, was sustained in the *Patsone* case, 232 U. S. 138. Cf. Tit. 30 § 240. Other Pennsylvania statutes whose validity has not been passed upon regulate the activities of aliens: Tit. 63, setting forth license requirements for the practice of certain professions and occupations, makes special requirements for aliens seeking to practice as certified public accountants (§ 1), architects (§ 22), engineers (§ 137), nurses (§ 202), physicians and surgeons (§ 406), and undertakers (§ 478c). The real property holdings of aliens are limited to 5000 acres of land or land producing net income of $20,000 or less (Title 68, §§ 28, 32). Taxes are to be deducted from the wages of aliens by their employers when the tax collector requests (Tit. 72, § 5681).

ity conferred by the Constitution on the national government over the national defense, the conduct of foreign relations, its powers over immigration and deportation of aliens or their naturalization. The existence of the national power to conduct foreign relations and negotiate treaties does not foreclose state legislation dealing exclusively with aliens as such. This Court has consistently held that treaties of the United States for the protection of resident aliens do not supersede such legislation unless they conflict with it. See *Ohio* v. *Deckebach, supra,* 395 and cases cited; *Todok* v. *Union State Bank,* 281 U. S. 449, 454 *et seq.;* cf. *Nielsen* v. *Johnson,* 279 U. S. 47. It is not contended that the Pennsylvania statute conflicts with any term of any treaty.

The question presented here is a different one from that considered in *Henderson* v. *Mayor of New York,* 92 U. S. 259, 273, where the state taxation and registration of all persons entering the United States through a port of the state was held to be a regulation of foreign commerce forbidden to the states by the Constitution, even though Congress had passed no similar legislation. The registration of aliens resident in a state is not a regulation of interstate or foreign commerce or of the entry or deportation of aliens and would seem to be no more an exercise of any power granted to the national government, or an encroachment upon it, than is a state census for local purposes an infringement of the national authority to take a national census for national purposes. It is the federal act alone which is pointed to as curtailing or withdrawing the reserved power of the state over its alien population.

Title I of the federal statute penalizes certain acts of any persons intended to interfere with, impair or influence the loyalty, morale or discipline of the military or naval forces of the United States. Title II, among other things, provides for the deportation of aliens after con-

viction and service of sentence for violations of the provisions of Title I. And the evident purpose of the registration provisions of Title III is to aid in the enforcement of the other provisions of the Act and in the prevention of subversive activities of aliens resident within the United States. It requires the registration and fingerprinting of all aliens over fourteen years of age, with exceptions not now material, who are not registered and fingerprinted upon entering the country. Registered aliens resident in the United States are required to notify the Commissioner of Immigration of any change of residence and penalties are imposed for wilful non-compliance. As construed and applied by the opinion of the Court the federal act denies to the states the practicable means of identifying their alien residents and of recording their whereabouts and it withholds from the states the benefit of the information secured under the federal act except insofar as it may be made available to them on application to the Attorney General.

It is conceded that the federal act in operation does not at any point conflict with the state statute, and it does not by its terms purport to control or restrict state authority in any particular. But the government says that Congress by passing the federal act, has "occupied the field" so as to preclude the enforcement of the state statute and that the administration of the latter might well conflict with Congressional policy to protect the civil liberty of aliens against the harassments of intrusive police surveillance.

Little aid can be derived from the vague and illusory but often repeated formula that Congress "by occupying the field" has excluded from it all state legislation. Every Act of Congress occupies some field, but we must know the boundaries of that field before we can say that it has precluded a state from the exercise of any power reserved to it by the Constitution. To discover

the boundaries we look to the federal statute itself, read in the light of its constitutional setting and its legislative history.

Federal statutes passed in aid of a granted power obviously supersede state statutes with which they conflict. *Pennsylvania R. Co.* v. *Illinois Brick Co.*, 297 U. S. 447, 459. See *Kelly* v. *Washington*, 302 U. S. 1, 10. But we are pointed to no such conflict here. In the exercise of such powers Congress also has wide scope for prohibiting state regulation of matters which Congress may, but has not undertaken to regulate itself. But no words of the statute or of any committee report, or any Congressional debate indicate that Congress intended to withdraw from the states any part of their constitutional power over aliens within their borders. We must take it that Congress was not unaware that some nineteen states have statutes or ordinances requiring some form of registration for aliens, seven of them dating from the last war. The repeal of this legislation is not to be inferred from the silence of Congress in enacting a law which at no point conflicts with the state legislation and is harmonious with it.

The exercise of the federal legislative power is certainly not more potent to curtail the exercise of state power over aliens than is the exercise of the treaty making power. Yet as we have seen no treaty has that effect unless it conflicts with a state statute. The passage of the National Pure Food & Drug Act did not preclude the states from supplementing it by like additional requirements not conflicting with those of the Congressional act. *Savage* v. *Jones*, 225 U. S. 501. The enactment of federal laws for the inspection, as a safety measure, of vessels plying navigable waters of the United States does not foreclose the states from like inspection of the hull and machinery of such vessels within the state, to insure safety and determine seaworthiness, demands

which lie outside the federal requirements. *Kelly* v. *Washington, supra.* The passage of the National Draft and the National Espionage Acts with their penalties for violation, did not preclude a state from making it a misdemeanor for any person to advocate that citizens of the state refuse to aid or assist the United States in carrying on a war. *Gilbert* v. *Minnesota,* 254 U. S. 325; cf. *Halter* v. *Nebraska,* 204 U. S. 34; see also *Reid* v. *Colorado,* 187 U. S. 137; *Carey* v. *South Dakota,* 250 U. S. 118; *Dickson* v. *Uhlmann Grain Co.,* 288 U. S. 188; *Mintz* v. *Baldwin,* 289 U. S. 346; *Maurer* v. *Hamilton,* 309 U. S. 598, 614. These are but a few of the many examples of the long established principle of constitutional interpretation that an exercise by the state of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so "direct and positive" that the two acts cannot "be fairly reconciled or consistently stand together." *Sinnot* v. *Davenport,* 22 How. 227, 243; *Kelly* v. *Washington, supra,* 10. A federal registration act designed to aid in enforcing federal statutes and to prevent subversive activities against the national government can stand consistently with a like statute applicable to residents passed in aid of state laws and as a safeguard to property and persons within the state, as readily as the federal and state laws which annually demand two separate income tax returns of the citizen.

The Fourteenth Amendment guarantees the civil liberties of aliens as well as of citizens against infringement by state action in the enactment of laws and their administration as well. Again we are pointed to nothing in the Federal Alien Registration Act or in the records of its passage through Congress to indicate that Congress thought those guarantees inadequate or that in requiring registration of all aliens it undertook to prevent the states from passing any registration measure otherwise constitutional. True, it was careful to bring the new

legislation into harmony with existing federal statutes and to avoid, so far as consistent with its purposes, any harsh or oppressive requirements, but in all this there is to be found no warrant for saying that there was a Congressional purpose to curtail the exercise of any constitutional power of the state over its alien residents or to protect the alien from state action which the Constitution prohibits and which the federal courts stand ready to prevent. See *Hague* v. *C. I. O.*, 307 U. S. 496, 518, 525 *et seq.*

Here compliance with the state law does not preclude or even interfere with compliance with the act of Congress. The enforcement of both acts involves no more inconsistency, no more inconvenience to the individual, and no more embarrassment to either government than do any of the laws, state and national, such as revenue laws, licensing laws, or police regulations, where interstate commerce is involved, which are equally applied to the citizen because he is subject, as are aliens, to a dual sovereignty.

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

RECONSTRUCTION FINANCE CORPORATION *v.* J. G. MENIHAN CORP. ET AL.

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

No. 200. Argued January 10, 1941.—Decided February 3, 1941.

1. Rule 54 (d) of the Rules of Civil Procedure providing that "costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law," is merely declaratory and effected no change of principle. P. 83.
2. The Reconstruction Finance Corporation, a government agency whose transactions are akin to those of private enterprise and

which is empowered by statute to sue and be sued, has not been endowed by Congress with governmental immunity from the costs and equitable allowances which are the natural and appropriate incidents of litigation. P. 83.

Held, that in an unsuccessful suit by the Corporation to enjoin alleged infringements of trade-marks the right to which it claims as part of property on which it has taken mortgages and assignments as security for a loan, the Corporation is liable for costs and the additional allowance made by courts of equity in such cases in accordance with sound equity practice.

111 F. 2d 940, affirmed.

CERTIORARI, 311 U. S. 625, to review the affirmance of a decree which reversed an order of the District Court denying costs and an additional allowance, 29 F. Supp. 853, in a suit to enjoin an alleged infringement of trade-marks.

Mr. Clifford J. Durr, with whom *Solicitor General Biddle* and *Mr. Hans A. Klagsbrunn* were on the brief, for petitioner.

Mr. Arthur E. Sutherland, Jr. argued the cause, and *Mr. George H. Harris* was on a brief, for respondents.

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

Petitioner, Reconstruction Finance Corporation, took mortgages and assignments of real and personal property of a corporation, including its trade-marks and trade names, as security for a loan. On a sale by the trustee in bankruptcy of the debtor, petitioner purchased the property. A new corporation undertook to use the trade-marks and petitioner sought an injunction. Decree went against petitioner. Defendants' application for costs and additional allowance was denied. 29 F. Supp. 853. This order was reversed by the Circuit Court of Appeals, 111 F. 2d 940, and we granted certiorari because of a conflict of decisions. See *Federal Deposit*

Insurance Corporation v. *Casady,* C. C. A. 10th, 106 F. 2d 784.

Rule 54 (d) of the Rules of Civil Procedure provides that "costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law." This provision was merely declaratory and effected no change of principle.

The Reconstruction Finance Corporation is a corporate agency of the government, which is its sole stockholder. 47 Stat. 5; 15 U. S. C. 601. It is managed by a board of directors appointed by the President by and with the advice and consent of the Senate. The Corporation has wide powers and conducts financial operations on a vast scale. While it acts as a governmental agency in performing its functions (see *Pittman* v. *Home Owners' Loan Corp.,* 308 U. S. 21, 32, 33), still its transactions are akin to those of private enterprises and the mere fact that it is an agency of the government does not extend to it the immunity of the sovereign. *Sloan Shipyards Corp.* v. *United States Fleet Corporation,* 258 U. S. 549, 566, 567. Congress has expressly provided that the Reconstruction Finance Corporation shall have power "to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal." There is nothing in the statutes governing its transactions which suggests any intention of Congress that in suing and being sued the Corporation should not be subject to the ordinary incident of unsuccessful litigation in being liable for the costs which might properly be awarded against a private party in a similar case.

We have had recent occasion to consider the status, in relation to suits, of a regional corporation chartered by the Reconstruction Finance Corporation and we have set forth the general principles which we think should govern in our approach to the particular question now presented. *Keifer* v. *Reconstruction Finance Corporation,* 306 U. S.

381. In the *Keifer* case we did not find it necessary to trace to its origin the doctrine of the exceptional freedom of the United States from legal responsibility, but we observed that "because the doctrine gives the government a privileged position, it has been appropriately confined." Hence, we declared that "the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work." *Id.*, p. 388. Recognizing that Congress may endow a governmental corporation with the government's immunity, we found the question to be "Has it done so?" That is, immunity in the case of a governmental agency is not presumed. We sought evidence that Congress had intended that its creature, considering the purpose and scope of its powers, should have the immunity which the sovereign itself enjoyed, and we noted the practice of Congress as an indication "of the present climate of opinion" which had brought governmental immunity from suit into disfavor. Accordingly, being unable to find that Congress had intended immunity from suit we denied it.

It was with a similar approach that we decided in *Federal Housing Administration* v. *Burr*, 309 U. S. 242, that the Federal Housing Administration was subject to be garnished under state law for moneys due to an employee. There, the Administrator under the National Housing Act was authorized "to sue and be sued in any court of competent jurisdiction, State or Federal." 49 Stat. 722. Starting from the premise indicated in the *Keifer* case that waivers by Congress of governmental immunity from suit should be liberally construed in the case of federal instrumentalities—that being in line with the current disfavor of the doctrine of governmental immunity—we concluded that in the absence of a contrary showing "it must be presumed that when Congress launched a governmental agency into the commercial

world and endowed it with authority to 'sue and be sued' that agency is not less amenable to judicial process than a private enterprise under like circumstances would be." Following that reasoning, the precise point of the decision was that the words "sue and be sued" normally embrace all civil process incident to the commencement or continuance of legal proceedings and hence embraced garnishment as part of that process.

These decisions chart our course. The Reconstruction Finance Corporation is expressly authorized to sue and be sued. It has availed itself of that authority to bring the defendants into court to answer the charge of trademark infringement. The defendants have successfully resisted the charge and the question is whether they should be denied the usual incidents of their success. We apply the principle that there is no presumption that the agent is clothed with sovereign immunity. We look as in the *Keifer* and *Burr* cases to see whether Congress has endowed petitioner with that immunity and we find no indications whatever of such an intent. We apply the farther principle that the words "sue and be sued" normally include the natural and appropriate incidents of legal proceedings. The payment of costs by the unsuccessful litigant, awarded by the court in the proper exercise of the authority it possesses in similar cases, is manifestly such an incident. The additional allowance made by courts of equity in accordance with sound equity practice is likewise such an incident. *Sprague* v. *Ticonic Bank,* 307 U. S. 161. We perceive no reason for holding that petitioner may avail itself of the judicial process in accordance with the authority conferred upon it and escape the usual incidents of that process in case its assertions of right prove to be unfounded. On the contrary, we think that the unqualified authority to sue and be sued placed petitioner upon an equal footing with private parties as to the usual inci-

dents of suits in relation to the payment of costs and allowances.

The judgment of the Circuit Court of Appeals is

Affirmed.

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

UNITED STATES *v.* GILLILAND ET AL.*

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

No. 245. Argued January 10, 1941.—Decided February 3, 1941.

1. On an appeal under the Criminal Appeals Act the Court is concerned with the construction of the criminal statute involved and not with interpretation of the indictment as a pleading. P. 89.
2. That part of § 35 of the Criminal Code, as amended by the Act of June 18, 1934, which makes it a crime knowingly and willfully to cause to be made or used any false affidavit, etc., knowing the same to contain any fraudulent statement, "in any matter within the jurisdiction of any department or agency of the United States," is not restricted to cases involving pecuniary or property loss to the United States. P. 91.
3. The language and history of the amending Act show that it was intended to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described. P. 93.
4. Section 35 of the Criminal Code, as amended by the Act of June 18, 1934, embraces verified reports falsely and fraudulently stating the amount of petroleum produced from specified wells or received from other producers, which reports were filed with a Federal Tender Board in purported compliance with executive regulations promulgated by the Secretary of the Interior, with the approval of the President, under the "Hot Oil" Act of February 22, 1935. P. 95.

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*In *United States* v. *Cohn,* 270 U. S. 339, first paragraph of headnotes, change "§ 65" to § 35.—REPORTER.

By the Act last mentioned the transportation in interstate commerce from any State of "contraband" oil produced therein—i. e., oil produced, transported or withdrawn from storage in excess of the amounts permitted under the laws and regulations of the State—was prohibited, and the President was authorized to prescribe enforcement regulations.

5. Section 35 of the Criminal Code as so applied is not invalid for indefiniteness. P. 91.
6. The rule of *ejusdem generis* gives no warrant for narrowing alternative provisions which the legislature has adopted with the purpose of affording added safeguards. P. 93.
7. The fact that the maximum penalty prescribed by § 35 of the Criminal Code was greater than that fixed by the Act of February 22, 1935, for violations of its provisions, is of no significance in the construction and application of the former. P. 95.
8. The Act of February 22, 1935, *supra*, did not operate to supplant § 35 of the Criminal Code in its application to affidavits, documents, etc., relative to the subject of excluding "hot oil" from interstate commerce. P. 95.

35 F. Supp. 181, reversed.

APPEAL, under the Criminal Appeals Act, from a judgment sustaining a demurrer and quashing ten counts of an indictment.

Mr. Herbert Wechsler, with whom *Solicitor General Biddle, Assistant Attorney General Rogge,* and *Messrs. Ben F. Foster, George F. Kneip,* and *Fred E. Strine* were on the brief, for the United States.

Mr. F. W. Fischer for appellees.

The general terms in the second clause relate to the things that are enumerated in the context of the Act. This clause gathers up the things that are of the same class as those that are enumerated. *Salas* v. *United States,* 234 F. 842; *United States* v. *Bowman,* 260 U. S. 92; *United States* v. *Walter,* 263 U. S. 15; *Mobile Trade Co.* v. *Lott,* 12 Wall. 221; *Greenleaf* v. *Goodrich,* 101 U. S. 278; *Sewing Machine Cos.* case, 18 Wall. 553; *United*

States v. *Keitel,* 211 U. S. 370; *United States* v. *Salen,* 235 U. S. 236.

The second clause should not be lifted out of the statute and be made to stand alone. This would create a multitude of new offenses that are entirely dissociated and distinct from the offenses enumerated in the Act. So treated, it would not be valid as a penal statute. *United States* v. *Wiltberger,* 5 Wheat. 76; *United States* v. *Brewer,* 139 U. S. 278; *United States* v. *Resnick,* 299 U. S. 207; *Connally* v. *General Construction Co.,* 269 U. S. 385.

Assuming that by the 1934 amendment Congress intended to prohibit the presentation and use of false papers in connection with the shipment of "hot" oil, that part of the Act was repealed by implication when Congress later enacted what is known as the Connally Act, § 715, Tit. 15, U. S. C., which is a self-sustained and organic whole, covering in detail the entire subject of the shipment of "hot" or excessively produced oil in interstate commerce. See *Panama Refining Co.* v. *Ryan,* 293 U. S. 388; *United States* v. *Powers,* 307 U. S. 214; *United States* v. *Yuginovich,* 256 U. S. 450.

The Connally Act is clearly inconsistent with the Act under which the indictment is brought. *United States* v. *Windham,* 264 F. 376; *State* v. *Tate,* 171 So. 108. Many other decisions from other jurisdictions are to the same effect.

Otherwise, we have the same offense created and punished by two distinct enactments; and at the election of the prosecuting officer the offender may receive as punishment not more than six months in jail and two thousand dollars fine, or ten years in the penitentiary and ten thousand dollars fine. As to which, see *United States* v. *Stever,* 222 U. S. 157.

In the charge of having violated the second clause of § 35, an intent to accomplish a purpose that this clause

contemplates and prohibits is an ingredient of the offense and should be averred in the indictment.

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

The District Court sustained a demurrer to ten counts of an indictment and the Government appeals. 18 U. S. C. 682.

There were eleven counts in the indictment, the first of which, a conspiracy count, the District Court found good. The other counts now before us were based on § 35 of the Criminal Code. 18 U. S. C. 80.[1] Eight of these counts charged in substance that defendants had willfully caused to be made and used verified reports falsely and fraudulently stating the amount of petroleum produced from certain oil wells, and the other two counts made a similar charge with respect to verified reports as to the amount of petroleum received from certain producers.

The District Court held that these substantive counts did not state an offense under § 35 of the Criminal Code as amended by the Act of June 18, 1934. 48 Stat. 996. The court plainly rested its decision upon its construction of the statute and hence direct appeal to this Court is properly brought. We are concerned only with the correctness of this construction and not with the mere interpretation of the indictment as a pleading. *United States* v. *Patten,* 226 U. S. 525, 535; *United States* v. *Birdsall,* 233 U. S. 223, 230; *United States* v. *Kapp,* 302 U. S. 214, 217; *United States* v. *Borden Co.,* 308 U. S. 188, 195.

Section 35, as amended, makes it a crime knowingly and willfully to "make or cause to be made any false or fraudulent statements or representations," or to "make or use or cause to be made or used any false bill, receipt,

[1] See Act of April 4, 1938, c. 69, 52 Stat. 197.

voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, in any matter within the jurisdiction of any department or agency of the United States." The reports containing the alleged false and fraudulent statements in this instance were charged to have related "to a matter within the jurisdiction of the Department of the Interior, the Secretary of the Interior, and the Federal Tender Board No. 1, Kilgore, Texas."

By the Act of February 22, 1935, 49 Stat. 30, 31,[2] the so-called "Hot Oil" Act, the transportation in interstate commerce from any State of "contraband oil" produced therein was prohibited, such oil being that "produced, transported, or withdrawn from storage" in excess of the amounts permitted under the laws of the State or regulations duly made by its agencies. The President was authorized to prescribe regulations for the enforcement of the Act, including the requirement of "reports, maps, affidavits, and other documents relating to the production, storage, refining, processing, transporting, or handling of petroleum and petroleum products." Under this authority the President designated the Secretary of the Interior as his agent, and the latter promulgated regulations which the President approved. There was thus set up Federal Tender Board No. 1, to be located at Kilgore, Texas, for the East Texas Field and monthly reports on forms approved by the Secretary were required to be filed with the Board.[3]

If the provision of § 35, under which the indictment is laid, be construed according to its literal and natural import, it is manifest that the statute covers the offenses

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[2] 15 U. S. C. 715–715d.

[3] Executive Orders No. 6979, issued February 28, 1935; No. 6980–B, Regulation XIV, approved March 1, 1935; No. 6980–C, approved March 1, 1935.

charged in the substantive counts. The affidavits and reports, as described in the indictment, containing statements alleged to be false and fraudulent, were made and used in a matter within the jurisdiction of a department and agency of the United States. Nor can the statute be deemed to be invalid because of indefiniteness. The affidavits and reports required had been sufficiently described and the duty enjoined had been adequately defined. Any one presenting the required affidavits and reports to the Board set up under the pertinent regulations was suitably charged with notice of the consequence of knowingly and willfully including therein any false and fraudulent statements.

Defendant's contention, which the District Court sustained, is that the broad language of the statutory provision here involved should be restricted by construction so as to apply only to matters of a nature similar to those with which other provisions of § 35 deal, "such as claims against, rights to, or controversies about funds involved in 'operations of the Government,' " that is, to matters in which the Government has some financial or proprietary interest. This contention is sought to be supported by the doctrine of *ejusdem generis* and the construction given to § 35 prior to the amendment of 1934, and by reference to the incongruity of the penalty prescribed for violation of § 35 as contrasted with the penalty prescribed by the Act of February 22, 1935, to the enforcement of which the requirements in question were directed. Defendant also presents the contention, upon which the District Court did not pass, that the Act of February 22, 1935, was intended to cover the entire subject of the exclusion of "hot oil" from interstate commerce and consequently operated as a repeal of all other provisions dealing with that matter.

Before the amendment of 1934, § 35, after referring to the presentation of claims against the government which were known to be false or fraudulent, provided:

"or whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry; . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both." [4]

Distinguishing that provision from § 37, the conspiracy section of the Criminal Code which by its terms extended broadly to every conspiracy "to defraud the United States in any manner or for any purpose," [5] this Court held that § 35 which used the word "defrauding" in connection with "cheating and swindling" should be construed "as relating to the fraudulent causing of pecuniary or property loss" to the Government. And that meaning was deemed to be emphasized by the context found in other provisions of § 35. *United States* v. *Cohn,* 270 U. S. 339, 346, 347.

The Act of June 18, 1934,[6] amended § 35 so that in place of the portion quoted above there were substituted these words:

"or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or

[4] 40 Stat. 1015.

[5] See *Haas* v. *Henkel,* 216 U. S. 462, 479; *Hammerschmidt* v. *United States,* 265 U. S. 182, 188.

[6] 48 Stat. 996.

fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder; . . . shall be fined" etc.

The amendment eliminated the words "cheating and swindling" and broadened the provision so as to leave no adequate basis for the limited construction which had previously obtained. The statute was made to embrace false and fraudulent statements or representations where these were knowingly and willfully used in documents or affidavits "in any matter within the jurisdiction of any department or agency of the United States." In this, there was no restriction to cases involving pecuniary or property loss to the government. The amendment indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described. We see no reason why this apparent intention should be frustrated by construction.

The rule of *ejusdem generis* is a familiar and useful one in interpreting words by the association in which they are found, but it gives no warrant for narrowing alternative provisions which the legislature has adopted with the purpose of affording added safeguards. "The rule of '*ejusdem generis*' is applied as an aid in ascertaining the intention of the legislature, not to subvert it when ascertained." *Texas* v. *United States*, 292 U. S. 522, 534.

If the language of the amended section could be deemed ambiguous, the legislative history of the amendment would dispel any doubt as to the congressional purpose. Legislation had been sought by the Secretary

of the Interior to aid the enforcement of laws relating to the functions of the Department of the Interior and, in particular, to the enforcement of regulations under § 9 (c) of the National Industrial Recovery Act of 1933 [7] with respect to the transportation of "hot oil." The Secretary's effort was due, as he stated, to the lack of a law under which prosecutions might be had "for the presentation of false papers." [8] The bill which was passed by Congress, however, was amended in its final stages so as to require "intent to defraud the United States." [9] This bill was returned by the President without his approval for the reason that the offense as defined was covered by existing law which provided for more severe punishment than that proposed by the bill.[10] Another measure was then proposed by the Secretary of the Interior which would obviate these objections and accomplish the purpose of reaching the presentation of false papers in relation to "hot oil." A bill was then passed and approved which included, with other amendments of § 35 the provision now before us, omitting the limiting words which had been deemed to make the former provision applicable only to cases where pecuniary or property loss to the government had been caused.[11] The report of the Judiciary Committee of the Senate stated that the amendment in question had been proposed by the Department of the Interior with the purpose "of reaching a large number of cases involving the shipment of 'hot'

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[7] 48 Stat. 195, 200.

[8] See letter of the Secretary of the Interior to the Chairman of the Judiciary Committee of the Senate dated February 7, 1934. S. Rep. No. 288, 73d Cong., 2d sess.; 78 Cong. Rec., Pt. 3, p. 2859. See, also, H. Rep. No. 829, 73d Cong., 2d sess.

[9] 78 Cong. Rec., Pt. 4, pp. 3724, 3725; Pt. 6, p. 5746.

[10] 78 Cong. Rec., Pt. 6, p. 6778.

[11] 78 Cong. Rec., Pt. 10, pp. 11270, 11271; Pt. 11, p. 11513. Act of June 18, 1934, 48 Stat. 996.

oil, where false papers are presented in connection therewith." [12]

The fact that the Secretary of the Interior was then seeking aid in the enforcement of § 9 (c) of the National Industrial Recovery Act, which this Court later found to be invalid (*Panama Refining Co.* v. *Ryan,* 293 U. S. 388), in no way affects the present application of the statute. Its provisions were not limited to the enforcement of § 9 (c) of the National Industrial Recovery Act but were enacted with appropriate breadth so that they at once applied to the presentation of affidavits, reports, etc., required by the subsequent Act of February 22, 1935, and the regulations duly prescribed thereunder. In the light of the text of the Act of 1934, amending § 35, and its legislative history, it is also clear that the fact that the penalty prescribed by § 35 was greater than that fixed by the Act of February 22, 1935, has no significance in connection with the construction and application of the former. The matter of penalties lay within the discretion of Congress. Section 35 covered a variety of offenses and the penalties prescribed were maximum penalties which gave a range for judicial sentences according to the circumstances and gravity of particular violations.

Similarly lacking in merit is the contention that the Act of February 22, 1935, operated to repeal § 35 as amended in 1934, so far as the latter applied to affidavits, documents, etc., presented in relation to "hot oil." There was no express repeal and there was no repugnancy in the subject matter of the two statutes which would justify an implication of repeal. The Act of 1934, with its provision as to false and fraudulent papers, has its place as a fitting complement to the Act of 1935 as well as to other statutes under which, in connection with the au-

[12] S. Rep. No. 1202, 73d Cong., 2d sess.

thorized action of governmental departments or agencies, the presentation of affidavits, documents, etc., is required. There is no indication of an intent to make the Act of 1935 a substitute for any part of the provision in § 35. See *Posadas* v. *National City Bank,* 296 U. S. 497, 503, 504; *United States* v. *Borden Company,* 308 U. S. 188, 198, 199.

The judgment sustaining the demurrer to counts 2 to 11, inclusive, is reversed and the cause is remanded to the District Court for further proceedings in conformity with this opinion.

Reversed.

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

RAWLINGS, RECEIVER, *v.* RAY.

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

No. 327. Argued January 17, 1941.—Decided February 3, 1941.

1. The state statute of limitations applies in an action by the receiver of an insolvent national bank against a stockholder to collect a Comptroller's assessment. P. 97.
2. In such an action the question when the cause of action accrued, as a complete and present cause of action, is a federal question turning upon the construction of the assessment and the authority of the Comptroller to make it under applicable federal legislation. P. 98.
3. In making a stockholders' assessment, the Comptroller is authorized to fix a later date for its payment. P. 99.
4. In an action by the receiver of an insolvent national bank in Arkansas to collect a Comptroller's assessment, *held* that the three years statute of limitations of Arkansas began to run not on the day when the assessment was made but on a later day on or before which it was expressly made payable. P. 98.

111 F. 2d 695, reversed.

CERTIORARI, 311 U. S. 627, to review the affirmance of a judgment sustaining a plea of the statute of limitations in a suit by the receiver of a national bank to collect an assessment from a stockholder.

Mr. George P. Barse, with whom *Mr. Lee Roy Stover* and *Miss Harriet Buckingham* were on the brief, for petitioner.

Mr. Earl King submitted for respondent.

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

Petitioner is the receiver of the Lee County National Bank of Marianna, Arkansas, which in 1933 was declared by the Comptroller of the Currency to be insolvent. On November 6, 1935, the Comptroller assessed its shareholders fifty per centum of the par value of their shares. The assessment was required to be paid on or before December 13, 1935, and the receiver gave notice accordingly. As respondent failed to pay, the receiver brought suit on December 7, 1938, in the District Court of the United States for the Eastern District of Arkansas to recover the amount assessed. Respondent pleaded the Arkansas statute of limitations which provides that such an action must be commenced "within three years after the cause of action shall accrue." Pope's Digest of Statutes of Arkansas (1937), § 8928. The District Court sustained the plea and its judgment was affirmed by the Circuit Court of Appeals. 111 F. 2d 695. Because of a conflict of decisions we granted certiorari. See *Strasburger* v. *Schram,* Ct. App. D. C., 93 F. 2d 246; *Reich* v. *Van Dyke,* C. C. A. 3d, 107 F. 2d 682; *Haight* v. *First Trust & Deposit Co.,* C. C. A. 2d, 112 F. 2d 572; *MacPherson* v. *Schram,* C. C. A. 5th, 112 F. 2d 674.

The state statute of limitations is applicable. *McDonald* v. *Thompson,* 184 U. S. 71, 72; *McClaine* v.

Rankin, 197 U. S. 154, 158. The question is whether the statute began to run on the date of the assessment, as held by the court below, or on the date fixed for payment. The words "after the cause of action shall accrue" in the Arkansas statute have their usual meaning and refer to "a complete and present cause of action." *Holloway* v. *Morris,* 182 Ark. 1096, 1099; 34 S. W. 2d 750, 752.

The question as to the time when there was a complete and present cause of action so that the receiver could enforce by suit the liability imposed by the Comptroller's assessment is a federal question and turns upon the construction of the assessment and the authority of the Comptroller to make it under the applicable federal legislation.

While the assessment was made on November 6, 1935, it was expressly made payable on or before December 13, 1935. Respondent was allowed until that date to pay and prior thereto suit could not be maintained against him. Hence the statute of limitations did not begin to run until December 13, 1935, and the suit was in time.

The case of *Pufahl* v. *Estate of Parks,* 299 U. S. 217 (upon which the court below relied) is not to the contrary. The question now presented was not there involved. In that case, after the death of a stockholder of a national bank, and after the expiration of one year from the date of letters testamentary, the Comptroller of the Currency made an assessment upon the decedent's estate. The state court, applying a state statute, had disallowed the receiver's claim upon the assessment as against undistributed assets in the hands of the executors, which had been inventoried within a year from the date of letters testamentary, because the claim did not accrue and was not presented to the probate court within that period, but allowed the claim as to assets not inventoried within the year. We affirmed the judgment. We said that where an assessment had been made in the de-

cedent's lifetime an accrued and provable debt existed against his estate, and that if the assessment were made after his death a claim against the funds and assets of the estate accrued as of the date of the assessment. Further, that the claim of the receiver, although based upon a federal statute, could be enforced only in conformity with the law of the forum governing the recovery of debts of like nature (*Id.*, pp. 224, 225) and that the non-discriminatory legislation of Illinois where the suit was brought was controlling. We observed that the contingent obligation of a stockholder to pay an assessment was rendered absolute by the Comptroller's action in ordering one and that from the moment of the order of assessment the receiver had a claim which would support an action at common law against a living stockholder or the executor of a deceased stockholder; that if the assessment were made after the estate had been distributed, the receiver could recover from the distributees or heirs if and up to the extent they were liable under the applicable local law. *Id.*, pp. 222, 223.

In all this we were not considering or deciding the question of the application of a statute of limitations to a suit against a stockholder upon an assessment made by the Comptroller where payment was not required before a specified date, prior to which no suit could be maintained.

We find no ground for questioning the authority of the Comptroller in making an assessment to fix a later date for its payment. The federal legislation does not impose or suggest any such limitation upon the exercise of his power. 12 U. S. C. 63, 64, 191, 192. What was done in the instant case appears to be in accord with a practice of long standing.

The judgment of the Circuit Court of Appeals is reversed and the cause is remanded to the District Court for further proceedings in conformity with this opinion.

Reversed.

UNITED STATES *v.* DARBY.

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

No. 82. Argued December 19, 20, 1940.—Decided February 3, 1941.

1. The Fair Labor Standards Act of 1938 provides for fixing minimum wages and maximum hours for employees engaged in the production of goods for interstate commerce, with increased compensation for overtime, and forbids, under pain of fine and imprisonment: (1) violation by an employer of such wage and hour provisions; (2) shipment by him in interstate commerce of any goods in the production of which any employee was employed in violation of such provisions; and (3) failure of the employer to keep such records of his employees and of their wages and hours, as shall be prescribed by administrative regulation or order. *Held* within the commerce power and consistent with the Fifth and Tenth Amendments. P. 111.
2. While manufacture is not of itself interstate commerce, the shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is a regulation of interstate commerce. P. 113.
3. Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from it articles whose use in the State for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the State has not sought to regulate their use. P. 114.
4. Such regulation is not a forbidden invasion of state power merely because either its motive or its consequence is to restrict the use of articles of commerce within the States of destination; and is valid unless prohibited by other Constitutional provisions. P. 114.
5. The motive and purpose of the present regulation are plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the States from and to which it flows. P. 115.
6. The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control. P. 115.

7. In prohibiting interstate shipment of goods produced under the forbidden substandard labor conditions the Act is within the authority of Congress, if no Constitutional provision forbids. P. 115.
8. *Hammer* v. *Dagenhart,* 247 U. S. 251, overruled; *Carter* v. *Carter Coal Co.,* 298 U. S. 238, declared to have been limited. Pp. 115, 123.
9. The "production for interstate commerce" intended by the Act includes, at least, production of goods, which, at the time of production, the employer, according to the normal course of his business, intends or expects to move in interstate commerce although, through the exigencies of the business, all of the goods may not thereafter actually enter interstate commerce. P. 117.
10. The power of Congress over interstate commerce extends to those intrastate activities which so affect interstate commerce or the exercise of the power of Congress over it as to make their regulation an appropriate means to the attainment of a legitimate end,—the exercise of the granted power of Congress to regulate interstate commerce. P. 118.
11. Congress, having by the present Act adopted the policy of excluding from interstate commerce all goods produced for that commerce which do not conform to the specified labor standards, it may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities. P. 121.
12. Independently of the prohibition of shipment or transportation of the proscribed goods, the provision of the Act for the suppression of their production for interstate commerce is within the commerce power. P. 122.
13. The Tenth Amendment is not a limitation upon the authority of the National Government to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end. P. 123.
14. The requirements of the Act as to the keeping of records are valid as incidental to the wage and hour requirements. P. 124.
15. The wage and hour provisions of the Act do not violate the due process clause of the Fifth Amendment. P. 125.
16. In its criminal aspect, the Act is sufficiently definite to meet constitutional demands. P. 125.

32 F. Supp. 734, reversed.

APPEAL, under the Criminal Appeals Act, from a judgment quashing an indictment.

Solicitor General Biddle, with whom *Assistant Attorney General Arnold* and *Messrs. Robert L. Stern, Hugh B. Cox, Warner W. Gardner, J. Saxton Daniel, Gerard D. Reilly,* and *Irving J. Levy* were on the brief, for the United States.

No State, acting alone, could require labor standards substantially higher than those obtaining in other States whose producers and manufacturers competed in the interstate market. Employers with lower labor standards possess an unfair advantage in interstate competition, and only the national government can deal with the problem.

The congressional committees made specific findings which were embodied in the Act as the congressional judgment that low labor standards were detrimental to the health and efficiency of workers, caused the channels of interstate commerce to spread those labor conditions among the States, burdened interstate commerce, led to labor disputes obstructing that commerce, and constituted an unfair method of competition. These findings accord with facts of which this Court has already taken judicial notice, and are conclusive.

The incapacity of the individual States to remedy the serious evils resulting from long hours and low wages in interstate industry rests in part upon the commerce clause itself, which prevents the States from forbidding importation of goods produced under substandard conditions. *Baldwin* v. *Seelig,* 294 U. S. 511. And, even if a State could constitutionally protect its industries within its own borders, it could not safeguard them against the loss of their markets in other States. The commerce clause was designed to empower the national government to deal with such problems.

The phrase "interstate commerce" had at the time of the adoption of the Constitution a meaning equivalent to "the interrelated business transactions of the several

States." Lexicographers, economists, and authors used the term "commerce" to refer not only to the narrow concept of sale or exchange, but to include the entire moneyed economy, embracing production and manufacture as well as exchange.

The decisions of this Court, from the beginning, have recognized that the commerce clause gives Congress power to meet the economic problems of the Nation, whatever they may be. *Gibbons* v. *Ogden,* 9 Wheat. 1, 194–195. See also *Minnesota Rate Cases,* 230 U. S. 352, 398. Labor conditions, so far from being the concern of the individual States alone, can now adequately be regulated only by Congress. The commerce clause, in incapacitating the States, gives the requisite power to Congress.

Section 15 (a) (1) forbids the interstate shipment of goods produced under substandard labor conditions. The provision is on its face a regulation of interstate commerce, and therefore within the powers of Congress. *Mulford* v. *Smith,* 307 U. S. 38; *Electric Bond & Share Co.* v. *Commission,* 303 U. S. 419, 442; *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.,* 299 U. S. 334, 347.

It can no longer be asserted that the power of Congress to restrict or condition interstate commerce is limited to articles in themselves harmful or deleterious.

The suggestion that Congress cannot regulate interstate commerce for ends which do not concern commerce itself is also unavailing. The Act, intended to prevent unfair competition and the spread of harmful conditions in interstate commerce, has a goal which is commercial in the strictest sense. But, even if it were concerned simply with humanitarian ends, it would none the less be within the commerce power. That power is measured by what it regulates, not by what it affects.

Hammer v. *Dagenhart,* 247 U. S. 251, has been repudiated by subsequent decisions of this Court.

Section 15 (a) (2) is an appropriate means by which to keep the interstate channels free of goods produced under substandard conditions. Intrastate acts lie within the power of Congress when necessary effectively to control interstate transactions, and Congress need not wait until transportation commences in its effort to protect the flow of commerce. *Shreveport Case,* 234 U. S. 342.

Even if § 15 (a) (2) were entirely independent of § 15 (a) (1), it would constitute a valid control over unfair competition in interstate commerce.

The *Labor Board Cases* are controlling because Congress has found that § 15 (a) (2) will diminish the obstructions to interstate commerce which flow from labor disputes.

The *Schechter* case, 295 U. S. 495, applied only to local activities after interstate commerce had ended. The *Carter Coal* case, 298 U. S. 238, is wholly inconsistent with the subsequent decisions of this Court, in particular *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board,* 303 U. S. 453, and should now be overruled.

Sections 11 (c) and 15 (a) (5), requiring employers to keep records and forbidding them to make false reports, are ancillary to the regulatory sections of the Act.

The Tenth Amendment merely reserves to the States "the powers not delegated to the United States." That it is not a limitation upon the exercise of the powers which are delegated to the Federal Government is confirmed by the history of its adoption.

From *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 325, to *Wright* v. *Union Central Life Ins. Co.,* 304 U. S. 502, 516, the Court has repeatedly recognized that the Tenth Amendment adds nothing to the Constitution. A few of the relatively recent decisions of this Court suggesting a contrary view cannot be taken to have overruled *sub silentio* so important a constitutional doctrine.

The Act does not violate the Fifth Amendment.

Mr. Archibald B. Lovett for appellee.

The Act attempts to regulate conditions in the production of goods, and can not be sustained as a power delegated to Congress to regulate interstate commerce. The origin of the commerce clause, the nature of our constitutional system, and the course of judicial decisions prevent.

A prohibition of shipment in interstate commerce is not necessarily within the congressional power. *United States* v. *Butler,* 297 U. S. 1; *Hammer* v. *Dagenhart,* 247 U. S. 251; *Labor Board Cases,* 301 U. S. 1, *et seq.; Bailey* v. *Drexel Furniture Co.,* 259 U. S. 20.

Nor is the imposition of conditions upon shipment in interstate commerce necessarily valid regulation. The subjects upon which the conditions react must be examined to determine whether the requisite relation to the needs of interstate commerce exists. If prohibition *per se* be valid, Congress could deny the channels of interstate commerce to commodities produced with labor of a certain creed or color.

A clear distinction exists between the power of Congress to prohibit interstate shipments of harmful and deleterious goods and its power to regulate shipments of useful commodities. Prohibition of shipments of harmful commodities does not infringe upon, but supplements, the powers of the other governmental units which might be affected; whereas, in the case of useful and harmless commodities the separate interests are unequally affected.

Mere similarity of commercial problems which are common to all of the States does not mean that Congress may legislate with respect to such problems. The concentration of population in urban areas and the increasing use of motor vehicles have created serious traffic problems in all of the States of the Union. But the cumulative effect of these conditions upon commerce

among the States and their prevalence throughout the country would not validate uniform regulation of traffic by Congress.

The Congressional power over intrastate commerce is limited to the regulation of intrastate activities which directly affect interstate commerce. *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, 548; *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 308.

Conditions in production like those involved here have always been held to affect interstate commerce only indirectly. Their control is therefore subject solely to the reserved powers of the States.

The proposition that every conceivable legislative power is conferred by § 8 of Article I of the Constitution is in direct conflict with the doctrine that the Federal Government is a government of enumerated powers. Moreover, there is no need for a finding that legislative power over every matter of concern to the people of the States and of the Nation is lodged in either the State or Federal Governments, individually or collectively, since the Tenth Amendment expressly stipulates that certain powers are reserved to the people. *Kansas* v. *Colorado,* 206 U. S. 46, 89–91.

Administrative expediency can not justify regulation of intrastate matters where the result is to obscure completely the boundaries of national and state power. *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, 507–508; *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 246, 292, *et seq.*

The doctrine which permits the regulation of intrastate transactions which are so commingled with interstate transactions that all must be regulated if the latter are to be effectively controlled, is inapplicable.

Although not required to stay its hand until actual movement in interstate commerce begins, Congress may extend its power only to those transactions occurring be-

fore the commencement of interstate movement whose relationship to interstate commerce is sufficiently close and substantial to justify congressional action.

Failure to conform to the statutory standard of minimum wages and maximum hours in such manufacturing establishments as appellee's does not in such a manner affect interstate commerce, nor constitute such an unfair method of competition, as to be subject to the regulatory power of Congress.

The Government's argument is an indirect attack upon the dual system of government established by the Constitution. *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, 549.

The Government would solve the problem of the division of governmental powers by rendering the Federal Government dominant in all commercial and economic matters.

The power to control the conditions of production in the manner attempted by the Act is the power to impose the standard of living of one section of the country upon another, to discriminate against the industries of one section and in favor of those of another, and to equalize economic conditions by eliminating the economic advantages of more fortunate localities. If Congress may eliminate differentials in labor conditions, it may likewise eliminate other economic differentials which affect conditions in interstate commerce. *Kidd* v. *Pearson,* 128 U. S. 1, 21–22.

Cases cited under the Federal Trade Commission Act and under the Sherman Act are inapplicable. In those decisions the condemned practices tended to restrict competition in interstate commerce.

The fact that individual States can not adequately protect the markets which lie outside their borders for the orderly sale of their products does not vest in the national government unqualified power to regulate competition in those interstate markets.

Failure to conform to the statutory standard of minimum wages and maximum hours in such manufacturing establishments as appellee's does not lead to labor disputes which burden and obstruct commerce, nor interfere with the orderly and fair marketing of goods in commerce.

The Act deprives appellee of liberty and property without due process of law, and of the freedom of contract guaranteed by the Fifth Amendment. It is arbitrary and capricious; and is indefinite as to what persons are subject to its penal provisions.

MR. JUSTICE STONE delivered the opinion of the Court.

The two principal questions raised by the record in this case are, *first,* whether Congress has constitutional power to prohibit the shipment in interstate commerce of lumber manufactured by employees whose wages are less than a prescribed minimum or whose weekly hours of labor at that wage are greater than a prescribed maximum, and, *second,* whether it has power to prohibit the employment of workmen in the production of goods "for interstate commerce" at other than prescribed wages and hours. A subsidiary question is whether in connection with such prohibitions Congress can require the employer subject to them to keep records showing the hours worked each day and week by each of his employees including those engaged "in the production and manufacture of goods to-wit, lumber, for 'interstate commerce.'"

Appellee demurred to an indictment found in the district court for southern Georgia charging him with violation of § 15 (a) (1) (2) and (5) of the Fair Labor Standards Act of 1938; 52 Stat. 1060, 29 U. S. C. § 201, *et seq.* The district court sustained the demurrer and quashed the indictment and the case comes here on direct appeal under § 238 of the Judicial Code as amended, 28

U. S. C. § 345, and § 682, Title 18 U. S. C., 34 Stat. 1246, which authorizes an appeal to this Court when the judgment sustaining the demurrer "is based upon the invalidity or construction of the statute upon which the indictment is founded."

The Fair Labor Standards Act set up a comprehensive legislative scheme for preventing the shipment in interstate commerce of certain products and commodities produced in the United States under labor conditions as respects wages and hours which fail to conform to standards set up by the Act. Its purpose, as we judicially know from the declaration of policy in § 2 (a) of the Act,[1] and the reports of Congressional committees proposing the legislation, S. Rept. No. 884, 75th Cong. 1st Sess.; H. Rept. No. 1452, 75th Cong. 1st Sess.; H. Rept. No. 2182, 75th Cong. 3d Sess., Conference Report, H. Rept. No. 2738, 75th Cong. 3d Sess., is to exclude from interstate commerce goods produced for the commerce and to prevent their production for interstate commerce, under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being; and to prevent the use of interstate

[1] Sec. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

Section 3 (b) defines "commerce" as "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof."

commerce as the means of competition in the distribution of goods so produced, and as the means of spreading and perpetuating such substandard labor conditions among the workers of the several states. The Act also sets up an administrative procedure whereby those standards may from time to time be modified generally as to industries subject to the Act or within an industry in accordance with specified standards, by an administrator acting in collaboration with "Industry Committees" appointed by him.

Section 15 of the statute prohibits certain specified acts and § 16 (a) punishes willful violation of it by a fine of not more than $10,000 and punishes each conviction after the first by imprisonment of not more than six months or by the specified fine or both. Section 15 (1) makes unlawful the shipment in interstate commerce of any goods "in the production of which any employee was employed in violation of section 6 or section 7," which provide, among other things, that during the first year of operation of the Act a minimum wage of 25 cents per hour shall be paid to employees "engaged in [interstate] commerce or the production of goods for [interstate] commerce," § 6, and that the maximum hours of employment for employees "engaged in commerce or the production of goods for commerce" without increased compensation for overtime, shall be forty-four hours a week. § 7.

Section 15 (a) (2) makes it unlawful to violate the provisions of §§ 6 and 7 including the minimum wage and maximum hour requirements just mentioned for employees engaged in production of goods for commerce. Section 15 (a) (5) makes it unlawful for an employer subject to the Act to violate § 11 (c) which requires him to keep such records of the persons employed by him and of their wages and hours of employment as the administrator shall prescribe by regulation or order.

The indictment charges that appellee is engaged, in the State of Georgia, in the business of acquiring raw materials, which he manufactures into finished lumber with the intent, when manufactured, to ship it in interstate commerce to customers outside the state, and that he does in fact so ship a large part of the lumber so produced. There are numerous counts charging appellee with the shipment in interstate commerce from Georgia to points outside the state of lumber in the production of which, for interstate commerce, appellee has employed workmen at less than the prescribed minimum wage or more than the prescribed maximum hours without payment to them of any wage for overtime. Other counts charge the employment by appellee of workmen in the production of lumber for interstate commerce at wages at less than 25 cents an hour or for more than the maximum hours per week without payment to them of the prescribed overtime wage. Still another count charges appellee with failure to keep records showing the hours worked each day a week by each of his employees as required by § 11 (c) and the regulation of the administrator, Title 29, Ch. 5, Code of Federal Regulations, Part 516, and also that appellee unlawfully failed to keep such records of employees engaged "in the production and manufacture of goods, to-wit lumber, for interstate commerce."

The demurrer, so far as now relevant to the appeal, challenged the validity of the Fair Labor Standards Act under the Commerce Clause and the Fifth and Tenth Amendments. The district court quashed the indictment in its entirety upon the broad grounds that the Act, which it interpreted as a regulation of manufacture within the states, is unconstitutional. It declared that manufacture is not interstate commerce and that the regulation by the Fair Labor Standards Act of wages and hours of employment of those engaged in the manufac-

ture of goods which it is intended at the time of production "may or will be" after production "sold in interstate commerce in part or in whole" is not within the congressional power to regulate interstate commerce.

The effect of the court's decision and judgment is thus to deny the power of Congress to prohibit shipment in interstate commerce of lumber produced for interstate commerce under the proscribed substandard labor conditions of wages and hours, its power to penalize the employer for his failure to conform to the wage and hour provisions in the case of employees engaged in the production of lumber which he intends thereafter to ship in interstate commerce in part or in whole according to the normal course of his business and its power to compel him to keep records of hours of employment as required by the statute and the regulations of the administrator.

The case comes here on assignments by the Government that the district court erred insofar as it held that Congress was without constitutional power to penalize the acts set forth in the indictment, and appellee seeks to sustain the decision below on the grounds that the prohibition by Congress of those Acts is unauthorized by the Commerce Clause and is prohibited by the Fifth Amendment. The appeal statute limits our jurisdiction on this appeal to a review of the determination of the district court so far only as it is based on the validity or construction of the statute. *United States* v. *Borden Co.*, 308 U. S. 188, 193–195, and cases cited. Hence we accept the district court's interpretation of the indictment and confine our decision to the validity and construction of the statute.

The prohibition of shipment of the proscribed goods in interstate commerce. Section 15 (a) (1) prohibits, and the indictment charges, the shipment in interstate commerce, of goods produced for interstate commerce by employees whose wages and hours of employment do not

conform to the requirements of the Act. Since this section is not violated unless the commodity shipped has been produced under labor conditions prohibited by § 6 and § 7, the only question arising under the commerce clause with respect to such shipments is whether Congress has the constitutional power to prohibit them.

While manufacture is not of itself interstate commerce, the shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce. The power to regulate commerce is the power "to prescribe the rule by which commerce is governed." *Gibbons* v. *Ogden,* 9 Wheat. 1, 196. It extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it. *Reid* v. *Colorado,* 187 U. S. 137; *Lottery Case,* 188 U. S. 321; *United States* v. *Delaware & Hudson Co.,* 213 U. S. 366; *Hoke* v. *United States,* 227 U. S. 308; *Clark Distilling Co.* v. *Western Maryland Ry. Co.,* 242 U. S. 311; *United States* v. *Hill,* 248 U. S. 420; *McCormick & Co.* v. *Brown,* 286 U. S. 131. It is conceded that the power of Congress to prohibit transportation in interstate commerce includes noxious articles, *Lottery Case, supra; Hipolite Egg Co.* v. *United States,* 220 U. S. 45; cf. *Hoke* v. *United States, supra;* stolen articles, *Brooks* v. *United States,* 267 U. S. 432; kidnapped persons, *Gooch* v. *United States,* 297 U. S. 124, and articles such as intoxicating liquor or convict made goods, traffic in which is forbidden or restricted by the laws of the state of destination. *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.,* 299 U. S. 334.

But it is said that the present prohibition falls within the scope of none of these categories; that while the prohibition is nominally a regulation of the commerce its motive or purpose is regulation of wages and hours of persons engaged in manufacture, the control of which has been reserved to the states and upon which Georgia

and some of the states of destination have placed no restriction; that the effect of the present statute is not to exclude the proscribed articles from interstate commerce in aid of state regulation as in *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co., supra,* but instead, under the guise of a regulation of interstate commerce, it undertakes to regulate wages and hours within the state contrary to the policy of the state which has elected to leave them unregulated.

The power of Congress over interstate commerce "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." *Gibbons* v. *Ogden, supra,* 196. That power can neither be enlarged nor diminished by the exercise or non-exercise of state power. *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co., supra.* Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use. *Reid* v. *Colorado, supra; Lottery Case, supra; Hipolite Egg Co.* v. *United States, supra; Hoke* v. *United States, supra.*

Such regulation is not a forbidden invasion of state power merely because either its motive or its consequence is to restrict the use of articles of commerce within the states of destination; and is not prohibited unless by other Constitutional provisions. It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states. *Seven Cases* v. *United States,* 239 U. S. 510, 514; *Hamilton* v. *Kentucky Distilleries & Warehouse Co.,* 251 U. S. 146, 156; *United States* v. *Carolene Products Co.,* 304 U. S.

144, 147; *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377.

The motive and purpose of the present regulation are plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows. The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control. *McCray* v. *United States,* 195 U. S. 27; *Sonzinsky* v. *United States,* 300 U. S. 506, 513 and cases cited. "The judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged power." *Veazie Bank* v. *Fenno,* 8 Wall. 533. Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause. Subject only to that limitation, presently to be considered, we conclude that the prohibition of the shipment interstate of goods produced under the forbidden substandard labor conditions is within the constitutional authority of Congress.

In the more than a century which has elapsed since the decison of *Gibbons* v. *Ogden,* these principles of constitutional interpretation have been so long and repeatedly recognized by this Court as applicable to the Commerce Clause, that there would be little occasion for repeating them now were it not for the decision of this Court twenty-two years ago in *Hammer* v. *Dagenhart,* 247 U. S. 251. In that case it was held by a bare majority of the Court over the powerful and now classic dissent of Mr. Justice Holmes setting forth the fundamental issues involved,

that Congress was without power to exclude the products of child labor from interstate commerce. The reasoning and conclusion of the Court's opinion there cannot be reconciled with the conclusion which we have reached, that the power of Congress under the Commerce Clause is plenary to exclude any article from interstate commerce subject only to the specific prohibitions of the Constitution.

Hammer v. *Dagenhart* has not been followed. The distinction on which the decision was rested that Congressional power to prohibit interstate commerce is limited to articles which in themselves have some harmful or deleterious property—a distinction which was novel when made and unsupported by any provision of the Constitution—has long since been abandoned. *Brooks* v. *United States, supra; Kentucky Whip & Collar Co.* v. *Illinois Central R. Co., supra; Electric Bond & Share Co.* v. *Securities & Exchange Comm'n,* 303 U. S. 419; *Mulford* v. *Smith,* 307 U. S. 38. The thesis of the opinion that the motive of the prohibition or its effect to control in some measure the use or production within the states of the article thus excluded from the commerce can operate to deprive the regulation of its constitutional authority has long since ceased to have force. *Reid* v. *Colorado, supra; Lottery Case, supra; Hipolite Egg Co.* v. *United States, supra; Seven Cases* v. *United States, supra,* 514; *Hamilton* v. *Kentucky Distilleries & Warehouse Co., supra,* 156; *United States* v. *Carolene Products Co., supra,* 147. And finally we have declared "The authority of the federal government over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce." *United States* v. *Rock Royal Co-operative,* 307 U. S. 533, 569.

The conclusion is inescapable that *Hammer* v. *Dagenhart,* was a departure from the principles which have prevailed in the interpretation of the Commerce Clause both

before and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted. It should be and now is overruled.

Validity of the wage and hour requirements. Section 15 (a) (2) and §§ 6 and 7 require employers to conform to the wage and hour provisions with respect to all employees engaged in the production of goods for interstate commerce. As appellee's employees are not alleged to be "engaged in interstate commerce" the validity of the prohibition turns on the question whether the employment, under other than the prescribed labor standards, of employees engaged in the production of goods for interstate commerce is so related to the commerce and so affects it as to be within the reach of the power of Congress to regulate it.

To answer this question we must at the outset determine whether the particular acts charged in the counts which are laid under § 15 (a) (2) as they were construed below, constitute "production for commerce" within the meaning of the statute. As the Government seeks to apply the statute in the indictment, and as the court below construed the phrase "produced for interstate commerce," it embraces at least the case where an employer engaged, as is appellee, in the manufacture and shipment of goods in filling orders of extrastate customers, manufactures his product with the intent or expectation that according to the normal course of his business all or some part of it will be selected for shipment to those customers.

Without attempting to define the precise limits of the phrase, we think the acts alleged in the indictment are within the sweep of the statute. The obvious purpose of the Act was not only to prevent the interstate transportation of the proscribed product, but to stop the initial step toward transportation, production with the purpose of so transporting it. Congress was not unaware that

most manufacturing businesses shipping their product in interstate commerce make it in their shops without reference to its ultimate destination and then after manufacture select some of it for shipment interstate and some intrastate according to the daily demands of their business, and that it would be practically impossible, without disrupting manufacturing businesses, to restrict the prohibited kind of production to the particular pieces of lumber, cloth, furniture or the like which later move in interstate rather than intrastate commerce. Cf. *United States* v. *New York Central R. Co.*, 272 U. S. 457, 464.

The recognized need of drafting a workable statute and the well known circumstances in which it was to be applied are persuasive of the conclusion, which the legislative history supports, S. Rept. No. 884, 75th Cong. 1st Sess., pp. 7 and 8; H. Rept. No. 2738, 75th Cong. 3d Sess., p. 17, that the "production for commerce" intended includes at least production of goods, which, at the time of production, the employer, according to the normal course of his business, intends or expects to move in interstate commerce although, through the exigencies of the business, all of the goods may not thereafter actually enter interstate commerce.[2]

There remains the question whether such restriction on the production of goods for commerce is a permissible exercise of the commerce power. The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. See *McCul-*

[2] Cf. Administrator's Opinion, Interpretative Bulletin No. 5, 1940 Wage and Hour Manual, p. 131 *et seq.*

loch v. *Maryland,* 4 Wheat. 316, 421. Cf. *United States* v. *Ferger,* 250 U. S. 199.

While this Court has many times found state regulation of interstate commerce, when uniformity of its regulation is of national concern, to be incompatible with the Commerce Clause even though Congress has not legislated on the subject, the Court has never implied such restraint on state control over matters intrastate not deemed to be regulations of interstate commerce or its instrumentalities even though they affect the commerce. *Minnesota Rate Cases,* 230 U. S. 352, 398 *et seq.,* and case cited; 410 *et seq.,* and cases cited. In the absence of Congressional legislation on the subject state laws which are not regulations of the commerce itself or its instrumentalities are not forbidden even though they affect interstate commerce. *Kidd* v. *Pearson,* 128 U. S. 1; *Bacon* v. *Illinois,* 227 U. S. 504; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245; *Oliver Iron Co.* v. *Lord,* 262 U. S. 172.

But it does not follow that Congress may not by appropriate legislation regulate intrastate activities where they have a substantial effect on interstate commerce. See *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board,* 303 U. S. 453, 466. A recent example is the National Labor Relations Act for the regulation of employer and employee relations in industries in which strikes, induced by unfair labor practices named in the Act, tend to disturb or obstruct interstate commerce. See *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 38, 40; *National Labor Relations Board* v. *Fainblatt,* 306 U. S. 601, 604, and cases cited. But long before the adoption of the National Labor Relations Act this Court had many times held that the power of Congress to regulate interstate commerce extends to the regulation through legislative action of activities in-

trastate which have a substantial effect on the commerce or the exercise of the Congressional power over it.[3]

In such legislation Congress has sometimes left it to the courts to determine whether the intrastate activities have the prohibited effect on the commerce, as in the Sherman Act. It has sometimes left it to an administrative board or agency to determine whether the activities sought to be regulated or prohibited have such effect, as in the case of the Interstate Commerce Act, and the National Labor Relations Act, or whether they come within the statutory definition of the prohibited Act, as in the Federal Trade Commission Act. And sometimes Congress itself has said that a particular activity affects the commerce, as it did in the present Act, the Safety Appliance Act and the Railway Labor Act. In passing on the validity of legislation of the class last mentioned the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach

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[3] It may prohibit wholly intrastate activities which, if permitted, would result in restraint of interstate commerce. *Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295, 310; *Local 167* v. *United States,* 291 U. S. 293, 297. It may regulate the activities of a local grain exchange shown to have an injurious effect on interstate commerce. *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1. It may regulate intrastate rates of interstate carriers where the effect of the rates is to burden interstate commerce. *Houston, E. & W. Texas Ry. Co.* v. *United States,* 234 U. S. 342; *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563; *United States* v. *Louisiana,* 290 U. S. 70, 74; *Florida* v. *United States,* 292 U. S. 1. It may compel the adoption of safety appliances on rolling stock moving intrastate because of the relation to and effect of such appliances upon interstate traffic moving over the same railroad. *Southern Ry. Co.* v. *United States,* 222 U. S. 20. It may prescribe maximum hours for employees engaged in intrastate activity connected with the movement of any train, such as train dispatchers and telegraphers. *Baltimore & Ohio R. Co.* v. *Interstate Commerce Comm'n,* 221 U. S. 612, 619.

of the federal power. See *United States* v. *Ferger, supra; Virginian Ry. Co.* v. *Federation,* 300 U. S. 515, 553.

Congress, having by the present Act adopted the policy of excluding from interstate commerce all goods produced for the commerce which do not conform to the specified labor standards, it may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities. Such legislation has often been sustained with respect to powers, other than the commerce power granted to the national government, when the means chosen, although not themselves within the granted power, were nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power of the national government. See *Jacob Ruppert, Inc.* v. *Caffey,* 251 U. S. 264; *Everard's Breweries* v. *Day,* 265 U. S. 545, 560; *Westfall* v. *United States,* 274 U. S. 256, 259. As to state power under the Fourteenth Amendment, compare *Otis* v. *Parker,* 187 U. S. 606, 609; *St. John* v. *New York,* 201 U. S. 633; *Purity Extract & Tonic Co.* v. *Lynch,* 226 U. S. 192, 201–202. A familiar like exercise of power is the regulation of intrastate transactions which are so commingled with or related to interstate commerce that all must be regulated if the interstate commerce is to be effectively controlled. *Shreveport Case,* 234 U. S. 342; *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563; *United States* v. *New York Central R. Co., supra,* 464; *Currin* v. *Wallace,* 306 U. S. 1; *Mulford* v. *Smith, supra.* Similarly Congress may require inspection and preventive treatment of all cattle in a disease infected area in order to prevent shipment in interstate commerce of some of the cattle without the treatment. *Thornton* v. *United States,* 271 U. S. 414. It may prohibit the removal, at destination, of labels required by the Pure Food & Drugs Act to be affixed to ar-

ticles transported in interstate commerce. *McDermott* v. *Wisconsin,* 228 U. S. 115. And we have recently held that Congress in the exercise of its power to require inspection and grading of tobacco shipped in interstate commerce may compel such inspection and grading of all tobacco sold at local auction rooms from which a substantial part but not all of the tobacco sold is shipped in interstate commerce. *Currin* v. *Wallace, supra,* 11, and see to the like effect *United States* v. *Rock Royal Co-op., supra,* 568, note 37.

We think also that § 15 (a) (2), now under consideration, is sustainable independently of § 15 (a) (1), which prohibits shipment or transportation of the proscribed goods. As we have said the evils aimed at by the Act are the spread of substandard labor conditions through the use of the facilities of interstate commerce for competition by the goods so produced with those produced under the prescribed or better labor conditions; and the consequent dislocation of the commerce itself caused by the impairment or destruction of local businesses by competition made effective through interstate commerce. The Act is thus directed at the suppression of a method or kind of competition in interstate commerce which it has in effect condemned as "unfair," as the Clayton Act has condemned other "unfair methods of competition" made effective through interstate commerce. See *Van Camp & Sons Co.* v. *American Can Co.,* 278 U. S. 245; *Federal Trade Comm'n* v. *Keppel & Bro.,* 291 U. S. 304.

The Sherman Act and the National Labor Relations Act are familiar examples of the exertion of the commerce power to prohibit or control activities wholly intrastate because of their effect on interstate commerce. See as to the Sherman Act, *Northern Securities Co.* v. *United States,* 193 U. S. 197; *Swift & Co.* v. *United States,* 196 U. S. 375; *United States* v. *Patten,* 226 U. S. 525; *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344; *Local*

No. 167 v. *United States,* 291 U. S. 293; *Stevens Co.* v. *Foster & Kleiser Co.,* 311 U. S. 255. As to the National Labor Relations Act, see *National Labor Relations Board* v. *Fainblatt, supra,* and cases cited.

The means adopted by § 15 (a) (2) for the protection of interstate commerce by the suppression of the production of the condemned goods for interstate commerce is so related to the commerce and so affects it as to be within the reach of the commerce power. See *Currin* v. *Wallace, supra,* 11. Congress, to attain its objective in the suppression of nationwide competition in interstate commerce by goods produced under substandard labor conditions, has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer. It recognized that in present day industry, competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great. See H. Rept. No. 2182, 75th Cong. 1st Sess., p. 7. The legislation aimed at a whole embraces all its parts. Cf. *National Labor Relations Board* v. *Fainblatt, supra,* 606.

So far as *Carter* v. *Carter Coal Co.,* 298 U. S. 238, is inconsistent with this conclusion, its doctrine is limited in principle by the decisions under the Sherman Act and the National Labor Relations Act, which we have cited and which we follow. See also *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381; *Currin* v. *Wallace, supra; Mulford* v. *Smith, supra; United States* v. *Rock Royal Co-op., supra; Clover Fork Coal Co.* v. *National Labor Relations Board,* 97 F. 2d 331; *National Labor Relations Board* v. *Crowe Coal Co.,* 104 F. 2d 633; *National Labor Relations Board* v. *Good Coal Co.,* 110 F. 2d 501.

Our conclusion is unaffected by the Tenth Amendment which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the

States, are reserved to the States respectively, or to the people." The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers. See e. g., II Elliot's Debates, 123, 131; III *id.* 450, 464, 600; IV *id.* 140, 149; I Annals of Congress, 432, 761, 767–768; Story, Commentaries on the Constitution, §§ 1907–1908.

From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end. *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 324, 325; *McCulloch* v. *Maryland, supra,* 405, 406; *Gordon* v. *United States,* 117 U. S. 697, 705; *Lottery Case, supra; Northern Securities Co.* v. *United States, supra,* 344–345; *Everard's Breweries* v. *Day, supra,* 558; *United States* v. *Sprague,* 282 U. S. 716, 733; see *United States* v. *The Brigantine William,* 28 Fed. Cas. No. 16,700, p. 622. Whatever doubts may have arisen of the soundness of that conclusion, they have been put at rest by the decisions under the Sherman Act and the National Labor Relations Act which we have cited. See also, *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 330–331; *Wright* v. *Union Central Ins. Co.,* 304 U. S. 502, 516.

Validity of the requirement of records of wages and hours. § 15 (a) (5) and § 11 (c). These requirements are incidental to those for the prescribed wages and

hours, and hence validity of the former turns on validity of the latter. Since, as we have held, Congress may require production for interstate commerce to conform to those conditions, it may require the employer, as a means of enforcing the valid law, to keep a record showing whether he has in fact complied with it. The requirement for records even of the intrastate transaction is an appropriate means to the legitimate end. See *Baltimore & Ohio R. Co.* v. *Interstate Commerce Comm'n,* 221 U. S. 612; *Interstate Commerce Comm'n* v. *Goodrich Transit Co.,* 224 U. S. 194; *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1, 42.

Validity of the wage and hour provisions under the Fifth Amendment. Both provisions are minimum wage requirements compelling the payment of a minimum standard wage with a prescribed increased wage for overtime of "not less than one and one-half times the regular rate" at which the worker is employed. Since our decision in *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379, it is no longer open to question that the fixing of a minimum wage is within the legislative power and that the bare fact of its exercise is not a denial of due process under the Fifth more than under the Fourteenth Amendment. Nor is it any longer open to question that it is within the legislative power to fix maximum hours. *Holden* v. *Hardy,* 169 U. S. 366; *Muller* v. *Oregon,* 208 U. S. 412; *Bunting* v. *Oregon,* 243 U. S. 426; *Baltimore & Ohio R. Co.* v. *Interstate Commerce Comm'n, supra.* Similarly the statute is not objectionable because applied alike to both men and women. Cf. *Bunting* v. *Oregon,* 243 U. S. 426.

The Act is sufficiently definite to meet constitutional demands. One who employs persons, without conforming to the prescribed wage and hour conditions, to work on goods which he ships or expects to ship across state

lines, is warned that he may be subject to the criminal penalties of the Act. No more is required. *Nash* v. *United States*, 229 U. S. 373, 377.

We have considered, but find it unnecessary to discuss other contentions.

Reversed.

OPP COTTON MILLS, INC., ET AL. *v.* ADMINISTRATOR OF THE WAGE AND HOUR DIVISION OF THE DEPARTMENT OF LABOR.

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

No. 330. Argued December 20, 1940.—Decided February 3, 1941.

1. Wage and hours provisions of the Fair Labor Standards Act, as applied to manufacturers of textile goods for interstate commerce, *held* within the commerce power and consistent with the Fifth and Tenth Amendments. *United States* v. *Darby*, *ante*, p. 100. P. 142.
2. In the exertion of its legislative powers, Congress may provide that administrative findings of fact, made in conformity to previously adopted legislative standards and definitions of Congressional policy, shall be prerequisite to the operation of its statutory command. P. 144.

   The adoption of the declared policy by Congress and its definition of the circumstances in which its command is to be effective, constitute the performance, in the constitutional sense, of the legislative function.
3. Where the standards set up for the guidance of the administrative agency, the procedure which it is directed to follow, and the record of its action which is required by the statute to be kept, or which is in fact preserved, are such that Congress, the courts and the public can ascertain whether the agency has conformed to the standards which Congress has prescribed, there is no failure of performance of the legislative function. P. 144.
4. The Fair Labor Standards Act, to the extent that it authorizes the Administrator and the industry committees appointed by him to classify industries and fix minimum wages, is not an unconstitutional delegation of legislative power. Pp. 142, 145.

The Act declares the policy of Congress to raise the minimum wage to the 40 cents per hour limit "as rapidly as economically feasible without substantially curtailing employment." It directs that wage rates shall be determined with due regard to economic and competitive conditions and shall be such as will not substantially curtail employment in the industry. As prerequisites to classification within an industry, the committee and the Administrator must determine that classification is necessary for the purpose of fixing for each class the highest minimum wage rate (not in excess of 40 cents an hour) that will not substantially curtail employment in such class and will not give a competitive advantage to any group in the industry. In making these determinations, the committee and the Administrator must consider, "among other relevant factors," competitive conditions as affected by transportation, living and production costs, and the wage scale for comparable work established by collective bargaining labor agreements, and by employers who voluntarily maintain minimum wage standards in the industry.

5. Under this Act, § 8 (a)–(d), an industry committee acts as an investigating body with duty to report its recommendations to the Administrator. Its report is the basis of proceedings before the Administrator under § 8 (d), which are judicial in character with provisions for notice and full hearing. P. 147.

   The issue to be determined by the Administrator upon the hearing is whether the recommendations of the committee "are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the industry committee, will carry out the purposes of this section." No wage is fixed which is not recommended by the committee, and not then without appropriate hearing, findings and order by the Administrator.

6. The preliminary definition of an industry made by the Administrator when he appoints an industry committee under § 5 (a) of the Act—distinguished from the definition to be made in the final order fixing the wage, § 8 (f)—may be revised by him while the investigation is pending before the committee, but the committee's report must be based on the amended definition. P. 147.

7. In defining the textile industry as including cotton, silk, and rayon products, the Administrator took into account the competitive interrelationship of the fabrics included and the interchangeability of the looms employed in producing them; and in excluding the woolen industry he took account of its competitive relationships

with the products included and the different nature of the establishments, labor forces and wage structures associated with the two types of product. *Held* consistent with the provisions and purpose of the statute. P. 149.

8. The composition of the industry committee in this case satisfies the requirements of § 5 (b) of the statute. P. 150.

The requirement that the administrator give "due regard" to geographical considerations is not a requirement for a mathematical geographical apportionment of the committee. It calls for the exercise of discretion by the Administrator in selecting, with the purposes of the Act in mind, a committee on which the geographically distributed interests of the industry shall be fairly represented.

9. An industry committee engaged in investigations with a view to recommending a minimum wage is not required by the Act to conduct a quasi-judicial proceeding upon notice and hearing. P. 151.

10. The demands of due process do not require a hearing at the initial stage, or at any particular point, or at more than one point, in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective. P. 152.

The proceedings before the Administrator as provided by § 8 (d) satisfy the requirements of due process without further requirement, which the statute omits, of a hearing on notice before the committee.

11. The command of § 8 (d) that the Administrator, as a prerequisite to a wage order, find that the recommendations of the committee "are made in accordance with law" does not extend to a review of the evidence and hearings before the committee or an investigation of the mental processes by which committee members reached their conclusion to recommend the minimum wage, or extend beyond inquiry upon evidence before the Administrator whether the requirements of the statute and rules of the Administrator as to the composition of the committee, the definition of the industry, and the actions required to be taken by the committee have been observed. P. 153.

12. Such being the function of the committee it is immaterial that in this case substitutes were appointed for two of its members in the course of its deliberations, it not appearing that they did not consider the evidence taken and the proceedings had before their appointments. P. 153.

13. A party who appeared before the Administrator, was heard, introduced evidence, and was given opportunity to introduce more, has no ground to complain that notice of the hearing, given 40 days previously and in conformity with the statute, was inadequate. P. 153.
14. Persons interested in a wage hearing before the Administrator are sufficiently informed of the matter in issue by the report and recommendation of the industry committee, upon which the hearing is based. P. 153.
15. There was no error or want of due process in permitting the industry committee to appear before the Administrator by counsel and to offer evidence in support of its recommendations, or in permitting members of the staff of the Wage and Hour Division to give testimony. P. 154.
16. The evidence upon which the Administrator's findings may be based is not limited to such as would be competent in a court of law. It includes relevant statistical and economic data in published reports of investigations by governmental agencies. P. 154.

In a court of law if evidence of this character is admitted without objection it must be accorded "its natural probative effect as if it were in law admissible."

111 F. 2d 23, affirmed.

CERTIORARI, 311 U. S. 631, to review a judgment sustaining an order fixing a uniform minimum wage for the textile industry under the Fair Labor Standards Act. The proceeding in the court below was begun, pursuant to § 10 of the statute, by the petition of Opp Cotton Mills, Inc., to have the order set aside, and for other relief. Numerous other manufacturers of cotton goods became parties by intervention.

Mr. Ben F. Cameron, with whom *Mr. W. Gordon McKelvey* was on the brief, for petitioners.

The wage order is void because: (1) the Industry Committee was not constituted in accordance with the requirements of the Act; (2) the definition of the textile industry was not seasonably made in compliance with the Act; (3) the Committee did not proceed in accord-

ance with the requirements of the Constitution and of the Act; and (4) the procedure followed by the Committee and the Administrator did not afford a full and fair hearing as required by due process of law. *Morgan* v. *United States,* 298 U. S. 468; 304 U. S. 1, 23; *United States* v. *Morgan,* 307 U. S. 183; *Ohio Bell Telephone Co.* v. *Public Util. Comm'n,* 301 U. S. 292.

The wage order is void because the Administrator's findings that the proposed minimum will not substantially curtail employment, or give a competitive advantage to any group, are not supported by substantial evidence. *Morris* v. *Harmer,* 7 Pet. 554; *Florida* v. *United States,* 282 U. S. 194; *Panama Refining Co.* v. *Ryan,* 293 U. S. 388; *National Labor Relations Board* v. *Bell Oil & Gas Co.,* 98 F. 2d 406; *South Alabama Co.* v. *Commissioner,* 104 F. 2d 27.

The general conclusions of the Administrator and the establishment of a uniform minimum—without classifications or differentials—were contrary to law and not supported by substantial evidence.

The Act is beyond the power of Congress, because it usurps power reserved to the States by the Tenth Amendment. *Bailey* v. *Drexel Furniture Co.,* 259 U. S. 20; *Coe* v. *Errol,* 116 U. S. 517; *Champlin Refining Co.* v. *Corporation Comm'n,* 286 U. S. 210; *Carter* v. *Carter Coal Co.,* 298 U. S. 238; *Collins* v. *New Hampshire,* 171 U. S. 30; *Chassaniol* v. *Greenwood,* 291 U. S. 584; *Dartmouth College* v. *Woodward,* 4 Wheat. 518, 629; *Hammer* v. *Dagenhart,* 247 U. S. 251; *Heisler* v. *Thomas Colliery,* 260 U. S. 245; *Kidd* v. *Pearson,* 128 U. S. 1; *Oliver Iron Mining Co.* v. *Lord,* 262 U. S. 172; *Panama Refining Co.* v. *Ryan,* 293 U. S. 388; *Rickert Rice Mills* v. *Fontenot,* 297 U. S. 110; *Schechter Poultry Co.* v. *United States,* 295 U. S. 495; *United States* v. *Ohio Oil Co.,* 234 U. S. 548; *United States* v. *Butler,* 297 U. S. 1.

The Act is not justified by the commerce clause. *Bacon* v. *Illinois,* 227 U. S. 504; *Board of Trade* v. *Olsen,* 262 U. S. 1; *Coe* v. *Errol, supra; Crutcher* v. *Kentucky,* 141 U. S. 47; *Carter* v. *Carter Coal Co., supra; Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295; *Dartmouth College* v. *Woodward, supra; Delaware, L. & W. R. Co.* v. *Yarkonis,* 238 U. S. 439; *Gibbons* v. *Ogden,* 9 Wheat. 1; *Hammer* v. *Dagenhart, supra; Hoke* v. *United States,* 227 U. S. 308; *Kidd* v. *Pearson, supra; Kentucky Whip & Collar Co.* v. *Illinois Central R. Co., supra; Lottery Case,* 188 U. S. 321; *McDermott* v. *Wisconsin,* 228 U. S. 115; *Mulford* v. *Smith,* 307 U. S. 38; *Milk Control Board* v. *Eisenberg Farm Products,* 306 U. S. 346; *National Labor Relations Board* v. *Jones & Laughlin Co.,* 301 U. S. 1, 37; *Old Dearborn Co.* v. *Seagram Distilling Corp.,* 299 U. S. 183; *Schechter Poultry Co.* v. *United States, supra; Second Employers' Liability Cases,* 223 U. S. 1; *Stafford* v. *Wallace,* 258 U. S. 495; *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board,* 303 U. S. 453; *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381; *Texas & Pacific Ry. Co.* v. *United States,* 234 U. S. 342; *United States* v. *Rock Royal Coöperative,* 307 U. S. 533; *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344; *Weber* v. *Fried,* 239 U. S. 325.

The Act unconstitutionally delegates legislative power to the Administrator. *Mulford* v. *Smith, supra; Panama Refining Co.* v. *Ryan, supra; Schechter Poultry Co.* v. *United States, supra; United States* v. *Rock Royal Coöperative, supra.*

The Act denies to these litigants due process of law in contravention of the Fifth Amendment. *Adair* v. *United States,* 208 U. S. 161; *Adkins* v. *Children's Hospital,* 261 U. S. 525; *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226; *Coppage* v. *Kansas,* 236 U. S. 1; *Home Telephone Co.* v. *Los Angeles,* 227 U. S. 278; *Lawton* v. *Steel,* 152

U. S. 133; *Louisville Bank* v. *Radford,* 295 U. S. 555; *Morehead* v. *New York,* 298 U. S. 587; *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312; *Murray* v. *Hoboken Co.,* 18 How. 272; *United States* v. *Chicago, M., St. P. & P. R. Co.,* 282 U. S. 311; *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379; *Wilson* v. *New,* 243 U. S. 332.

Solicitor General Biddle, with whom *Messrs. Robert L. Stern, George A. McNulty, Warner W. Gardner, Gerard D. Reilly, Irving J. Levy, Rufus G. Poole,* and *Louis Sherman* were on the brief, for respondent.

Whether a subject has an impact upon many States or is "purely internal" is a practical question to be decided on the basis of facts, not on predilections for local or for central government. Petitioners do not deny the facts upon which the Government relies to show the relationship between interstate commerce and the subject regulated; their reliance upon a theoretical standard of distribution of powers is beside the point.

The Act contains no invalid delegation. *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381; *Mulford* v. *Smith,* 307 U. S. 38; *Hampton & Co.* v. *United States,* 276 U. S. 394.

The procedure before the Industry Committee and the Administrator was proper under the statute and the Constitution.

The Committee is not required to hold a hearing. Nevertheless, it made a thorough investigation. The record shows that about 130 representative persons and organizations were invited to appear; and that about 200 persons, representing organizations of large membership, did appear before the Committee or its subcommittees.

Inasmuch as the testimony before the Committee is not included in the printed record, the question whether the Committee's report is properly supported could not be reviewed by this Court even if the Committee were required to hold a formal hearing.

The Committee's report completely answers the argument that the Committee did not consider the factors enumerated in the statute.

The Administrator's findings are supported by substantial evidence.

MR. JUSTICE STONE delivered the opinion of the Court.

Three types of questions are presented by the petition for certiorari in this case:

First, whether the Fair Labor Standards Act of 1938, 52 Stat. 1060, is authorized by the Commerce Clause, violates the Tenth Amendment and the Due Process Clause of the Fifth Amendment and is an unconstitutional delegation of the legislative power of Congress to the Administrator of the Wage and Hour Division of the Department of Labor, appointed pursuant to § 4 (a) of the Act.

Second, whether an order of the Administrator prescribing a minimum wage in an industry is unauthorized by the statute and invalid because the procedure of the Administrator and an Industry Committee appointed by him pursuant to § 5 of the Act, which resulted in the order, is unauthorized and violates the Fifth Amendment.

Third, whether the order of the Administrator is invalid because his findings on which the order is based are without the support of substantial evidence. The challenged findings are that the minimum wage established by the order will not substantially curtail employment, and that a classification within the industry is unnecessary for the purpose of fixing, for each classification within it, the highest minimum wage which will not substantially curtail employment in such classification and will not give any competitive advantage to any group in the industry.

Petitioner, Opp Cotton Mills, Inc., an Alabama corporation subject to the Fair Labor Standards Act, alleging that it was aggrieved by an order of respondent, the Administrator, brought the present proceeding in the Circuit Court of Appeals for the Fifth Circuit pursuant to § 10 of the Act, to review and set aside the order fixing a uniform 32½ cents per hour minimum wage for the textile industry, and for other relief. So far as now relevant petitioners challenged the validity of the Act and the order upon the grounds already mentioned. The Court of Appeals sustained the order. 111 F. 2d 23. We granted certiorari, 311 U. S. 631, on a petition raising the same questions concerning the validity of the order, which we deem of public importance in the administration of the Act.

The general scope of the Act and the provisions of § 15 (a) (1) (2) and (5) and §§ 6 and 7, prohibiting the manufacture for and shipment in interstate commerce of goods produced for the commerce by employees employed at less than the prescribed minimum wage or more than the prescribed maximum hours without payment of the required overtime wage, have been discussed in *United States* v. *Darby, ante,* p. 100. It is unnecessary to repeat that discussion here.

We are here concerned with § 5 (a), § 6 (a) (4), and § 8, under which the proceedings were had which resulted in the challenged order of the Administrator. These sections read together set up an administrative procedure for establishing a minimum wage in particular industries greater than the statutory minimum prescribed by § 6, but not in excess of 40 cents an hour, such increase over the statutory minimum to be fixed for any industry subject to the Act by the Administrator in collaboration with an industry committee.

Section 5 provides, subsection (a), that the Administrator shall appoint an industry committee for each in-

dustry engaged in interstate commerce or in the production of goods for the commerce; that, subsection (b), the committee shall include persons representing the public, one of whom shall be designated as chairman, a like number representing employees in the industry, a like number representing employers in the industry, and directs that "In the appointment of the persons representing each group, the Administrator shall give due regard to the geographical regions in which the industry is carried on"; that, subsection (d), the Administrator shall submit to the committee from time to time available data on matters referred to it, shall cause to be brought before the committee in connection with such matters any witnesses whom he deems material, and that the committee may summon other witnesses or call upon the Administrator to furnish additional information to aid it in its deliberations.

Section 6 (a) (4) provides that at any time after the effective date of the section the minimum wage shall be "not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8." Section 8 (a) prescribes the procedure to be followed by the Administrator and industry committee in establishing the minimum wage authorized by § 6 (a) (4). It provides that with the view to carrying out the policy of the Act "by reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry" subject to the Act, the Administrator "shall from time to time convene the industry committee for each such industry" which "shall . . . recommend the minimum rate or rates of wages to be paid under section 6 by employers" subject to the Act "in such industry or classifications therein."

Upon the Administrator's referring to the committee the question of minimum wage rates in an industry, § 8

(b) requires it to "investigate conditions in the industry," authorizes it or a subcommittee to "hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions" under the Act and requires the committee to "recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry." Subsection (c) requires the committee for any industry to "recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of 40 cents an hour) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification." It further directs that "no classification shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee and the Administrator shall consider among other relevant factors the following:

"(1) competitive conditions as affected by transportation, living, and production costs;

"(2) The wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

"(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry."

By § 8 (d) after the industry committee files its report with the Administrator he, "after due notice to inter-

ested persons, and giving them an opportunity to be heard, shall by order approve and carry into effect the recommendations contained in such report, if he finds that the recommendations are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the industry committee, will carry out the purposes of this section." Otherwise the Administrator is required to disapprove the recommendations of the committee and again refer the matter to the committee or to another committee for the industry which he may appoint for that purpose. Subsection (f) provides among other things that the wage orders of the Administrator "shall define the industries and classifications therein to which they are to apply" and subsection (g) provides that "due notice of any hearing provided for in the section shall be given by publication in the Federal Register and by such other means as the administrator deems reasonably calculated to give general notice to interested persons."

As appears from his findings in support of the order, the Administrator, on September 13, 1938, appointed Industry Committee No. 1 for the textile industry, that industry being so defined by the order of appointment as to include the manufacture of cotton, silk, rayon and other products. Seven persons representing the public, seven representing employers in the industry, and seven representing employees were appointed to the Committee. Upon request of the Administrator at the Committee's first meeting in October, 1938, subcommittees were appointed for the purpose of considering precisely where the line should be drawn between the textile and some related industries not included in the definition adopted. Before the Committee concluded its deliberations on the recommended wage order the Administrator modified the definition in certain respects not now material.

At a meeting in December, 1938, the Committee heard witnesses and received briefs and memoranda from numerous interested parties. Statistical and economic studies by the Bureau of Labor Statistics in the Economic Section of the Wage and Hour Division had been previously submitted. The Committee then designated another subcommittee to gather additional information and hear such testimony as it deemed necessary to enable the Committee to arrive at a wage recommendation. This subcommittee obtained further economic data and heard additional witnesses including representatives of the American Association of Cotton Manufacturers of which petitioner is a member.

On March 21, 1939, after extended discussion and deliberation, the Committee, by a vote of thirteen to six, adopted a resolution which fixed tentatively a minimum wage of 32½ cents an hour amounting to $13 per forty-hour week or $676 for 52 weeks, as the rate to be recommended to the Administrator. At this meeting the Committee rejected proposals to establish classifications in the industry and wage differentials among the classes. A subcommittee was appointed to draft a report, and on May 22nd and 23rd, after the Administrator had again modified the definition of the industry, the Committee again approved by the same vote as before the 32½ cents minimum wage. The report was accepted and signed, the minority filing two reports in opposition to the recommendation. The report detailed the proceedings of the Committee, analyzed the evidence and data upon which the Committee relied in making its recommendation, gave special consideration to the question whether the wage fixed would curtail employment in the industry generally and in the southern cotton mills in particular, and to the problem of classification. It concluded that "no reasonably efficient enterprise in the textile industry need fear the result of the modest wage standard recommended for

the industry," and that the data before it "did not warrant any regional" or other "classification."

On May 27th the Administrator gave notice in the Federal Register which was also issued to the press and published in many newspapers, of a public hearing on the recommendations of the Committee. At the hearing which commenced on June 19, 1939, and was concluded on July 11th, more than 135 witnesses were heard, over 3,300 pages of testimony were taken and eight volumes of exhibits were submitted; oral arguments were heard by the Administrator on July 25th and written briefs were received until August 22, 1939. On September 29, 1939, the Administrator made his findings and order carrying into effect the recommendations of the Committee, effective October 24, 1939, the date on which pursuant to § 6 (a) (2) a minimum wage of 30 cents per hour for all employees subject to the Act became effective.

The industry, as defined by the order, includes broadly the manufacture of yarns and fabrics of cotton and competing material such as rayon and silk, and of those finished products such as sheets, towels and napkins which are normally manufactured in the fabric weaving mills. The Administrator found that the basic considerations in determining which manufacturing processes were to be included within the definition were competitive interrelationships, convertibility of looms and the operations normally carried on by textile mills.

Although the Adminstrator was of opinion that the question of the composition of the Industry Committee was not properly before him for determination, he reviewed the evidence and concluded that the members had been chosen with due regard to the geographical regions in which the industry is carried on and that the Committee had considered the factors set forth in § 8 of the Act and had reached its recommendation in accordance with law.

The Administrator found that the 32½ cent minimum wage would increase the average wage bill for the textile industry as a whole 4 per cent over the 25 cent minimum in effect before October 24, 1939, and 2.1 per cent over the 30 cent minimum in effect thereafter and that the wage increases in the southern portion of the industry would be 6.25 per cent and 2.15 per cent over the 25 and 30 cent minimum respectively. He further found that since the average labor costs do not constitute over 36 per cent of production costs the minimum wage increase would increase production costs slightly over one-third of the percentages of wage increases just indicated, and that the increase in production costs would not result in such a rise in prices to ultimate consumers of the finished product as to decrease consumer demand.

From all this he drew the conclusion that there would be no substantial curtailment of employment in the industry as a whole or in its southern branch as a result of the increased wage. In the case of small cotton mills in the south employing only 7 per cent of the southern cotton textile workers (5 per cent of all in the entire cotton industry), paying the lowest wages, he concluded that the new minimum rate as contrasted with the 30 cent statutory rate would raise manufacturing costs more than the 1.94 per cent average, and for these mills the increase would range from 2.77 per cent to 3.75 per cent. The Adminstrator found that curtailment of employment even in the mills paying the lowest wages would be dependent on total cost and the technological and general efficiency of each mill, and that low wages do not necessarily coincide with a low degree of efficiency. The Administrator found generally that the small southern mills are not necessarily marginal or the least profitable and that, accepting the figures submitted by the group of small mills opposing the 32½ cent minimum, the increase in labor costs for such mills would be 13.5% and

only 4 per cent in total manufacturing cost over the 25 cent minimum. The increase over the 30 cent minimum would be slightly over one-third of these percentages. The Administrator also found that a modernization program in these mills would displace only a small number of employees. From these and other facts detailed in the findings, the Administrator concluded that there would be no substantial curtailment of employment even in the group of small mills.

The Administrator also considered the factors for determining whether classification should be made for wage differentials within the industry. After examining numerous studies of living costs made by the Bureau of Labor Statistics of the Department of Labor he concluded that the cost of living in the north exceeds that in the south by about 4.6% on the average, and that the differences in costs between cities in each region greatly exceed the difference between the two regions as a whole. He accordingly concluded that living costs do not vary substantially or uniformly between regions and do not affect competitive conditions in the industry. He found that northern mills had an advantage with respect to transportation costs in shipping to the New England states, but southern mills had an advantage in shipping to the middle west and south, having a great population; that many northern finishing mills receive unfinished cloth from southern factories and thus bear the disadvantage in freight rates from the south to northern finishing mills and that on an average the south has a slight transportation advantage with respect to cotton coming to the mills there. He concluded that even with the average freight rates in the south somewhat higher than the north, on the whole the advantages and disadvantages in transportation costs in the two regions were approximately in balance and that any remaining disadvantage was so small as not to affect competitive conditions appreciably.

After considering the proportion of obsolescent machinery in northern and southern mills, their taxes, efficiency of workers, power and construction costs and profits, the Administrator found that the southern mills were at least in a position of equality with northern mills in so far as these factors affect production costs, and that after the establishment of the 32½ cent minimum the prevailing minimum wages in the north would be considerably higher than in the south. He concluded that neither wage rates in collective labor agreements nor wages paid by employers maintaining voluntary minimum wage standards required a classification within the industry, and finally he concluded that the Industry Committee's recommendations "are made in accordance with law, are supported by the evidence adduced at the hearing and, taking into consideration the same factors as are required to be considered by the Industry Committee, the prescribed 32½ cent wage will carry out the purposes of § 8 of the Act."

Constitutionality of the Act. The objections that the sections of the Act imposing a minimum wage and maximum hours are not within the commerce power and infringe the Tenth and Fifth Amendments were discussed and disposed of in our opinion in *United States* v. *Darby, supra.* Since petitioners concede that they are engaged in the manufacture of cotton goods for interstate commerce it is unnecessary to consider these contentions further here.

There remains the question whether the Act is an unconstitutional delegation of the legislative power of Congress. Petitioners urge that the standards prescribed for fixing the authorized minimum wages between 30 and 40 cents per hour are too vague and indefinite to admit of any judicial determination whether they are within or without the standards prescribed by Congress.

It is not seriously urged that the policy and standards of the statute are subject to these criticisms independently of the provisions relating to classification. Section 8 defines, with precision, the policy of the Act to raise the minimum wage to the 40 cents per hour limit "as rapidly as economically feasible without substantially curtailing employment" in each industry, and the standards of the administrative action applicable to the Administrator are those made applicable to the committee which it is provided "shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry." But it is said that application of these standards in an industry is made contingent upon the determination whether the industry is to be classified and if so, whether it is to be subject to particular wage differentials, and that these determinations in turn depend upon factors so inadequately defined as to afford no standard of administrative action.

Committee and Administrator are required, as prerequisites for the classification, to determine that it will not give a competitive advantage to any group in the industry, and that the prescribed wage will not substantially curtail employment in each classification, and in making these determinations the committee and Administrator must consider "among other relevant factors," competitive conditions as affected by transportation, living and production costs, and the wage scale for comparable work established by collective bargaining labor agreements, and by employers who voluntarily maintain minimum wage standards in the industry.

It is urged that the statute does not prescribe the relative weight to be given to the specified factors or the other unnamed "relevant factors." It is said that this,

with the further requirements that the prescribed wage is to be fixed with "due regard to economic and competitive conditions"; that the classification if made shall not "give a competitive advantage to any group in the industry," and that the prescribed wage must be one fixed "without substantially curtailing employment," leave the function which the committee and Administrator are to perform so vague and indefinite as to be practically without any Congressional guide or control.

The mandate of the Constitution that all legislative powers granted "shall be vested" in Congress has never been thought to preclude Congress from resorting to the aid of administrative officers or boards as fact-finding agencies whose findings, made in conformity to previously adopted legislative standards or definitions of Congressional policy, have been made prerequisite to the operation of its statutory command. The adoption of the declared policy by Congress and its definition of the circumstances in which its command is to be effective, constitute the performance, in the constitutional sense, of the legislation function.

True, the appraisal of facts in the light of the declared policy and in conformity to prescribed legislative standards, and the inferences to be drawn by the administrative agency from the facts, so appraised, involve the exercise of judgment within the prescribed limits. But where, as in the present case, the standards set up for the guidance of the administrative agency, the procedure which it is directed to follow and the record of its action which is required by the statute to be kept or which is in fact preserved, are such that Congress, the courts and the public can ascertain whether the agency has conformed to the standards which Congress has prescribed, there is no failure of performance of the legislative function.

While fact finding may be and often is a step in the legislative process, the Constitution does not require that Congress should find for itself every fact upon which it bases legislation. "It is a *constitution* we are expounding" "intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs." *McCulloch* v. *Maryland,* 4 Wheat. 316, 407, 415. In an increasingly complex society Congress obviously could not perform its functions if it were obliged to find all the facts subsidiary to the basic conclusions which support the defined legislative policy in fixing, for example, a tariff rate, a railroad rate or the rate of wages to be applied in particular industries by a minimum wage law. The Constitution, viewed as a continuously operative charter of government, is not to be interpreted as demanding the impossible or the impracticable. The essentials of the legislative function are the determination of the legislative policy and its formulation as a rule of conduct. Those essentials are preserved when Congress specifies the basic conclusions of fact upon ascertainment of which, from relevant data by a designated administrative agency, it ordains that its statutory command is to be effective.

The present statute satisfies those requirements. The basic facts to be ascertained administratively are whether the prescribed wage as applied to an industry will substantially curtail employment, and whether to attain the legislative end there is need for wage differentials applicable to classes in industry. The factors to be considered in arriving at these determinations, both those specified and "other relevant factors," are those which are relevant to or have a bearing on the statutory objective. The fact that Congress accepts the administrative judgment as to the relative weights to be given to these factors in each case when that judgment in other respects

is arrived at in the manner prescribed by the statute, instead of attempting the impossible by prescribing their relative weight in advance for all cases, is no more an abandonment of the legislative function than when Congress accepts and acts legislatively upon the advice of experts as to social or economic conditions without reexamining for itself the data upon which that advice is based.

Measured by this requirement the present statute is no less an exercise of the legislative function than was the Tariff Act of 1922 authorizing the President to raise or lower tariff duties so as to equalize the difference which, with the aid of the Tariff Commission, he finds between the costs of production of dutiable articles in this and in foreign countries, his determination, to be based upon a variety of relevant factors, some specified and others not, for which the statute prescribed no relative weight. See *Hampton & Co.* v. *United States,* 276 U. S. 394; cf. *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294; *United States* v. *Bush & Co.,* 310 U. S. 371. See to the like effect under other statutes *Interstate Commerce Comm'n* v. *Louisville & N. R. Co.,* 190 U. S. 273 (Interstate Commerce Act); *Mulford* v. *Smith,* 307 U. S. 38, 48, 49 (Agricultural Adjustment Act of 1938); *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381, 399 (Bituminous Coal Conservation Act of 1937); *Currin* v. *Wallace,* 306 U. S. 1 (Federal Tobacco Inspection Act); *United States* v. *Rock Royal Co-operative,* 307 U. S. 533 (Agricultural Marketing Agreement Act).

The procedure before the Industry Committee. The procedure before the Committee is assailed upon three principal grounds: that the changes in definition of the textile industry made after the appointment of the Committee rendered the order of apportionment void; that the order defining the industry is also invalid because the Administrator placed the woolen industry in a different

industry under a different committee, rather than in the textile industry including cotton, silk and rayon; and that the Committee was not properly constituted under the statute because the Administrator in selecting it did not give "due regard to the geographical regions in which the industry is carried on." Certain procedures before the Committee are also challenged because they are said to be unauthorized or contrary to the statute or to the requirements of due process.

At the outset the distinct separation of the functions to be performed by the committee under § 8 (a), (b), (c), (d), from that to be performed by the Administrator after submission of the committee's report, is to be noted. The committee is required to be composed of equal numbers of representatives of the public, of the employers and of the employees in the industry, selected with due regard to geographical considerations. It acts as an investigating body with the duty to report its recommendations to the Administrator. Its report is the basis of the proceedings before the Administrator under § 8 (d) which are judicial in character, with provisions for notice and full hearing. The issue to be determined by the Administrator upon the hearing is whether the recommendations of the committee "are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the industry committee, will carry out the purposes of this section." Review of the Administrator's order fixing a wage is had under § 10 by petition to the circuit court of appeals on the record made before the Administrator. Thus under the provisions of § 8 (d) no wage is fixed which is not recommended by the committee, and not then without appropriate hearing, findings and order by the Administrator.

As already stated the Administrator's order of September 13, 1938, setting up the Industry Committee, de-

fined the industry so as to include the manufacture of a variety of cotton, silk and rayon products, including those made by petitioners, and throughout the proceedings their products were so included. On recommendation of the Committee two changes in the definition were made with reference to the inclusion and exclusion of products which were near the borderline of the definition before the amendment. December 19, 1938, the order was amended so as to exclude knitted fabrics and to include other products such as blankets and sheets. A second amendment ordered by the Administrator on May 22, 1939, just before the Committee adopted its report, added to the Industry the manufacture of mixed products containing not more than 45 percent wool.

In all this we can find no failure to comply with the statute. Section 5 (a) directs that "the Administrator shall, as soon as practicable, appoint an industry committee for each industry" subject to the Act. But it does not direct a final definition of the industry to be made before the committee meets and such a requirement plainly would not comport with the purposes of the Act. Section 8 (f) provides that orders of the Administrator "issued under this section" which are the final orders fixing a wage "shall define the industries and classifications therein to which they are to apply." So far as the definition is open to attack, it is upon the record made before the Administrator if it there appears that the definition does not conform to the statute, or that the recommendations of the committee were based on a different definition of the industry from that finally made and so do not support an order for the industry as defined.[1] But subject to these requirements which in-

[1] Here the Committee reconsidered its report, after the Administrator had redefined the industry on May 22, 1939, and again adopted its recommendations which had been agreed upon.

sure that recommendations of the committee and the order of the Administrator are based on the same definition of the industry, there is no provision of the statute preventing amendment of the definition while the matter is pending before the committee and no purpose or policy of the Act which would be served by precluding such amendments so long as the report of the committee is based on the amended definition. It is to the advantage of the administration of the Act that the completeness and accuracy of the definition should be reexamined and the definition revised with the aid of the committee at any time before its report is submitted. We find nothing in the statute to prevent it.

Section 3 (h) defines "Industry" as meaning "industry, or branch thereof, or group of industries." In defining the textile industry and in fixing for it a wage which with due regard to "economic and competitive conditions" will not substantially curtail employment in the industry it was appropriate for the Administrator to take into account competitive conditions. In defining the industry the Administrator took into account the competitive interrelationship of the fabrics included and the interchangeability of the looms employed in producing them; and in excluding the woolen industry he took account of its competitive relationships with the products included and the different nature of the establishments, labor forces and wage structures associated with the two types of product. On the record before us, we cannot say that in so doing he transgressed any provision of the statute. Nor can we say that in applying these tests he departed from its purpose. The inclusion of a given product in one industry or another, where both are subject to the Act, principally concerns convenience in administering the Act. For the provisions for classification with appropriate wage differentials afford ample opportunity for fixing an appropriate

wage with respect to any product whether it is placed in one industry or another. There is no serious contention and we find no basis for saying that the evidence does not support the Administrator's order with respect to exclusion of wool from the definition of the textile industry.

We conclude also that the composition of the Committee satisfies the requirements of the Act. The Committee consisted of twenty-one persons, seven selected from each of the three groups represented. Of the employer representatives five were cotton goods manufacturers, and four of these were from the southern states. The rayon and silk manufacturers each had one representative. Since these branches of the industry are predominantly northern they were selected from the north. Three of the seven members representing the public were from southern states, one was from Pennsylvania and three from the middle west. Two of the representatives of labor were from the south, three from the north and two of them from Washington, D. C. All five of the non-southern labor members of the Committee were executive officials of or connected with labor organizations, national in scope, which represented employees in the south. Thus nine of the members of the Committee were from the south, and the Administrator could have concluded that five others fairly represented the south.

While only 31 per cent of the factories in the industry are in the south, 51.5 per cent of the value of the product is produced in southern mills and 55 per cent of the wage earners in the industry are employed by those mills. Petitioners argue that since the south had a mathematical preponderance in the Industry the Administrator was required by the statute to appoint a majority of each group, or at least a majority of the members of the Committee from that region. But the requirement of the statute that the Administrator give "due

regard" to geographical considerations is not a requirement for a mathematical geographical apportionment of the committee. It calls for the exercise of discretion by the Administrator in selecting, with the purposes of the Act in mind, a committee on which the geographically distributed interests of the Industry shall be fairly represented. As the record shows that the lowest wage scale prevailed in the southern mills, the Administrator could have concluded that a selection of a committee, a majority of whose members represented a low wage locality would tend to defeat the purposes of the Act. The Act was also intended to protect the interests of employers and employees of mills in other localities which compete with the low wage scale mills. We cannot say that the Administrator failed to give "due regard" to geographical considerations or otherwise abused his discretion in the selection of the Committee.

Petitioners make a great variety of criticisms of the proceedings before the Committee, all of which rest on the presupposition that either the statute or the demand of due process of law requires the Committee to hold hearings upon notice to interested persons and that its hearings be subject to review before the Administrator and finally as a part of the proceedings before the Administrator to judicial review on petition to the Circuit Court of Appeals, as provided by § 10.

Section 5 (c) directs that the Administrator shall "by rules and regulations prescribe the procedure to be followed by the committee." Section 5 (d), as already noted, provides that the Administrator shall submit data to the committee, shall cause witnesses whom he deems material to be brought before it, and that the committee "may summon other witnesses" to aid in its deliberations. Section 8 (b) requires the industry committee to "investigate" conditions in the industry. It provides that the committee "may hear such witnesses and re-

ceive such evidence as may be necessary or appropriate" and requires the committee to "recommend" to the Administrator the highest minimum wages "which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry." After the report is filed with the Administrator he, upon due notice and hearing, is required to approve or reject the recommendations.

It is clear that the sections of the statute now before us do not require the committee to conduct a quasi-judicial proceeding upon notice and hearing. Its function, as already stated, is to investigate upon the basis of data which the Administrator may submit and which the committee may procure for itself and to report its recommendation with respect to the minimum wage. Cf. *Norwegian Nitrogen Co.* v. *United States, supra,* 318. That such is the interpretation of the statute is abundantly supported by its legislative history. See Conference Committee Report, H. Rept. No. 2738, 75th Cong., 3d Sess., p. 31, and the explanation of the bill by the Chairman of the Senate Committee, 83 Cong. Rec. 9164. In his statement he pointed out that the procedure is modeled upon the New York Minimum Wage Act, see *Morehead* v. *Tipaldo,* 298 U. S. 587, 619, and he emphasized that no minimum wage rate could be established which had not been first "carefully worked out" by a committee drawn principally from the industry itself and that it should not then be put into effect "by administrative action which has not been found to be in accordance with law by an independent, responsible administrative office of the Government, exercising an independent judgment on the evidence after a legal hearing."

The demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long

as the requisite hearing is held before the final order becomes effective. The proceedings before the Administrator as provided by § 8 (d) satisfy the requirements of due process without further requirement, which the statute omits, of a hearing on notice before the Committee. *York* v. *Texas,* 137 U. S. 15; *American Surety Co.* v. *Baldwin,* 287 U. S. 156, 168; *United States* v. *Illinois Central R. Co.,* 291 U. S. 457, 463.

The command of § 8 (d) that the Administrator, as a prerequisite to a wage order, find that the recommendations of the committee "are made in accordance with law" does not extend to a review of the evidence and hearings before the committee or an investigation of the mental processes by which Committee members reached their conclusion to recommend the minimum wage, or extend beyond inquiry upon evidence before the Administrator whether the requirements of statute and rules of the Administrator as to the composition of the committee, the definition of the industry, and the actions required to be taken by the committee have been observed.

Such being the function of the committee it is immaterial that substitutes were appointed for two members in the course of its deliberations, it not appearing that they did not consider the evidence taken and the proceedings had before their appointment to the Committee.

Procedure before the Administrator. Notice of the hearing before the Administrator was given in conformity to the statute, and since the notice was forty days in advance of the time when petitioner's representative was heard and introduced evidence into the record and a further opportunity was given to present evidence, the contention that the notice to petitioner was inadequate or failed to meet constitutional requirements is without merit. And as the issue for determination by the Administrator in the light of the statutory require-

ments was framed by the report and recommendation of the Committee to the Administrator there was no failure to inform petitioner of the contentions made in behalf of the Government. Cf. *Morgan* v. *United States*, 298 U. S. 468; 304 U. S. 1. Nor can we find any error or want of due process in permitting the Industry Committee to appear before the Administrator by counsel and to offer evidence in support of its recommendations or in permitting members of the staff of the Wage and Hour Division to give testimony. See *Denver Union Stock Yard Co.* v. *United States*, 304 U. S. 470, 477.

Support in the evidence of the Administrator's findings. By § 10 review of the Administrator's order by the courts is limited to questions of law "and findings of fact by the Administrator when supported by substantial evidence shall be conclusive." Petitioners attack the Administrator's findings that the 32½ cent minimum will not substantially curtail employment and that classification of the industry is not required, on the ground that they are not supported by substantial evidence.

Since the statute required these findings to be based upon consideration of economic and competitive conditions in the industry, as affected by transportation, living and production costs, including wages, the findings rest, to a substantial degree, upon studies of statistical data with respect to these factors gathered by government agencies and published by them officially. They include publications of the Bureau of Labor Statistics, the Interstate Commerce Commission, the Federal Trade Commission, and the Economic Section of the Wage and Hour Division of the Department of Labor. The most important and the principal object of attack is Bulletin No. 663 of the Bureau of Labor Statistics entitled "Wages in Cotton Goods Manufacturing," which is a study of the economic conditions generally prevailing in the cotton textile industry and in particular of the wages of employees. The statistics gathered, if regarded as of proba-

tive force, and the inferences drawn from them by the Administrator, taken with other evidence, amply support his findings.

The argument of petitioners is not that the record contains no evidence supporting the findings but rather that this class of evidence must be ignored because not competent in a court of law. But it has long been settled that the technical rules for the exclusion of evidence applicable in jury trials do not apply to proceedings before federal administrative agencies in the absence of a statutory requirement that such rules are to be observed. *Interstate Commerce Comm'n* v. *Baird,* 194 U. S. 25, 44; *Interstate Commerce Comm'n* v. *Louisville & N. R. Co.,* 227 U. S. 88, 93; *Spiller* v. *Atchison, T. & S. F. Ry. Co.,* 253 U. S. 117; *United States* v. *Abilene & Southern Ry. Co.,* 265 U. S. 274, 288; *John Bene & Sons* v. *Federal Trade Commission,* 299 F. 468, 471. We need not consider whether this class of evidence must be excluded from proceedings in court.

Further the documents in question were received in evidence without objection. And even in a court of law if evidence of this character is admitted without objection it is to be considered and must be accorded "its natural probative effect as if it were in law admissible." *Diaz* v. *United States,* 223 U. S. 442, 450; *Rowland* v. *St. Louis & San Francisco R. Co.,* 244 U. S. 106, 108; cf. *United States* v. *Los Angeles & Salt Lake R. Co.,* 273 U. S. 299, 312.

The reliability of the data published in the Bulletin was supported before the Administrator by the testimony of some of his compilers. In the circumstances we think the Bulletin and other documents in question were evidence to be considered by the Administrator; that the weight to be given to them and the inferences to be drawn from them were for the Administrator and not the courts, and that they lend substantial support to his findings.

Further contentions that the findings, and particularly the finding that classification in the industry is unnecessary, and the subsidiary findings as to differences in transportation, living, and production costs, are unsupported by substantial evidence are addressed either to the weight and dependability of the evidence supporting the findings or to the testimony of particular witnesses or conflicting evidence on which petitioners rely. We have examined these contentions and, without further elaboration of the details of the evidence, we conclude that the Administrator's findings are supported by substantial evidence. Any different conclusion would require us to substitute our judgment of the weight of the evidence and the inferences to be drawn from it for that of the Administrator which the statute forbids.

Numerous other contentions are advanced by petitioners but they are subsidiary to those which we have already considered, or are of such slight moment as to call for no further discussion.

Affirmed.

PALMER ET AL., TRUSTEES, *v.* WEBSTER AND ATLAS NATIONAL BANK OF BOSTON, TRUSTEE.

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

No. 120. Argued January 8, 1941.—Decided February 3, 1941.

1. Trustees of a railroad in reorganization proceedings under § 77 of the Bankruptcy Act, who, after rejection of leases of other lines, continue pursuant to § 77 (c) (6) to operate them "for the account of the lessor," are not required by the Act of June 18, 1934, by § 65 of the Judicial Code, or by § 77 (c) (6), to advance funds, without security, out of the estate of the railroad for the payment of obligations to creditors of the former lessors, which payment is not essential to continued operation of the lines. P. 162.
2. How far cash advances to the former lessors should go; whether the security for further advances is adequate; and whether ad-

vances are necessary to continued operation, are all questions to be decided by the District Court having jurisdiction of the reorganization proceedings. Upon the facts of this case, the District Court exercised a sound discretion in ordering the trustees to withhold further cash payments in respect of obligations of the former lessors. P. 167.

3. The question whether under a statute of the State the railroad is directly liable in respect of the obligations in question, is not presented by the record and is not decided. P. 168.

111 F. 2d 215, reversed.

CERTIORARI, 311 U. S. 625, to review the reversal of an order or the District Court directing the trustees of a railroad in reorganization proceedings under § 77 of the Bankruptcy Act to withhold certain payments out of the estate.

Mr. Hermon J. Wells for petitioners.

Mr. Robert H. Davison, with whom *Mr. Oscar W. Haussermann* was on the brief, for respondent.

By special leave of Court, *Mr. Robert H. Hopkins* for the City of Boston, as *amicus curiae,* urging affirmance.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

In proceedings for the reorganization of the New York, New Haven and Hartford Railroad under § 77 of the Bankruptcy Act,[1] the District Court, in response to a petition of the trustees, ordered them to withhold payment of taxes assessed upon the property of Boston Terminal Company and franchise taxes and bond interest owed by the same company.[2] The Circuit Court of Appeals reversed on the ground that statutes of the

[1] 11 U. S. C. § 205.

[2] The order also directed the trustees to withhold payment of taxes approximating $613,000 due by Old Colony Railroad Company, and Boston and Providence Railroad Corporation to Massa-

United States compelled payment by the trustees.[3] The importance of the questions involved, and a conflict of decision,[4] moved us to grant certiorari.

In 1888 Boston and Providence Railroad Corporation leased its property to Old Colony Railroad Company for a term of 99 years. In 1893 Old Colony leased its property, including its leasehold interest in the Boston and Providence property, to New Haven for a term of 99 years. Boston was then served by four railroads entering the city from the South and West: the two lessors, New England Railroad Company, and Boston and Albany Railroad Company.

In 1896 Massachusetts, by a special act, incorporated The Boston Terminal Company,[5] with power to construct and maintain a union passenger station in the southerly part of Boston, and to provide and operate terminal facilities "for the several railroad companies" by the act "authorized to hold the stock" of the company. The Act sets the capital stock at $500,000, and provides that Boston and Albany, New England, Boston and Providence, Old Colony, "and the New York, New Haven and Hartford Railroad Company, being lessee of Old Colony Railroad Company, may each subscribe for and hold" one-fifth thereof.

The management of the company's affairs is vested in five trustees, one to be appointed by each of the five stockholding companies.

All the named railroads, including the New Haven, are required to use the terminal for all their terminal

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chusetts, and taxes approximating $76,000 due by the same companies to Rhode Island. That portion of the order is not involved in this case.

[3] 111 F. 2d 215.

[4] See *Philadelphia Co.* v. *Dipple, post,* pp. 168, 169–170.

[5] Act of June 9, 1896, Massachusetts Acts and Resolves, 1896, Ch. 516, p. 520.

passenger business in Boston. They are to pay to the terminal company for such use the amounts needed to cover the company's expenses, including interest upon its bonds, and taxes. Each railroad is required to pay in proportion to its use, as agreed amongst them, or, in default of agreement, according to the proportion determined by the railroad commissioners (now the Department of Public Utilities).

The real estate of the terminal company "required by this act to be used by said railroad companies shall be assessed to and the taxes thereon shall be paid by said railroad companies, and in the assessment of franchise taxes upon said railroad companies each of them shall be deemed to be the owner of said real estate in the proportion in which it then has the use thereof under this act."

In 1905 New England was merged into New Haven.[6] Later Boston and Albany leased its property to the New York Central. Thereafter, in 1921, the Massachusetts Act of June 9, 1896, was amended [7] to give the New York Central, as lessee, the right to hold stock of the terminal company and, during the term of the lease, to exercise all the powers by the Act conferred on Boston and Albany. The total use of the terminal thereafter was by New York Central, as lessee of Boston and Albany, by New Haven, as lessee of Old Colony, and by New Haven, as owner of the New England line. During the period involved in this case there was no use of the terminal by the New Haven trustees on behalf of the New England line.[8]

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[6] Massachusetts Acts and Resolves 1905, Ch. 252; Rhode Island Acts and Resolves, 1915, p. 452, § 4.

[7] Act of May 7, 1921, Massachusetts Acts and Resolves, 1921, Ch. 363, p. 391.

[8] It is asserted by respondent that such use has been resumed, but, if this be the fact, it is irrelevant to any issue in the case. No payment in respect of New England use is in question.

In 1931 the Department of Public Utilities of Massachusetts determined that the proportion of use of the union station and facilities was seventy per cent. by New Haven and thirty per cent. by New York Central. No reapportionment has since been made.

New Haven filed its petition for reorganization in the District Court for Connecticut October 23, 1935. At that time the lines of Old Colony and Boston and Providence came into the custody of the court as a part of the New Haven system. The court directed continued operation of the system and appointed trustees. Old Colony filed its petition for reorganization in the New Haven proceeding June 3, 1936, and the court appointed the same persons trustees as had been appointed upon the New Haven petition. Boston and Providence initiated a reorganization proceeding in the District Court for Massachusetts August 5, 1938, and trustees of its property were appointed by that court. The New Haven trustees disaffirmed and rejected the Old Colony lease June 2, 1936, and the trustees of Old Colony rejected the Boston and Providence lease July 19, 1938. Under orders of the District Court for Connecticut, made pursuant to the provisions of § 77 (c) (6), the New Haven trustees have continued to operate both Old Colony and Boston and Providence railroads for the account of the former lessors.[9] The trustees have kept their accounts covering the operations of the two lines according to a segregation and allocation of expenses and revenues approved by the Interstate Commerce Commission and by the District Court and confirmed by the Circuit Court of Appeals.[10] In the accounting, the seventy per cent. of the use of

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[9] See *Palmer* v. *Palmer*, 104 F. 2d 161; *Palmer* v. *Warren*, 108 F. 2d 164, affirmed *Warren* v. *Palmer*, 310 U. S. 132.

[10] Pursuant to § 77 (c) (6), 77 (c) (10); see *Palmer* v. *Palmer*, *supra*, Note 9.

the terminal facilities formerly charged to New Haven as lessee is charged by the trustees to Old Colony and Boston and Providence operations in proportion to use.

The trustees' operation of Old Colony and Boston and Providence properties has resulted in losses exceeding $20,000,000 in the period between October 23, 1935, and December 31, 1939. This excess of expenditures over receipts is secured by liens on the properties. Payment of the taxes and bond interest of Boston Terminal Company has required cash advances increasing the accumulating deficit at the rate of approximately $800,000 per annum. The trustees believe that the properties of the lessors are insufficient to secure repayment of further cash advances by the New Haven estate and that to make them will jeopardize the claims of New Haven's own secured creditors. In a petition of October 17, 1939, they set forth the facts and stated their view that they should not make further advances for payment of Boston Terminal taxes and bond interest for the account of the Old Colony and Boston and Providence estates. Notice of hearing was given and a number of interested parties appeared. The District Court announced its opinion and entered an order, October 30, 1939, directing the trustees to withhold the payments in question. Old Colony Trust Company, the trustee under the mortgage of the terminal company, appealed. The appeal was prosecuted in the Circuit Court of Appeals by its successor trustee, Webster and Atlas National Bank, the respondent in this court.

The District Court overruled the contention that § 77 (c) (6) imposes an obligation on the trustees of New Haven in behalf of creditors of the lessors. The court held that the section requires the continued operation of the lessors' property, if the lessors are unable to operate, in the interest of the public. It called attention to the fact that the section provides that the operation is to

be "for the account of the lessor" and that no claim was made that failure to pay the interest or taxes in question would result in the suspension of operation of Old Colony and Boston and Providence lines. The court further held, on an analysis of the Massachusetts statute creating the terminal company, that any direct obligation on the part of New Haven to pay interest and taxes terminated with the rejection of the Old Colony lease which related back to the date of the petition for reorganization, since which time the trustees have not operated for their own account but for that of the former lessors. The court thought that upon plain principles of equity it ought not to jeopardize the interests of New Haven's secured creditors by imposing the probable loss upon the New Haven estate.

The Circuit Court of Appeals declined to pass upon the question whether § 77 (c) (6), of its own force, requires the New Haven trustees to make the payments as operating expenses of the former lessors, though payment is not indispensable to the continuance of railroad operations, and declined to decide whether the direct obligations imposed by the Massachusetts statute upon New Haven bound the trustees of New Haven after rejection of the leases. The court based its reversal of the District Court's order upon two federal statutes.

It held that the Act of June 18, 1934,[11] which provides that "Any receiver, liquidator, referee, trustee, or other officers or agents appointed by any United States court who is authorized by said court to conduct any business, or who does conduct any business, shall, from and after June 18, 1934, be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation . . . ," lays upon the trustees the obligation to pay the taxes in question. We are unable to agree.

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[11] c. 585, 48 Stat. 993; 28 U. S. C. § 124 (a).

The question is whether the trustees, who are officers or agents appointed by the court to conduct the business of New Haven, are also, within the intendment of the statute, agents who are conducting the business of Old Colony. Stated otherwise, the inquiry is whether, in adopting the statute, Congress had in view an enforced operation of a lessor's property by the trustees of the lessee under § 77 (c) (6) to prevent stoppage of railroad transportation. We think Congress had no such intent.

The legislative history of the Act discloses its purpose. The committee reports accompanying the bill which became the Act of 1934 state: [12] "The purpose of this bill is to subject businesses conducted under receivership in Federal courts to State and local taxation the same as if such businesses were being conducted by private individuals or corporations." The reports advert to the fact that federal courts had held a federal receiver operating a business exempt from state sales taxes. They conclude: "No good reason is perceived why a receiver should be permitted to operate under such an advantage as against his competitors not in receivership, and the States and local governments be deprived of this revenue."

What Congress intended was that a business in receivership, or conducted under court order, should be subject to the same tax liability as the owner would have been if in possession and operating the enterprise. In the light of this purpose, the Act does not impose upon the New Haven trustees the obligation to pay taxes arising out of the conduct of the business of Old Colony or Boston and Providence. Section 77 (c) (2) accords the trustees of a railroad in reorganization the right to reject burdensome leases. Section 77 (c) (6) provides

[12] H. R. 1138, 73d Cong., 2d Sess.; S. Rept. 1372, 73d Cong., 2d Sess.

that if a lease of a line of railroads is so rejected it shall be the duty of the lessor to operate the line unless it be found impracticable for the lessor so to do, "in which event it shall be the duty of the lessee to continue operation on or for the account of the lessor." The taxes in question are, in the words of the Act of 1934, "applicable to" the business of Old Colony, and Boston and Providence. The New Haven trustees having rejected the Old Colony lease, they are no longer applicable, in any proper sense, to the business of New Haven.

By § 77 (c) (2) the trustees of a railroad in reorganization are given power to operate "the business of the debtor." By subsection (c) (4) the trustees are required to file schedules and information disclosing "the conduct of the debtor's affairs." The New Haven trustees' duty is to conduct the business of New Haven. Old Colony petitioned for reorganization and trustees were appointed in that proceeding as "trustees of the property of Old Colony Railroad Company," and were granted, pursuant to § 77, power to operate "the business of Old Colony Railroad Company." The trustees of Old Colony, as such, are the persons who, in the language of the statute, are "authorized by said court to conduct" the "business" of Old Colony.

Upon the petition of a creditor for the reorganization of Boston and Providence, which alleged that company was a common carrier by railroad engaged in the transportation of persons and property in interstate commerce, and that the Connecticut District Court had ordered the operation of its line to be continued by the New Haven trustees for the account of Boston and Providence, and upon the company's admission of the truth of the allegations of the petition, the Massachusetts District Court approved the petition and appointed trustees for the property of Boston and Providence. The appointment was confirmed by the Interstate Commerce Commission

and the trustees are in office. As in the case of Old Colony, these trustees are the persons who are conducting the business of Boston and Providence and not the New Haven trustees.

If the trustees of either of the lessor's properties were able to operate the lines of railroad and from the proceeds of that operation, or from any other source, were in possession of available funds, it would be the duty of the court in view of the Act of 1934 to require them to pay the taxes applicable to the business they are conducting under the orders of the court. But it does not follow that the New Haven trustees, who are not conducting the business of Old Colony or Boston and Providence, as such, but who, under the constraint of § 77 (c) (6), are merely operating the lines of those companies to prevent public inconvenience are, in the contemplation of the Act of 1934, conducting the business of the lessors in such sense as to be liable, out of New Haven estate funds, for taxes owed by those companies. It would require very clear and explicit language to evince an intent on the part of Congress to appropriate the moneys of the New Haven estate, which has rejected the Old Colony lease and rid itself of the leasehold interest thereby created, to pay the taxes of its lessor. We find in the Act of 1934 no such clear expression. On the contrary we think it plain Congress did not have in mind, in adopting that statute, any such situation as is created by § 77 (c) (6).

The Court of Appeals was of opinion that an obligation is imposed upon the New Haven trustees to pay the bond interest of the terminal company by § 65 of the Judicial Code,[13] which provides:

"Whenever in any cause pending in any court of the United States there shall be a receiver or manager in

[13] 28 U. S. C. § 124.

possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall willfully violate any provision of this section shall be fined not more than $3,000, or imprisoned not more than one year, or both."

The court held the statute applicable by regarding its letter, and, as we think, ignoring its obvious purpose. In the words of the statute, the trustees of the New Haven are "in possession" of certain property belonging to Old Colony, and Boston and Providence. They also are operating that property. Hence the Court of Appeals concluded that the Massachusetts Act of 1896,—a valid law placing upon New Haven an obligation to pay the bond interest of the terminal company,—binds the trustees, so long as they operate the properties, to comply with the New Haven's statutory obligation.

Section 65 is not a new enactment. It has its origin in § 2 of the Act of March 3, 1887 [14] and it has frequently been interpreted and applied by the courts.[15] Its obvious purpose was to negative the idea that a federal receiver or trustee could ignore the rules of law of the state of operation affecting the conduct of the business committed to his charge. In this sense it has been interpreted and applied and, in this sense, it is certainly binding upon the trustees of New Haven so long as they operate the property of the former lessors. The application of the Act by the court below goes much farther

[14] c. 373, 24 Stat. 552, 554.

[15] See e. g. *United States* v. *Harris*, 177 U. S. 305; *Erb* v. *Morasch*, 177 U. S. 584; *Gillis* v. *California*, 293 U. S. 62; *Hornsby* v. *Eddy*, 56 F. 461; *Peirce* v. *Van Dusen*, 78 F. 693.

than this. If valid state laws require a debtor to pay his debts then, under the decision of the court, such laws bind the New Haven trustees to pay the debts of Old Colony, and Boston and Providence. If this view were correct, the trustees would not be operating the property of those companies for the account of the latter as § 77 (c) (6) provides. On the contrary, they would be operating for the account of the New Haven estate. Moreover, on this assumption, the New Haven estate would be compelled to pay the former lessors' debts as they accrued. The result would be a preference of the creditors of the confessedly insolvent lessors as against the creditors of the New Haven whose trustees are operating the Boston and Providence and Old Colony property only under the constraint of § 77 (c) (6). We think that to state the proposition is to demonstrate that § 65 of the Judicial Code has no such purpose or effect.

We are of opinion, as was the District Court, that nothing in § 77 (c) (6) works the inequitable result that the involuntary operation of the Old Colony, and Boston and Providence properties by the New Haven trustees requires them to advance New Haven's funds, without security, for the payment of obligations of the former lessors which are not essential to the continued operation demanded of the trustees.

How far cash advances to the former lessors should go; whether the security for further advances is adequate; whether advances are necessary to continued operation; are all questions to be decided by the District Court having jurisdiction of the New Haven reorganization proceedings. These are problems of administration to be solved by the exercise of a sound discretion. Upon the uncontested facts, we think the District Court exercised such a discretion in ordering the withholding of further cash payments towards the taxes and interest of the terminal company, and that its order should stand.

The District Court discussed at some length the provisions of the Massachusetts Act of 1896 chartering the terminal company. The respondent insists that the court erroneously construed the Act and held that it will not sustain any claim on the part of the terminal company, or the State or the City of Boston, against the New Haven estate in respect of the interest on the terminal company's bonds and taxes assessed on its property and franchise. The trustees' petition sought an order dealing only with the current administration of the New Haven estate and the District Court need not have decided, and we think did not decide, any question other than that presented. In any event, no question of the validity of any such claim is presented on this record and our affirmance of the District Court's order is not to be taken as the expression of an opinion upon any such question.

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

Reversed.

PHILADELPHIA COMPANY ET AL. *v.* DIPPLE ET AL.

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

Nos. 242 and 243. Argued January 8, 9, 1941.—Decided February 3, 1941.

1. The trustees of a debtor street railway company in a reorganization proceeding under § 77B (now Chapter X) of the Bankruptcy Act, are not required by the Act of June 18, 1934 to pay, out of the estate of the debtor, taxes owed by corporations whose properties the debtor operated—together with its own in a unified system—under leases and operating agreements, and which the trustees continued to operate. P. 175.
2. Pending affirmation or rejection of the leases and operating agreements by the trustees, their obligation was to pay only a reason-

able amount for use and occupation, not in excess of the net earnings derived from the operation of each property. P. 174.
111 F. 2d 932, affirmed.

CERTIORARI, 311 U. S. 628, to review the reversal of an order directing the payment of certain taxes by the trustees in a reorganization proceeding under § 77B of the Bankruptcy Act. An appeal from the order of the District Court was taken by the Tort Creditors' Committee and the City of Pittsburgh, respondents here. Petitioners here are the Philadelphia Company (principal creditor and owner of all the capital stock of the debtor Pittsburgh Railways Company) and certain underliers.

Mr. W. A. Seifert, with whom *Messrs. Lee C. Beatty, Richard W. Ahlers,* and *Hill Burgwin* were on the brief, for petitioners.

Miss Anne X. Alpern and *Mr. A. E. Kountz,* with whom *Messrs. Leon Wald* and *Lewis M. Alpern* were on the brief, for respondents.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This case presents a problem similar to that involved in *Palmer* v. *Webster & Atlas National Bank, ante,* p. 156. Here the debtor instituted a reorganization proceeding under § 77B of the Bankruptcy Act (now chapter X of that Act) [1] and the question presented is whether the

[1] § 77B was adopted June 7, 1934, 48 Stat. 912, and was amended Aug. 29, 1935, 49 Stat. 965, and Aug. 12, 1937, 50 Stat. 622. By the terms of the Chandler Act adopted June 22, 1938, 52 Stat. 840, 883, the provisions of § 77B were superseded by chapter X of the Bankruptcy Act and that chapter was made applicable, so far as practicable, in cases pending when the Act took effect. The petition in this case was filed May 10, 1938, and the Chandler Act became effective Sept. 22 of that year.

trustees should be directed to pay taxes owed by corporations whose properties the debtor operated under leases and operating agreements and the trustees continued to operate. Although the courts below did not refer to the Act of June 18, 1934,[2] the petitioners' insistence that the decision of the Circuit Court of Appeals is in the teeth of the provisions of the Act and conflicts with the decision of the Circuit Court of Appeals of the Second Circuit in the *Palmer* case caused us to grant certiorari.

The debtor, Pittsburgh Railways Company, has, for many years, possessed and used the properties of some fifty-five street railway companies and has operated those properties, in connection with its own, as a unified street railway system in Pittsburgh, Pennsylvania, and surrounding territory. The debtor obtained possession of the properties of the underlying companies through leases and operating agreements which required the debtor to pay all expenses of operation and maintenance and all the taxes of the underlying companies. The system comprises some 560 miles of track, incline plane railways, cars, car barns, and buildings. The debtor owns 28 miles of the track and owns cars and other property. Pursuant to the terms of the leases and agreements, the debtor has directly paid the expenses of operating, maintenance charges, and all taxes of the underlying companies. After the filing of the debtor's petition under § 77B, its approval, and an order continuing the debtor in possession, the court, June 14, 1938, appointed trustees with authority to maintain, manage, and operate the property in possession of, or owned by, the debtor; to manage and conduct its business; collect the revenues therefrom, and to pay all taxes and assessments due, or to become due, upon property in possession of, or owned by, the debtor. The trustees have since been operating

[2] 48 Stat. 993, 28 U. S. C. § 124 (a).

the business, using therein the properties of the underlying companies. They have not affirmed or disaffirmed the leases and operating agreements.

March 10, 1939, the trustees petitioned the District Court for instructions respecting the payment, as administration expenses, of taxes assessed against the debtor, a subsidiary, and the underlying companies.[3] The petition was referred to a master before whom objections were filed by the City of Pittsburgh, a creditor, and also by a creditors' committee, to the payment of the taxes assessed against the underlying companies. These consisted of Pennsylvania corporate stock taxes, Pennsylvania corporate net income taxes, Pennsylvania corporate loan taxes, and federal income taxes, some of which accrued and became payable subsequent to the filing of the petition for reorganization and some of which accrued prior thereto. The present petitioners appeared before the master and advocated an order for payment of the taxes.

It appeared from the trustees' petition that they had on hand an amount sufficient to pay all the taxes as to which they requested instruction and that none of the underlying companies had funds with which to pay any of the taxes assessed against them. The testimony before the master showed that during the existence of the unified system no attempt was made to account for the revenues and operating expenses of individual underlying companies; that any attempt to account for the revenues and expenses of individual companies would be very expensive and the results would not be sufficiently accurate to form a basis for allocating the items; that it was impossible to operate each underlying company separately so as to ascertain the net earnings of each, and

[3] The terms of the order ultimately entered with respect to taxes of the debtor and its subsidiary are not here drawn in question.

that it was probably impossible to determine what would be the fair proportion of rentals to be paid to the various underlying companies whose properties were utilized by the debtor and are now utilized by the trustees. There was testimony that it was impracticable at the time of the hearing for the trustees to state what properties of underlying companies would be embraced in the contemplated plan of reorganization.

In his report, the master recommended that the trustees be directed not to pay taxes assessed against the underlying companies at the present time. This recommendation was supported by a finding that it was uncertain that any of the leases would be affirmed by the trustees and that, in the absence of evidence that the net earnings of each underlying company equalled its taxes, payment of taxes might result in preferment or overpayment. Furthermore, the master found that claims of the debtor against certain of the underlying companies might extinguish any existing equities in the properties of the latter.

After a hearing on exceptions to the master's report, and after receiving a recommendation from the trustees as to what taxes of the underlying companies should be paid, the District Court entered an order that the bulk of the taxes of the underlying companies should be paid by the trustees. The decree was predicated upon the fact that the system had been operated as a unit for many years; that all income derived from the lines of the underlying companies had been kept in one fund, and that it was equitable that the taxes of the underlying companies be treated as taxes of the debtor.

Upon an appeal by the creditors' committee and by the City of Pittsburgh, the Circuit Court of Appeals reversed the order of the District Court so far as it applied to the taxes of the underlying companies.[4] That court held

[4] 111 F. 2d 932.

that the debtor's undertaking to pay the taxes of the underlying companies was merely a portion of the consideration for the use of their property and was, therefore, a rental obligation and not a tax liability. The argument was pressed upon the court that the separate corporate entities of the underlying companies should be disregarded. In view of the fact that none of the underlying companies had filed petitions for reorganization, and thus subjected themselves to the jurisdiction of the court, the Circuit Court of Appeals held that, until affirmation of the leases and operating agreements by the trustees, their sole obligation was to pay a reasonable amount for use and occupation which could not be in excess of the net earnings derived from the operation of each property and could not be ascertained until it was determined what property was being used, the extent of the use, and the net earnings derived from it or its value.

The petitioners challenge the decision on the ground that it is contrary to the terms of the Act of June 18, 1934,[5] which directs that a trustee appointed by a court of the United States who is authorized to conduct any business, or does so, shall be subject to all state and local taxes applicable to the business; and on the further ground that it is violative of accepted principles of equitable administration of estates in receivership or reorganization.

The situation here differs from that disclosed in the *Palmer* case in that § 77B contains no provision requiring the debtor to continue to operate the business of a lessor upon rejection of the lease. It further differs in that, here, the trustees have neither affirmed nor disaffirmed the leases and operating agreements. Another difference is that, in the present instance, none of the lessors or underlying companies is in reorganization.

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[5] *Supra,* Note 2.

Notwithstanding the fact that § 77B gives no specific authority to trustees in reorganization to reject burdensome leases or contracts, it is well settled that they have that right and are accorded a reasonable time within which to exercise it. If, in the opinion of the officers of the underlying companies, a reasonable time has expired those companies are not without redress. They may declare a forfeiture of the leases and abrogate the agreements for nonperformance on the part of the trustees, or they may apply to the District Court to compel an election by the trustees, to affirm or disaffirm. In the meantime, if the situation were such as to permit a proper calculation of the amount due for use and occupation, it would be proper for the court to order the trustees to pay a reasonable sum to be treated as a payment for use and occupation in the event that the leases and agreements are disaffirmed or, on account of rent, in the event they are affirmed. But this record furnishes no basis for such a calculation. The master has found, and the finding is not challenged, that there are no data available from which it can be determined what is the value of the various underlying properties or what is the fair value of their use. It is evident that the debtor has welded these underlying properties into one system in such fashion that a single route or a single passenger ride may involve the use of a number of the underlying companies' properties. Ascertainment of a proper apportionment of the receipts of the system as a whole to the respective contributions of the underlying companies' properties is obviously almost an impossible task. Moreover, since the underlying companies are simple contract creditors, an overpayment to any one of them might work a preference as against other such creditors, including the City of Pittsburgh and the tort claimants who are respondents here.

In the light of these facts, it becomes evident that the Act of 1934 has no application. The trustees are operating the business of the Pittsburgh Railways Company, a corporation of Pennsylvania. The District Court has ordered them to pay the taxes due by that corporation and by its wholly owned subsidiary, a bus company. In that aspect the order is not attacked. But the trustees are not operating the business of the various underlying companies. It may well be that the only business those companies have is to collect or enforce payment of the rentals and considerations due them under the respective leases and operating agreements. But, even so, that businees is not the business of the Pittsburgh Railways Company and the trustees are not trustees of any such business.

What has been said in the *Palmer* case need not be amplified in this case. It is plain that the Act of 1934 is inapplicable.

The petitioners recognize that the authorities cited by them in which courts having charge of receiverships or of reorganization proceedings under § 77B have ordered the payment of taxes by a receiver or by trustees dealt only with the taxes of the corporation represented by the receiver, or for whose business the trustees were appointed. They contend, however, that the same principle ought to apply here because the system operated by the Pittsburgh Railways Company is a unified system. They urge that the business is a single business. They show that for thirty-six years prior to the filing of the petition the identity of the lines of the underlying companies has been obliterated by the creation of a unified system of railway transportation and they say that the whole business should be treated as that of the Pittsburgh Railways Company now conducted by its trustees in reorganization. But, as we have said, the underlying companies' relation to the Pittsburgh Railways Company

is that of creditor and debtor and no principle of equity justifies ignoring that relation when, so to do, might adversely affect the claims of other creditors.

For these reasons we hold the judgment of the Circuit Court of Appeals was right and should be affirmed.

Affirmed.

SUPERIOR BATH HOUSE CO. *v.* McCARROLL, COMMISSIONER OF REVENUES OF ARKANSAS.

APPEAL FROM THE SUPREME COURT OF ARKANSAS.

No. 180. Submitted December 18, 1940.—Decided February 3, 1941.

1. An Arkansas corporation which leases from the United States and operates for profit a bath house on the federal reservation at Hot Springs is taxable by Arkansas on its net income, under authority of the Act of Congress of 1891, which gives the consent of the United States to "the taxation, under the authority of the laws of the State of Arkansas applicable to the equal taxation of personal property in that State, as personal property of all structures and other property in private ownership on the Hot Springs Reservation." P. 178.
2. The Act of 1891 may not be construed as consenting only to *ad valorem* taxes imposed directly on tangible property. P. 179.

200 Ark. 233; 139 S. W. 2d 378, affirmed.

APPEAL from a decree sustaining the validity of a state tax.

Mr. Terrell Marshall submitted for appellant.

Messrs. Frank Pace, Jr. and *Lester M. Ponder* submitted for appellee.

MR. JUSTICE BLACK delivered the opinion of the Court.

By a 1929 Act, Arkansas imposed a tax of 2% on the net income of domestic corporations "with respect to

carrying on or doing business" in the state.[1] Appellant, a corporation organized under Arkansas law, leases from the United States and operates for profit a bath house on the federal reservation at Hot Springs. Whether appellant is subject to the state tax depends on the interpretation of the language of a provision of a Congressional Act of 1891 and the corresponding provision of an Arkansas Act of 1903. The Congressional Act reads: "The consent of the United States is hereby given for the taxation, under the authority of the laws of the State of Arkansas applicable to the equal taxation of personal property in that State, as personal property of all structures and other property in private ownership on the Hot Springs Reservation."[2] The 1903 Arkansas act ceded to the United States exclusive jurisdiction over the business area of the reservation, reserving only the right to tax accorded by the 1891 Act and the right to serve criminal and civil process.[3] The Supreme Court of Arkansas held appellant liable for the tax,[4] and the case is here on appeal as authorized by 28 U. S. C., § 344.

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[1] Ark. Acts (1929) No. 118.

[2] 26 Stat. 844. The quoted language was § 5 of a general Act dealing with the reservation. The section was added as a Senate amendment to a House bill, and the only relevant legislative reference to it is a statement by the House conferees that "Section 5 provides for local taxation of the bath houses, so far as the consent of the United States is concerned." 22 Cong. Rec. 3513. Arkansas, in ceding exclusive jurisdiction over part of the reservation, expressly referred to the taxing powers conferred by the 1891 Act (Ark. Acts (1903) No. 30), and later federal Acts extending exclusive federal jurisdiction over larger portions of the reservation have provided that such extension of jurisdiction shall "not be so construed as to interfere with the right to tax all structures and other property. . . ." (E. g., 33 Stat. 187.)

[3] Ark. Acts (1903) No. 30.

[4] 200 Ark. 233; 139 S. W. 2d 378. In addition to urging that Arkansas had no power to levy this tax, appellant had urged that it was denied equal protection by virtue of a 1931 statute exempting

Arkansas does not contend, nor did the Supreme Court of that state hold, that appellant was liable for the state income tax under the general power of the state to tax corporations created pursuant to Arkansas law. On the contrary Arkansas admits that under the reciprocal state and federal acts the United States possesses complete sovereign power over the Hot Springs Reservation, subject to the right of the State of Arkansas to tax in accordance with the 1891 Act and subject to its right to execute within the reservation its civil and criminal process. The state does not claim a right of any kind to tax any corporation or individual doing business on the reservation unless the tax comes within the scope of its agreement with the government, effectuated by the 1891 and 1903 federal and state legislation. Since the state has taken this view, and since it is our opinion that the tax can be sustained on this basis, it is unnecessary for us to determine whether any other basis might conceivably exist.

While not controlling here, it has been the consistent conviction of the Arkansas court that the federal legislation conferred broad powers of taxation upon the state. In *Ex parte Gaines,* 56 Ark. 227; 19 S. W. 602, decided one year after the original 1891 Act, the court held that a leasehold interest on the reservation was subject to state taxation. In *Buckstaff Bath House Co.* v. *McKinley,* 198 Ark. 91; 127 S. W. 2d 802,[5] the court upheld the state unemployment compensation tax, saying of the 1891 Act: "The Congress seemingly intended (and this construction is strengthened by the *Gaines* case) to permit

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from the tax those domestic corporations organized for the purpose of doing business outside the state. (Ark. Acts (1931) No. 220.) This latter contention is wholly without merit, and will not be discussed.

[5] Affirmed on other grounds, 308 U. S. 358.

the State to exercise its sovereignty within the Reservation with respect to the conduct of business, commerce, and the professions, subject only to the interest retained by the Government and the right to enforce restrictions under the federal laws . . ."

Appellant, however, reads the Act more narrowly than does the Arkansas court, and contends that the only taxes Arkansas can levy are ad valorem taxes imposed directly on tangible property. But the words tangible and ad valorem appear nowhere in the Act, nor do any synonymous words there appear. And in our opinion to construe the Act as though such words had been used would do violence to the intent of Congress. The language of Congress was peculiarly adapted to the broadening of the state's taxing power—not to its restriction. Thus, though under Arkansas law structures attached to land were considered a part of the realty, taxable or non-taxable with the land,[6] Congress provided that privately owned structures on the tax exempt land of the reservation should be taxed "as personal property." Not only was this done, but also all "other property in private ownership" was expressly made subject to state taxation. By these provisions Congress manifested its purpose that no type of privately owned property should escape the state's taxing power merely because it was owned or used on the reservation.

And appellant's insistence that these provisions permit only ad valorem taxation loses sight of the fact that the word property is by no means limited, in all its variations,

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[6] At the time of the 1891 Act, the Arkansas law provided that "The term 'real property and lands' . . . shall be held to mean . . . all buildings, structures and improvements, and other fixtures of whatever kind. . . ." Ark. Stats. (Mansfield, 1884) § 5585. See *Union Compress Co.* v. *State,* 64 Ark. 136. Such is still the Arkansas law. Ark. Dig. Stats. (Pope, 1937) § 13358.

to actual tangible physical things.[7] Its meaning must be determined from its context as illumined by the subject treated and the objectives sought. It is true that Arkansas had no corporate income tax in 1891, when the original permission to tax was granted. But taxation policies and systems change with necessities and experience, and no support can be found in the Act for a belief that Congress consented to state taxation only if Arkansas would make its 1891 tax system static. If we accept appellant's premise that what Congress consented to was ad valorem taxation only, we must conclude that Congress consented to a tax under which Arkansas was collecting virtually all of its revenues in 1891. Since 1900, state governments—Arkansas included—have tended to secure less and less of their revenue from ad valorem taxation, and more and more from taxes of other types.[8] The Arkansas legislature, in fact, in the preamble to the 1929 income tax act, gave as a reason for its adoption that "Agricultural and Industrial development is now being retarded because of a policy to secure practically all of the Revenue from an Advalorem Tax, thus penalizing and discouraging ownership of property, . . ."[9] The narrow construction of the Act urged by appellant—a corporation created under the laws of Arkansas—would thus relieve it from an Arkansas tax on corporate income enacted, at least in part, as a substitute for those state ad valorem taxes to which appellant admits it is subject. And "The privilege of use is only one attribute, among many, of the bundle of privi-

[7] Cf. *Fidelity & Deposit Co.* v. *Arenz*, 290 U. S. 66, 68.

[8] Arkansas, for example, received approximately 77% of its total revenue from general property taxes in 1915, while in 1937 this source accounted for only 13%. Financial Statistics of States, 1915, Table 3, pp. 66–67; *id.*, 1937, Table 5, pp. 36–41.

[9] Ark. Acts (1929) No. 118. Compare the preceding footnote.

leges that makes up property or ownership." [10] It is our opinion that the decision below must be affirmed. [11]

Affirmed.

MR. JUSTICE STONE, concurring:

MR. JUSTICE ROBERTS and I concur in the judgment of the Court but upon different grounds from those stated in its opinion.

The state court has held that so far as the state constitution and laws are involved it has power to lay the present tax. It is no concern of ours what reasons are assigned for that conclusion. The only question for decision here is whether there is anything in the acts of Congress establishing the reservation or in the relationship of the two sovereignties, state and national, to prevent the state from laying a tax on the net income of its own corporation.

If the consent of the national government were needful in order to sustain the present tax we should have difficulty in finding that consent in the words of the Act of Congress authorizing the state to tax "all structures and other property in private ownership on the . . . reservation." But we think that such consent is unnecessary to enable a state to tax the income of its own corporations, derived from property located on the reservation. It is enough that no Act of Congress and no agreement by the state with the Federal Government prohibits the tax.

The fact that income-producing property is physically located on the territory of another sovereignty does not foreclose the state from taxing its own residents and corporations on the income derived from the property.

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[10] *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 582.

[11] Cf. *Buckstaff Bath House Co.* v. *McKinley*, 308 U. S. 358; *Collins* v. *Yosemite Park & Curry Co.*, 304 U. S. 518.

Cohn v. *Graves,* 300 U. S. 308; *Lawrence* v. *State Tax Comm'n,* 286 U. S. 276; see *Newark Fire Insurance Co.* v. *State Board,* 307 U. S. 313. We have recently held that such a tax is not a tax on the income-producing property in any such sense as to preclude the tax for want of "jurisdiction" of the state to lay it. *Cohn* v. *Graves, supra,* 313, 314; *Graves* v. *O'Keefe,* 306 U. S. 466, 480. There is no occasion now to give renewed currency to the notion erroneously attributed to *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429; cf. *Cohn* v. *Graves, supra,* 314, 315, that a tax on income is subject to the limitations of a tax on the property which produces it.

For that reason if Arkansas had made an unrestricted grant of the reservation it could not be said to have renounced its authority to tax income of its corporations or citizens derived from property on the reservation, more than if it were located in the District of Columbia or in another state. It clearly has not done so by reserving the right to lay a property tax within the reservation or by agreeing that the United States shall have exclusive jurisdiction over it for any or for every purpose. The state's power to lay the tax, being independent of its jurisdiction over the ceded territory, subsists unless waived or prohibited by competent authority.

Whatever constitutional power the Federal Government may have to prohibit the state taxation of income derived from property located on the reservation, regarded as a federal instrumentality, it is plain that it has not assumed to exercise the power. *Graves* v. *O'Keefe, supra,* 480. Since the state has not surrendered its constitutional power to tax the income and since Congress has not assumed in the act establishing the reservation, or otherwise, to prohibit the tax, the power of the state is unimpaired, unless restricted by its own constitution and laws.

MR. JUSTICE FRANKFURTER while agreeing with the Court's opinion also agrees with the view expressed in this opinion.

HURON HOLDING CORPORATION ET AL. *v.* LINCOLN MINE OPERATING CO.

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

No. 212. Argued January 13, 1941.—Decided February 3, 1941.

Pending appeal to the Circuit Court of Appeals from a judgment of the federal District Court for Idaho, a third party sued the judgment creditor in a state court in New York and a warrant of attachment was issued attaching the judgment debt in the hands of the judgment debtor in New York. After the Circuit Court of Appeals had affirmed the judgment of the District Court, but before the mandate issued, the New York court rendered judgment against the judgment creditor and execution was had against the attached debt. *Held:*

1. The validity of the attachment was governed by the law of New York, and by that law the attachment was valid. P. 188.

2. Having paid the judgment debt under compulsion of the execution, the judgment debtor was entitled to have the judgment of the federal court for Idaho marked satisfied; and the surety was not chargeable on its supersedeas bond. Pp. 189, 194.

111 F. 2d 438, reversed.

CERTIORARI, 311 U. S. 625, to review the reversal of judgments of the District Court, 27 F. Supp. 720, holding that an earlier judgment of that court had been satisfied, and declining to enter judgment against the surety on a supersedeas bond.

Mr. Leonard G. Bisco, with whom *Mr. Daniel Gordon Judge* was on the brief, for petitioners.

The New York court had power to enforce its attachment proceedings against Huron, a New York corporation, and on that power was based its jurisdiction to bind

the nonresident judgment creditor, Lincoln, to the extent of Lincoln's interest in the judgment debt attached.

The state court proceedings were regular in form, and fully authorized by the statutes and decided law of the State of New York.

The procedural regularity of the state court attachment, judgment and execution, was found below as a fact, and is admitted by respondent.

The law of New York authorized the attachment of a debt evidenced by a judgment obtained in a federal court in another state.

The money judgment in the District Court was an adjudication of Huron's debt to Lincoln and remained binding upon both parties during appeal; although execution was stayed in the District Court, the judgment was not vacated, and could be sued upon in a foreign court.

The Circuit Court's failure to judge the validity of the state court attachment in accordance with the state law, and its application of a general federal rule instead, is contrary to the principles laid down by this Court in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64.

The District Court in deciding that its judgment was satisfied by Huron and that no judgment should issue against the Surety Company, correctly adjudged the issues before it and gave due weight under its own law to the facts proved, including the validity of the state court proceedings and Huron's prior payment of the judgment debt pursuant thereto.

Messrs. D. Worth Clark and *William H. Langroise* submitted for respondent.

The jurisdiction of the state court in the action against Lincoln depended solely upon attachment proceedings.

The attachment proceedings in New York were void for the reason that when the proceedings were initiated and when the attachment was levied, the judgment debt

was not attachable because (a) it was not absolutely payable at the time or in the future, and (b) payment of the debt was dependent upon a contingency which had not then happened.

The jurisdiction of the District Court of the United States and the right of the plaintiff to prosecute his suit in that court having attached, that right cannot be arrested or taken away by any proceedings in another court. *Wallace* v. *M'Connell,* 13 Pet. 136; *Wabash R. Co.* v. *Tourville,* 179 U. S. 322; *United States Shipping Board Corp.* v. *Hirsh Lumber Co.,* 59 App. D. C. 116; 35 F. 2d 1010; *Mack* v. *Winslow,* 59 F. 316, 319; *Henry* v. *Gold Park Mining Co.,* 15 F. 649, 650; *Thomas* v. *Woolridge,* 23 Fed. Cas. 986, 987, No. 13,918; *Franklin* v. *Ward,* 9 Fed. Cas. 711, No. 5,055; *McDonald* v. *McDonald,* 56 Ida. 444, 457; 55 P. 2d 827; Freeman, Judgments, 7th ed. § 622.

The judgment of the District Court was final for the purpose of appeal, but it was not final in the sense that it constituted the final liquidation of a tort claim, the claim for damages stated in the pleading which commenced the action. *Waplee-Platter Grocer Co.* v. *Texas Pacific Ry. Co.,* 62 S. W. 265; *Dibrell* v. *Neely,* 61 Miss. 218; *Kreisle* v. *Campbell,* 32 S. W. 581 (Tex.); *Burke* v. *Hance,* 76 Tex. 76.

Erie R. Co. v. *Tompkins,* 304 U. S. 64, has not changed the rule that a federal judgment may not be attached in a foreign jurisdiction.

Congress has provided for appeals, for cost and supersedeas bonds (28 U. S. C. 869, 874), for executions (28 U. S. C. 727, 729), and in this connection has vested the federal courts with power and authority necessary for the "trial and disposition of the cause." (28 U. S. C. 729).

In a long line of decisions the federal courts have carefully protected federal jurisdictions from interference by

state courts, or courts of other jurisdictions. *Riggs* v. *Johnson County,* 6 Wall. 166, 187; *Collin County Nat. Bank* v. *Hughes,* 152 F. 414; *Wayman* v. *Southard,* 10 Wheat. 1, 22; *Barber Asphalt Paving Co.* v. *Morris,* 132 F. 945; *Brun* v. *Mann,* 151 F. 145; *Chicot County* v. *Sherwood,* 148 U. S. 529, 533, 534; *West* v. *American Tel. & Tel. Co.,* 311 U. S. 223; *Neirbo Co.* v. *Bethlehem Corp.,* 308 U. S. 165, 175.

MR. JUSTICE BLACK delivered the opinion of the Court.

This case involves the effect a federal District Court should give to state court proceedings attaching, while appeal is pending, a judgment previously rendered by the federal court.

Respondent, Lincoln Mine Operating Company, obtained judgment against petitioner, Huron Holding Corporation, in the federal District Court for Idaho. Pending appeal of this judgment to the Circuit Court of Appeals, a New York creditor of Lincoln brought suit on a promissory note against Lincoln in a state court of New York. Upon a showing that Lincoln was an Idaho corporation, the New York court caused a warrant of attachment to issue against Lincoln's New York property.[1] In accordance with New York law,[2] summons upon Lincoln was served by a Deputy Sheriff of Ada County, Idaho. Huron, a New York corporation, answered the warrant of attachment served upon it in New York and admitted that it was the defendant against which judgment in favor of Lincoln had been en-

[1] Sections 902 and 903 of Art. 54 of the New York Civil Practice Act authorize courts to issue warrants of attachment against defendants shown to be foreign corporations in actions against them based on "Breach of contract, express or implied, . . ."

[2] Section 233, Art. 25, New York Civil Practice Act.

tered in the Idaho District Court, and that the judgment was still unpaid, subject to its right on an appeal then pending. After the Circuit Court of Appeals had affirmed the Idaho District Court judgment, but before the mandate had been sent down, the New York court rendered judgment against Lincoln, execution was issued, and under the warrant of attachment the New York Sheriff was commanded to obtain satisfaction out of the judgment obligation of Huron to Lincoln. Under compulsion of the New York execution Huron paid and then filed a motion in the Idaho court asking that the federal court's judgment be marked satisfied. Lincoln countered with a motion against National Surety Company, the guarantor on Huron's supersedeas bond in the original action, asking that judgment against the surety be entered in favor of Lincoln. After a hearing on both motions, the District Court made findings of fact and conclusions of law, held that the judgment had been fully satisfied, and declined to enter judgment against the surety.[3] The Circuit Court of Appeals reversed.[4] Because the issues involved are important to the orderly administration of justice in the relationship of state and federal courts, we granted certiorari.[5]

Petitioner contends that the attachment was valid under the New York law, and should have been given full effect by the federal court. It is respondent's contention that (1) the attachment proceedings were void; and (2) even if not void, the District Court should not have given effect to them, for the reason that this would be tantamount to an improper deprivation of Lincoln's right to prosecute its suit in the District Court to full payment of the judgment.

[3] 27 F. Supp. 720.
[4] 111 F. 2d 438.
[5] 311 U. S. 625.

First. Here, New York law clearly governed the validity of the attachment proceedings. The Idaho District Court found, and it is not denied, that those proceedings complied with the formal requirements of New York's attachment statutes. But it is contended that at the time of the levy the New York court, under New York law, was without jurisdiction because the Idaho judgment was then pending on appeal and therefore contingent. Respondent points to certain New York cases which lay down the general proposition that "an indebtedness is not attachable unless it is absolutely payable at present, or in the future, and not dependable upon any contingency." [6] But both the District Court and the Circuit Court of Appeals rejected this argument. And indeed the New York court itself necessarily passed upon this question, adversely to respondent's contention. The garnishee's answer in the New York court disclosed that the judgment was pending on appeal, and the New York court's final judgment was not rendered, nor execution issued, until the Idaho judgment had been affirmed. By its action the New York court necessarily decided that the judgment debt was within the scope of New York's attachment laws. And none of the New York authorities to which the respondents direct our attention militate against the soundness of the New York court's ruling. On the contrary, other decisions of the New York courts lead to the conclusion that the judgment—even though on appeal—was sufficiently definite and final to bring it within the New York

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[6] *Herrmann & Grace* v. *City of New York*, 130 App. Div. 531; 114 N. Y. S. 1107, 1110, affirmed, 199 N. Y. 600; 93 N. E. 376. Other cases cited by respondent which set out the same general principle are: *Fredrick* v. *Chicago Bearing Metal Co.*, 221 App. Div. 588; 224 N. Y. S. 629, 630; *Reifman* v. *Warfield Co.*, 170 Misc. 8; 8 N. Y. S. 2d 591, 592; *Sheehy* v. *Madison Square Garden Corp.*, 266 N. Y. 44, 47; 193 N. E. 633.

statute.[7] To the same effect, in the federal courts the general rule has long been recognized that while appeal with proper supersedeas stays execution of the judgment, it does not—until and unless reversed—detract from its decisiveness and finality.[8]

Second. Respondent's next contention is that even though Huron was compelled to pay the New York judgment as a result of attachment proceedings fully authorized by the New York statutes, the Idaho federal court not only can but should require a second payment of the same amount. The Circuit Court of Appeals so held. But since Huron, owing a judgment debt to Lincoln, paid it to a creditor of Lincoln under a valid New York judgment, it certainly should not be required to pay it a second time, except for the most compelling reasons. "It ought to be and it is the object of courts to prevent the payment of any debt twice over." [9]

It has not been urged here, nor was it urged in the courts below, that Huron was guilty of any negligence, misconduct or fraud in connection with the New York judgment. It has not been claimed that there was a failure to give Lincoln notice of the New York suit against it. No federal statute or constitutional provision is invoked as supporting the contention that the Idaho federal court was under a duty to disregard the effect of the payment made by Huron under the compulsion

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[7] *Shipman Coal Co.* v. *Delaware & Hudson Co.*, 219 App. Div. 312; 219 N. Y. S. 628, affirmed, 245 N. Y. 567; 157 N. E. 859. In determining what is the law of a state, we look to the decisions of lower state courts as well as to those of the state's highest court, and follow the same line of inquiry recently pointed out in *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223. And see *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64.

[8] E. g., *Railway Co.* v. *Twombly*, 100 U. S. 78; *Deposit Bank* v. *Frankfort*, 191 U. S. 499.

[9] *Harris* v. *Balk*, 198 U. S. 215, 226.

of the valid New York judgment. What is contended is that historically federal courts have carved out a rule to protect themselves from interference by state courts, and that a plaintiff in a federal court proceeding has an absolute right to prosecute his suit and collect his judgment in that court—a right which would somehow be arrested or taken away by giving effect to the New York attachment. This contention rests primarily upon a statement of this Court in *Wallace* v. *M'Connell,* 13 Pet. 136, 151. That case, a suit on a promissory note, was begun in the federal District Court for Alabama. While it was pending, a suit for collection of the note, based on its attachment, was instituted in an Alabama state court. In the state court action, though tentative judgment was rendered against the federal court defendant as garnishee, the matter was then stayed for six months because no judgment had yet been rendered against the state court defendant. At this point, therefore, actions involving the same issues were concurrently pending in both the state and the federal court without final determination in either. Before final determination of the state proceedings, the case came on for decision in the federal court. That court overruled defendant's plea based on the state court attachment. On appeal, this Court said: "The plea shows that the proceedings on the attachment were instituted after the commencement of this suit. The jurisdiction of the District Court of the United States, and the right of the plaintiff to prosecute his suit in that Court, having attached, that right could not be arrested or taken away by any proceeding in another Court. This would produce a collision in the jurisdiction of Courts, that would extremely embarrass the administration of justice . . . [The doctrine here announced] is essential to the protection of the rights of the garnishee." The concrete question presented to the Court there appears to have been nothing

more than a situation in which two courts were called upon to litigate the same issues at the same time.[10] Such is not true in this case.

Another case relied on by respondent is *Wabash Railroad Co.* v. *Tourville,* 179 U. S. 322. But that case, involving actions in the courts of two states rather than in a state and a federal court, as here, does not support respondent's contention. In that case this Court did not hold that state laws with reference to attachment and garnishment should not be given effect. On the contrary it based its decision upon a holding by the Missouri appellate court that the Illinois garnishment was void for failure to comply with statutory requirements, and upon a ruling by the Missouri Supreme Court "that the judgment was foreign to Illinois, and therefore not subject to garnishment there." [11] After basing its judgment on these grounds, the Court added a last statement to the effect that "This Court has held that to the validity of a plea of attachment the attachment must have preceded the commencement of the suit in which the plea is made. *Wallace* v. *M'Connell,* 13 Pet. 136." Whatever may be the present day effect of the principle announced in *Wallace* v. *M'Connell* and reasserted in the *Tourville* case,

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[10] Cf. *Princess Lida* v. *Thompson,* 305 U. S. 456, 466; *Insurance Company* v. *Harris,* 97 U. S. 331.

[11] If by this the Court meant that under Illinois law such a judgment was not subject to garnishment, the case is nothing more than a holding that one state need not give full faith and credit to a void act of a sister state. But both the Missouri Supreme Court (148 Mo. 614, 624; 50 S. W. 300) and this Court (179 U. S. 322, 327) cited Drake on Attachments (7th ed. 1891) § 625 for the proposition that by the weight of authority a judgment of one court was not subject to attachment in another court. This citation of the "weight of authority" might indicate that this Court was deciding the issue as a question of "general law," under *Swift* v. *Tyson,* 16 Pet. 1. If so, this aspect of the decision is no longer of any weight. *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64.

that principle has no application here. But it is said that a broader principle, stemming from those cases, is here applicable. And it is true that some courts, both state and federal, have adopted the broader rule for which respondent contends.[12] The leading federal case on the subject is *Thomas* v. *Wooldridge,* 23 Fed. Cas. 986, No. 13,918. The rule in that case, as announced by Justice Bradley on circuit, was that "judgments of state and federal courts should not be subject to attachments issued by each other." The reasons there given to support this rule were: the debt was quasi *in custodia legis;* attachments of it would therefore interfere with the court's dignity and prerogatives, excite jealousies and bring about conflicts of jurisdiction; many rights are still left for adjustment after judgment and therefore attachment of a court's judgment would be an inconvenient, dangerous and potentially fraud-ridden interference with judicial proceedings. Justice Bradley was also of opinion that recognition of this rule was practically compelled by *Wallace* v. *M'Connell.*

It is our opinion that no such broad general rule exists. This does not, however, mean that a court which has rendered a judgment is without power to exercise jurisdiction, when properly invoked, to adjudicate newly asserted rights related to the judgment debt. It does mean that later opinions of this Court have undermined the basic reasoning upon which Justice Bradley relied in declaring that judgments in a federal court were never

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[12] E. g., *Thomas* v. *Wooldridge,* 23 Fed. Cas. 986, No. 13,918; *United States Shipping Board Merchant Fleet Corp.* v. *Hirsch Lumber Co.,* 59 App. D. C. 116; 35 F. 2d 1010; *Elson* v. *Chicago, R. I. & P. Ry.,* 154 Iowa 96; 134 N. W. 547. Contra: *Shipman Coal Co.* v. *Delaware & Hudson Co.,* 219 App. Div. 312; 219 N. Y. S. 628; affirmed, 245 N. Y. 567; 157 N. E. 859; *Fithian* v. *New York & Erie R. Co.,* 31 Pa. 114. And compare *McNish* v. *Burch,* 49 S. D. 215; 207 N. W. 85, with *Hardwick* v. *Harris,* 22 N. M. 394; 163 P. 253.

subject to attachment elsewhere. For it is now settled that attachment is wholly the creature of, and controlled by, the law of the state; property and persons within the state can be subjected to the operation of that local law; power over the person who owes a debt confers jurisdiction on the courts of the state where the writ of attachment issues; and by reason of the constitutional requirement that full faith and credit be given the valid actions of a state, courts of one state must recognize valid attachment judgments of other states.[13] And under congressional enactment federal courts must also give full faith and credit.[14] These later decisions are but a recognition of the greatly developed statutory use of attachment by the states, a development brought about by the increased mobility of persons and property and the expanded area of business relationships. Whatever may have been the necessity for the rule in other times, it does not fit its present day environment.

Further, we do not here, as in *Wallace* v. *M'Connell,* have a case in which two courts are proceeding in the same matter at the same time. The New York court has proceeded under New York law to final judgment. It has compelled obedience to its judgment. The New York proceedings did not arrest or take away the right of Lincoln to try out its issues with Huron in the federal court for Idaho. Those issues had already been tried and determined in that court, and its jurisdiction to adjust and adjudicate newly asserted rights relating to the judgment had not been invoked. There was therefore no possibility of collision between the two courts, for similar issues were not pending before them at the same

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[13] E. g., *Harris* v. *Balk,* 198 U. S. 215, 222; *Louisville & Nashville R. Co.* v. *Deer,* 200 U. S. 176, 178; *Baltimore & Ohio R. Co.* v. *Hostetter,* 240 U. S. 620.

[14] 1 Stat. 122, as amended, 28 U. S. C. § 687. And see note 17, *infra.*

time. In fact, far from colliding with the Idaho court, the New York court accepted as final that court's determination of the issues that it had passed on. For the suit in New York was based on the Idaho judgment, and not on the original cause of action, and "A cause of action on a judgment is different from that upon which the judgment was entered." [15]

Both the Idaho federal court and the New York state court decided matters within the respective authority of each. To give effect to the judgment rendered in the New York attachment proceedings cannot, in any manner, interfere with the jurisdiction of the Idaho court. While the Idaho court did have authority to issue an execution for the collection of an unpaid judgment, it would not have enforced an execution for the benefit of Lincoln if the judgment had previously been paid directly to Lincoln. Nor should it issue an execution when the money was paid to Lincoln's creditors by reason of valid attachment proceedings. For this would be to exercise the jurisdiction of a federal court to render ineffective that protection which a garnishee should be afforded by reason of having obeyed a judgment rendered by a state in the exercise of its constitutional power over persons and property within its territory.[16] To take such a step would constitute a denial of that full faith and credit which a federal court should give to the acts of a state court.[17]

The District Court properly ordered that its judgment be marked satisfied, and correctly refused to render judgment on the supersedeas bond. The judgment of the Circuit Court of Appeals is reversed, and the judgments of the District Court are affirmed.

Reversed.

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[15] *Milwaukee County* v. *M. E. White Co.*, 296 U. S. 268, 275.

[16] Cf. *United States* v. *Klein*, 303 U. S. 276, 281–282.

[17] *Pennoyer* v. *Neff*, 95 U. S. 714, 733; *Goldey* v. *Morning News*, 156 U. S. 518, 521; *Cooper* v. *Newell*, 173 U. S. 555, 567–568; *Davis* v. *Davis*, 305 U. S. 32, 39–40.

ARMOUR & COMPANY *v.* ALTON RAILROAD CO. ET AL.

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

No. 293. Argued January 14, 1941.—Decided February 3, 1941.

Upon the basis of the allegations of a complaint filed in the District Court in this case, wherein a packer seeks to compel railroad companies to deliver shipments of livestock at such a location and in such manner that it need not pay a "yardage charge" to a stockyard company (contrary to a custom of long standing), *held* that, as determination of many complex transportation problems was prerequisite to a decision, the cause was within the primary jurisdiction of the Interstate Commerce Commission and the complaint was properly dismissed. Pp. 200, 202.

111 F. 2d 913, affirmed.

CERTIORARI, 311 U. S. 627, to review the affirmance of a judgment dismissing a bill of complaint, 27 F. Supp. 625.

Mr. Paul E. Blanchard, with whom *Messrs. Chas. J. Faulkner, Jr.* and *John Potts Barnes* were on the brief, for petitioner.

Mr. Douglas F. Smith, with whom *Messrs. Kenneth F. Burgess* and *Frank H. Towner* were on the brief, for respondents.

MR. JUSTICE BLACK delivered the opinion of the Court.

This litigation is the latest episode of a long struggle involving the meat packers, the railroads, and the Union Stock Yard and Transit Company of Chicago.[1] Basically, on the merits the issue here presented is whether

[1] See *Adams* v. *Mills,* 286 U. S. 397; *Atchison, T. & S. F. Ry. Co.* v. *United States,* 295 U. S. 193.

Armour and Company, one of the packers, is correct in its contention that under the facts of this case the railroads must deliver its shipments of livestock at such a location and in such a manner that it need pay no "yardage charge" to the Stock Yards Company. The case is here on certiorari (311 U. S. 627) from the Court of Appeals for the Seventh Circuit,[2] which affirmed a District Court order dismissing Armour's complaint against the railroads.[3] The ground on which the Circuit Court affirmed was that the issues involved presented administrative problems, necessitating primary resort to the Interstate Commerce Commission.[4] The sole question we find it necessary to decide is whether the Circuit Court was correct in this conclusion.

It is petitioner's contention that its complaint showed a wilful failure and refusal on the part of the railroads to deliver livestock to petitioner in accordance with the railroads' contractual and common law duties; that instead of delivering to petitioner, the railroads delivered to the Stock Yards Company—contrary to petitioner's express direction—with full knowledge that the Stock Yards Company would not effect a delivery to petitioner without first exacting a yardage charge in addition to the agreed transportation charges set out in the railroads' regular published tariffs; and that petitioner's right to proceed in the courts for such a breach of duty exists under the provisions of 49 U. S. C., §§ 9 and 22.[5]

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[2] 111 F. 2d 913.

[3] 27 F. Supp. 625.

[4] The District Court, in addition to relying on this ground, held that the complaint should be dismissed for failure to join the Stock Yards Company as a defendant, and for failure to obtain consent of court to bring suit against railroads which were in receivership. We express no opinion on the correctness of those holdings.

[5] Section 9 provides for concurrent jurisdiction of the Interstate Commerce Commission and the courts "for the recovery of the damages for which such common carrier may be liable under the

But respondents contend, and both courts below held, that the issues tendered by the complaint are not so simple as petitioner would have them seem. Their view is that adjudication of the issues presented relates to such complex transportation problems that determination of the legal questions must necessarily be preceded by the consideration of extensive evidence in a specialized field, and that decision of such questions is by statute vested exclusively in the Interstate Commerce Commission.[6] Since the cause was dismissed without answer or evidence, it is on the basis of the allegations of the complaint that we must apply the controlling law.

The factual situation, according to the complaint, is as follows: For many years prior to 1933 the railroads held themselves out as ready to transport goods to "Union Stock Yards, Illinois," and petitioner shipped to itself at that station much livestock from various points of origin in the United States. None of the railroads own or operate a depot or terminal facilities for the unloading and delivery of livestock, but all of them jointly have long had arrangements with the "Union Stock Yard and Transit Company," a public stock yard, for the use of its terminal facilities. This public stock yard is a common carrier, subject in some respects to the jurisdiction of the Interstate Commerce Commission, and in others to that of the Secretary of Agriculture. Its unloading charges, fixed according to a tariff published and on file with the Interstate Commerce Commission, are collected by the railroads from petitioner and other shippers and are in

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provisions of this chapter. . . ." Section 22 provides that "nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies; . . ."

[6] Cf. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Mitchell Coal & Coke Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247.

turn paid to the Stock Yards Company.[7] This charge, however, does not include payment for use of the facilities after unloading and before delivery to consignees, or for any services then performed. To cover these items, the Stock Yards Company collects an additional charge, since 1921 contained in a tariff filed with the Secretary of Agriculture,[8] and it is this charge which is at the root of the present controversy.

In 1933 petitioner, without resort to the Interstate Commerce Commission, demanded that the railroads alter this long-standing practice so as to relieve it from payment of this additional charge. Pursuant to its purpose, petitioner notified the railroads that it would not thereafter utilize any services after unloading; asked that tender of delivery be made to it immediately after unloading so that it could remove its stock to its own plant; avowed its readiness thereafter to accept delivery at such "reasonable and proper delivery pens of the carrier" at "Union Stock Yards, Illinois," as might be provided by the railroads; demanded that the railroads either directly or through their agent, the Stock Yards Company, deliver the consigned stock to petitioner without any charges except those paid for transportation; and declared that delivery to the Stock Yards Company contrary to petitioner's demand would be treated as a conversion of property for which the railroads would be held responsible. Notwithstanding this demand the railroads continued to deliver petitioner's consignments to the

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[7] Special statutory provision requires railroads delivering at public stockyards to unload the livestock. "Transportation . . . of ordinary livestock . . . destined to or received at public stockyards shall include . . . delivery . . . into suitable pens. . . ." 49 U. S. C. § 15 (5).

[8] Packers & Stockyards Act, 42 Stat. 159, 7 U. S. C. § 181 *et seq.* Before 1921, this charge was fixed by the Stock Yards Company itself.

Stock Yards Company and that Company, over petitioner's protest, continued to exact the controverted charge. The railroad companies knew that delivery to petitioner would only be made by the Stock Yards Company on Company property and with no means of egress save by crossing other property of the Company, for which privilege a charge would be exacted.

The complaint adds that in spite of this demand the railroads have "continuously refused to provide or establish by lease or otherwise at their said common station, Union Stock Yards, Illinois, any depot or platforms, pens or facilities" where petitioner might accept delivery of its stock without payment of the controverted charge, and have also "failed to make any arrangement with its said agent under . . . which the plaintiff might have free ingress . . . and egress . . . to a public street." Specifically, two breaches are alleged: (1) a breach of duty in failing "to provide reasonably convenient, accessible and safe unloading pens, at the said common depot or station, at which such livestock could be tendered to plaintiff"; and (2) a breach of contract in "failing to afford to plaintiff an opportunity of receiving its livestock and of removing the same with reasonable promptness from the unloading pens used by defendants at Union Stock Yards, Chicago, Illinois, or from any point at which delivery thereof is tendered, . . ." The contract relied on provides "That the carrier has received from the shipper . . . the livestock . . . consigned and destined as indicated below, which the carrier agrees to carry to its usual place of delivery at said destination, . . ." The usual place of delivery for livestock shipped to Union Stock Yards, Chicago, Illinois, and indeed the only place of delivery ever utilized at that station so far as the complaint shows is the public stock yards.

The complaint concludes with a prayer for affirmative relief: an adjudication that petitioner is entitled to de-

livery free of any charges other than those filed with the Interstate Commerce Commission; a mandatory injunction to require such delivery; and an accounting for those charges paid under protest.

This statement of the facts alleged in the complaint reveals that there are many questions relating to complex transportation problems that must be solved as a prerequisite to a determination of whether the railroads, in violation of contracts or governing laws, have failed properly to deliver petitioner's livestock.[9] For illustration:

First. At what point did the common carriers' duty to transport come to an end? Neither the statute nor any applicable principle of governing law can be said to mark this boundary, under all circumstances and conditions and in all cases.

Second. Under the allegations of the complaint, the practice of delivering livestock to the public stock yards in Chicago, and the practice of the Stock Yards Company of exacting a charge from consignees, are long-standing customs. Shippers, railroads, the Stock Yard Company, and the Interstate Commerce Commission alike have left these practices in effect over a long period of years. If use of the terminal facilities for egress to the street after unloading of livestock is a part of transportation, as petitioner alleges, and if this use is a service for which reasonable compensation is justified, it cannot be doubted that this charge, like the unloading charge,

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[9] Cf. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Mitchell Coal & Coke Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247; *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402. Petitioner relies on *Covington Stock-Yards Co.* v. *Keith*, 139 U. S. 128. But that case, a suit originally instituted before Congress adopted the Interstate Commerce Act, is not determinative of the respective jurisdictions of the courts and the Commission in this case.

is a part of that reasonable transportation rate determination of which is committed to the jurisdiction of the Interstate Commerce Commission. And before such long-standing transportation customs can be held illegal, it is of course necessary that evidence be heard.

Third. If the railroad delivers through the public stock yards, and petitioner's position is sustained, the railroad must necessarily absorb the additional charge. Under the complaint, this would be upon the basis that the railroad had not fully performed its transportation service. Yet the tariff charges for shipping petitioner's livestock were based upon the long-standing custom in which petitioner and the other packers had acquiesced. The railroad is entitled to receive and the shipper is required under the statute to pay a just and reasonable rate. A court judgment in favor of petitioner would reduce the compensation of the railroads for the performance of their services, and would in effect constitute a readjustment of their rate schedules.

Fourth. If, as petitioner insists, it is the duty of the railroads to provide terminal facilities which they do not now own, possess or control, a drastic change might have to be accomplished by them. Property might have to be acquired, expensive facilities might have to be secured, and correspondingly, rates might have to be adjusted. The need for such steps raises a transportation problem of the greatest magnitude, involving many intricate considerations such as must always play a part in evaluating a claim that new depots and facilities are necessary.

Fifth. The complaint shows that there is no provision in the tariff which would authorize the railroads to make refunds to petitioner of those charges paid by petitioner to the Stock Yards Company. Such refunds, if made, would be in the nature of special allowances not authorized by the tariff. A court's adjudication of this question in this case would not uniformly benefit all shippers

for whom respondents have transported livestock. Whether or not such a refund would amount to a discrimination should be determined by studies such as those the Interstate Commerce Commission is especially empowered to make.

Sixth. The complaint alleges that petitioner is willing to accept delivery at any point in the station area. What the station area embraces is not defined. Whether there is property in the area on which the railroads could erect pens is not shown. To decide this issue would require a court to define the boundaries of a station named in a tariff approved by the Interstate Commerce Commission.

The complexities of the situation here presented are graphically illustrated in the companion case of Swift & Co. *v.* Alton R. Co., 238 I. C. C. 179. Swift, one of Armour's competitors, took its petition for alteration of the same long-standing practice directly to the Commission. That expert body found it a necessary prerequisite to decision to have a trial examiner conduct extensive hearings, compiling in the process a record of 5 volumes, 1147 pages, and numerous exhibits.[10]

The principles making up the so-called primary jurisdiction doctrine are well settled. This is obviously a case for their application. The decision below is accordingly

Affirmed.

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[10] For instances where this Court has referred to the Commission's reports as indicative of the administrative problems involved in particular cases, see *Loomis* v. *Lehigh Valley R. Co.*, 240 U. S. 43, 50–51; *Northern Pacific Ry. Co.* v. *Solum*, 247 U. S. 477, 483.

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

APPEAL FROM THE COURT OF CLAIMS.

No. 191. Argued January 9, 1941.—Decided February 3, 1941.

1. The taking of property by a government officer, claiming to represent the Government but acting without authority and tortiously, confers no right to sue the Government in the Court of Claims for just compensation under the Fifth Amendment. P. 207.
2. Where an army engineer officer retook possession of boats which were leased to an individual and assumed to cancel the lease, acting in the matter under an order from the Acting Secretary of War, but without authority and tortiously, subsequent possession and use of the boats after the lease had been duly cancelled by the Chief of Engineers in accordance with its terms did not indicate a ratification by the United States of the unlawful taking. P. 209.
3. An Act of Congress conferring jurisdiction on the Court of Claims to hear and render judgment on a particular claim against the United States notwithstanding lapse of time, bar of statute of limitations, or previous court decisions (Act of April 18, 1934, c. 150, 48 Stat. 1322), *held* an act of grace to be strictly construed against the claimant. P. 210.
4. The Act of April 18, 1934, *supra,* conferring special jurisdiction on the Court of Claims to adjudge certain claims for "just compensation," for the taking of certain vessels, etc., "whether tortiously or not, . . . by the United States . . . for the use and benefit of the United States," does not allow interest on the recovery. Pp. 207, 211.
5. In a suit by a lessee on a claim based upon the retaking of vessels which were leased to him by the Government, the weight, if any, to be given to evidence in proof of damages, consisting of an offer to rent the vessels, made years after the seizure, and the rental value of similar vessels, was for the Court of Claims to determine in the light of the circumstances of the case. P. 211.

91 Ct. Cls. 42, modified and affirmed.

Cross appeals from a judgment of the Court of Claims.

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*Together with No. 192, *Goltra et al., Executors,* v. *United States,* also on appeal from the Court of Claims.

Assistant Solicitor General Fahy, with whom *Solicitor General Biddle, Assistant Attorney General Shea,* and *Messrs. Alexander Holtzoff, Melvin H. Siegel,* and *Thomas E. Harris* were on the brief, for the United States.

Messrs. Herman J. Galloway and *Frederick W. P. Lorenzen,* with whom *Mr. John F. Caskey* was on the brief, for Goltra et al.

MR. JUSTICE REED delivered the opinion of the Court.

The appeal brings here the correctness of the ruling by the Court of Claims which allows interest on a claim against the appellant, the United States. The cross appeal raises an issue that the compensation awarded is inadequate because the court failed to consider certain evidence as to the value for lease or use of the property involved.[1] The judgment was entered upon a petition filed under authority of a private jurisdictional act, quoted in the margin.[2]

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[1] Both parties also sought review by petition for certiorari because of this Court's decision in *Colgate* v. *United States,* 280 U. S. 43, and *Assiniboine Indian Tribe* v. *United States,* 292 U. S. 606. The inclusion of the phrase "as of right" in the jurisdictional act sufficiently makes clear the intention of Congress to authorize either party to take a technical appeal to this Court. Cf. House Report No. 828, 73rd Cong., 2nd Sess., p. 3.

[2] Act of April 18, 1934, 48 Stat. 1322, c. 150:

"*Be it enacted* . . . That jurisdiction is hereby conferred upon the Court of Claims of the United States, whose duty it shall be, notwithstanding the lapse of time or the bar of any statute of limitations or previous court decisions, to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States for just compensation to him for certain vessels and unloading apparatus taken, whether tortiously or not, on March 25, 1923, by the United States under orders of the Acting Secretary of War, for the use and benefit of the United States; and any other legal or equitable claims arising out of the transactions in connection therewith:

This controversy had its inception on March 25, 1923. At that time Edward F. Goltra was the lessee of four tug boats and 19 steel barges belonging to the United States. While tied up for the winter on the Mississippi at the Port of St. Louis, they were repossessed, because of an alleged breach of the lease, by Colonel Ashburn, Chief of the Inland and Coastwise Waterways Service, under orders from the Acting Secretary of War. Apparently some unloading facilities were also seized. In several court proceedings to recover possession Mr. Goltra was defeated.[3] It would be futile to examine as to whether these adjudications determined all or any controversies between the parties, since the jurisdictional act opened the doors of the Court, "notwithstanding the lapse of time or the bar of any statute of limitations or previous court decisions." Suing under this special legislation Mr. Goltra [4] sought damages for the wrongful taking of the fleet and facilities and recovered $350,000 with six per cent interest from March 25, 1923, to the date of payment. The Government assigns error only to the allowance of interest and the executors only to the refusal to consider certain proffered evidence.

By a contract of 1919, with a supplement of 1921, Mr. Goltra leased the fleet of river boats for governmentally

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Provided, That separate suits may be brought with respect to the vessels and the unloading apparatus, but no suit shall be brought after the expiration of one year from the effective date of this Act: *Provided further,* That either party may appeal as of right to the Supreme Court of the United States from any judgment in said case at any time within ninety days after the rendition thereof, and any judgment rendered in favor of the claimant shall be paid in the same manner as other judgments of said Court of Claims are paid."

[3] *Weeks* v. *Goltra,* 7 F. 2d 838; *Ex parte United States,* 263 U. S. 389; *Goltra* v. *Weeks,* 271 U. S. 536; *Goltra* v. *Davis,* 29 F. 2d 257, cert. denied, 279 U. S. 843; *Goltra* v. *Inland Waterways Corp.,* 49 F. 2d 497.

[4] On his death his executors were substituted.

supervised operation as common carriers on the Mississippi and its tributaries from the Chief of Engineers as lessor. The lessor was acting for the War Department, the executive agency in charge of the boats. The term of the lease was five years from the delivery of the first unit of the fleet, which occurred on July 15, 1922. All net earnings were sequestered during the term for application upon the purchase of the fleet at cost or appraised value as detailed in the lease, with provision for subsequent installment payments over sixteen years. Section 8 provided for termination by the lessor upon the lessee's noncompliance "in his judgment with any of the terms and conditions" and for the return to the lessor of the plant, barges, and towboats.

On March 4, 1921, the Secretary of War consented, in accordance with the lease, that Mr. Goltra's tariffs should be 80 per cent of the prevailing rail tariffs. This consent was withdrawn in May, 1922, before the delivery of the boats, and a consent limited to specific articles substituted. A control over the amount of grain to be carried was delegated to the Federal Manager of the Mississippi-Warrior River Service, a governmental corporation which operated a competing line. The enterprise got under way in the summer of 1922 and was immediately entangled in the ordinary viscissitudes of river transportation. The towboats had mechanical deficiencies; the open barges were not suitable for grain or other perishables; low water seriously interfered with navigation. After a few months towing by one tug, the fleet went into winter quarters late in the fall. Before business was resumed, Mr. Goltra was notified on March 4, 1923, by the Secretary of War that the lease was terminated and he was directed to turn over the towboats, barges and unloading facilities to Colonel Ashburn. Obedience to this order was refused and on March 25, 1923, Colonel Ashburn, under orders from the Acting

Secretary of War, took possession of the fleet without the consent of Mr. Goltra or his employees, for the use and benefit of the United States.

The seizure was without the knowledge of the Chief of Engineers, who was the lessor empowered by its terms to terminate the lease, and that officer had not reached any conclusion to the effect that Mr. Goltra had in any manner failed in his obligations under the contract. Subsequently, in April, the Chief of Engineers terminated the lease pursuant to § 8. The action did not represent his judgment but was done under direction of his superior, the Secretary of War.

The Court of Claims fixed the damages as of the time of seizure, with interest to the date of payment "not as interest but as a part of just compensation."

Interest. By statute,[5] derived from the Act of March 3, 1863, no interest is allowed on any claim up to the time of the rendition of judgment by the Court of Claims. This accords with the traditional immunity of the Government from the burden of interest unless it is specifically agreed upon by contract or imposed by legislation.[6] Without controverting this general rule, the executors find authority for the allowance of interest in the provision of the jurisdictional act for "just compensation . . . for certain vessels and unloading apparatus taken, whether tortiously or not . . . , for the use and benefit of the United States." Their argument is that the words "just compensation" have within themselves the same legal significance of interest on the award or damages from the date of the taking as has been given to these same words

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[5] Judicial Code § 177.

[6] 1 Op. Atty. Gen. 268, 550, 554; 3 *id.* 635; 4 *id.* 14, 136, 286; 7 *id.* 523; 9 *id.* 449; *Tillson* v. *United States,* 100 U. S. 43, 47; *Angarica* v. *Bayard,* 127 U. S. 251, 260; *United States* v. *North Carolina,* 136 U. S. 211, 216; *National Volunteer Home* v. *Parrish,* 229 U. S. 494, 496.

in the Fifth Amendment. They further urge that this interpretation is required by the phrase in the act "for the use and benefit of the United States" and the accepted finding that Colonel Ashburn's taking was for that purpose. In support of this position, the ruling of this Court in *Seaboard Air Line Ry. Co.* v. *United States*[7] and subsequent similar authority[8] is relied upon.

In the *Seaboard* case, § 10 of the Lever Act authorizing the taking by eminent domain of property for the public use on payment of just compensation was under examination. It contains no specific provision for interest. This Court held that a taking under the authority of § 10 required the just compensation "provided for by the Constitution" and that such compensation is payable "as of the time when the owners were deprived of their property."[9] This case, however, and the others cited in the preceding paragraph, involve the requisitioning or taking of property by eminent domain under authority of legislation. The distinction between property taken under authorization of Congress and property appropriated without such authority has long been recognized.[10] Acts of government officials in taking property without authorization of Congress confer no right of recovery upon the injured citizen.[11] There are two instances of Congressional ratification of takings which turned tortious acts into the exercise of the power of

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[7] 261 U. S. 299.

[8] *Phelps* v. *United States,* 274 U. S. 341; *Jacobs* v. *United States,* 290 U. S. 13; *Liggett & Myers* v. *United States,* 274 U. S. 215; *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106, 123.

[9] Cf. *Danforth* v. *United States,* 308 U. S. 271, 284–286.

[10] See *United States* v. *North American Co.,* 253 U. S. 330, 333–334, the *Seaboard* case at pages 304 and 305, the *Phelps* case at pages 343 and 344, and the *Jacobs* case at page 18.

[11] *Hooe* v. *United States,* 218 U. S. 322, 333; *United States* v. *Buffalo Pitts Co.,* 234 U. S. 228, 235.

eminent domain and placed upon the Government the duty to make "just compensation," including sums in the nature of interest. These are *United States* v. *Creek Nation* [12] and *Shoshone Tribe* v. *United States*.[13] In both cases there was a special jurisdictional act. In neither case was interest expressly allowed. In both this Court found Congressional confirmation of the previously unauthorized acts; in the *Creek* case, by disposition of the wrongfully acquired lands and failure to seek cancellation of the disposals after "full knowledge of the facts" [14] and in the *Shoshone* case by "the statutes already summarized, recognizing the Arapahoes equally with the Shoshones as occupants of the land, accepting their deeds of cession, assigning to the tribes equally the privilege of new allotments, and devoting to the two equally the award of future benefits." [15]

In the case now before us, however, there is neither the requisite Congressional authority before the taking nor any ratification or confirmation of the tort after the taking, which would justify a conclusion that the fleet was acquired by eminent domain. The jurisdictional act in itself is not an exercise of the power of eminent domain.[16] As the lease required action by the Chief of Engineers, the attempt to cancel it by the letter of the Secretary of War of March 3, 1923, and the order of the Acting Secretary of March 22, 1923, to take possession was unauthorized. The lower court found the taking tortious.[17]

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[12] 295 U. S. 103.

[13] 299 U. S. 476.

[14] 295 U. S. at 110.

[15] 299 U. S. at 495.

[16] *Shoshone Tribe* v. *United States*, 299 U. S. 476, 492.

[17] *Hawkins* v. *United States*, 96 U. S. 689, 697; *Plumley* v. *United States*, 226 U. S. 545, 547; *Yuhasz* v. *United States*, 109 F. 2d 467, 468; *Burton Coal Co.* v. *United States*, 60 Ct. Cls. 294, 312; *Lutz Co.* v. *United States*, 76 Ct. Cls. 405, 415.

Nor can it be said that the continued possession and use by the United States indicated any confirmation or ratification of the tortious act, so as to bring this case within the rule of the *Creek* or *Shoshone* cases. A reading of the reports of the prior litigation [18] makes abundantly clear that the United States relied upon the termination of the lease by the Chief of Engineers which was practically contemporaneous with, though subsequent to, the taking, as their justification for possession of the fleet and property. This reliance found complete support in the various cited decisions of the courts, even though Mr. Goltra's petition for rehearing in this Court pointed out that the letter of the Chief of Engineers was written to justify the seizure.[19] Notwithstanding these definite judicial decisions upon the rights of the parties, Congress felt that Mr. Goltra may not have had fair treatment. It passed the present jurisdictional act and to that the executors are relegated to find authority to allow interest.

Such acts are to be strictly construed.[20] In the pre-

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[18] See note 3 *supra*.

[19] Brief filed July 16, 1926, pp. 33–34: "The opinion violates the elementary common-law rule that a trespass cannot be justified by an act subsequent. It appears from the record that counsel for defendant caused this letter to be written for the sole purpose of justification of a prior trespass. It was not the act, therefore, of Major-General Beach for the purpose of canceling the contract, but the act of counsel for defendant to excuse the illegal act. We quote from the record: 'Mr. Hocker: I caused this letter to be executed and delivered to Mr. Goltra for the purpose of meeting that objection. The Court: You caused a letter to be written a month after the seizure to justify the seizure and an attempted cancellation which had already been had? Mr. Hocker: Yes, I did.' Certainly bad faith is shown here."

[20] *Dubuque & Pacific R. Co.* v. *Litchfield,* 23 How. 66, 88; *Slidell* v. *Grandjean,* 111 U. S. 412, 437–38; *Coosaw Mining Co.* v. *South Carolina,* 144 U. S. 550, 562; *Blair* v. *Chicago,* 201 U. S. 400, 471; *Charles River Bridge* v. *Warren Bridge,* 11 Pet. 420, 544; see *Russell* v. *Sebastian,* 233 U. S. 195, 205.

ceding paragraphs we have demonstrated that this unauthorized taking and judicially approved retention was in no sense an exercise of the power of eminent domain. We see no ground to read into this act of grace, which was apparently drawn to rectify what Congress felt might be a wrong, an authority to allow interest as a part of just compensation. If interest was to be allowed for so long a period upon an ordinary claim, and contrary to established governmental practice, Congress would have so declared.[21]

Evidence. The main issue raised by the appeal of Mr. Goltra's executors relates to the evidence. In its opinion the Court of Claims said:

"It is contended by the plaintiff that, in arriving at just compensation, an offer to rent the fleet made years after the fleet had been seized and the rental value of similar vessels on the Mississippi River should be taken into consideration. These contentions cannot be sustained." 91 Ct. Cls. 42, 73.

Assuming that these items of evidence were competent, we cannot say that the Court of Claims, making a jury award, was bound to give them weight. The actual damages suffered by Mr. Goltra were highly speculative, especially since the contract was subject to lawful cancellation whenever the Chief of Engineers rightly or wrongly but in good faith determined that Mr. Goltra was violating its provisions. Mr. Goltra's operation under the lease had been a losing venture. Under these circumstances, the Court of Claims may have believed that an offer to purchase, made in May, 1925, was too remote to influence its judgment and that the rental value of other vessels on the Mississippi, not subject to the same restrictions as those taken by the Govern-

[21] Cf. *Tillson* v. *United States,* 100 U. S. 43, 46; *Boston Sand Co.* v. *United States,* 278 U. S. 41, 46.

ment, was too unreliable to afford a useful comparison. It was for the Court of Claims to decide what weight such facts deserved, and we construe its opinion only as holding that under the circumstances of this case the evidence was not considered to be of any assistance in reaching a conclusion.

Mr. Goltra's executors also complain of the failure of the Court of Claims to make certain findings, but there is no indication that the Court of Claims did not consider the facts which were embodied in the proposed findings.

The judgment in No. 191 is modified as indicated in the opinion and, as modified, affirmed; the judgment in No. 192 is affirmed.

No. 191, modified and affirmed.
No. 192, affirmed.

The CHIEF JUSTICE and MR. JUSTICE BLACK took no part in the consideration and decision of these appeals.

HIGGINS *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 253. Argued January 10, 13, 1941.—Decided February 3, 1941.

1. Salaries and other expenses incident to the looking after one's own investments in bonds and stocks are not deductible under § 23 (a) of the Revenue Act of 1932 as expenses paid or incurred in carrying on a "trade or business." P. 214.
2. In this connection, "carrying on a business," has not been interpreted by any regulation or by rulings approved by the Secretary of the Treasury. Certain rulings of less dignity, favorable to the taxpayer, made in individual cases, are not determinative. P. 215.

Unless the administrative practice is long continued and substantially uniform in the Bureau and without challenge by the Government before the Board of Tax Appeals and in the courts,

it should not be assumed that Congressional reënactment of language so construed by rulings of the Board was an adoption of the construction.

3. The proposition that the management of one's own securities may be a "business" where there is sufficient extent, continuity, variety and regularity, is supported by no fixed administrative construction. P. 216.

4. For the purpose of deduction, the part of the taxpayer's expense attributable to the management of his real estate business may be segregated from the part paid for the care of his bond and stock investments. P. 218.

111 F. 2d 795, affirmed.

CERTIORARI, 311 U. S. 626, to review the affirmance of a ruling of the Board of Tax Appeals, 39 B. T. A. 1005, which sustained the Commissioner's refusal to allow certain deductions in an income tax return.

Mr. Selden Bacon, with whom *Mr. Orwill V. W. Hawkins* was on the brief, for petitioner.

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

Messrs. Rollin Browne, John G. Jackson, Jr., and *George Craven* filed a brief, as *amici curiae,* urging reversal.

MR. JUSTICE REED delivered the opinion of the Court.

Petitioner, the taxpayer, with extensive investments in real estate, bonds and stocks, devoted a considerable portion of his time to the oversight of his interests and hired others to assist him in offices rented for that purpose. For the tax years in question, 1932 and 1933, he claimed the salaries and expenses incident to looking after his properties were deductible under § 23 (a) of

the Revenue Act of 1932.[1] The Commissioner refused the deductions. The applicable phrases are: "In computing net income there shall be allowed as deductions: (a) *Expenses.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . ." There is no dispute over whether the claimed deductions are ordinary and necessary expenses. As the Commissioner also conceded before the Board of Tax Appeals that the real estate activities of the petitioner in renting buildings[2] constituted a business, the Board allowed such portions of the claimed deductions as were fairly allocable to the handling of the real estate. The same offices and staffs handled both real estate and security matters. After this adjustment there remained for the year 1932 over twenty and for the year 1933 over sixteen thousand dollars expended for managing the stocks and bonds.

Petitioner's financial affairs were conducted through his New York office pursuant to his personal detailed instructions. His residence was in Paris, France, where he had a second office. By cable, telephone and mail, petitioner kept a watchful eye over his securities. While he sought permanent investments, changes, redemptions, maturities and accumulations caused limited shiftings in his portfolio. These were made under his own orders. The offices kept records, received securities, interest and dividend checks, made deposits, forwarded weekly and annual reports and undertook generally the care of the investments as instructed by the owner. Purchases were made by a financial institution. Petitioner did not participate directly or indirectly in the management of the corporations in which he held stock or bonds. The method of handling his affairs under examination had been employed by petitioner for more than thirty years.

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[1] 47 Stat. 169, c. 209.

[2] Cf. *Pinchot* v. *Commissioner*, 113 F. 2d 718.

No objection to the deductions had previously been made by the Government.

The Board of Tax Appeals [3] held that these activities did not constitute carrying on a business and that the expenses were capable of apportionment between the real estate and the investments. The Circuit Court of Appeals affirmed,[4] and we granted certiorari because of conflict.[5]

Petitioner urges that the "elements of continuity, constant repetition, regularity and extent" differentiate his activities from the occasional like actions of the small investor. His activity is and the occasional action is not "carrying on business." On the other hand, the respondent urges that "mere personal investment activities never constitute carrying on a trade or business, no matter how much of one's time or of one's employees' time they may occupy."

Since the first income tax act, the provisions authorizing business deductions have varied only slightly. The Revenue Act of 1913 [6] allowed as a deduction "the necessary expenses actually paid in carrying on any business." By 1918 the present form was fixed and has so continued.[7] No regulation has ever been promulgated which interprets the meaning of "carrying on a business," nor any rulings approved by the Secretary of the Treasury, i. e., Treasury Decisions.[8] Certain rulings of less dignity, favorable to petitioner,[9] appeared in individual cases but

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[3] 39 B. T. A. 1005.

[4] 111 F. 2d 795.

[5] *Kales* v. *Commissioner,* 101 F. 2d 35; *DuPont* v. *Deputy,* 103 F. 2d 257.

[6] 38 Stat. 167, § II B.

[7] 40 Stat. 1066, § 214 (a) (1).

[8] Cf. *Helvering* v. *New York Trust Co.,* 292 U. S. 455, 467–468.

[9] O. D. 537, 2 C. B. 175 (1920); O. D. 877, 4 C. B. 123 (1921); I. T. 2751, XIII–1 C. B. 43 (1934). See also 1934 C. C. H. Federal Tax Service, Vol. 3, ¶ 6035, p. 8027.

they are not determinative.[10] Even acquiescence[11] in some Board rulings after defeat does not amount to settled administrative practice.[12] Unless the administrative practice is long continued and substantially uniform in the Bureau and without challenge by the Government in the Board and courts, it should not be assumed, from rulings of this class, that Congressional reënactment of the language which they construed was an adoption of their interpretation.

While the Commissioner has combated views similar to petitioner's in the courts, sometimes successfully[13] and sometimes unsuccessfully,[14] the petitioner urges that the Bureau accepted for years the doctrine that the management of one's own securities might be a business where there was sufficient extent, continuity, variety and regularity. We fail to find such a fixed administrative construction in the examples cited. It is true that the decisions are frequently put on the ground that the taxpayer's activities were sporadic but it does not follow that had those activities been continuous the Commissioner would not have used the argument advanced here, i. e., that no amount of personal investment management would turn those activities into a business. Evidently such was the Government's contention in the *Kales*

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[10] *Biddle* v. *Commissioner,* 302 U. S. 573, 582. Cf. *Estate of Sanford* v. *Commissioner,* 308 U. S. 39, 52. But see *Helvering* v. *Bliss,* 293 U. S. 144, 151, and *McFeely* v. *Commissioner,* 296 U. S. 102, 108.

[11] Kissel *v.* Commissioner, 15 B. T. A. 1270, acquiesced in VIII–2 C. B. 28 (1929); Croker *v.* Commissioner, 27 B. T. A. 588, acquiesced in XII–1 C. B. 4 (1933).

[12] *Higgins* v. *Smith,* 308 U. S. 473, 478–479.

[13] *Bedell* v. *Commissioner,* 30 F. 2d 622, 624; *Monell* v. *Helvering,* 70 F. 2d 631; *Kane* v. *Commissioner,* 100 F. 2d 382.

[14] *Kales* v. *Commissioner,* 101 F. 2d 35; *DuPont* v. *Deputy,* 103 F. 2d 257, 259, reversed on other grounds, 308 U. S. 488.

case,[15] where the things the taxpayer did met petitioner's tests, and in *Foss* v. *Commissioner*[16] and *Washburn* v. *Commissioner*[17] where the opinions turned on the extent of the taxpayer's participation in the management of the corporations in which investments were held.[18]

Petitioner relies strongly on the definition of business in *Flint* v. *Stone Tracy Company:*[19] "'Business' is a very comprehensive term and embraces everything about which a person can be employed." This definition was given in considering whether certain corporations came under the Corporation Tax law which levies a tax on corporations engaged in business. The immediate issue was whether corporations engaged principally in the "holding and management of real estate"[20] were subject to the act. A definition given for such an issue is not controlling in this dissimilar inquiry.[21]

To determine whether the activities of a taxpayer are "carrying on a business" requires an examination of the facts in each case. As the Circuit Court of Appeals observed, all expenses of every business transaction are not deductible. Only those are deductible which relate to carrying on a business. The Bureau of Internal Revenue has this duty of determining what is carrying on a business, subject to reëxamination of the facts by the Board of Tax Appeals[22] and ultimately to review on the law by the

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[15] *Kales* v. *Commissioner,* 34 B. T. A. 1046, 101 F. 2d 35.

[16] 75 F. 2d 326.

[17] 51 F. 2d 949, 953.

[18] Cf. Roebling *v.* Commissioner, 37 B. T. A. 82; Heilbroner *v.* Commissioner, 34 B. T. A. 1200.

[19] 220 U. S. 107, 171.

[20] *Id.* 169.

[21] *Cohens* v. *Virginia,* 6 Wheat. 264, 399; *Puerto Rico* v. *Shell Co.,* 302 U. S. 253, 269.

[22] Revenue Act of 1932, 47 Stat. 169, § 272; Internal Revenue Code, § 272.

courts on which jurisdiction is conferred.[23] The Commissioner and the Board appraised the evidence here as insufficient to establish petitioner's activities as those of carrying on a business. The petitioner merely kept records and collected interest and dividends from his securities, through managerial attention for his investments. No matter how large the estate or how continuous or extended the work required may be, such facts are not sufficient as a matter of law to permit the courts to reverse the decision of the Board. Its conclusion is adequately supported by this record, and rests upon a conception of carrying on business similar to that expressed by this Court for an antecedent section.[24]

The petitioner makes the point that his activities in managing his estate, both realty and personalty, were a unified business. Since it was admittedly a business in so far as the realty is concerned, he urges, there is no statutory authority to sever expenses allocable to the securities. But we see no reason why expenses not attributable, as we have just held these are not, to carrying on business cannot be apportioned. It is not unusual to allocate expenses paid for services partly personal and partly business.[25]

Affirmed.

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[23] Internal Revenue Code, § 1141.

[24] *Van Wart* v. *Commissioner,* 295 U. S. 112, 115.

[25] 3 Paul & Mertens, Law of Federal Income Taxation § 23.65; cf. *National Outdoor Advertising Bureau* v. *Helvering,* 89 F. 2d 878, 881.

UNITED STATES *v.* HUTCHESON ET AL.

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

No. 43. Argued December 10, 1940.—Decided February 3, 1941.

1. In determining whether trade union conduct violates the Sherman Act, that Act should be read with § 20 of the Clayton Act and with the Norris-LaGuardia Act. P. 231.
2. Labor union activities enumerated in § 20 of the Clayton Act, which that section declares shall not be "considered or held to be violations of any law of the United States," are not punishable as criminal under the Sherman Act. P. 232.
3. Section 20 of the Clayton Act does not differentiate between trade union conduct directed against an employer because of a controversy arising in the relation between employer and employee, as such, and conduct similarly directed but arising from a struggle between two unions seeking the favor of the same employer. P. 232.
4. In a case involving interstate commerce, union carpenters refused to work for a brewing company by which they were employed, or on construction work being done for it and for its adjoining tenant; they attempted to persuade members of other unions similarly to refuse to work; they picketed the brewer's premises, displaying signs "Unfair to Organized Labor"; and they recommended to the union members and their friends not to buy or use the brewer's product. *Held:*

   (1) That these actions were protected from prosecution under the Sherman Act by § 20 of the Clayton Act, construed in the light of Congress's definition of a "labor dispute" in the Norris-LaGuardia Act. P. 233.

   (2) In view of the broad definition of "labor dispute" in the Norris-LaGuardia Act, § 20 of the Clayton Act gives protection to the conduct it describes although directed in part against outsiders to the labor dispute. *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, is inapplicable. P. 234.

32 F. Supp. 600, affirmed.

APPEAL under the Criminal Appeals Act from a judgment quashing an indictment under the Sherman Act.

Assistant Attorney General Arnold, with whom *Solicitor General Biddle* and *Messrs. Richard H. Demuth* and *Roscoe T. Steffen* were on the brief, for the United States.

The indictment charges a direct physical restraint of interstate commerce in goods manufactured and sold by Anheuser-Busch, in goods manufactured and sold by the Gaylord Container Corporation, in building materials intended for Anheuser-Busch, Borsari Tank Corporation, L. O. Stocker Co., and Gaylord Container Corporation, and in materials purchased by Anheuser-Busch for the production of its goods. It further alleges that the defendants had the purpose and intent to restrain this interstate commerce. These allegations are clearly sufficient to show a direct and deliberate restraint of interstate trade.

The indictment also charges the kind of restraint which is illegal under the Sherman Act. Distinguishing *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469. In the first place there is here no mere local dispute between an employer and his employees, and the acts charged are not merely local activities conducted in a single factory and subject to the supervision and control of the local authorities. The indictment charges rather that a restraint of trade has been imposed as a result of a jurisdictional dispute between two national unions and that this dispute has resulted in many different strikes in many different places which have imposed a direct and unreasonable burden upon interstate trade. It further charges that the defendants sought to force Anheuser-Busch to take their side in this dispute and, when Anheuser-Busch refused, they engaged in a deliberate campaign on a national scale to drive Anheuser-Busch from the interstate market.

In the second place, the objective of the conspiracy was not the protection and advancement of the rights

of labor, such as collective bargaining, wages, hours, or working conditions; it was rather to win by force a jurisdictional dispute with another union and to deprive the members of that other union of work. Defendants attempted to destroy the interstate business of Anheuser-Busch, and to restrain the interstate trade of the other companies, because they hoped by these methods to compel Anheuser-Busch to side with them in the jurisdictional dispute. The holding in the *Apex* case that a union may stop production in a local factory in order to achieve union recognition is not authority for a similar holding when the objective of the union is to win by force a nation-wide contest, not with the employer, but with another union.

In the third place, the objective of the union was sought to be achieved not, as in the *Apex* case, by interfering with the business of the other party to the dispute, but by stopping interstate trade to or by four companies, with only one of which it had any relation and against none of which it had any real grievance. The purpose of the defendants in restraining the interstate commerce of Anheuser-Busch was to compel it to become a partisan in the fight between the Brotherhood of Carpenters and the Machinists' Union. The purpose of the defendants in restraining the interstate commerce of the other companies was to compel them to put pressure on Anheuser-Busch to become a partisan in the jurisdictional dispute. This aspect of the defendants' activities indicates an intent to interfere with interstate commerce on a far broader scale than the closing of one local plant; it raises a question quite distinct from that in the *Apex* case.

The opinion in that case recognizes that the type of restraint charged to the defendants in this case, because it actually and potentially interferes with competitors in every direction, is within the prohibitions of the Sher-

man Act. The test laid down in that case is whether the restraint is "upon commercial competition in the marketing of goods or services." The mere closing of a factory is not enough to bring the case within that test. But if, as in this case, the restraints go beyond that and are directed toward driving an employer, against whom the union has no real grievance, from the interstate market and are calculated to interfere with the interstate commerce of persons dealing with the employer, the application of the Sherman Act is clear.

In *Loewe* v. *Lawlor,* 208 U. S. 274, *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443, and *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Assn.,* 274 U. S. 37, this Court held that activities similar in all important respects to the activities of the defendants here restrained commerce within the meaning of the Sherman Act.

The exclusion of a trader from the market, or the erection of arbitrary barriers to free access to the market, has long been recognized both under the Sherman Act and the common law as a restraint of trade. See *Darcy* v. *Allein,* 11 Coke 84b; *The Case of the Tailors of Ipswich,* 11 Coke 53a; *Colgate* v. *Bacheler,* Cro. Eliza. 872; *Mitchel* v. *Reynolds,* 1 P. Wms. 181; *Anon.,* Moore (K. B.) 115, 72 Eng. Repr. 477; *Anon.,* 2 Leo. 210, 74 Eng. Repr. 485; *Alger* v. *Thacher,* 19 Pick. 51; *United States* v. *Addyston Pipe & Steel Co.,* 85 F. 271, 279; *Pratt* v. *British Medical Assn.,* 1 K. B. 244; *United States* v. *American Medical Assn.,* 110 F. 2d 703. This Court has in a number of cases struck down restraints, not because of their effect upon prices or production, but because they operated to destroy free access to the market. *Paramount Famous Corp.* v. *United States,* 282 U. S. 30; *United States* v. *First National Pictures, Inc.,* 282 U. S. 44; *Eastern States Lumber Assn.* v. *United States,* 234 U. S. 600.

The restraint charged in the indictment may not be justified under the "rule of reason" enunciated in *Standard Oil Co.* v. *United States,* 221 U. S. 1.

There is no form of labor warfare so opposed to the public interest and to the interest of organized labor itself as the jurisdictional strike which stops the commerce of an employer who is trying to be fair to organized labor. An employer who finds himself the victim of such a strike is powerless. There is no concession he can make which will stop the attack on his business. Similarly, the union whose relations with the employer the other union seeks to disrupt cannot rely on its satisfactory service or its superior craftsmanship to maintain its position; it has no weapon, other than ruthless economic warfare, to defend itself against the aggressive tactics of those who would destroy it.

If a union is permitted to expand through the mere brutal use of power against neutral employers, there will be a premium on ruthless and coercive leadership. If, as this Court has said, the Sherman Act is a charter of freedom, it must include within its prohibitions the destruction of one labor organization by another through force and coercion at the expense of innocent bystanders and the tying up of the business of the public at large.

The view that the Norris-LaGuardia Act modified or amended § 1 of the Sherman Act so as to make lawful thereunder activities which might otherwise be illegal is plainly erroneous. That statute does nothing more than limit the equity powers of the federal courts. Its purpose and scope are shown by its first section.

The purpose thus declared is carried out by the other provisions of the Act which prescribe terms and conditions to be followed by the federal courts in issuing and enforcing injunctions in cases arising out of labor disputes. Nothing in the Act purports to change the existing substantive rules of criminal and civil law as they

apply to the activities of labor organizations. This conclusion as to the purpose of the Act is confirmed by its legislative history. The reports of the congressional committees and the debates on the floor of Congress show that the Act was directed at nothing more than the equity powers of the federal courts.

The situation as to the criminal law is too plain to require elaboration. It may be suggested that by reason of its denial of the injunctive remedy the law changes the substantive rights of one who seeks relief in a court of equity. On the other hand, there is much to be said for the view that for the most part the Act simply embodies the sound view as to the equity practice prevailing before its enactment. The only section of the Act which might properly be regarded as impairing substantive rights is § 3, which outlaws the so-called "yellow dog" contract. It has never been suggested that the Norris-LaGuardia Act modifies in any way § 7 of the Sherman Act, which confers a civil right to triple damages.

In both the Senate and the House the bill finally enacted was entitled "a bill to define and limit the jurisdiction of courts sitting in equity." For explicit statements as to the purpose of the bill see the Senate report at pages 7–8 (S. Rep. No. 163, 72d Cong., 1st Sess.). Similar statements appear in the House report at pages 2–3 (H. Rep. No. 669, 72d Cong., 1st Sess.). If it were necessary to resort to statements made in the debates on the bill, additional support for this conclusion could be supplied. See 75 Cong. Rec. 5467, 5464.

The same reasoning which supports the conclusion that the Norris-LaGuardia Act does not expressly amend § 1 of the Sherman Act closes the door on any possible argument that an amendment is accomplished by inference or implication. Moreover, "It is a cardinal principle of construction that repeals by implication are not favored." *United States* v. *Borden Company*, 308 U. S. 188, 198.

It is obvious that the Norris-LaGuardia Act is a limited statute passed with specific reference to the exercise of a particular kind of jurisdiction by the federal courts.

Mr. Charles H. Tuttle, with whom *Messrs. Joseph O. Carson, Thomas E. Kerwin,* and *Joseph O. Carson, II,* were on the brief, for appellees.

The case is ruled by the *Apex* decision, 310 U. S. 469.

The attack upon the "jurisdictional strike" is without any sound legal basis. We are not here concerned with social and economic questions and reforms which lie within the jurisdiction of Congress and the state legislatures.

If the Sherman Law applies equally to capital and labor, how can non-competition between industrial concerns be a crime under that law and yet competition between labor unions be also a crime?

There are multitudinous decisions holding that a jurisdictional strike is not an offense, criminal or even civil, against the Sherman Law. There is no decision to the contrary. *Terrio* v. *S. N. Nielsen Const. Co.,* 30 F. Supp. 77; *Levering & G. Co.* v. *Morrin,* 289 U. S. 103; *United Leather Workers* v. *Herkert,* 265 U. S. 457; *Senn* v. *Tile Layers Union,* 301 U. S. 468; *Lauf* v. *E. G. Shinner & Co.,* 303 U. S. 323; *Blankenship* v. *Kurfman,* 96 F. 2d 450; *United Chain Theatres* v. *Philadelphia Union,* 50 F. 2d 890; *Allen* v. *Flood,* House of Lords 1898; *Pickett* v. *Walsh,* 192 Mass. 572; *Kemp* v. *Division No. 241,* 255 Ill. 213; *Exchange Bakery & Restaurant* v. *Rifkin,* 245 N. Y. 260; *Stillwell Theatre, Inc.* v. *Kaplan,* 259 N. Y. 405; *Nann* v. *Raimist,* 255 N. Y. 306; *Bossert* v. *Dhuy,* 221 N. Y. 342; *National Protective Assn.* v. *Cummings,* 170 N. Y. 315; *Horman* v. *United Mine Workers,* 166 Ark. 255; *Overland Publishing Co.* v. *Union Lithograph Co.,* 57 Cal. App. 366; *Greenwood* v. *Building Trades Council,* 71 Cal. App. 159; *Shaughnessy* v. *Jordan,* 184 Ind. 499; *Roddy* v. *United Mine Workers,* 41 Okla. 621.

See report of the House Committee recommending the Clayton Act, 63rd Cong., 2d Sess., H. R. 2, pp. 14 *et seq.*

The assumption that § 6 of the Clayton Act is irrelevant rests in large part upon the substitution of "reasonable" or "justified" for the word "legitimate" in the Act, and upon disregarding that the Supreme Court has defined this word "legitimate" as meaning "normal." *Duplex Co.* v. *Deering,* 254 U. S. 443. It also disregards that portion of the section which expressly immunizes "the operation of labor organizations for the purposes of mutual help."

See the dissenting opinion of Mr. Justice Holmes in the *Bedford Company* case, 247 U. S. 37, 65.

Section 20 of the Clayton Act expressly provides that none of the acts specified therein shall "be considered or held to be violations of any law of the United States."

That section and the subsequent Norris-LaGuardia Act are also fatal to this indictment. See *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products, Inc.,* 311 U. S. 91; *Donnelly Garment Co.* v. *International L. G. W. Union,* 20 F. Supp. 767; *Grace Co.* v. *Williams,* 20 F. Supp. 263.

The claim of appellant that the Norris-LaGuardia Act has to do only with "the equity powers of the Federal Courts" is clearly erroneous. It overlooks the express declaration in § 2 of the "public policy of the United States" on the substantive rights of labor, and overlooks also the inherent and implied declaration of public policy contained in the whole text and substance of the Act.

Another fundamental error which organized labor must and does resist as fatal to its very existence, is the constant exclusion of the right to seek, gain and protect employment and to strike in defense thereof, from the normal and legitimate objects and operations of a labor union.

The indictment nowhere charges a secondary boycott. The very contrary appears.

The United Brotherhood had a perfect common law, statutory and constitutional right peacefully to endeavor to persuade its members and friends of organized labor to refrain from patronizing Anheuser-Busch beer, which was merely one of many products manufactured by the Anheuser-Busch Company.

The acts of the defendants affecting Borsari Tank Corporation and L. O. Stocker Company were not a crime under the anti-trust laws.

Aside from the omission to show any crime against the anti-trust law, the indictment fails to show that the Brotherhood was morally or legally bound to submit to the unilateral decision of the Anheuser-Busch Company awarding to the machinists by contract the exclusive right to this particular class of work at the very time when the construction contract was about to be let.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Whether the use of conventional, peaceful activities by a union in controversy with a rival union over certain jobs is a violation of the Sherman Law, Act of July 2, 1890, 26 Stat. 209, as amended, 15 U. S. C. § 1, is the question. It is sharply presented in this case because it arises in a criminal prosecution. Concededly an injunction either at the suit of the Government or of the employer could not issue.

Summarizing the long indictment, these are the facts. Anheuser-Busch, Inc., operating a large plant in St. Louis, contracted with Borsari Tank Corporation for the erection of an additional facility. The Gaylord Container Corporation, a lessee of adjacent property from Anheuser-Busch, made a similar contract for a new building with the Stocker Company. Anheuser-Busch obtained the

materials for its brewing and other operations and sold its finished products largely through interstate shipments. The Gaylord Corporation was equally dependent on interstate commerce for marketing its goods, as were the construction companies for their building materials. Among the employees of Anheuser-Busch were members of the United Brotherhood of Carpenters and Joiners of America and of the International Association of Machinists. The conflicting claims of these two organizations, affiliated with the American Federation of Labor, in regard to the erection and dismantling of machinery had long been a source of controversy between them. Anheuser-Busch had had agreements with both organizations whereby the Machinists were given the disputed jobs and the Carpenters agreed to submit all disputes to arbitration. But in 1939 the president of the Carpenters, their general representative, and two officials of the Carpenters' local organization, the four men under indictment, stood on the claims of the Carpenters for the jobs. Rejection by the employer of the Carpenters' demand and the refusal of the latter to submit to arbitration were followed by a strike of the Carpenters, called by the defendants against Anheuser-Busch and the construction companies, a picketing of Anheuser-Busch and its tenant, and a request through circular letters and the official publication of the Carpenters that union members and their friends refrain from buying Anheuser-Busch beer.

These activities on behalf of the Carpenters formed the charge of the indictment as a criminal combination and conspiracy in violation of the Sherman Law. Demurrers denying that what was charged constituted a violation of the laws of the United States were sustained, 32 F. Supp. 600, and the case came here under the Criminal Appeals Act. Act of March 2, 1907, 34 Stat. 1246, 18 U. S. C. § 682; Judicial Code § 238, 28 U. S. C. § 345.

In order to determine whether an indictment charges an offense against the United States, designation by the pleader of the statute under which he purported to lay the charge is immaterial. He may have conceived the charge under one statute which would not sustain the indictment but it may nevertheless come within the terms of another statute. See *Williams* v. *United States,* 168 U. S. 382. On the other hand, an indictment may validly satisfy the statute under which the pleader proceeded, but other statutes not referred to by him may draw the sting of criminality from the allegations. Here we must consider not merely the Sherman Law but the related enactments which entered into the decision of the district court.

Section 1 of the Sherman Law on which the indictment rested is as follows: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." The controversies engendered by its application to trade union activities and the efforts to secure legislative relief from its consequences are familiar history. The Clayton Act of 1914 was the result. Act of October 15, 1914, 38 Stat. 730. "This statute was the fruit of unceasing agitation, which extended over more than twenty years and was designed to equalize before the law the position of workingmen and employer as industrial combatants." *Duplex Co.* v. *Deering,* 254 U. S. 443, 484. Section 20 of that Act, which is set out in the margin in full,[1] with-

[1] 38 Stat. 738, 29 U. S. C. § 52: "No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the appli-

drew from the general interdict of the Sherman Law specifically enumerated practices of labor unions by prohibiting injunctions against them—since the use of the injunction had been the major source of dissatisfaction—and also relieved such practices of all illegal taint by the catch-all provision, "nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States." The Clayton Act gave rise to new litigation and to renewed controversy in and out of Congress regarding the status of trade unions. By the generality of its terms the Sherman Law had necessarily compelled the courts to work out its meaning from case to case. It was widely believed that into the Clayton Act courts read the very beliefs which that Act was designed to remove. Specifically the courts restricted the scope of § 20 to trade union activities directed against an employer by his own employees. *Duplex Co.* v. *Deer-*

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cation, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

"And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

ing, supra. Such a view it was urged, both by powerful judicial dissents and informed lay opinion, misconceived the area of economic conflict that had best be left to economic forces and the pressure of public opinion and not subjected to the judgment of courts. *Ibid.*, p. 485–486. Agitation again led to legislation and in 1932 Congress wrote the Norris-LaGuardia Act. Act of March 23, 1932, 47 Stat. 70, 29 U. S. C. §§ 101–115.

The Norris-LaGuardia Act removed the fetters upon trade union activities, which according to judicial construction § 20 of the Clayton Act had left untouched, by still further narrowing the circumstances under which the federal courts could grant injunctions in labor disputes. More especially, the Act explicitly formulated the "public policy of the United States" in regard to the industrial conflict,[2] and by its light established that the allowable area of union activity was not to be restricted, as it had been in the *Duplex* case, to an immediate employer-employee relation. Therefore, whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and § 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct.

[2] "Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Were, then, the acts charged against the defendants prohibited, or permitted, by these three interlacing statutes? If the facts laid in the indictment come within the conduct enumerated in § 20 of the Clayton Act they do not constitute a crime within the general terms of the Sherman Law because of the explicit command of that section that such conduct shall not be "considered or held to be violations of any law of the United States." So long as a union acts in its self-interest and does not combine with non-labor groups,[3] the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means. There is nothing remotely within the terms of § 20 that differentiates between trade union conduct directed against an employer because of a controversy arising in the relation between employer and employee, as such, and conduct similarly directed but ultimately due to an internecine struggle between two unions seeking the favor of the same employer. Such strife between competing unions has been an obdurate conflict in the evolution of so-called craft unionism and has undoubtedly been one of the potent forces in the modern development of industrial unions. These conflicts have intensified industrial tension but there is not the slightest warrant for saying that Congress has made § 20 inapplicable to trade union conduct resulting from them.

In so far as the Clayton Act is concerned, we must therefore dispose of this case as though we had before us precisely the same conduct on the part of the defendants in pressing claims against Anheuser-Busch for in-

[3] Cf. *United States* v. *Brims*, 272 U. S. 549, involving a conspiracy of mill work manufacturers, building contractors and union carpenters.

creased wages, or shorter hours, or other elements of what are called working conditions. The fact that what was done was done in a competition for jobs against the Machinists rather than against, let us say, a company union is a differentiation which Congress has not put into the federal legislation and which therefore we cannot write into it.

It is at once apparent that the acts with which the defendants are charged are the kind of acts protected by § 20 of the Clayton Act. The refusal of the Carpenters to work for Anheuser-Busch or on construction work being done for it and its adjoining tenant, and the peaceful attempt to get members of other unions similarly to refuse to work, are plainly within the free scope accorded to workers by § 20 for "terminating any relation of employment," or "ceasing to perform any work or labor," or "recommending, advising, or persuading others by peaceful means so to do." The picketing of Anheuser-Busch premises with signs to indicate that Anheuser-Busch was unfair to organized labor, a familiar practice in these situations, comes within the language "attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working." Finally, the recommendation to union members and their friends not to buy or use the product of Anheuser-Busch is explicitly covered by "ceasing to patronize . . . any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do."

Clearly, then, the facts here charged constitute lawful conduct under the Clayton Act unless the defendants cannot invoke that Act because outsiders to the immediate dispute also shared in the conduct. But we need not determine whether the conduct is legal within the restrictions which *Duplex Co.* v. *Deering* gave to the im-

munities of § 20 of the Clayton Act. Congress in the Norris-LaGuardia Act has expressed the public policy of the United States and defined its conception of a "labor dispute" in terms that no longer leave room for doubt. *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products,* 311 U. S. 91. This was done, as we recently said, in order to "obviate the results of the judicial construction" theretofore given the Clayton Act. *New Negro Alliance* v. *Sanitary Grocery Co.,* 303 U. S. 552, 562; see *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 507, n. 26. Such a dispute, § 13 (c) provides, "includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." [4] And under § 13 (b) a person is "participating or interested in a labor dispute" if he "is engaged in the same industry, trade, craft, or occupation, in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation."

To be sure, Congress expressed this national policy and determined the bounds of a labor dispute in an act explicitly dealing with the further withdrawal of injunctions in labor controversies. But to argue, as it was urged before us, that the *Duplex* case still governs for purposes of a criminal prosecution is to say that that which on the equity side of the court is allowable conduct may in a criminal proceeding become the road to

[4] Three years later, in the National Labor Relations Act, Congress gave similar breadth to the definition of a labor dispute. Act of July 3, 1935, 49 Stat. 448, 449, 29 U. S. C. § 152 (9).

prison. It would be strange indeed that although neither the Government nor Anheuser-Busch could have sought an injunction against the acts here challenged, the elaborate efforts to permit such conduct failed to prevent criminal liability punishable with imprisonment and heavy fines. That is not the way to read the will of Congress, particularly when expressed by a statute which, as we have already indicated, is practically and historically one of a series of enactments touching one of the most sensitive national problems. Such legislation must not be read in a spirit of mutilating narrowness. On matters far less vital and far less interrelated we have had occasion to point out the importance of giving "hospitable scope" to Congressional purpose even when meticulous words are lacking. *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381, 391, and authorities there cited. The appropriate way to read legislation in a situation like the one before us, was indicated by Mr. Justice Holmes on circuit: "A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur in the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for the courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before." *Johnson* v. *United States* 163 F. 30, 32.

The relation of the Norris-LaGuardia Act to the Clayton Act is not that of a tightly drawn amendment to a technically phrased tax provision. The underlying aim

of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction. This was authoritatively stated by the House Committee on the Judiciary. "The purpose of the bill is to protect the rights of labor in the same manner the Congress intended when it enacted the Clayton Act, October 15, 1914 (38 Stat. L., 738), which act, by reason of its construction and application by the Federal courts, is ineffectual to accomplish the congressional intent." H. Rep. No. 669, 72d Congress, 1st Session, p. 3. The Norris-LaGuardia Act was a disapproval of *Duplex Printing Press Co.* v. *Deering, supra,* and *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Assn.,* 274 U. S. 37, as the authoritative interpretation of § 20 of the Clayton Act, for Congress now placed its own meaning upon that section. The Norris-LaGuardia Act reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act. In this light § 20 removes all such allowable conduct from the taint of being a "violation of any law of the United States," including the Sherman Law.

There is no profit in discussing those cases under the Clayton Act which were decided before the courts were furnished the light shed by the Norris-LaGuardia Act on the nature of the industrial conflict. And since the facts in the indictment are made lawful by the Clayton Act in so far as "any law of the United States" is concerned, it would be idle to consider the Sherman Law apart from the Clayton Act as interpreted by Congress. Cf. *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469. It was precisely in order to minimize the difficulties to which the general language of the Sherman Law in its application to workers had given rise, that Congress cut through all the tangled verbalisms and enumerated concretely the types

of activities which had become familiar incidents of union procedure.

Affirmed.

MR. JUSTICE MURPHY took no part in the disposition of this case.

MR. JUSTICE STONE, concurring.

As I think it clear that the indictment fails to charge an offense under the Sherman Act, as it has been interpreted and applied by this Court, I find no occasion to consider the impact of the Norris-LaGuardia Act on the definition of participants in a labor dispute in the Clayton Act, as construed by this Court in *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443—an application of the Norris-LaGuardia Act which is not free from doubt and which some of my brethren sharply challenge.

The indictment is for a conspiracy to promote by peaceful means a local "jurisdictional" strike in St. Louis, Missouri. Its aim is to determine whether the United Brotherhood of Carpenters or the International Association of Machinists, both labor organizations affiliated with the American Federation of Labor, shall be permitted to install certain machinery on the premises of Anheuser-Busch, Inc. in St. Louis. It appears that Anheuser-Busch brews beer and manufactures other products which it ships to points outside the state. It also uses supplies and building materials which are shipped to it from points outside the state. Borsari Tank Corporation is about to construct for Anheuser-Busch upon its premises a building for its use in brewing beer. L. O. Stocker Company has contracted and intends to construct an office building upon land of Anheuser-Busch adjacent to its brewery and leased by it to the Gaylord Container Corporation, a manufacturer of paper and cardboard containers which it ships in interstate commerce. It is al-

leged that both Borsari and Stocker will require and use in the construction of the buildings, materials to be shipped from points outside the state to the building sites on or adjacent to the Anheuser-Busch premises.

The indictment charges that pursuant to the conspiracy to enforce the jurisdictional demands appellees, who are officers or representatives of the Brotherhood, called a strike of its members, some seventy-eight in number, in the employ of Anheuser-Busch, attempted to call sympathy strikes by members of other unions in its employ and caused the premises of Anheuser-Busch and the adjacent premises leased to Gaylord to be picketed by persons "bearing umbrellas and charging Anheuser-Busch, Inc., to be unfair to organized labor; with the intent to shut down the brewery and manufacturing plant of Anheuser-Busch, Inc., to hinder and prevent the passage of persons and property to and from said premises and thus to restrain and stop the commerce of Anheuser-Busch" in the beer and other products manufactured by it, and in the supplies and materials procured by it extrastate, and "to restrain the commerce" of Gaylord. It is alleged that pursuant to the conspiracy, defendants "refused to permit members of the United Brotherhood . . . to be employed and prevented such members from being employed by Borsari . . . with the intent and effect of preventing construction of the building about to be built by Borsari . . . and thus of restraining the commerce of Anheuser-Busch in beer . . . and also with the knowledge and willful disregard of the consequent restraint and stoppage of commerce in the materials intended to be used by Borsari." Like allegations are made with respect to Stocker with the added charge that the acts alleged were with intent to prevent performance of Stocker's contract with Gaylord "with willful disregard of the consequent restraint of the commerce of Gaylord."

There is the further allegation that pursuant to the conspiracy defendants and their co-conspirators have instigated and brought about a "boycott of beer brewed by Anheuser-Busch . . . and of dealers in said beer throughout the United States," by distributing to members of labor organizations and to the public at large in many states and by published notices circulated interstate "denouncing Anheuser-Busch, Inc. as unfair to organized labor and calling upon all union members and friends of organized labor to refrain from purchasing and drinking said beer."

We are concerned with the alleged activities of defendants, actual or intended, only so far as they have an effect on commerce prohibited by the Sherman Act as it has been amended or restricted in its operation by the Clayton Act. The legality of the alleged restraint under the Sherman Act is not affected by characterizing the strike, as this indictment does, as "jurisdictional" or as not within the "legitimate object of a labor union." The restraints charged are of two types: One is that resulting to the commerce of Anheuser-Busch, Borsari, Stocker and Gaylord from the peaceful picketing of the Anheuser-Busch premises, a part of which is leased to Gaylord, and the refusal of the Brotherhood to permit its members to work, and its prevention of its members from working (by what means other than picketing does not appear) for Borsari and Stocker. The other is that resulting from the requests addressed to the public to refrain from purchasing Anheuser-Busch beer.

It is plain that the first type of restraint is only that which is incidental to the conduct of a local strike and which results from closing the plant of a manufacturer or builder who ships his product in interstate commerce, or who procures his supplies from points outside the state. Such restraints, incident to such a strike, upon the interstate transportation of the products or supplies have

been repeatedly held by this Court, without a dissenting voice, not to be within the reach of the Sherman Anti-Trust Act. There is here no allegation in the case of any of the employers of any interference, actual or intended, by strikers with goods moving or about to be shipped in interstate commerce such as was last term so sharply presented and held not to be a violation of the Sherman Act in *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469.

With respect to Borsari and Stocker the indictment does no more than charge a local strike to enforce the jurisdictional demands upon Anheuser-Busch by the refusal of union members to work in the construction of buildings for Anheuser-Busch or upon its land, the work upon which, so far as appears, has not even begun. The restraint alleged is only that resulting from the "disregard" by the strikers of the stoppage of the movement interstate of the building materials and the manufactured products of Gaylord consequent upon their refusal to construct the buildings. Precisely as in *Levering & Garrigues Co.* v. *Morrin,* 289 U. S. 103, where a local building strike with like consequences was held not to violate the Sherman law, there is wanting here any fact to show that the conspiracy was directed at the use of any particular building material in the states of origin and destination or its transportation between them "with the design of narrowing or suppressing the interstate market," each of which were thought to be crucial in *Bedford Cut Stone Co.* v. *Stone Cutters' Assn.,* 274 U. S. 37, 46–47. See *Apex Hosiery Co.* v. *Leader, supra,* 506.

As to the commerce of Anheuser-Busch and Gaylord, the indictment at most shows a conspiracy to picket peacefully their premises and publicly to charge the former with being unfair to organized labor, all with the intent to shut down the plant of Anheuser-Busch

and to hinder and prevent the passage of persons and property to and from the premises and thus to restrain the commerce of Anheuser-Busch and Gaylord. There is also the allegation already noted that the refusal to work for Stocker will restrain the commerce of Gaylord, presumably because he will manufacture and ship less of his product if the proposed building is not completed.

It is a novel proposition that allegations of local peaceful picketing of a manufacturing plant to enforce union demands concerning terms of employment accompanied by announcements that the employer is unfair to organized labor is a violation of the Sherman Act whatever effect on interstate commerce may be intended to follow from the acts done. They, like the allegations here, show only such effect upon interstate commerce as may be inferred from the acts alleged and in any event such restraint as there may be is not shown to be more than that which is incidental to every strike causing a shutdown of a manufacturing plant whose product moves in interstate commerce or stopping building operations where the builder is using materials shipped to him in interstate commerce. If the counts of the indictment which we are now considering make out an offense, then every local strike aimed at closing a shop whose products or supplies move in interstate commerce is, without more, a violation of the Sherman Act. They present a weaker case than those unanimously held by this Court not to involve violation of the Sherman Act in *United Mine Workers* v. *Coronado Coal Co.* (First Coronado Case), 259 U. S. 344; *United Leather Workers* v. *Herkert & Meisel Co.*, 265 U. S. 457; *Levering & Garrigues Co.* v. *Morrin, supra,* and see *Coronado Coal Co.* v. *United Mine Workers* (Second Coronado Case), 268 U. S. 295, 310. In any case there is no allegation in the indictment that the restraint did or could operate to suppress competition

in the market of any product and so dismissal of these counts is required by our decision in *Apex Hosiery Co.* v. *Leader, supra.*

The second and only other type of restraint upon interstate commerce charged is the so-called "boycott" alleged to be by the publication of notices charging Anheuser-Busch with being unfair to labor and requesting members of the Union and the public not to purchase or use the Anheuser-Busch product. Were it necessary to a decision I should have thought that, since the strike against Anheuser-Busch was by its employees and there is no intimation that there is any strike against the distributors of the beer, the strike was a labor dispute between employer and employees within the labor provisions of the Clayton Act as they were construed in *Duplex Printing Press Co.* v. *Deering, supra.* In that case § 20 of the Act, as the opinion of the Court points out, makes lawful the action of any person* "ceasing to patronize . . . any party to such dispute" or "recommending, advising, or persuading others by peaceful and lawful means so to do."

Be that as it may, it is a sufficient answer to the asserted violation of the Sherman Act by the publication of such notices and requests, to point out that the strike was by employees of Anheuser-Busch; that there was no boycott of or strike against any purchaser of Anheuser-Busch beer by any concerted action or refusal to patronize him by the purchase of beer or other products supplied by him such as was condemned in *Loewe* v. *Lawlor,* 208 U. S. 274, 300–307; cf. *Apex Hosiery Co.* v. *Leader,*

*Appellees, being national and local officers of the Brotherhood and representing the employees in the labor dispute with their employer, are "proximately and substantially concerned" as parties to an actual dispute and are, therefore, entitled to the benefits of the Clayton Act. See *Duplex Printing Press Co.* v. *Deering, supra,* 470, 471.

supra, 505; and finally that the publication, unaccompanied by violence, of a notice that the employer is unfair to organized labor and requesting the public not to patronize him is an exercise of the right of free speech guaranteed by the First Amendment which cannot be made unlawful by act of Congress. See *Thornhill* v. *Alabama,* 310 U. S. 88.*

I can only conclude that, upon principles hitherto recognized and established by the decisions of this Court, the indictment charges no violation of the Sherman Act.

MR. JUSTICE ROBERTS, dissenting.

I am of opinion that the judgment should be reversed.

The indictment adequately charges a conspiracy to restrain trade and commerce with the specific purpose of preventing Anheuser-Busch from receiving in interstate commerce commodities and materials intended for use in its plant; of preventing the Borsari Corporation from obtaining materials in interstate commerce for use in performing a contract for Anheuser-Busch, and of preventing the Stocker Company from receiving materials in like manner for the construction of a building for the Gaylord Corporation. The indictment further charges that the conspiracy was to restrain interstate commerce flowing from Missouri into other states of products of Anheuser-Busch and generally to restrain the interstate trade and commerce of the three corporations named.[1]

Without detailing the allegations of the indictment, it is sufficient to say that they undeniably charge a secondary boycott, affecting interstate commerce.

This court, and many state tribunals, over a long period of years, have held such a secondary boycott illegal. In 1908 this court held such a secondary boycott, instigated to enforce the demands of a labor union against

[1] *C. E. Stevens Co.* v. *Foster & Kleiser Co.,* 311 U. S. 255.

an employer, was a violation of the Sherman Act and could be restrained at the suit of the employer.[2] It is matter of history that labor unions insisted they were not within the purview of the Sherman Act but this court held to the contrary. As a result of continual agitation the Clayton Act was adopted. That Act, as amended, became effective October 15, 1914.[3] Subsequently suits in equity were brought to restrain secondary boycotts similar to those involved in earlier cases. The contention was made that the Clayton Act exempted labor organizations from such suits. That contention was not sustained.[4] Upon the fullest consideration, this court reached the conclusion that the provisions of § 20 of the Clayton Act governed not the substantive rights of persons and organizations but merely regulated the practice according to which, and the conditions under which, equitable relief might be granted in suits of this character. Section 6 has no bearing on the offense charged in this case.

This court also unanimously held that a conspiracy such as is charged in the instant case renders the conspirators liable to criminal prosecution by the United States under the anti-trust acts.[5]

It is common knowledge that the agitation for complete exemption of labor unions from the provisions of the anti-trust laws persisted. Instead of granting the complete exemption desired, Congress adopted, March 23, 1932, the Norris-LaGuardia Act.[6] The title and the contents of that Act, as well as its legislative history,[7] dem-

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[2] *Loewe* v. *Lawlor*, 208 U. S. 274.

[3] c. 323, 38 Stat. 730.

[4] *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443; *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Assn.*, 274 U. S. 37.

[5] *United States* v. *Brims*, 272 U. S. 549.

[6] c. 90, 47 Stat. 70; 29 U. S. C. §§ 101–115.

[7] S. Rep. No. 163, 72d Cong., 1st Sess., pp. 7–8; H. Rep. No. 669, 72d Cong., 1st Sess., pp. 2–3; 75 Cong. Rec. 5464, 5467.

onstrate beyond question that its purpose was to define and to limit the jurisdiction of federal courts sitting in equity. The Act broadens the scope of labor disputes as theretofore understood, that is, disputes between an employer and his employes with respect to wages, hours, and working conditions, and provides that before a federal court can enter an injunction to restrain illegal acts certain preliminary findings, based on evidence, must be made. The Act further deprives the courts of the right to issue an injunction against the doing of certain acts by labor organizations or their members. It is unnecessary to detail the acts as to which the jurisdiction of a court of equity is abolished. It is sufficient to say, what a reading of the Act makes letter clear, that the jurisdiction of actions for damages authorized by the Sherman Act, and of the criminal offenses denounced by that Act, are not touched by the Norris-LaGuardia Act.

By a process of construction never, as I think, heretofore indulged by this court, it is now found that, because Congress forbade the issuing of injunctions to restrain certain conduct, it intended to repeal the provisions of the Sherman Act authorizing actions at law and criminal prosecutions for the commission of torts and crimes defined by the anti-trust laws. The doctrine now announced seems to be that an indication of a change of policy in an Act as respects one specific item in a general field of the law, covered by an earlier Act, justifies this court in spelling out an implied repeal of the whole of the earlier statute as applied to conduct of the sort here involved. I venture to say that no court has ever undertaken so radically to legislate where Congress has refused so to do.[8]

The construction of the act now adopted is the more clearly inadmissible when we remember that the scope

[8] The rule always heretofore followed in respect of implied repeal was recently expounded in an analogous situation in *United States* v. *Borden Co.*, 308 U. S. 188, 198.

of proposed amendments and repeals of the anti-trust laws in respect of labor organizations has been the subject of constant controversy and consideration in Congress. In the light of this history, to attribute to Congress an intent to repeal legislation which has had a definite and well understood scope and effect for decades past, by resurrecting a rejected construction of the Clayton Act and extending a policy strictly limited by the Congress itself in the Norris-LaGuardia Act, seems to me a usurpation by the courts of the function of the Congress not only novel but fraught, as well, with the most serious dangers to our constitutional system of division of powers.

The CHIEF JUSTICE joins in this opinion.

PHILLIPS, GOVERNOR OF OKLAHOMA, ET AL. *v.* UNITED STATES ET AL.

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

No. 201. Argued January 15, 1941.—Decided February 3, 1941.

1. Section 266 of the Jud. Code is not a measure of broad social policy to be construed with great liberality, but an enactment technical in the strict sense of the term and to be applied as such. P. 251.
2. A suit to enjoin the Governor of a State from employing military force in alleged violation of plaintiff's constitutional rights, can not be maintained in a three-judge District Court under Jud. Code § 266, or be reviewed by direct appeal to this Court under that section, where the validity of no statute of the State is challenged, but merely the legality of the Governor's actions done under color of general provisions of the state constitution and laws conferring his executive and military powers. *Sterling* v. *Constantin*, 287 U. S. 378, distinguished. P. 253.

3. A decree of the District Court in a suit mistakenly brought under Jud. Code § 266, is reviewable by the Circuit Court of Appeals, though rendered by three judges. P. 254.
4. On an appeal to this Court from a decree of a three-judge District Court, in a suit erroneously brought under Jud. Code § 266, this Court vacated the decree and remanded the cause to the District Court so that it might enter a fresh decree from which a timely appeal could be taken. P. 254.

Decree vacated.

APPEAL from a decree of the District Court of three judges awarding an interlocutory injunction. 33 F. Supp. 261.

Messrs. John B. Dudley and *Randell S. Cobb,* First Assistant Attorney General of Oklahoma, with whom *Messrs. Mac Q. Williamson,* Attorney General, *George S. Ramsey, Duke Duvall, Villard Martin,* and *Thomas Garrett Logan* were on the brief, for appellants.

Assistant Attorney General Shea, with whom *Solicitor General Biddle* and *Messrs. Melvin H. Siegel, Sidney J. Kaplan, Frederick Bernays Wiener, Richard H. Demuth, Alan Johnstone,* and *Charlie C. McCall* were on the brief, for the United States.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

As part of a flood control and hydro-electric development, the Grand River Dam Authority, an agency of the State of Oklahoma, was empowered to construct the Grand River Dam, with authority to borrow money and accept grants from the United States. Oklahoma Laws of 1935, Art. 4, c. 70. For the construction of the dam the United States allotted twenty million dollars to the Authority. Eight and one-half millions, in round numbers, were to be used as a grant, and eleven and one-half for the bonds of the Authority. Construction began in

February, 1938, and by the spring of last year much of the work was nearing completion. During this period, the Governor of Oklahoma unsuccessfully pressed against the Authority claims for the flooding of roads within the dam area. The action which the Governor finally took to enforce his own views in this matter is the source of the present litigation. On March 13, 1940, he declared martial law in an area surrounding part of the dam-site and ordered the Adjutant General of the state to occupy it. The following day the Governor in conjunction with other state officials obtained an *ex parte* order in a state court restraining further work on the dam by the Authority. Thereupon the United States began the present suit in a federal district court. A temporary order was issued against the Governor and the other officials restraining them from interference with the Grand River project by further prosecution of their suit in the state court and by the use of military force. Deeming the suit to be one arising under § 266 of the Judicial Code as amended, 28 U. S. C. § 380, a district court of three judges was convened which, after hearing, entered an interlocutory injunction in the terms of the temporary restraining order. This is the decree that is now before us.

But unless § 266 required the present suit to be heard by three judges, under the Jurisdictional Act of 1925 we are without authority to entertain this direct appeal from a district court. § 238 of the Judicial Code as amended, 28 U. S. C. § 345. Having concluded that there is a fatal bar to our entertaining the appeal, we are without power to consider the other issues that were argued here.

By § 266, which is set forth in the margin,[1] Congress provided an exceptional procedure for a well-understood

[1] Judicial Code § 266, as amended, 28 U. S. C. § 380:

"No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by

type of controversy. The legislation was designed to secure the public interest in "a limited class of cases of special importance." *Ex parte Collins,* 277 U. S. 565, 567.

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restraining the action of any officer of such State in the enforcement or execution of such statute or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: *Provided, however,* That one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the State, and to such other persons as may be defendants in the suit: *Provided,* That if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. It is further provided that if before the

It is a matter of history that this procedural device was a means of protecting the increasing body of state legislation regulating economic enterprise from invalidation by a conventional suit in equity. While Congress thus sought to assure more weight and greater deliberation by not leaving the fate of such litigation to a single judge, it was no less mindful that the requirement of three judges, of whom one must be a Justice of this Court or a circuit judge, entails a serious drain upon the federal judicial system particularly in regions where, despite modern facilities, distance still plays an important part in the effective administration of justice. And all but the few great metropolitan areas are such regions. Moreover, inasmuch as this procedure also brings direct review of a district court to this Court, any loose construction of the requirements of § 266 would defeat the purposes of Congress, as expressed by the Jurisdictional Act of February 13, 1925, to keep within narrow confines our appellate docket. *Moore* v. *Fidelity & Deposit Co.*, 272 U. S. 317, 321. The history of § 266 (see Pogue, State Determination of State Law, 41 Harv. L. Rev. 623, and Hutcheson, A Case for Three Judges, 47 Harv. L. Rev. 795), the nar-

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final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the State, that the suit in the State courts is not being prosecuted with diligence and good faith. The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

rowness of its original scope, the piece-meal explicit amendments which were made to it (see Act of March 4, 1913, 37 Stat. 1013, and Act of February 13, 1925, 43 Stat. 936, amending § 238 of the Judicial Code), the close construction given the section in obedience to Congressional policy (see, for instance, *Moore* v. *Fidelity & Deposit Co., supra; Smith* v. *Wilson,* 273 U. S. 388; *Ex parte Collins, supra; Oklahoma Gas Co.* v. *Packing Co.,* 292 U. S. 386;*Ex parte Williams,* 277 U. S. 267; *Ex parte Public National Bank,* 278 U. S. 101; *Rorick* v. *Board of Comm'rs,* 307 U. S. 208; *Ex parte Bransford,* 310 U. S. 354), combine to reveal § 266 not as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such.

To bring this procedural device into play—to dislocate the normal operations of the system of lower federal courts and thereafter to come directly to this Court—requires a suit which seeks to interpose the Constitution against enforcement of a state policy, whether such policy is defined in a state constitution or in an ordinary statute or through the delegated legislation of an "administrative board or commission." The crux of the business is procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy. This was the aim of Congress and this is the reconciling principle of the cases.

To the test of this principle must be put the argument that the present case is within § 266.

The Oklahoma constitution has the customary provisions pertaining to the powers of a governor. In him is lodged "The Supreme Executive power," he is "Commander-in-Chief of the militia of the State" and he "shall cause the laws of the State to be faithfully executed." Constitution of Oklahoma, Article VI, §§ 2, 6, 8. Defining with particularity these powers, an Oklahoma statute

"authorized and required" its Governor to call out the national guard in case of war or similar contingencies including "any forcible obstructing of the execution of the laws or reasonable apprehension thereof, and at all other times he may deem necessary . . ." Oklahoma Statutes, 1931, § 4989; Okla. Stat. Ann. Title 44, § 66. In its complaint the United States did not impugn the validity of these Oklahoma provisions. But the Governor justified his declaration of martial law under their authority, and since his action is deemed a lawless interference with the Government's constitutional rights, the suit is claimed to be an "application for" an "interlocutory injunction . . . restraining the enforcement, operation, or execution of" a "statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute . . . upon the ground of the unconstitutionality of such statute."

The claim proves too much. Probably most of the actions of governors trace back to the common provision charging them with taking care that the laws be faithfully executed. Some constitutional or statutory provision is the ultimate source of all actions by state officials. But an attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority even though a misreading of the statute is invoked as justification. At least not within the Congressional scheme of § 266. It is significant that the United States in its complaint did not charge the enabling acts of Oklahoma with unconstitutionality, but assailed merely the Governor's action as exceeding the bounds of law. In other words, it seeks a restraint not of a statute but of an executive action. But the enforcement of a "statute," within the meaning of § 266, is not sought to be enjoined merely because a state official seeks shelter under it by way of defense against a charge of lawlessness. As Mr. Justice

Cardozo said of a related problem affecting the business of the federal courts, "we do not travel back so far." *Gully* v. *First National Bank,* 299 U. S. 109, 116.

On its face, § 266 precludes a reading which would bring within its scope every suit to restrain the conduct of a state official whenever, in the ultimate reaches of litigation, some enactment may be said to authorize the questioned conduct. The special procedure only attends "the application for" an interlocutory injunction restraining enforcement of a statute. In other words, the complainant must seek to forestall the demands of some general state policy, the validity of which he challenges. No one questions Oklahoma's authority to give her Governor "Supreme Executive power" nor to make him Commander-in-Chief of her militia. What is here challenged is a single, unique exercise of these prerogatives of his office. This view is reinforced by the proviso added to § 266 by the Act of March 4, 1913, 37 Stat. 1013, whereby suit in a federal court against the enforcement of a statute can be stayed if appropriate provision is made for testing its validity in the state courts. Of course, a suit cannot be brought in the court of a state to enforce a governor's declaration of martial law. In short, this is not a case for which the procedural structure of § 266 was devised. If the Governor's action is subject to restraint in the District Court, the procedural road to be taken is the normal course of litigation in a federal district court and not the short cut of § 266.

Sterling v. *Constantin,* 287 U. S. 378, which is invoked as a precedent, was a very different case. There martial law was employed in support of an order of the Texas Railroad Commission limiting production of oil in the East Texas field. The Governor was sought to be restrained as part of the main objective to enjoin "the execution of an order made by an administrative . . . commission," and as such was indubitably within § 266.

Compare *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 311 U. S. 570, and *Railroad Commission* v. *Humble Oil & Refining Co.*, 311 U. S. 578.

Had a timely appeal been taken to the circuit court of appeals the decree below could have been reviewed there, though rendered by three judges. *Healy* v. *Ratta*, 289 U. S. 701; 67 F. 2d 554; 292 U. S. 263. While this Court cannot hear the merits, it will, where the question of jurisdiction was not obviously settled by prior decisions, enforce the limitations of § 266 by an order framed to save appellants their proper remedies. *Oklahoma Gas Co.* v. *Packing Co.*, 292 U. S. 386, 392. We therefore vacate the decree and remand the cause to the court which heard the case so that it may enter a fresh decree from which appellants may, if they wish, perfect a timely appeal to the circuit court of appeals.

Decree vacated.

GUGGENHEIM *v.* RASQUIN, ADMINISTRATRIX.

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

No. 92. Argued January 6, 7, 1941.—Decided February 3, 1941.

1. Under § 506 of the Revenue Act of 1932, which provides that for the purposes of the gift tax the amount of a gift is "the value thereof at the date of the gift," the "value" in the case of single-premium policies of life insurance, irrevocably assigned simultaneously with issuance, is the cost to the donor and not the cash surrender value of the policies. P. 256.
2. Article 2 (5) of Treasury Regulations 79, which provided that the "irrevocable assignment of a life insurance policy . . . constitutes a gift in the amount of the net cash surrender value, if any, plus the prepaid insurance adjusted to the date of the gift," applied only to policies upon which current premiums were still being paid at the date of the gift, not to single-premium policies. P. 258.

110 F. 2d 371, affirmed.

CERTIORARI, 311 U. S. 628, to review the reversal of a judgment for the petitioner, 28 F. Supp. 322, in a suit for a tax refund.

Mr. John G. Jackson, Jr., with whom *Mr. Paul B. Barringer, Jr.* was on the brief, for petitioner.

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

Messrs. J. Merrill Wright and *David R. Shelton* filed a brief on behalf of Martha F. Mason, as *amicus curiae,* urging reversal.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

It is provided in the Revenue Act of 1932 (47 Stat. 169, 248) that for gift-tax purposes the amount of a gift of property shall be "the value thereof at the date of the gift." § 506. This controversy involves the question of whether such "value" in case of single-premium life insurance policies, which are irrevocably assigned simultaneously with issuance, is cost to the donor or cash-surrender value of the policies. The case is here on a petition for certiorari which we granted because of a conflict among the Circuit Courts of Appeals [1] as respects the proper method for valuation of such gifts made prior to 1936.[2]

[1] In conflict with the decision below are *Commissioner* v. *Haines,* 104 F. 2d 854 (C. C. A. 3d); *Helvering* v. *Cronin,* 106 F. 2d 907 (C. C. A. 8th); *United States* v. *Ryerson,* 114 F. 2d 150 (C. C. A. 7th), discussed in Paul, Studies in Federal Taxation (3d series) pp. 403, *et seq.*

[2] Art. 19 (9), Treasury Regulations 79, promulgated February 26, 1936, provides that replacement cost at the date of the gift is the measure of value of a single-premium life insurance policy.

In December, 1934, petitioner purchased, at a cost of $852,438.50, single-premium life insurance policies on her own life in the aggregate face amount of $1,000,000. At substantially the same time she assigned them irrevocably to three of her children. Her gift-tax return listed the policies at their asserted cash-surrender value [3] of $717,344.81. The Commissioner determined that the "value" of the policies was their cost and assessed a deficiency which petitioner paid. This is a suit for a refund. Judgment for petitioner in the District Court was reversed by the Circuit Court of Appeals. 110 F. 2d 371.

We agree with the Circuit Court of Appeals that cost rather than cash-surrender value is the proper criterion for valuation of such gifts under § 506 of the Act.

Cash-surrender value is the reserve less a surrender charge. And in case of a single-premium policy the reserve is the face amount of the contract discounted at a specified rate of interest on the basis of the insured's expected life. If the policy is surrendered, the company will pay the cash-surrender value. It is asserted that the market for insurance contracts is usually the issuing companies or the banks who will lend money on them; that banks will not loan more than the cash-surrender value; and that if policies had an actual realizable value in excess of their cash-surrender value, there would arise a business of purchasing such policies from those who otherwise would surrender them. From these facts it is urged that cash-surrender value represents the amount which would be actually obtained for the policies in a willing buyer-willing seller market—the test suggested

[3] The government asserts that none of the policies had a cash-surrender value prior to the expiration of one year. In view of our disposition of the case we do not stop to decide whether, in view of the pleadings and the stipulation, that position can be maintained here.

by Treasury Regulations 79, Art. 19 (1), promulgated October 30, 1933.[4]

That analysis, however, overlooks the nature of the property interest which is being valued. Surrender of a policy represents only one of the rights of the insured or beneficiary. Plainly that right is one of the substantial legal incidents of ownership. See *Chase National Bank* v. *United States,* 278 U. S. 327, 335; Vance on Insurance (2d ed.) pp. 54–56. But the owner of a fully paid life insurance policy has more than the mere right to surrender it; he has the right to retain it for its investment virtues and to receive the face amount of the policy upon the insured's death. That these latter rights are deemed by purchasers of insurance to have substantial value is clear from the difference between the cost of a single-premium policy and its immediate or early cash-surrender value—in the instant case over $135,000. All of the economic benefits of a policy must be taken into consideration in determining its value for gift-tax purposes. To single out one and to disregard the others is in effect to substitute a different property interest for the one which was the subject of the gift. In this situation as in others (*Susquehanna Power Co.* v. *State Tax Comm'n,* 283 U. S. 291, 296) an important element in the value of the property is the use to which it may be put. Certainly the petitioner here did not expend $852,438.50 to make an immediate gift limited to $717,344.81. Presumptively the value of these policies at the date of the

[4] Art. 19 (1) provided: ". . . The value of property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell. Where the property is sold within a reasonable period after the date of the gift, and it is shown that the selling price reflects the fair market value thereof as of the date of the gift, the selling price will be accepted as the amount of the gift. All relevant facts and elements of value should be considered in every case."

gift was the amount which the insured had expended to acquire them. Cost is cogent evidence of value. And here it is the only suggested criterion which reflects the value to the owner of the entire bundle of rights in a single-premium policy—the right to retain it as well as the right to surrender it. Cost in this situation is not market price in the normal sense of the term. But the absence of market price is no barrier to valuation.[5] *Lucas* v. *Alexander*, 279 U. S. 573, 579.

Petitioner, however, argues that cash-surrender value was made the measure of value by Art. 2 (5), Treasury Regulations 79, promulgated October 30, 1933, which provided that the "irrevocable assignment of a life insurance policy . . . constitutes a gift in the amount of the net cash surrender value, if any, plus the prepaid insurance adjusted to the date of the gift." The argument is that under this regulation the reserve in case of a single-premium policy covers the prepaid insurance and represents the entire value of the policy. The regulation is somewhat ambiguous. But in our view it applied only to policies upon which current premiums were still being paid at the date of the gift, not to single-premium policies. Accordingly, the problem here involves an interpretation of the meaning of "value" in § 506 unaided by an interpretative regulation.

Affirmed.

[5] In this connection it should be noted that Art. 19 (1), *supra*, note 4, did not establish market price as the sole criterion of value.

POWERS v. COMMISSIONER OF INTERNAL REVENUE.

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

No. 486. Argued January 7, 1941.—Decided February 3, 1941.

Determination of the criterion of "value" for the purposes of the gift tax under the Revenue Act of 1932 is a question of law, and a decision of the Board of Tax Appeals that in the case of single-premium policies of life insurance, irrevocably assigned as gifts shortly after issuance, the value of the gifts was the cash surrender value of the policies, was properly reversed by the Circuit Court of Appeals as "not in accordance with law." *Guggenheim* v. *Rasquin, ante* p. 254. P. 260.

115 F. 2d 209, affirmed.

CERTIORARI, 311 U. S. 640, to review the reversal of a decision of the Board of Tax Appeals setting aside a determination of a deficiency in a gift tax.

Mr. Ralph G. Boyd for petitioner.

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

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The issue in this case is the same as that in *Guggenheim* v. *Rasquin, ante,* p. 254. Petitioner in November and December, 1935, purchased single-premium policies of insurance on her own life and late in December, 1935, irrevocably assigned them as gifts. The Commissioner determined a deficiency, claiming that the value of the policies for gift-tax purposes was the cost of duplicating them at the dates of the gifts, not the cash-surrender

value as reported by petitioner. The Board of Tax Appeals held that the value of the gifts was their cash-surrender value. The Circuit Court of Appeals reversed. 115 F. 2d 209. That judgment must be affirmed on the authority of *Guggenheim* v. *Rasquin, supra,* unless as claimed by petitioner the court below was precluded from substituting its judgment of value for that of the Board. *Helvering* v. *Rankin,* 295 U. S. 123, 131. But the question of what criterion should be employed for determining the "value" of the gifts is a question of law. See *Lucas* v. *Alexander,* 279 U. S. 573. Accordingly, the Circuit Court of Appeals was justified in reversing the decision of the Board as "not in accordance with law." Int. Rev. Code 1939, § 1141 (c) (1); 53 Stat. 164.

Affirmed.

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

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

No. 494. Argued January 7, 1941.—Decided February 3, 1941.

The lapse of time between the issuance of single-premium policies of life insurance and their assignment as gifts, *held* not to justify the substitution of cash surrender value, instead of replacement cost at the date of the gift, as the criterion of value for the purposes of the gift tax under the Revenue Act of 1932. P. 261.

114 F. 2d 150, reversed.

CERTIORARI, 311 U. S. 640, to review the reversal of a judgment, 28 F. Supp. 265, for the taxpayer in a suit to recover alleged overpayments of gift taxes.

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

Mr. William N. Haddad, with whom *Mr. Walter T. Fisher* was on the brief, for respondents.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The question here is the same as that in *Guggenheim* v. *Rasquin, ante,* p. 254. Consequently the decision of the Circuit Court of Appeals holding that cash-surrender value on the dates of the gifts was the proper method of valuing single-premium life insurance policies for gift-tax purposes (114 F. 2d 150) must be reversed, unless the elapse of time between the issuance of the policies and the making of the gifts calls for a different result. The single-premium policies here involved were taken out by the insured in 1928 and 1929. They were assigned as gifts in December, 1934, when the insured was 79 years old. The cost of the policies was less than their cash-surrender value at the dates of the gifts. But the cost of replacing the policies at the then age of the insured would have been in excess of their cash-surrender value. We think that such cost of replacement, as held by the District Court, is the best available criterion of the value of the policies for the purposes of the gift tax. The elapse of time between issuance and assignment of the policies does not justify the substitution of cash-surrender value for replacement cost as the criterion of value. We cannot assume with respondents that at the dates of the gifts the policies presumably had no insurance, as distinguished from investment, value to the donor. Here, as in the case where the issuance of the policies and their assignment as gifts are simultaneous, cash-surrender value reflects only a part of the value of the contracts. The cost of duplicating the policies at the dates of the gifts is, in absence of more cogent evidence, the one criterion which reflects both their insurance and investment value to the owner at that time. Cf. Vance on

Insurance (2d ed.) pp. 332–333; *Speer* v. *Phoenix Mutual Life Ins. Co.*, 36 Hun 322. The fact that the then condition of an insured's health might make him uninsurable emphasizes the conclusion that the use of that criterion will result in placing a minimum value upon such a gift.

Reversed.

WOODS, COURT TRUSTEE, *v.* CITY NATIONAL BANK AND TRUST CO. OF CHICAGO ET AL.

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

Nos. 281 and 282. Argued January 13, 1941.—Decided February 3, 1941.

1. Under Chapter X of the Bankruptcy Act, the bankruptcy court has plenary power to review all fees and expenses in connection with the reorganization from whatever source they may be payable. Reasonable compensation for services rendered may be allowed. The claimant has the burden of proving their worth. P. 267.
2. "Reasonable compensation for services rendered" necessarily implies loyal and disinterested service in the interest of those for whom the claimant purported to act. P. 268.
3. No compensation should be allowed for services rendered in connection with a reorganization by a claimant who represented not only members of the investing public but also other and conflicting interests; and this although no fraud or unfairness is shown to have resulted from the conflict. P. 268.
4. In corporate reorganizations, protective committees, as well as indenture trustees, are fiduciaries. P. 268.
5. Expenditures incurred in connection with the administration of the estate are not "proper," within the meaning of § 242 of the Act, and should not be allowed, where the claimant can not show that they were made in furtherance of a project exclusively devoted to the interests of those whom the claimant purported to represent. On the other hand, those expenditures normally should be allowed which have clearly benefited the estate. P. 269.

111 F. 2d 834, reversed.

CERTIORARI, 311 U. S. 629, to review the reversal of an order, in a proceeding under Chapter X of the Bankruptcy Act, which disallowed the claims of an indenture trustee, a bondholders' committee, and their counsel, for services and expenses, and which allowed in part a counter-claim made by the trustee in bankruptcy. The latter took two appeals, one by petition to the District Court, the other by petition to the Circuit Court of Appeals—prior to the ruling in *Reconstruction Finance Corp.* v. *Prudence Securities Advisory Group,* 311 U. S. 579.

Mr. Weightstill Woods for petitioner.

Mr. Vincent O'Brien, with whom *Mr. Tracy Wilson Buckingham* was on the brief, for respondents.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The basic question involved in this case concerns the power of the District Court in proceedings under Ch. X of the Chandler Act[1] (52 Stat. 840) to disallow claims for compensation and reimbursement on the grounds that the claimants were serving dual or conflicting interests. The claimants, respondents here, are an indenture trustee, a bondholders' committee, and the committee's counsel.

[1] This reorganization started with foreclosure proceedings in the Illinois state court and later was transferred to the United States District Court upon the filing of petitions under § 77B of the Bankruptcy Act. Pursuant to § 276 (c) (2) of the Chandler Act, the bankruptcy court made that chapter applicable to the allowance of these claims. The claims under review cover not only the proceedings under § 77B but also the earlier state court proceedings. Though some of the allowances here in issue apparently had been fixed by the state court prior to the transfer of the proceedings to bankruptcy, respondents agreed to submit the claims *de novo* to the District Court.

Counsel to the committee was also counsel to the indenture trustee; and its services in the latter capacity were included in the claim of the indenture trustee. The bankruptcy trustee appeared in opposition to the allowance of these claims, and counterclaimed against the indenture trustee seeking to surcharge it for various alleged acts of misconduct and negligence. The indenture trustee answered. There was a hearing on the claims and on the counterclaim. The District Court disallowed the claims "for want of equity"; and allowed the counterclaim only as a recoupment to extinguish any claims of respondents. On appeal the Circuit Court of Appeals reversed. 111 F. 2d 834. It held that there was no conspiracy to defraud, nor substantial evidence of mismanagement or negligence on the part of respondent-trustee. It thereupon remanded the cause to the District Court, indicating that the out-of-pocket expenses should be allowed in full and that the reasonable and customary charge for services so rendered should govern the claims for compensation. We granted the petition for writs of certiorari [2] in view of the importance in reorganization proceedings of the power of the District Court over such allowances.

We are not inclined to question the conclusion of the Circuit Court of Appeals on the issue of fraud. We agree with it that on this record recovery on the counterclaim would not be warranted. But we do not believe it was justified in disregarding the evidence and findings of fact as respects respondents' dual or conflicting interests in this reorganization.

[2] The two cases raise the same question. One represents an appeal to the Circuit Court of Appeals as of right; the other an appeal with leave. They were taken prior to our decision in *Dickinson Industrial Site* v. *Cowan,* 309 U. S. 382. And see *Reconstruction Finance Corp.* v. *Prudence Securities Advisory Group,* 311 U. S. 579.

The property here involved is an apartment hotel—Granada Apartments, Inc. A committee was formed by the respondent-trustee [3] to represent the first mortgage bonds in the reorganization. It was composed of five members. Two of these were officers or employees of one of the principal underwriters of the bonds.[4] This underwriter was heavily interested in the equity.[5] So far as appears, that fact was not disclosed when the committee solicited the bondholders. In any event, the equity owner is peculiarly ill-suited to represent the mortgagee in these situations because of their historic clash of interests. See *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106. Furthermore, a rather serious question was raised early in this reorganization concerning alleged misrepresentations by the underwriters on the sale of the bonds that the furnishings of the hotel were covered by the mortgage. It turned out that they were not; and bondholders' money was used to satisfy the lien outstanding against them.[6] Objective scrutiny and full en-

[3] Not then the trustee under the indenture.

[4] A third member was also a distributor of the bonds when they were publicly offered.

[5] This underwriter—Cody Trust Co.—went into receivership in December, 1933, the Granada bondholders' committee having been formed in April, 1933. The District Court found that nominees of Cody Trust Co. operated the property until January, 1934.

The reorganization began with a foreclosure proceeding in the state court. The indenture trustee, predecessor of respondent trustee, later took possession and employed a so-called agent at $50 per month "to keep Cody Trust Company informed as to the status from time to time."

[6] Certain phases of the litigation involving this question are revealed in *Thuma* v. *Granada Hotel Corp.*, 269 Ill. App. 484; *Wenstrand* v. *Pick & Co.*, 38 F. 2d 25; *In re Granada Apartments, Inc.*, 104 F. 2d 528.

So far as appears no effort was made in this reorganization to assert any claim against the underwriters.

forcement of an underwriter's liability requires a committee freed from that underwriter's influence.

The committee was closely affiliated with the respondent-trustee, which, as we have noted, caused its formation. And respondent-trustee was in turn later appointed as successor trustee under the mortgage on petition of the committee. The committee had as its two most active members officers of the indenture trustee. It was in substance a part of the indenture trustee's reorganization division.[7] The indenture trustee was the committee's depositary; it would receive any fees accruing to the committee. Indenture trustees themselves have frequently condemned such entanglements with committees.[8] The indenture trustee represents all the bondholders; the committee those who have given it authorizations—in this case about 50 per cent. Where the interests of majorities and minorities do not coincide, the interests of the indenture trustee and the committee will tend to be antagonistic.[9] Beyond that is the fact

[7] That division had handled over 400 reorganizations, having been formed to act in connection with defaulted bond issues underwritten by Chicago Trust Co. and Central Trust Co. of Illinois. Chicago Trust Co. was one of the underwriters of the Granada bonds.

[8] Utter, Problems of Trustees Under Defaulted Bond Issues, 56 Trust Companies 653 (1933); Littleton, Administration Problems Under Corporate Trusteeship, *id.*, 335, 338.

[9] Utter, *op. cit. supra* note 8, pp. 656–657. That antagonism was best illustrated in foreclosure reorganizations where the minority was not bound to accept new securities but could insist on cash. See Weiner, Conflicting Functions of the Upset Price in a Corporate Reorganization, 27 Col. L. Rev. 132. In the instant case the reorganization proceeding was in the state court from June, 1930 when a receiver under the second mortgage was appointed to May, 1937 when petitions under § 77B of the Bankruptcy Act were approved. For an earlier and unsuccessful attempt to place this company under § 77B see *Tuttle* v. *Harris*, 297 U. S. 225. Respondent-indenture trustee became such in January, 1935. It was in possession from then until May, 1937.

that an indenture trustee closely affiliated with a committee shares the committee's conflicts of interest.

In this case the indenture trustee was also indenture trustee for neighboring apartment properties and dominated the committees representing the bonds of those other companies. Two members of respondent committee were also members of one of those other committees. There was no unitary plan of reorganization for these several properties. But there were dealings between them by their common representatives—dealings attacked by petitioner as unfair to the instant company and defended by respondents as fair.

That is not all.

Counsel to the committee was not only counsel to the indenture trustee in this reorganization; it was also counsel to the indenture trustee and the committees for the neighboring properties. And respondent-counsel had acted as general counsel for one of the two principal underwriters [10] during the fianancing of the property here involved; and that underwriter's prospectus was under attack in these proceedings.[11]

Under Ch. X of the Chandler Act the bankruptcy court has plenary power to review all fees and expenses in connection with the reorganization from whatever source they may be payable.[12] Reasonable compensation for

[10] Chicago Trust Co., which was also the original indenture trustee.

[11] Respondent-counsel denies that it acted as counsel in that particular transaction or knew of the alleged misrepresentation in the prospectus at the time, and asserts that it did not learn of the contents of the circular until a question was raised concerning it during this reorganization proceeding. We accept its version of the facts.

[12] Sec. 221 (4) provides: "The judge shall confirm a plan if satisfied that . . . all payments made or promised by the debtor or by a corporation issuing securities or acquiring property under the plan or by any other person, for services and for costs and expenses in, or in connection with, the proceeding or in connection with the plan

services rendered may be allowed.[13] The claimant, however, has the burden of proving their worth. Furthermore, "reasonable compensation for services rendered" necessarily implies loyal and disinterested service in the interest of those for whom the claimant purported to act. *Amercian United Mutual Life Ins. Co.* v. *City of Avon Park,* 311 U. S. 138. Where a claimant, who represented members of the investing public, was serving more than one master or was subject to conflicting interests, he should be denied compensation. It is no answer to say that fraud or unfairness were not shown to have resulted. Cf. *Jackson* v. *Smith,* 254 U. S. 586, 589. The principle enunciated by Chief Justice Taft in a case involving a contract to split fees in violation of the bankruptcy rules, is apposite here: "What is struck at in the refusal to enforce contracts of this kind is not only actual evil results but their tendency to evil in other cases." *Weil* v. *Neary,* 278 U. S. 160, 173. Furthermore, the incidence of a particular conflict of interest can seldom be measured with any degree of certainty. The bankruptcy court need not speculate as to whether the result of the conflict was to delay action where speed was essential, to close the record of past transactions where publicity and investigation were needed, to compromise claims by inattention where vigilant assertion was necessary, or otherwise to dilute the undivided loyalty owed to those whom the claimant purported to represent. Where an actual conflict of interest exists, no more need be shown in this type of case to support a denial of compensation.

Protective committees, as well as indenture trustees, are fiduciaries. *Bullard* v. *City of Cisco,* 290 U. S. 179;

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and incident to the reorganization, have been fully disclosed to the judge and are reasonable or, if to be fixed after confirmation of the plan, will be subject to the approval of the judge; . . ."

[13] Indenture trustees, committees, and their attorneys are included among those to whom the compensation may be allowed. § 242.

Jewett v. *Commonwealth Bond Corp.,* 241 App. Div. 131; 271 N. Y. S. 522; *Bergelt* v. *Roberts,* 144 Misc. 832; 258 N. Y. S. 905, aff'd 236 App. Div. 777; 258 N. Y. S. 1086; *Carter* v. *First Nat'l Bank,* 128 Md. 581; 98 A. 77. Cf. *Nichol* v. *Sensenbrenner,* 220 Wis. 165; 263 N. W. 650. A fiduciary who represents security holders in a reorganization may not perfect his claim to compensation by insisting that, although he had conflicting interests, he served his several masters equally well or that his primary loyalty was not weakened by the pull of his secondary one. Only strict adherence to these equitable principles can keep the standard of conduct for fiduciaries "at a level higher than that trodden by the crowd." See Mr. Justice Cardozo in *Meinhard* v. *Salmon,* 249 N. Y. 458, 464; 164 N. E. 545.

The findings of the District Court that these claimants represented conflicting interests are amply supported by the evidence.

Some discrimination, however, is necessary in applying the foregoing rule to claims for expenses. Reimbursement for "proper costs and expenses incurred in connection with the administration" of the estate may be allowed.[14] The rule disallowing compensation because of conflicting interests may be equally effective to bar recovery of the expenditures made by a claimant subject to conflicting interests. Plainly expenditures are not "proper" within the meaning of the Act where the claimant cannot show that they were made in furtherance of a project exclusively devoted to the interests of those whom the claimant purported to represent. On the other hand, those expenditures normally should be allowed which have clearly benefited the estate. Scott on Trusts (1939), § 245.1. Thus where taxes have been paid, needful repairs or additions to the property have been made, or the like, equity does not permit the estate

[14] § 242.

to retain those benefits without paying for them. Such classification of expenses, at times difficult, rests in the sound discretion of the bankruptcy court. The District Court drew no such distinction but proceeded on the theory that reimbursement for all expenses must be denied. But it is not apparent that all of them fall within the prohibited category.

The other points raised by petitioner are so plainly without merit that they do not warrant mention.

For the reasons stated we reverse the judgment of the Circuit Court of Appeals and remand the cause to the District Court for further proceedings in conformity with this opinion.

Reversed.

MARYLAND CASUALTY CO. *v.* PACIFIC COAL & OIL CO. ET AL.

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

No. 194. Argued January 9, 1941.—Decided February 3, 1941.

1. To support a suit under the Declaratory Judgment Act, the facts must show a substantial controversy, real and immediate between parties having adverse legal interests. P. 273.
2. An insurer issued a policy covering liability of the insured for personal injuries caused by automobiles "hired by the insured." Under the policy and the state law, an injured party could keep the policy from lapsing by serving notice of the accident, etc., if the insured failed to do so; and, if successful in obtaining judgment against the insured, could enforce it by supplementary proceedings against the insurer. The insured having been sued in the state court for personal injuries sustained in a collision between a truck driven by an employee of the insured and the automobile of the claimant, the insurer brought suit in the federal court against the insured and the claimant, alleging that the truck was not "hired by the insured" and contending that it was not bound to defend the state court suit or to indemnify the insured. *Held:*

(1) That diverse citizenship and jurisdictional amount being present, the insurer's suit involved an "actual controversy" cognizable under the Declaratory Judgment Act. P. 273.

(2) An injunction to restrain the proceedings in the state court is prohibited by § 265 of the Judicial Code. P. 274.

111 F. 2d 214, reversed.

CERTIORARI, 311 U. S. 625, to review the affirmance of a decree in a suit for a declaratory judgment.

Mr. Parker Fulton, with whom *Mr. Paca Oberlin* was on the brief, for petitioner.

No appearance for respondents.

MR. JUSTICE MURPHY delivered the opinion of the Court.

Petitioner issued a conventional liability policy to the insured, the Pacific Coal & Oil Co., in which it agreed to indemnify the insured for any sums the latter might be required to pay to third parties for injuries to person and property caused by automobiles hired by the insured. Petitioner also agreed that it would defend any action covered by the policy which was brought against the insured to recover damages for such injuries.

While the policy was in force, a collision occurred between an automobile driven by respondent Orteca and a truck driven by an employee of the insured. Orteca brought an action in an Ohio state court against the insured to recover damages resulting from injuries sustained in this collision. Apparently this action has not proceeded to judgment.

Petitioner then brought this action against the insured and Orteca. Its complaint set forth the facts detailed above and further alleged that at the time of the collision the employee of the insured was driving a truck sold to him by the insured on a conditional sales contract.

Petitioner claimed that this truck was not one "hired by the insured" and hence that it was not liable to defend the action by Orteca against the insured or to indemnify the latter if Orteca prevailed. It sought a declaratory judgment to this effect against the insured and Orteca, and a temporary injunction restraining the proceedings in the state court pending final judgment in this suit.

Orteca demurred to the complaint on the ground that it did not state a cause of action against him. The District Court sustained his demurrer and the Circuit Court of Appeals affirmed. 111 F. 2d 214. We granted certiorari, 311 U. S. 625, to resolve the conflict with the decisions of other Circuit Courts of Appeals cited in the note.[1]

The question is whether petitioner's allegations are sufficient to entitle it to the declaratory relief prayed in its complaint. This raises the question whether there is an "actual controversy" within the meaning of the Declaratory Judgment Act (Judicial Code § 274d, 28 U. S. C. § 400), since the District Court is without power to grant declaratory relief unless such a controversy exists. *Nashville, C. & St. L. Ry. Co.* v. *Wallace,* 288 U. S. 249, 259; U. S. C. A. Constitution, Art. III, § 2.

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[1] *Maryland Casualty Co.* v. *United Corporation,* 111 F. 2d 443; *Central Surety & Insurance Corp.* v. *Norris,* 103 F. 2d 116; *Maryland Casualty Co.* v. *Consumers Finance Service, Inc.,* 101 F. 2d 514; *Aetna Casualty & Surety Co.* v. *Yeatts,* 99 F. 2d 665; *U. S. Fidelity & Guaranty Co.* v. *Pierson,* 97 F. 2d 560; *Associated Indemnity Corp.* v. *Manning,* 92 F. 2d 168. See also, *Employers' Liability Assurance Corp.* v. *Ryan,* 109 F. 2d 690; *C. E. Carnes & Co.* v. *Employers' Liability Assurance Corp.,* 101 F. 2d 739; *Standard Accident Insurance Co.* v. *Alexander, Inc.,* 23 F. Supp. 807; *U. S. Fidelity & Guaranty Co.* v. *Pierson,* 21 F. Supp. 678; *Builders & Manufacturers Mutual Casualty Co.* v. *Paquette,* 21 F. Supp. 858; *Travelers Insurance Co.* v. *Young,* 18 F. Supp. 450; *Commercial Casualty Insurance Co.* v. *Humphrey,* 13 F. Supp. 174.

The difference between an abstract question and a "controversy" contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. See *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227, 239–242. It is immaterial that frequently, in the declaratory judgment suit, the positions of the parties in the conventional suit are reversed; the inquiry is the same in either case. *Nashville, C. & St. L. Ry. Co.* v. *Wallace, supra,* p. 261.

That the complaint in the instant case presents such a controversy is plain. Orteca is now seeking a judgment against the insured in an action which the latter claims is covered by the policy, and §§ 9510–3 and 9510–4 of the Ohio Code (Page's Ohio General Code, Vol. 6, §§ 9510–3, 9510–4) give Orteca a statutory right to proceed against petitioner by supplemental process and action if he obtains a final judgment against the insured which the latter does not satisfy within thirty days after its rendition. Compare *Maryland Casualty Co.* v. *United Corporation,* 111 F. 2d 443, 446; *Central Surety & Insurance Corp.* v. *Norris,* 103 F. 2d 116, 117; *U. S. Fidelity & Guaranty Co.* v. *Pierson,* 97 F. 2d 560, 562. Moreover, Orteca may perform the conditions of the policy issued to the insured requiring notice of the accident, notice of suit, etc., in order to prevent lapse of the policy through failure of the insured to perform such conditions. *Hartford Accident & Indemnity Co.* v. *Randall,* 125 Ohio St. 581; 183 N. E. 433; see also, *Lind* v. *State Automobile Mutual Insurance Assn.,* 128 Ohio St. 1; 190 N. E. 138;

State Automobile Mutual Insurance Assn. v. *Friedman,* 122 Ohio St. 334; 171 N. E. 591.

It is clear that there is an actual controversy between petitioner and the insured. Compare *Aetna Life Ins. Co.* v. *Haworth, supra.* If we held contrariwise as to Orteca because, as to him, the controversy were yet too remote, it is possible that opposite interpretations of the policy might be announced by the federal and state courts. For the federal court, in a judgment not binding on Orteca might determine that petitioner was not obligated under the policy, while the state court, in a supplemental proceeding by Orteca against petitioner, might conclude otherwise. Compare *Central Surety & Insurance Corp.* v. *Norris, supra,* p. 117; *Aetna Casualty & Surety Co.* v. *Yeatts,* 99 F. 2d 665, 670.

Thus we hold that there is an actual controversy between petitioner and Orteca, and hence, that petitioner's complaint states a cause of action against the latter. However, our decision does not authorize issuance of the injunction prayed by petitioner. Judicial Code § 265, 28 U. S. C. § 379; see *Central Surety & Insurance Corp.* v. *Norris, supra,* p. 117; *Maryland Casualty Co.* v. *Consumers Finance Service, Inc.,* 101 F. 2d 514, 516; *Aetna Casualty & Surety Co.* v. *Yeatts, supra,* p. 670.

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

Reversed.

MR. JUSTICE BLACK did not participate in the consideration or decision of this case.

WALKER *v.* JOHNSTON, WARDEN.

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

No. 173. Argued January 15, 1941.—Decided February 10, 1941.

1. Under the statute governing *habeas corpus,* the writ may be denied if, upon the face of the petition, it appears that the petitioner is not entitled to it. P. 284.
2. The practice of issuing an order to show cause and permitting the relator to reply to the respondent's return, thus avoiding useless issuance of the writ and production of the prisoner and witnesses in cases where it appears upon the face of the papers that no material issue of fact is involved and that as a matter of law no cause for granting the writ exists,—is a settled practice permitted by the statute. P. 284.
3. Where the petition and traverse on the one hand and the return on the other raise substantial issues of fact the writ must be granted, the prisoner produced and his case determined upon a hearing of evidence and argument; the statute does not allow a disposition of the case upon *ex parte* affidavits. P. 285.
4. One who, through the deception or coercion of the prosecuting attorney, is induced to plead guilty to an indictment for a federal offense, without the advice of counsel and in ignorance of his right to such advice, is deprived of a constitutional right. P. 286.
5. On a hearing in *habeas corpus,* the prisoner is under the burden of proving by a preponderance of evidence the facts which, he alleges, entitle him to a discharge. P. 286.

109 F. 2d 436, reversed.

CERTIORARI, 311 U. S. 635, to review the affirmance of a judgment in *habeas corpus* discharging a rule to show cause and dismissing the petition for the writ.

Mr. Charles E. Wyzanski, Jr. for petitioner, acting under an assignment by the Court.

The application for the writ is good on its face. The ultimate issue is one of fact. The District Court

should have issued the writ, held a full judicial inquiry and specifically found the facts.

The allegations of the petition state a case of imprisonment in violation of the Fifth and Sixth Amendments. This is shown by precedents in this Court, the historical background of the Sixth Amendment, and modern views of the rights of indigent prisoners. The case falls within *Johnson* v. *Zerbst,* 304 U. S. 458, and *Powell* v. *Alabama,* 287 U. S. 45, which decide that an indigent prisoner charged with a serious crime is entitled to the assignment of counsel without cost, at every step of the proceedings, to aid him in scrutinizing the indictment and in preparing the case as well as actually trying it.

The Sixth Amendment was, as contemporary evidence indicates, designed to require in all serious criminal prosecutions the same right to the free assignment of counsel prior to arraignment which existed under the English Treason Act of 1695 (well known to the American colonists by its citation in Blackstone, Commentaries, Book IV, p. 356), and which was proposed to the French draftsmen of the Declaration of Rights (LaRochelle, Cahier du Tiers, III, 161). Furthermore, precedent and history aside, modern commentators regard assistance of counsel prior to arraignment as a prerequisite of due process. See National Commission on Law Observance and Enforcement (popularly known as the Wickersham Commission), Report on Lawlessness in Law Enforcement, Vol. IV, pp. 5, 7, 281.

Since the application is good on its face, and the ultimate issue is one of fact, the District Court was required by statute to issue the writ. R. S. §§ 755, 758. This is the practice followed in the orders of this Court (*Ng Fung Ho* v. *White,* 259 U. S. 276, 285) as well as in most, though not all, of the inferior federal courts, and in England. It is a practice which is demanded by considerations of fair play, and has not been found inconvenient

or impractical in Atlanta where one of the largest United States penitentiaries is located. Moreover, convenience is not an appropriate consideration in a proceeding that places at stake liberty of the person.

When the petitioner is brought into court on the writ he is entitled to a full inquiry into the facts and to specific findings of fact by the trial court. *Moore* v. *Dempsey,* 261 U. S. 86, 92; *Johnson* v. *Zerbst,* 304 U. S. 458.

Mr. Herbert Wechsler, with whom *Solicitor General Biddle* and *Messrs. Wendell Berge* and *Alfred B. Teton* were on the brief, for respondent.

The Government concedes that petitioner's right to the issuance of the writ of *habeas corpus* must be tested by the allegations of the petition and traverse and the uncontradicted or irrefutable allegations of the return.

Neither the Fifth nor the Sixth Amendment requires the court to assign counsel in the absence of a request, unless the defendant is in apparent need of aid. *Johnson* v. *Zerbst,* 304 U. S. 458, distinguished. See *Powell* v. *Alabama,* 287 U. S. 45.

The distinction between a trial and a plea of guilty as evidence of the need for counsel is the implicit basis of the many decisions since *Johnson* v. *Zerbst* which treat a voluntary plea of guilty, made without requesting counsel, as a waiver of the right. A trial judge does not accept a plea of guilty without assuring himself that it is voluntary and competent, and if it is not, it can be set aside. *Frame* v. *Hudspeth,* 309 U. S. 632.

The allegations of the traverse do not establish a request for counsel or show that the plea was not voluntarily made. The sentence conformed to the petitioner's expectation and was fair. It is not alleged that he had a defense which he was induced to forego.

The right to counsel was waived. A waiver does not always require "an intentional relinquishment or aban-

donment of a known right." *Johnson* v. *Zerbst,* 304 U. S. at 464. Waiver may be implied as a matter of law when reasons of extrinsic policy justify the implication. Such reasons ordinarily exist when a defendant of mature age competently and voluntarily pleads guilty without requesting counsel.

Petitioner has not shown that he actually needed counsel. Therefore the judgment can not be collaterally attacked. Even if the Sixth Amendment is interpreted to require that all defendants have counsel upon assignment or knowingly waive the right, it does not necessarily follow that whenever this has not occurred the judgment is void and is open to collateral attack. The concept of jurisdictional defect is not inflexible and even the availability of *habeas corpus* may turn on judicial discretion.

It is not enough to show that the abstract right was denied; petitioner must establish that he was in actual need of counsel either in choosing his own course or in presenting his case. Prejudice can not be implied when a defendant understandingly pleads guilty to a valid indictment; and certainly not when he is a man of mature age who has previously been convicted of crime. In the present case, the only significant complaint is that petitioner did not know and was not told of his right to counsel. Standing alone, this is insufficient.

Mr. Justice Roberts delivered the opinion of the Court.

This case presents important questions of practice touching the issue of the writ of *habeas corpus.* We accordingly granted certiorari *in forma pauperis,* and appointed counsel for the petitioner to insure adequate presentation at our bar.

The petitioner, who is confined in the Federal prison at Alcatraz, California, under sentence and commitment of

the District Court for Northern Texas upon a plea of guilty to an indictment charging armed robbery of a national bank, sought *habeas corpus* in the District Court for Northern California. His petition recites that he was indicted in the District Court for Northern Texas March 9, 1936; that the cause came on for trial April 28, 1936, and he pleaded guilty; that he was sentenced May 1, 1936, to twelve years' imprisonment, was committed to the penitentiary at Leavenworth, Kansas, May 4, 1936, and is now confined at Alcatraz. The petition alleges that at trial the petitioner was without the assistance of counsel; that he did not waive his right to counsel; that the court did not inquire whether he desired counsel or instruct him that he was entitled to counsel; that he did not know he was so entitled if he had no money to pay an attorney; and that the judgment of conviction is void, as he was deprived of the assistance of counsel for his defense in violation of the Sixth Amendment of the Constitution. The prayer is that the writ issue and that he be released from custody.

The court issued an order to show cause addressed to the warden of the penitentiary. That officer filed a return showing that he held the prisoner under a commitment issued by the Texas District Court and a transfer from Leavenworth to Alcatraz ordered by the Director of the Bureau of Prisons of the Department of Justice. Attached to the return were certified copies of the indictment, minute entries, sentence, and commitment, and docket entries in the cause, transfer order, and record of commitment. Also attached were affidavits of the United States Attorney, the Assistant United States Attorney, and the Probation Officer (formerly a deputy marshal) of the Northern District of Texas. These affiants, or some of them, deposed to the following effect: The petitioner was jointly indicted with one White, who pleaded not guilty, was tried, convicted, and sentenced;

the petitioner had no counsel as he entered a plea of guilty. At the time of the commission of the offense for which the petitioner was indicted he was an escaped convict from the State Penitentiary of New Mexico and was brought thence for trial. On the day of the trial, the marshal brought him to the Federal building where the District Attorney talked to him; asked him whether he was guilty and he stated he was; asked him if he was going to plead guilty and he stated he was; asked him whether he had a lawyer and he stated he did not want an attorney as he thought an attorney would be of no value to him. The District Attorney explained to the petitioner that he thought the judge would give him greater consideration, if he was guilty, on his entering a plea of guilty. The petitioner was told his interviewers believed that if he would tell the judge the truth and testify in the case as to his accomplices that fact would be considered by the judge in passing sentence. The petitioner stated he would enter a plea of guilty but would not testify. He refused to say whether the co-defendant White was with him at the time of the robbery and said that he would prefer not to make a statement with respect to other facts in the case. One affiant stated his belief that petitioner told the judge in open court that he had no counsel and did not desire any as he was guilty and intended to plead guilty. Three witnesses identified the petitioner as being one of the men who entered the bank and there was no question of his guilt. After sentence, petitioner expressed his satisfaction at the length of sentence imposed. Some time later a letter was received from the petitioner thanking the District Attorney for what he had done for him.

The petitioner answered, denying that he had stated to one or more of the affiants, or in the presence of one or more of them, that he was guilty or that he intended

to plead guilty; that he did not want an attorney or felt that an attorney would be of no value to him. He alleged that he first learned he was to be prosecuted for the offense in question about April 26, 1936, when a deputy marshal took him from New Mexico to Texas; that, prior to trial, the District Attorney, in the presence of the deputy marshal, asked him to plead guilty and he replied that he intended to plead not guilty, whereupon the District Attorney exhibited to him pictures of the scene of the alleged crime and, by means of them and otherwise, sought to persuade him that he would be proved guilty; that the petitioner refused to talk further with the District Attorney at that time; that the District Attorney again visited him and the petitioner then requested that the trial be continued so that he could communicate with his relatives and try to obtain money to enable him to hire an attorney for his defense, but that the District Attorney advised him this was not possible and told him to plead guilty, warning him that he would be sentenced to twice as great a term if he did not so plead; that the petitioner had no relatives or friends near the scene of the trial other than his co-defendant White. He alleged that he requested the District Attorney to be permitted to talk to White or White's attorney, but the request was refused. In view of the District Attorney's warning, and in fear of a heavy prison term, he told the District Attorney he would plead guilty. The answer alleges that petitioner has no information and belief sufficient to enable him to answer the statement concerning his letter claimed to have been sent from the penitentiary and, therefore, denies the fact; denies that the petitioner stated to the judge that he did not desire counsel appointed for him or that he was pleading guilty because he was guilty; alleges that at no time was petitioner informed, did he know or believe

that he was entitled to the assistance of counsel for his defense, and that at no time did anyone ask him if he desired the assistance of counsel nor did anyone offer to procure such assistance for him; avers that he was without money to pay for counsel and believed he could not obtain the assistance of counsel without money to pay a lawyer; asserts that he attended school to the fifth grade and had had no further schooling or education, was entirely unversed in the law and unable and unqualified to represent or act for himself in a criminal proceeding; that at no time was he asked to waive his right to the assistance of counsel nor did he by word or act state or indicate that he waived, or intended to waive, that right; denies his guilt and denies that the evidence produced at trial showed his guilt.

Upon these pleadings the District Judge, after hearing argument, discharged the rule to show cause and dismissed the petition for the writ. The Circuit Court of Appeals affirmed.[1]

The petitioner contended in the Circuit Court of Appeals that the statute required the District Court to issue the writ and, upon his production in court, to hold a hearing on the issues made by the pleadings. The court found it unnecessary to pass on the contention, since it held "another manner of proceeding" (that here followed by the District Court) was permissible under our decisions. It approved the summary disposition of the case on the pleadings and affidavits submitted, as the petitioner had been afforded an opportunity to submit by affidavit whatever he deemed material. It thought the District Court was justified in disbelieving the petitioner's allegations and, on the basis of such disbelief, discharging the rule and denying the petition.

[1] 109 F. 2d 436.

The case presents these questions: (1) Was the District Court, on the filing of the petition, bound forthwith to issue the writ and have the petitioner produced in answer to it? (2) If the procedure followed by the District Court was permissible, and the pleadings raised issues of fact, should those issues have been resolved by testimony rather than upon affidavits? (3) Did the pleadings raise any material issue of fact?

First. The statutes of the United States declare that the supreme court and the district courts shall have power to issue writs of *habeas corpus;* [2] that application for the writ shall be made to the court or justice or judge authorized to issue the same by complaint in writing, under oath, signed by the petitioner, setting forth the facts concerning his detention, in whose custody he is and by virtue of what claim or authority, if known.[3] The court or justice or judge "shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto." The writ shall be directed to the person in whose custody the petitioner is detained.[4] The person to whom the writ is directed must certify to the court or judge the true cause of detention and, at the same time he makes his return, bring the body of the party before the judge who granted the writ.[5] When the writ is returned a day is to be set for the hearing, not exceeding five days thereafter, unless the petitioner requests a longer time.[6] The petitioner may deny the facts set forth in the return or may allege any other material facts, under oath.[7] The court or judge

[2] R. S. 751, 28 U. S. C. 451.
[3] R. S. 754, 28 U. S. C. 454.
[4] R. S. 755, 28 U. S. C. 455.
[5] R. S. 757, 28 U. S. C. 457; R. S. 758, 28 U. S. C. 458.
[6] R. S. 759, 28 U. S. C. 459.
[7] R. S. 760, 28 U. S. C. 460.

"shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require." [8]

It will be observed that if, upon the face of the petition, it appears that the party is not entitled to the writ, the court may refuse to issue it. Since the allegations of such petitions are often inconclusive, the practice has grown up of issuing an order to show cause, which the respondent may answer. By this procedure the facts on which the opposing parties rely may be exhibited, and the court may find that no issue of fact is involved. In this way useless grant of the writ with consequent production of the prisoner and of witnesses may be avoided where from undisputed facts or from incontrovertible facts, such as those recited in a court record, it appears, as matter of law, no cause for granting the writ exists. On the other hand, on the facts admitted, it may appear that, as matter of law, the prisoner is entitled to the writ and to a discharge. This practice has long been followed by this court [9] and by the lower courts.[10] It is a convenient one, deprives the petitioner of no substantial right, if the petition and traverse are treated, as we think they should be, as together constituting the application for the writ, and the return to the rule as setting up the facts thought to warrant its denial, and if issues of fact emerging from the pleadings are tried as required by the statute.

Second. The District Court proceeded to adjudicate the petitioner's right to the writ upon the allegations of

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[8] R. S. 761, 28 U. S. C. 461.

[9] *Ex parte Yarbrough,* 110 U. S. 651, 653; *Mooney* v. *Holohan,* 294 U. S. 103, 111.

[10] *Murdock* v. *Pollock,* 229 F. 392.

his petition and traverse and those of the return and accompanying affidavits. Thus the case was disposed of on *ex parte* affidavits and without the taking of testimony. The practice thus to dispose of applications for *habeas corpus* on matters of fact as well as of law has been followed in the Ninth and Tenth Circuits.[11]

In other circuits, if an issue of fact is presented, the practice appears to have been to issue the writ, have the petitioner produced, and hold a hearing at which evidence is received.[12] This is, we think, the only admissible procedure. Nothing less will satisfy the command of the statute that the judge shall proceed "to determine the facts of the case, by hearing the testimony and arguments." It is not a question what the ancient practice was at common law or what the practice was prior to 1867 when the statute from which R. S. 761 is derived was adopted by Congress. The question is what the statute requires.

As we said in *Johnson* v. *Zerbst,* 304 U. S. 458, 466, "Congress has expanded the rights of a petitioner for *habeas corpus* . . . 'There being no doubt of the authority of the Congress to thus liberalize the common law procedure on *habeas corpus* . . . it results that under the sections cited a prisoner in custody . . . may have a judicial inquiry . . . into the very truth and sub-

[11] *Harpin* v. *Johnston,* 109 F. 2d 434; *Franzeen* v. *Johnston,* 111 F. 2d 817; *Walker* v. *Chitty,* 112 F. 2d 79; *Zahn* v. *Hudspeth,* 102 F. 2d 759; *Nivens* v. *Hudspeth,* 105 F. 2d 756; *McCoy* v. *Hudspeth,* 106 F. 2d 810; *McDonald* v. *Hudspeth,* 108 F. 2d 943; *Moore* v. *Hudspeth,* 110 F. 2d 386; *Taylor* v. *Hudspeth,* 113 F. 2d 825.

[12] *Cundiff* v. *Nicholson,* 107 F. 2d 162; *Hurt* v. *Zerbst,* 97 F. 2d 519; *Brown* v. *Zerbst,* 99 F. 2d 745; *Mothershead* v. *King,* 112 F. 2d 1004; *Sanders* v. *Allen,* 69 App. D. C. 307; 100 F. 2d 717; *Clawans* v. *Rives,* 70 App. D. C. 107; 104 F. 2d 240; *United States* v. *Hiatt,* 33 F. Supp. 545.

stance of the causes of his detention,' . . . " Such a judicial inquiry involves the reception of testimony, as the language of the statute shows.

The Government properly concedes that if the petition, the return, and the traverse raise substantial issues of fact it is the petitioner's right to have those issues heard and determined in the manner the statute prescribes.

Third. Did the pleadings present any material issue of fact? The Government says they did not. It urges that, construed most favorably to petitioner, the allegations of the petition and the traverse do not show that he was in apparent or actual need of counsel's aid; and do disclose that he voluntarily waived the right to counsel.

Without repeating the allegations of the petition and traverse, which have been summarized above, we think it clear that, taken together, they overcome the presumption of regularity which the record of the trial imports and that, if the facts alleged were established by testimony to the satisfaction of the judge, they would support a conclusion that the petitioner desired the aid of counsel, and so informed the District Attorney, was ignorant of his right to such aid, was not interrogated as to his desire or informed of his right, and did not knowingly waive that right, and that, by the conduct of the District Attorney, he was deceived and coerced into pleading guilty when his real desire was to plead not guilty or at least to be advised by counsel as to his course. If he did not voluntarily waive his right to counsel,[13] or if he was deceived or coerced by the prosecutor into entering a guilty plea,[14] he was deprived of a constitutional right. On a hearing he would have the burden of sustaining his allegations by a preponderance of evidence. It is true that they are denied in the affidavits filed with the return

[13] *Johnson* v. *Zerbst,* 304 U. S. 458.

[14] *Mooney* v. *Holohan,* 294 U. S. 103.

to the rule, but the denials only serve to make the issues which must be resolved by evidence taken in the usual way. They can have no other office. The witnesses who made them must be subjected to examination *ore tenus* or by deposition as are all other witnesses. Not by the pleadings and the affidavits, but by the whole of the testimony, must it be determined whether the petitioner has carried his burden of proof and shown his right to a discharge. The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence. On this record it is his right to be heard.

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

Reversed.

MILK WAGON DRIVERS UNION OF CHICAGO, LOCAL 753, ET AL. *v.* MEADOWMOOR DAIRIES, INC.

CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

No. 1. Argued December 13, 16, 1940.—Decided February 10, 1941.

1. A State is at liberty under the Fourteenth Amendment to use injunctive powers vested in its courts for the prevention of violence by labor unions in industrial disputes. P. 292.
2. And where the controversy is attended by peaceful picketing and by acts of violence, and the violence has been such that continuation of the picketing will operate coercively by exciting fear that violence will be resumed, an injunction by a state court forbidding the picketing as well as the violence does not infringe the Fourteenth Amendment. P. 294.
3. The master in the state court found "intimidation of the customers . . . by the commission of the acts of violence," and the supreme court of the State justified its injunction against picketing because picketing, "in connection with or following a series

of assaults or destruction of property, could not help but have the effect of intimidating the persons in front of whose premises such picketing occurred and of causing them to believe that noncompliance would possibly be followed by acts of an unlawful character." *Held* that it is not for this Court to make an independent valuation of the testimony before the master or to substitute its judgment for that of the state court resolving conflicts in the testimony or its interpretation. P. 294.

4. In determining whether acts of violence accompanying an industrial controversy were attributable to a labor union rather than to irresponsible outsiders, a state court is not confined to the technicalities of the laws of agency. P. 295.
5. The present decision does not bar resort to the state court for a modification of the terms of the injunction should that court find that the passage of time has deprived the picketing of its coercive influence. P. 298.
6. *Thornhill* v. *Alabama,* 310 U. S. 88, and *Carlson* v. *California,* 310 U. S. 106, distinguished. P. 297.

371 Ill. 377; 21 N. E. 2d 308, affirmed.

CERTIORARI, 310 U. S. 655, to review a decree directing a permanent injunction against acts of violence and picketing by a labor union.

Mr. Abraham W. Brussell, with whom *Messrs. Joseph A. Padway* and *David A. Riskind* were on the brief, for petitioners. *Mr. Myron D. Alexander* entered an appearance.

The due process clause of the Fourteenth Amendment protects all persons against action by a state judiciary that tends to deprive them of their constitutional right to free speech. *Brinkerhof Trust Co.* v. *Hall,* 281 U. S. 673; *Ex parte Virginia,* 100 U. S. 339, 347; *Gelpcke* v. *Dubuque,* 1 Wall. 175, 207; *Muhlker* v. *New York & Harlem Railroad Co.,* 197 U. S. 544, 570; *Hovey* v. *Elliott,* 167 U. S. 409, 419, 444; *Murray* v. *Hoboken Land,* 18 How. 272, 276; *Powell* v. *Alabama,* 287 U. S. 45.

Some state courts have squarely decided that an injunction to restrain peaceful picketing, i. e., carrying of

banners in an industrial controversy, violates the constitutional guaranties. *Vulcan Detinning Co.* v. *St. Clair,* 315 Ill. 40, 46–47; *Illinois Malleable Iron Co.* v. *Michalek,* 279 Ill. 221; *Schuster* v. *International Assn. of Machinists,* 293 Ill. App. 177, 193; *Lietzman* v. *Broadcasting Station WCFL,* 282 Ill. App. 203, 214, 218; cf. *Beaton* v. *Tarrant,* 102 Ill. App. 124, 129. See, also, Beckner, Labor Legislation in Illinois, p. 51 (1929); *Ex parte Lyons,* 27 Cal. App. 70.

Other cases holding that the constitutional guaranties of freedom of speech preclude a state court from enjoining "publication" or "utterances" by picketing in connection with an industrial controversy involving a strike or a boycott, are: *Marx & H. Clothing Co.* v. *Watson,* 168 Mo. 113; *Ex parte Tucker,* 110 Tex. 335; *Truax* v. *Bisbee Local,* 19 Ariz. 379; *Re Heffron,* 79 Mo. App. 639; *Lindsay & Co.* v. *Montana Fed. Labor,* 37 Mont. 264; *Richter Bros.* v. *Journeymen Tailors' Union,* 24 Ohio L. J. 189; *Riggs* v. *Cincinnati Waiters' Alliance,* 5 Ohio N. P. 386; 8 Ohio S. & C. P. § 565.

State courts have held ordinances or statutes prohibiting peaceful picketing, in terms like the prohibitions of the injunction in the case at bar, invalid as violative of free speech. *People* v. *Harris,* 104 Colo. 386; *Reno* v. *Second Judicial Dist.,* 95 P. 2d 998; *Denver Truck Lines* v. *Perry,* 101 P. 2d 436, 444. Cf., *Julie Baking Co.* v. *Graymard,* 152 Misc. 946; 247 N. Y. S. 250, 251–252; *Rossmar* v. *United Kosher Butchers,* 163 Misc. 331; 298 N. Y. S. 343–344; *Bernstein* v. *Retail Cleaners,* 31 Ohio N. P. 433, 436; *Individual Store Owners* v. *Pennsylvania Treaty Stores,* 33 Pa. D. & C. 100, 101.

The decisions of this Court interpreting and applying the constitutional guaranties of free speech preclude a state court from enjoining labor union members and workmen from carrying on the public streets banners

or placards conveying to the public information concerning an industrial controversy in which they have a substantial economic interest. *American Steel Foundries* v. *Tri-City Council,* 257 U. S. 184; *Senn* v. *Tile Layers Union,* 301 U. S. 468; *Lovell* v. *Griffin,* 303 U. S. 444; *Hague* v. *C. I. O.,* 307 U. S. 496; *Schneider* v. *State,* 307 U. S. 147; *Thornhill* v. *Alabama,* 310 U. S. 88; *Carlson* v. *California,* 310 U. S. 106.

See *Grosjean* v. *American Press Co.,* 297 U. S. 233; *Near* v. *Minnesota,* 283 U. S. 697, 716.

The state court's attempted justification of the abridgment of the right of union members to speak freely and disseminate information concerning the controversy between the plaintiff and the union is inconsistent with the *Thornhill* case. Cf., *Schenck* v. *United States,* 249 U. S. 47; *United States* v. *Carolene Products,* 304 U. S. 144, 152; *Schneider* v. *State,* 308 U. S. 147, 161.

The constitutional right to free speech may not be abridged by the state court on the ground that the carrying of the banner has been preceded by acts of violence. *American Steel Foundries* v. *Tri-City Council,* 257 U. S. 184; *Iron Molders Union* v. *Allis Chalmers Co.,* 166 F. 45; *Fenske Brothers* v. *Upholsterers Union,* 358 Ill. 239; *People* v. *Young,* 188 Ill. App. 208, 212, 213; *Henrici Co.* v. *Alexander,* 198 Ill. App. 568; *Wise Shoe Co.* v. *Lowenthal,* 266 N. Y. 264; *Warner* v. *Lilly Co.,* 265 U. S. 526, 532; *Borderland Coal Co.* v. *Gasway,* 278 F. 56; *Baillis* v. *Fuchs,* 283 N. Y. 133; *May's Furs* v. *Bauer,* 282 N. Y. 331.

Petitioners' constitutional right to free speech can not be lost through "unlawful acts of violence" by irresponsible and unauthorized third persons. *Johnson* v. *Zerbst,* 304 U. S. 458, 464.

Messrs. Donald N. Schaffer and *Roy Massena* for respondent.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The supreme court of Illinois sustained an injunction against the Milk Wagon Drivers Union over the latter's claim that it involved an infringement of the freedom of speech guaranteed by the Fourteenth Amendment. Since this ruling raised a question intrinsically important, as well as affecting the scope of *Thornhill* v. *Alabama,* 310 U. S. 88, and *Carlson* v. *California,* 310 U. S. 106, we brought the case here. 310 U. S. 655.

The "vendor system" for distributing milk in Chicago gave rise to the dispute. Under that system, which was fully analyzed in *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products,* 311 U. S. 91, milk is sold by the dairy companies to vendors operating their own trucks who resell to retailers. These vendors departed from the working standards theretofore achieved by the Union for its members as dairy employees. The Union, in order to compel observance of the established standards, took action against dairies using the vendor system. The present respondent, Meadowmoor Dairies, Inc., brought suit against the Union and its officials to stop interference with the distribution of its products. A preliminary injunction restraining all union conduct, violent and peaceful, promptly issued, and the case was referred to a master for report. Besides peaceful picketing of the stores handling Meadowmoor's products, the master found that there had been violence on a considerable scale. Witnesses testified to more than fifty instances of window-smashing; explosive bombs caused substantial injury to the plants of Meadowmoor and another dairy using the vendor system and to five stores; stench bombs were dropped in five stores; three trucks of vendors were wrecked, seriously injuring one driver, and another was driven into a river; a store was set on fire and in large

measure ruined; two trucks of vendors were burned; a storekeeper and a truck driver were severely beaten; workers at a dairy which, like Meadowmoor, used the vendor system were held with guns and severely beaten about the head while being told "to join the union"; carloads of men followed vendors' trucks, threatened the drivers, and in one instance shot at the truck and driver. In more than a dozen of these occurrences, involving window-smashing, bombings, burnings, the wrecking of trucks, shootings, and beatings, there was testimony to identify the wrongdoers as union men.[1] In the light of his findings, the master recommended that all picketing, and not merely violent acts, should be enjoined. The trial court, however, accepted the recommendations only as to acts of violence and permitted peaceful picketing. The reversal of this ruling by the supreme court, 371 Ill. 377; 21 N. E. 2d 308, directing a permanent injunction as recommended by the master, is now before us.

The question which thus emerges is whether a state can choose to authorize its courts to enjoin acts of picketing in themselves peaceful when they are enmeshed with contemporaneously violent conduct which is concededly outlawed. The Constitution is invoked to deny Illinois the power to authorize its courts to prevent the continuance and recurrence of flagrant violence, found after an extended litigation to have occurred under specific circumstances, by the terms of a decree familiar in such cases. Such a decree, arising out of a particular controversy and adjusted to it, raises totally different constitutional problems from those that would be presented by an abstract statute with an overhanging and undefined threat to free utterance. To assimilate the two is

[1] It would needlessly encumber the reports to quote in detail the evidence thus summarized. The curious may turn to the record in the case.

to deny to the states their historic freedom to deal with controversies through the concreteness of individual litigation rather than through the abstractions of a general law.

The starting point is *Thornhill's* case. That case invoked the constitutional protection of free speech on behalf of a relatively modern means for "publicizing, without annoyance or threat of any kind, the facts of a labor dispute." 310 U. S. 100. The whole series of cases defining the scope of free speech under the Fourteenth Amendment are facets of the same principle in that they all safeguard modes appropriate for assuring the right to utterance in different situations. Peaceful picketing is the workingman's means of communication.

It must never be forgotten, however, that the Bill of Rights was the child of the Enlightenment. Back of the guarantee of free speech lay faith in the power of an appeal to reason by all the peaceful means for gaining access to the mind. It was in order to avert force and explosions due to restrictions upon rational modes of communication that the guarantee of free speech was given a generous scope. But utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution.

Still it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality. That is why this Court has the ultimate power to search the records in the state courts where a claim of constitutionality is effectively made. And so the right of free speech cannot be denied by drawing from a trivial rough incident or a moment of animal exuberance the conclusion that otherwise peaceful picketing has the taint of force.

In this case the master found "intimidation of the customers of the plaintiff's vendors by the commission of the acts of violence," and the supreme court justified its decision because picketing, "in connection with or following a series of assaults or destruction of property, could not help but have the effect of intimidating the persons in front of whose premises such picketing occurred and of causing them to believe that non-compliance would possibly be followed by acts of an unlawful character." It is not for us to make an independent valuation of the testimony before the master. We have not only his findings but his findings authenticated by the State of Illinois speaking through her supreme court. We can reject such a determination only if we can say that it is so without warrant as to be a palpable evasion of the constitutional guarantee here invoked. The place to resolve conflicts in the testimony and in its interpretation was in the Illinois courts and not here. To substitute our judgment for that of the state court is to transcend the limits of our authority. And to do so in the name of the Fourteenth Amendment in a matter peculiarly touching the local policy of a state regarding violence tends to discredit the great immunities of the Bill of Rights. No one will doubt that Illinois can protect its storekeepers from being coerced by fear of window-smashings or burnings or bombings. And acts which in isolation are peaceful may be part of a coercive thrust when entangled with acts of violence. The picketing in this case was set in a background of violence. In such a setting it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful. So the supreme court of Illinois found. We cannot say that such a finding so contradicted experience as to warrant our rejection. Nor can we say that it was written into the Fourteenth Amendment that a state

through its courts cannot base protection against future coercion on an inference of the continuing threat of past misconduct. Cf. *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436.

These acts of violence are neither episodic nor isolated. Judges need not be so innocent of the actualities of such an industrial conflict as this record discloses as to find in the Constitution a denial of the right of Illinois to conclude that the use of force on such a scale was not the conduct of a few irresponsible outsiders. The Fourteenth Amendment still leaves the state ample discretion in dealing with manifestations of force in the settlement of industrial conflicts. And in exercising its power a state is not to be treated as though the technicalities of the laws of agency were written into the Constitution. Certainly a state is not confined by the Constitution to narrower limits in fashioning remedies for dealing with industrial disputes than the scope of discretion open to the National Labor Relations Board. It is true of a union as of an employer that it may be responsible for acts which it has not expressly authorized or which might not be attributable to it on strict application of the rules of *respondeat superior. International Association of Machinists* v. *Labor Board,* 311 U. S. 72, 80; *Heinz Co.* v. *Labor Board,* 311 U. S. 514. To deny to a state the right to a judgment which the National Labor Relations Board has been allowed to make in cognate situations, would indeed be distorting the Fourteenth Amendment with restrictions upon state power which it is not our business to impose. A state may withdraw the injunction from labor controversies but no less certainly the Fourteenth Amendment does not make unconstitutional the use of the injunction as a means of restricting violence. We find nothing in the Fourteenth Amendment that prevents a state if it so chooses from placing confidence in a chancellor's decree and compels it to rely exclusively on a policeman's club.

We have already adverted to the generous scope that must be given to the guarantee of free speech. Especially is this attitude to be observed where, as in labor controversies, the feelings of even the most detached minds may become engaged and a show of violence may make still further demands on calm judgment. It is therefore relevant to remind that the power to deny what otherwise would be lawful picketing derives from the power of the states to prevent future coercion. Right to free speech in the future cannot be forfeited because of dissociated acts of past violence. Nor may a state enjoin peaceful picketing merely because it may provoke violence in others. *Near* v. *Minnesota,* 283 U. S. 697, 721–22; *Cantwell* v. *Connecticut,* 310 U. S. 296. Inasmuch as the injunction was based on findings made in 1937, this decision is no bar to resort to the state court for a modification of the terms of the injunction should that court find that the passage of time has deprived the picketing of its coercive influence. In the exceptional cases warranting restraint upon normally free conduct, the restraint ought to be defined by clear and guarded language. According to the best practice, a judge himself should draw the specific terms of such restraint and not rely on drafts submitted by the parties. But we do not have revisory power over state practice, provided such practice is not used to evade constitutional guarantees. See *Fox River Co.* v. *Railroad Comm'n,* 274 U. S. 651, 655; *Long Sault Development Co.* v. *Call,* 242 U. S. 272, 277. We are here concerned with power and not with the wisdom of its exercise. We merely hold that in the circumstances of the record before us the injunction authorized by the supreme court of Illinois does not transgress its constitutional power. That other states have chosen a different path in such a situation indicates differences of social view in a domain in which states are free to shape their local policy. Com-

pare *Busch Jewelry Co.* v. *United Retail Employees' Union,* 281 N. Y. 150; 22 N. E. 2d 320, and *Baillis* v. *Fuchs,* 283 N. Y. 133; 27 N. E. 2d 812.

To maintain the balance of our federal system, insofar as it is committed to our care, demands at once zealous regard for the guarantees of the Bill of Rights and due recognition of the powers belonging to the states. Such an adjustment requires austere judgment, and a precise summary of the result may help to avoid misconstruction.

(1) We do not qualify the *Thornhill* and *Carlson* decisions. We reaffirm them. They involved statutes baldly forbidding all picketing near an employer's place of business. Entanglement with violence was expressly out of those cases. The statutes had to be dealt with on their face, and therefore we struck them down. Such an unlimited ban on free communication declared as the law of a state by a state court enjoys no greater protection here. *Cantwell* v. *Connecticut,* 310 U. S. 296; *American Federation of Labor* v. *Swing, post,* p. 321. But just as a state through its legislature may deal with specific circumstances menacing the peace by an appropriately drawn act, *Thornhill* v. *Alabama, supra,* so the law of a state may be fitted to a concrete situation through the authority given by the state to its courts. This is precisely the kind of situation which the *Thornhill* opinion excluded from its scope. "We are not now concerned with picketing *en masse* or otherwise conducted which might occasion such imminent and aggravated danger . . . as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger." 310 U. S. 105.[2] We would not strike down a statute which author-

[2] See also this statement in the *Carlson* opinion: "The power and duty of the State to take adequate steps to preserve the peace and protect the privacy, the lives, and the property of its residents cannot be doubted." 310 U. S. 113.

ized the courts of Illinois to prohibit picketing when they should find that violence had given to the picketing a coercive effect whereby it would operate destructively as force and intimidation. Such a situation is presented by this record. It distorts the meaning of things to generalize the terms of an injunction derived from and directed towards violent misconduct as though it were an abstract prohibition of all picketing wholly unrelated to the violence involved.

(2) The exercise of the state's power which we are sustaining is the very antithesis of a ban on all discussion in Chicago of a matter of public importance. Of course we would not sustain such a ban. The injunction is confined to conduct near stores dealing in respondent's milk, and it deals with this narrow area precisely because the coercive conduct affected it. An injunction so adjusted to a particular situation is in accord with the settled practice of equity, sanctioned by such guardians of civil liberty as Mr. Justice Cardozo. Compare *Nann* v. *Raimist,* 255 N. Y. 307; 174 N. E. 690. Such an injunction must be read in the context of its circumstances. Nor ought state action be held unconstitutional by interpreting the law of the state as though, to use a phrase of Mr. Justice Holmes, one were fired with a zeal to pervert. If an appropriate injunction were put to abnormal uses in its enforcement, so that encroachments were made on free discussion outside the limits of violence, as for instance discussion through newspapers or on the radio, the doors of this Court are always open.

(3) The injunction which we sustain is "permanent" only for the temporary period for which it may last. It is justified only by the violence that induced it and only so long as it counteracts a continuing intimidation. Familiar equity procedure assures opportunity for modifying or vacating an injunction when its continuance is no longer warranted. Here again, the state courts have not

the last say. They must act in subordination to the duty of this Court to enforce constitutional liberties even when denied through spurious findings of fact in a state court. Compare *Chambers* v. *Florida,* 309 U. S. 227. Since the union did not urge that the coercive effect had disappeared either before us or, apparently, before the state court, that question is not now here.

(4) A final word. Freedom of speech and freedom of the press cannot be too often invoked as basic to our scheme of society. But these liberties will not be advanced or even maintained by denying to the states with all their resources, including the instrumentality of their courts, the power to deal with coercion due to extensive violence. If the people of Illinois desire to withdraw the use of the injunction in labor controversies, the democratic process for legislative reform is at their disposal. On the other hand, if they choose to leave their courts with the power which they have historically exercised, within the circumscribed limits which this opinion defines, and we deny them that instrument of government, that power has been taken from them permanently. Just because these industrial conflicts raise anxious difficulties, it is most important for us not to intrude into the realm of policy-making by reading our own notions into the Constitution.

Affirmed.

MR. JUSTICE BLACK, dissenting.

In my belief the opinion just announced gives approval to an injunction which seriously infringes upon the constitutional rights of freedom of speech and the press. To such a result I cannot agree.

Before detailing the reasons for my disagreement, some preliminary observations will doubtless aid in clarifying the subsidiary issues. The right of the Illinois courts to enjoin violence is not denied in this case. And I agree

that nothing in the Federal Constitution deprives them of that right. But it is claimed that Illinois—through its courts—has here sanctioned an injunction so sweeping in its terms as to deny to petitioners and others their constitutional rights freely to express their views on matters of public concern. And this is the single federal question we must decide. In their brief, petitioners state that they "have never and do not at the present time in any way condone or justify any violence by any member of the defendant union. Petitioners did not object to the issuance of an injunction restraining acts of violence. There is no contention made that the act of the Chancellor in granting such an injunction was erroneous." [1] "Ethically, morally and legally," the petitioning union disclaims and condemns the acts of violence. And the master who conducted the hearings in the case specifically found that the union officials had instructed their pickets to refrain from violence.[2] The record shows that

[1] The record shows that in a petition to determine damages, filed even before the trial court entered its final order, the petitioners said: "The court was informed at that time [when the original effort was made to secure dissolution of the temporary injunction] that the defendants and each of them, were wholly in accord with the injunction prohibiting violence of any kind. . . ." R. 265.

[2] "That the instructions given to such persons so patrolling or picketing by the officers of the defendant Union have been to do same peacefully and not to interfere with the ordinary course of business in said stores, except to patrol back and forth with said placards." R. 230–231.

Meadowmoor had originally sought an injunction in the federal district court. The federal master's report, introduced in this case as an exhibit for Meadowmoor, states: "I further find that the instructions given to such persons patrolling or peacefully picketing by the officers of the defendant association have been not to speak or carry on any conversation with any other person or persons in front of the said premises, nor to interfere with the orderly course of business of the said stores, except to patrol back and forth with the said placard." R. 165.

the officials gave these instructions (which were obeyed), not only because they realized that resort to force and violence would be reprehensible and indefensible, but also because they recognized that such lawless conduct injures a labor union far more than it helps it. Aside from this, it cannot be doubted that attempts to persuade others by the application of physical force and violence as a substitute for persuasion by reason and peaceable argument is contrary to the first principles of our government. Nor can it be questioned that it is a prime function of courts to provide law enforcement means intended both to punish such illegal conduct and to protect against it. But this great responsibility is entrusted to courts not merely to determine the guilt or innocence of defendants, but to do so in such manner that those brought before them may enjoy a trial in which all their constitutional rights are safeguarded—including the constitutional guaranties of freedom of speech and the press.

In determining whether the injunction does deprive petitioners of their constitutional liberties, we cannot and should not lose sight of the nature and importance of the particular liberties that are at stake. And in reaching my conclusion I view the guaranties of the First Amendment[3] as the foundation upon which our governmental structure rests and without which it could not continue to endure as conceived and planned.[4] Free-

[3] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." It is now too well settled to require citation that by the Fourteenth Amendment the guaranties of the First Amendment are protected against abridgment by the states.

[4] Thomas Jefferson, the great strategist of the campaign to bring about the adoption of the Bill of Rights, a campaign which he began even before the Constitution was adopted, said as to one of

dom to speak and write about public questions is as important to the life of our government as is the heart to the human body. In fact, this privilege is the heart of our government. If that heart be weakened, the result is debilitation; if it be stilled, the result is death.

In addition, I deem it essential to our federal system that the states should be left wholly free to govern within the ambit of their powers. Their deliberate governmental actions should not lightly be declared beyond their powers. For us to shear them of power not denied to them by the Federal Constitution would amount to judicial usurpation. But this Court has long since—and I think properly—committed itself to the doctrine that a state cannot, through any agency, either wholly remove, or partially whittle away, the vital individual freedoms guaranteed by the First Amendment. And in solemnly adjudicating the validity of state action touching these cherished privileges we cannot look merely at the surface of things, for were we to do so these constitutional guaranties would become barren and sterile. We must look beneath the surface, and must carefully examine each step in proceedings which lead a court to enjoin peaceful discussion. In this case, in order to determine whether or not the state has overstepped constitutional boundaries, I find it necessary to give consideration to a number of factors, including the nature of the proceedings; the definiteness, indefiniteness and constitutional validity of the basic law upon which the injunction is said to rest; the findings and the evidence; the definiteness, indefiniteness and scope of the language

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the guaranties of the First Amendment: "The basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter."

of the injunction itself; and the alleged imminence of the threatened dangers said to justify the admitted abridgment of free speech. My conclusion that the injunction as directed by the Supreme Court of Illinois invades the constitutional guaranties of freedom of speech and the press rests on my belief that these propositions are correct: (1) the subjects banned from public discussion by the injunction are matters of public concern, touching which the Constitution guarantees the right of freedom of expression; (2) the law of Illinois, as declared by its Supreme Court, makes illegal the exercise of constitutionally guaranteed privileges, and is an inadequate basis upon which to defend this abridgment of free speech; (3) the rule upon which the injunction is supported here and which this Court now declares to be the Illinois law is not the rule upon which the Illinois Supreme Court relied; (4) the rule announced here as supporting the right of a state to abridge freedom of expression is so general and sweeping in its implications that it opens up broad possibilities for invasion of these constitutional rights; (5) in any event, the injunction here approved is too broad and sweeping in its terms to find justification under the rule announced by the Illinois court, and even though under other circumstances such an injunction would be permissible under the rule now announced by this Court, still in this case such an injunction is supported neither by the findings nor the evidence.

First. What petitioners were enjoined from discussing were matters of public concern "within that area of free discussion that is guaranteed by the Constitution." [5] The controversy here was not a mere private quarrel between individuals, involving their interests alone. This injunction dealt with two conflicting methods of milk distribution—a matter of interest not only to Chi-

[5] *Thornhill* v. *Alabama*, 310 U. S. 88, 102. Cf. *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552.

cago's 148 dairies, their employees and their hundreds of retail outlets, but to the mass of milk consumers in the Chicago area as well. The older method of distribution, by which members of the petitioning union are employed, distributes a major part of the milk supply by door-to-door deliveries to the ultimate consumer. The rival method of distribution, in which respondent engages, takes two forms: the dairies using this method sell their milk to "cut-rate" stores, either directly or through the medium of so-called "vendors." The cut-rate stores sell milk at a retail price two cents a quart less than that fixed by the dairies employing union labor. According to the court below, the system of cut-rate distribution, resulting in loss of business by the union dairies, loss of employment by the union drivers, and loss of a thousand members by the union itself, is at the root of a long-standing controversy. Not only this: the situation here is an intimate part of the larger problem of milk production and distribution throughout the country, and, indeed, of the still larger problem of all sorts of cut-rate distribution. There are thus involved trade practices which are not confined to Chicago alone—trade practices in which there is known to be a distinct cleavage in public thought throughout the nation.

Second. In essence, the Illinois Supreme Court held that it was illegal for a labor union to publicize the fact of its belief that a cut-rate business system was injurious to the union and to the public, since such publicity necessarily discouraged that system's prospective purchasers. This conclusion of the court was based on the following reasoning: The Fourteenth Amendment and the Due Process Clause of the Illinois Constitution, considered (in some way not made clear) in connection with the unwritten "common law," assure respondent the unqualified right to do business free from all unjustifiable inter-

ference; publication and peaceful argument intended to persuade respondent's customers that its methods of doing business were such that they should not buy the dairy's products were therefore illegal interference; the union's purpose to better working conditions of its members was no justification for its peaceful discussion of the controversy. Neither the presence nor the absence of violence was considered by the court to be a necessary element in its conclusion. All this was but to say that in this controversy peaceful criticism of the "vendor system" was illegal because it might injure respondent's business by discouraging trade. But Illinois cannot, without nullifying constitutional guaranties, make it illegal to marshal public opinion against these general business practices. An agreement so to marshal public opinion is protected by the Constitution, even though called a "common law" conspiracy or a "common law" tort. Despite invidious names, it is still nothing more than an attempt to persuade people that they should look with favor upon one side of a public controversy.

Third. But this Court sustains the injunction on the ground that the Illinois Supreme Court "justified its decision" by reference to violence, thereby indicating that that characteristic was made an essential element of the rule from which the injunction sprang. I do not so read that court's opinion, and apparently the Illinois Supreme Court itself does not so read it. That this is true is evidenced by that court's language in a later decision where, speaking of the present case, it said: "In that case there was some evidence of violence, but . . . the issue of violence was not the turning point of the decision." [6] And even if violence were unintentionally included or incidentally referred to in the course of formulating a

[6] *Ellingsen* v. *Milk Wagon Drivers' Union*, 2 Labor Cases 567, 568; 377 Ill. 76.

rule touching the right of free speech, such an unintentional inclusion or incidental reference is too uncertain a support upon which to rest a deprivation of this vital privilege.

Fourth. There is no state statute upon which either this Court or the Supreme Court of Illinois could have relied in sustaining the injunction.[7] Assuming that the Supreme Court of Illinois did declare the rule which this Court has adopted, in doing so it has not marked the limits of the rule with that clarity which should be a prerequisite to an abridgment of free speech. Nor do I believe that this Court, even if it should, has supplied that essential definiteness. What we are here dealing with is an injunction, and not a "statute narrowly drawn" to cover a situation threatening "imminent and aggravated danger." [8] Speaking of a similar abridgment of constitutional rights where there was no guiding legislative act, we said in *Cantwell* v. *Connecticut*: "Violation of an Act exhibiting such a legislative judgment and narrowly drawn to prevent the supposed evil, would pose a question differing from that we must here answer. Such a declaration of the state's policy would weigh heavily in any challenge of the law as infringing constitutional limitations. Here, however, the judgment is based on a common law concept of the most general and undefined nature. . . . Here we have a situation analogous to a conviction under a statute sweeping in a great variety

[7] Illinois has an anti-injunction statute relating to matters involving labor disputes (Ill. Rev. Stat. 1939, chap. 48, § 2 (a)). The Supreme Court said that this statute was modeled on the federal Clayton Act (38 Stat. 738, 29 U. S. C. § 52). But the court held that the facts here did not constitute the type of "labor dispute" to which the act applied. 371 Ill. at 383–386; 21 N. E. 2d 308. Cf. *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products*, 311 U. S. 91.

[8] *Thornhill* v. *Alabama*, 310 U. S. 88, 105.

of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application." [9] In the present case, the prohibition against the dissemination of information through peaceful picketing was but one of the many restraints imposed by the sweeping injunction. As to this one single element of the prohibitions a number of statements appear in the rule now formulated. On the one hand it is said that "dissociated acts of past violence" are not enough to forfeit the right of free speech. On the other hand a "background of violence" appears to be sufficient. Nor are any more definite standards or guides to be found in such clauses as "context of violence"; "entanglement with violence"; "coercive effect"; "taint of force"; and "coercive thrust." It is my apprehension that a rule embodying such broad generalizations opens up new possibilities for invasion of the rights guaranteed by the First Amendment.

Fifth. In my opinion the sweeping injunction here approved is justified by neither of the rules, and is not supported by the record.

For our purposes, in order to reach a proper conclusion as to just what is the sweep of the injunction, we must necessarily turn to the complaint, the answer, the evidence, the findings, and the decision and judgment of the Illinois courts. And whether the injunction will restrain the exercise of constitutional rights depends upon the effect it will have upon the minds of those whose freedom of expression might be abridged by its mandate. This effect in turn depends upon the language appearing upon the face of the injunction. By that language we must judge it. For this injunction does not run merely against lawyers who might give it a legalistic interpretation, but against laymen as well. Our question then

[9] 310 U. S. 296, 307–308.

becomes: To what extent will the layman who might wish to write about or discuss the prohibited subjects feel that he cannot do so without subjecting himself to the possibility of a jail sentence under a summary punishment for contempt? This injunction, like a criminal statute, prohibits conduct under fear of punishment. There is every reason why we should look at the injunction as we would a statute, and if upon its face it abridges the constitutional guaranties of freedom of expression, it should be stricken down. This is especially true because we must deal only with the federal question presented, which is whether petitioners have been denied their rights under the First Amendment. The injunction, like a statute, stands as an overhanging threat of future punishment. The law of Illinois has been declared by its highest court in such manner as to infringe upon constitutional guaranties. And by this injunction that law as actually applied abridges freedom of expression. Looking at the injunction, we find that under pain of future punishment by a trial judge all of the members of the petitioning union (about six thousand) are prohibited "From interfering, hindering or otherwise discouraging or diverting, or attempting to interfere with, hinder, discourage or divert persons desirous of or contemplating purchasing milk and cream or other products aforesaid, including the use of said signs, banners or placards, and walking up and down in front of said stores as aforesaid, and further preventing the deliveries to said stores of other articles which said stores sell through retail; [or] From threatening in any manner to do the foregoing acts; . . ." It surely cannot be doubted that an act of the Illinois legislature, couched in this sweeping language, would be held invalid on its face.[10] For this

[10] Cf. *Thornhill* v. *Alabama*, 310 U. S. 88; *Carlson* v. *California*, 310 U. S. 106. With a change of but one word, a passage from the *Carlson* case is directly applicable to the present case: "The sweep-

language is capable of being construed to mean that none of those enjoined can, without subjecting themselves to summary punishment, speak, write or publish anything anywhere or at any time which the Illinois court—acting without a jury in the exercise of its broad power to punish for contempt [11]—might conclude would result in

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ing and inexact terms of the [injunction] disclose the threat to freedom of speech inherent in its existence. It cannot be thought to differ in any material respect from the statute held void in *Thornhill's* case." 310 U. S. at 112.

And a comparison of the language of the statutes held invalid in the *Thornhill* and *Carlson* cases with that of the injunction here sustained is very revealing:

Thornhill statute:	Meadowmoor injunction:	Carlson statute:
"go[ing] near to or loiter[ing] about the premises or place of business . . .; influencing . . . persons not to trade . . .; picket[ing] the works or place of business . . ."	"walking up and down in front of said stores . . .; discouraging . . . persons . . . contemplating purchasing . . .; interfering, hindering, or . . . divert[ing] . . . persons desirous of . . . purchasing . . .; us[ing] signs, banners or placards . . . in front of said stores . . ."	"loiter[ing] in front of . . . any place of business . . .; influencing . . . any person to refrain from purchasing . . .; intimidating, threatening or coercing . . . any person . . .; display[ing] any banner . . . badge or sign in front of . . . any place of business . . ."

[11] In Illinois, the power to punish summarily for contempt is said to be a broad "inherent" power of courts, "independent of statutory provisions" and of "constitutional grant." *Schmidt* v. *Cooper,* 274 Ill. 243, 250; 113 N. E. 641; *People* v. *Peters,* 305 Ill. 223, 226–227; 137 N. E. 118. And where a trial judge has ruled that conduct is or is not contempt, the appellate court will not interfere unless the trial judge's findings are "manifestly against the weight of the evidence" or "clearly and palpably contrary" to it. See *Oehler* v. *Levy,* 256 Ill. 178, 183; 99 N. E. 912; *Boyden* v. *Boyden,* 162 Ill. App. 77, 83; *American Cigar Co.* v. *Berger,* 221 Ill. App. 339, 341 (violation of injunction against picketing); *id.,* 221 Ill. App. 332; *Schmook* v. *Fane,* 301 Ill. App. 626; 22 N. E. 2d 450 (violation of injunction against picketing). And where the trial court has determined the extent of

discouraging people from buying milk products of the complaining dairy. And more than that—if the language is so construed, those enjoined can be sent to jail if they even threaten to write, speak, or publish in such way as to discourage prospective milk purchasers. I find not even slight justification for an interpretation of this injunction so as to confine its prohibitions to conduct near stores dealing in respondent's milk. Neither the language of the injunction nor that of the complaint which sought the injunction indicates such a limitation. Mr. Justice Cardozo approved no such injunction as this in *Nann* v. *Raimist,* 255 N. Y. 307; 174 N. E. 690. In fact, he ordered expunged from the injunction those prohibitions which impaired "defendant's indubitable right to win converts over to its fold by recourse to peaceable persuasion, and to induce them by like methods to renounce allegiance to its rival."

But the injunction approved here does not stop at closing the mouths of the members of the petitioning union. It brings within its all-embracing sweep the spoken or written words of any other person "who may . . . now . . . or hereafter . . . agree or arrange with them . . . " So, if a newspaper should "agree or arrange" with all or some of those here enjoined to publish their side of the controversy, thereby necessarily tending to "discourage" the sale of cut-rate milk, the publishers might likewise be subject to punishment for contempt.[12] Ordinarily the scope of the decree is co-

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the punishment to be inflicted, "courts of appellate jurisdiction will not interfere with the exercise of such discretion except for its abuse." *Ash-Madden-Rae Co.* v. *International Ladies Garment Workers' Union,* 290 Ill. 301, 306; 125 N. E. 258 (violation of injunction against picketing).

[12] Cf. *Cohen* v. *United States,* 295 F. 633; *Taliaferro* v. *United States,* 290 F. 906, 214. Cohen, "the owner, editor, and publisher" of a newspaper, was convicted of contempt by the District Court under an injunction restraining "strikers and their sympathizers."

extensive with the allegations of the bill, its supporting affidavits or findings of fact. In other words, the acts enjoined are the acts alleged in the bill as the basis for complaint.[13] And the complaint on which the injunction here rests specifically charged that the union had caused "announcement to be made by the public press of the City of Chicago, for the purpose of intimidating the said storekeepers and causing them to cease purchasing the milk sold by said plaintiffs through fear and terror of the renewal of said conspiracy, . . ." Specific reference was made to these newspaper stories as appearing in the Chicago *Tribune* and the Chicago *Evening American.* Proof was made of these publications. And the injunction of the trial judge, set aside by the Supreme Court of Illinois, specifically saved to petitioners—as in effect did Justice Cardozo in the New York case—their right to publicize their cause by means of "advertisement or communication." But the injunction sustained here is to be issued as prayed for in the bill of complaint. And since the acts enjoined are the acts alleged in the bill as the basis for complaint, newspaper publications of the type referred to in the complaint are literally enjoined. Since the literal language of the injunction, read in the light of the complaint, the supporting evidence, and the language of the trial judge's saving

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The Circuit Court of Appeals reversed. Taliaferro, a barber in no way connected with a railroad strike, was convicted of contempt under an injunction restraining union members and those "associated with them." Taliaferro's offense consisted in placing in his window a sign saying "No scabs wanted in here." The Circuit Court of Appeals affirmed the conviction. And see *Illinois Malleable Iron Co.* v. *Michalek,* 279 Ill. 221; 116 N. E. 714.

[13] Cf. Frankfurter and Greene, The Labor Injunction, p. 112, citing *Hotel & Railroad News Co.* v. *Clark,* 243 Mass. 317; 137 N. E. 534. And see *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229, 262; *Illinois Malleable Iron Co.* v. *Michalek,* 279 Ill. 221, 228; 116 N. E. 714.

clause—stricken down by action sustained here—thus unconstitutionally abridges the rights of freedom of speech and press, we cannot escape our responsibility by the simple expedient of declaring that those who might be sent to jail for violating the plain language of the injunction might eventually obtain relief by appeal to this Court. To uphold vague and undefined terminologies in dragnet clauses directly and exclusively aimed at restraining freedom of discussion upon the theory that we might later acquit those convicted for violation of such terminology amounts in my judgment to sanctioning a prior censorship of views. No matter how the decree might eventually be construed, its language, viewed in the light of the whole proceedings, stands like an abstract statute with an overhanging and undefined threat to freedom of speech and the press. All this, of course, is true only as to those who argue on the side of the opponents of cut-rate distribution. No such undefined threat hangs over those who "agree or arrange" with the advocates of the cut-rate system to encourage their method of distribution.

Nor is it any answer to say that the injunction would not be carried out in all its potential rigor. It was to obtain just these potentialities that respondent, already having secured from the trial court an injunction against acts of violence, appealed to the Illinois Supreme Court in order to secure an injunction broad enough to prevent petitioners' peaceable comunication to the public of their side of the controversy. It is too much to expect that after complete approval of this abridgment of public discussion by the Supreme Court of Illinois, and after the opinion just announced, the injunction will not be enforced as written. So written, there could hardly be provided a more certain method wholly and completely to prevent all public discussion antagonistic to respondent's method of selling milk. And it is claimed by the

members of the petitioning union that foreclosure of opportunity for public discussion amounts to a death sentence for the method of business which gives them employment. The decision here thus permits state control by injunction as a substitute for competitive discussion of a controversy of particular interest to the union, and a matter of public concern as well.

A careful study of the entire record in this case convinces me that neither the findings nor the evidence, even viewed in the light most favorable to respondent, showed such imminent, clear and present danger [14] as to justify an abridgment of the rights of freedom of speech and the press. The picketing, which did not begin until September, 1934, has at all times been peaceful. Usually one picket, and never more than two, walked along the street bearing a sign. These pickets never impeded traffic either on the sidewalks or in the street, nor did they disturb any passersby or customers. In fact, it is stipulated in the record that pickets "made no threats against any of these storekeepers, but peacefully picketed these stores. They made no attempt to stop any customers or to stop delivery except insofar as their situation and the signs they bore had that tendency." There was no evidence to connect them with any kind or type of violence at any time or place. As was found by the master, this was in accordance with the instruction which was given to them by the union officials.[15] There is no

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[14] *Cantwell* v. *Connecticut,* 310 U. S. 296, 308; *Carlson* v. *California,* 310 U. S. 106, 113; *Herndon* v. *Lowry,* 301 U. S. 242, 258; *Schenck* v. *United States,* 249 U. S. 47, 52. And see the concurring opinion of Justices Holmes and Brandeis in *Whitney* v. *California,* 274 U. S. 357, 373, and the dissenting opinions of the same Justices in *Gitlow* v. *New York,* 268 U. S. 652, 672–673; *Pierce* v. *United States,* 252 U. S. 239, 255; *Schaefer* v. *United States,* 251 U. S. 466, 482; and *Abrams* v. *United States,* 250 U. S. 616, 627.

[15] See note 2, *supra.*

evidence and no finding that dissemination of information by pickets stimulated anyone else to commit any act of violence.

There was evidence that violence occurred—some committed by identified persons and some by unidentified persons. A strike of farmers supplying most of Chicago's milk took place in the early part of January, 1934. This strike practically stopped the inflow of milk into the city. As a result, the union drivers were ordered not to report for work on January 8 and 9, at the height of the strike. It was during this period that the larger part of the major acts of violence occurred. According to the complaint and the evidence, seven trucks were seized or damaged on the 8th and 9th of January, 1934, and one on the 6th. These are the only trucks that were ever seized or damaged, according to both the complaint and the evidence, and it was in connection with these seizures that the injuries to truck drivers, the shootings, and the threats referred to in this Court's opinion took place. Undoubtedly, some of the members of the union participated in this violence, as is shown by the fact that several were arrested, criminal prosecutions were instituted, and the cases later settled with the approval of the trial judge. It was eight months after this before any picketing occurred; four years afterwards before the trial judge granted an injunction, limited to violence alone; five years before the Supreme Court of Illinois directed a more stringent injunction against peaceful persuasion; and seven years before this Court sustained the injunction.

During the period of the farmers' strike in 1934, and in the immediately succeeding months, five stores were either bombed or burned. Three union members were tried, convicted and sentenced to the penitentiary for arson in connection with one of these burnings. All of this violence took place many months before any of the

picketing occurred. In addition to these 1934 acts of violence, the evidence showed that one stench bomb was thrown into a store in 1935, one in 1936, and two in 1937. The identity of the persons throwing these stench bombs was not shown.

The only other violence alleged or testified to was the breaking of windows in cut-rate stores. Most of the testimony as to these acts of violence was given by respondent's vendors, and was extremely indefinite. The master made no findings as to specific acts of violence, nor as to the dates of their occurrence. Viewing the evidence in the light most favorable to respondent, however, all of the acts of violence as to which any testimony was offered are gathered in the accompanying footnote.[16]

[16]

	Windows Broken	Trucks Seized	Stores Bombed or Burned	Miscellaneous
1934	34	8	5	4
1935	5	0	1	0
1936	7	0	1	0
1937	7	0	2	0
	53	8	9	4

Petitioners offered evidence that three men, with no union connections whatsoever, confessed to and were convicted of the smashing of windows in twenty-four cut-rate milk stores in 1934, pursuant to an insurance racket. The master struck this evidence from the record, on respondent's motion.

In addition to the acts of violence enumerated in the foregoing table, there was evidence of six acts of violence in 1932, among them the bombing of Meadowmoor's plant referred to in the opinion. Petitioners offered evidence to show that at that time respondent was gangster-dominated, and that the gangsters in question had sought to obtain control of the union, but this evidence was excluded.

The opinion also refers to the beating of workers at a cut-rate dairy other than Meadowmoor. The master did not mention this incident in his findings, but it is referred to in the evidence, and from that source it appears that those beaten and told "to join the union"

It is on the basis of my study of the entire record that I rest my conclusion that the forfeiture of the right to free speech effected by the injunction is not warranted. In reaching this conclusion, I fully recognize that the union members guilty of violence were subject to punishment in accordance with the principles of due process of law. And some of them have in fact been prosecuted and convicted. Punishment of lawless conduct is in accord with the necessities of government and is essential to the peace and tranquillity of society. But it is going a long way to say that because of the acts of these few men, six thousand other members of their union can be denied the right to express their opinion to the extent accomplished by the sweeping injunction here sustained.[17] Even those convicted of crime are not in this country punished by having their freedom of expression curtailed except under prison rules and regulations, and then only for the duration of their sentence.

No one doubts that Illinois can protect its storekeepers from being coerced by fear of damage to their property from window-smashing, or burnings or bombings. And to that end Illinois is free to use all its vast resources and powers, nor should this Court stand in the way so long as Illinois does not take away from its people rights guaranteed to them by the Constitution of the United States. When clear and present danger of riot, disorder,

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were inside workers not eligible for membership in the petitioning union.

[17] It is said that the decision here leaves the Illinois courts free to consider modification of the injunction. But whether modification is permissible or will in fact take place depends on Illinois law and Illinois courts. A statute can be modified or even repealed by subsequent legislation, but if upon its face it infringes the right of free speech it is invalid. And a court's injunction, making a law for a particular case, can stand no higher than a legislature's act, generally applicable to all the people.

interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order appears, the power of the Illinois courts to prevent or punish is obvious.[18] Furthermore, this is true because a state has the power to adopt laws of general application to provide that the streets shall be used for the purpose for which they primarily exist, and because the preservation of peace and order is one of the first duties of government. But in a series of cases we have held that local laws ostensibly passed pursuant to this admittedly possessed general power could not be enforced in such a way as to amount to a prior censorship on freedom of expression, or to abridge that freedom as to those rightfully and lawfully on the streets.[19] Illinois, like all the other states of the Union, is part of a national democratic system the continued existence of which depends upon the right of free discussion of public affairs—a right whose denial to some leads in the direction of its eventual denial to all. I am of opinion that the court's injunction strikes directly at the heart of our government, and that deprivation of these essential liberties cannot be reconciled with the rights guaranteed to the people of this Nation by their Constitution.

MR. JUSTICE DOUGLAS concurs in this opinion.

MR. JUSTICE REED, dissenting.

My conclusion is that the injunction ordered by the Supreme Court of Illinois violates the constitutional rights of the Milk Wagon Drivers Union of Chicago, its officers and members. The Court reaches a contrary

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[18] *Cantwell* v. *Connecticut,* 310 U. S. 296, 308.

[19] *Lovell* v. *City of Griffin,* 303 U. S. 444; *Schneider* v. *State,* 308 U. S. 147; *Thornhill* v. *Alabama,* 310 U. S. 88; *Carlson* v. *California,* 310 U. S. 106; *Cantwell* v. *Connecticut,* 310 U. S. 296.

result on the ground that a state may "authorize its courts to enjoin acts of picketing in themselves peaceful when they are enmeshed with contemporaneously violent conduct which is concededly outlawed." Since this controversy, by virtue of the Court's opinion, centers around picketing as a phase of free speech rather than around the more general topic of freedom of expression, I desire to state for myself the reasons which lead me to the conviction that the judgment should be reversed. A principle is thus involved, as well as a dispute over the scope of a court injunction.

The record shows inexcusable acts of violence, committed at least in part by members of the union. For such conduct, the offenders are subject to punishment by the criminal laws of Illinois. The future conduct of the rioters is also subject to state control by injunction, exercised within the limits of the Constitution. The burden and the duty of maintaining law and order fall primarily on Illinois. Whether it chooses an injunction against violence alone or against violence and peaceful picketing, it must be assumed that its commands will be obeyed. It is a postulate of reasoned thinking that the judicial decrees will be faithfully carried out. This question then emerges. Is the right to picket peacefully an employer's place of business lost for any period of future time by past acts of violence? The trial court, in this very case, while prohibiting all violence, permitted by its injunction the continuance of efforts by the union, either singly or in concert, to peaceably persuade others by picketing or other lawful means to support its contentions.

Where nothing further appears, it is agreed that peaceful picketing, since it is an exercise of freedom of speech, may not be prohibited by injunction or by statute. *Thornhill* v. *Alabama,* 310 U. S. 88; *American Federation of Labor* v. *Swing, post,* p. 321. It is equally clear that

the right to picket is not absolute. It may, if actually necessary, be limited, let us say, to two or three individuals at a time and their manner of expressing their views may be reasonably restricted to an orderly presentation. *Thornhill* v. *Alabama, supra,* 105. From the standpoint of the state, industrial controversy may not overstep the bounds of an appeal to reason and sympathy.

The Court now determines that where there is a background of violence, and inferentially, I think it must be admitted, that where there is a reasonable fear of violence, the freedom of speech which is secured to all persons by the First and Fourteenth Amendments to the Constitution may be withdrawn. It finds its justification in the authority of Illinois to "protect its storekeepers from being coerced by fear of window-smashings or burnings or bombings." The momentum of fear from past violence, it is thought, would reach over into the peaceful picketing of the future. This goes much farther than the injunction approved by this Court in *Hague* v. *C. I. O.,* 307 U. S. 496, 517, which forbade interferences with the liberty of free speech but left to the guardians of public peace the right "to enforce law and order by lawful search and seizure or by arrest and production before a judicial officer." This authority of Illinois to protect its storekeepers must be exercised, however, within the framework of the Constitution. If Illinois were not a member of the United States, but a sovereign without exterior political or social obligations, it would be in a position to use whatever means it or its courts might decide would best put an end to labor disturbances. As a state of the Union it is subject to the restraints of the Constitution. If the fear engendered by past misconduct coerces storekeepers during peaceful picketing, the remedy lies in the maintenance of order, not in denial of free speech. Constitutional guarantees against oppression are of value only when needed to challenge attacks.

The right to picket peacefully in industrial disputes is a recognized means for the marshaling of public opinion on the side of the worker. There is no finding that violence was planned or encouraged by the union. To deny this right of peaceful picketing to thousands because of the violence of a few means the cutting off of one of the constitutionally protected ways in which orderly adjustments of economic disputes are brought about. I cannot see that the constitutional problem is "totally different" because raised by a court decree rather than a statute. Constitutional guarantees are just as effective for the individual as they are for the general public. The principle contended for by petitioners is the right to tell their side of the story by peaceful picketing despite a state court's view that such picketing may project fear from past violence into the future. In the last analysis we must ask ourselves whether this protection against assumed fear of future coercion flowing from past violence is sufficient to justify the suspension of the constitutional guarantee of free speech. If picketing is prohibited here, the right maintained by *Thornhill* v. *Alabama* collapses on the first attack.

This nation relies upon public discussion as one of the indispensable means to attain correct solutions of problems of social welfare. Curtailment of free speech limits this open discussion. Our whole history teaches that adjustment of social relations through reason is possible while free speech is maintained. This Court has the solemn duty of determining when acts of legislation or decrees of courts infringe that right guaranteed to all citizens. Free speech may be absolutely prohibited only under the most pressing national emergencies. Those emergencies must be of the kind that justify the suspension of the writ of habeas corpus or the suppression of the right of trial by jury. Nothing approaching this situation exists in this record and, in my judgment, the

action of the Supreme Court of Illinois in prohibiting peaceful picketing violates the constitutional rights of these petitioners.

AMERICAN FEDERATION OF LABOR ET AL. *v.* SWING ET AL.

CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

No. 56. Argued December 13, 1940.—Decided February 10, 1941.

The constitutional guarantee of freedom of discussion is infringed by the common law policy of a State limiting peaceful picketing by labor unions to cases in which the controversy is between the employer and his own employees. Pp. 323, 325.

372 Ill. 91; 22 N. E. 2d 857, reversed.

CERTIORARI, 310 U. S. 620, to review the affirmance of a decree of the Appellate Court of Illinois, 298 Ill. App. 63, 18 N. E. 2d 258, which directed an injunction against picketing of a beauty shop by a labor union. The plaintiffs were the proprietor Swing and his employees.

Mr. Walter F. Dodd, with whom *Mr. Daniel D. Carmell* was on the brief, for petitioners.

Mr. Myer N. Rosengard, with whom *Mr. Samuel A. Rinella* was on the brief, for respondents.

The due process clause of the Fourteenth Amendment does not confer an absolute right to strike. The Amendment does not operate as a restraint upon the inherent power of the State to regulate and control the social and economic destiny of its citizens. Labor disputes involve internal, social and economic problems of the State; (except where the power to regulate or control is granted to the Federal Government by the Constitution of the United States, either by direct grant or as an incident to

the exercise of granted power). *Schechter Corp.* v. *United States,* 295 U. S. 495; *Carter* v. *Carter Coal Co.,* 298 U. S. 238; *Senn* v. *Tile Layers Union,* 301 U. S. 468; *Lauf* v. *Shinner & Co.,* 303 U. S. 323.

Assuming that the judgment of a state court, enunciating the common law of the State, can be considered as a declaration of state policy and analogous to a state statute, the declaration of policy in this case is not an unreasonable or arbitrary exercise of state sovereignty. *Nebbia* v. *New York,* 291 U. S. 502; *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379; *National Labor Relations Board* v. *Jones & Laughlin,* 301 U. S. 1; *Minersville School District* v. *Gobitis,* 310 U. S. 586.

The objective sought to be attained by the trade union having been declared to be unlawful, the means used—the strike campaign, the picketing and patrolling—are necessarily unlawful as being a part of a conspiracy to damage and injure and in aid of an unlawful objective. *Aikens* v. *Wisconsin,* 195 U. S. 194; *American Steel Foundries* v. *Tri-City Council,* 257 U. S. 184; *Dorchy* v. *Kansas,* 272 U. S. 306; *Meadowmoor Dairies* v. *Milk Wagon Drivers Union,* 371 Ill. 377; Frankfurter & Greene, The Labor Injunction, p. 25.

The due process clause does not grant an unbridled license to speak. Freedom of speech is always subject to the exercise of governmental regulation and control in the interest of public welfare. The Fourteenth Amendment recognizes the power of the State to deprive citizens of liberty and property, and even life, if done in the reasonable exercise of police power. *Senn* v. *Tile Layers Union,* 301 U. S. 468; *Meadowmoor Dairies* v. *Milk Wagon Drivers Union,* 371 Ill. 377.

This case involves private parties, each side seeking to further its own economic well being. It is distinguishable from an attempt on the part of the State to pass and enforce penal laws. The clear and present danger

rule should not be the test. *Abrams* v. *United States,* 250 U. S. 616; *Near* v. *Minnesota,* 283 U. S. 697.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

In *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, ante,* p. 287, we held that acts of picketing when blended with violence may have a significance which neutralizes the constitutional immunity which such acts would have in isolation. When we took this case, 310 U. S. 620, it seemed to present a similar problem. More thorough study of the record and full argument have reduced the issue to this: is the constitutional guarantee of freedom of discussion infringed by the common law policy of a state forbidding resort to peaceful persuasion through picketing merely because there is no immediate employer-employee dispute?

A union of those engaged in what the record describes as beauty work unsuccessfully tried to unionize Swing's beauty parlor. Picketing of the shop followed. To enjoin this interference with his business and with the freedom of his workers not to join a union, Swing and his employees began the present suit. In addition, they charged the use of false placards in picketing and forcible behavior towards Swing's customers. A preliminary injunction was granted. Answers were then filed denying violence as well as falsity of the placards. The union also moved to strike the complaint and the trial court, finding the complaint wanting in equity, granted the motion and dissolved the preliminary injunction. The appellate court, one of Illinois' intermediate courts of review, held that the trial court was in error. 298 Ill. App. 63; 18 N. E. 2d 258. This action of the appellate court was affirmed by the state supreme court. 372 Ill. 91; 22 N. E. 2d 857. It found that the complaint properly invoked equity for three reasons: (1) there was no dis-

pute between the employer and his immediate employees; (2) the placards were libelous; (3) there were acts of violence. Inasmuch as the supreme court affirmed the issuance merely of a preliminary injunction, we denied certiorari for want of a final judgment. 309 U. S. 659. Thereupon, although as we have seen issue had been formally joined on the claims of libel and violence, the appellate court, by a procedure unrevealed by the record and without opinion, entered a permanent injunction ranging from peaceful persuasion to acts of violence. The decree recited "that this Court and the Supreme Court of this State have held in this case, that, under the law of this State, peaceful picketing or peaceful persuasion are unlawful when conducted by strangers to the employer (i. e., where there is not a proximate relation of employees and employer), and that appellants are entitled in this case to relief by injunction against the threat of such peaceful picketing or persuasion by appellees." The union sought review of this decree in the supreme court by writ of error. Swing and his employees moved to dismiss the writ because in seeking to obtain it the union had conceded that "all issues of the case have been settled on prior appeal and that the decree entered by the appellate court is in conformity with the mandate issued" to the appellate court. The writ was dismissed.

Such is the case as we extract it from a none too clear record. It thus appears that in passing upon the temporary injunction the supreme court of Illinois sustained it in part because of allegations of violence and libel. But our concern is with the final decree of the appellate court. On its face the permanent injunction in that decree rested on the explicit avowal that "peaceful persuasion" was forbidden in this case because those who were enjoined were not in Swing's employ. Moreover,

as we have seen, the supreme court of Illinois dismissed proceedings before it to review that decree on representations that the decree was in accordance with its mandate on the temporary injunction.

Since the case clearly presents a substantial claim of the right to free discussion and since, as we have frequently indicated, that right is to be guarded with a jealous eye, *Herndon* v. *Lowry,* 301 U. S. 242, 258; *Schneider* v. *State,* 308 U. S. 147, 161; *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152n., it would be improper to dispose of the case otherwise than on the face of the decree, which is the judgment now under review. We are therefore not called upon to consider the applicability of *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, supra,* the circumstances of which obviously present quite a different situation from the controlling allegations of violence and libel made in the present bill.

All that we have before us, then, is an instance of "peaceful persuasion" disentangled from violence and free from "picketing *en masse* or otherwise conducted" so as to occasion "imminent and aggravated danger." *Thornhill* v. *Alabama,* 310 U. S. 88, 105. We are asked to sustain a decree which for purposes of this case asserts as the common law of a state that there can be no "peaceful picketing or peaceful persuasion" in relation to any dispute between an employer and a trade union unless the employer's own employees are in controversy with him.

Such a ban of free communication is inconsistent with the guarantee of freedom of speech. That a state has ample power to regulate the local problems thrown up by modern industry and to preserve the peace is axiomatic. But not even these essential powers are unfettered by the requirements of the Bill of Rights. The

scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state. A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace. *American Steel Foundries* v. *Tri-City Council,* 257 U. S. 184, 209. The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ. Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected in *Thornhill's* case. "Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution." *Senn* v. *Tile Layers Union,* 301 U. S. 468, 478.

Reversed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS concur in the result.

MR. JUSTICE ROBERTS, dissenting.

I am unable to agree to the court's disposition of this case. I think the writ should be dismissed or the judgment affirmed.

The record presents difficult questions concerning Illinois procedure, as to which the parties are in disagreement, and we ought not to attempt to resolve them.

The respondents filed a complaint in the Circuit Court, on which a temporary injunction issued. The petitioners answered. They also made a motion to dismiss the complaint and that motion was granted, with the result that the temporary injunction was dissolved. On appeal, the appellate court reversed the order dismissing the complaint. From that action an appeal was taken to the Supreme Court of the State, which affirmed the decree of the appellate court. On analysis of the complaint, the Supreme Court found that it charged that no disputes existed between the employer and his employees; that the petitioners had been indulging, and were continuing to indulge, in a series of libels against the respondents; were indulging and were continuing to indulge, in threats and acts of violence. The grounds on which the court sustained the complaint as stating a cause of action in equity are summed up in the conclusion of its opinion thus: "A State or nation ceases to be sovereign if it tolerates within it any force other than its own, and that force must be such as is established by law, directed by the courts, observing the principles of due process and equal protection of the law. To whatever extent these rules are violated we have lawlessness, and under such circumstances a court of equity will not pick and choose among the unlawful acts and threats but will enjoin the whole scheme."

Thereafter the record discloses merely that the cause came on for further hearing in the appellate court. We do not know whether that hearing was upon the bill and answers or upon the complaint and the motion to dismiss, and the parties are in grave dispute on the

subject. We do know from the record that the appellate court, after reciting the previous history of the case, including the affirmance of its judgment by the Supreme Court, and a statement that, under the law of Illinois, peaceful picketing is unlawful when conducted by strangers to the employer, coupled with the further statement that the respondents were entitled "in this case" to relief by injunction against the threat of such peaceful picketing, and that the respondents had maintained their complaint and the equities of the case were with them, the appellate court proceeded to decree "in accordance with the mandate of the Supreme Court of Illinois," that the petitioners should be enjoined from picketing or patrolling respondents' shop, exhibiting signs and placards to persuade persons to refrain from entering the place of business and from acts of violence menacing or coercing persons seeking employment from entering respondents' place of business.

From this final decree the petitioners sued out a writ of error in the Supreme Court of Illinois and the respondents moved to dismiss it for the reason that the order and opinion on the previous appeal "finally settles all the rights of the parties." In the brief filed by the petitioners they stated: "The writ of error is here presented with knowledge that this court has fully settled all issues of the case in a prior review thereof and that the decree entered by the Appellate Court is in compliance with the mandate of this court . . . If this court adheres to the position in *People* v. *Militzer,* 301 Ill. 284, page 287; 133 N. E. 761, that issues once decided on review will not be again considered on a second review, a final order in this case may properly dismiss the writ of error on the ground that all issues of the case have been settled on prior appeal and that the decree entered by the Appel-

late Court is in conformity with the mandate issued to the Appellate Court by this Court."

The Supreme Court of Illinois, without opinion, sustained the motion and dismissed the writ of error. I am unable to say that this action was an affirmance of any recital in the decree of the appellate court respecting the legality of peaceful picketing disconnected with a continued course of publishing libels, making threats, and using force. If the final decree was right on the ground stated by the Supreme Court in sustaining the temporary injunction; and if, under the Illinois practice, the affirmance of such a correct decree based on a previous opinion of the Supreme Court does not amount to the adoption of a preamble or recital of the decree, then we ought not to reverse the final decree of the Supreme Court, which, on the facts stated in the complaint, is correct when tested by the principles enunciated in *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436, 461, and in *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, ante,* p. 287, because of a recital in the decree of the appellate court.

The CHIEF JUSTICE joins in this opinion.

SMITH *v.* O'GRADY, WARDEN.

CERTIORARI TO THE SUPREME COURT OF NEBRASKA.

No. 364. Argued January 17, 1941.—Decided February 17, 1941.

1. The remedy by *habeas corpus* is available in the courts of Nebraska for determining whether the petitioner's incarceration is in violation of the Federal Constitution. P. 331.
2. A petition for *habeas corpus* alleging facts showing a case of incarceration for a serious offense, resulting from a plea of guilty into the making of which the petitioner, an uneducated man un-

aided by counsel, was tricked by state officers, states a cause of action under the due process clause of the Fourteenth amendment. P. 334.

Reversed.

CERTIORARI, 311 U. S. 633, to review the affirmance of a judgment dismissing an application for writ of *habeas corpus*.

Mr. William L. Marbury, Jr., for petitioner, acting under an assignment by the Court.

Mr. Clarence S. Beck, Assistant Attorney General of Nebraska, with whom *Messrs. Walter R. Johnson*, Attorney General, *H. Emerson Kokjer*, and *Charles F. Bongardt*, Assistant Attorneys General, were on the brief, for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

The question presented is whether petitioner's application for writ of habeas corpus filed in a Nebraska state court alleged facts which if proven entitled him to release from prison because he was held pursuant to a court judgment rendered in violation of rights guaranteed him by the federal Constitution. The trial court declined to issue the writ, holding that the petition failed to state a cause of action justifying the relief prayed. Without requiring the state to answer and without giving petitioner an opportunity to prove his allegations, the application was dismissed. A motion for reconsideration, setting out additional facts, was similarly dismissed. On appeal, the Supreme Court of Nebraska affirmed, without opinion.

The judgment of the Nebraska Supreme Court is a final and authoritative answer to petitioner's contention that his imprisonment was illegal under the state's constitution or laws. But petitioner also contended that

his imprisonment was illegal under the federal Constitution. And in denying the writ the Nebraska court necessarily held that petitioner's allegations—even if proven in their entirety—would not entitle him to habeas corpus, even if the petition showed a deprivation of federally protected rights.[1] It was to review this question that we granted certiorari. 311 U. S. 633.

But before examining the pleadings in order to determine whether the allegations showed a deprivation of federally protected rights, it is necessary to consider a preliminary contention urged by the state. The tenor of this contention is that under Nebraska law petitioner could not have his asserted federal rights determined in habeas corpus proceedings. And, supporting this contention, there is in the record a letter to petitioner from the trial judge who originally denied the writ—a letter indicating that petitioner's only relief from illegal imprisonment was by application to the Nebraska Parole and Pardon Board. This letter is not, however, a judicial determination, and apparently no state statutes or court decisions compel the result it indicates. Nor can we lightly assume that Nebraska affords no corrective process for one who is imprisoned under a judgment rendered in violation of rights protected by the federal Constitution. That Constitution is the supreme law of the land, and "Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that Constitution." [2] Moreover, while

[1] It is suggested that the Nebraska Supreme Court's final judgment of affirmance rested on petitioner's failure to file a printed brief in that court, and that this was an adequate non-federal ground, precluding our review of the federal question raised. But this contention is obviously not sound, because the Supreme Court denied petitioner's motion for relief from the rule requiring printed briefs solely on the ground that upon examination of the whole record the court had found the appeal to be without merit.

[2] *Mooney* v. *Holohan,* 294 U. S. 103, 113.

the opinions of the Nebraska courts do not mark clearly the exact boundaries within which Nebraska confines the historic remedy of habeas corpus, the Nebraska Supreme Court has held that the writ was properly invoked to obtain release from imprisonment resulting from deprivation of constitutional rights.[3] Because of this, and because a contrary conclusion would apparently mean that Nebraska provides no judicial remedy whatsoever for petitioner even though he can show he is imprisoned in violation of procedural safeguards commanded by the federal Constitution,[4] we are unable to reach the conclusion that habeas corpus is unavailable to him under Nebraska law.

It is therefore our duty to examine petitioner's allegations in order to determine whether they show that his imprisonment is the result of a deprivation of rights guaranteed him by the federal Constitution. The heart of his charge is that he, an ignorant layman not represented by counsel, was tricked into pleading guilty to a serious offense. Among the specific allegations are:

Petitioner, without being informed of the charges against him, was arrested in one county, and then removed to another county for two days. There he was told he was wanted for burglary in a third county (Valley County), but would be dealt with leniently if he would plead guilty. After a long distance telephone conversation between petitioner and a man identified as the prosecuting attorney of Valley County, a conversation arranged and listened to by the Valley County sheriff, a sentence of not over three years was agreed upon. Petitioner was soon thereafter transferred to the Valley

[3] *In re Resler*, 115 Neb. 335, 338–340; 212 N. W. 765. And see *Kuwitzky* v. *O'Grady*, 135 Neb. 466, 468; 282 N. W. 396. Cf. *Darling* v. *Fenton*, 120 Neb. 829; 235 N. W. 582.

[4] See *Newcomb* v. *State*, 129 Neb. 69; 261 N. W. 765.

County jail. His efforts to get copies of the charges filed against him were unsuccessful, the sheriff telling him that this was "not necessary" since "everything had been 'fixed.'" After three days in the Valley County jail, and "without ever having had a copy of the charge," petitioner was taken before a trial judge, "summarily arraigned, and, upon his prearranged plea of guilty, sentenced, to his surprise and consternation, to a term of twenty years imprisonment in the Nebraska State Penitentiary." Petitioner, an uneducated layman, had no knowledge of law or legal procedure, and had never before been arrested or been in a court room for any purpose whatsoever. Upon imposition of the twenty year sentence, however, he vigorously protested, asked the court and the prosecuting attorney for a copy of the charge to which he had pleaded guilty, and, this request being refused, asked permission to withdraw his plea of guilty, requested appointment of an attorney to advise and assist him, and asked that he be given a proper opportunity to defend himself. All of these requests were refused by the court, and "within the hour" he was on his way to the penitentiary, accompanied by the sheriff. After arriving at the penitentiary he discovered "that he had been duped and inveigled into entering a plea of guilty to a charge of burglary with explosives . . .," punishable in Nebraska by twenty years to life imprisonment. Simple burglary, to which petitioner agreed to plead guilty, upon condition that he be sentenced to three years, carries a penalty of one to ten years. During the eight years petitioner has been in the penitentiary, he has done everything an uneducated person could do to bring his illegal imprisonment to the attention of the Nebraska authorities, but has not been able to get counsel because of lack of funds. His appeals to the Board of Pardons have been futile. Because of his ignorance of his rights,

and because of the trial court's failure to appoint, and his inability to obtain, counsel, the original sentence was not appealed.

These allegations, if true, undermine and invalidate the judgment upon which petitioner's imprisonment rests. The circumstances under which petitioner asserts he was entrapped and imprisoned in the penitentiary are wholly irreconcilable with the constitutional safeguards of due process. For his petition presents a picture of a defendant, without counsel, bewildered by court processes strange and unfamiliar to him, and inveigled by false statements of state law enforcement officers into entering a plea of guilty. The petitioner charged that he had been denied any real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process; that because of deception by the state's representatives he had pleaded guilty to a charge punishable by twenty years to life imprisonment; that his request for the benefit and advice of counsel had been denied by the court; and that he had been rushed to the penitentiary where his ignorance, confinement and poverty had precluded the possibility of his securing counsel in order to challenge the procedure by regular processes of appeal. If these things happened, petitioner is imprisoned under a judgment invalid because obtained in violation of procedural guaranties protected against state invasion through the Fourteenth Amendment.[5] The state court erroneously decided that the petition stated no cause of action. If petitioner can prove his allegations the judgment upon which his imprisonment rests was rendered in violation of due process and cannot stand.

Reversed and remanded.

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[5] Cf. *Walker* v. *Johnston, ante,* p. 275; *Johnson* v. *Zerbst,* 304 U. S. 458; *Mooney* v. *Holohan,* 294 U. S. 103. And see *Chambers* v. *Florida,* 309 U. S. 227.

BROWDER *v.* UNITED STATES.

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

No. 287. Argued January 16, 1941.—Decided February 17, 1941.

1. A citizen of the United States who willfully and knowingly uses a United States passport which was secured by a false statement, is guilty of an offense under § 2 of the Passport Title of the Act of June 15, 1917, when the use was for the purpose of establishing his identity and citizenship and consequent right to reënter this country from abroad. P. 337.
2. The term "willful" often denotes an intentional, as distinguished from an accidental, act. P. 342.

113 F. 2d 97, affirmed.

CERTIORARI, 311 U. S. 631, to review the affirmance of a sentence on two counts of an indictment.

Mr. Carl S. Stern, with whom *Carol King* was on the brief, for petitioner.

Mr. John T. Cahill, with whom *Solicitor General Biddle, Assistant Attorney General Berge,* and *Messrs. Herbert Wechsler, Raoul Berger,* and *Robert L. Werner* were on the brief, for the United States.

MR. JUSTICE REED delivered the opinion of the Court.

The question is whether the use by an American citizen of a passport obtained by false statements to facilitate reëntry into the United States is a "use" within § 2 of the Passport Title of the Act of June 15, 1917,[1]

[1] 40 Stat. 217, 227, Title IX:

"SEC. 2. Whoever shall willfully and knowingly make any false statement in an application for passport with intent to induce or secure the issuance of a passport under the authority of the United States, either for his own use or the use of another, contrary to the

and, if so, whether petitioner was properly convicted of a "willful" use. We brought the case here because of its importance in the administration of the passport laws.

Section 2 provides that whoever shall either make a false statement in an application for a passport or "shall willfully and knowingly use . . . any passport the issue of which was secured in any way by reason of any false statement, shall be fined not more than $2,000 or imprisoned not more than five years or both." The indictment in two counts charged that petitioner, having secured a passport by a false statement, willfully and knowingly used it on April 30, 1937, and again on February 15, 1938, each time by presenting it to an immigration inspector to gain entry into the United States. The proof showed that petitioner, a native-born American citizen, had in 1921, 1927 and 1931 obtained passports under different assumed names by means of false statements. In 1934 petitioner applied for a passport in his own name. The application blank contained the clause: "My last passport was obtained from ..... and is submitted herewith for cancellation." Despite the three passports previously issued to him, petitioner wrote "none" in the blank space, then signed the application and swore to the truth of its contents. The Government issued him a passport, which was later extended upon a renewal application until September 1, 1938. Returning from Europe in April, 1937, and again in February,

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laws regulating the issuance of passports or the rules prescribed pursuant to such laws, or whoever shall willfully and knowingly use or attempt to use, or furnish to another for use, any passport the issue of which was secured in any way by reason of any false statement, shall be fined not more than $2,000 or imprisoned not more than five years or both."

By the Act of March 28, 1940, the maximum term of imprisonment under this section was increased to ten years. 54 Stat. 80.

1938, petitioner showed his passport to an inspector to identify himself and establish his citizenship and consequent right to reënter the United States. The jury convicted him on both counts for willfully using a passport secured by a false statement, and the District Court sentenced him to two years' imprisonment and a fine of $1,000 on each count, the terms to run consecutively. The Circuit Court of Appeals affirmed.[2] At the time of the indictment, the statute of limitations had run on the obtaining of the passport by a false statement (18 U. S. C. § 582).

Petitioner contends that the indictment is for the "use" "of a passport as truthful proof of his Kansas birth." Since the "use" to prove an admitted fact—his American citizenship—was innocent, it is urged, no statutory prohibition was violated. The indictment, however, charges that petitioner "used . . . a passport . . . the issue of which he secured by reason of a false statement . . . in the application therefor." The language of the indictment conforms to the definition of the offense in the statute, as the use of "any passport the issue of which was secured in any way by reason of any false statement." The balanced form of § 2, quoted above at note 1, shows that the Congress viewed with concern and punished with equal severity the securing of passports by false statements and their use. The crimes denounced are not the securing or the use but either of such actions made criminal only by the false statements in the procurement of the passport. If the misrepresentation is withdrawn nothing culpable remains in the use. A condemned use of a passport secured by the fraud seems obviously within the act.

A more difficult issue emerges from petitioner's assertion that the use proven here is not the kind of use covered by the statute. He finds the prohibitions di-

[2] 113 F. 2d 97.

rected against "dishonest uses of the safe-conduct of the United States in foreign relations." Such use must be "willful and knowing," an expression said to bear the connotation of evil or dishonest. Attention is called to alleged passport frauds of about the time of the passage of the passport sections and to the recommendation of the Attorney General that Congress pass legislation against the fraudulent use of passports.[3] These are brought forward as indicative of the purpose of Congress to punish fraudulent uses or those uses abroad which would involve misuse of the privilege, under international law, of traveling through foreign countries.

It is quite true that passports are used chiefly in foreign travel. There is no limitation, however, to that field and surely the close connection between foreign travel and reëntry to this country is obvious. The plain meaning of the words of the act covers this use. No single argument has more weight in statutory interpretation than this.[4] Nothing in the legislative history is brought to our attention which indicates any other purpose in Congress than that expressed by the words of the act. The final form of the enactment did not vary in this particular portion from the bill originally introduced.[5] The Government does not urge that every use of a fraudulent passport is violative of the act but only those "uses in connection with travel which are a part of the ordinary incentives for obtaining passports." Certainly the use to prove citizenship on reëntry to the country is within the ordinary incentives.[6] It is en-

[3] Report of the Attorney General (1916), p. 17.

[4] *United States* v. *American Trucking Associations,* 310 U. S. 534, 543.

[5] H. R. 291, 65th Cong.

[6] Since 1929, the State Department has carried substantially the following suggestion in its "Notice to Bearers of Passports": "22. An American citizen leaving the United States for a country where pass-

tirely clear from the record that passports were customarily used to prove the bearer's citizenship on reëntry into the United States at the time of this alleged offense. The use of a passport for reëntry is now routine, although neither at the time of the passage of the act nor at present are passports required of citizens on reëntry. Our conclusion is not weakened by the fact that the Act of May 22, 1918,[7] which required citizens to use passports to depart from or enter the United States, was permitted to expire after the war emergency. While passports no longer were required for reëntry, their use for that purpose afterwards became both convenient and customary.

The fact that at the time of the passage of the act, passports were not customarily used by citizens to assure easy reëntry is brought forward by petitioner to support the argument that Congress did not intend to punish uses such as the one charged here. There is nothing in the legislative history to indicate that Congress considered the question of use by returning citizens. Old crimes, however, may be committed under new conditions. Old laws apply to changed situations.[8] The reach of the act is not sustained or opposed by the fact that it is sought to bring new situations under its terms.[9] While a statute

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ports are not required is nevertheless advised to carry a passport, except in travel to Canada or Mexico. The passport may later save the time and inconvenience of applying for one abroad should the holder desire to travel in countries where passports are required. It will also enable the holder to establish his American citizenship upon his return to the United States and thus facilitate his entry. American citizens who leave the United States without passports should carry with them proof of their citizenship, such as birth, baptism, or naturalization certificates."

[7] 40 Stat. 559.

[8] Cf. *Cain* v. *Bowlby,* 114 F. 2d 519, 522, and cases and instances there cited; Maxwell, Interpretation of Statutes, (7th ed. 1929) pp. 69–70.

[9] *Newman* v. *Arthur,* 109 U. S. 132, 138; *Pickhardt* v. *Merritt,* 132 U. S. 252, 257; *De Lima* v. *Bidwell,* 182 U. S. 1, 197.

speaks from its enactment, even a criminal statute embraces everything which subsequently falls within its scope.[10] The use here charged under these tests was clearly within the scope of the act. The purpose of this act was to punish the use of passports obtained by false statements.

There is the further contention that the Government's construction of the word "use" would make criminal, under other sections of the act, the presentation of expired passports for the purpose of identifying citizens returning from Mexico, Bermuda and Canada. Petitioner urges that such uses, though frequent and apparently acquiesced in by the authorities, would then violate § 3, which prohibits a use "in violation of the conditions or restrictions therein contained," and also § 4, which prohibits the use of a passport "validly issued which has become void by the occurrence of any condition therein prescribed invalidating the same." The question of the meaning of other sections is not before us. Considered solely from the standpoint of their analogy to § 2, the use of expired passports to identify the holder seems entirely different from the use of a passport obtained by false statements. The vice in the latter is congenital. Its willful use is prohibited.

Petitioner points out, however, that the use must be "willfully and knowingly." In his view this means a use which is dishonest in addition to or apart from the dishonesty in obtaining the passport, and which is in itself evil "as the use of a passport to invoke fraudulently the protection of the United States abroad." Further it is said this evil must be the kind of evil within the spirit and intendment of the act. But the statute plainly does

[10] *State* v. *Butler*, 42 N. M. 271, 274; 76 P. 2d 1149; *Commonwealth* v. *Tilley*, 28 N. E. 2d 245 (Mass.); *People* v. *Hines*, 284 N. Y. 93, 104; 29 N. E. 2d 483.

not purport to punish fraudulent or dishonest use other than such as is involved in the use of a passport dishonestly obtained. None of its words suggest that fraudulent use is an element of the crime. The statute is aimed at the protection of the integrity of United States passports. It penalizes both procuring the passport by a false statement and its use when so procured. The crime of "use" is complete when the passport so obtained is used willfully and knowingly.

Read in its context the phrase "willfully and knowingly," as the trial court charged the jury, can be taken only as meaning "deliberately and with knowledge and not something which is merely careless or negligent or inadvertent." No exception was taken to this instruction. The point at issue arises because a motion was denied to dismiss the indictment on the ground that "the government's case is fatally defective in that it lacks the most essential ingredient of the entire case; namely, the criminal intent of the defendant at the time of the alleged act"; that there is "no proof that there was a knowing and willful use to gain entry." Petitioner relies upon *United States* v. *Murdock*.[11] That case affirmed a reversal of conviction for a violation of § 1114 (a) of the Revenue Act of 1926 and a like section of the 1928 act. These sections made it a misdemeanor for a taxpayer to "willfully" fail to supply information in regard to income. The taxpayer refused the information on the ground of privilege from fear of self-incrimination. At the time the law upon the point was uncertain. This reasonable fear, this Court held, entitled the taxpayer to requested instruction on his good faith in refusing to answer. This claim of constitutional right is quite different from the claim here of a right to use a passport obtained by false representation, contrary

[11] 290 U. S. 389, 394.

to the express words of the statute, because there was no ulterior evil purpose in mind. The *Murdock* opinion recognizes, p. 394, that the word "willful" often denotes an intentional as distinguished from an accidental act. Once the basic wrong under this passport statute is completed, that is the securing of a passport by a false statement, any intentional use of that passport in travel is punishable.

Other suggestions as a basis for reversal are made. These do not require particular comment.

Affirmed.

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

WARSZOWER *v.* UNITED STATES.

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

No. 338. Argued January 16, 17, 1941.—Decided February 17, 1941.

1. A citizen of the United States who willfully and knowingly uses a United States passport which was secured by a false statement, is guilty of an offense under § 2 of the Passport Title of the Act of June 15, 1917, when the use was for the purpose of establishing his identity and citizenship and consequent right to reënter this country from abroad. *Browder* v. *United States, ante,* p. 335. P. 343.
2. Evidence consisting of a ship's manifest of incoming United States citizens with their names and the numbers of their respective passports, and the testimony of an immigration inspector as to his practice of examining the passports in such cases, checking their numbers with those on the manifest,—*held* sufficient to go to the jury on the question whether the prisoner presented his passport on entering the country. P. 344.
3. Statements that were made by an accused before the commission of the crime charged and which are inconsistent with his innocence are admissible in evidence without corroborative proof. P. 347.

113 F. 2d 100, affirmed.

CERTIORARI, 311 U. S. 631, to review the affirmance of a sentence under an indictment.

Mr. Osmond K. Fraenkel, with whom *Mr. Edward I. Aronow* was on the brief, for petitioner.

Mr. John T. Cahill, with whom *Solicitor General Biddle, Assistant Attorney General Berge,* and *Messrs. Herbert Wechsler* and *Robert L. Werner* were on the brief, for the United States.

MR. JUSTICE REED delivered the opinion of the Court.

This case is similar to *Browder* v. *United States, ante,* p. 335. This petitioner also was indicted for the use of a passport for the purpose of entering the United States, which passport had been secured by false statements in the application for its issue. We granted certiorari because of the contention that this use of the passport was not prohibited by § 2, Title IX of the Act of June 15, 1917, and because of a conflict on a rule of evidence, referred to by the Circuit Court of Appeals.

The false statements charged were with respect to petitioner's name, citizenship, place of birth and residence abroad and the use relied upon was the presentation of the passport to an immigration inspector. A jury convicted petitioner, a sentence of two years was imposed and that judgment was affirmed by the Circuit Court of Appeals.[1]

As grounds for reversal petitioner urges (1) that the presentation of a wrongfully held passport to an immigration officer upon landing is not a use within the statute; (2) that the evidence of the use was insufficient to justify the submission of the case to the jury; and (3) that conviction was obtained by the use of admissions

[1] 113 F. 2d 100.

before the crime, without corroboration, to establish necessary elements of the charge.

Nothing need be added to the discussion in the *Browder* case of the illegality of this use. There are no marks of differentiation.

Proof of Presentation.—Petitioner's argument that the proof of presentation of the passport was insufficient rests upon the testimony of the inspector, which was based on the manifest of United States citizens arriving on the *S. S. Normandie* on September 30, 1937. The manifest contains a list of names, accompanied by passport numbers and other information. Next to each name appears a check mark by the inspector. The list includes "Robert Wiener," the holder of passport No. 332,207, which is the passport issued to petitioner. The inspector testified that he had no independent recollection of the arrival of this Robert Wiener, but that from looking at the manifest he could say that the passport had been presented to him, because "it is my invariable practice when the number of the passport appears on the manifest to ask for that passport and have it shown to me . . . by the passenger." On cross-examination the inspector stated that he himself did not make any writing on the manifest as to what the people showed him. This colloquy then occurred:

"The COURT. . . . do you make any entry on the manifest when a man identifies himself as an American citizen?

The WITNESS. The whole manifest is of American citizens.

The COURT. And when the man presented his passport what did you do?

The WITNESS. That check mark shows he was admitted as a United States citizen.

The COURT. On a passport?

The WITNESS. Not necessarily.

The COURT. Can you tell us whether he had a passport?

The WITNESS. From the fact the number of the passport appears there.

Q. And you checked——

Mr. FOWLER. That is objected to.

Q. Did you check the information on the manifest with information in the passport?

A. That is correct."

The petitioner asks reversal because of the answer "Not necessarily," contending this shows that the check mark did not inescapably indicate the presentation of a passport. The Government argues that the check mark was intended merely to show admission as a citizen and that the language does not nullify or indeed impugn the direct assertions of the inspector. We are clear that this testimony as a whole justified the submission to the jury at any rate and its conclusion that petitioner actually used his passport in securing admission to this country.

Corroboration of Admissions.—The prosecution had the burden of proving that the passport was obtained by the use of false statements. As the trial court instructed the jury it might convict if any one of the statements charged in the indictment to be false was found false, it is necessary before affirmance is justified to decide whether there was adequate evidence to support the charge of falsity as to each of the statements. Petitioner contends that as to the allegedly false statements of American citizenship and no prior residence outside the United States, there was no proof of falsity except admissions to the contrary made by petitioner prior to the use of the passport. Such admissions, it is urged, require corroboration. This argument is drawn from the requirement of corroboration as to confessions after the crime.[2]

[2] Wharton, Criminal Law (12th Ed.) §§ 357, 359; *Daeche* v. *United States,* 250 F. 566; Wigmore, Evidence (3rd Ed.) §§ 2070–71; Chamberlayne, Modern Law of Evidence § 1598; Underhill, Criminal Evidence (4th Ed.) p. 42.

As a corollary, it is said that the corroboration must reach to each element of the corpus delicti.[3]

To establish that petitioner was not a citizen of the United States and that he had resided abroad, the Government relied on the following proof: The manifest of alien passengers of the *S. S. Haverford,* which arrived at Philadelphia on March 27, 1914, stated that Welwel Warszower, age 21, was a citizen or subject of Russia, whose last permanent residence was in Vikolsk, Russia, where his father lived; that he had never been in the United States before; and that he had been born in Radajenko, Russia. Although the officer who had examined Warszower on this occasion was dead, the boarding officer testified it was the practice to check all answers on the manifest with the alien personally before allowing him to enter. Three years later, on June 5, 1917, petitioner registered for the draft under the name of William Weiner"; he stated he was an alien born in Russia on September 5, 1893, and a citizen or subject of Russia. Petitioner furnished the same information in a draft questionnaire returned on December 31, 1917, where he also stated that he spoke Russian, that he arrived in this country at Philadelphia on March 28, 1914, on the *S. S. Haverford,* that his parents had not been naturalized, that he had not taken out first papers, and that he was willing to return to Russia and enter its military service. In 1932, preparatory to traveling abroad, petitioner applied for a reëntry permit, which is required only of aliens. To support his application he showed the inspection card issued to him in 1914 upon his arrival in Philadelphia, and stated that he was born on September 5, 1893, at Kiev, Russia, which was his last permanent residence before his arrival in Philadelphia. The Government also showed that petitioner had never applied

[3] Cf. *Forte* v. *United States,* 68 App. D. C. 111; 94 F. 2d 236.

for naturalization under his own name, or the names "Weiner" or "Wiener," which he on occasion used. In his 1936 application for a passport in the name of Robert William Wiener, petitioner submitted a certified transcript of an entry in the Atlantic City birth records that a person of that name was born there September 5, 1896, but at the trial the Government proved the entry a forgery.

The rule requiring corroboration of confessions protects the administration of the criminal law against errors in convictions based upon untrue confessions alone. Where the inconsistent statement was made prior to the crime this danger does not exist.[4] Therefore we are of the view that such admissions do not need to be corroborated. They contain none of the inherent weaknesses of confessions or admissions after the fact. Cases in the circuits are cited by petitioner to the contrary. In *Gulotta* v. *United States*,[5] the decision turned on the similarity of confessions and admissions rather than upon any differences between admissions before and after the fact. In *Duncan* v. *United States*[6] and in *Gordnier* v. *United States*[7] the conclusion was reached without any comment upon this difference. Our consideration of the effect of admissions prior to the crime leads us to the other conclusion.[8]

The law requires that a jury be convinced beyond a reasonable doubt of the defendant's guilt. An uncorroborated confession or evidence of perjury, given by one witness only,[9] does not as a matter of law establish be-

[4] Wigmore, *supra*.

[5] 113 F. 2d 683.

[6] 68 F. 2d 136.

[7] 261 F. 910.

[8] Cf. *Miles* v. *United States*, 103 U. S. 304.

[9] *Phair* v. *United States*, 60 F. 2d 953. Cf. *United States* v. *Harris*, 311 U. S. 292.

yond a reasonable doubt the commission of a crime, but these are exceptions to the normal requirement that disputed questions of fact are to be submitted to the jury under appropriate instructions. In this case the earlier statements of birth and therefore necessarily of residence outside of the United States, if believed by the jury, prove the falsity of the statements to the contrary in the application. Where the crime charged is a false statement and where it finds its only proof in admissions to the contrary prior to the act set out in the indictment, it may be unlikely that a jury will conclude that the falsity of the later statement is proven beyond a reasonable doubt, but such evidence justifies submission of the question to them.

In this present case there was other evidence of the falsity of the disputed statements in the application. The manifest of the *S. S. Haverford* showed petitioner's arrival and classification as an alien at Philadelphia in 1914. The forged birth certificate adds to the proof of foreign birth by showing an effort to establish American nativity by false means, and the Government's proof of the absence of any attempt at naturalization supports the allegation of false statement as to citizenship.

Affirmed.

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

FEDERAL TRADE COMMISSION *v.* BUNTE BROTHERS, INC.

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

No. 85. Argued January 6, 1941.—Decided February 17, 1941.

1. The Federal Trade Commission is without authority under § 5 of the Federal Trade Commission Act to prevent a candy manufacturer within a State from selling, wholly within that State, candy in so-called "break and take" assortments. P. 350.
2. Such selling is not a method of competition "in [interstate] commerce" within the meaning of the Act, and therefore not within the jurisdiction of the Commission, even though it be in competition with and affect the sales of out-of-state manufacturers who are barred from selling "break and take" assortments in interstate commerce as an unfair method of competition. P. 351.
3. The phrase "unfair methods of competition in [interstate] commerce," as used in the Federal Trade Commission Act, is not to be construed as though it meant "unfair methods of competition in any way affecting interstate commerce." P. 355.

110 F. 2d 412, affirmed.

CERTIORARI, 311 U. S. 624, to review a judgment setting aside an order of the Federal Trade Commission.

Mr. Hugh B. Cox, with whom *Solicitor General Biddle, Assistant Attorney General Arnold,* and *Messrs. Charles H. Weston* and *W. T. Kelley* were on the brief, for petitioner.

Mr. Theodore E. Rein, with whom *Mr. Samuel G. Clawson* was on the brief, for respondent.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The Federal Trade Commission found that Bunte Brothers, candy manufacturers in Illinois, sold products there in what the trade calls "break and take" packages,

which makes the amount the purchaser receives dependent upon chance; and that thereby it was enabled in the Illinois market to compete unfairly with manufacturers outside of Illinois who could not indulge in this device because the Trade Commission has barred "break and take" packages as an "unfair method of competition." Federal Trade Commission Act, § 5 (a), 38 Stat. 719, as amended, 15 U. S. C. § 45, *Federal Trade Comm'n* v. *Keppel & Bro.*, 291 U. S. 304. Deeming the "break and take" sales unfair methods of competition under § 5, even though the sales took place wholly within Illinois, the Commission forbade Bunte Brothers further use of the device. The circuit court of appeals set aside the order, 110 F. 2d 412, and we brought the case here because the issue at stake presents an important aspect of the interplay of state and federal authority. 311 U. S. 624.

The scope of § 5 is in controversy.[1] That section, the court below held, authorizes the Commission to proceed only against business practices employed in interstate commerce. The Commission urges that its powers are not so restricted, that it may also proscribe unfair methods used in intrastate sales when these result in a handicap to interstate competitors.

While one may not end with the words of a disputed statute, one certainly begins there. "Unfair methods of competition in commerce" are the concern of § 5, and the Commission is "directed to prevent persons . . . from using unfair methods of competition in com-

[1] "Sec. 5. (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

"The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

merce . . ." The "commerce" in which these methods are barred is interstate commerce.[2] Neither ordinary English speech nor the considered language of legislation would aptly describe the sales by Bunte Brothers of its "break and take" assortments in Illinois as "using unfair methods of competition in [interstate] commerce." When in order to protect interstate commerce Congress has regulated activities which in isolation are merely local, it has normally conveyed its purpose explicitly. See for example, National Labor Relations Act, §§ 2 (7), 9 (c), 10 (a), 49 Stat. 450, 453, 29 U. S. C. §§ 152 (7), 159 (c), 160 (a); Bituminous Coal Act, § 4–A, 50 Stat. 83, 15 U. S. C. § 834; Federal Employers' Liability Act, § 1, 35 Stat. 65, as amended, 53 Stat. 1404, 45 U. S. C. § 51. To be sure, the construction of every such statute presents a unique problem in which words derive vitality from the aim and nature of the specific legislation. But bearing in mind that in ascertaining the scope of congressional legislation a due regard for a proper adjustment of the local and national interests in our federal scheme must always be in the background, we ought not to find in § 5 radiations beyond the obvious meaning of language unless otherwise the purpose of the Act would be defeated. *Minnesota Rate Cases,* 230 U. S. 352, 398–412.

That for a quarter century the Commission has made no such claim is a powerful indication that effective enforcement of the Trade Commission Act is not dependent

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[2] "Sec. 4. The words defined in this section shall have the following meaning when found in this Act, to wit:

" 'Commerce' means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any state or foreign nation, or between the District of Columbia and any State or Territory or foreign nation."

on control over intrastate transactions.[3] Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred. See *Norwegian Nitrogen Co.* v. *United States,* 288 U. S. 294, 315. This practical construction of the Act by those entrusted with its administration is reinforced by the Commission's unsuccessful attempt in 1935 to secure from Congress an express grant of authority over transactions "affecting" commerce in addition to its control of practices in commerce. S. Rep. No. 46, 74th Cong., 1st Sess. These circumstances are all the more significant in that during the whole of the Commission's life the so-called *Shreveport* doctrine operated in the regulatory field committed to the Interstate Commerce Commission. And it is that doctrine which gives the contention of the Trade Commission its strongest support.

[3] The Commission makes no claim of a contrary administrative practice. The cases which it cites in no way mitigate what is stated in the text of the opinion. (1) Counsel for the Commission apparently argued for recognition of the power claimed here in *Canfield Oil Co.* v. *Federal Trade Comm'n,* 274 F. 571, but the Commission had made no findings of discrimination against commerce and had only found that the Oil Company was engaged in commerce. (2) The jurisdiction sustained in *Chamber of Commerce of Minneapolis* v. *Federal Trade Comm'n,* 13 F. 2d 673, was very different from that claimed here. It rested on the fact that the Chamber conducted a market for grain in the current of interstate commerce. See *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1, and cases cited. (3) The order of the Commission reviewed in *California Rice Industry* v. *Federal Trade Comm'n,* 102 F. 2d 716, resulted from proceedings instituted more than a year after this proceeding against Bunte Brothers had begun.

Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business. The Interstate Commerce Act and the Federal Trade Commission Act are widely disparate in their historic settings, in the enterprises which they affect, in the range of control they exercise, and in the relation of these controls to the functioning of the federal system. We need not at this late day rehearse the considerations that led to the *Shreveport* decision. *Houston, E. & W. T. Ry. Co.* v. *United States,* 234 U. S. 342. The nub of it, in the language of Chief Justice Taft, lay in the relation between intrastate and interstate railroad traffic: "Effective control of the one must embrace some control over the other in view of the blending of both in actual operation. The same rails and the same cars carry both. The same men conduct them." *Wisconsin Railroad Comm'n* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563, 588. And so when the Interstate Commerce Commission found that the intrastate rates of a carrier subject to the Act in effect operated as a discrimination against its interstate traffic, this Court sustained the power of the Commission to bring the two rates into harmonious relation and thereby to terminate the unlawful discrimination. Congress in 1920 revised the Interstate Commerce Act and explicitly confirmed this power of the Commerce Commission. 41 Stat. 484, 49 U. S. C. § 13 (4).

There is the widest difference in practical operation between the control over local traffic intimately connected with interstate traffic and the regulatory authority here asserted. Unlike the relatively precise situation presented by rate discrimination, "unfair competition" was designed by Congress as a flexible concept with evolving content. *Federal Trade Comm'n* v. *Keppel & Bro., supra,* at 311–312. It touches the greatest variety of unrelated activities. The Trade Commission in its Report

for 1939 lists as "unfair competition" thirty-one diverse types of business practices which run the gamut from bribing employees of prospective customers to selling below cost for hindering competition.[4] The construction of § 5 urged by the Commission would thus give a federal agency pervasive control over myriads of local businesses in matters heretofore traditionally left to local custom or local law. Such control bears no resemblance to the

[4] Report, pp. 83, 88. And see these additional examples (pp. 83, 85, 89):

"6. Making false and disparaging statements respecting competitors' products and business, in some cases under the guise of ostensibly disinterested and specially informed sources or through purported scientific, but in fact misleading, demonstrations or tests; and making false and misleading representations with respect to competitors' products, such as that seller's product is competitor's, and through use of such practices as deceptive simulation of competitor's counter-display catalogs or trade names; and that competitor's business has been discontinued, and that seller is successor thereto or purchaser and owner thereof."

"10. Selling rebuilt, second-hand, renovated, or old products or articles made from used or second-hand materials as and for new."

"19. Using containers ostensibly of the capacity customarily associated in the mind of the general purchasing public with standard weights or quantities of the product therein contained, or using such standard containers only partially filled to capacity, so as to make it appear to the purchaser that he is receiving the standard weight or quantity."

"30. Failing and refusing to deal justly and fairly with customers in consummating transactions undertaken, through such practices as refusing to correct mistakes in filling orders, or to make promised adjustments or refunds, and retaining, without refund, goods returned for exchange or adjustment, and enforcing, notwithstanding agents' alterations, printed terms of purchase contracts, and exacting payments in excess of customers' commitments."

"31. Shipping products at market prices to its customers or prospective customers or to the customers or prospective customers of competitors without an order and then inducing or attempting by various means to induce the consignees to accept and purchase such consignments."

strictly confined authority growing out of railroad rate discrimination. An inroad upon local conditions and local standards of such far-reaching import as is involved here, ought to await a clearer mandate from Congress. The problem now before us is very different from that which was recently presented by *United States* v. *Darby, ante,* p. 100. We had there to consider the full scope of the constitutional power of Congress under the Commerce Clause in relation to the subject matter of the Fair Labor Standards Act. This case presents the narrow question of what Congress did, not what it could do. And we merely hold that to read "unfair methods of competition in [interstate] commerce" as though it meant "unfair methods of competition in any way affecting interstate commerce," requires, in view of all the relevant considerations, much clearer manifestation of intention than Congress has furnished.

Affirmed.

MR. JUSTICE DOUGLAS, dissenting.

In my opinion the judgment should be reversed.

The Commission found that respondent's "use of chance assortments in the sale and distribution of its candies in Illinois has a direct and powerful burdensome effect upon interstate commerce in candies from other states to the State of Illinois, and gives respondent an undue and unreasonable preference over competitors located in other states." The validity of that finding and of the Commission's conclusion that respondent's practices constitute unfair methods of competition are not in issue. The only question presented by this petition for certiorari is whether respondent's practices constitute unfair methods of competition "in commerce" within the meaning of § 5 (a) of the Federal Trade Commission Act.

I think they do.

Unfair competition involves not only an offender but also a victim. Here some of the victims of the unfair methods of competition are engaged in interstate commerce. The fact that the acts of the offender are intrastate is immaterial. The purpose of the Act is to protect interstate commerce against specified types of injury. So far as the jurisdiction of the Commission is concerned, it is the existence of that injury to interstate commerce not the interstate or intrastate character of the conduct causing the injury which is important. An unfair method of competition is "in" interstate commerce not only when it has an interstate origin but also when it has a direct interstate impact. Respondent is "using" unfair methods of competition "in" interstate commerce when the direct effect of its conduct is to burden, stifle, or impair that commerce.

Under the Sherman Act (26 Stat. 209) a contract or conspiracy may be "in restraint of trade or commerce among the several States" even though the acts or conduct are intrastate. *Swift & Co.* v. *United States,* 196 U. S. 375, 397; *United States* v. *Patten,* 226 U. S. 525, 541–543; *Standard Oil Co.* v. *United States,* 283 U. S. 163, 168–169. Sec. 5 of the Federal Trade Commission Act is "supplementary" to the Sherman Act. *Federal Trade Comm'n* v. *Raladam Co.,* 283 U. S. 643, 647. Like the Sherman Act it seeks "to protect the public from abuses arising in the course of competitive interstate and foreign trade. . . . The paramount aim of the act is the protection of the public from the evils likely to result from the destruction of competition or the restriction of it in a substantial degree." *Federal Trade Comm'n* v. *Raladam Co., supra,* pp. 647–648. And as this Court said in *Federal Trade Comm'n* v. *Beech-Nut Packing Co.,* 257 U. S. 441, 453, the declaration of public policy contained in the Sherman Act is "to be considered in determining what are unfair methods of competition, which

the Federal Trade Commission is empowered to condemn and suppress." For the Federal Trade Commission Act "undoubtedly was aimed at all the familiar methods of law violation which prosecutions under the Sherman Act had disclosed." *Federal Trade Comm'n* v. *Keppel & Bro.*, 291 U. S. 304, 310.

That history, of course, does not give us license to disregard plain and unambiguous limitations on the power of the Commission. But it does admonish us to construe one of a series of legislative acts dealing with a common or related problem in light of the integrated statutory scheme. See *United States* v. *Hutcheson, ante,* p. 219. It warns us not to whittle away administrative power by resolving an ambiguity against the existence of that power where the full arsenal of that power is necessary to cope with the evil at hand. The evil here is direct, injurious discrimination against interstate commerce. The Commission has issued orders against some 120 of respondent's competitors prohibiting them from selling chance assortments of candy in interstate commerce. Under this decision respondent may continue to use this same unfair method of competition to increase its business at the expense of those who sell in interstate commerce and who are not free to employ the same methods in self-defense. I think the Act, an exercise by Congress of its commerce power, should be interpreted to protect interstate commerce not to permit discrimination against it.

Such an approach was used in the *Shreveport* case (234 U. S. 342) to give the Interstate Commerce Commission control over intrastate rates which injuriously affected, through an unreasonable discrimination, traffic that was interstate. That result was reached though the Act expressly denied the Commission any jurisdiction where the "transportation" was "wholly within one State." This Court said (234 U. S. at p. 358) that those

words had "appropriate reference to exclusively intrastate traffic, separately considered; to the regulation of domestic commerce, as such. The powers conferred by the act are not thereby limited where interstate commerce itself is involved." The interrelation between the intrastate and interstate activities in the instant case is hardly less intimate than in the *Shreveport* case. The fact that the nexus here is economic and not physical is inconsequential. In this case as in the other the problem is the existence of administrative authority to provide effective protection of interstate commerce against discrimination. In the *Shreveport* case statutory doubts were resolved so as to strengthen the administrative process even against the claim that thereby the state authorities would be "shorn of those powers which alone can justify their existence." Similar arguments should not deter us from being tolerant of an asserted power, admittedly constitutional, to deal effectively with the realities of economic interdependence.

The fact that a clarifying amendment to the Act was sought which would have removed the doubts as to the meaning of "in commerce" is not material except to the extent that it shows that doubts existed. It does not aid in resolving those doubts. To be sure, recent statutes dealing with other fields have removed such doubts by explicit provisions. But they are of little aid in interpreting an earlier act in its own legislative setting. See *United States* v. *Stewart,* 311 U. S. 60, 69. And as to the charge that for a quarter of a century the Commission made no claim to such a power, two answers may be made. In the first place, as early as 1921, the Commission urged that the doctrine of the *Shreveport* case permitted an interpretation of the Act which would give it control over certain intrastate activities. *Canfield Oil Co.* v. *Federal Trade Comm'n,* 274 F. 571; Hankin, Jurisdiction of the Federal Trade Commission, 12 Calif.

L. Rev. 179, 197, *et seq.* Although the question does not appear to have been definitely settled, in 1926 the Commission received some support for its view. See *Chamber of Commerce* v. *Federal Trade Comm'n,* 13 F. 2d 673, 684. Cf. *American Can Co.* v. *Ladoga Canning Co.,* 44 F. 2d 763, 770–771. But in 1939 that power was denied. *California Rice Industry* v. *Federal Trade Comm'n,* 102 F. 2d 716, 723. Nonuse of the asserted power clearly cannot be inferred from that record. In the second place, it would not be relevant if this power did lay dormant for years. Mere nonuse does not subtract from power which has been granted. The host of practical reasons which may defer exhaustion of administrative powers lies in the realm of policy. From that delay we can hardly infer that the need did not or does not exist.

MR. JUSTICE BLACK and MR. JUSTICE REED join in this dissent.

NELSON, CHAIRMAN OF THE STATE TAX COMMISSION, ET AL. *v.* SEARS, ROEBUCK & CO.

CERTIORARI TO THE SUPREME COURT OF IOWA.

No. 255. Argued January 13, 14, 1941.—Decided February 17, 1941.

The Iowa Use Tax Act, complementing a sales tax, requires every retailer maintaining a place of business within the State, at the time of making sales of tangible personal property for use within the State, to collect from the purchaser the tax imposed. The amount required to be collected is made a "debt" of the retailer to the State. Failure to collect the tax subjects a foreign corporation to revocation of its permit to do business within the State. *Held* that a foreign corporation which maintained retail stores in Iowa may constitutionally be required to collect the tax in respect of mail orders, sent by Iowa purchasers to out-of-state branches of the corporation and filled by direct shipment by mail or common carrier from those branches to the purchasers,

even though such orders were not solicited or placed by any of the corporation's agents in Iowa. Pp. 361, 364.

1. The collection of the tax in such case is a burden which the State may impose on the corporation as a price for enjoying the full benefits of its Iowa business. P. 364.

2. Since the use tax and the sales tax are complementary, and sales made wholly within the State bear the same burden as the mail order sales, there is no discrimination against interstate commerce. P. 364.

3. That the corporation is in competition with out-of-state mail order houses which, because they are not authorized to do business in Iowa, need not and do not collect the tax on their sales to Iowa purchasers, does not invalidate the operation of the Act as to it. P. 365.

4. Nor is the Act invalid because of the cost or inconvenience to the corporation of collecting the tax, nor because of losses it may sustain in making deliveries before collecting the tax. P. 365.

228 Iowa 1273; 292 N. W. 130, reversed.

CERTIORARI, 311 U. S. 630, to review the affirmance by the state supreme court of a decree enjoining the enforcement against respondent of provisions of the Iowa Use Tax Act as applied to mail order sales.

Mr. John E. Mulroney, Assistant Attorney General of Iowa, with whom *Mr. John M. Rankin,* Attorney General, was on the brief, for petitioners.

Mr. Joseph G. Gamble, with whom *Messrs. Charles Lederer, Ralph L. Read,* and *Bert L. Klooster* were on the brief, for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case involves the constitutionality of the Iowa Use Tax (Ia. Code 1939, §§ 6943.102–6943.125) as applied to respondent's mail order business conducted directly between customers in Iowa and respondent's mail order houses located outside Iowa. The Supreme Court of Iowa, in a five to four decision, held for respondent

on that issue. 228 Ia. 1273; 292 N. W. 130. We granted certiorari because of the importance of the constitutional question presented. Jud. Code § 237 (b); 28 U. S. C. § 344 (b).

The Iowa Use Tax is complementary to the Iowa Retail Sales Tax. Ia. Code 1939, §§ 6943.074, *et seq.* It is a tax on the use in Iowa of tangible personal property at the rate of two per cent of the purchase price.[1] "Use," so far as material here, is defined as "the exercise by any person of any right or power over tangible personal property incident to the ownership of that property." § 6943.102. While the tax is imposed on "every person using such property within this state until such tax has been paid" (§ 6943.103), it is further provided (§ 6943.109) that every "retailer maintaining a place of business in this state and making sales of tangible personal property for use in this state . . . shall at the time of making such sales, whether within or without the state, collect the tax imposed by this act from the purchaser . . ." By § 6943.112 the tax constitutes a "debt owed by the retailer" to the state.[2] And if the retailer

[1] The Use Tax Act provides in § 6943.103,

"An excise tax is hereby imposed on the use in this state of tangible personal property purchased on or after the effective date of this act (April 16, 1937) for use in this state, at the rate of two per cent of the purchase price of such property. Said tax is hereby imposed upon every person using such property within this state until such tax has been paid directly to the county treasurer, to a retailer, or to the commission as hereinafter provided."

The sales tax is a two per cent tax on gross receipts from sales of tangible personal property sold at retail in the state to consumers or users. § 6943.075. So far as material here, the Use Tax need not be paid on property where a tax is required to be paid under the Sales Tax Act. § 6943.104.

[2] The retailer must also make quarterly returns. § 6943.113. Penalties are imposed for delay in filing returns (§ 6943.118), for failure to do so or for failure to furnish data required by the commission. § 6943.120.

fails to collect the tax, etc., his retailer's permit (§ 6943.084) may be revoked; and in case of a foreign corporation, its permit to do business in the state as well. § 6943.122.

Respondent is a New York corporation authorized since 1928 to do business in Iowa. It has various retail stores there. It pays the tax on sales made at those stores. It also pays the tax on orders placed at those stores, though shipment is made direct to the purchaser from one of respondent's out of state branches. But it has refused to collect the tax on mail orders sent by Iowa purchasers to its out of state branches and filled by direct shipments through the mails or a common carrier from those branches to the purchasers.[3] On threat of petitioners to revoke respondent's permit because of such refusal, respondent brought this suit for an injunction, alleging, *inter alia,* that the Act as applied violates § 8 of Article I of the Constitution and the Fourteenth Amendment.

The Iowa Supreme Court held that if respondent had limited its activities to a mail order business of the kind here involved, it would not be doing business in Iowa;

[3] In 1937 respondent mailed to residents of Iowa about 600,000 small catalogues and 427,000 large ones. Respondent maintains 12 retail stores in Iowa, its investment therein exceeding $500,000. The aggregate sales of the retail stores in Iowa for 1936 amounted to $5,080,000; for 1937, $5,600,000. Its mail order sales in Iowa for 1936 aggregated about $5,900,000; for 1937, about $5,400,000. It estimates that it has some 300,000 Iowa customers of its mail order houses and that in 1937 there were about 1,200,000 orders received from Iowa customers.

One of respondent's witnesses testified that the catalogues and bulletins mailed out were "our sole means of securing" the mail order business. But he also testified, "If a customer inquired from a clerk in the store as to whether or not he would have to pay a use tax upon an order, I believe the clerk would inform him that if he himself mailed the order that there would be no sales tax or use tax charged."

that, although technically the tax may be on the purchaser, it must be collected when the sale is made, at which time the property is outside the state; that these sales are separate and distinct from respondent's activities in Iowa. It therefore concluded that the tax as applied was unconstitutional since Iowa has no power to regulate respondent's activities outside the state or to regulate such activities as a condition to respondent's right to continue to do business in the state.

In passing on the constitutionality of a tax law "we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." *Lawrence* v. *State Tax Comm'n,* 286 U. S. 276, 280; *Southern Pacific Co.* v. *Gallagher,* 306 U. S. 167, 177; *Wisconsin* v. *J. C. Penney Co.,* 311 U. S. 435. The fact that under Iowa law the sale is made outside of the state does not mean that the power of Iowa "has nothing on which to operate." *Wisconsin* v. *J. C. Penney Co., supra.* The purchaser is in Iowa and the tax is upon use in Iowa. The validity of such a tax, so far as the purchaser is concerned, "has been withdrawn from the arena of debate." *Henneford* v. *Silas Mason Co.,* 300 U. S. 577, 583; *Southern Pacific Co.* v. *Gallagher, supra.* It is one of the well-known functions of the integrated use and sales tax to remove the buyers' temptation "to place their orders in other states in the effort to escape payment of the tax on local sales." *Henneford* v. *Silas Mason Co., supra,* p. 581. As pointed out in that case (p. 582), the fact that the buyer employs agencies of interstate commerce in order to effectuate his purchase is not material, since the tax is "upon the privilege of use after commerce is at an end." And see *Southern Pacific Co.* v. *Gallagher, supra.* Use in Iowa is what is taxed regardless of the time and place of passing title and regardless of the time the tax is required to be paid. Cf. *McGoldrick* v. *Berwind-White Coal Mining Co.,* 309 U. S. 33, 49.

So the nub of the present controversy centers on the use of respondent as the collection agent for Iowa. The imposition of such a duty, however, was held not to be an unconstitutional burden on a foreign corporation in *Monamotor Oil Co.* v. *Johnson,* 292 U. S. 86, and *Felt & Tarrant Mfg. Co.* v. *Gallagher,* 306 U. S. 62. But respondent insists that those cases involved local activity by the foreign corporation as a result of which property was sold to its local customers, while in the instant case there is no local activity by respondent which generates or which relates to the mail orders here involved. Yet these orders are still a part of respondent's Iowa business. The fact that respondent could not be reached for the tax if it were not qualified to do business in Iowa would merely be a result of the "impotence of state power." *Wisconsin* v. *J. C. Penney Co., supra.* Since Iowa has extended to it that privilege, Iowa can exact this burden as a price of enjoying the full benefits flowing from its Iowa business. Cf. *Wisconsin* v. *J. C. Penney Co., supra.* Respondent cannot avoid that burden though its business is departmentalized. Whatever may be the inspiration for these mail orders, however they may be filled, Iowa may rightly assume that they are not unrelated to respondent's course of business in Iowa. They are nonetheless a part of that business though none of respondent's agents in Iowa actually solicited or placed them. Hence to include them in the global amount of benefits which respondent is receiving from Iowa business is to conform to business facts.

Nor is the mode of enforcing the tax on the privileges of these Iowa transactions any discrimination against interstate commerce. As we have seen, the use tax and the sales tax are complementary. Sales made wholly within Iowa carry the same burden as these mail order sales. A tax or other burden obviously does not discriminate against interstate commerce where "equality

is its theme." *Henneford* v. *Silas Mason Co., supra,* pp. 583–586; *McGoldrick* v. *Berwind-White Coal Mining Co., supra,* pp. 48–49.

Respondent, however, insists that the duty of tax collection placed on it constitutes a regulation of and substantial burden upon interstate commerce and results in an impairment of the free flow of such commerce. It points to the fact that in its mail order business it is in competition with out of state mail order houses which need not and do not collect the tax on their Iowa sales. But those other concerns are not doing business in the state as foreign corporations. Hence, unlike respondent, they are not receiving benefits from Iowa for which it has the power to exact a price. Respondent further stresses the cost to it of making these collections and its probable loss as a result of its inability to collect the tax on all sales.[4] But cost and inconvenience inhered in the same duty imposed on the foreign corporations in the *Monamotor* and *Felt & Tarrant* cases. And so far

[4] In Illinois respondent undertakes to collect the sales tax on mail orders from its Illinois customers. A notice and schedule of the tax for various amounts of orders are contained in the Illinois catalogue. It asserts that approximately 65% of those orders include an allowance for the tax. Where the orders are not accompanied by an amount covering the Illinois sales tax, respondent does not hold up the order but fills it and sends the customer a bill for the difference. It says that it collects approximately 36% of those deficiencies where the amount is less than 25¢; 70% to 75%, where the amount is more. On the assumption that on sales to Iowa purchasers the use tax would amount to $100,000 a year, respondent asserts that, based on its Illinois experience, the maximum that would be collected would be $68,000. To do that, it says, would entail a direct cost to it of approximately $13,700 a year. Those calculations are on the assumption that respondent would put a notice in its Iowa catalogues similar to the one used in Illinois. If such a notice were not given, it asserts that collections of the Iowa use tax would not exceed $35,000 (out of an assumed $100,000) and that its cost would be approximately $18,000.

as assumed losses on tax collections are concerned, respondent is in no position to found a constitutional right on the practical opportunities for tax avoidance which its method of doing business affords Iowa residents, or to claim a constitutional immunity because it may elect to deliver the goods before the tax is paid.

Prohibited discriminatory burdens on interstate commerce are not to be determined by abstractions. Particular facts of specific cases determine whether a given tax prohibitively discriminates against interstate commerce. Hence a review of prior adjudications based on widely disparate facts, howsoever embedded in general propositions, does not facilitate an answer to the present problem.

The judgment is reversed and the cause is remanded to the Iowa Supreme Court for proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE STONE took no part in the consideration or disposition of this case.

MR. JUSTICE ROBERTS, dissenting.

I think that the judgment should be affirmed.

The respondent, a New York corporation, conducts an interstate mail order business. It has also established retail stores throughout the country. In 1928, to secure the privilege of conducting stores in Iowa as a foreign corporation, it obtained a permit which has been kept in force by payment of the fees prescribed by the State. No question arises with respect to the collection by the respondent of the tax on sales made in stores in Iowa or on sales based upon orders taken in those stores but filled by forwarding articles from a warehouse in another state.

The controversy arises only over pure mail order sales. These are consummated in the following manner: The respondent forwards to persons in Iowa catalogues de-

tailing the articles it has for sale, the prices, and the cost of transporting them. A person in Iowa forwards his written order to one of the respondent's mail order houses located outside Iowa for the purchase of tangible personal property as listed and priced in respondent's catalogue, the order being accompanied by a remittance of the purchase price, plus transportation charges, and usually specifying the method of transportation desired by the purchaser. The order is accepted or rejected at the place where it is received and, if accepted, is filled by delivery to the post office or to a carrier for direct shipment from the extra-state mail order house to the purchaser in Iowa.

This mail order branch of respondent's business is separate and distinct from any activity conducted at its stores in Iowa. In conducting it the respondent is in direct competition with other mail order houses which conduct their business in exactly similar fashion but have no stores in Iowa and are not therein registered as foreign corporations.

The method necessarily pursued in the respondent's mail order business makes it a certainty that it will be unable, by whatever practical efforts it may put forth, to collect the amount of the use tax on all its mail order sales made to persons in Iowa. In 1937 the number of its mail order transactions with some 300,000 persons in Iowa was approximately 1,200,000. Under the statute as attempted to be enforced against its mail order business, if, in 1937, the respondent had failed to collect from each customer the sum involved as tax, it would have been liable to Iowa in the aggregate for two per cent. on approximately $5,400,000,—the volume of its Iowa mail order business in that year. If it had made the effort to collect the tax, the cost of so doing would have been approximately eighteen per cent. of the total tax on the mail order sales made to persons in Iowa and, in addition to that cost, the respondent would have been liable

for approximately $38,000 of tax uncollected from purchasers. In addition, as a result of the exaction, the respondent's mail order business will be placed at a serious disadvantage in competition with other mail order concerns which have no retail stores in Iowa and so have a price advantage of two per cent. of sales price as against respondent.

The penalty for failing to collect the tax as agent for the State, or to pay the sum not susceptible of collection from purchasers, as required by the State, will be the revocation of respondent's permit for the conduct of its stores in Iowa, which represent a large expenditure for furniture, fixtures, appliances, and stock, and will entail loss of rental values under long term leases.

I am of opinion that the attempted enforcement of the statute in the manner proposed by the taxing authorities of the State violates both the commerce clause and the Fourteenth Amendment of the Constitution.

First. The respondent's mail order business is interstate commerce,[1] and Iowa may not prohibit the respondent from conducting that business with her citizens.[2] To attempt so to do would be a violation of the commerce clause of the Constitution.

Not only so, but Iowa may not directly burden such commerce. Therefore she may not tax the privilege of engaging in it; regulate or license its pursuit,[3] or tax the

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[1] *Heyman* v. *Hayes*, 236 U. S. 178, 186.

[2] *Bowman* v. *Chicago & N. W. Ry. Co.*, 125 U. S. 465; *Leisy* v. *Hardin*, 135 U. S. 100; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1; *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229, 250, 262; *Louisville & Nashville R. Co.* v. *Cook Brewing Co.*, 223 U. S. 70, 82; *Minnesota Rate Cases*, 230 U. S. 352, 401.

[3] *International Text Book Co.* v. *Pigg*, 217 U. S. 91, 105, 108; *Buck Stove Co.* v. *Vickers*, 226 U. S. 205, 215; *Sault Ste. Marie* v. *International Transit Co.*, 234 U. S. 333, 340; *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50; *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90, 94.

gross income derived from it.[4] And even if the respondent maintained a force of agents in Iowa soliciting orders to be shipped in interstate commerce that fact would not render it amenable to the regulation or taxation of its mail order business.[5]

Thus Iowa may not lawfully license or regulate the business of agents soliciting orders to be shipped in interstate commerce;[6] or limit or condition the right to enforce mail order contracts in Iowa courts.[7] The power to exclude foreign corporations altogether from doing a local business does not enable the State to impose burdens upon the transaction of interstate commerce by a foreign corporation registered in the State; and registration by a foreign corporation in order to do business within the State does not constitute a waiver of the corporation's right to transact interstate business free from the burdens of state regulation or taxation.[8]

Iowa may not abuse its conceded power to tax or regulate the respondent's activities within the State by attempting to compel compliance by the respondent with unconstitutional efforts to tax or burden its interstate commerce.[9] And Iowa may not forfeit, as it proposes to do, the right to conduct a domestic business by reason of the refusal of the respondent to submit to a burden upon its interstate business.[10]

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[4] *Fisher's Blend Station* v. *Tax Commission,* 297 U. S. 650, 655; *Adams Manufacturing Co.* v. *Storen,* 304 U. S. 307.

[5] *Crutcher* v. *Kentucky,* 141 U. S. 47; *International Text Book Co.* v. *Pigg, supra.*

[6] *Brennan* v. *Titusville,* 153 U. S. 289; *Crenshaw* v. *Arkansas,* 227 U. S. 389.

[7] *Sioux Remedy Co.* v. *Cope,* 235 U. S. 197, 201; *Furst & Thomas* v. *Brewster,* 282 U. S. 493.

[8] *Fidelity & Deposit Co.* v. *Tafoya,* 270 U. S. 426, 434; *Hanover Fire Ins. Co.* v. *Harding,* 272 U. S. 494, 507, 517.

[9] *Looney* v. *Crane Co.,* 245 U. S. 178, 187.

[10] *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1, 34; *Pullman Co.* v. *Kansas,* 216 U. S. 56; *Atchison, T. & S. F. Ry. Co.* v.

Clearly in this instance the effort is directly and substantially to burden the transaction of an interstate business with the state's citizens, in violation of the commerce clause, by the threat of penalizing disobedience by the forfeiture of the right to transact, within Iowa, an independent business which the respondent conducts in accordance with all existing laws, including the law requiring it to deduct and pay over the amount of the Iowa sales tax. Upon reason, as well as upon the unbroken current of authority in this court, Iowa has no such power to burden interstate commerce.

Monamotor Oil Co. v. *Johnson,* 292 U. S. 86, and *Felt & Tarrant Mfg. Co.* v. *Gallagher,* 306 U. S. 62, relied upon by the petitioners, are not in point.

The first is not apposite because there the company was engaged in the distribution of gasoline in the State of Iowa. This was the only activity drawn in question. The statute merely required the company, in distributing gasoline to users, to add the tax to its sales price and report and return the amount of tax thus withheld. In the second, the collection of the use tax was imposed with respect to property sold by the corporation through its general agents who were doing business in the State of California and were handling articles sold for delivery in that State. As an incident of such sales, the seller was required to add the tax and make return of it to the State.[11]

In justification of the exaction it is said that the purchaser is in Iowa and the tax is on the purchaser's use in that State. But if these facts were determinative they would justify the imposition of a tax or burden, by the

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O'Connor, 223 U. S. 280, 285; *Western Union Tel. Co.* v. *Foster,* 247 U. S. 105, 114; *Frost Trucking Co.* v. *Railroad Commission,* 271 U. S. 583, 593.

[11] Compare *Wiloil Corporation* v. *Pennsylvania,* 294 U. S. 169; *Graybar Electric Co.* v. *Curry,* 308 U. S. 513.

state of the purchaser's residence, on every transaction in which goods are sold in interstate commerce. Attention is also called to the fact that Iowa cannot effectively reach its own citizens in order to enforce the use tax on them. This cannot, however, justify the state's attempt to save itself trouble by placing an unconstitutional burden upon interstate commerce conducted by a citizen of another state. Reference is made to the circumstance that, as a similar tax is laid on local sales in Iowa, there is no discrimination in imposing the tax or its collection upon the respondent, but the argument will not serve to legalize the tax. A state cannot justify a burden on interstate commerce by laying a similar burden on local commerce.[12]

Second. So far as the Fourteenth Amendment is concerned, Iowa may lay a tax on any activity of the respondent which it pursues within the State, but plainly, upon the facts disclosed, there is, in the conduct of respondent's mail order business, no such local activity. The Supreme Court of the State correctly found:

"The sales are consummated outside the State of Iowa in each instance. They are separate and distinct from plaintiff's activities in Iowa. The statute here challenged seeks to impose upon plaintiff the obligation that it 'shall at the time of making such sales, whether within or without the state, collect the tax imposed by this chapter from the purchaser.' The sales are made outside of Iowa and the statute requires plaintiff to collect the tax at the time the sales are made. It clearly seeks to regulate activities of plaintiff outside the state. . . . Under repeated pronouncements of the Supreme Court of the United States, hereinbefore reviewed and quoted from, the State of Iowa has no such right."

[12] *Western Union Telegraph Co.* v. *Kansas, supra; Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292.

Delivery to a designated carrier is delivery to the customer [13] and, in this case, is completed outside Iowa. The attempt, therefore, to impose a burden upon such delivery or to regulate the transaction is but an effort on the part of Iowa to regulate or tax an event which occurs outside her borders and over which she has no jurisdiction.[14] This court has recently enforced this principle in a case on its merits more favorable to the State's contention than the present.[15] There it was said:

"It follows that such a tax, otherwise unconstitutional, is not converted into a valid exaction merely because the corporation enjoys outside the state economic benefits from transactions within it, which the state might but does not tax, or because the state might tax the transactions which the corporation carries on outside the state if it were induced to carry them on within."

McGoldrick v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, is distinguishable from the instant case for there the decision was grounded on the fact that the transfer of title and consummation of sale depended upon delivery by the seller in the taxing state.

In this aspect also the power of the State does not extend to measures which condition respondent's privilege to do business in another state free from the regulation or taxation of Iowa.[16]

The CHIEF JUSTICE joins in this opinion.

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[13] *United States* v. *R. P. Andrews & Co.*, 207 U. S. 229; compare *Garretson* v. *Selby*, 37 Iowa 529.

[14] *St. Louis Cotton Compress Co.* v. *Arkansas*, 260 U. S. 346.

[15] *Connecticut General Life Ins. Co.* v. *Johnson*, 303 U. S. 77.

[16] *New York Life Ins. Co.* v. *Dodge*, 246 U. S. 357, 375; *Home Insurance Co.* v. *Dick*, 281 U. S. 397, 407; *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 139.

NELSON, CHAIRMAN OF THE STATE TAX COMMISSION, ET AL. *v.* MONTGOMERY WARD & CO., INC.

CERTIORARI TO THE SUPREME COURT OF IOWA.

No. 256. Argued January 13, 14, 1941.—Decided February 17, 1941.

1. A foreign corporation which maintained retail stores in Iowa, and also solicited mail orders in that State by local advertising, may constitutionally be required to collect the tax imposed by the Iowa Use Tax Act, in respect of mail orders sent by Iowa purchasers to out-of-state branches of the corporation and filled by direct shipment by mail or common carrier from such branches to the purchasers. *Nelson* v. *Sears, Roebuck & Co., ante,* p. 359. P. 375.
2. The effect of admitted facts is a question of law. P. 376.

228 Iowa 1301; 292 N. W. 142, reversed.

CERTIORARI, 311 U. S. 630, to review the affirmance by the state supreme court of a decree enjoining the enforcement against respondent of provisions of the Iowa Use Tax Act as applied to mail order sales.

Mr. John E. Mulroney, Assistant Attorney General of Iowa, with whom *Mr. John M. Rankin,* Attorney General, was on the brief, for petitioners.

Mr. Stuart S. Ball, with whom *Messrs. John A. Barr, Maxwell A. O'Brien,* and *Harold W. Bancroft* were on the brief, for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The issue in this case is identical with that in *Nelson* v. *Sears, Roebuck & Co., ante,* p. 359. Respondent is an Illinois corporation authorized to do business in Iowa.

Respondent operates retail stores and mail order houses throughout the United States. It has 29 retail stores [1] and several order offices in Iowa. It collects the Iowa tax on sales made at the retail stores and on sales handled by those order offices. But it has refused to collect the tax [2] on orders sent directly from Iowa customers to its out of state mail order houses and filled by direct shipments through the mails or a common carrier to the purchasers in Iowa. Respondent, in seeking an affirmance of the judgment of the Iowa Supreme Court [3] (228 Ia. 1301; 292 N. W. 142) which held that the Iowa Use

[1] The investment in these stores is over $900,000. The approximate sales by these stores in 1937 was $7,716,000.

[2] In the catalogues sent into Iowa there was the following notice:

"To our Iowa Customers:

We believe that certain of the provisions of the Iowa Use Tax law as applied to our business, are unconstitutional. Therefore we are not collecting or reporting the Use Tax on mail orders sent by Iowa customers direct to any of our mail order houses.

Until you hear from us to the contrary, mail in your orders just as you have in the past.

MONTGOMERY WARD & Co."

It was testified that the purpose of this notice was not to intimate to Iowa purchasers that by mailing their orders to mail order houses outside the state they could secure a two per cent differential over purchases made in the state.

[3] One question, not raised by the petition for certiorari, related to the duty of respondent to collect the use tax on sales made in retail stores located near, but outside, the boundaries of Iowa, where the purchaser was a resident of Iowa and purchased the property for use in Iowa. The Supreme Court of Iowa, one judge dissenting, held that the Use Tax Act as applied to these transactions was unconstitutional. Chief Justice Hamilton, who dissented from the judgment as respects the mail orders, concurred insofar as sales from the out of state retail stores were concerned, saying that respondent "has no feasible way of knowing or ascertaining where the customer lives or where he is going to make use of the merchandise purchased" and that to impose the burden of tax collection on it would be to give it "an almost impossible task."

Tax as applied to these mail orders is unconstitutional,[4] makes substantially the same arguments[5] as were advanced in *Nelson* v. *Sears, Roebuck & Co., supra.* Distribution of catalogues in Iowa apparently involves no act of respondent or its agents within the state. There was testimony that no employee of the mail order houses lives in Iowa; that there are no acts of respondent in Iowa in regard to any of the orders sent to the out of state mail order houses; and that respondent has no machinery for collecting sums due from Iowa customers by individuals within the state, it not being the practice of respondent to refer its delinquent mail order accounts to its retail stores in Iowa for collection. Those facts are immaterial. Some of respondent's employees are in Iowa representing it in the course of business which it is conducting pursuant to its permit to do business in that state. The fact that other of its employees who work in the mail order houses and handle the mail orders here involved are not in Iowa is wholly irrelevant. It does not permit respondent to escape the burden which Iowa has exacted as a price of enjoying the full benefits flowing from its aggregate Iowa business. *Nelson* v. *Sears, Roebuck & Co., supra.*

[4] Respondent's bill also contained allegations that the Use Tax as applied contravened certain provisions of the Iowa constitution. Those issues, however, were not passed on by the Iowa Supreme Court.

[5] Its experience with the Illinois sales tax shows that only 75% of the Illinois customers remit the tax with their orders. Due bills are sent (except for deficiencies less than two cents) and 58% are not collected. Based on this experience respondent estimates that out of $10,000 of use taxes on mail orders from Iowa customers, it would be able to collect $8,550. If no notices were included in the catalogues sent into Iowa, then based on its Illinois experience respondent estimates that only 42% of the due bills would be collected. In addition to these deficits respondent asserts that it would incur a direct cost ranging from $890 to $1,040 for every $10,000 of tax liability.

There is a further fact in this record which makes a reversal of this judgment necessary. It was stipulated that "advertisements have been caused to be printed by the retail stores of the petitioner (Montgomery Ward and Co.) in the State of Iowa, advertising not only retail merchandise, but the ability to complete service through the use of the catalog." This stipulation clearly means that respondent has solicited mail order sales in Iowa. The fact that that solicitation was done through local advertisements rather than directly by local agents as in *Felt & Tarrant Mfg. Co.* v. *Gallagher,* 306 U. S. 62, is immaterial. Nor is it material that the orders were filled by direct shipments from points outside the state to purchasers within the state. For that method of delivery also obtained in case of some of the orders involved in *Felt & Tarrant Mfg. Co.* v. *Gallagher, supra.*

The effect of admitted facts is a question of law. *Swift & Co* v. *Hocking Valley Ry. Co.,* 243 U. S. 281; *Estate of Sanford* v. *Commissioner,* 308 U. S. 39, 51.

Reversed.

MR. JUSTICE STONE took no part in the consideration or disposition of this case.

The CHIEF JUSTICE and MR. JUSTICE ROBERTS dissent for the reasons stated in the dissenting opinion in *Nelson* v. *Sears, Roebuck & Co., ante,* p. 366.

Syllabus.

KELLEAM ET AL. *v.* MARYLAND CASUALTY CO. OF BALTIMORE, MD., ET AL.

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

No. 349. Argued February 5, 1941.—Decided February 17, 1941.

1. A federal court of equity should not grant a receivership except as ancillary to some primary relief which is sought and which equity may appropriately grant. P. 380.
2. The reasons for such restraint are reinforced where the rights to the property sought to be conserved by a receivership are being litigated in a state court. P. 381.
3. A remedial right to proceed in a federal court sitting in equity can not be enlarged by a state statute. P. 382.
4. After an estate had been distributed to heirs and the administrator and his surety discharged by a decree of a state probate court, and while an appeal by other heirs from a refusal of that court to set aside the decree for fraud was pending before another state court, the surety company entered a federal court on the ground of diversity of citizenship and sought protection against its contingent liability by a bill which impleaded all of the heirs, alleging that the probate decree was fraudulent and praying that the defendants be required to set up their claims and that a receiver be appointed to preserve the property pending the outcome of their dispute. For ought that appeared, the surety could have obtained protection in the cause pending in the state court. *Held:*

   (1) That appointment by the federal court of a receiver was an abuse of discretion. P. 382.

   (2) Since the bill should have been dismissed as to the surety, it having no present claim to relief on its own behalf in the federal court, that court had no jurisdiction to adjudicate the claims of the heirs, there not being diversity of citizenship between them. P. 382.

   (3) If the bill were to be construed as presenting a controversy between heirs which the federal court might otherwise have jurisdiction to adjudicate, that court could not properly proceed because the very controversy was before a state court in an action

not simply *in personam* but involving adjudication of rights to specific property. P. 382.
112 F. 2d 940, reversed.

CERTIORARI, 311 U. S. 627, to review the affirmance of a decree appointing a receiver, providing for exoneration of the administrator's surety, adjudicating the rights of heirs in a decedent's estate, establishing a lien, ordering an accounting, etc.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This controversy has its origin in a probate proceeding in an Oklahoma court. Petitioner, E. A. Kelleam, was administrator in that proceeding. Respondent, Maryland Casualty Company, was surety on his bond. The probate court held that all of decedent's property was a maternal ancestral estate to which the full-blood heirs, E. A. Kelleam and Nell Southard, were entitled to the exclusion of the half-blood heirs, the individual respondents here. Such distribution was ordered and the administrator and Maryland Casualty Company were discharged from further liability. No appeal was taken; but shortly thereafter the half-blood heirs brought an action in the Oklahoma court to set aside that decree, alleging that petitioners E. A. Kelleam and Nell Southard had perpetrated a fraud upon the probate court and that the half-bloods were entitled to participation, the estate being a general not an ancestral estate. A demurrer to the complaint was sustained and an appeal was taken to the Oklahoma District Court where it is now pending. After that suit had been commenced [1] respondent-surety, learning that E. A. Kelleam and Nell Southard had transferred some of the property received from the estate,[2]

[1] Respondent-surety apparently was served with notice of that suit and appeared therein for the purpose of quashing the notice.

[2] According to the findings below, transfers were made to petitioners Joe E. Kelleam and Joe R. Southard, Jr.

brought this suit in the United States District Court, joining the full-bloods and the half-bloods as defendants and invoking federal jurisdiction on the basis of diversity of citizenship. In this suit in equity [3] respondent-surety sought exoneration on its bond, alleged that its remedy at law was inadequate, and prayed that a receiver be appointed to preserve the decedent's property pending the outcome of the dispute between the heirs, and that the parties be required to set up whatever claims they might have to the property. By their answer and cross-petition, the half-bloods renewed their claims of fraud in the probate decree and joined in the prayer for the appointment of a receiver. The answers of petitioners alleged, *inter alia,* lack of jurisdiction in the federal court by reason of the action in the state court; and they moved to strike the cross-petition for lack of jurisdiction. By an amendment to its bill respondent-surety added allegations charging fraud in the probate decree. The District Court found that petitioners E. A. Kelleam and Nell Southard, knowing of the existence of the other heirs, fraudulently concealed those facts from the probate court, gave no notice to the other heirs as required by law, and represented that E. A. Kelleam was a resident of Oklahoma when he was not; that the administrator failed to appoint a service agent as required by Oklahoma statutes; that the estate was fraudulently represented as an ancestral estate and that petitioners E. A. Kelleam and Nell Southard in furtherance of the plan to defraud the half-bloods consummated a settlement with some of them in exchange for their agreement not to contest the probate decree; that that decree, having been obtained by fraud, was void as to the half-bloods; that the intermediate conveyances by petitioners E. A. Kelleam and Nell Southard were fraudulent; that the remaining assets of

[3] This was not a bill of interpleader under 49 Stat. 1096, 28 U. S. C. § 41 (26) nor a suit under the Federal Declaratory Judgment Act, 48 Stat. 955, 49 Stat. 1027; 28 U. S. C. § 400.

the estate were in danger of being dissipated; that respondent-surety would become liable to the half-bloods for failure of the administrator to perform his duties; and that the property should be preserved pending a final order of accounting. Accordingly, it appointed a receiver, decreed that respondent-surety was entitled to exoneration by having designated property applied to the satisfaction of the interests of the half-bloods, decreed that the half-bloods were owners of designated undivided interests in the estate, established a lien thereon, and ordered petitioners E. A. Kelleam and Nell Southard to account. The Circuit Court of Appeals affirmed. 112 F. 2d 940. We granted certiorari because of the challenged propriety of the action of the District Court in appointing a receiver and in adjudicating matters at issue in the state court.

We think the bill should have been dismissed.

The essential purpose of the bill was to secure the appointment of a receiver so as to conserve the property and to impress it with a lien for the surety's protection. The surety had no stake in the outcome of the dispute among the heirs beyond its contingent right to exoneration. In this posture of the case it is manifest that respondent-surety sought the receivership not as a means to an end but as an end in itself. The receivership was ancillary only in the sense that it was protective of the surety whatever the future outcome of the controversy between the heirs. The surety was not presently liable on its bond; its liability and its right to exoneration were wholly contingent, being dependent on a successful attack on the probate decree by the half-bloods. That attack was currently being made in the state court.

Accordingly, a receiver should not have been appointed. The error in the appointment was not a question of authority but of propriety. *Pennsylvania* v. *Williams,* 294 U. S. 176; *Gordon* v. *Washington,* 295 U. S. 30. As this

Court stated in the *Gordon* case (p. 37): "A receivership is only a means to reach some legitimate end sought through the exercise of the power of a court of equity. It is not an end in itself." Receiverships for conservation of property "are to be watched with jealous eyes lest their function be perverted." *Michigan* v. *Michigan Trust Co.,* 286 U. S. 334, 345. This Court has frequently admonished that a federal court of equity should not appoint a receiver where the appointment is not a remedy auxiliary to some primary relief which is sought and which equity may appropriately grant. *Booth* v. *Clark,* 17 How. 322, 331; *Pusey & Jones Co.* v. *Hanssen,* 261 U. S. 491; *Gordon* v. *Washington, supra.* And the reasons for such restraint are reinforced where the rights to the property sought to be conserved by a receivership are being litigated in a state court. Cf. *Penn General Casualty Co.* v. *Pennsylvania,* 294 U. S. 189; *Pennsylvania* v. *Williams, supra.* There was here no accrued right of the surety as respects the enforcement of which the receivership was an ancillary remedy, its right to exoneration being wholly contingent.[4] The existence of any right to exoneration was dependent on the outcome of the action which was pending in the Oklahoma court. In view of those circumstances, equity practice does not sanction the use of a conservation receivership to protect such a claim. Furthermore, from all that appears, the surety could be adequately protected in the cause pending in the Oklahoma court by provisional remedies or otherwise.

Respondent-surety contends that under Oklahoma statutes a surety may obtain indemnity against his prin-

[4] Cf. *Glades County* v. *Detroit Fidelity & Surety Co.,* 57 F. 2d 449, 452; *Morley Construction Co.* v. *Maryland Casualty Co.,* 90 F. 2d 976; *Southwestern Surety Ins. Co.* v. *Wells,* 217 F. 294; *Central Surety & Ins. Corp.* v. *Bagley,* 44 F. 2d 808; Arant, Suretyship (1931) pp. 318–321.

cipal even before the debt is due and receive the protection of various provisional remedies. Even so, a "remedial right to proceed in a federal court sitting in equity cannot be enlarged by a state statute." *Pusey & Jones Co.* v. *Hanssen, supra,* p. 497.

For these reasons, the appointment of the receiver was an abuse of discretion.

Since respondent-surety had no present claim to relief on its own behalf in the federal court, that court had no jurisdiction to adjudicate the dispute between the full-bloods and the half-bloods. Even if, on this record, the presence of respondent-surety would support a claim to diversity of citizenship, that diversity was lacking as between the other parties. Hence once the bill of complaint were dismissed, no jurisdiction would remain for any grant of relief under the cross-petition. See *Kromer* v. *Everett Imp. Co.,* 110 F. 22. And even if the bill be construed as drawing in issue the merits of the controversy between the heirs which the federal court had jurisdiction to adjudicate within the rule of *Arrowsmith* v. *Gleason,* 129 U. S. 86, and *Sutton* v. *English,* 246 U. S. 199, 205, that court could not with propriety proceed. A case involving that very controversy was pending in the Oklahoma court. That case did not involve simply an *in personam* action. Cf. *Kline* v. *Burke Construction Co.,* 260 U. S. 226. It involved an adjudication of rights to specific property distributed pursuant to a probate decree. Cf. *Penn General Casualty Co.* v. *Pennsylvania, supra,* at p. 195. The federal court therefore should not have asserted its authority. In such a case it is "in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy." *Pennsylvania* v. *Williams, supra,* p. 185.

Reversed.

JUST ET AL. v. CHAMBERS, EXECUTRIX.

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

No. 373. Argued February 5, 6, 1941.—Decided March 3, 1941.

1. The court accepts concurrent findings by two courts below on matters of fact. P. 385.
2. By the law of Florida, a cause of action for personal injury due to another's negligence survives the death of the tort-feasor. P. 385.
3. Federal statutory provision for limitation of liability embraces claims for damages against the vessel-owner for personal injuries suffered on board through his negligence. P. 385.
4. When the jurisdiction of the court of admiralty has attached through a petition for limitation, the jurisdiction to determine claims is not lost merely because the shipowner fails to establish his right to limitation. Claimants will be furnished a complete remedy by distribution of the *res* and by judgments *in personam* for deficiencies against the owner. P. 386.
5. A cause of action against the owner of the vessel for personal injuries suffered aboard on navigable waters within the boundary of a State, and which under the state law survives his death, survives also in admiralty against his estate and against the vessel. P. 391.

   With respect to maritime torts, a State may modify or supplement the maritime law by creating liability which a court of admiralty will recognize and enforce when the state action is not hostile to the characteristic features of the maritime law or inconsistent with federal legislation.

113 F. 2d 105, reversed.

CERTIORARI, 311 U. S. 634, to review a decree which in part affirmed and in part reversed an interlocutory decree of the District Court sitting in admiralty in a proceeding begun by a petition for limitation of liability. The District Court had held that certain claims for personal injuries suffered through the negligence of the vessel-owner, who afterwards had died, were enforcible against his estate as well as the vessel. The Circuit Court

of Appeals decided that the liability *in personam* did not survive the death and that recovery was therefore limited to the value of the ship.

Mr. W. O. Mehrtens, with whom *Messrs. Samuel W. Fordyce, Walter R. Mayne,* and *M. L. Mershon* were on the brief, for petitioners.

Mr. Raymond Parmer, with whom *Mr. Vernon S. Jones* was on the brief, for respondent.

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

Respondent, as executrix of the estate of Henry C. Yeiser, Jr., owner of the yacht "Friendship II," brought this proceeding in admiralty for limitation of liability. 46 U. S. C. 183. Petitioners presented claims for damages for personal injuries due to carbon monoxide gas poisoning alleged to have occurred on board the vessel. It was cruising at the time within the territorial limits of the State of Florida and petitioners were guests of the owner. On the owner's death, petitioners' claims were filed against his estate.

Upon the facts the District Court found liability to the claimants and denied limitation upon the ground of neglect of duty by the owner. The court held that under a statute of Florida the claimants' causes of action survived the owner's death.

Upon appeal from the interlocutory decree (28 U. S. C. 227) the Circuit Court of Appeals ruled that all the findings of fact made by the District Judge were supported by the evidence; that, as the injuries thus proved were not occasioned without the knowledge or privity of the shipowner, respondent could not have limitation; that as the ship was at fault as well as the owner the causes of action *in rem* survived the owner's death and the claimants on that ground might recover up to

the value of the ship, but that under the governing principles of admiralty law the personal liability of the owner did not survive. 113 F. 2d 105. Because of the importance of the question as to the enforceability in admiralty of the claims for personal injuries against the estate of the deceased tortfeasor, we granted certiorari, 311 U. S. 634.

In support of the judgment of the Circuit Court of Appeals, respondent asks us to review the evidence with respect to the cause of the claimants' injuries and the breach of duty by the shipowner, contending that the evidence was insufficient to support the findings. Applying the well-established rule, we accept the concurrent findings of the courts below upon these matters (*Texas & New Orleans R. Co.* v. *Railway Clerks,* 281 U. S. 548, 558) and we confine our attention to the question of the survival of the causes of action.

There is no question that there was a maritime tort. There is also no question that the injury occurred within the territorial limits of Florida and that under the local statute, as construed by the Supreme Court of the State, the causes of action survived against the wrongdoer's estate. This was recognized by the Circuit Court of Appeals. 113 F. 2d p. 107. Compiled General Laws of Florida (1927), § 4211; *Waller* v. *First Savings & Trust Co.,* 103 Fla. 1025, 1047, 1049; 138 So. 780; *Granat* v. *Biscayne Trust Co.,* 109 Fla. 485, 488; 147 So. 850; *State ex rel. Wolfe Construction Co.* v. *Parks,* 129 Fla. 50, 56, 57; 175 So. 786.

The statutory provision for limitation of liability, enacted in the light of the maritime law of modern Europe and of legislation in England, has been broadly and liberally construed in order to achieve its purpose to encourage investments in shipbuilding and to afford an opportunity for the determination of claims against the vessel and its owner. *Norwich Company* v. *Wright,* 13

Wall. 104, 121. It looks to a complete disposition of what may be a "many cornered controversy," thus applying to proceedings *in rem* against the ship as well as to proceedings *in personam* against the owner, the limitation extending to the owner's property as well as to his person. *The City of Norwich,* 118 U. S. 468, 503; *Hartford Accident Co.* v. *Southern Pacific Co.,* 273 U. S. 207, 216. It applies to cases of personal injury and death as well as to cases of injury to property. *Butler* v. *Boston Steamship Co.,* 130 U. S. 527, 552; *The Albert Dumois,* 177 U. S. 240, 259. The limitation extends to tort claims even when the tort is non-maritime. *Richardson* v. *Harmon,* 222 U. S. 96.

When the jurisdiction of the court in admiralty has attached through a petition for limitation, the jurisdiction to determine claims is not lost merely because the shipowner fails to establish his right to limitation. We have said that the court of admiralty in such a proceeding acquires the right to marshal all claims, whether of strictly admiralty origin or not, and to give effect to them by the apportionment of the *res* and by judgment *in personam* against the owner, so far as the court may decree. And that, if Congress has this constitutional power, it necessarily follows, as incidental to that power, that it may furnish a complete remedy for the satisfaction of those claims by distribution of the *res* and by judgments *in personam* for deficiencies against the owner, if he is not released by virtue of the statute. *Hartford Accident Co.* v. *Southern Pacific Co., supra,* p. 217. While it is recognized that the equitable rule for retaining jurisdiction in order completely to dispose of a cause does not usually apply in admiralty, the proceeding for limitation of liability is different from the ordinary admiralty suit and, by reason of the statute and rules governing it, the court of admiralty has authority to grant an injunction and thus bring litigants

into the admiralty court. There is thus jurisdiction to fulfill the obligation to do equity to claimants by furnishing them a complete remedy although limitation is refused. *Id.*, p. 218.

But respondent contends that to permit recovery upon the claims here in question would do violence to a precept of the admiralty law that causes of action for personal injury die with the person. Respondent argues that the source of this principle was not the common law [1] but the civil law [2] and that it should be regarded as an integral part of the maritime law, considered as an independent body of law, and hence can be changed only by Congress, which has not acted.[3]

Whether the particular rule now invoked is so securely based in our maritime law [4] that a different one can be established only by legislation and not by the exercise of the judicial power responding to present standards of justice,[5] we need not now consider. For, while the injury occurred on navigable waters, these were within the limits of Florida whose legislation provided that the cause of action should survive. And it is not a principle of our maritime law that a court of admiralty must invariably refuse to recognize and enforce a liability which

[1] As to the rule in the common law, see Holdsworth's History of English Law, Vol. 3, pp. 576–578.

[2] Inst. Just. Lib. IV, Tit. XII, Cooper, p. 364, Sandars, p. 476.

[3] The "Death on the High Seas" Act, 46 U. S. C. 761–768, is not applicable, as it occupies a limited field and even as to wrongful death provides that the provisions of state statutes shall not be affected.

[4] The rule of the non-survival of a cause of action against a deceased tortfeasor has but a slender basis in admiralty cases in this country. See *Crapo* v. *Allen*, 6 Fed. Cas. (No. 3360) 763; *Cutting* v. *Seabury*, 1 Sprague 522, 525; *In re Statler*, 31 F. 2d 767, 36 F. 2d 1021; *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 371. The precise question here presented does not seem to have been authoritatively determined.

[5] See *The Lottawanna*, 21 Wall. 558, 572–574.

the State has established in dealing with a maritime subject. On the contrary, there are numerous instances in which the general maritime law has been modified or supplemented by state action, as e. g. in creating liens for repairs or supplies furnished to a vessel in her home port. *The Lottawanna,* 21 Wall. 558, 580; *The J. E. Rumbell,* 148 U. S. 1, 12.[6] With respect to maritime torts we have held that the State may modify or supplement the maritime law by creating liability which a court of admiralty will recognize and enforce when the state action is not hostile to the characteristic features of the maritime law or inconsistent with federal legislation. *The City of Norwalk,* 55 F. 98; *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, 242; *Great Lakes Dredge Co.* v. *Kierejewski,* 261 U. S. 479; *Vancouver Steamship Co.* v. *Rice,* 288 U. S. 445.[7]

This is illustrated, in the cases cited, by the effect given in admiralty to state legislation creating liability for wrongful death. The leading continental States of Europe, whose jurisprudence was developed from the civil law, have given a remedy in such a case,[8] but a right of action was denied by the common law and likewise by the admiralty in England. And this Court, upon an elaborate review of the decisions, concluded that no suit for wrongful death would lie "in the courts of the United States under the general maritime law." *The Harrisburg,* 119 U. S. 199, 213. See, also, *The Corsair,* 145 U. S. 335, 344. The absence of a federal or state

[6] Many other instances are listed in *The City of Norwalk,* 55 F. 98, 106, 107.

[7] See, also, *Grant Smith-Porter Co.* v. *Rohde,* 257 U. S. 469, 477, 478; *Millers' Underwriters* v. *Braud,* 270 U. S. 59, 64. Compare *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, 216, 220; *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372; *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149; *Robins Dry Dock Co.* v. *Dahl,* 266 U. S. 449.

[8] Hughes on Admiralty, Chap. X, §§ 108–110, pp. 224–226. See, also, *The Harrisburg,* 119 U. S. 199, 212, 213.

statute giving a right of action was emphasized. But when a State, acting within its province, has created liability for wrongful death, the admiralty will enforce it.

There was a careful and comprehensive exposition of this subject by Judge Addison Brown in *The City of Norwalk, supra,* decided shortly after *The Corsair, supra.* He observed that if it was not within the power of the State to create such a liability in a maritime case, the statutes of the majority of the States would be void so far as they related to deaths in cases arising on navigable waters. But the validity of judgments in the state courts giving damages in such cases, and the validity of the statutes on which they rested, had been sustained. *Steamboat Company* v. *Chase,* 16 Wall. 522; *Sherlock* v. *Alling,* 93 U. S. 99. The grounds of objection to the admiralty jurisdiction in enforcing liability for wrongful death were similar to those urged here; that is, that the Constitution presupposes a body of maritime law, that this law, as a matter of interstate and international concern, requires harmony in its administration and cannot be subject to defeat or impairment by the diverse legislation of the States, and hence that Congress alone can make any needed changes in the general rules of the maritime law. But these contentions proved unavailing and the principle was maintained that a State, in the exercise of its police power, may establish rules applicable on land and water within its limits, even though these rules incidentally affect maritime affairs, provided that the state action "does not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations." It was decided that the state legislation encountered none of these objections. The many instances in which state action had created new rights,

recognized and enforced in admiralty, were set forth in *The City of Norwalk,* and reference was also made to the numerous local regulations under state authority concerning the navigation of rivers and harbors. There was the further pertinent observation that the maritime law was not a complete and perfect system [9] and that in all maritime countries there is a considerable body of municipal law that underlies the maritime law as the basis of its administration. These views find abundant support in the history of the maritime law and in the decisions of this Court.

In *The Hamilton,* 207 U. S. 398, there was a proceeding in admiralty for limitation of liability in respect of a collision on the high seas, both vessels belonging to corporations of the State of Delaware. The Court held that a Delaware statute giving damages for wrongful death was a valid exercise of the legislative power, and that there was thus created a personal liability of the owner to the claimants which admiralty would respect. Moreover, as the case was one for limitation of liability, the Court noted that the federal statute had enabled the owner to transfer liability to a fund and to the exclusive jurisdiction of admiralty and hence "all claims to which the admiralty does not deny existence" must be recognized. In *La Bourgogne,* 210 U. S. 95, 139, also a limited liability proceeding, the reasoning of *The Hamilton* was followed in the ruling that, as the case was one of a French vessel and the law of France gave a right of action for wrongful death, our court of admiralty would enforce the claim.

Finally, in *Western Fuel Co.* v. *Garcia, supra,* the Court deemed it to be the logical result of prior decisions that where death "results from a maritime tort committed on navigable waters within a State whose statutes give a right of action on account of death by

[9] See *The Blackheath,* 195 U. S. 361, 365.

wrongful act, the admiralty courts will entertain a libel *in personam* for the damages sustained by those to whom such right is given." The libel there failed solely because suit was barred by the state statute of limitations. And the criterion applied in determining the validity and effect of the state legislation was set forth in substantially the same terms as those stated in *The City of Norwalk,* above quoted. *Western Fuel Co.* v. *Garcia, supra,* p. 242.

This criterion is manifestly not limited to cases of wrongful death. It is a broad recognition of the authority of the States to create rights and liabilities with respect to conduct within their borders, when the state action does not run counter to federal laws or the essential features of an exclusive federal jurisdiction. See *Minnesota Rate Cases,* 230 U. S. 352, 402–410. We see no reason why, under this test, the Florida rule in providing for the survival of a cause of action against a deceased tortfeasor for injuries occurring on navigable waters within the limits of the State should not be applied.

Respondent argues that, in relation to wrongful death, the maritime law had left the matter "untouched" (*The Harrisburg, supra*) and thus the state law was admitted to supplement the maritime law, while in the instant case there is a positive rule of admiralty against the survival of the cause of action. That is, in the one case, there is said to be a "void" in the maritime law, which the state law may fill, while in the other there is an attempt to modify an existing principle. This is a subtlety which we think does not merit judicial adoption. The admiralty rule in the case of wrongful death can be stated either negatively or positively, and the result does not turn on the mere mode of expression. The pith of the matter is that the maritime law, as we conceived it, did not permit recovery, and in the same sense, in substance,

the maritime law denied the survival of causes of action against a deceased tortfeasor. The maritime law would be supplemented or modified by state legislation in the one case as truly as in the other, and either supplement or modification is permissible in accordance with the accepted criterion.

Our decisions in the wrongful death cases also meet the further argument which is addressed to lack of uniformity. For whatever lack of uniformity there may be in giving effect to the state rule as to survival is equally present when the state rule is applied to wrongful death, or, for that matter, in any case when state legislation is upheld in its dealing with local concerns in the absence of federal legislation. Uniformity is required only when the essential features of an exclusive federal jurisdiction are involved. But as admiralty takes cognizance of maritime torts, there is no repugnancy to its characteristic features either in permitting recovery for wrongful death or in allowing compensation for a wrong to the living to be obtained from a tortfeasor's estate. *A fortiori,* in applying the established rules as to proof of claims in limitation proceedings, petitioners, brought into admiralty, were entitled to have their claims against the shipowner's estate heard and determined.

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

Reversed.

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

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

No 419. Argued January 8, 1941.—Decided March 3, 1941.

1. In the computation of the tax laid upon "net gifts" made during the calendar year, § 504 (b) of the Revenue Act of 1932 provides that "In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year the first $5,000 of such gifts . . . shall not . . . be included in the total amount of gifts made during such year." *Held* that where the donor conveyed property in trust for the benefit of numerous beneficiaries he was entitled to separate exemptions or exclusions of $5,000 for each beneficiary. P. 395.

   The question whether the gifts to the beneficiaries were "future interests" within the meaning of the section is not decided, not having been presented by the petition for certiorari, but is left open for consideration by the Board of Tax Appeals.
2. In common understanding and usage a gift is made to him upon whom the donor bestows the benefit of his donation. P. 396.

111 F. 2d 229, affirmed.

CERTIORARI, 311 U. S. 638, to review a decree reversing a decision of the Board of Tax Appeals, 40 B. T. A. 27, which sustained an additional assessment of gift taxes.

Solicitor General Biddle, with whom *Assistant Attorney General Clark* and *Messrs. Sewall Key* and *Thomas E. Harris* were on the brief, for petitioner.

Messrs. Rupert R. Harkrider and *T. W. Lain* for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

The petition for certiorari presents the single question whether under § 504 (b) of the Revenue Act of 1932, 47

Stat. 169, 247, the donor of property in trust for the benefit of numerous beneficiaries is entitled to a single gift tax exemption or exclusion to the extent of the first $5,000 or to separate exemptions of $5,000 for each beneficiary.

Sections 501 (a), 502 (1) impose for each calendar year a tax on the net amount of the transfers "by any individual . . . of property by gift." By § 501 (b) the tax applies "whether the transfer is in trust or otherwise" and "whether the gift is direct or indirect." In the computation of the tax laid upon "net gifts" made during the calendar year, § 504 (b) provides "In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year, the first $5,000 of such gifts . . . shall not . . . be included in the total amount of gifts made during such year." And § 1111, defining generally terms used throughout the Revenue Act, provides: "(a) When used in this Act— (1) The term 'person' means an individual, a trust or estate, a partnership, or a corporation."

On December 30, 1935, the taxpayer executed a trust indenture by which she transferred, in trust, property of a value of approximately $145,000 for a term ending in 1957, unless sooner terminated by the trustees, for the benefit of her seven children, with gifts over of the share of each child in event of the death of that child before the expiration of the trust. The taxpayer in her gift tax return for 1935 excluded from the taxable amount of her gifts the sum of $5,000 for each child or a total of $35,000. The Commissioner allowed only a single deduction of $5,000 in lieu of the seven $5,000 deductions claimed by the taxpayer and assessed a deficiency accordingly. The Board of Tax Appeals, treating the trust as the donee rather than the individual beneficiaries, sustained the Commissioner's assessment. The Court of Appeals for the Fifth Circuit reversed. 111 F. 2d 229. We granted certiorari, 311 U. S. 638, to resolve a conflict

of the decision below and of like decisions in other circuits, *Welch* v. *Davidson,* 102 F. 2d 100 (first circuit); *Rheinstrom* v. *Commissioner,* 105 F. 2d 642 (eighth circuit); *McBrier* v. *Commissioner,* 108 F. 2d 967 (third circuit), and in the Court of Claims, *Pelzer* v. *United States,* 90 Ct. Cls. 614; 31 F. Supp. 770, with that of the Seventh Circuit in *United States* v. *Ryerson,* 114 F. 2d 150.

It is not doubted that separate gifts, other than of future interests, made directly to the donees without the intervention of a trustee entitle the donor under § 504 (b), to one $5,000 exclusion for each gift. But the Government argues that here the trustee or the trust is the donee and as there was only a single trust there can be only a single statutory deduction from the total amount of the gifts. As the statute allows one deduction of the first $5,000 for each gift "made to any person" by the donor, the question for decision is whether in this case of a gift in trust for the benefit of the designated beneficiaries the single trust, or each beneficiary, is the "person" to whom the gift was made and for which the deduction is allowed.

The statutory definition of "person" in § 1111(a) (1) is of little aid in answering this question. The definition is made generally applicable to all of the sections of the revenue act and was carried forward from earlier acts which contained no gift tax provisions. See § 2(a)(1) of the 1926 Revenue Act, 44 Stat. 9; § 701(a)(1) of the 1928 Revenue Act, 45 Stat. 878. The section means no more than that the word "person" in any section of the act in which it occurs may be taken as meaning "trust" rather than "individual" as the context may require. But § 504 (b), allowing the deduction in the case of each gift to any person when applied to gifts in trust for designated beneficiaries, may be read as referring either to a gift to the trust or a gift to each individual beneficiary. Hence we must read the section in its setting of the gift tax pro-

visions and in the light of its legislative history, to determine whether, within its meaning, the trust or each individual beneficiary is the donee to whom the gift is made.

The gift tax provisions are not concerned with mere transfers of legal title to the trustee without surrender by the donor of the economic benefits of ownership and his control over them. A gift to a trustee reserving to the donor the economic benefit of the trust or the power of its disposition, involves no taxable gift. It is only upon the surrender by the donor of the benefit or power reserved to himself that a taxable gift occurs, *Estate of Sanford* v. *Commissioner,* 308 U. S. 39; *Rasquin* v. *Humphreys,* 308 U. S. 54, and it would seem to follow that the beneficiary of the trust to whose benefit the surrender inures, whether made at the time the trust is created or later, is the "person" or "individual" to whom the gift is made.

But for present purposes it is of more importance that in common understanding and in the common use of language a gift is made to him upon whom the donor bestows the benefit of his donation. One does not speak of making a gift to a trust rather than to his children who are its beneficiaries. The reports of the committees of Congress used words in their natural sense and in the sense in which we must take it they were intended to be used in § 504 (b) when, in discussing § 501, they spoke of the beneficiary of a gift upon trust as the person to whom the gift is made. Similarly they spoke of gifts effected by transfer of money or property to another as consideration for the payment of money or other property to a third person as a gift to the third person. H. Rept. No. 708, 72d Cong., 1st Sess., pp. 27–28; S. Rept. No. 665, 72d Cong., 1st Sess., pp. 39–40. It is of some significance also that the denial by § 504(b) of the exemption in the case of gifts of "future interests" has little scope for practical operation unless the gifts to which the exemption applies

include those gifts made to beneficiaries of a trust, since it is by resort to the conveyance in trust that most future interests are created.

Moreover, the very purpose of allowing a gift tax exemption measured by the number of donees, would be defeated if a distinction were to be taken between gifts made directly to numerous donees and a gift made for their benefit by way of a single trust, and we are unable to discern in the statute or its legislative history any purpose to make such a distinction. While one object of the exemption was to permit small tax free gifts, and at the same time "to fix the amount sufficiently large to cover in most cases wedding and Christmas gifts" without the necessity of keeping accounts and reporting the gifts, H. Rept. *supra,* 29; S. Rept. *supra,* 41, nevertheless the statute extended the exemption in the specified amount to all gifts, whether large or small, "made to any person."

In the face of an exemption thus made broadly applicable to all gifts to all donees and in the absence of some indication of an intention to discriminate between gifts made directly to the donees and those made indirectly to the beneficiaries of a trust, we can hardly assume a purpose to favor one class of donees over the other or find such a purpose in the words of the statutory definition of "person" which may indicate either the trust or each individual beneficiary of the trust as the person to whom the gift is made. Further, such an assumption would open the way to avoid the $5,000 limitation upon the allowed exemption, by resort to the simple expedient of the creation by a single donor of any number of trusts of $5,000 each for the benefit of a single beneficiary.[1] A

[1] It was this construction of the statute by the Board of Tax Appeals and by "several of the federal courts" which lead to the amendment of § 504 (b) so as to withdraw the exemption in the case of every gift in trust. See § 505 of the 1938 Act, 52 Stat. 447. S. Rept. No. 1567, 75th Cong., 3rd Sess., p. 41.

construction so dependent upon an artificial meaning of the words of the statute and so out of harmony with the statutory scheme and purpose is not to be favored.

Article 11 of 79 Treasury Regulations (1933 edition), issued under the 1932 Act, treats each gift to the beneficiary of a trust as entitled to the benefit of the $5,000 deduction unless the gift is of a "future interest" which § 504 (b) excepts from the exemption otherwise allowed. Such we think is the correct construction of the statute.

It is unnecessary to consider here the question whether a gift upon trust for impersonal, public or charitable purposes where there are no designated or ascertainable first beneficiaries is a gift to the trust entitled to a single $5,000 deduction. See *Hutchings* v. *Commissioner*, 111 F. 2d 229, 231. Nor do we consider whether the gifts to the beneficiaries here are of future interests which are excepted from the benefit of the $5,000 deduction allowed by § 504 (b). That question is not presented by the petition for certiorari. But our judgment will be without prejudice to consideration of that question by the Board of Tax Appeals upon the remand to it if, under the rules and procedure governing proceedings before the Board, the Commissioner is free to present the question there.

Affirmed.

UNITED STATES *v.* PELZER.

CERTIORARI TO THE COURT OF CLAIMS.

No. 393. Argued January 7, 1941.—Decided March 3, 1941.

1. Decided in part upon authority of *Helvering* v. *Hutchings, ante,* p. 393. P. 401.
2. The revenue laws are to be construed in the light of their general purpose to establish a nationwide scheme of taxation uniform in its application. Their provisions are not to be taken as subject to state control or limitation unless the language or necessary implication of the section involved makes its application dependent on state law. P. 402.
3. Gifts in trust to grandchildren, limited to those who survive a ten-year accumulation period and attain twenty-one years of age, are gifts of "future interests," from which the $5,000 exemption in computing gift taxes is withheld by § 504 (b) of the Revenue Act of 1932. P. 403.

90 Ct. Cls. 614; 31 F. Supp. 770, reversed.

CERTIORARI, 311 U. S. 634, to review a judgment of the Court of Claims granting a recovery of money collected as gift taxes.

Solicitor General Biddle, with whom *Assistant Attorney General Clark* and *Messrs. Sewall Key* and *Thomas E. Harris* were on the brief, for the United States.

Mr. Robert A. Littleton for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

Decision in this case turns on the question whether certain gifts of property in trust for the benefit of several beneficiaries are gifts of "future interests" which, in the computation of the gift tax, are, by § 504 (b) of the 1932 Revenue Act, 47 Stat. 169, 247, denied the benefit, otherwise allowed, of exclusion from the compu-

tation to the extent of the first $5,000 of each gift "made to any person by the donor" during the calendar year.

Sections 501 (a) and 502 (1) of the 1932 Act impose for each calendar year a tax upon the net amount of transfers "by any individual . . . of property by gift." For the purpose of computing the tax § 504 (b) provides "In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year, the first $5,000 of such gifts . . . shall not . . . be included in the total amount of gifts made during such year."

In 1932 the taxpayer, respondent here, created a trust for the benefit of his eight grandchildren and any other grandchildren who might afterward be born during the term of the trust. The trustee was directed to accumulate the income for a period of ten years and thereafter to pay an "equal grandchild's distributive share" of the income to each of the named grandchildren who were then living and twenty-one years of age and to pay a like share of income to each other named grandchild for life after that child should reach the age of twenty-one years. Provision was made whereby grandchildren born after the creation of the trust and during its life were to receive like participation in the income of the trust except as to distributions of income made prior to the birth of such after-born grandchildren, and except that the after-born grandchildren should be paid their shares of the income during their respective minorities after the termination of the ten-year accumulation period. The trust instrument also made gifts over of the share of the income of each grandchild at death, the details of which are not now material. It was further provided that the trust should terminate twenty-one years after death of the last survivor of the named grandchildren, when the corpus of the trust, with accumulated income, was to be distributed in equal shares among

the surviving grandchildren and the issue *per stirpes* of all deceased grandchildren.

During the years 1933, 1934, and 1935, the taxpayer added further amounts of property to the 1932 trust. In 1934 he also made gifts directly to his three granddaughters and created a trust to pay the income in equal shares to his wife and three daughters with gifts over of each share of the corpus of the trust upon the death of the life tenant.

Upon claims for refunds of overpaid taxes upon the transfers made in the years 1933, 1934, and 1935, the commissioner recomputed the tax and allowed one $5,000 exclusion only from the net amounts subject to gift tax given or added in each year to each trust. In the present suit, brought in the Court of Claims, respondent sought to recover overpaid taxes for the years in question on the grounds that the gifts to the beneficiaries were gifts of present, not future, interests and that the taxpayer in the computation of the tax for each year was entitled to one exclusion of $5,000 for each beneficiary. The court sustained both contentions and gave judgment for respondent accordingly. 90 Ct. Cls. 614; 31 F. Supp. 770. We granted certiorari, 311 U. S. 634, to resolve the conflict of the decision below with that of the Seventh Circuit in *United States* v. *Ryerson,* 114 F. 2d 150.

The Government challenges both grounds of decision below. It argues that only a single $5,000 exclusion is allowable under § 504 (b) from the total gifts made to the trust in each calendar year and that if the gifts are deemed to be made to the named beneficiaries of the trust no deduction can be allowed in the case of gifts to the 1932 trust because they were of future interests for which no exclusion is allowed by § 504 (b).

We have this day decided the first question, in *Helvering* v. *Hutchings, ante,* p. 393, in which we held that in the case of gifts in trust the beneficiaries are the

persons to whom the gifts are made and that for purposes of computation of the tax § 504 (b) excludes the first $5,000 in value of the gift to each beneficiary from the taxable amount of the gifts made in the calendar year. For the reasons stated in our opinion in that case we hold that the first beneficiaries of the trusts in this case are the persons to whom the gifts were made and that the taxpayer is entitled to the benefit of the $5,000 exclusion for each gift to such beneficiary if it is not of a future interest.

But the Government argues here, as it did below, that the gifts to the beneficiaries of the 1932 trust are of future interests within the meaning of the statute and treasury regulations. While the eight named grandchildren are the first beneficiaries of the trust, and the persons to whom the gifts were made, none of them takes any benefit from the trust before the end of the ten-year accumulation period or until he is twenty-one, whichever last occurs, and then only if he survives that event. And the question is whether such a gift is a gift of a "future interest" within the meaning of § 504 (b). Respondent, relying on statutes and judicial decisions of Alabama, where the trust was created and is being administered, insists that the gifts to the named grandchildren are present, not future, interests as defined by Alabama law. He argues that as § 504 (b) does not define the "future interests" gifts of which are excluded from its benefits, they must be taken to be future interests as defined by the local law, and it is the local law definition of future interests which must be adopted in applying the section. But as we have often had occasion to point out, the revenue laws are to be construed in the light of their general purpose to establish a nationwide scheme of taxation uniform in its application. Hence their provisions are not to be taken as subject to state control or limitation unless the language or necessary implication of the sec-

tion involved makes its application dependent on state law. *Burnet* v. *Harmel*, 287 U. S. 103, 110; *Morgan* v. *Commissioner*, 309 U. S. 78, 81.

We find no such implication in the exclusion of gifts of "future interests" from the benefits given by § 504 (b). In the absence of any statutory definition of the phrase we look to the purpose of the statute to ascertain what is intended. It plainly is not concerned with the varying local definitions of property interests or with the local refinements of conveyancing, and there is no reason for supposing that the extent of the granted tax exemption was intended to be given a corresponding variation. Its purpose was rather the protection of the revenue and the appropriate administration of the tax immunity provided by the statute. It is this purpose which marks the boundaries of the statutory command. The committee reports recommending the legislation declared (H. Rept. No. 708, 72d Cong., 1st Sess., p. 29; S. Rept. No. 665, 72d Cong., 1st Sess., p. 41):

"The term 'future interests in property' refers to any interest or estate, whether vested or contingent, limited to commence in possession or enjoyment at a future date. The exemption being available only in so far as the donees are ascertainable, the denial of the exemption in the case of gifts of future interests is dictated by the apprehended difficulty, in many instances, of determining the number of eventual donees and the values of their respective gifts."

Article XI of Treasury Regulations 79, 1933 and 1936 editions, interpreting § 504 (b), declared that "future interests" include any interest or estate "whether vested or contingent, limited to commence in use, possession, or enjoyment at some future date or time." This definition stands unchanged in the regulations and, while § 504 (b) was amended by § 505 of the 1938 Revenue Act so as to withdraw the benefit of the

$5,000 exclusion from all gifts in trust, the section as amended continues to withhold the benefit of the exclusion from all gifts of "future interests in property."

We think that the regulations, so far as they are applicable to the present gifts, are within the competence of the Treasury in interpreting § 504 (b) and effect its purpose as declared by the reports of the Congressional committees, and that the gifts to the eight beneficiaries of the 1932 trust were gifts of future interests which are excluded from the benefits of that section. Here the beneficiaries had no right to the present enjoyment of the corpus or of the income and unless they survive the ten-year period they will never receive any part of either. The "use, possession, or enjoyment" of each donee is thus postponed to the happening of a future uncertain event. The gift thus involved the difficulties of determining the "number of eventual donees and the value of their respective gifts" which it was the purpose of the statute to avoid.

We have no occasion to consider the definition of future interests in other aspects than those presented by the present case. The judgment of the Court of Claims will be reversed so far only as it excluded the gifts to the 1932 trust from the computation of the tax for each of the years in question.

Reversed.

Counsel for Parties.

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

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

No. 495. Argued January 8, 1941.—Decided March 3, 1941.

1. A respondent in certiorari is entitled to sustain the judgment upon a ground other than that adopted by the court below. P. 408.
2. In computing gift taxes under the Revenue Act of 1932, gifts in one trust for several beneficiaries are each entitled to deduction up to $5,000, if they are not gifts of "future interests." *Helvering* v. *Hutchings, ante,* p. 393. P. 408.
3. Gifts of separate equal shares of the corpus of a trust to each of the two trustees in the event of their joint request that the trust be terminated are gifts upon a contingency which may never happen and are therefore gifts of "future interests" within the meaning of § 504 (b) of the Revenue Act of 1932. *United States* v. *Pelzer, ante,* p. 399. P. 408.
4. A joint power to two beneficiaries to terminate a trust and thereby acquire the corpus in equal shares is not the equivalent of ownership since the joint power is not for the joint benefit of the donees and its exercise could only operate for the benefit of each to the extent of one-half of the trust property and then only in the event that both agreed to unite in its exercise, and the use and enjoyment of any part of the trust fund by either will be postponed until both join in the exercise of the power. P. 408.
5. Gifts in trust dependent upon survivorship of one or more persons at the death of the donor, are gifts of "future interests" within the meaning of § 504 (b) of the Revenue Act of 1932. *United States* v. *Pelzer, ante,* p. 399. P. 409.

114 F. 2d 150, affirmed.

CERTIORARI, 311 U. S. 640, to review a judgment reversing a recovery in the District Court, 28 F. Supp. 265, for alleged overpayment of gift taxes.

Mr. William N. Haddad, with whom *Mr. Walter T. Fisher* was on the brief, for petitioners.

Solicitor General Biddle, with whom *Assistant Attorney General Clark* and *Messrs. Sewall Key, J. Louis Mon-*

arch, and *Thomas E. Harris* were on the brief, for the United States.

MR. JUSTICE STONE delivered the opinion of the Court.

This is a companion case to *Helvering* v. *Hutchings, ante,* p. 393, and *United States* v. *Pelzer, ante,* p. 399, and it presents the questions decided in those cases.

The sole question raised by the petition for certiorari is whether, under § 504 (b) of the Revenue Act of 1932, 47 Stat. 169, 247, the donor of property in trust for numerous beneficiaries is entitled to a single gift tax exemption or exclusion to the extent of the first $5,000 of the gift, or to separate exemptions of $5,000 for each beneficiary. The Government insists that if that question be decided against it, it is nevertheless entitled to retain the judgment below in its favor because the gifts to the beneficiaries were of future interests which, by § 504 (b), are denied the benefit of the exclusion otherwise allowed by the section.

In 1934 petitioners' testatrix transferred two single premium insurance policies on her own life maturing at a future date, as additions to two separate trusts, one created in 1933, the other established in 1934 but before the transfer. The instrument creating the first trust provided that the trustees should pay over one-fourth of the net income to Mary Ryerson Frost, one of the trustees, for life, with remainder over for life to her two daughters if surviving at her death, with further remainders over to their issue *per stirpes.* The trust instrument directed that the remaining three-fourths of the income should be accumulated and added to the principal of the trust. It provided that the trust was to terminate upon the death of the last survivor of three persons, the first life tenant and her two daughters, and was then to be distributed, the particular distribution be-

ing dependent upon contingencies which are not now material. The trust instrument also contained numerous provisions for the termination of the trust by joint action of the trustees, Donald McKay Frost and Mary Ryerson Frost, who was also life tenant, or by the survivor or other of them in the case of the death or mental incapacity of either. Other provisions were made for the termination of the trust and distribution of the trust property in the event of the death or mental incapacity of both, without having exercised their power of termination.

The instrument creating the 1934 trust provided that upon the death of the grantor, who was the insured, who was living at the time of the transfer, the trustees should distribute the proceeds of the insurance as follows: If the widow of the grantor's son survived the grantor the income of one-third of the proceeds of the insurance policy was to be paid to the son's widow for life with remainders over to those persons who would be heirs at law of the son had he died at the same time as the life tenant. The remaining two-thirds of the proceeds, or all if the son's widow did not survive the grantor, were to go to the descendants of the grantor's son then surviving, with gifts over in default of such descendants.

In a suit brought by petitioner to recover overpaid gift taxes for the year 1934 the district court ruled that in the computation of the tax the taxpayer was entitled to two exclusions to the extent of $5,000 each for the gifts made to Mary Ryerson Frost and Donald McKay Frost under the 1933 trust and to three exclusions under the 1934 trust, one for the son's widow and two for his two living descendants. The Court of Appeals for the Seventh Circuit reversed, 114 F. 2d 150, holding that the two trusts were the donees and that a single exclusion was allowable for each trust. We granted certiorari, 311 U. S. 640, to resolve the conflict between the decision

below and that of the Court of Claims in the *Pelzer* case and the Circuit Court of Appeals for the Fifth Circuit in the *Hutchings* case.

For the reasons stated in our opinion in the *Hutchings* case we hold that the beneficiaries of the two trusts were the persons to whom the gifts were made and that the gifts to them and not to the trusts, as the courts below held, were entitled to the benefit of the exclusion allowed by § 504 (b) provided the gifts were not of "future interests" to which the section denies the benefit of the exclusion.

As the Government has not sought certiorari it cannot attack the judgment below, but it is free to sustain it upon any legal ground which will support it. *LeTulle* v. *Scofield,* 308 U. S. 415, 421, 422. Even though the judgment below was rested upon the erroneous ground that the trusts were "persons" to whom the gifts were made within the meaning of § 504 (b), the Government may justify the judgment here on the ground that petitioners are not entitled to the exclusions claimed so far as the gifts were of future interests.

The gifts of a separate equal share of the corpus of the 1933 trust to each of the two trustees in the event of their joint request that the trust be terminated was a gift upon a contingency which might never happen. For the reasons stated in our opinion in the *Pelzer* case those gifts were of future interests within the meaning of § 504 (b) and consequently were not entitled to the benefit of the exclusion. While a present power of disposition for one's own benefit is the equivalent of ownership, see *Curry* v. *McCanless,* 307 U. S. 357, 370, *et seq.,* and cases cited, here the joint power was not for the joint benefit of the donees of the power. Its exercise could only operate for the benefit of each to the extent of one-half of the trust property and then only in the event that both agreed to unite in its exercise. In any case use and

enjoyment of any part of the trust fund by either was postponed until such time as both joined in the exercise of the power. The interests granted to the trustees upon their termination of the trust should therefore have been included to their full extent in the computation of the gift tax because they were "future interests" within the meaning of § 504 (b) and Art. XI, Treasury Regulations 79. As the petitioners have been allowed one exclusion by the judgment below which is not attacked here it is unnecessary to consider whether the life interest in the income given to Mary Ryerson Frost is a present or future interest within the meaning of § 504 (b).

For like reasons we conclude that the gifts to the beneficiaries of the 1934 trust were of future interests and that the petitioners are entitled to no exclusion with respect to them. The gift of income to the life tenant was contingent upon her survivorship of the grantor at a future date. The gifts of the principal amount of the proceeds of the policy to descendants of the deceased son of the grantor were in part contingent upon their survivorship of the son's widow and her survivorship of the grantor or, if she did not survive him, then the gifts of the entire principal were contingent upon survivorship of the descendants at the grantor's death. Thus all those who might become entitled to the use and enjoyment of the trust, principal and income, were ascertainable only upon the happening of one or more uncertain future events, survivorship of one or more persons at the death of the donor, and so they were donees of gifts of "future interests" within the meaning of § 504 (b) and the treasury regulations. Consequently petitioners are not entitled to the single exclusion which the court below allowed. But because the Government has sought no cross-petition attacking the judgment below, it must be

Affirmed.

EQUITABLE LIFE INSURANCE CO. OF IOWA *v.* HALSEY, STUART & CO.

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

No. 291. Argued January 15, 16, 1941.—Decided March 3, 1941.

1. In an action in a federal court for damages resulting from sales of securities on representations of fact affecting their value alleged to have been false and fraudulent, the right of recovery is governed by the law of the State in which the representations and sales were made. P. 420.
2. Stipulations by which one attempts to avoid the consequences of false statements fraudulently or recklessly made are strictly construed in the courts of Iowa. P. 419.
3. Assuming that a dealer in securities who offers bonds by a printed circular containing false representations is protected from liability for them, and for like statements made later, by a "hedge clause" in a circular reading: "All statements herein are official, or are based on information which we regard as reliable, and while we do not guarantee them, we ourselves have relied upon them in the purchase of this security," the protection does not extend to misrepresentations of other and different facts made after submisson of the circular to the purchaser. P. 419.
4. A buyer of bonds who relies to his injury upon material false representations by the seller of conditions affecting their value, is not under Iowa law precluded from recovering his damage by his failure to make his own investigation to ascertain whether the representations are true. P. 424.
5. The trial court correctly instructed the jury, in conformity to Iowa law, that to find a verdict for the purchaser of the bonds it must find that the untrue statements were known by the seller to be untrue or were made as true with no reasonable ground for believing them to be true, and it correctly submitted to the jury the question whether such statements, including those in the hedge clause itself, were recklessly made without reasonable ground for believing them to be true. P. 420.
6. Upon evidence that the seller of bonds had induced their purchase by exhibiting to the buyer the balance sheet of a corporation, which had guaranteed the payment of the bonds, without disclosing circumstances known to the seller indicating that since the

date of the balance sheet the financial condition of the corporation had been seriously impaired, *held* that the trial court, in conformity to Iowa law, correctly submitted the evidence to the jury with the instruction that it could find the seller liable for fraud or misrepresentation from such partial disclosure accompanied by wilful concealment of material facts inconsistent with those stated in the balance sheet. P. 425.

112 F. 2d 302, reversed.

CERTIORARI, 311 U. S. 626, to review a judgment reversing a recovery of damages in the District Court. The action was based on fraud practiced in sales of public improvement bonds.

Mr. Joseph G. Gamble, with whom *Mr. Alden B. Howland* was on the brief, for petitioner.

Mr. Edward R. Johnston, with whom *Mr. Floyd E. Thompson* was on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

Petitioner brought this suit in the District Court for Northern Illinois to recover damages suffered by reason of alleged fraudulent statements made by respondent's agents which induced petitioner to purchase of respondent a large number of Longview (Washington) local improvement bonds. The trial to a jury resulted in a verdict and judgment for petitioner in the sum of $66,150. The Court of Appeals for the Seventh Circuit reversed on the ground that some of the untrue statements, on the faith of which petitioner had purchased the bonds, were within the protection of the "hedge clause" which appeared in a circular by which respondent had offered the bonds for sale to petitioner. The clause read:

"All statements herein are official, or are based on information which we regard as reliable, and while we do

not guarantee them, we ourselves have relied upon them in the purchase of this security."

The court found that another untrue statement contained in a letter written by respondent's agent to petitioner was "carelessly made," but, taken alone, was too trivial in its effect in inducing petitioner to purchase the bonds, to support the verdict. It also held that there was no breach of legal duty on the part of respondent or its officers in their failure to reveal to petitioner facts known to respondent indicating that a financial statement of a guarantor of the bonds, submitted to petitioner by respondent's agent, on the faith of which petitioner had bought the bonds, did not truly represent the financial condition of the guarantor. We granted certiorari, 311 U. S. 626, upon a petition which asserted the failure of the court below to follow state law in its rulings, the questions presented being of public importance because they involve the relation of the federal courts to the states.

We summarize briefly the evidence submitted to the jury which bears on the contentions made before us. Respondent is a large dealer in bonds and securities, with an office in Chicago. Petitioner is an Iowa corporation having its office and principal place of business in Iowa where the transactions resulting in the sale of the bonds in question took place. In May, 1930, respondent through an agent offered to sell petitioner a quantity of the bonds of the Longview local improvement districts. The offering was by printed circular issued by respondent on April 7, 1927, which described the bonds as payable from proceeds of special assessments to be levied upon the benefited properties and stated that their payment was guaranteed principal and interest by Long-Bell Lumber Company, whose balance sheet for the year ending December 31, 1926, was printed in the circular. The circular stated—

"Longview is situated about 133 miles south of Seattle at the confluence of the Columbia and Cowlitz Rivers. It has a frontage of 7¼ miles on the former, and is a port of call for ocean-going vessels midway between Portland and the Pacific Ocean. . . . Because of its natural advantages and proximity to the timber stands of the Long-Bell and Weyerhaeuser interests, Longview was selected as the site for the vast lumber manufacturing plants of these companies. The present output of the Long-Bell plants is 1,800,000 board feet per day. The Weyerhaeuser plants are under construction. Manufacturing plants have also been erected by other concerns, including the Longview Concrete Pipe Company, the Pacific Straw Paper & Board Company, the Magor Car Corporation, the Standard Oil Company, Longview Paint & Varnish Company, and the Central Mill Works. The first unit of the plants of the Longview Fibre Company, to cost 2½ million dollars, is now well under way." The circular contained the "hedge clause" which has already been quoted.

In making the offering, respondent's agent also informed a vice president of petitioner that the bonds were secured by assessments on properties in the City of Longview and as additional security carried the full and complete guarantee of the Long-Bell Lumber Company which was a very large, long established company doing business in the south and west; and that Local Improvement Districts Nos. 11 and 19, against which most of the bonds were issued, were practically co-extensive with the limits of the city.

After reading the circular petitioner's vice president requested of respondent's agent additional information about Longview and the property there and about the Long-Bell Lumber Company, which he supplied in a number of documents. One was a booklet issued by the

Longview Company, a subsidiary of Long-Bell Lumber Company, engaged in selling Longview real estate. The booklet showed a map on which the mills of Longview Lumber Company, the property of the Weyerhaeuser Timber Company and the City of Longview appeared to extend to and along the northerly side of the Columbia River. The map bore a legend reciting that it "is intended to show in a general way the relation of the various parts of the city site to each other, and location of the city in relation to water, railroad and highway transportation facilities." Another document was advance proof of an advertisement of the Longview Company, published in the Saturday Evening Post. It contained an illustration of extensive manufacturing plants, beneath which it was stated "The thoroughly modern electrically operated manufacturing plants shown in the above sketch are in Longview, Wn. They produce 1,800,000 feet of Douglas fir lumber a day. The buildings cover 72 acres. Six ocean-going freighters can load at one time at the Long-Bell docks." Another document was a booklet issued by the Longview Chamber of Commerce containing statements from which it could reasonably be inferred that the manufacturing plants of the Long-Bell Lumber Company and the Weyerhaeuser Timber Company were within the City of Longview and that the latter was on the Longview waterfront along the Columbia River.

Still another document, which will presently be discussed, was the published balance sheet for the year ending December 31, 1929, of the Long-Bell Lumber Company. Respondent's sales manager, on May 15, 1930, also wrote to petitioner's vice president a letter offering the first $100,000 of bonds purchased by petitioner, saying, "We believe you have before you practically all the data covering this issue of bonds," and "you observe, of course, that this city has no funded debt other than these

improvement bonds and that the original debt has been materially reduced through retirement and maturity."

It is not seriously contended here that petitioner did not purchase the bonds on the faith of the statements which we have detailed and others of similar character, nor is it denied that the Long-Bell, Weyerhaeuser, Longview Fibre and Standard Oil Company plants were all outside the city limits of Longview and that none of those properties were subject to assessments in any of the improvement districts. The mill properties were located between the Columbia River and the limits of the City of Longview. The city never had a frontage of 7¼ miles upon the Columbia River and no such frontage at all except for a distance of about 200 yards adjacent to the Longview dock and not within the improvement districts. Substantially all of the land included within the local improvement districts of Longview was also included within a diking district known as Cowlitz County Consolidated Diking District No. 1, which in May, 1930, when the negotiations for the sale of the bonds to petitioner took place, had outstanding bonds in the sum of $2,554,000 payable from the proceeds of special assessments to be levied upon substantially all lands within the improvement districts. Respondent had purchased the entire issue of diking bonds from the Long-Bell Lumber Company in 1925 and later resold them to the public.

At the trial a vice president of respondent, called by petitioner as an adverse witness, testified that in purchasing the local improvement district bonds respondent gave no consideration to the special assessments against Longview real estate; that respondent regarded Long-Bell Lumber Company's guarantee as the sole justification for handling the bonds and would not have handled them without the guarantee. None of these facts detailed by the witness were communicated to petitioner in advance of the sale of the bonds.

A close business relationship had existed between respondent and Long-Bell Lumber Company for some years before 1930. It had purchased from the Lumber Company and sold to customers $25,000,000 of its first mortgage bonds between 1922 and 1926, and in some of its offerings it had been referred to as the "fiscal agent" of the Long-Bell Lumber Company. In 1926 it had purchased from the Lumber Company and resold $3,250,000 of its bonds. In the years 1925, 1926 and 1927 it purchased from the Lumber Company and later resold more than $3,000,000 of the Longview local improvement district bonds.

The Long-Bell Lumber Company balance-sheet for 1929, to which we have referred, disclosed total assets of more than $116,000,000 with current assets of cash and inventories amounting to more than $15,000,000. Current liabilities were less than $8,000,000 including bank loans of $4,000,000. The funded debt of Long-Bell and all subsidiaries was less than $42,000,000, and capital and surplus were shown in excess of $59,000,000.

There was much evidence from which the jury could have found that the Lumber Company, prior to the first sale of the bonds to petitioner in May, 1930, had, by more or less regular reports, kept respondent closely advised of developments at Longview and generally of its financial condition. Among the data transmitted were documents produced from respondent's files showing that in 1927 sales of Longview real estate by the Lumber Company's real estate subsidiary had practically ceased; that during 1928 properties already sold were being taken back on the forfeiture of installment sales contracts, and that in April and May of that year forfeitures and repurchases in number and valuation of properties equalled new sales; that in 1928 respondent conducted market operations in the securities of the Lumber Company and asked $75,000 as compensation

for bringing about an improvement in their market quotations.

During the early months of 1930 and before the first sale of bonds to petitioner, which occurred on May 17th, there were frequent communications of information from the Long-Bell Lumber Company to respondent from which the jury could have found that respondent was advised of the progressive financial deterioration and loss of credit of the Long-Bell Lumber Company. These included discussion of an attempt to consolidate the Long-Bell Company with other lumber producers in the effort, as stated by Long-Bell's officers to respondent, "to meet quickly an acute and distressing situation"; efforts to procure loans and to convert Long-Bell property into cash; "to strengthen the Lumber Company's current financial condition by converting physical assets into working capital to meet current requirements"; unsuccessful efforts in March and April to market secured bonds and note issues of the Long-Bell Lumber Company, unsuccessful efforts by respondent in May to secure financing for Long-Bell by New York banking houses. There was evidence from which the jury could have found that respondent had been advised by the Long-Bell Company, that the officers of the Chase National Bank of New York and a large St. Louis bank had withdrawn and refused to renew the Long-Bell Company's line of bank credit and that the Chase Bank had advised strengthening of the Lumber Company's current financial position, and had suggested the formation for credit purposes of a subsidiary corporation to which the Long-Bell could transfer its liquid assets for purposes of borrowing operations. This advice was carried into effect in October, 1930. None of these circumstances showing the changed financial condition of the Long-Bell Lumber Company after its December 31, 1929 statement or any of the information of respondent with

respect to them were revealed by respondent or known to petitioner before purchasing the improvement bonds.

Petitioner purchased from respondent $353,000 of the bonds, $100,000 on May 17, 1930, $26,000 in September, $211,000 in October, $13,000 in January, 1931 and $3,000 in February. Of these, $279,000 were bonds of districts 11 and 19, which were the two districts which embraced substantially the whole City of Longview. In 1934 the Long-Bell Lumber Company filed a petition for reorganization under § 77B of the Bankruptcy Act. By the decree in the reorganization proceeding the Lumber Company was relieved of its guarantee of the improvement district bonds, the petitioner receiving 8 and 4/10ths shares of common stock in the reorganized corporation in lieu of the guarantee on each $1,000 bond.

Petitioner's case as submitted to the jury was in substance that it had been induced to purchase the bonds by untrue statements knowingly or recklessly made by respondent's officers and agents as follows: (1) That the extensive mill properties of the Long-Bell Lumber Company, the Weyerhaeuser Timber Company, the Longview Fibre Company and others were located in Longview and subject to assessment in Local Improvement Districts Nos. 11 or 19, the limits of which were substantially co-extensive with the limits of the city; (2) that Longview had a frontage of 7¼ miles upon the Columbia River which, if true, would locate the mill properties within the corporate limits; (3) that the improvement bonds were the only bonds constituting a charge or lien upon the lands in the improvement districts of the city; and, finally, (4) that respondent's officers and agents had in May, 1930, made representations of the strong financial position shown in the 1929 balance sheet of the Long-Bell Lumber Company which had guaranteed the improvement bonds, without disclosing to petitioner the knowledge which it then had or later acquired before

the sale of the bonds, that the Long-Bell Company was in fact in a declining and precarious financial condition.

The Court of Appeals held that the various statements and information given by respondent's officers and agents, after respondent's offering circular had been submitted to petitioner, were substantially the same as those made in the circular itself and therefore were under the protection of the hedge clause which had been printed in the circular. Stipulations by which one attempts to avoid the consequences of false statements fraudulently or recklessly made are strictly construed in the Iowa courts. *Jordan* v. *Nelson,* 178 N. W. 544. We are cited to no Iowa authority to the effect that such a clause applies or affords protection to any except the statements to which it refers. But we assume for present purposes, without deciding, as the Court of Appeals held, that the hedge clause extended its protection to later statements made by respondent like those contained in the circular. But in reaching its conclusion the court overlooked the fact that the documents and statements which followed the submission of the circular to petitioner were in response to a request by petitioner for additional information and contained items of information not found in the circular.

Among them was the December 31, 1929, financial statement of the Long-Bell Lumber Company, the advertising map bearing a legend indicating the city's frontage on the river and the location of the taxing districts within the city limits, other advertising material containing pictures indicating the location of the Long-Bell and other plants within the city limits, and the statement made to petitioner by respondent's sales manager that the city, which was co-extensive with the improvement district, had no funded debt. The court also failed to consider the question whether, under Iowa law, the

hedge clause afforded to respondent protection from untrue statements recklessly made, whether the statements in the circular and others later submitted to petitioner were recklessly made, and whether the hedge clause itself contained statements known to respondent to be untrue and had a material influence in inducing petitioner's purchase of the bonds.

It is obvious that the jury could have found that statements having persuasive influence in promoting the sale of the improvement bonds to the petitioner were: the statement as to the location along that waterfront and within the Improvement District of extensive manufacturing plants which would thus be subject to assessment for payment of the bonds, the statement that the city had no funded indebtedness other than the improvement bonds, and the representations as to the strong financial position of the Long-Bell Lumber Company which was guarantor of payment of the bonds. If, as the jury found, petitioner relied on these representations to its injury, it is immaterial, as appears to be conceded, that petitioner did not make its own investigation to ascertain whether they were true. *Gardner* v. *Trenary*, 65 Iowa 646; 22 N. W. 912; *Creamer* v. *Stevens*, 192 Iowa 920; 185 N. W. 581; *Ford* v. *Ott*, 186 Iowa 820; 173 N. W. 121.

The trial court correctly charged the jury in accordance with the Iowa decisions, in substance, that as a prerequisite to a verdict for petitioner, it must find that the representations in question were known by respondent to be false or were made as true with no reasonable ground for believing them to be true, but that if they were believed by respondent to be true and were made without reckless disregard as to their truth or falsity, and without intention to deceive petitioner, petitioner could not recover. The question of respondent's recklessness was thus submitted to the jury and we think properly so

upon the evidence. *Hanson* v. *Kline,* 136 Iowa 101; 113 N. W. 504; *Davis* v. *Central Land Co.,* 162 Iowa 269; 143 N. W. 1073; *Haigh* v. *White Way Laundry Co.,* 164 Iowa 143; 145 N. W. 473.

Respondent's witness, a vice president in charge of its municipal bond issues, testified that he assembled the data appearing in the circular submitted by respondent to petitioner without his ever having visited the City of Longview and without making any inquiry of the city officials or representatives as to the truth of the matters stated in the circular. So far as appears no such inquiry was made by respondent or in its behalf before the sale of the bonds to petitioner. The witness stated that he had obtained the information from the offices of the Long-Bell Lumber Company at Kansas City and Longview; that he had submitted the circular when prepared to the general counsel of the Long-Bell Lumber Company at Kansas City, who had approved it. Whether counsel had any personal knowledge of the matters stated in the circular, or what he stated to respondent with respect to it, does not appear. The information about the 7¼ mile frontage of the city on the Columbia River and the location of the Long-Bell, Weyerhaeuser and other plants within the limits of the improvement districts was compiled by the witness from advertising copy suggested by the advertising manager of the Long-Bell Lumber Company. His recollection was that some of this information came from an address made "by one of the Long-Bell land agents at Longview."

No testimony was forthcoming to show that any executive officer of the Long-Bell Lumber Company gave assurances of the truth or accuracy of this information, or that any of them believed it to be true. When the witness sought this information in October, 1930, he promptly obtained the correct information from the Long-

view tax authorities. The evidence is conflicting whether this information ever was communicated to petitioner, and if so whether before its October purchase of the bonds. Petitioner's testimony was that it first acquired the information in June, 1931. Two of respondent's vice presidents had visited Longview two or more times in 1922 and 1924 in connection with the purchase by respondent of Long-Bell bond issues. Both testified as witnesses, but neither of them denied knowledge of the location of the corporate limits of the City of Longview and of the mill properties. Another vice president in charge of purchases of municipal issues had made a trip to Longview in 1925 and while there had entered into a contract with the Lumber Company for the purchase from it by respondent of the improvement bonds. He also arranged in that year for the purchase from Long-Bell Lumber Company by respondent of the diking district bonds, already referred to. This vice president, having died, did not testify, but there was testimony by his assistant and successor that the location of the diking district was ascertained by respondent at that time.

The only identified sources of respondent's information as to the location of the city on the river and the location of the manufacturing plants with respect to the taxing districts, were an advertising agent of the Long-Bell Lumber Company, a land agent acting either for the Long-Bell Lumber Company or its subsidiary, and a map with descriptive material printed on it appearing as a part of a published advertisement of the Longview Company, which promoted the real estate enterprise in Longview. None of this information was verified by any responsible official of the Long-Bell Lumber Company nor by any official or representative of the City of Longview, and no such verification appears to have been sought by respondent. We think it was for the jury to say whether statements resting upon such flimsy support,

made as the basis for a public offering of municipal bonds aggregating more than $3,000,000, were recklessly made, or were without reasonable basis for the assertion of their truth to prospective investors.

The court below thought the statement made by respondent's sales manager, despite the outstanding diking district bonds, that the city was without funded debt other than the improvement district bonds, was carelessly made but trivial in its effect in inducing the purchase of the bonds. But we cannot say that the trial court should not have left it to the jury to decide whether this statement was knowingly false or recklessly made, or whether in all the circumstances it materially influenced petitioner's purchase of the bonds. Moreover, we think that in all the circumstances of the case the trial court rightly left it to the jury to say whether in fact respondent in the course of its investigation, through its vice presidents or others, of issues of bonds totalling more than $30,000,000, issued either by the City of Longview or the Long-Bell Lumber Company or bearing its guarantee, became aware of the actual location of the properties in question.

Petitioner also insists that the jury could have found that the hedge clause itself was known by respondent to be untrue when made. The clause declared that the statements contained in the circular "are based on information which we regard as reliable and . . . we ourselves have relied upon them in the purchase of this security." Yet, respondent's vice president in charge of municipal issues, who had prepared the offering circular, testified, without contradiction, "We bought and sold the bonds solely on the guarantee of the Long-Bell Lumber Company paying no attention whatever to the valuation of the lands upon which the assessments were laid." Upon this state of the record the jury could have found that the hedge clause itself was untrue and would mislead

prospective purchasers to the erroneous belief that Halsey, Stuart & Co. regarded the bonds as worthy investments on their merits either independently or in conjunction with the guarantee. It could have found also that its materiality was of added importance in influencing the sale of the bonds in view of the knowledge of respondent, not disclosed to petitioner, that the Long-Bell Lumber Company was already in financial straits.

While it is arguable, as the court below thought, whether in view of all the circumstances petitioner placed more or less reliance upon the obligations attaching to a municipal security on the one hand or upon the guarantee of the Long-Bell Lumber Company on the other, or whether it would have scrutinized more searchingly the guarantee had it known that respondent depended on that alone, these are arguments for the jury and not the court.

The court below held that the failure of respondent to reveal to petitioner its knowledge of the declining financial status of the Long-Bell Lumber Company, which respondent acquired in the early months of 1930, fell short of establishing fraud or breach of legal duty on its part. The court reached this conclusion on the grounds that there was no fiduciary relationship between respondent and petitioner; that the 1929 balance sheet of the Lumber Company was not shown to be an untruthful statement of the financial condition of the Company at that time; that respondent did not seek additional information as to the financial condition of the Company, and if it had done so could readily have ascertained its condition from other sources.

But we think that, under Iowa law, these factors did not, in the circumstances of this case, relieve respondent of the duty to speak. As we have said, petitioner was under no duty to make an independent investigation of the truth of respondent's statements if, as the jury found,

it relied on those statements in the purchase of the bonds. Respondent furnished the balance sheet in response to petitioner's request for information about the Lumber Company after emphasizing to petitioner the Company's guarantee of the improvement bonds and stating "we believe you have before you practically all the data covering this issue of bonds." From the evidence the jury could have found that the balance sheet was submitted to petitioner as one of the bases of the pending negotiation and as a representation, that it disclosed, so far as known to respondent, the financial condition of the Company, that notwithstanding such representation respondent then knew that the Company's financial condition had so steadily and seriously declined after the date of the balance sheet as to impair substantially the value of the guarantee, and that this statement of a half truth had materially assisted in the sale of the bonds to petitioner.

The trial court instructed the jury:

"It is the duty of one selling securities, who attempts to supply a prospective purchaser with facts concerning the issue, not only to state truthfully what he actually tells, but also not to suppress any facts within his knowledge which will materially change or alter the effect of the facts actually stated. To tell less than the whole truth may constitute a false and fraudulent representation. A partial and fragmentary disclosure of certain facts concerning an issue of securities, accompanied by the willful concealment of material facts which change the effect of the facts actually stated, is as much a fraud as an actual positive misrepresentation."

By this instruction and others of like tenor the court left the jury free to apply to the evidence the generally accepted doctrine adopted by the American Law Institute, Restatement of Torts, §§ 529, 551. Section 529 states:

"A statement in a business transaction which, while stating the truth so far as it goes, the maker knows or be-

lieves to be materially misleading because of his failure to state qualifying matter is a fraudulent misrepresentation."

Such a statement of a half truth is as much a misrepresentation as if the facts stated were untrue. The court's charge was in conformity to Iowa law as disclosed by its judicial opinions. See *Howard* v. *McMillen,* 101 Iowa 453; 70 N. W. 623; *Noble* v. *Renner,* 177 Iowa 509; 159 N. W. 214; *Foreman* v. *Dugan,* 205 Iowa 929; 218 N. W. 912. No argument made or authority cited here persuades us that the Supreme Court of Iowa would, upon the evidence presented, apply any different rule. See *Wichita Royalty Co.* v. *City National Bank,* 306 U. S. 103, 107; cf. *West* v. *American Telephone & Telegraph Co.,* 311 U. S. 223.

Respondent has raised numerous other questions which were not considered by the court below. This cause will therefore be reversed and remanded to the Court of Appeals for further proceedings not inconsistent with this opinion.

Reversed.

NATIONAL LABOR RELATIONS BOARD *v.* EXPRESS PUBLISHING CO.

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

No. 442. Argued February 14, 1941.—Decided March 3, 1941.

1. A respondent employer can not attack, as without support in the evidence, findings of the National Labor Relations Board which were the basis of its order and of a judgment sustaining it which the employer has not sought to review. P. 431.
2. Where an employer is found to have refused to bargain collectively in violation of § 8 (5) of the National Labor Relations Act, the Board's order may properly require him to cease and desist from

such refusal in addition to an affirmative requirement that he bargain with his employees' representatives. P. 432.

3. An order of the National Labor Relations Board which, when judicially confirmed, the courts may be called on to enforce by contempt proceedings, must, like the injunction order of a court, state with reasonable specificity the acts which the respondent is to do or refrain from doing. P. 433.
4. The authority conferred on the Board to restrain an unfair labor practice in which the employer is found to have been engaged, does not support an order purporting to restrain him from other unfair labor practices in which he is not found to have been engaged and which are unrelated to the proven unfair labor practice. P. 433.
5. The National Labor Relations Act does not give the Board an authority, which courts can not rightly exercise, to enjoin violations of all the provisions of the statute merely because the violation of one has been found. To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed, or that danger of their commission in the future is to be anticipated from the course of his conduct in the past. P. 437.
6. The order of the Board directing the employer to post notices informing its employees that it will "cease and desist" from refusing to bargain with the authorized representatives of its employees, is modified so as to provide that the posted notices shall state that the employer "will not engage in conduct from which it is ordered to cease and desist." P. 438.

111 F. 2d 588, reversed.

CERTIORARI, 311 U. S. 638, to review a judgment enforcing an order of the National Labor Relations Board, but in part only and with modification.

Mr. Laurence A. Knapp, with whom *Solicitor General Biddle* and *Messrs. Richard H. Demuth, Robert B. Watts,* and *Mortimer B. Wolf* were on the brief, for petitioner.

Mr. Leroy G. Denman for respondent.

Messrs. Arthur E. Pettit and *Roland Obenchain* filed a brief on behalf of the Singer Manufacturing Co., as *amicus curiae,* in support of respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

The National Labor Relations Board ordered respondent affirmatively to bargain collectively with the San Antonio Newspaper Guild, the authorized representative of respondent's employees. In addition it ordered respondent, (1) to "cease and desist" from refusing to bargain collectively with the Guild; (2) to "cease and desist" from "interfering with, restraining or coercing its employees in the exercise of their rights to self-organization," and other rights guaranteed by § 7 of the National Labor Relations Act, 49 Stat. 449; 29 U. S. C. Supp. V, § 151, *et seq.;* (3) to post notices stating, among other things, that respondent will "cease and desist as aforesaid" and will bargain collectively with the organized representative of its employees. On the record before us the question for our decision is whether the provisions of the order which we have enumerated are supported by the Board's finding that the respondent had refused to bargain collectively with the authorized representative of its employees, and had interfered with such bargaining negotiation, and had thereby interfered with the exercise of the rights guaranteed by § 7 of the Act.

The Board issued its complaint charging respondent, a publisher of a newspaper, with refusal to bargain collectively with the Guild as the authorized representative of the employees in respondent's editorial department, and that by such refusal and by statements made by respondent at a meeting of those employees it "did interfere with, restrain and coerce" its employees in the exercise of the rights guaranteed by § 7 of the Act[1] and did

[1] The statements alleged to have been made by officers or agents of respondent were "Existing independent employment relations may be continued by the individual employees or by employees as a group." "No one can compel you to join any organization." And referring to respondent's treatment of its employees, it was alleged

engage in unfair labor practices defined by §§ 8 (1) and 8 (5). The usual proceedings and hearings before the Board resulted in findings by the Board to the effect that although respondent had throughout recognized the organization of respondent's editorial room employees and the Guild as their representative, and had met with the Guild representatives whenever requested for the purpose of discussing the employees' demands, it nevertheless had persistently refused to discuss in detail the proposals of the Guild, to make any counter proposals or to enter into any agreement with it, and had not negotiated in good faith in a genuine effort to compose the differences between employer and employees.

The Board found that respondent had refused to bargain as required by § 8 (5) of the Act. It found that respondent had made the statements charged in the complaint at a meeting of its employees and that these statements were an "interference with the Guild's efforts to negotiate." Treating respondent's action in refusing to bargain and in interfering with the bargaining negotiations as an infringement of all the rights guaranteed to the employees by the Act, it found broadly, in the words of the statute, a violation of § 8 (1) which declares that it is an unfair labor practice for the employer "to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 7." Section 7 provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

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that respondent's officer stated: "Each of you know we were not forced to do this by any labor organization and no labor organization can force us to do these things."

From all this the Board concluded that the "appropriate remedy" was an order directing respondent "upon request, to bargain collectively with the . . . Guild" as the "exclusive representative" of respondent's editorial room employees and "if understandings are reached, to embody such understandings in a signed agreement, if requested to do so by the Guild." Having provided the recommended remedy by the provisions of its order directing the respondent to bargain and to cease and desist from refusing to bargain the Board went further and ordered broadly that respondent should in effect refrain from violating the Act in any manner whatsoever. This it did by paragraph 1 (b) of the order which directed respondent to cease and desist from

"In any manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid and protection, as guaranteed in Section 7 of the Act."

It is this and the provisions of the order other than that part of it directing respondent to bargain which are the subjects of the present controversy.

Upon petition of the Board to enforce the order, the Court of Appeals for the Fifth Circuit struck from it all the provisions except that which directed respondent to bargain with the Guild on request, and to embody any understanding in a signed agreement. For so much of the order as directed the posting of notices the court substituted a requirement that respondent notify the Guild of its willingness to comply with the order as modified and to notify a specified agent of the Board what steps respondent had taken to comply with the order. 111 F. 2d 588. We granted certiorari, 311 U. S. 638, the ques-

tions raised being of importance in the administration of the National Labor Relations Act.

Although respondent has not sought certiorari it seeks to retain such advantages as it may have gained from the modification of the Board's order below, by arguing broadly that the Board's finding of respondent's refusal to bargain is without support in the evidence, which it is said shows only that respondent refused to yield to the Guild demands as it was free to do. But in the absence of a cross-petition for certiorari by respondent that question is not open here. Without the findings relating to respondent's refusal to bargain there was no basis for any order by the Board and we think that the purpose and effect of the judgment sustaining so much of the Board's order as directed that respondent bargain with the Guild was to sustain the findings on which it was based. This appears both from the opinion of the Court of Appeals, the purport of which is that respondent in its negotiations with the Guild had not acted in good faith and so had failed to bargain as the statute requires, and also from the terms of the judgment modifying the Board's order. The judgment affirming the Board's order as modified retained, as the foundation of the judgment, the recital contained in the Board's original order that it was made upon the basis of all the Board's findings. In this state of the record our review is limited to the sufficiency of the Board's findings to support the order.

We conclude also that it is not open to respondent to challenge the judgment below, as it attempts to do, on the ground that the Board's complaint in charging a failure to bargain did not sufficiently inform respondent of the contention that it had failed to bargain in good faith. This is the case both because respondent has sought no review of the judgment below and because it sufficiently appears from the record that in the

course of the hearings before the Board respondent was fully advised of the nature of the Board's contention.

But it is the Board which has brought the judgment below here for review and on it rests the burden of showing in what respects the judgment is erroneous. Cf. *Federal Trade Comm'n* v. *Beech-Nut Co.*, 257 U. S. 441. To sustain that burden the Board insists that all the provisions of its order were lawfully made and that it is entitled to have the order enforced in its entirety. Section 10 (c) of the Act provides that if the Board "upon all the testimony taken" "shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of this Act." The Board, having found in this case that respondent had refused to bargain, that part of its order directing respondent to "cease and desist from refusing to bargain collectively" with the Guild, was in exact compliance with the statute and should have been left undisturbed by the judgment below.

A question of a different nature is presented by paragraph 1 (b) of the order, by which the Board, on the basis of respondent's action in refusing to bargain and its statements interfering with the bargaining negotiations, has directed respondent not to violate "in any manner" the duties imposed on the employer by the statute. Petitioner argues that since respondent's refusal to bargain, which is a violation of § 8 (5), is also a violation of § 8 (1), which in terms incorporates by reference all the rights enumerated in § 7, the Board is not only free to restrain violations like those which respondent has committed, but any other unfair labor

practices of any kind which likewise infringe any of the rights enumerated in § 7, however unrelated those practices may be to the acts of respondent which alone emerged in course of the hearing and which the Board has found.

But we think it does not follow that, because the act of respondent which the Board has found to be an unfair labor practice defined by § 8(5) is also a technical violation of § 8(1), the Board, in the circumstances of this case, is justified in making a blanket order restraining the employer from committing any act in violation of the statute, however unrelated it may be to those charged and found, or that courts are required for the indefinite future to give effect in contempt proceedings to an order of such breadth.

We cannot find such authority or requirement in the carefully chosen language of § 10(c), which directs the Board to state its findings of fact showing the unfair labor practice charged and to order the person accused to "cease and desist from such unfair labor practice," or in § 10(e) of the Act which authorizes the court on application of the Board to enter a "decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board." It is obvious that the order of the Board, which, when judicially confirmed, the courts may be called on to enforce by contempt proceedings, must, like the injunction order of a court, state with reasonable specificity the acts which the respondent is to do or refrain from doing. It would seem equally clear that the authority conferred on the Board to restrain the practice which it has found the employer to have committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct.

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Congress has itself afforded a guide pointing to the appropriate limits of the order which the Board is to make in restraining unfair labor practices. By its definition and classification of unfair labor practices in the statute it has shown that they are not always so similar or related that the commission of one necessarily merits or rightly admits of an order restraining all. Here the whole controversy between respondent and the Guild was with respect to the Guild's request to bargain and respondent's attempt to influence the negotiations and its ultimate refusal to enter into an agreement from all of which the Board inferred the refusal to bargain in good faith. In all other respects respondent has consistently left the Guild and its activities undisturbed. The Board made no finding and there is nothing in the record to suggest that the failure of the bargaining negotiations and all that attended them gave any indication that in the future respondent would engage in all or any of the numerous other unfair labor practices defined by the Act.

Refusal to bargain, defined as an unfair labor practice by § 8 (5), may be, as we think it was here, wholly unrelated to the domination of a labor union or the interference with its formation or administration or financial or other support to it, all of which are defined as unfair labor practices by § 8 (2). Refusal to bargain may be, as we think it was here, wholly unrelated to "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization," all of which are unfair labor practices as defined by § 8 (3). Here the Board made no finding based either on the specific circumstances disclosed by the record or on its own expert judgment of their relation to the policy embodied in § 7, or as to any relationship or probable relationship of respondent's refusal to bargain and the other types of unfair practices some of which are enumer-

ated in § 8. Yet, if the contention which it makes is to be sustained, subsequent violations of § 8 (2) and (3), which are also violations of § 8 (1), may be the subject of a contempt order merely because respondent by the refusal to bargain has violated § 8 (5) which is similarly a violation of § 8 (1).

In view of the authority given to the Board by § 10 (c), carefully restricted to the restraint of such unfair labor practices as the Board has found the employer to have committed, and of the broad language of § 10 (e) authorizing the courts to modify the order of the Board wholly or in part, we can hardly suppose that Congress intended that the Board should make or the court should enforce orders which could not appropriately be made in judicial proceedings. This is the more so because § 10 (a), which authorizes the Board "as hereinafter provided, to prevent any person from engaging in any unfair labor practice," specifically directs that "This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise." In the light of these provisions we think that Congress did not contemplate that the courts should, by contempt proceedings, try alleged violations of the National Labor Relations Act not in controversy and not found by the Board and which are not similar or fairly related to the unfair labor practice which the Board has found.

A federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past. But the mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if

he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged. This Court will strike from an injunction decree restraints upon the commission of unlawful acts which are thus dissociated from those which a defendant has committed. *Swift & Co.* v. *United States,* 196 U. S. 375; *New York, N. H. & H. R. Co.* v. *Interstate Commerce Comm'n,* 200 U. S. 361, 404, and see under the National Labor Relations Act, *National Labor Relations Board* v. *Swift & Co.,* 108 F. 2d 988.

It is a salutary principle that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts. But we think that, without sacrifice of that principle, the National Labor Relations Act does not contemplate that an employer who has unlawfully refused to bargain with his employees shall for the indefinite future, conduct his labor relations at the peril of a summons for contempt on the Board's allegation, for example, that he has discriminated against a labor union in the discharge of an employee, or because his supervisory employees have advised other employees not to join a union. See e. g., *H. J. Heinz Co.* v. *National Labor Relations Board,* 311 U. S. 514.

Having found the acts which constitute the unfair labor practice the Board is free to restrain the practice and other like or related unlawful acts. But as the Court has held in the case of the Federal Trade Commission, see *Federal Trade Comm'n* v. *Beech-Nut Co., supra,* 455, an order not so related should be appropriately restricted on review. The breadth of the order, like the injunction of a court, must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed

by the employer in the past. See *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 308, 309; *Standard Oil Co.* v. *United States*, 221 U. S. 1, 77; *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548; *Local 167* v. *United States*, 291 U. S. 293; *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515, 541, 543, 544. We hold only that the National Labor Relations Act does not give the Board an authority, which courts cannot rightly exercise, to enjoin violations of all the provisions of the statute merely because the violation of one has been found. To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past. That justification is lacking here. To require it is no more onerous or embarrassing to the Board than to a court. And since we are in a field where subtleties of conduct may play no small part, it is appropriate to add that an order of the Board, like the injunction of a court, is not to be evaded by indirections or formal observances which in fact defy it. After an order to bargain collectively in good faith, for example, discriminatory discharge of union members may so affect the bargaining process as to establish a violation of the order.

The Board places strong reliance on *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, and on *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks, supra*, 555, 567, 568, 571, and *Virginian Ry. Co.* v. *System Federation No. 40, supra*, 543, 544. In those cases the cease and desist order and the injunctions were substantially like paragraph 1(b) of the Board's order in the present case. But in them the unfair labor practices did not appear to be isolated acts in violation of the right of self-organization, like the refusal

to bargain here, but the record disclosed persistent attempts by varying methods to interfere with the right of self-organization in circumstances from which the Board or the court found or could have found the threat of continuing and varying efforts to attain the same end in the future.

An appropriate order in the circumstances of the present case would go no further than to restrain respondent from any refusal to bargain and from any other acts in any manner interfering with the Guild's efforts to negotiate. So far as respondent's past conduct may be thought to have had any effect on the rights guaranteed by § 7, such consequences would be effectively prevented by the prohibition of such an order without drawing it so broadly as to forbid all other unrelated unfair labor practices.

Only a word need be said of that part of the Board's order requiring the posting of notices. We have often held that the posting of notices advising the employees of the Board's order and announcing the readiness of the employer to obey it is within the authority conferred on the Board by § 10(c) of the Act "to take such affirmative action . . . as will effectuate the policies" of the Act. See *National Labor Relations Board* v. *Pennsylvania Greyhound Lines,* 303 U. S. 261, 268; *H. J. Heinz Co.* v. *National Labor Relations Board, supra.*

But respondent argues that the authority of the Board does not extend to the requirement, such as was made in this case, that the employer confess violation of the Act by a published announcement that he will "cease and desist" from violating it. See, *National Labor Relations Board* v. *Abell Co.,* 97 F. 2d 951; *Burlington Co.* v. *National Labor Relations Board,* 104 F. 2d 736; *Swift & Co.* v. *National Labor Relations Board,* 106 F. 2d 87; *Art Metals Construction Co.* v. *National Labor Relations Board,* 110 F. 2d 148, 151, 152; *Hartsell Mills Co.* v. *Na-*

tional Labor Relations Board, 111 F. 2d 291, 293. Since the Board has changed its practice and now provides in all orders that the employers' notices shall state "that he will not engage in the conduct from which he is ordered to cease and desist" it consents that the present order be modified accordingly.

What we have said requires a reversal of the judgment below and the reëstablishment of the Board's order with the following exceptions:

Paragraph 1 (b) of the order will be modified so as to require only that respondent shall cease and desist from "In any manner interfering with the efforts of the Guild to bargain collectively with Express Publishing Company, San Antonio, Texas."

Paragraph 2 (b) of the order will be modified by striking from it the words "will cease and desist as aforesaid", and substituting for them the words "will not engage in the conduct from which it is ordered to cease and desist as aforesaid."

Reversed.

MR. JUSTICE DOUGLAS:

I think the cease and desist order should be enforced in full.

Respondent did not object in its answer to the Board's petition before the Circuit Court of Appeals to that portion of the Board's order which the Court now modifies. So far as the briefs disclose it did not make any such objection in the Circuit Court of Appeals. Nor did respondent question the propriety of that provision of the order or challenge the power of the Board to make it either in its brief or in its oral argument here. Any controversy on that issue before this Court is therefore not attributable to respondent. For on the record before us

it must be assumed that respondent wholly acquiesces in that phase of the Board's action. In that posture of the case, it is plain this Court will not customarily raise *sua sponte* objections which respondent did not choose to make. We are, of course, asked to enforce an order of the Board. And I suppose we might refuse to enforce provisions of such an order which are patently *ultra vires,* even though the other party raises no objection but acquiesces in them. But, in my view, this provision of the order is not beyond the power of the Board.

The order as modified restrains respondent from interfering in any manner "with the efforts of the Guild to bargain collectively" with it. But respondent is not restrained from interfering with the employees in the exercise of their rights (a) to self-organization, (b) to form, join, or assist labor organizations, or (c) to engage in concerted activities for the purposes of collective bargaining or other mutual aid and protection. These deletions represent the loss of substantial sanctions—sanctions which the expert administrative agency may well have concluded are basic and essential for protection of the right which this very union has won.

Take the case where an employer is playing ducks and drakes with the National Labor Relations Act. He pays mere lip service to the requirements of the Act while intent on blocking in his plant any effective union action. If that is a faithful representation of his attitude, the mandate of the Act might be wholly frustrated or its enforcement needlessly delayed were the Board merely to order him to cease and desist from interfering "with the efforts" of the union "to bargain collectively." That, without more, might well be wholly ineffective, or so the Board in its discretion might conclude. In fact, it might even be an open invitation to an employer intent on evasion of the spirit and letter of the Act to resort to devious routes to the same end. Employees are dropped—per-

haps the leaders of the union; labor spies are employed; a company union is sponsored and financed; new employees are selected who promise not to join the outside union. The purpose is to thwart any effective action by that union. Such obstructive tactics could go on apace and yet no "efforts" of the union "to bargain collectively" need be denied. The employer could continue the so-called negotiations with the union, perhaps reach at least a tentative agreement with it, and yet in a myriad of ways undermine it if the breadth of the cease and desist order were delimited.

Perhaps this is to conjure up remote and hypothetical situations. Perhaps that is not this case.[1] But I think it is important to remind that we do not sit as an administrative agency with discretion to adjust the remedies accorded by the Act to what we think are the needs of particular cases, with power to write or rewrite administrative orders in light of what we think are the exigencies of specific situations, with the duty to pass on the wisdom of administrative policies. Congress has invested the Board, not us, with discretion to choose and select the remedies necessary or appropriate for the evil at hand.

The Board concluded (so we must presume) that its order directing respondent to bargain collectively with the Guild need be buttressed by broad protective provisions good against any and all methods of evasion. Formal recitals could hardly make that plainer than it is.[2] And clearly those provisions are no broader than

[1] It should, however, be noted that the Board concluded that "the respondent had no intention of negotiating in good faith with the Guild nor of entering into a collective bargaining agreement with it." And the Circuit Court of Appeals observed, ". . . we think there was evidence to support the finding of the Board that respondent had determined in advance never to agree to anything."

[2] In this connection it should be observed that the Board found that respondent had "interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act" by reading to them a statement which "presented a distorted con-

the wide reaches of the controversy disclosed in this record.

Whether the remedy chosen by the Board was reasonably necessary in this case is not for us to determine. Nor is it for us to say what language is adequate to safeguard the labor rights which are in issue. To cut down the language of this order not only substitutes our judgment for that of the Board; it will also result in the creation of a host of uncertainties. The original order makes clear that any attempted evasion, no matter how devious, is banned. As modified the order clearly subtracts from those sanctions. But the precise extent of its dilution remains uncertain. The Board may, of course, in case of future violations institute new administrative proceedings. Yet the method here chosen for settlement of this labor controversy does not promise peace. It invites a prolongation of the dispute which should be deemed to have been settled, with the employer's acquiescence, once and for all. That practical aspect of the matter is of great importance on the merits; and it also emphasizes the seriousness of our intrusion into the administrative domain. See Note (1940) 53 Harv. L. Rev. 472.

MR. JUSTICE BLACK and MR. JUSTICE REED join in this opinion.

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cept" of the employees' rights under the Act. The Circuit Court of Appeals set aside that finding. While the Board did not raise that issue in its petition for certiorari, that episode is nevertheless relevant to the scope of the cease and desist order. If it be assumed, as does the majority, that such a broad order must be founded at least on some evidence that other related unlawful acts "may fairly be anticipated from the defendant's conduct in the past," that episode is of significance. For though it might not of itself support an additional finding of a separate violation of § 8, it certainly is some evidence for the exercise of the Board's expert judgment that the refusal to bargain did not have an improbable relationship to other likely obstructive tactics of a related order.

Counsel for Parties.

MAASS, EXECUTOR, *v.* HIGGINS, COLLECTOR OF INTERNAL REVENUE.*

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

No. 274. Argued February 3, 1941.—Decided March 3, 1941.

1. Where an executor elects, under § 302 (j) of the Revenue Act of 1926, as added by § 202 (a) of the Revenue Act of 1935, to have the estate valued as of one year after death, or to have items of the estate which have been disposed of during the year valued as of the time of disposition, rents, dividends and interest accrued and received between the time of death and the time of such valuation should not be included as part of the value of the gross estate. P. 446.
2. Art. 11, T. R. 80 (1937 ed.), to the contrary, is invalid. P. 446.

111 F. 2d 78; 114 *id.* 1017, reversed.

CERTIORARI, 311 U. S. 626, to review judgments sustaining deficiency assessments of estate taxes. No. 274 was a suit against a Collector to recover an alleged overpayment. For the opinion of the District Court, see 29 F. Supp. 996. The other two cases were decided in the first instance by the Board of Tax Appeals, whose decision, 41 B. T. A. 1178, sustaining the Commissioner was affirmed by the court below on a petition to review it.

Mr. Homer S. Cummings argued the cause, and *Messrs. Wilbur C. Davidson, Herbert H. Maass, David J. Levy,* and *Melville F. Weston* were on the brief, for petitioner in No. 274. *Mr. Rollin Browne,* with whom *Messrs. James D. Ouchterloney* and *George Craven* were on the brief, for petitioners in Nos. 510 and 511.

* Together with No. 510, *Estate of Abendroth et al.* v. *Commissioner of Internal Revenue,* and No. 511, *Estate of Blacque et al.* v. *Commissioner of Internal Revenue,* also on writs of certiorari, 311 U. S. 641, to the Circuit Court of Appeals for the Second Circuit.

Mr. Richard H. Demuth, with whom *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Harry Marselli* were on the brief, for respondents.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

In these cases we must decide whether, where an executor avails himself of the option extended by the estate tax law to value a decedent's gross estate as of one year after the decedent's death, rents, dividends, and interest received and accrued during the year are to be added to the value of the property to which they are attributable and included in the value of the gross estate. The question arises under § 302 (j) of the Revenue Act of 1926 as added by § 202 (a) of the Revenue Act of 1935.[1]

No. 274 is a suit against the Collector to recover an overpayment of tax. The complaint alleged that the decedent died August 30, 1936; that in the estate's return the executors elected to have the value of the gross

[1] The subsection has now been embodied in the Internal Revenue Code as § 811 (j), 53 Stat. 122, 26 U. S. C. 811 (j), and is in part as follows:

"*Optional valuation.* If the executor so elects upon his return . . ., the value of the gross estate shall be determined by valuing all the property included therein on the date of the decedent's death as of the date one year after the decedent's death, except that (1) property included in the gross estate on the date of death and, within one year after the decedent's death, distributed . . . or sold, exchanged, or otherwise disposed of, shall be included at its value as of the time of such distribution, sale, exchange, or other disposition, whichever first occurs, instead of its value as of the date one year after the decedent's death, and (2) any interest or estate which is affected by mere lapse of time shall be included at its value as of the time of death (instead of the later date) with adjustment for any difference in its value as of the later date not due to mere lapse of time. . . ."

estate determined by valuing it as of one year after the decedent's death; that the Commissioner included in the estate a sum which was not in fact the decedent's property at the time of her death but represented income, namely, rents, dividends, and interest earned by the estate subsequent to the decedent's death; that the executors paid the tax and their claim for refund was rejected. The Collector's answer raised no material issue of fact. Each party moved for judgment on the pleadings. The court dismissed the complaint.[2] The Circuit Court of Appeals affirmed, one judge dissenting.[3]

In Nos. 510 and 511, the executor of two decedents who died respectively October 9, 1936, and April 3, 1937, elected in its returns to have the gross estates valued as of one year after death or as of date of disposition. In each case the executor collected interest and dividends upon bonds and stocks forming part of the estate at decedent's death. The sums so collected were not reckoned in fixing the values of the estates, except such portion of them as accrued prior to death. The Commissioner determined deficiencies due to the failure to return them. The Board of Tax Appeals affirmed his action [4] and the Circuit Court of Appeals affirmed the Board's decision.[5]

Although there was no conflict between decisions of Circuit Courts of Appeals,[6] we granted certiorari because of the importance of the question and the number of pending cases in which it is presented.

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[2] 29 F. Supp. 996.

[3] 111 F. 2d 78.

[4] 41 B. T. A. 1178, four members dissenting.

[5] 114 F. 2d 1017.

[6] The District Court for Maryland has decided contrary to the Circuit Court of Appeals for the Second Circuit: *Clark* v. *United States,* 33 F. Supp. 216.

It is agreed that the purpose of subdivision (j) was to mitigate the hardship consequent upon shrinkage in the value of estates during the year following death. Congress enacted it in the light of the fact that, due to such shrinkages, many estates were almost obliterated by the necessity of paying a tax on the value of the assets at the date of decedent's death. About one year after the adoption of the subsection, the Treasury promulgated Art. 11 of Regulations 80 (1937 Ed.) in which it ruled that interest-bearing obligations, such as bonds, embodied two promises, one to pay principal, the other to pay interest, both a part of the gross estate if the obligation was owned by the decedent at his death. It further ruled that in the case of leased real estate two factors were to be considered, the value of the realty and the value of the covenant to pay rent. With respect to stocks, it ruled that the value of the stock and the value of the right to dividends thereon were separable and each constituted an element of value to the decedent. The regulation required that if, during the year subsequent to death, rents, royalties, interest, or dividends were received by the decedent's estate, such portion thereof as had not accrued, or was not attributable to a period, prior to death, should be returned in full and reckoned as part of the gross estate in any case where the executor elected, as permitted by subsection (j), to value the assets as of one year after the decedent's death or as of the date of disposition of any asset. In accordance with the regulation the deficiencies in the present cases were determined.

In the courts below, and before the Board of Tax Appeals, the Government contended that such items of income are in truth payments on account of principal and that, by such payments, the principal is reduced so that, when the capital asset is valued at the end of the period, its true value is not reflected unless there be

added the interest, dividend, or other like payment received by the estate in the interim. In this court, the argument takes a somewhat different form. Reference is made to the fact that, under the option granted, a capital asset is to be valued either at the expiration of the year or at the time of disposition and it is urged that, as respects interest, rent or dividends, a disposition occurs at the date of the receipt of the item. In either aspect the validity of the contention depends upon the theory that, for purposes of estate tax valuation, the asset consists of two elements,—one the right of ownership the other the right to receive the income. It is said that both of these elements enter into the valuation made as of the date of death and if, in the subsequent period, the latter emerges in the shape of a payment, that payment is to be attributable to the income right rather than to the right of ownership of the income producing property.

On the other hand, the petitioners insist that the Government's position is unreal and artificial; that it does not comport either with economic theory or business practice; and that the regulation is an unwarranted extension of the plain meaning of the statute and cannot, therefore, be sustained. We hold that the petitioners are right.

It is not denied that, in common understanding, rents, interest, and dividends are income. Under the revenue acts, if such items are collected by a decedent's estate, the executors are bound to return them and pay tax upon them as income. In the case of a living holder, such receipts are never treated as on account of principal. Nor does the promise to pay interest, rents or dividends either to a living owner of the asset or to his executor after death, which has not been legally separated from the asset of which it is an incident, have any mar-

ket value apart from the asset, or bear any invariable relation to the value of the capital asset.

It is true that a bond embodies two promises, one to pay the principal at maturity, the other to pay interest at intervals until maturity. And the promise to pay interest or rent, or the expectancy of dividends upon stock, the amount of such payments, the past and prospective regularity of the payments, and other elements bearing upon the expectation of the receipt of income affect the value of any income producing property. But these elements are not separately valued in appraising the worth of the asset at any given time. It is the uniform practice to value the asset as an entirety, taking into consideration all the elements that go to give it value in the market.

In the appraisal of a decedent's estate, rent or interest accrued to the date of death is properly treated as a capital asset. So also, on the sale of an interest-bearing security, it is the uniform practice to add to the value of the obligation, as such, accrued interest to the date of sale. Since the statute says that, at the option of the executor, a bond may be valued as of one year subsequent to decedent's death, the natural conclusion is that the usual method of valuation shall be pursued whichever date is selected. The method always adopted for valuation at death is the same used in fixing a sale price; that is, to take the market value of the bond and add accrued interest to the date of transfer, at the rate stipulated in the instrument. It is not believed that Congress, in providing for two dates of valuation, intended that a different method should be followed if one date were chosen rather than the other.

If Congress intended the result for which the Government contends, namely, that a different method of valuation should apply at the end of the one year period than that applicable as of the date of death, it would have

been a simple matter so to state. That Congress had no such intention seems clear from the report of the House Managers on the conference committee report on the bill which embodied the language in question.[7] There an example is given as to how the calculation of value should be made at the end of the year. In this example, appreciation and depreciation in the value of bonds, stocks, and other assets, during the year, are shown but dividends or interest received are not included.

As has been said, the view we take comports with standard business practice; whereas the theory advocated by the Government involves the attribution to interest payments of a quality derived from a refined separation of so-called rights inherent in the ownership of income-producing property. Conceding that the ownership of a bond involves both the right to receive principal and the right to receive income, it is a highly artificial concept that an interest payment is a disposition, *pro tanto,* of the latter right by the owner of the obligation. Moreover, while the Constitution does not forbid double taxation, the intent to impose it upon a given receipt is not presumed. We think that, if it had been intended, Congress unequivocally would have so declared.

Judgments reversed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the view that this question of statutory construction is peculiarly appropriate for administrative interpretation (see Paul, Studies in Federal Taxation (3d series) pp. 423–425) and accordingly that the judgments in these cases should be affirmed for the reasons stated in the opinion of the court below in No. 274, *Saks* v. *Higgins,* 111 F. 2d 78.

[7] H. R. 1885, 74th Cong., 1st Sess., pp. 10–11.

BERRY *v.* UNITED STATES.

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

No. 336. Argued February 4, 1941.—Decided March 3, 1941.

1. In this suit against the United States to recover total permanent disability benefits under policies of War Risk Insurance, *held* that the District Court properly denied the Government's motion for a directed verdict, and that the evidence sustained the verdict for the plaintiff. P. 451.
2. Rule 50 (b) of the Rules of Civil Procedure goes farther than the old practice in that district judges, under certain circumstances, are now expressly declared to have the right (but not the mandatory duty) to enter a judgment contrary to the jury's verdict without granting a new trial; but it has not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact. P. 452.
3. The jury properly could have found from the evidence in this case that, as a result of injuries suffered in the World War, and while his policies of War Risk Insurance were in force, the plaintiff became totally and permanently disabled within the meaning of the policies and has since remained so, in that he has not since been able, and will not again be able, to work with any reasonable regularity at any substantially gainful employment. P. 453.

   To justify a finding of total and permanent disability, it is not necessary that the insured be bedridden and helpless, or that he should not have undertaken any work of any kind. P. 455.
4. That thirteen years elapsed before suit was brought in this case does not bar recovery, but is a circumstance to be weighed by the jury with the other evidence. P. 456.

111 F. 2d 615, reversed.

CERTIORARI, 311 U. S. 633, to review the reversal of a judgment for the plaintiff in a suit upon policies of War Risk Insurance.

Messrs. Ernest W. Gibson, Jr. and *C. L. Dawson* for petitioner.

Mr. Warner W. Gardner, with whom *Solicitor General Biddle* and *Messrs. Julius C. Martin* and *Wilbur C. Pickett* were on the brief, for the United States.

MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioner sued the United States in a federal district court, alleging that he became totally and permanently disabled prior to December 1, 1919, while his policies of War Risk Insurance were in force and effect.[1] Trial was had and evidence heard. The trial judge declined to grant the government's request for a directed verdict in its favor. The jury found for petitioner. The government, without having made any motion either for a new trial or for judgment notwithstanding the verdict, took the case to the Circuit Court of Appeals. Upon review that court held plaintiff had not produced sufficient evidence to justify submission of the cause to the jury. The court did not, however, remand the case to the District Court for further proceedings, but reversed the judgment and dismissed the cause of action.[2]

The petition for certiorari presented two questions: First, whether there was sufficient evidence to sustain the verdict; Second, whether the Circuit Court of Appeals erred in dismissing the cause instead of remanding it for a new trial. This second question invoked our juris-

[1] Though petitioner alleged that his policies were in effect until December 1, 1919, in reality it was necessary for him to show that he became totally and permanently disabled prior to September 1, 1919. This variance in dates is not material, however.

[2] 111 F. 2d 615.

diction in order to obtain an authoritative construction of subdivision (b) of Rule 50 of the Rules of Civil Procedure. In part that subdivision provides: "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; . . ." Since the government made no such motion within 10 days after the verdict, petitioner urged here that the Circuit Court of Appeals was without power to dismiss the cause but should have remanded it for a new trial. But while this important point, upon which the Circuit Courts of Appeals are not in complete agreement,[3] is one of the two questions upon which the petition for certiorari rested, there is no occasion for us to reach it here. For we find that there was sufficient evidence to sustain the jury's verdict, and we hold that the District Court properly denied the government's motion for a directed verdict in its favor.

Rule 50 (b) goes further than the old practice[4] in that district judges, under certain circumstances, are now expressly declared to have the right (but not the mandatory duty) to enter a judgment contrary to the jury's verdict

[3] Compare *Conway* v. *O'Brien*, 111 F. 2d 611, 613 (C. C. A. 2d), reversed, *post*, p. 492, with *Pruitt* v. *Hardware Dealers Mutual Fire Ins. Co.*, 112 F. 2d 140, 143 (C. C. A. 5th). And see *United States* v. *Halliday*, 116 F. 2d 812 (C. C. A. 4th).

[4] Compare *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364, with *Baltimore & Carolina Line* v. *Redman*, 295 U. S. 654.

without granting a new trial.[5] But that rule has not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact[6]—a jury being the constitutional tribunal provided for trying facts in courts of law. Here, although there was evidence from which a jury could have reached a contrary conclusion, there was testimony from which a jury could have found these to be the facts: Petitioner suffered injuries on June 16, 1918, while serving in the front lines in France. On that date, in the early morning hours, bits of shrapnel wounded him in the right arm, right shoulder, right hip and in front of the right ear. He was helped to a dugout by another soldier. There he found others who were wounded. About fifteen minutes after he arrived at the dugout, another shell struck, immediately in front of the dugout door. All the nine or ten men present were either killed outright or were so badly wounded that they were unable to leave. Petitioner's left leg was practically cut off below the knee. He twisted a part of his wrapped leggings around his wound to stop the bleeding. About six and one-half hours later he was taken on a stretcher and carried back to the First Aid Station. There his wounds were temporarily dressed. After another six or seven hours, he was carried to the hospital. Shortly thereafter an operation followed and his left leg was removed. He underwent several operations in the

[5] The relevant portion of the rule provides: "If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed."

[6] See *Gunning* v. *Cooley*, 281 U. S. 90, 94; *Richmond & Danville R. Co.* v. *Powers*, 149 U. S. 43, 45; *Texas & Pacific Ry. Co.* v. *Cox*, 145 U. S. 593, 606; *Railroad Co.* v. *Stout*, 17 Wall. 657, 663.

hospitals in France, leaving that country for the United States in August of 1918 and arriving in Boston on September 7. He was treated in hospitals in the United States until about Christmas, 1918. During the years between the time of the injury and the time of the trial, petitioner suffered repeatedly from abscesses and blisters on the stump of his left leg, and his right leg has caused him inconvenience, suffering and disability. In addition his nervous system has shown serious and continuous impairment, so much so that the Circuit Court of Appeals properly said, "Certain it is that he was neurasthenic, and had uncontrollable accesses of terror at any explosion, or even during thunderstorms." There has never been a time since his injuries when he could do work which required him to stand upon or use the stump without having it blistered, chafed or abscessed within two days. Several physicians who examined and treated him through the years were of opinion that he would never be able to work continuously at a gainful occupation because of his condition, and that he had never been able so to work since the wound was received. The government gave him vocational training both in photography and in automobile repair work. He tried both, but from his own evidence, corroborated by that of his employers in many instances, the jury could have found that in spite of his determination to succeed, he was physically unable to do so. He bought a farm. He was compelled to depend on the work of his own family and relatives in this undertaking, but the venture was a failure and he lost the farm. He tried to operate a garage in partnership with another. In this, too, he was unsuccessful, and the jury could have found that his failure was attributable to his physical disabilities. For a time he was engaged as a salesman of aluminum cooking utensils. But here again the jury could have found that his contribution to the venture was small. For, as else-

where, there was testimony tending to show that it was a member of his family, in this instance his wife, whose labors made it possible for this activity to be carried on. Taking the evidence as a whole, the jurors, who heard the witnesses and personally examined the petitioner's wounds, could fairly have reached the conclusion that since his injuries petitioner never had been able, and would not be able thereafter, to work with any reasonable degree of regularity at any substantially gainful employment. The trial judge, who had the same opportunity as the jury to hear the witnesses, denied the government's motion for a directed verdict and correctly instructed the jury what they must find from the evidence in order to return a verdict for petitioner.[7]

It was not necessary that petitioner be bedridden, wholly helpless, or that he should abandon every possible effort to work in order for the jury to find that he was totally and permanently disabled.[8] It cannot be doubted that if petitioner had refrained from trying to

[7] The government expressed satisfaction with the trial judge's charge, which, as to total and permanent disability, contained this statement: "A total disability is any physical or nervous injury which makes it impossible for a person to follow continuously a substantially gainful occupation at any kind of work for which he was competent or qualified, physically and mentally, or for which he could qualify himself by a reasonable amount of study and training. The word 'total' as applied to 'disability' does not necessarily mean incapacitated to do any work at all. The word 'continuously' means with reasonable regularity. It does not preclude periods of disability which are ordinarily incident to activities of persons in generally sound health, for nearly all persons are at times temporarily incapacitated by injuries, or poor health, from carrying on their occupations. If Berry was able to follow a gainful occupation only spasmodically, with frequent interruptions, due to his injuries, and his shock, he was totally disabled. A disability is permanent when it is of such a nature that it is reasonably certain it will continue throughout a person's lifetime."

[8] *Lumbra* v. *United States,* 290 U. S. 551, 559–560.

do any work at all, and the same evidence of physical impairment which appears in this record had been offered, a jury could have properly found him totally and permanently disabled. And the jury could have found that his efforts to work—all of which sooner or later resulted in failure—were made not because of his ability to work but because of his unwillingness to live a life of idleness, even though totally and permanently disabled within the meaning of his policies.[9] Nor does the fact that he waited thirteen years before bringing suit stand as an insuperable barrier to his recovery. His case was not barred by any statute of limitations. Whatever weight the jury should have given to the circumstance of petitioner's delay in filing his claim, that weight was still for their consideration in connection with all the other evidence in the case.

There was evidence from which a jury could reach the conclusion that petitioner was totally and permanently disabled. That was enough. The judgment of the Circuit Court of Appeals is reversed, and that of the District Court is affirmed.

Reversed.

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[9] See *United States* v. *Rice*, 72 F. 2d 676, 677; *Nicolay* v. *United States*, 51 F. 2d 170, 173; *United States* v. *Lawson*, 50 F. 2d 646, 651; *United States* v. *Godfrey*, 47 F. 2d 126, 127; *United States* v. *Phillips*, 44 F. 2d 689, 691.

FASHION ORIGINATORS' GUILD OF AMERICA, INC., ET AL. *v.* FEDERAL TRADE COMMISSION.

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

No. 537. Argued February 10, 1941.—Decided March 3, 1941.

A combination of manufacturers of women's garments and manufacturers of textiles used in their making, who claimed that the designs of their products, though not protected by patent or copyright, were original and distinctive, sought to suppress competition by others who copied their designs and sold at generally lower prices. To this end, those in the combination systematically registered their designs and refused all sales to manufacturers and retailers of garments who dealt in the copies or would not agree not to sell them. To aid in effectuating the boycott, the combination employed "shoppers" to visit retailers' stores, established tribunals to determine whether garments were copies of designs registered, audited the books of its members, fined them for violations of its regulations, etc. In view of these things, and the power of the combination and its effect upon sales in interstate commerce, the Federal Trade Commission concluded that the practices of the combination constituted unfair methods of competition tending to monopoly and issued a "cease and desist" order. *Held:*

1. That the conclusion of the Commission was based on adequate and unchallenged findings and was correct. P. 463.

2. Where the purpose and practice of a combination run counter to the public policy declared in the Sherman and Clayton Acts, the Federal Trade Commission has the power to suppress it as an unfair method of competition. P. 463.

3. A practice short of a complete monopoly but which tends to create a monopoly and to deprive the public of the advantages from free competition in interstate trade, offends the policy of the Sherman Act. P. 466.

4. A combination may be contrary to the policy of the Sherman and Clayton Acts though it does not tend to fix or regulate prices, parcel out or limit production, or bring about a deterioration in quality. P. 466.

It was the object of the Federal Trade Commission Act to reach in their incipiency combinations which could lead to these and other trade restraints and practices deemed undesirable.

5. Since the purpose and object of this combination, its potential power, its tendency to monopoly, the coercion it could and did practice upon a rival method of competition, all brought it within the prohibition declared by the Sherman and Clayton Acts, it was not erroneous to exclude evidence offered to prove that the practices were reasonable and necessary for the protection of manufacturer, laborer, retailer and consumer against the evils growing from the pirating of original designs. P. 467.

6. Whether or not systematic copying of the dress designs by trade competitors is in itself tortious is a question of state law; but even if tortious under the laws of all the States, that circumstance would not justify a combination to suppress it by regulating and restraining interstate commerce in violation of federal law. P. 468.

114 F. 2d 80, affirmed.

CERTIORARI, 311 U. S. 641, to review the affirmance by the court below of a "cease and desist" order of the Federal Trade Commission.

Mr. Charles B. Rugg, with whom *Messrs. Milton C. Weisman, Archibald Cox,* and *Melvin A. Albert* were on the brief, for petitioners.

The petitioners' program does not violate § 5 because its sole consequence is to curb the unlawful competition of the style pirate. "Style piracy" is unfair competition in which the copyist has no right to engage. *International News Service Co.* v. *Associated Press,* 248 U. S. 215; *Schechter Corp.* v. *United States,* 295 U. S. 495, 532; Callman, Style & Design Piracy, 22 Journal of Patent Office, 578, 586; 47 Harv. L. Rev. 1419, 1426–1427; Note (1930), 14 Minn. L. Rev. 537. Cf. Rogers, Unfair Competition, 17 Mich. L. Rev. 490; Handler, Unfair Competition, 21 Iowa L. Rev. 175, 191.

"Unfair competition" is essentially a branch of the law of torts. A man's interest in his business is a subject of

protection against unlawful invasion by others. Indeed, equity calls it a property right and will enjoin unlawful interferences. *Truax* v. *Corrigan,* 257 U. S. 312, 327; *Pierce* v. *Society of Sisters,* 268 U. S. 510; *Mosler Safe Co.* v. *Ely Norris Safe Co.,* 273 U. S. 132; *The Case of the Schoolmasters,* Y. B. 11 Hen. 4, f. 47, pl. 21. The injured trader has a remedy whenever he shows that the other invaded his interest in his business by lessening his prospect of customers by an act which society condemns.

Clear and immediate injury to the design originator's business flows from the conduct of the copyist. The conduct of the copyist is "wrongful," that is to say, it is condemned by both the courts and society. *Montegut* v. *Hickson,* 178 App. Div. 94; *Margolis* v. *National Bellas Hess Co.,* 139 Misc. 738. He systematically, mechanically and continuously appropriates the fruits of the creator's skill, labor and expense. He is not like the wide-awake competitor who espies and fills a particular demand that another may first have noticed.

The Federal Trade Commission itself has specifically condemned the piracy of patterns, styles and designs. In many industries it has accepted rules proposed in trade practice conferences which unequivocally condemned the practice of copying competitors' creations.

The sole consequence of the FOGA program is to limit the unlawful activities of the style pirates and of the retailers who join them.

A method of competition which has no effect except to limit the unfair competition of others is not a violation of § 5. *Federal Trade Comm'n* v. *Butterick Pub. Co.,* 85 F. 2d 522.

Section 5 of the Act can not be supposed to have barred all self-help to a trader.

The Act does not protect from interference trade which has no right to exist. The Act is intended also to pro-

tect the public. See *Federal Trade Comm'n* v. *Royal Milling Co.*, 288 U. S. 212; *Federal Trade Comm'n* v. *R. F. Keppel & Bro.*, 291 U. S. 304. Congress did not intend to vest the Federal Trade Commission with jurisdiction to prevent methods of competition which have no consequences except to limit those activities of others which are unfair and which equity would forbid.

The Federal Trade Commission erred in refusing to hear evidence of the economic justification for the FOGA program. The proffered evidence was relevant and material to a determination of whether the petitioners were violating the Sherman Act. It was relevant and material to a determination of whether the petitioners' conduct was tortious at common law.

Solicitor General Biddle, with whom *Assistant Attorney General Arnold* and *Messrs. James C. Wilson* and *Wilber Stammler* were on the brief, for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

The Circuit Court of Appeals, with modifications not here challenged, affirmed a Federal Trade Commission decree ordering petitioners to cease and desist from certain practices found to have been done in combination and to constitute "unfair methods of competition" tending to monopoly.[1] Determination of the correctness of the decision below requires consideration of the Sherman, Clayton, and Federal Trade Commission Acts.[2]

[1] 114 F. 2d 80. Because of inconsistency between the holding below and that of the First Circuit Court of Appeals in *Wm. Filene's Sons Co.* v. *Fashion Originators' Guild of America*, 90 F. 2d 556, we granted certiorari. 311 U. S. 641.

[2] 26 Stat. 209, 15 U. S. C. § 1 *et seq.*; 38 Stat. 730, 15 U. S. C. § 12 *et seq.*; 38 Stat. 717, 15 U. S. C. § 41 *et seq.*

Some of the members of the combination design, manufacture, sell and distribute women's garments—chiefly dresses. Others are manufacturers, converters or dyers of textiles from which these garments are made. Fashion Originators' Guild of America (FOGA), an organization controlled by these groups, is the instrument through which petitioners work to accomplish the purposes condemned by the Commission. The garment manufacturers claim to be creators of original and distinctive designs of fashionable clothes for women, and the textile manufacturers claim to be creators of similar original fabric designs. After these designs enter the channels of trade, other manufacturers systematically make and sell copies of them, the copies usually selling at prices lower than the garments copied. Petitioners call this practice of copying unethical and immoral, and give it the name of "style piracy." And although they admit that their "original creations" are neither copyrighted nor patented, and indeed assert that existing legislation affords them no protection against copyists, they nevertheless urge that sale of copied designs constitutes an unfair trade practice and a tortious invasion of their rights. Because of these alleged wrongs, petitioners, while continuing to compete with one another in many respects, combined among themselves to combat and, if possible, destroy all competition from the sale of garments which are copies of their "original creations." They admit that to destroy such competition they have in combination purposely boycotted and declined to sell their products to retailers who follow a policy of selling garments copied by other manufacturers from designs put out by Guild members. As a result of their efforts, approximately 12,000 retailers throughout the country have signed agreements to "coöperate" with the Guild's boycott program, but more than half of these signed the

agreements only because constrained by threats that Guild members would not sell to retailers who failed to yield to their demands—threats that have been carried out by the Guild practice of placing on red cards the names of non-coöperators (to whom no sales are to be made), placing on white cards the names of coöperators (to whom sales are to be made), and then distributing both sets of cards to the manufacturers.

The one hundred and seventy-six manufacturers of women's garments who are members of the Guild occupy a commanding position in their line of business. In 1936, they sold in the United States more than 38% of all women's garments wholesaling at $6.75 and up, and more than 60% of those at $10.75 and above. The power of the combination is great; competition and the demand of the consuming public make it necessary for most retail dealers to stock some of the products of these manufacturers. And the power of the combination is made even greater by reason of the affiliation of some members of the National Federation of Textiles, Inc.—that being an organization composed of about one hundred textile manufacturers, converters, dyers, and printers of silk and rayon used in making women's garments. Those members of the Federation who are affiliated with the Guild have agreed to sell their products only to those garment manufacturers who have in turn agreed to sell only to coöperating retailers.

The Guild maintains a Design Registration Bureau for garments, and the Textile Federation maintains a similar Bureau for textiles. The Guild employs "shoppers" to visit the stores of both coöperating and non-coöperating retailers, "for the purpose of examining their stocks, to determine and report as to whether they contain . . . copies of registered designs . . ." An elaborate system of trial and appellate tribunals exists, for the determination of whether a given garment is in fact a copy of

a Guild member's design. In order to assure the success of its plan of registration and restraint, and to ascertain whether Guild regulations are being violated, the Guild audits its members' books. And if violations of Guild requirements are discovered, as, for example, sales to red-carded retailers, the violators are subject to heavy fines.[3]

In addition to the elements of the agreement set out above, all of which relate more or less closely to competition by so-called style copyists, the Guild has undertaken to do many things apparently independent of and distinct from the fight against copying. Among them are the following: the combination prohibits its members from participating in retail advertising; regulates the discount they may allow; prohibits their selling at retail; coöperates with local guilds in regulating days upon which special sales shall be held; prohibits its members from selling women's garments to persons who conduct businesses in residences, residential quarters, hotels or apartment houses; and denies the benefits of membership to retailers who participate with dress manufacturers in promoting fashion shows unless the merchandise used is actually purchased and delivered.

If the purpose and practice of the combination of garment manufacturers and their affiliates runs counter to the public policy declared in the Sherman and Clayton Acts, the Federal Trade Commission has the power to suppress it as an unfair method of competition.[4] From

[3] In one instance a fine of $1500 was imposed, and the Guild notified its membership that a fine of $5000 would be assessed in case of future violation.

[4] *Federal Trade Comm'n* v. *Beech-Nut Packing Co.*, 257 U. S. 441, 453–455. See 26 Stat. 209, 15 U. S. C. § 1 *et seq.;* 38 Stat. 730, 15 U. S. C. § 12 *et seq.;* 38 Stat. 717, 15 U. S. C. § 41 *et seq.* By 38 Stat. 734, 15 U. S. C. § 21, the Federal Trade Commission is expressly given authority to enforce the Clayton Act.

its findings the Commission concluded that the petitioners, "pursuant to understandings, arrangements, agreements, combinations and conspiracies entered into jointly and severally" had prevented sales in interstate commerce, had "substantially lessened, hindered and suppressed" competition, and had tended "to create in themselves a monopoly." And paragraph 3 of the Clayton Act (15 U. S. C. § 14) declares "It shall be unlawful for any person engaged in commerce, . . . to . . . make a sale or contract for sale of goods, . . . on the condition, agreement, or understanding that the . . . purchaser thereof shall not use or deal in the goods, . . . of a competitor or competitors of the . . . seller, where the effect of such . . . sale, or contract for sale . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce." The relevance of this section of the Clayton Act to petitioners' scheme is shown by the fact that the scheme is bottomed upon a system of sale under which (1) textiles shall be sold to garment manufacturers only upon the condition and understanding that the buyers will not use or deal in textiles which are copied from the designs of textile manufacturing Guild members; (2) garment manufacturers shall sell to retailers only upon the condition and understanding that the retailers shall not use or deal in such copied designs. And the Federal Trade Commission concluded in the language of the Clayton Act that these understandings substantially lessened competition and tended to create a monopoly. We hold that the Commission, upon adequate and unchallenged findings, correctly concluded that this practice constituted an unfair method of competition.[5]

[5] Cf. *Federal Trade Comm'n* v. *R. F. Keppel & Bro.*, 291 U. S. 304, 314; *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 357.

Not only does the plan in the respects above discussed thus conflict with the principles of the Clayton Act; the findings of the Commission bring petitioners' combination in its entirety well within the inhibition of the policies declared by the Sherman Act itself. Section 1 of that Act makes illegal every contract, combination or conspiracy in restraint of trade or commerce among the several states; § 2 makes illegal every combination or conspiracy which monopolizes or attempts to monopolize any part of that trade or commerce. Under the Sherman Act "competition not combination, should be the law of trade." *National Cotton Oil Co.* v. *Texas,* 197 U. S. 115, 129. And among the many respects in which the Guild's plan runs contrary to the policy of the Sherman Act are these: it narrows the outlets to which garment and textile manufacturers can sell and the sources from which retailers can buy (*Montague & Co.* v. *Lowry,* 193 U. S. 38, 45; *Standard Sanitary Mfg. Co.* v. *United States,* 226 U. S. 20, 48–49); subjects all retailers and manufacturers who decline to comply with the Guild's program to an organized boycott (*Eastern States Retail Lumber Dealers' Assn.* v. *United States,* 234 U. S. 600, 609–611); takes away the freedom of action of members by requiring each to reveal to the Guild the intimate details of their individual affairs (*United States* v. *American Linseed Oil Co.,* 262 U. S. 371, 389); and has both as its necessary tendency and as its purpose and effect the direct suppression of competition from the sale of unregistered textiles and copied designs (*United States* v. *American Linseed Oil Co., supra,* at 389). In addition to all this, the combination is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus "trenches upon the power of the national legislature and violates the statute."

Addyston Pipe & Steel Co. v. *United States,* 175 U. S. 211, 242.

Nor is it determinative in considering the policy of the Sherman Act that petitioners may not yet have achieved a complete monopoly. For "it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition." *United States* v. *E. C. Knight Co.,* 156 U. S. 1, 16; *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, 237. It was, in fact, one of the hopes of those who sponsored the Federal Trade Commission Act that its effect might be prophylactic and that through it attempts to bring about complete monopolization of an industry might be stopped in their incipiency.[6]

Petitioners, however, argue that the combination cannot be contrary to the policy of the Sherman and Clayton Acts, since the Federal Trade Commission did not find that the combination fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality. But action falling into these three categories does not exhaust the types of conduct banned by the Sherman and Clayton Acts. And as previously pointed out, it was the object of the Federal Trade Commission Act to reach not merely in their fruition but also in their incipiency combinations which could lead to these and other trade restraints and practices deemed undesirable. In this case, the Commission found that the combination exercised sufficient control and power in the women's garments and textile businesses "to exclude from the industry those manufacturers and distributors who do not conform to the rules and regulations of said respondents, and thus tend to

[6] *Federal Trade Comm'n* v. *Raladam Co.,* 283 U. S. 643, 647. And see remarks of Senator Cummins, Chairman of the Committee which reported the bill, 51 Cong. Rec. 11455, quoted by Brandeis, J., in *Federal Trade Comm'n* v. *Gratz,* 253 U. S. 421, 435.

create in themselves a monopoly in the said industries." While a conspiracy to fix prices is illegal, an intent to increase prices is not an ever-present essential of conduct amounting to a violation of the policy of the Sherman and Clayton Acts; a monopoly contrary to their policies can exist even though a combination may temporarily or even permanently reduce the price of the articles manufactured or sold. For as this Court has said, "Trade or commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of such a class, and the absorption of control over one commodity by an all-powerful combination of capital." [7]

But petitioners further argue that their boycott and restraint of interstate trade is not within the ban of the policies of the Sherman and Clayton Acts because "the practices of FOGA were reasonable and necessary to protect the manufacturer, laborer, retailer and consumer against the devastating evils growing from the pirating of original designs and had in fact benefited all four." The Commission declined to hear much of the evidence that petitioners desired to offer on this subject. As we have pointed out, however, the aim of petitioners' combination was the intentional destruction of one type of manufacture and sale which competed with Guild members. The purpose and object of this combination, its potential power, its tendency to monopoly, the coercion it could and did practice upon a rival method of competition, all brought it within the policy of the prohibition

[7] *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 323.

declared by the Sherman and Clayton Acts. For this reason, the principles announced in *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, and *Sugar Institute* v. *United States,* 297 U. S. 553, have no application here. Under these circumstances it was not error to refuse to hear the evidence offered, for the reasonableness of the methods pursued by the combination to accomplish its unlawful object is no more material than would be the reasonableness of the prices fixed by unlawful combination. Cf. *Thomsen* v. *Cayser,* 243 U. S. 66, 85; *United States* v. *Trenton Potteries Co.,* 273 U. S. 392, 398; *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 212–224. Nor can the unlawful combination be justified upon the argument that systematic copying of dress designs is itself tortious, or should now be declared so by us. In the first place, whether or not given conduct is tortious is a question of state law, under our decision in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64. In the second place, even if copying were an acknowledged tort under the law of every state, that situation would not justify petitioners in combining together to regulate and restrain interstate commerce in violation of federal law. And for these same reasons, the principles declared in *International News Service* v. *Associated Press,* 248 U. S. 215, cannot serve to legalize petitioners' unlawful combination. The decision below is accordingly

Affirmed.

MILLINERY CREATOR'S GUILD, INC. (FORMERLY MILLINERY QUALITY GUILD, INC.), ET AL. *v.* FEDERAL TRADE COMMISSION.

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

No. 251. Argued February 7, 10, 1941.—Decided March 3, 1941.

Decided upon the authority of *Fashion Originators' Guild of America, Inc.* v. *Federal Trade Commission, ante,* p. 457. P. 472.
109 F. 2d 175, affirmed.

CERTIORARI, 311 U. S. 625, to review the affirmance by the court below of a cease and desist order of the Federal Trade Commission.

Mr. Lowell M. Birrell, with whom *Mr. Charles A. Van Patten* was on the brief, for petitioners.

It is not the plan of the Guild, but "design piracy" itself, which is unfair competition. *International News Service* v. *Associated Press,* 248 U. S. 215; *Wm. Filene's Sons Co.* v. *Fashion Originators' Guild,* 90 F. 2d 556; Callman, Style & Design Piracy Journal of U. S. Patent Office Soc., Aug. 1940, Vol. XXII, pp. 557, 580, 583; XX Boston Law Rev. 365, reprinted in N. Y. Law Journal of May 4 and 6, 1940; *Dutton & Co.* v. *Cupples,* 117 App. Div. 172; *Wolfenstein* v. *Fashion Originators' Guild,* 244 App. Div. 656. See also *National Tel. News* v. *Western Union,* 119 F. 294; *Associated Press* v. *KVOS, Inc.,* 80 F. 2d 575, 299 U. S. 269; *Pittsburgh Athletic Co.* v. *K. Q. V.,* 24 F. Supp. 490; *Fanotopia, Ltd.* v. *Bradley,* 171 F. 951; *Twentieth Century Sporting Club* v. *Transradio Press Service,* 165 Misc. 71; and *Fisher* v. *Star Co.,* 231 N. Y. 414.

The Federal Trade Commission Act simply declares unlawful, unfair methods of competition. As the sole purpose of the plan of the Guild is to combat a practice

which the Commission itself has condemned as unfair and which was also condemned as unfair in some seventeen codes under N. R. A., it is difficult to see how the plan could amount to a violation of the Federal Trade Commission Act.

The sole reason assigned by the court below was that the plan was said to violate the Sherman Act. Virtually any contract is in some respect a restraint of trade, *Board of Trade* v. *U. S.*, 246 U. S. 231, 238, and yet not all agreements between two or more parties are within the prohibition of the Sherman Act. See *Apex Co.* v. *Leader*, 310 U. S. 469. A proper analysis of the question is, therefore, this: Does the plan present any of the evils which the Sherman Act was designed to prevent? The answer is clearly, no.

The plan does not contemplate price-fixing. The mere hope for fairer price levels through voluntary regulation does not render the regulation unlawful; and this Court has likewise encouraged business men to "clean house" without recourse to the courts. *Sugar Institute* v. *United States*, 297 U. S. 553, 597–598; *United States* v. *Socony Vacuum Oil Co.*, 310 U. S. 150, 215; *Appalachian Coals* v. *United States*, 288 U. S. 344; *Anderson* v. *United States*, 171 U. S. 604; *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238; *Cement Mfrs. Protective Assn.* v. *United States*, 268 U. S. 588; *Maple Flooring Assn.* v. *United States*, 268 U. S. 563; *National Assn. of Window Glass Mfrs.* v. *United States*, 263 U. S. 403. *Wolfenstein* v. *Fashion Originators' Guild*, 244 App. Div. 656. Nor is any other factor of illegal restraint present in this situation.

Finally, the plan shows no likelihood of resulting in deterioration of quality. In fact, quite the reverse may be expected. Johnston & Fitch, N. R. A. Work Materials Div. (1936) Bulletin No. 52, pp. 199–200, and Worthy,

N. R. A. Work Materials Div. (1936) Bulletin No. 53. Nystrom, Fashion Merchandising, p. 223.

The plan is not monopolistic in character. There is no attempt to obtain the exclusive right or power to sell millinery in any market or part of a market. There is no attempt to concentrate the millinery industry or any part of it in the hands of a few. Everyone, whether a member of the Guild or not, may obtain the protection it affords. Anyone who can design a hat may compete for the common prize; and they do compete vigorously. All that the Guild asks is that they compete by their own skill and organization rather than by merely appropriating the skill and organization of others. XX Boston Law Rev. 365.

The record shows no tendency to crowd anyone out of the industry. Our clients merely attempt to see to it that their own designs, and those of firms registering with them, be not filched and thereby ruined and that their competitors enjoy no unfair and unearned advantage.

Solicitor General Biddle, with whom *Assistant Attorney General Arnold* and *Messrs. Charles H. Weston* and *W. T. Kelley* were on the brief, for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

This case presents virtually the same issues as *Fashion Originators' Guild of America* v. *Federal Trade Comm'n, ante,* p. 457. Here, as in that case, the Circuit Court of Appeals affirmed a Federal Trade Commission decree ordering the petitioners to cease and desist from certain practices found to have been done in combination and to constitute "unfair methods of competition" tending to monopoly.[1]

[1] 109 F. 2d 175.

The members of the Guild involved in this case are designers and manufacturers of women's hats. Their Guild operates a plan modelled after that of the Fashion Originators' Guild of America, Inc.

It was stipulated by the parties that "The capacity, tendency, purpose, and result of the plan . . . and the acts and practices performed thereunder . . . have been, and now are, to restrain commerce by eliminating manufacturers of stylish hats . . . as to the outlets of their products and by limiting the retail dealers . . . as to their source of supply, and to deprive the public of the benefits, if any, of competition as to price or otherwise among retailers of stylish hats in this respect . . ." Pursuant to the evidence and to the stipulation containing this statement, the Commission found that the effect of the plan was "unduly to hinder competition and to create monopoly in the sale of women's hats in interstate commerce."

The respects in which the plan of the Millinery Creator's Guild differs from that of the Fashion Originators' Guild are not material, and need not be set out in detail. Nor need the findings of the Commission be enumerated here. The Commission did find that the Millinery Creator's Guild had tended to hinder competition and create monopoly "By depriving the public of the benefits of normal price competition among retailers of stylish hats for women," a finding not made in the other case, but the presence or absence of such a finding is not determinative here. On the authority of *Fashion Originators' Guild of America* v. *Federal Trade Comm'n,* the decision below is

Affirmed.

EDWARDS *v.* UNITED STATES.

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

No. 377. Argued February 12, 1941.—Decided March 3, 1941.

1. To an indictment under the Securities and Mail Fraud Acts, and for conspiracy, based upon sales of securities issued by organizations alleged to have been created by the defendant as part of a fraudulent scheme, a plea in bar claiming immunity under the Securities Act sufficiently shows the incriminating character of the evidence produced under subpoena of the Securities and Exchange Commission by alleging that it concerned the identity of the accused and his relationship to the organizations "which are the subject matter of this prosecution" and concerned his personal entries, books and records "which are a part of the subject matter of this prosecution." P. 479.
2. The overruling of a plea in bar claiming immunity under the Securities Act because of testimony given before the Securities and Exchange Commission can not be justified upon the ground that the defendant failed to prove its allegations where the plea was accompanied by a motion for the production of the transcript of the testimony and both plea and motion showed that application for such transcript had been refused by the Commission. P. 480.

   It rested in the discretion of the trial court in this case to issue an order to show cause why the complete transcript should not be produced, if it deemed all of it necessary, or only so much of it as would fairly make it appear whether the testimony of the accused before the Commission was a proper foundation for the amnesty claimed.
3. Error of a trial court in overruling a plea of immunity under the Securities Act without ordering production of a transcript of testimony delivered by the defendant before the Securities and Exchange Commission, was not cured by an offer of the Government to produce the transcript at the trial, which the court declined, or by its subsequent production by the Government in the Circuit Court of Appeals. P. 481.
4. An appeal in a criminal case is to be heard on the record certified to the Circuit Court of Appeals. Criminal Appeals Rules VIII and IX. P. 482.

5. An objection to an indictment because in its endorsement as a true bill the foreman of the grand jury described himself as "Foreman" instead of "Foreman of the Grand Jury," *held* frivolous. P. 482.
6. A count charging sale of unregistered securities in violation of the Securities Act need not allege that they were not of the class exempted from registration by § 3 of the Act and the rules and regulations thereunder. P. 482.
7. The indictment in this case sufficiently showed the materiality of facts withheld from purchasers of the securities, in violation of the Securities Act, 15 U. S. C. 77q (a) (2). P. 483.

113 F. 2d 286, reversed.

CERTIORARI, 311 U. S. 632, to review a judgment affirming a sentence which was entered on a plea of *nolo contendere* after a demurrer and a plea in bar had been overruled.

Mr. J. Forrest McCutcheon for petitioner.

Mr. Richard H. Demuth, with whom *Solicitor General Biddle* and *Messrs. Wendell Berge* and *M. Joseph Matan* were on the brief, for the United States.

MR. JUSTICE REED delivered the opinion of the Court.

This case is here upon affirmance by the Circuit Court of Appeals of a sentence imposed after a plea of *nolo contendere*.[1] We granted certiorari because there were involved certain important questions of criminal procedure, especially with respect to a plea in bar filed by petitioner. That plea claimed immunity from prosecution because of prior incriminating testimony given under compulsion by the petitioner at an investigation conducted by the Securities and Exchange Commission.

The indictment against petitioner, in eleven counts, arose out of an alleged fraudulent scheme for selling in-

[1] 113 F. 2d 286.

terests, created by him as a part of the device, in various oil and gas leases in Oklahoma and Texas. The first three counts charged violations of the fraud provisions of the Securities Act, 15 U. S. C. § 77q (a); the fourth and fifth, violations of the registration provisions of that Act, 15 U. S. C. § 77e; counts six to ten, violations of the mail fraud statute, 18 U. S. C. § 338; and the eleventh count, a conspiracy to commit the offenses previously set forth.

On December 16, 1938, petitioner filed a demurrer, attacking the legal sufficiency of the indictment on a number of grounds. At the same time he filed a "Plea in Bar and Application for Production of Transcript of Evidence." The substance of this plea was the following: That on April 14, 1938, and two successive dates, pursuant to subpoenas duces tecum, petitioner had appeared before an officer of the Securities and Exchange Commission with the books and records called for, and "after having claimed his immunity against self incrimination, as provided by law and the Constitution of the United States, under compulsion, testified under oath, pursuant to various questions propounded and asked him by said officer of said Commission, said testimony concerning said defendant's identity and relationship to various trusts and organizations which are the subject matter of this prosecution and concerning divers and sundry other matters pertaining to the matters which are the subject of this prosecution, and particularly to the personal entries, books and records of said defendant, which are a part of the subject matter of this prosecution."

The pleading goes on to state, upon information and belief, that the evidence adduced by the Commission in the course of its investigation was transmitted to the Attorney General for criminal prosecution; that petitioner was compelled to give information and testimony "which

it is believed the Government will use against him in the prosecution herein"; and that petitioner was accordingly immune from prosecution under § 22 (c) of the Securities Act.[2] Petitioner further set forth that at the time of the Commission hearings he had demanded a copy of the transcript of his testimony, offering to pay the cost thereof, but that the request had been refused; that on December 1, 1938, he had made a similar request, which also had been refused, as evidenced by an attached letter from the assistant general counsel of the Commission.[3] Petitioner renewed his demand and tender of payment, asserting that it was necessary for him to have the transcript in the presentation to the court of his plea in bar, and that it was necessary for the court to have it before passing on the plea. The pleading concludes by pray-

[2] 15 U. S. C. § 77v (c): "No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other documents before the Commission, or in obedience to the subpena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying."

[3] In part, the letter read:

"Inasmuch as the evidence adduced by the Commission in the course of its investigation was transmitted to the Attorney General for criminal prosecution and an indictment has been returned, this Commission does not feel it proper to make available to the defendant the testimony taken from witnesses which may be used by the Government in the prosecution of its case. In view of this, the Commission must respectfully refuse to comply with your request. The United States Attorney concurs in this view."

ing the court to order that the transcript be furnished petitioner and that he be heard on the merits of this plea in bar.

On February 28, 1939, the Government filed a pleading called a "Motion to Strike Plea in Bar and Objection to Production of Transcript of Evidence." This attacked the sufficiency of the plea in bar on its face in three different respects, and also alleged in the nature of an answer that petitioner

"was never sworn at any time during the proceedings or hearings complained of and at no time produced any books or records, and did not at any time testify under oath, and was never compelled to testify or give any information against himself or anyone else under oath or otherwise and that each of said hearings complained of was recessed shortly after the defendant interposed his plea of immunity."

In support of this last allegation the Government attached an affidavit of an attorney of the Securities and Exchange Commission who had been present on all three occasions when the petitioner claimed to have given incriminating testimony under compulsion.

Petitioner moved to strike this affidavit of the Commission attorney on the ground that it deprived him of his right to cross-examination and that it was "wholly incompetent to establish the facts attempting to be established."

The District Court overruled petitioner's demurrer to the indictment, his plea in bar and application for the transcript, and also his motion to strike the affidavit of the Commission attorney. An affidavit later filed by the Government in the Circuit Court of Appeals shows that at this hearing on petitioner's plea in bar

"counsel for the government of the United States stated to the Court that they had the transcripts of the record

in the proceedings . . . and if the government's affidavit was not sufficient, the government would offer them in evidence if the Court desired to examine them; that upon being so advised, His Honor, Judge Vaught, stated that he did not care to see the transcripts, that he did not need them to pass upon the said plea in bar, and that he was going to overrule the defendant's plea in bar."

The Government's motion to strike the plea in bar was overruled, also. Subsequently petitioner withdrew his original plea of not guilty,[4] and entered a plea of *nolo contendere*. The District Court sentenced him to three years on each count, the terms to run concurrently. On appeal petitioner assigned as error the action of the District Court in overruling his demurrer and plea.

When the case was argued before the Circuit Court of Appeals the Government submitted, over petitioner's objection, a copy of what it said was a transcript of petitioner's testimony before the Securities and Exchange Commission, supported by an affidavit of the assistant United States attorney in charge of this prosecution. The transcript was offered to buttress the Government's contention that petitioner had in fact given no testimony of an incriminating nature, but the Circuit Court of Appeals did not rest its affirmance even in part upon the contents of the transcript.

The court affirmed because the plea in bar did not allege that the claim of immunity was made in a "hearing" of the Commission as distinguished from an "investigation" and because no evidence was produced by petitioner in support of his plea. As to the demurrer to the indictment, the Circuit Court of Appeals found no error in omitting from the conspiracy count allegations that the classes of securities involved in the alleged frauds were not in the excepted categories of securities

[4] Petitioner had pleaded not guilty on December 17, 1938.

in section three of the Securities Act. This was the sole ground of petitioner's attack on the conspiracy count. In the belief that a sentence on this count, to run concurrently with equal sentences on the other counts, made it unnecessary to examine the other counts,[5] the court did not examine the sufficiency of the other counts.

Petitioner urges as grounds for our reversal of the judgment below the errors in overruling his plea in bar and demurrer, in affirming a sentence of three years on the conspiracy count of the indictment without examination of the other counts, and in receiving the transcript of testimony before the Commission and accompanying affidavit as evidence.

Plea in Bar. The Government challenges the sufficiency of the plea in bar to show petitioner's claim to the benefit of the amnesty of § 22 (c). It suggests that the excerpt set out in the third paragraph of this opinion shows only that testimony was given concerning "defendant's identity and relationship" to the organizations whose securities the indictment charges defendant fraudulently sold; that "other matters" testified to are not specified nor the "nature" of the testimony concerning them or his personal records. But the allegations of the plea are not to be weighed separately. Petitioner's identity and his relationship to the trusts alleged to have been created by him as a part of the fraudulent scheme are of primary importance in the proof of his criminality. This is quite different from the testimony in *Heike* v. *United States,*[6] a prosecution for fraud on the revenue in weighing imported sugar. There, former testimony in a Sherman Act proceeding related to official connection with a company involved and also a table showing the

[5] *Claassen* v. *United States,* 142 U. S. 140; *Gorin* v. *United States,* 312 U. S. 19.

[6] 227 U. S. 131.

amount of sugar handled by the company, and a claim for amnesty was denied because the evidence "neither led nor could have led to a discovery of his crime." Certainly, had petitioner given evidence of his creation of the organizations which the indictment says were part of his artifice it might easily have led to discovery of his trickery. It seems, too, that at least some of the other matters were specified, to wit: the personal entries, books and records of petitioner. Likewise, the nature of his alleged testimony concerning his records is sufficiently related to the indictment by saying they are a part of the subject matter of this prosecution. The plea is good on its face.

It is next urged that the plea was properly overruled because of petitioner's failure to prove its allegations.[7] Such result is assumed to follow on the theory that, as the burden was on petitioner to prove his plea, the failure of the record to show an offer of proof justifies the order. As appears from the preceding statement of the case, the trial court overruled not only the plea in bar but petitioner's motion for production of the transcript, which was certainly the best evidence of whether the testimony before the Commission was sufficiently related to the prosecution to support amnesty. In the *Martin* case,[8] this Court said the action dismissing a traversed motion for failure of proof would have been reversed if the opportunity to establish the facts by evidence had been denied the accused. Treating the Government's motion to strike the plea in bar as a traverse of that pleading which would justify the order overruling it in the absence of a showing in the record of an offer of proof, that result does not follow where, as here, the plea

[7] Cf. *Nardone* v. *United States,* 308, U. S. 338, 341; *Martin* v. *Texas,* 200 U. S. 316, 319; *Mamaux* v. *United States,* 264 F. 816, 819.

[8] *Supra,* note 7.

is accompanied by a motion for the production of the transcript of the former evidence. The plea and motion showed that application had previously been made to the Securities and Exchange Commission for the transcript and had been refused.

We assume that the proceeding in which the former testimony was given was a private and confidential investigation of the Commission rather than a hearing which might eventuate in an order.[9] The Commission's refusal to produce the record indicates that the request had been for a complete transcript of the hearing. It rests in the discretion of the trial court to issue an order to show cause why the complete transcript should not be produced, if it deems all of it necessary, or only so much as may fairly make it appear whether the testimony of petitioner before the Commission was a proper foundation for the amnesty claimed. This is not an instance of the inspection of notes or material gathered by a prosecutor for his own use.[10] What is sought is the production as evidence in the hearing on the plea in bar of the very foundation of the plea. We find nothing in this record to indicate the desirability of secrecy so far as the testimony of petitioner is concerned. The Government introduced in the Court of Appeals a purported transcript of petitioner's former testimony without asserting its confidential character then or in the motion and traverse below.

Finally the Government contends that the refusal to order the production of the testimony was not prejudicial. This argument presupposes that the offer to produce in the trial court and the actual production in the Circuit Court of Appeals was adequate. Otherwise we cannot

[9] Cf. *In re Securities & Exchange Commission,* 14 F. Supp. 417, 418; 84 F. 2d 316; reversed as moot, 299 U. S. 504.

[10] *People ex rel. Lemon* v. *Supreme Court,* 245 N. Y. 24; 156 N. E. 84; cf. *Rex* v. *Holland,* 4 T. R. (Durnford & East) 691.

know what the testimony was which is relied upon for the amnesty. We think that neither offer was an adequate proffer. In neither instance was the petitioner given an opportunity to cross-examine; no witness produced the transcript; it was not certified as a part of the record from the trial court or as a part of the records of the agency.[11] The record certified to the Circuit Court of Appeals is the record on which the appeal is to be heard. Criminal Appeals Rules VIII and IX.

The refusal to permit the accused to prove his defense may prove trivial when the facts are developed. Procedural errors often are. But procedure is the skeleton which forms and supports the whole structure of a case. The lack of a bone mars the symmetry of the body. The parties must be given an opportunity to plead and prove their contentions or else the impression of the judge arising from sources outside the record dominates results. The requirement that allegations must be supported by evidence tested by cross-examination protects against falsehood. The opportunity to assert rights through pleading and testimony is essential to their successful protection. Infringement of that opportunity is forbidden.[12]

Other Objections. As the case must be remanded, petitioner's objection to the three-year sentence on the conspiracy count is sustained without discussion. Criminal Code, § 37; 18 U. S. C. § 88. Frivolous objection is made to the indictment because it is endorsed "A true bill, Ernest W. Clarke, Foreman" instead of "Foreman of the grand jury." This contention is rejected.

Petitioner brings here for review his demurrer to the indictment and each count thereof. The Circuit Court of Appeals found the conspiracy count sufficient against

[11] Cf. R. S. § 882, as amended, 48 Stat. 1109.

[12] Cf. *Walker* v. *Johnston*, 312 U. S. 275.

an attack that, in charging a conspiracy to violate the Securities Act of 1933 by selling unregistered securities, the count failed to charge that the securities so sold were not of the class exempted from registration under section three of the Act and the rules and regulations thereunder. With this ruling we agree.[13] As the sentence under count eleven, the conspiracy count, was for as long a time as any of the other counts upon which concurrent sentences had been imposed, the Circuit Court of Appeals did not review the alleged deficiencies of the other counts.

Counts four and five are charged with the same fault as eleven. For a like reason we hold them good. Counts one and two describe the scheme to defraud and allege instances of the use of the mails. The brief of petitioner fails to raise any question deserving consideration as to their sufficiency and we see none. Petitioner challenges count three for failure to state the materiality of facts which the count charges were omitted, although they were required to be stated to avoid misleading purchasers.[14] But the count, after describing various omitted facts by paragraphs, ends such paragraphs with the allegation

"such fact being well known to said defendants and each of them at all times herein mentioned, and such fact being material in order to make the statements made by said defendants, in the light of the circumstances under which they were made, not misleading . . ."

The facts alleged were obviously material. Counts six to ten inclusive are based upon the mail fraud statute.[15] Petitioner's objection to these counts is that a later act, the Securities Act of 1933, makes it unlawful to use the

[13] *McKelvey* v. *United States,* 260 U. S. 353, 357.

[14] § 17 (a) (2), Securities Act of 1933; 15 U. S. C. 77q (a) (2).

[15] Criminal Code, § 215; 18 U. S. C. § 338.

mails to defraud by the sale of securities. His argument is that, in so far as the later act prohibits the fraudulent sale of securities by mail, it repeals by implication the provisions of the old mail fraud statute in so far as they cover securities. We see no basis for a conclusion that Congress intended to repeal the earlier statute. The two can exist and be useful, side by side.[16]

Reversed.

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

BREISCH *v.* CENTRAL RAILROAD OF NEW JERSEY.

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

No. 384. Argued January 17, 1941.—Decided March 3, 1941.

1. The remedy of an employee of an interstate railway for personal injuries suffered while he was engaged about intrastate transportation and caused by a breach of the Federal Safety Appliance Acts, is the remedy afforded by the common or statutory law of the State. P. 486.
2. The Federal Safety Appliance Acts create the right; the remedy is within the State's discretion. P. 486.
3. A fixed interpretation of a state statute by the supreme court of the State should be accepted by the federal courts when it does not obviously depend altogether on a misconception of federal law. P. 488.
4. In construing the state Workmen's Compensation Act as inapplicable to causes of action arising under the Federal Safety Appliance Acts and in ruling that the remedy in such cases is by action at law, the Supreme Court of Pennsylvania does not

[16] Cf. *United States* v. *Rollnick*, 91 F. 2d 911, 918; *United States* v. *Montgomery*, 21 F. Supp. 770; *United States* v. *Alluan*, 13 F. Supp. 289.

appear to have been actuated entirely by a misunderstanding of the federal Acts. P. 489.

Confirmatory of this conclusion is the Pennsylvania statute providing "That when a court of last resort has construed the language used in a law, the Legislature in subsequent laws on the same subject matter intend the same construction to be placed upon such language," and the fact that the state court's constructions of the Compensation Act and of jurisdiction over claims arising under the Safety Appliance Acts remain undisturbed by the subsequent amendments of the Compensation Act. P. 491.

112 F. 2d 595, reversed.

CERTIORARI, 311 U. S. 634, to review the reversal of a judgment for personal injuries resulting from violations of the Federal Safety Appliance Acts.

Mr. Fred B. Gernerd, with whom *Mr. David Getz* was on the brief, for petitioner.

Mr. Henry B. Friedman, with whom *Mr. George W. Aubrey* was on the brief, for respondent.

MR. JUSTICE REED delivered the opinion of the Court.

This certiorari brings here the question as to whether the law of Pennsylvania limits recovery under the provisions of the Federal Safety Appliance Acts to the procedure and awards of that state's Workmen's Compensation Act in accidents where the railway employee is engaged in an intrastate activity at the time of injury.

The suit was brought at common law in the Federal District Court for the Eastern District of Pennsylvania on the ground of diversity of citizenship. The employee, petitioner here, was a citizen of Pennsylvania and the defendant was a corporation created under the laws of New Jersey, handling transportation moving between states. The basis of the action was respondent's violation of the Safety Appliance Acts by failure to furnish efficient hand

brakes for a car.[1] This failure resulted in an injury to petitioner in Pennsylvania. No interstate commerce was involved. He recovered in the trial court but the judgment was reversed by the Circuit Court of Appeals on its determination that the remedy of the petitioner lay solely in the Compensation Act and was not cognizable at law.[2] We granted certiorari because of an alleged conflict on a question of local law between the judgment below and *Miller* v. *Reading Company*.[3]

No issues arise except the one upon procedure. It is clear that an employee injured in intrastate transportation by defective equipment of an interstate railroad comes under the Safety Appliance Acts.[4] Nor is there any longer a question as to the power of the state to provide whatsoever remedy it may choose for breaches of the Safety Appliance Acts.[5] The federal statutes create the right; the remedy is within the state's discretion. In this case we are to find what remedy the State of Pennsylvania has provided.

This Court had occasion to consider the matter of what remedies for breach of the Federal Safety Appliance Acts had been provided by a state in *Tipton* v. *Atchison, T. & S. F. Ry. Co.*[6] The circumstances there were quite similar to the present case. Tipton was an employee of a railroad which was a highway of interstate commerce and suffered injury through violation of the safety acts while engaged within California in intrastate transpor-

[1] Act of April 14, 1910, § 2, 36 Stat. 298.

[2] 112 F. 2d 595.

[3] 292 Pa. 44; 140 A. 618.

[4] *Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U. S. 33; *Tipton* v. *Atchison Ry. Co.*, 298 U. S. 141.

[5] *Moore* v. *Chesapeake & Ohio Ry. Co.*, 291 U. S. 205; *Gilvary* v. *Cuyahoga Valley Ry. Co.*, 292 U. S. 57; *Tipton* v. *Atchison Ry. Co.*, *supra* note 4.

[6] 298 U. S. 141.

tation. He sought damages at common law and, after removal to the federal court, was cast in the litigation on the ground that his only redress lay through the California Workmen's Compensation Act. In affirming this conclusion here, two cases of the district courts of appeal of California were examined—*Ballard* v. *Sacramento Northern Railway Co.*[7] and *Walton* v. *Southern Pacific Co.*[8] Petition for review of the two cases had been refused by the Supreme Court of California.[9] The *Ballard* case treated § 6 of the Act of April 22, 1908,[10] the jurisdictional section of the Federal Employers Liability Act, as applicable to the cause of action under consideration, although that cause was bottomed upon the Safety Appliance Acts. From that premise the California court went ahead to conclude that its Workmen's Compensation Act did not apply by virtue of § 69 (c) of the Compensation Act.[11] That section omitted employments governed by the acts of Congress. The Compensation Act is the exclusive state remedy for injuries within its scope. The Federal Employers Liability Act does give a right of action and fix the tribunals where it may be

[7] 126 Cal. App. 486; 14 P. 2d 1045; 15 P. 2d 793.

[8] 8 Cal. App. 2d 290; 48 P. 2d 108.

[9] 126 Cal. App. at 501; 14 P. 2d 1045; 15 P. 2d 793, and 8 Cal. App. 2d at 305; 48 P. 2d 108.

[10] 35 Stat. 66 as amended April 5, 1910, 36 Stat. 291, and March 3, 1911, § 291, 36 Stat. 1167. There has been a subsequent amendment immaterial here, Aug. 11, 1939, § 2, 53 Stat. 1404.

[11] Section 69 provided:

"(c) *Employers engaged in interstate commerce.* This act shall not be construed to apply to employers or employments which, according to law, are so engaged in interstate commerce as not to be subject to the legislative power of the state, or to employees injured while they are so engaged, except in so far as this act may be permitted to apply under the provisions of the Constitution of the United States or the acts of Congress."

enforced.[12] Thus through assimilating the rights and remedies under the Safety Appliance Acts to those under the Federal Employers Liability Act, the California Workmen's Compensation Act was found inapplicable. *Walton's* was a similar case and it too, page 305, following *Ballard,* permitted the maintenance of the suit in the state court.

This Court was of the view that the California courts excluded these railroad employees from the benefits of the Compensation Act "because they [the courts] thought the Safety Appliance Acts required the State to afford a remedy in the nature of an action for damages" and for that reason refused to follow their interpretation of the Compensation Act. Although the *Tipton* case decided the only available California remedy was the compensation scheme, it was indicated that "a definite and authoritative decision" to the contrary by the California courts would, of course, be followed.[13] Tipton lost through the determination here that California had declared by its statute he must seek relief through compensation.

In the present case, Breisch sued at common law. The Circuit Court of Appeals reversed the judgment in his favor on the ground that the Pennsylvania Workmen's Compensation Act supplied the exclusive remedy for his injury. To reach this conclusion, the court determined that in *Miller* v. *Reading Company*[14] the Supreme Court of Pennsylvania decided that "the Compensation Act did not apply to *Miller's* case, not as a matter of statutory construction of that Act but because it thought that the

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[12] *Moore* v. *Chesapeake & Ohio Ry. Co.,* 291 U. S. 205, 215, 216, and § 1 and § 6, 45 U. S. C. 51 and 56.

[13] A later decision of the Supreme Court of California is in accord with this Court's ruling in the *Tipton* case. *Scott* v. *Industrial Accident Comm'n,* 9 Cal. 2d 315, 323; 70 P. 2d 940.

[14] 292 Pa. 44; 140 A. 618.

proper construction of the Federal Safety Appliance Acts required the ruling that Miller had a cause of action under the Safety Appliance Acts, cognizable in a court of law but not within the purview of the Compensation Law." Reliance was placed upon the *Tipton* case and *Red Cross Line* v. *Atlantic Fruit Co.*[15] which support the principle that interpretation of state statutes by state courts under compulsion of federal law erroneously understood does not bind federal courts.

It is not apparent to us, however, that the *Miller* opinion depends upon the compulsion of a misunderstanding of the Safety Appliance Acts. In *McMahan* v. *Montour Railroad Co.*,[16] it is true, the Supreme Court of Pennsylvania held the Compensation Act was the exclusive remedy for injuries to employees of interstate railroad highways, when the employees at the time of the injury were engaged in an intrastate movement. But that case was predicated upon an erroneous conception of the relation of the employee to interstate commerce. It was thought that only employees who were engaged in that commerce at the time of the accident were covered by the Safety Appliance Acts.[17] Nothing was said as to the tribunal which might award relief in employments covered by the Safety Appliance Acts. This Court's citations on reversal dealt only with the scope of the federal acts, not with remedies under them.[18] When the question next arose, in the *Miller* case, the Pennsylvania court undertook an interpretation of the scope of the coverage of the Workmen's Compensation Act. That act provides in § 302:

"(a) In every contract of hiring made after December thirty-first, one thousand nine hundred and fifteen, and

[15] 264 U. S. 109, 120.

[16] 283 Pa. 274; 128 A. 918.

[17] *Tipton* v. *Atchison Ry. Co.*, 298 U. S. 141, 148.

[18] *McMahon* v. *Montour Railroad Co.*, 270 U. S. 628.

in every contract of hiring renewed or extended by mutual consent, expressed or implied, after said date, it shall be conclusively presumed that the parties have accepted the provisions of article three of this act, and have agreed to be bound thereby, unless there be . . ." (Article three is the compensation schedule.) There are no exceptions to this except the customary exemptions of domestic service or agriculture.[19] In the *Miller* case, compensation coverage was refused employees of interstate roads engaged in intrastate activities in these words:

"Our Workmen's Compensation Act gave to a board exclusive jurisdiction of proceedings to adjudicate claims of employees, which, by consent, express or implied, it was agreed should be so disposed of, and, as to such cases, jurisdiction of the courts to try and determine is ousted. But as to demands, not arising from the ordinary relation of employer and employee, such as the enforcement of rights fixed by federal statute, their powers remain as if no such state legislation was in force." [20]

Though there undoubtedly were other statements in the course of the opinion which reflect a misconception of the state's authority over procedure for recovery under the Safety Appliance Acts, we conclude that such misconception is not enough to call for a refusal to follow the Supreme Court's definite ruling that the state courts were open for redress for accidents covered by the Safety Appliance Acts.

State Tax Commission v. *Van Cott*,[21] relied upon to support the conclusion reached below, is not controlling. In that case a direct review of the question decided by the state court was sought here on the ground that the state's conclusion on a matter of construction of a state

[19] Pa. Laws 1915, p. 777.

[20] 292 Pa. at 50; 140 A. 620.

[21] 306 U. S. 511.

income tax statute was controlled by the decisions of this Court on the taxability by states of salaries of federal employees. It was not clear to us whether the state decision was controlled by the state court's view of our decisions or not. And, as our decisions at the time of review here permitted a decision by the state court on the state statute, free from federal constraint, we returned the case for state action. In the *Van Cott* case we were reviewing an application of federal law by a state court to a solution of a state's problems. Here we have a federal court's interpretation of a long-standing state decision. Uncompleted state action, probably influenced by decisions of this Court subsequently overruled, calls for an opportunity for the state to adjudicate the question for itself, while a fixed interpretation of a state statute should be accepted by the federal courts when it does not obviously depend altogether on a misconception of federal law.

There are other factors which forbid the conclusion below. A Pennsylvania statute, derived from the state's common law,[22] provides "That when a court of last resort has construed the language used in a law, the Legislature in subsequent laws on the same subject matter intend the same construction to be placed upon such language." [23] Since the *Miller* case the compensation act has been amended several times,[24] but the Legislature has never attempted to override the limitations read into it by the *Miller* opinion. There were comprehensive amendments in the 1937 reënactment,[25] more than a year

[22] *Buhl's Estate,* 300 Pa. 29; 150 A. 86.

[23] Pa. Laws 1937, Act No. 282, § 52 (4).

[24] Pa. Laws 1929, Acts No. 311, 358, 361, 372; Laws 1931, Acts No. 151, 205; Laws 1933, Acts No. 68, 324, 328; Laws, Special Session 1933–34, Acts No. 55, 56; Laws 1935, Act No. 412; Laws 1937, Act No. 323.

[25] Pa. Laws 1937, Act No. 323.

after this Court's decision in the *Tipton* case established that the compensation remedy could be made exclusive, but still the Legislature took no action. Under these circumstances we are of the opinion that the interpretation of the Supreme Court of Pennsylvania of its own Workmen's Compensation Act and of the jurisdiction of its courts over claims arising under the Safety Appliance Act is binding upon the federal courts and should be followed.

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

Reversed.

MR. JUSTICE ROBERTS is of the opinion that the judgment of the Circuit Court of Appeals should be affirmed.

CONWAY *v.* O'BRIEN.

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

No. 344. Argued February 4, 5, 1941.—Decided March 3, 1941.

Evidence *held* sufficient to go to the jury on the issue of gross negligence as defined by the law of Vermont, in an action against the owner of an automobile for personal injuries suffered by one riding in it as his guest who alleged that the accident was caused by the gross negligence of the owner in driving the vehicle. P. 493.

111 F. 2d 611, reversed.

CERTIORARI, 311 U. S. 634, to review the reversal of a judgment for damages recovered under a Vermont "guest occupant" law. Jurisdiction of the District Court was founded on diversity of citizenship.

Mr. Paul E. Lesh, with whom *Messrs. Herbert G. Garber* and *Jerome F. Barnard* were on the brief, for petitioner.

Mr. Edwin W. Lawrence for respondent.

MR. JUSTICE REED delivered the opinion of the Court.

Petitioner, a citizen of New Hampshire, was injured when the respondent's car, in which she was a passenger, collided with another on a country road in Vermont. Diversity of citizenship gave jurisdiction to the District Court and petitioner recovered a verdict under the Vermont guest occupant law,[1] which required her to prove gross negligence on the part of the respondent. The Circuit Court of Appeals, however, considering the evidence of gross negligence insufficient to go to the jury, reversed and dismissed the complaint.[2] We granted certiorari to examine whether there had been sufficient compliance with Rule 50 (b) to authorize dismissal of the complaint,[3] but our view of the merits makes it unnecessary to discuss this question.

The result is determined by a consideration of the facts in the light of the Vermont law. The accident occurred in broad daylight in the late morning of an August day. If the facts most favorable to the petitioner were accepted, the jury might have concluded properly that the defendant's car approached from the south a covered bridge on a little-used country road at a speed of fifteen miles per hour. Respondent who was the driver and owner sat on the front seat with another. The petitioner and another lady occupied the rear seat. The bridge spanned Williams River which at that point

[1] Vermont Public Laws (1933) § 5113.

[2] 111 F. 2d 611.

[3] As in *Berry* v. *United States*, *ante*, p. 450, the District Court denied respondent's motion for a directed verdict at the close of the case. After verdict, however, the respondent did not make a motion for judgment n. o. v.

ran eastwardly to join the Connecticut. As another car emerged from its southern end the collision happened.

The road along which respondent was driving ran parallel with the southernly bank of the river for a short distance and then turned "abruptly," in a "sharper curve than any on the road," at a sixty degree angle down a nine per cent grade towards the bridge. Bushes and small trees cut off the view of a car "coming out of the bridge" until the respondent's car was "probably 30 feet" away.

As respondent's light car came into this curve, he cut in to the left without slackening speed or blowing a horn and suddenly found himself face to face with a larger car coming out of the bridge on its right hand side of the road at two miles per hour. The collision knocked the heavier car backward several feet and through a guard rail on the west side of the bridge approach. The road approaching the bridge "at this blind corner" was sandy, from fourteen to seventeen feet wide. Respondent testified he had known the spot "all my life" and knew cars could pass only "at a snail's pace."

The "Law of the Road" in Vermont is to round curves "as far to the right . . . as reasonably practicable" [4] and to "signal with bell or horn" "in going around a curve." [5]

Under these circumstances we are of the opinion that the Vermont law requires the submission of the question of gross negligence to the jury. As a matter of law it seems quite plain that a jury might find a driver of a car familiar with the locality grossly negligent, when with three guests and without a signal he rounds a blind, sharp curve at fifteen miles per hour on the wrong side into a narrow bridge entrance. The accepted Ver-

[4] Vermont Public Laws (1933) § 5110–IX.

[5] *Id.*, § 5110–XV.

mont definition of gross negligence is found in *Shaw* v. *Moore:* [6]

"Gross negligence is substantially and appreciably higher in magnitude and more culpable than ordinary negligence. Gross negligence is equivalent to the failure to exercise even a slight degree of care. It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It is very great negligence, or the absence of slight diligence, or the want of even scant care. It amounts to indifference to present legal duty, and to utter forgetfulness of legal obligations so far as other persons may be affected. It is a heedless and palpable violation of legal duty respecting the rights of others. The element of culpability which characterizes all negligence is, in gross negligence, magnified to a high degree as compared with that present in ordinary negligence. Gross negligence is manifestly a smaller amount of watchfulness and circumspection than the circumstances require of a prudent man. But it falls short of being such reckless disregard of probable consequences as is equivalent to a wilful and intentional wrong. Ordinary and gross negligence differ in degree of inattention, while both differ in kind from wilful and intentional conduct which is or ought to be known to have a tendency to injure."

This has been repeated many times in later cases.[7] The application creates the difficulties. The latest cases say "each case must be judged according to its own facts." [8]

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[6] 104 Vt. 529, 531–532; 162 A. 373.

[7] *Dessereau* v. *Walker,* 105 Vt. 99, 101; 163 A. 632; *Franzoni* v. *Ravenna,* 105 Vt. 64; 163 A. 564; *Hunter* v. *Preston,* 105 Vt. 327, 338; 166 A. 17.

[8] *Ellison* v. *Colby,* 110 Vt. 431; 8 A. 2d 637, 640; *Kelley* v. *Anthony,* 110 Vt. 490; 8 A. 2d 641, 642.

Admittedly there are instances among the Vermont cases which might be logically cited to support a refusal to submit this case.[9] About as many are upon the other side.[10] We think the District Court correctly appraised the law and facts.

We reverse the judgment of the Circuit Court of Appeals and affirm that of the District Court.

Reversed.

RAILROAD COMMISSION OF TEXAS ET AL. *v.* PULLMAN COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

No. 283. Argued February 4, 1941.—Decided March 3, 1941.

A railroad company, some of whose trains in Texas had each but one Pullman sleeping car and that in charge of a colored porter subject to the control of the train conductor, assailed in the federal court, as unauthorized by Texas statutes and as violative of the Federal Constitution, a regulation by a state commission which would require that such cars be continuously in charge of an employee "having the rank and position of a Pullman conductor." Pullman porters, intervening, also attacked the order, adopting the railroad's objections but urging mainly that it discriminated against Negroes in violation of the Fourteenth Amendment, Pullman porters being Negroes and the conductors white. *Held:*

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[9] *Shaw* v. *Moore,* 104 Vt. 529; 162 A. 373; *Franzoni* v. *Ravenna,* 105 Vt. 64; 163 A. 564; *Anderson* v. *Olson,* 106 Vt. 70; 184 A. 712; *L'Ecuyer* v. *Farnsworth,* 106 Vt. 180; 170 A. 677; *Garvey* v. *Michaud,* 108 Vt. 226; 184 A. 712; *Kelley* v. *Anthony,* 110 Vt. 490; 8 A. 2d 641.

[10] *Dessereau* v. *Walker,* 105 Vt. 99; 163 A. 632; *Farren* v. *McMahon,* 110 Vt. 55; 1 A. 2d 726; *Hunter* v. *Preston,* 105 Vt. 327, 338; 166 A. 17; *Hall* v. *Royce,* 109 Vt. 99, 106; 192 A. 193; *Ellison* v. *Colby,* 110 Vt. 431; 8 A. 2d 637; *Powers* v. *Lackey,* 109 Vt. 505; 1 A. 2d 693.

1. Decision of the issue of unconstitutional discrimination should be withheld pending proceedings to be taken in the state courts to secure a definitive construction of the state statute. P. 498.

2. The federal courts, when asked for the extraordinary remedy of injunction, will exercise a sound discretion in the public interest to avoid needless friction with state policies that may result from tentative constructions of state statutes and premature adjudication on their constitutionality. P. 500.

33 F. Supp. 675, reversed.

APPEAL from a decree of the District Court of three judges which enjoined the enforcement of an order of the above-named Railroad Commission.

Mr. Cecil A. Morgan for M. B. Cunningham et al.; and *Mr. Cecil C. Rotsch,* Assistant Attorney General of Texas, with whom *Messrs. Gerald C. Mann,* Attorney General, *Glenn R. Lewis,* and *Lee Shoptaw,* Assistant Attorneys General, were on the brief, for the Railroad Commission et al., appellants.

Mr. Ireland Graves, with whom *Messrs. Lowell M. Greenlaw, Herbert S. Anderson, Charles L. Black, Claude Pollard,* and *F. B. Walker* were on the brief, for appellees.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

In those sections of Texas where the local passenger traffic is slight, trains carry but one sleeping car. These trains, unlike trains having two or more sleepers, are without a Pullman conductor; the sleeper is in charge of a porter who is subject to the train conductor's control. As is well known, porters on Pullmans are colored and conductors are white. Addressing itself to this situation, the Texas Railroad Commission after due hearing ordered that "no sleeping car shall be operated on any line of railroad in the State of Texas . . . unless such

cars are continuously in the charge of an employee . . . having the rank and position of Pullman conductor." Thereupon, the Pullman Company and the railroads affected brought this action in a federal district court to enjoin the Commission's order. Pullman porters were permitted to intervene as complainants, and Pullman conductors entered the litigation in support of the order. Three judges having been convened, Judicial Code, § 266, as amended, 28 U. S. C. § 380, the court enjoined enforcement of the order. From this decree, the case came here directly. Judicial Code, § 238, as amended, 28 U. S. C. § 345.

The Pullman Company and the railroads assailed the order as unauthorized by Texas law as well as violative of the Equal Protection, the Due Process and the Commerce Clauses of the Constitution. The intervening porters adopted these objections but mainly objected to the order as a discrimination against Negroes in violation of the Fourteenth Amendment.

The complaint of the Pullman porters undoubtedly tendered a substantial constitutional issue. It is more than substantial. It touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open. Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy. It is therefore our duty to turn to a consideration of questions under Texas law.

The Commission found justification for its order in a Texas statute which we quote in the margin.[1] It is com-

[1] Vernon's Anno. Texas Civil Statutes, Article 6445:

"Power and authority are hereby conferred upon the Railroad Commission of Texas over all railroads, and suburban, belt and terminal railroads, and over all public wharves, docks, piers, elevators, warehouses, sheds, tracks and other property used in connection therewith in this State, and over all persons, associations

mon ground that if the order is within the Commission's authority its subject matter must be included in the Commission's power to prevent "unjust discrimination . . . and to prevent any and all other abuses" in the conduct of railroads. Whether arrangements pertaining to the staffs of Pullman cars are covered by the Texas concept of "discrimination" is far from clear. What practices of the railroads may be deemed to be "abuses" subject to the Commission's correction is equally doubtful. Reading the Texas statutes and the Texas decisions as outsiders without special competence in Texas law, we would have little confidence in our independent judgment regarding the application of that law to the present situation. The lower court did deny that the Texas statutes sustained the Commission's assertion of power. And this represents the view of an able and experienced circuit judge of the circuit which includes Texas and of two capable district judges trained in Texas law. Had we or they no choice in the matter but to decide what is the law of the state, we should hesitate long before rejecting their forecast of Texas law. But no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination. The last word on the meaning of Article 6445 of the

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and corporations, private or municipal, owning or operating such railroad, wharf, dock, pier, elevator, warehouse, shed, track or other property to fix, and it is hereby made the duty of the said Commission to adopt all necessary rates, charges and regulations, to govern and regulate such railroads, persons, associations and corporations, and to correct abuses and prevent unjust discrimination in the rates, charges and tolls of such railroads, persons, associations and corporations, and to fix division of rates, charges and regulations between railroads and other utilities and common carriers where a division is proper and correct, and to prevent any and all other abuses in the conduct of their business and to do and perform such other duties and details in connection therewith as may be provided by law."

Texas Civil Statutes, and therefore the last word on the statutory authority of the Railroad Commission in this case, belongs neither to us nor to the district court but to the supreme court of Texas. In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication. *Glenn* v. *Field Packing Co.*, 290 U. S. 177; *Lee* v. *Bickell*, 292 U. S. 415. The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court. The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication.

An appeal to the chancellor, as we had occasion to recall only the other day, is an appeal to the "exercise of the sound discretion, which guides the determination of courts of equity." *Beal* v. *Missouri Pacific R. Co.*, *ante*, p. 45. The history of equity jurisdiction is the history of regard for public consequences in employing the extraordinary remedy of the injunction. There have been as many and as variegated applications of this supple principle as the situations that have brought it into play. See, for modern instances, *Beasley* v. *Texas & Pacific Ry. Co.*, 191 U. S. 492; *Harrisonville* v. *Dickey Clay Co.*, 289 U. S. 334; *United States* v. *Dern*, 289 U. S. 352. Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies, whether the policy relates to the enforcement of the criminal law, *Fenner* v. *Boykin*, 271 U. S. 240; *Spielman Motor Co.* v. *Dodge*, 295 U. S. 89; or the administration of a specialized scheme for liquidating embarrassed business enterprises, *Pennsylvania* v. *Williams*, 294 U. S. 176; or the final authority of a state court to interpret doubtful regulatory laws of the state, *Gilchrist* v. *Interborough Co.*, 279 U. S. 159;

cf. *Hawks* v. *Hamill,* 288 U. S. 52, 61. These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, "exercising a wise discretion," restrain their authority because of "scrupulous regard for the rightful independence of the state governments" and for the smooth working of the federal judiciary. See *Cavanaugh* v. *Looney,* 248 U. S. 453, 457; *Di Giovanni* v. *Camden Ins. Assn.,* 296 U. S. 64, 73. This use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers. Compare 37 Stat. 1013; Judicial Code, § 24 (1), as amended, 28 U. S. C. § 41 (1); 47 Stat. 70, 29 U. S. C. §§ 101–15.

Regard for these important considerations of policy in the administration of federal equity jurisdiction is decisive here. If there was no warrant in state law for the Commission's assumption of authority there is an end of the litigation; the constitutional issue does not arise. The law of Texas appears to furnish easy and ample means for determining the Commission's authority. Article 6453 of the Texas Civil Statutes gives a review of such an order in the state courts. Or, if there are difficulties in the way of this procedure of which we have not been apprised, the issue of state law may be settled by appropriate action on the part of the State to enforce obedience to the order. *Beal* v. *Missouri Pacific R. Co., supra;* Article 6476, Texas Civil Statutes. In the absence of any showing that these obvious methods for securing a definitive ruling in the state courts cannot be pursued with full protection of the constitutional claim, the district court should exercise its wise discretion by staying its hands. Compare *Thompson* v. *Magnolia Co.,* 309 U. S. 478.

We therefore remand the cause to the district court, with directions to retain the bill pending a determination

of proceedings, to be brought with reasonable promptness, in the state court in conformity with this opinion. Compare *Atlas Ins. Co.* v. *Southern, Inc.*, 306 U. S. 563, 573, and cases cited.

Reversed.

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

MISSOURI-KANSAS PIPE LINE CO. *v.* UNITED STATES ET AL.*

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

No. 268. Argued February 12, 13, 1941.—Decided March 3, 1941.

1. In a suit by the United States to enjoin violation of the Sherman Antitrust Act resulting from control of the affairs of a gas pipe line company by competitors through stock ownership, etc., a consent decree was entered which specifically conferred certain rights on the pipe line company and specifically provided that upon proper application it could become a party to the suit for the purpose of enforcing those rights, jurisdiction of the cause and the parties being retained to give full effect to the decree. *Held:*

(1) The right of the pipe line company to intervene at a subsequent stage to enforce the rights so reserved, was not dependent upon Rule 24 (a) of the Rules of Civil Procedure, nor subject to the District Court's discretion, but was a right established by the consent decree. P. 505.

(2) Orders denying motions to intervene made on its behalf were final orders appealable to this Court. P. 508.

(3) Enforcement of such rights of the pipe line company through its intervention and active participation in the litigation would not conflict with the public duties of the Attorney General. P. 508.

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*Together with No. 269, *Panhandle Eastern Pipe Line Co.* v. *United States et al.*, also on appeal from the District Court of the United States for the District of Delaware.

(4) The company's right of intervention was not barred by the denial of motions to intervene made earlier by one of its stockholders but made on that stockholder's own behalf and involving different claims from those now asserted. P. 508.

2. Expedition in the enforcement of the antitrust laws, to be attained by modification of an existing decree with the approval of the Government, can not be had at the sacrifice of private rights which the decree itself established. P. 509.

No. 268, reversed.

No. 269, affirmed.

APPEALS from two orders of a District Court of three judges denying applications for leave to intervene in a suit instituted by the Government under the Antitrust Act. One of the applications purported to be made by the Panhandle Eastern Pipe Line Company, the other was made on its behalf by the Missouri-Kansas Pipe Line Company as one of its stockholders.

Messrs. Arthur G. Logan and *Robert J. Bulkley,* with whom *Mr. Russell Hardy* was on the brief, for appellants.

Mr. Douglas M. Moffat, with whom *Mr. Clarence A. Southerland* was on the brief, for the Columbia Gas & Electric Corp.; and *Mr. William H. Button,* with whom *Messrs. Daniel O. Hastings* and *James B. Alley* were on the brief, for the Columbia Oil & Gas Corp., appellees. *Attorney General Jackson* and *Assistant Attorney General Arnold* submitted for the United States.

By special leave of Court, *Mr. James H. Lee,* with whom *Mr. Paul E. Krause* was on the brief, for the City of Detroit, as *amicus curiae.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

These proceedings grow out of a suit in equity brought by the Attorney General in 1935 to enforce the anti-

trust laws. That suit was terminated by a consent decree the terms of which specifically reserved certain rights to the Panhandle Eastern Pipe Line Company. The issues here revolve around the scope of those provisions of the decree.

In its bill the Government charged that Columbia Gas & Electric Corporation and its controlled instrumentality, Columbia Oil & Gasoline Corporation, together with individual defendants, had conspired, for the benefit of Columbia Gas, to shut out operation in the Indiana-Ohio-Michigan area by the Panhandle Company, which had built a natural gas pipe line from the Texas fields to the border of Indiana. Panhandle was an offspring of Missouri-Kansas Pipe Line Company (hereafter called Mokan), which, at the inception of the Government's suit, still owned half of Panhandle's stock and held half its junior debt. Columbia Gas, it was charged, had a practical monopoly of natural gas in the market which Panhandle proposed to enter, and to maintain this monopoly Columbia Gas acquired domination of Panhandle through the acquisition by Columbia Oil of half of Panhandle's stock and junior debt and its whole senior debt. These acts stifled, so it was claimed, Panhandle's potential competition, rendered it insolvent, and forced Mokan into receivership.

The consent decree sought to assure opportunities for competition by Panhandle. Deeming the terms of the decree inadequate for its purpose, the Government in 1939 reopened the proceedings. The defendants proposed modifications of the decree by a plan which the district court referred to a master. After the master's report approving the plan had been submitted but before the district court had acted upon it, two attempts to intervene were made on behalf of Panhandle. The de-

nial of these two motions by the district court is the basis of the appeals here which come to us directly under the Expediting Act, 32 Stat. 823, as amended, 15 U. S. C. § 29. In No. 268 Mokan, as a stockholder of Panhandle, made the appropriate allegations as to the unwillingness of those responsible for the actions of the corporation to protect its interests, and moved to intervene on behalf of Panhandle. In No. 269, the motion purported to be made in Panhandle's name. In addition to the formal parties, the City of Detroit was heard here as *amicus curiae* because of its interest in the supply of gas by Panhandle.

For clarity's sake, we shall first dispose of No. 268.

Numerous arguments were pressed upon us challenging our jurisdiction over the appeal, or, in the alternative, insisting on the propriety of the action of the district court. Treating Rule 24 (a) of the Rules of Civil Procedure as a comprehensive inventory of the allowable instances for intervention, it is insisted that the present case is not one for intervention as of right, and as an exercise of the district court's discretion is not reviewable here. In any event, the order of the district court is said not to be a "final decree" within the Expediting Act, compare *United States* v. *California Canneries,* 279 U. S. 553, 556, and on this score not reviewable. If the merits be here open, the order was correct because there was not "timely application," as required by Rule 24 (a). Finally, various considerations of controlling public interest are invoked to sustain the district court: the Attorney General is the guardian of the public interest in enforcing the antitrust laws, compare *New York City* v. *New York Telephone Co.,* 261 U. S. 312; injection of new issues ought not to be allowed to delay disposition of the main litigation, see *United States* v. *Northern Securities Co.,* 128 F. 808, 813; a decree already entered should not be

impeached by intervention, see *United States* v. *California Canneries, supra,* at 556.

All of these arguments misconceive the basis of the right now asserted. Its foundation is the consent decree. We are not here dealing with a conventional form of intervention, whereby an appeal is made to the court's good sense to allow persons having a common interest with the formal parties to enforce the common interest with their individual emphasis. Plainly enough, the circumstances under which interested outsiders should be allowed to become participants in a litigation is, barring very special circumstances, a matter for the *nisi prius* court. But where the enforcement of a public law also demands distinct safeguarding of private interests by giving them a formal status in the decree, the power to enforce rights thus sanctioned is not left to the public authorities nor put in the keeping of the district court's discretion.

That is the present case. Panhandle's right to economic independence was at the heart of the controversy. An important aspect of that independence was the extension of its operations to permit sales in Detroit. The assurance of this extension was deemed so vital that it was safeguarded by explicit provisions in the decree. Section IV, which is in full in the margin,[1] contained

[1] "That the defendants be and they are hereby perpetually enjoined from restraining or interfering in any manner in the freedom of Panhandle Eastern to contract or to finance or arrange the financing of all contracts, extensions (including the proposed new line to Detroit, whether or not built and owned by it), repairs, maintenance, service, or improvements necessary in its business through or with any firm, person, or corporation with whom it may choose to deal (and to that end any such financial or contractual arrangements made by Panhandle Eastern to consummate its contract dated August 31, 1935, with the Detroit City Gas Company shall be subject to the approval of the trustee who shall receive,

those provisions, and by Section V, also set out below,[2] Panhandle, "upon proper application," could "become a party" to the suit "for the limited purpose of enforcing the rights conferred by Section IV." Mokan, on behalf of Panhandle, claimed that Columbia Gas had made financial arrangements, which we need not detail, that would in practice defeat the free enterprise of Panhandle.

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and consider the advisability of, alternative methods of financing from any responsible underwriter);

"That if such contracts be made with or financial assistance be secured from Columbia Gas, such contracts may be made or financial assistance furnished only upon terms or conditions which do not in any way, directly or indirectly, presently or potentially, confer upon Columbia Gas any voting rights, control or participation in the management of Panhandle Eastern or confer any rights of ownership in the works or properties of Panhandle Eastern except as security for the investment; and in the event that Columbia Gas shall, with respect to any contract or any contractual rights of any kind whatsoever or any property held as security or used in connection with any contract, in any way prevent the free transportation, sale, and distribution of gas by Panhandle Eastern, then upon application to this Court or any court of competent jurisdiction Panhandle Eastern shall have the right (1) to the immediate appointment of a trustee to hold such contract rights or property subject to the purposes and provisions of this decree; (2) to immediate specific performance of any and all contracts with Columbia Gas; and (3) to immediate injunction, both temporary and final, as well as any other appropriate remedy at law or in equity, including any remedy hereunder."

[2] "That jurisdiction of this cause and of the parties hereto is retained for the purpose of giving full effect to this decree and for the enforcement of strict compliance herewith and the punishment of evasions hereof, and for the further purpose of making such other and further orders and decrees or taking such other action as may from time to time be necessary to the carrying out hereof; and that Panhandle Eastern, upon proper application, may become a party hereto for the limited purpose of enforcing the rights conferred by Section IV hereof."

We are not concerned with the substantiality of this claim. The sole question before us is whether there was standing to make the claim before the district court. We hold there was such standing. To enforce the rights conferred by Section IV was the purpose of the motion. Therefore, the codification of general doctrines of intervention contained in Rule 24 (a) does not touch our problem. And since the protection afforded Panhandle by Section IV of the decree could only be secured by the remedy designed by Section V, to wit, active participation in the suit, the denial of that protection is a definitive adjudication, and so appealable. See *Credits Commutation Co.* v. *United States,* 177 U. S. 311, 316; cf. *Cobbledick* v. *United States,* 309 U. S. 323. Nor can the enforcement of this protection be deemed remotely in conflict with the public duties of the Attorney General, nor to bring in digressive issues, nor to impeach the existing decree. It is a vindication of the decree.

A final contention in support of the order remains. It is based on two prior denials of motions by Mokan to intervene. Treating Mokan's motions as made on its own behalf on the score of its ownership of more than forty percent of Panhandle's stock, the district court denied the motions. Appeals from these denials were dismissed by the circuit court of appeals, 108 F. 2d 614, and we denied certiorari, 309 U. S. 687. The denials are now urged as *res judicata.* But they were a rejection of Mokan's attempt to intervene in its own behalf. In neither instance was the relief denied deemed a mode of enforcing Panhandle's rights under Sections IV and V of the decree. The earlier denials involved different legal claims from that now asserted, and, therefore, are no bar to the present proceeding.

In No. 269 Panhandle's intervention was sought by a different route. At a meeting of the stockholders of Panhandle a resolution was introduced authorizing this

proceeding. It was defeated because Columbia Oil's holding of Panhandle stock was voted against it. Mokan claimed that this stock was disqualified from being voted on a matter so deeply touching the self-interest of the Columbia companies. If this stock be not counted, so runs the argument, Mokan's votes constituted a majority and the resolution carried. But we need not pass on these problems of corporate control, because, under our decision in No. 268, Panhandle's participation, derivatively asserted by Mokan, is secured.

In a memorandum filed by the Attorney General we are advised that on January 18, 1941, the district court filed an opinion approving the plan for modifying the original decree subject to some suggestions by the Government. This, we are told, "is believed to satisfy the public interest," and so the Government desires to sustain the action of the court below without further litigation. We recognize the duty of expeditious enforcement of the antitrust laws. But expedition cannot be had at the sacrifice of rights which the original decree itself established. We assume that the district court will adjust the right which belongs to Panhandle with full regard to that public interest which underlay the original suit.

The order in No. 268 is reversed, but that in No. 269 is affirmed.

No. 268, reversed.
No. 269, affirmed.

MR. JUSTICE ROBERTS is of opinion that both judgments should be affirmed.

MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY took no part in the consideration or disposition of this case.

CONSOLIDATED ROCK PRODUCTS CO. ET AL. *v.* DU BOIS.*

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

No. 400. Argued February 13, 14, 1941.—Decided March 3, 1941.

In a proceeding to reorganize a parent corporation and its two wholly-owned subsidiaries, a plan was approved which provided *inter alia:* That all assets of the companies be transferred free and clear to a new corporation; that in exchange for the outstanding bonds of the subsidiaries, which were secured on their respective properties by separate mortgages, the bondholders receive, for 50% of the principal amounts of their claims, income bonds of inferior grade secured on the property of the new company, and for the balance receive an equal amount of its par-value preferred stock, with warrants to purchase its common stock on certain terms, but that their claims to accrued interest be extinguished; that the preferred stockholders of the parent corporation receive common stock of the new corporation, and that its common stockholders receive warrants to purchase the new common on terms stated. Although the mortgage debts of the subsidiaries differed in amount, the net income of the new company was to be applied one-half to the one and one-half to the other group of bondholders for servicing their new securities. Each of the two subsidiaries had a money claim against the parent company, under an agreement whereby the latter had taken over the entire management and financing of the business and properties of the subsidiaries, and which stipulated, *inter alia,* that that company would make certain payments and allow certain credits to the subsidiaries, and, upon termination of the agreement, would return their properties and render final accountings. The agreement declared that it was made for the benefit of the parties and not "for the benefit of any third person," and contained a provision for extension of its date of expiration at the option of the parent company. The District Court did not find specific values for the separate properties or the properties of the enterprise as a unit; yet,

*Together with No. 444, *Badgley et al.* v. *Du Bois,* also on writ of certiorari, 311 U. S. 636, to the Circuit Court of Appeals for the Ninth Circuit.

in face of a poor earnings record, it found that the present fair value of all the assets, exclusive of good will and going concern value, was in excess of the total bonded indebtedness, plus accrued and unpaid interest. It further found that, including good will and going concern value, the value was insufficient to pay the bonded indebtedness plus accrued and unpaid interest and certain liquidation preferences and accrued dividends on the parent company's preferred stock; that the present value of the assets subject to the trust indentures of the subsidiaries was insufficient to pay the face amount, plus accrued and unpaid interest, of the respective bond issues; that, as a result of commingling under the operating agreement, it would be physically impossible to segregate with any degree of accuracy or fairness properties which originally belonged to the companies separately, and that an appraisal would produce further confusion. No finding was made of the amount or validity of the intercompany claims, the court concluding that any liability under the operating agreement was not for the benefit of third parties, including the bondholders. *Held:*

1. To warrant approval of any plan of reorganization, there should have been a determination of what assets were subject to payment of the respective claims. P. 520.

2. The mortgaged assets being, as found by the District Court, insufficient to pay the mortgage indebtedness, the bondholders, under the full and absolute priority rule, would have, as against the parent corporation and its stockholders, prior recourse against any unmortgaged assets of the subsidiaries, including the money claims of the subsidiaries against the parent company. P. 520.

3. Assuming that, because of the extension provision, the operating contract is still executory, the trustees of the subsidiaries are entitled, under § 77B (b) of the Bankruptcy Act, to prove their claims at present worth. P. 521.

4. Equity will not permit a holding company, which has dominated and controlled its subsidiaries, to escape or reduce its liability to them by reliance upon self-serving contracts which it has imposed on them. P. 522.

5. A holding company in dominating and controlling position has fiduciary duties to security holders of its system which will be strictly enforced. P. 522.

6. A holding company owing money to its subsidiaries under an agreement between them can not defeat or postpone an accounting in the interest of their bondholders by resort to a declaration in

the agreement that it was made for the benefit of the parties to it, not "for the benefit of any third person." P. 522.

7. The bankruptcy court, having exclusive jurisdiction over the holding company and the subsidiaries, has plenary power to adjudicate all the issues pertaining to such intercompany claim. P. 523.

8. In view of the unified operation of all the properties by the parent company, the commingling of assets, and the treatment of the subsidiaries as mere departments of its business, that company is in no position to assert that its assets are insulated from the claims of the subsidiaries' bondholders. P. 523.

9. The value of the assets of the holding company must be determined, to furnish criteria for appropriate allocation of the new securities between bondholders and stockholders in case any equity remains after bondholders have been made whole. P. 524.

10. To determine the fairness of the plan as between the bondholders of the subsidiaries there must be at least an approximate ascertainment of the value of their respective assets, notwithstanding the difficulties occasioned by the lack of earnings records and by the commingling of properties. P. 524.

11. Future earning capacity of the enterprise is the appropriate criterion for the determination of solvency in connection with reorganization plans involving productive properties; valuations for other purposes are not relevant to that issue, except as they may indirectly bear on earning capacity. P. 525.

Unless meticulous regard for earning capacity be had, indefensible participation of junior securities in plans of reorganization may result. Findings as to earning capacity are essential for determination of the feasibility and fairness of a plan of reorganization.

12. Estimate of earning capacity must be based on an informed judgment which embraces all facts relevant to future earning capacity and hence to present worth, including the nature and condition of the properties, the past earning record, and all circumstances which indicate whether or not that record is a reliable criterion of future performance. P. 526.

A sum of values based on physical factors and assigned to separate units of the property without regard to the earning capacity of the whole enterprise is plainly inadequate.

13. Whether there should be a formal appraisal of properties in this case is left to the discretion of the District Court. P. 527.

14. The absolute priority principle applies to reorganizations of solvent, as well as insolvent, corporations. P. 527.

15. Under this principle, interest accrued on the bonds is entitled to the same priority as the principal. P. 527.

16. The absolute priority principle does not mean that creditors can not be given inferior grades of securities or even securities of the same kind as are received by junior interests; but, even where the enterprise as a whole is solvent in the bankruptcy sense, the principle is violated, in cases where stockholders are participating in the plan, if creditors are given securities inferior in grade to those they give up and of the same face amounts, with no additional compensation for the senior rights surrendered. P. 528.

17. Whether in case of a solvent company the creditors should be made whole for the change in or loss of their seniority by an increased participation in assets, in earnings, or in control, or in any combination thereof, will be dependent on the facts and requirements of each case. So long as the new securities offered are of a value equal to the creditors' claims, the appropriateness of the formula employed rests in the informed discretion of the court. P. 529.

18. The fact that a plan of reorganization substitutes for several old bond issues, separately secured, new securities constituting an interest in all of the properties does not make it unfair and inequitable *per se*. If the creditors are adequately compensated for the loss of their prior claims, it is not material out of what assets they are paid. P. 530.

114 F. 2d 102, affirmed.

CERTIORARI, 311 U. S. 636, to review the reversal of a judgment confirming a plan of reorganization under § 77B of the Bankruptcy Act.

Mr. Paul R. Watkins, with whom *Mr. Dana Latham* was on the brief, for petitioners in No. 400; and *Mr. Graham L. Sterling, Jr.,* with whom *Messrs. Homer I. Mitchell* and *John C. Macfarland* were on the brief, for petitioners in No. 444.

Mr. Kenneth E. Grant for respondent.

By special leave of Court, *Solicitor General Biddle,* with whom *Messrs. Richard H. Demuth, Chester T. Lane, Martin Riger, George Rosier,* and *Homer Kripke* were on

the brief, for the Securities and Exchange Commission, as *amicus curiae*.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case involves questions as to the fairness under § 77B of the Bankruptcy Act (48 Stat. 912) of a plan of reorganization for a parent corporation (Consolidated Rock Products Co.) and its two wholly owned subsidiaries [1]—Union Rock Co. and Consumers Rock and Gravel Co., Inc. The District Court confirmed the plan; the Circuit Court of Appeals reversed. 114 F. 2d 102. We granted the petitions [2] for certiorari because of the importance in the administration of the reorganization provisions of the Act of certain principles enunciated by the Circuit Court of Appeals.

The stock of Union and Consumers is held by Consolidated. Union has outstanding in the hands of the public [3] $1,877,000 of 6% bonds secured by an indenture on its property, with accrued and unpaid interest [4]

[1] The proceedings under § 77B were instituted in 1935 by the filing of separate voluntary petitions by Consolidated, Union and Consumers. No trustees have been appointed, Consolidated remaining in possession.

[2] The petition in No. 400 raises all of the questions discussed herein, while the petition in No. 444 raises only the question as to the authority of the reorganization court to approve a plan which substitutes one mortgage covering all of the property for so-called divisional mortgages on separate units of that property. The Interstate Commerce Commission and the Securities and Exchange Commission filed memoranda urging that the petition in No. 444 be granted and that the petition in No. 400 be granted to the extent that it raised the same question as that presented by the petition in No. 444.

[3] $102,500 face amount of Union's bonds are held by Consolidated.

[4] As of April 1, 1937, the effective date of the plan. Interest on Union bonds has been in default since March 1, 1934.

thereon of $403,555—a total mortgage indebtedness of $2,280,555. Consumers has outstanding in the hands of the public [5] $1,137,000 of 6% bonds secured by an indenture on its property, with accrued and unpaid interest [6] thereon of $221,715—a total mortgage indebtedness of $1,358,715. Consolidated has outstanding 285,947 shares of no par value preferred stock [7] and 397,455 shares of no par common stock.

The plan of reorganization calls for the formation of a new corporation to which will be transferred all of the assets of Consolidated, Union,[8] and Consumers free of all claims.[9] The securities of the new corporation are to be distributed as follows:

Union and Consumers bonds held by the public will be exchanged for income bonds [10] and preferred stock [11]

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[5] $63,500 face amount of Consumers' bonds are held by Consolidated.

[6] Interest has been in default since July 1, 1934.

[7] With a preference on liquidation of $25 per share plus accrued dividends.

[8] Reliance Rock Co. is a wholly owned subsidiary of Union whose properties also were to be transferred to the new company.

[9] The claims of general creditors will be paid in full or assumed by the new company.

[10] These bonds will mature in 20 years and will bear interest at the rate of 5 per cent if earned. The interest will be cumulative if not paid. The bonds, as well as the preferred stock, to be issued to Union and Consumers bondholders will be in separate series. The net income of the new company is to be divided into two equal parts: each part to be used to pay, with respect to bonds and preferred stock of each series, first, interest and sinking fund payments on the bonds; second, dividends and sinking fund payments on the preferred stock. Income remaining will be available for general corporate purposes.

[11] The new preferred stock will have a par value of $50 and will carry a dividend of 5 per cent. It will be noncumulative until the retirement of the bonds of the same series except to the extent that net income is available for dividends. Thereafter it will be cumulative.

of the new company. For 50 per cent of the principal amounts of their claims, those bondholders will receive income bonds secured by a mortgage on all of the property of the new company; for the balance they will receive an equal amount of par value preferred stock. Their claims to accrued interest are to be extinguished, no new securities being issued therefor. Thus Union bondholders for their claims of $2,280,555 will receive income bonds and preferred stock in the face amount of $1,877,000; Consumers bondholders for their claims of $1,358,715 will receive income bonds and preferred stock [12] in the face amount of $1,137,000. Each share of new preferred stock will have a warrant for the purchase of two shares of new $2 par value common stock at prices ranging from $2 per share within six months of issuance, to $6 per share during the fifth year after issuance.

Preferred stockholders of Consolidated will receive one share of new common stock ($2 par value) for each share of old preferred or an aggregate of 285,947 shares of new common.

A warrant to purchase one share of new common for $1 within three months of issuance will be given to the common stockholders of Consolidated for each five shares of old common.[13]

The new preferred stock, to be received by the old bondholders, will elect four out of nine directors of the new company; the new common stock will elect the re-

[12] All of the new income bonds and preferred stock are to be issued to the public holders of Union and Consumers bonds.

[13] 79,491 shares of new common will be reserved for the exercise of warrants issued to old common stockholders; an additional 60,280 shares of new common, for the exercise of warrants attached to the new preferred.

mainder.[14] But on designated delinquencies in payment of interest on the new bonds, the old bondholders would be entitled to elect six of the nine directors.

The bonds of Union and Consumers held by Consolidated,[15] the stock of those companies held by Consolidated, and the intercompany claims (discussed hereafter) will be cancelled.

In 1929 when Consolidated acquired control of these various properties, they were appraised in excess of $16,000,000 and it was estimated that their annual net earnings would be $500,000. In 1931 they were appraised by officers at about $4,400,000, "exclusive of going concern, good will and current assets." The District Court did not find specific values for the separate properties of Consolidated, Union, or Consumers, or for the properties of the enterprise as a unit. The average of the valuations (apparently based on physical factors) given by three witnesses[16] at the hearing before the master were $2,202,733 for Union as against a mortgage indebtedness of $2,280,555; $1,151,033 for Consumers as against a mortgage indebtedness of $1,358,715. Relying on similar testimony, Consolidated argues that the value of its property, to be contributed to the new company, is over $1,359,000, or exclusive of an alleged good will of $500,000, $859,784. These estimated values somewhat conflict with the consolidated balance sheet (as at June 30, 1938) which shows assets of $3,723,738.15 and liabilities (exclusive of capital and surplus) of $4,253,224.41. More important, the earnings record of the enterprise

[14] It is apparent that the majority of the new common will be held by the old preferred stockholders even if all warrants are exercised.

[15] See notes 3 and 5, *supra*.

[16] Two officers and one ex-employee. These valuation figures included the properties of Reliance. See note 8, *supra*.

casts grave doubts on the soundness of the estimated values. No dividends were ever paid on Consolidated's common stock; and except for five quarterly dividends in 1929 and 1931, none on its preferred stock. For the eight and a half years from April 1, 1929, to September 30, 1937, Consolidated had a loss of about $1,200,000 before bond interest but after depreciation and depletion. And except for the year 1929, Consolidated had no net operating profit, after bond interest and amortization, depreciation and depletion, in any year down to September 30, 1937.[17] Yet on this record the District Court found that the present fair value of all the assets of the several companies, exclusive of good will and going concern value, was in excess of the total bonded indebtedness, plus accrued and unpaid interest. And it also found that such value, including good will and going concern value, was insufficient to pay the bonded indebtedness plus accrued and unpaid interest and the liquidation preferences and accrued dividends on Consolidated preferred stock. It further found that the present fair value of the assets admittedly subject to the trust indentures of Union and Consumers was insufficient to pay the face amount, plus accrued and unpaid interest of the respective bond issues. In spite of that finding, the District Court also found that "it would be physically impossible to determine and segregate with any degree of accuracy or fairness properties which originally belonged to the companies separately"; that as a result of unified operation properties of every character "have been commingled and are now in the main held by Consolidated without any way of ascertaining what part, if any thereof, belongs to each or any of the companies separately"; and that, as a consequence, an appraisal "would

[17] The hearings on the plan were held before a master during November, 1937.

be of such an indefinite and unsatisfactory nature as to produce further confusion."

The unified operation which resulted in that commingling of assets was pursuant to an operating agreement which Consolidated caused its wholly owned subsidiaries [18] to execute in 1929. Under that agreement the subsidiaries ceased all operating functions and the entire management, operation and financing of the business and properties of the subsidiaries were undertaken by Consolidated. The corporate existence of the subsidiaries, however, was maintained and certain separate accounts were kept. Under this agreement Consolidated undertook, *inter alia,* to pay the subsidiaries the amounts necessary for the interest and sinking fund provisions of the indentures and to credit their current accounts with items of depreciation, depletion, amortization and obsolescence.[19] Upon termination of the agreement the properties were to be returned and a final settlement of accounts made, Consolidated meanwhile to retain all net revenues after its obligations thereunder to the subsidiaries had been met. It was specifically provided that the agreement was made for the benefit of the parties, not "for the benefit of any third person." Consolidated's

[18] This agreement covered the properties of Reliance as well as Union and Consumers. By a modification made in 1933 the agreement was to expire in February, 1938, Consolidated having an option to extend the agreement for another five years on specified notice.

[19] The agreement was modified in 1933 (by two officers acting for each of the four companies) whereby the depreciation to be credited to the subsidiaries should be credited only on termination of the agreement. At that time Consolidated was to have the right, by paying a five per cent penalty, to pay twenty-five per cent of the amount of the depreciation credit in ten annual installments and the balance at the end of ten years from the date of termination. Some question has been raised as to the propriety of that modification, a question on which we express no opinion.

books as at June 30, 1938, showed a net indebtedness under that agreement to Union and Consumers of somewhat over $5,000,000. That claim was cancelled by the plan of reorganization, no securities being issued to the creditors of the subsidiaries therefor. The District Court made no findings as respects the amount or validity of that intercompany claim; it summarily disposed of it by concluding that any liability under the operating agreement was "not made for the benefit of any third parties and the bondholders are included in that category."

We agree with the Circuit Court of Appeals that it was error to confirm this plan of reorganization.

I. On this record no determination of the fairness of any plan of reorganization could be made. Absent the requisite valuation data, the court was in no position to exercise the "informed, independent judgment" (*National Surety Co.* v. *Coriell,* 289 U. S. 426, 436) which appraisal of the fairness of a plan of reorganization entails. *Case* v. *Los Angeles Lumber Products Co.,* 308 U. S. 106. And see *First National Bank* v. *Flershem,* 290 U. S. 504, 525. There are two aspects of that valuation problem.

In the first place, there must be a determination of what assets are subject to the payment of the respective claims. This obvious requirement was not met. The status of the Union and Consumers bondholders emphasizes its necessity and importance. According to the District Court the mortgaged assets are insufficient to pay the mortgage debt. There is no finding, however, as to the extent of the deficiency or the amount of unmortgaged assets and their value. It is plain that the bondholders would have, as against Consolidated and its stockholders, prior recourse against any unmortgaged assets of Union and Consumers. The full and absolute priority rule of *Northern Pacific Ry. Co.* v. *Boyd,* 228

U. S. 482, and *Case* v. *Los Angeles Lumber Products Co., supra,* would preclude participation by the equity interests in any of those assets until the bondholders had been made whole. Here there are some unmortgaged assets, for there is a claim of Union and Consumers against Consolidated—a claim which according to the books of Consolidated is over $5,000,000 in amount. If that claim is valid,[20] or even if it were allowed only to the extent of 25% of its face amount,[21] then the entire assets of Consolidated would be drawn down into the estates of the subsidiaries. In that event Union and Consumers might or might not be solvent in the bankruptcy sense. But certainly it would render untenable the present contention of Consolidated and the preferred stockholders that they are contributing all of the assets of the Consolidated to the new company in exchange for which they are entitled to new securities. On that theory of the case they would be making a contribution of only such assets of Consolidated, if any, as remained after any deficiency of the bondholders had been wholly satisfied.

There are no barriers to a valuation and enforcement of that claim. If as Consolidated maintains the subsidiaries have no present claim against it,[22] the claim

[20] Consolidated seems to admit that that claim is valid, at least to the extent of net current liabilities aggregating more than $250,000 as of June 30, 1938.

[21] Respondent points out that even on the basis of a $3,300,000 valuation of the properties of Union and Consumers depreciation, depletion and obsolescence charges would be approximately $1,250,000.

[22] Consolidated maintains that there is no present claim against it because no claim exists until termination of the operating agreement which ran until February 1938, with an option in Consolidated to extend it for five years. But it does not assert, nor does the record show, that the option was exercised. But even if it had been,

can readily be discounted to present worth. It is provable by trustees of the subsidiaries, for the term "creditors" under § 77B (b) includes "holders of claims of whatever character against the debtor or its property, including claims under executory contracts, whether or not such claims would otherwise constitute provable claims under this Act." [23] Consolidated makes some point of the difficulty and expense of determining the extent of its liability under the operating agreement and of the necessity to abide by the technical terms of that agreement [24] in ascertaining that liability. But equity will not permit a holding company, which has dominated and controlled its subsidiaries, to escape or reduce its liability to those subsidiaries by reliance upon self-serving contracts which it has imposed on them. A holding company, as well as others in dominating or controlling positions (*Pepper* v. *Litton,* 308 U. S. 295), has fiduciary duties to security holders of its system which will be strictly enforced. See *Taylor* v. *Standard Gas & Electric Co.,* 306 U. S. 307. In this connection Consolidated cannot defeat or postpone the accounting because of the clause in the operating agreement that it was not made for the benefit of any third person. The question here is not a technical one as to who may sue to enforce that liability. It is merely a question as to the amount by which Consolidated is indebted to the

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only the time when the amounts accrued were payable would be affected.

[23] For an equally broad definition of "creditor" under Ch. X of the Chandler Act (52 Stat. 840) see § 106 (1) and (4).

[24] Thus Consolidated argues that under the operating agreement the machinery for an appraisal provided therein must be employed. Yet assuming *arguendo* that that is true, Consolidated which has been in possession and control throughout cannot rely on the failure to have an appraisal as a reason for blocking or delaying its duty to account.

subsidiaries and the proof and allowance of that claim. The subsidiaries need not be sent into state courts to have that liability determined. The bankruptcy court having exclusive jurisdiction over the holding company and the subsidiaries has plenary power to adjudicate all the issues pertaining to the claim. The intimations of Consolidated that there must be foreclosure proceedings and protracted litigation in state courts involve a misconception of the duties and powers of the bankruptcy court. The fact that Consolidated might have a strategic or nuisance value outside of § 77B does not detract from or impair the power and duty of the bankruptcy court to require a full accounting as a condition precedent to approval of any plan of reorganization. The fact that the claim might be settled, with the approval of the Court after full disclosure and notice to interested parties, does not justify the concealed compromise effected here through the simple expedient of extinguishing the claim.

So far as the ability of the bondholders of Union and Consumers to reach the assets of Consolidated on claims of the kind covered by the operation agreement is concerned, there is another and more direct route which reaches the same end. There has been a unified operation of those several properties by Consolidated pursuant to the operating agreement. That operation not only resulted in extensive commingling of assets. All management functions of the several companies were assumed by Consolidated. The subsidiaries abdicated. Consolidated operated them as mere departments of its own business. Not even the formalities of separate corporate organizations were observed, except in minor particulars such as the maintenance of certain separate accounts. In view of these facts, Consolidated is in no position to claim that its assets are insulated from such

claims of creditors of the subsidiaries. To the contrary, it is well settled that where a holding company directly intervenes in the management of its subsidiaries so as to treat them as mere departments of its own enterprise, it is responsible for the obligations of those subsidiaries incurred or arising during its management. *Davis* v. *Alexander,* 269 U. S. 114, 117; *Joseph R. Foard Co.* v. *Maryland,* 219 F. 827, 829; *Stark Electric R. Co.* v. *M'Ginty Contracting Co.,* 238 F. 657, 661–663; *The Willem Van Driel, Sr.,* 252 F. 35, 37–39; *Luckenbach S. S. Co.* v. *W. R. Grace & Co.,* 267 F. 676, 681; *Costan* v. *Manila Electric Co.,* 24 F. 2d 383; *Kingston Dry Dock Co.* v. *Lake Champlain Transp. Co.,* 31 F. 2d 265, 267; *Dillard & Coffin Co.* v. *Richmond Cotton Oil Co.,* 140 Tenn. 290; 204 S. W. 758. We are not dealing here with a situation where other creditors of a parent company are competing with creditors of its subsidiaries. If meticulous regard to corporate forms, which Consolidated has long ignored, is now observed, the stockholders of Consolidated may be the direct beneficiaries. Equity will not countenance such a result. A holding company which assumes to treat the properties of its subsidiaries as its own cannot take the benefits of direct management without the burdens.

We have already noted that no adequate finding was made as to the value of the assets of Consolidated. In view of what we have said, it is apparent that a determination of that value must be made so that criteria will be available to determine an appropriate allocation of new securities between bondholders and stockholders in case there is an equity remaining after the bondholders have been made whole.

There is another reason why the failure to ascertain what assets are subject to the payment of the Union and Consumers bonds is fatal. There is a question raised as to the fairness of the plan as respects the bondholders

inter sese. While the total mortgage debt of Consumers is less than that of Union, the net income of the new company, as we have seen,[25] is to be divided into two equal parts, one to service the new securities issued to Consumers bondholders, the other to service those issued to Union bondholders. That allocation is attacked here by respondent as discriminatory against Union, on the ground that the assets of Union are much greater in volume and in value than those of Consumers. It does not appear from this record that Union and Consumers have individual earnings records. If they do not, some appropriate formula for at least an approximate ascertainment of their respective assets must be designed in spite of the difficulties occasioned by the commingling. Otherwise the issue of fairness of any plan of reorganization as between Union and Consumers bondholders cannot be intelligently resolved.

In the second place, there is the question of the method of valuation. From this record it is apparent that little, if any, effort was made to value the whole enterprise by a capitalization of prospective earnings. The necessity for such an inquiry is emphasized by the poor earnings record of this enterprise in the past. Findings as to the earning capacity of an enterprise are essential to a determination of the feasibility as well as the fairness of a plan of reorganization. Whether or not the earnings may reasonably be expected to meet the interest and dividend requirements of the new securities is a *sine qua non* to a determination of the integrity and practicability of the new capital structure. It is also essential for satisfaction of the absolute priority rule of *Case* v. *Los Angeles Lumber Products Co., supra.* Unless meticulous regard for earning capacity be had, indefensible

[25] *Supra,* note 10.

participation of junior securities in plans of reorganization may result.

As Mr. Justice Holmes said in *Galveston, H. & S. A. Ry. Co.* v. *Texas,* 210 U. S. 217, 226, "the commercial value of property consists in the expectation of income from it." And see *Cleveland, C., C. & St. L. Ry. Co.* v. *Backus,* 154 U. S. 439, 445. Such criterion is the appropriate one here, since we are dealing with the issue of solvency arising in connection with reorganization plans involving productive properties. It is plain that valuations for other purposes are not relevant to or helpful in a determination of that issue, except as they may indirectly bear on earning capacity. *Temmer* v. *Denver Tramway Co.,* 18 F. 2d 226, 229; *New York Trust Co.* v. *Continental & Commercial Trust & Sav. Bank,* 26 F. 2d 872, 874. The criterion of earning capacity is the essential one if the enterprise is to be freed from the heavy hand of past errors, miscalculations or disaster, and if the allocation of securities among the various claimants is to be fair and equitable. *In re Wickwire Spencer Steel Co.,* 12 F. Supp. 528, 533; 2 Bonbright, Valuation of Property, pp. 870–881, 884–893. Since its application requires a prediction as to what will occur in the future, an estimate, as distinguished from mathematical certitude, is all that can be made. But that estimate must be based on an informed judgment which embraces all facts relevant to future earning capacity and hence to present worth, including, of course, the nature and condition of the properties, the past earnings record, and all circumstances which indicate whether or not that record is a reliable criterion of future performance. A sum of values based on physical factors and assigned to separate units of the property without regard to the earning capacity of the whole enterprise is plainly inadequate. See Finletter, The Law of Bankruptcy Reorganization, pp. 557 *et seq.* But hardly more than that was done here.

The Circuit Court of Appeals correctly left the matter of a formal appraisal to the discretion of the District Court. The extent and method of inquiry necessary for a valuation based on earning capacity are necessarily dependent on the facts of each case.

II. The Circuit Court of Appeals held that the absolute priority rule of *Northern Pacific Ry. Co.* v. *Boyd, supra,* and *Case* v. *Los Angeles Lumber Products Co., supra,* applied to reorganizations of solvent as well as insolvent companies. That is true. Whether a company is solvent or insolvent in either the equity or the bankruptcy sense, "any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights" of creditors "comes within judicial denunciation." *Louisville Trust Co.* v. *Louisville, N. A. & C. Ry. Co.,* 174 U. S. 674, 684. And we indicated in *Case* v. *Los Angeles Lumber Products Co., supra,* that that rule was not satisfied even though the "relative priorities" of creditors and stockholders were maintained (pp. 119–120).

The instant plan runs afoul of that principle. In the first place, no provision is made for the accrued interest on the bonds. This interest is entitled to the same priority as the principal. See *American Iron & Steel Mfg. Co.* v. *Seaboard Air Line Ry.,* 233 U. S. 261, 266–267; *Ticonic National Bank* v. *Sprague,* 303 U. S. 406. In the second place, and apart from the cancellation of interest, the plan does not satisfy the fixed principle of the *Boyd* case even on the assumption that the enterprise as a whole is solvent in the bankruptcy sense. The bondholders for the principal amount of their 6% bonds receive an equal face amount of new 5% income bonds and preferred stock, while the preferred stockholders receive new common stock. True, the relative priorities are maintained. But the bondholders have not been

made whole. They have received an inferior grade of securities, inferior in the sense that the interest rate has been reduced, a contingent return has been substituted for a fixed one, the maturities have been in part extended and in part eliminated by the substitution of preferred stock, and their former strategic position has been weakened. Those lost rights are of value. Full compensatory provision must be made for the entire bundle of rights which the creditors surrender.

The absolute priority rule does not mean that bondholders cannot be given inferior grades of securities, or even securities of the same grade as are received by junior interests. Requirements of feasibility [26] of reorganization plans frequently necessitate it in the interests of simpler and more conservative capital structures. And standards of fairness permit it. This was recognized in *Kansas City Terminal Ry. Co.* v. *Central Union Trust Co.*, 271 U. S. 445. This Court there said (p. 455) that though "to the extent of their debts creditors are entitled to priority over stockholders against all the property" of the debtor company, "it does not follow that in every reorganization the securities offered to general creditors must be superior in rank or grade to any which stockholders may obtain. It is not impossible to accord to the creditor his superior rights in other ways." And the Court went on to say (p. 456), "No offer is fair which does not recognize the prior rights of creditors . . .; but circumstances may justify an offer of different amounts of the same grade of securities to both creditors and stockholders." Thus it is plain that while creditors may be given inferior grades of securities, their "superior rights" must be recognized. Clearly, those prior rights are not recognized, in cases where stockholders are participating in the plan, if creditors are

[26] § 77B (f) (1).

given only a face amount of inferior securities equal to the face amount of their claims. They must receive, in addition, compensation for the senior rights which they are to surrender. If they receive less than that full compensatory treatment, some of their property rights will be appropriated for the benefit of stockholders without compensation. That is not permissible. The plan then comes within judicial denunciation because it does not recognize the creditors' "equitable right to be preferred to stockholders against the full value of all property belonging to the debtor corporation." *Kansas City Terminal Ry. Co.* v. *Central Union Trust Co., supra,* p. 454.

Practical adjustments, rather than a rigid formula, are necessary. The method of effecting full compensation for senior claimants will vary from case to case. As indicated in the *Boyd* case (228 U. S. at p. 508) the creditors are entitled to have the full value of the property, whether "present or prospective, for dividends or only for purposes of control," first appropriated to payment of their claims. But whether in case of a solvent company the creditors should be made whole for the change in or loss of their seniority by an increased participation in assets, in earnings or in control, or in any combination thereof, will be dependent on the facts and requirements of each case.[27] So long as the new securities offered are

[27] In view of the condition of the record relative to the value of the properties and the fact that the accrued interest is cancelled by the plan, it is not profitable to attempt a detailed discussion of the deficiencies in the alleged compensatory treatment of the bondholders. It should, however, be noted as respects the warrants issued to the old common stockholders that they admittedly have no equity in the enterprise. Accordingly, it should have been shown that there was a necessity of seeking new money from them and that the participation accorded them was not more than reasonably equivalent to their contribution. *Kansas City Terminal Ry. Co.* v.

of a value equal to the creditors' claims, the appropriateness of the formula employed rests in the informed discretion of the court.

The Circuit Court of Appeals, however, made certain statements which if taken literally do not comport with the requirements of the absolute priority rule. It apparently ruled that a class of claimants with a lien on specific properties must receive full compensation out of those properties, and that a plan of reorganization is *per se* unfair and inequitable if it substitutes for several old bond issues, separately secured, new securities constituting an interest in all of the properties. That does not follow from *Case* v. *Los Angeles Lumber Products Co., supra.* If the creditors are adequately compensated for the loss of their prior claims, it is not material out of what assets they are paid. So long as they receive full compensatory treatment and so long as each group shares in the securities of the whole enterprise on an equitable basis, the requirements of "fair and equitable" are satisfied.

Any other standard might well place insuperable obstacles in the way of feasible plans of reorganization. Certainly where unified operations of separate properties are deemed advisable and essential, as they were in this case, the elimination of divisional mortgages may be

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Central Union Trust Co., supra; Case v. *Los Angeles Lumber Products Co., supra,* pp. 121–122. In the latter case we warned against the dilution of creditors' rights by inadequate contributions by stockholders. Here that dilution takes a rather obvious form in view of the lower price at which the stockholders may exercise the warrants. Warrants exercised by them would dilute the value of common stock purchased by bondholders during the same period. Furthermore, on Consolidated's estimate of the equity in the enterprise, the values of the new common would have to increase many fold to reach a value which exceeds the warrant price by the amount of the accrued interest.

necessary as well as wise. Moreover, the substitution of a simple, conservative capital structure for a highly complicated one may be a primary requirement of any reorganization plan. There is no necessity to construct the new capital structure on the framework of the old.

Affirmed.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* LE GIERSE ET AL., EXECUTORS.

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

No. 237. Argued January 9, 10, 1941.—Decided March 3, 1941.

1. Within the meaning of § 302 (g) of the Revenue Act of 1926 as amended, amounts "receivable as insurance" are amounts receivable as the result of transactions which involved at the time of their execution an actual insurance risk. P. 537.
2. Risk-shifting and risk-distribution are essentials of a contract of life insurance. P. 539.
3. A contract in the standard form of a life insurance policy, containing the usual provisions, including those for assignment or surrender, was issued to a woman of eighty years of age, without physical examination, for a single premium less than the face of the policy, together with an annuity policy for another premium calling for annual payments to her until her death Although both policies were, on the face, separate contracts, neither referring to the other, and each was treated as independent in the matters of application, computation of premium, report and book entry of premium payment, maintenance of reserve, etc., they were issued at the same time, and the making of the annuity contract was a condition to the issuance of the life policy; and the combined effect was such that, in case of premature death, the gain to the insurance company under one would neutralize its loss under the other. *Held:*
   (1) That the contracts must be considered together. P. 540.
   (2) They created no insurance risk. P. 541.

Any risk that the prepayment would earn less than the amount paid by the insurance company as an annuity was an investment risk, not an insurance risk.

(3) The amount payable to the beneficiary named in the life policy, upon the death of the "insured," was not in the scope of § 302 (g), supra, but was properly taxed in the decedent's estate under § 302 (c) as a transfer to take effect in possession or enjoyment at or after death. P. 542.

110 F. 2d 734, reversed.

CERTIORARI, 311 U. S. 625, to review the affirmance of a decision of the Board of Tax Appeals, 39 B. T. A. 1134, reversing a deficiency assessment of estate tax.

Assistant Attorney General Clark, with whom *Solicitor General Biddle* and *Messrs. Sewall Key, J. Louis Monarch, Richard H. Demuth,* and *Maurice J. Mahoney* were on the brief, for petitioner.

Mr. Frederick O. McKenzie for respondents.

The life insurance policy and the annuity were separate, distinct, complete contracts. For each there was a separate application and a separate consideration. Regular, standard forms were used. Neither referred to the other directly or indirectly; either could have been surrendered without affecting the company's liability under the other. The company regarded the transactions as separate and distinct and they were so reported to the Commissioner of Insurance of the State of Connecticut, as required by law. Separate receipts were issued to the decedent by the company covering payment received by it for each contract. The consideration, or premium, for each contract was computed on an actuarial basis and in accordance with the company's regular schedule of rates. In other words, in computing the single premium charged for the life insurance policy, no adjustment or allowance was made for the annuity premium, and in computing the annuity premium, no adjustment or allowance was

made for the insurance premium. The amount received by the company as a single premium for the insurance policy was credited to its insurance reserve and the amount received by it for the annuity, to its annuity reserve. All the legal incidents of ownership enjoyed by the owner of any ordinary life insurance policy were vested in the decedent with respect to the policy here in question and she could have exercised any or all of them without reference to the annuity contract.

All the evidence points to an intention of the parties to enter into a life insurance and an annuity contract, separate, distinct and independent of each other. Williston, Contracts, 2d Ed., § 628.

Even where the contracting parties combine all their promises in one document, if the agreement sets forth separate features, clearly severable, each feature must be given its proper application. *Equitable Life Assur. Society* v. *Deem,* 91 F. 2d 569, 575; *Connecticut General Life Ins. Co.* v. *McClellan,* 94 F. 2d 445, 446; *Downey* v. *German Alliance Ins. Co.,* 252 F. 701, 703, 704; *Legg* v. *St. John,* 296 U. S. 489, 490–495; *Bodine* v. *Commissioner,* 103 F. 2d 982, 985. Dist'g *Pearson* v. *McGraw,* 308 U. S. 313.

Contracts executed as a condition precedent to, or in conjunction with, other contracts are commonplace in business transactions. With respect to the issuance of the annuity as a condition precedent to the issuance of the life insurance policy, we think that the court below covered the point succinctly when it said: "The fact that she could not have gotten that policy unless she had also bought an annuity contract does not change the character of what she got."

The decedent's age and the fact that she was not required to take a physical examination are in no way material to the issues.

We should hesitate to accept any definition of the oft-used term "insurance risk." Where insurance risk leaves off and investment risk begins is also difficult to determine. For example, we know that the investment element is of minor consideration in the low premium term contract, whereas it becomes a very important factor in the costly single premium endowment contract.

If the decedent had surrendered her life insurance policy at the end of the first year, a loss or a gain to the company on the two contracts would depend almost entirely on how long the decedent lived thereafter. The possibility of such a loss under such circumstances clearly existed at the time the two contracts were issued.

The fact that the company sought to underwrite the risk by different means than it ordinarily used in underwriting life insurance policies does not make the policy something other than life insurance. There is nothing in the exempting statute which requires that the insurance proceeds be receivable from a particular kind of life insurance contract, or that the policy be written in any particular way or conform to any particular standard, or that it be issued only after a physical examination of the insured, or that it be written according to any specific group of underwriting principles. The statute does not preclude the exemption on any of these grounds, and expresses no concern with any action the insurance company may take to relieve its underwriting problems or to minimize the risk in particular cases.

From a standpoint of underwriting, the reason the insurance company here would not have issued the life insurance policy to the decedent without the annuity was not because of her advanced age, not because she did not pass a physical examination, but because it would have been difficult to get a sufficient number of persons of her age to apply for similar policies and thus be

brought into the broad average for underwriting purposes. Since it was impractical to sell insurance to a large class of the age of decedent, the company accepted in lieu of a physical examination the issuance of the life annuity.

Petitioner would argue that if this decedent had been fifty years of age instead of eighty and had voluntarily purchased the annuity along with the policy, she would have received neither a life insurance policy nor an annuity but would have received instead one "investment contract."

Insurance policies should not be treated as *inter vivos* transfers akin to testamentary dispositions. There is no indication whatever that such was the intention of Congress in enacting § 302 (c) or § 302 (g). *Helvering* v. *Hallock,* 309 U. S. 106, and *Klein* v. *United States,* 283 U. S. 231, are inapplicable.

Most forms of life insurance provide some sort of cash value which is in itself an investment feature. It is common knowledge that life insurance is frequently purchased for investment purposes.

The contract in question presents the essential requisites of life insurance. For a stipulated consideration the company undertook to indemnify the beneficiary against loss by a specified contingency, peril or risk. That contingency was the death of the insured, this decedent. And the death of the decedent was the sole contingency for the payment of the principal amount of the policy. The fact that an annuity contract imposing entirely different obligations on the company was issued at the same time does not make the life insurance contract something other than life insurance.

The instant case is clearly distinguishable from the "deposit arrangement" cases. *Old Colony Trust Co.* v. *Commissioner,* 102 F. 2d 380; *State ex rel. Thornton* v. *Probate Court,* 186 Minn. 351.

The history of the statute indicates no intention on the part of Congress to restrict the exemption to proceeds of certain types of insurance contracts.

The contracts in question were entered into by the decedent neither in contemplation of death nor as a plan to evade or even avoid the payment of taxes.

The Board of Tax Appeals found as a matter of fact and held as a matter of law that the proceeds were received by the beneficiary "as insurance" within the meaning of the exempting statute. Such finding was supported by substantial evidence and should not be disturbed on review. *Colorado National Bank* v. *Commissioner,* 305 U. S. 23, 27; *Helvering* v. *Rankin,* 295 U. S. 123, 131.

The purchase of a single premium life insurance policy is not a "transfer" within the meaning of any of the provisions of § 302 (c) of the Revenue Act of 1926.

The plain language of the statute granting the exemption to life insurance proceeds should not be limited by implication to insurance issued under certain conditions. *Gould* v. *Gould,* 245 U. S. 151, 153; *United States* v. *Merriam,* 263 U. S. 179, 187–188; *Burnet* v. *Niagara Brewing Co.,* 282 U. S. 648, 654.

Mr. Justice Murphy delivered the opinion of the Court.

Less than a month before her death in 1936, decedent, at the age of 80, executed two contracts with the Connecticut General Life Insurance Co. One was an annuity contract in standard form entitling decedent to annual payments of $589.80 as long as she lived. The consideration stated for this contract was $4,179. The other contract was called a "Single Premium Life Policy—Non Participating" and provided for a payment of $25,000 to decedent's daughter, respondent Le Gierse, at decedent's death. The premium specified was $22,946. Decedent paid the total consideration, $27,125, at the

time the contracts were executed. She was not required to pass a physical examination or to answer the questions a woman applicant normally must answer.

The "insurance" policy would not have been issued without the annuity contract, but in all formal respects the two were treated as distinct transactions. Neither contract referred to the other. Independent applications were filed for each. Neither premium was computed with reference to the other. Premium payments were reported separately and entered in different accounts on the company's books. Separate reserves were maintained for insurance and annuities. Each contract was in standard form. The "insurance" policy contained the usual provisions for surrender, assignment, optional modes of settlement, etc.

Upon decedent's death, the face value of the "insurance" contract became payable to respondent Le Gierse, the beneficiary. Thereafter, a federal estate tax return was filed which excluded from decedent's gross estate the proceeds of the "insurance" policy. The Commissioner notified respondents Bankers Trust Co. and Le Gierse, as executors of decedent's estate, that he proposed to include the proceeds of this policy in the gross estate and to assess a deficiency. Suit in the Board of Tax Appeals followed, and the Commissioner's action was reversed. 39 B. T. A. 1134. The Circuit Court of Appeals affirmed. 110 F. 2d 734. We brought the case here because of conflict with *Commissioner* v. *Keller's Estate,* 113 F. 2d 833, and *Helvering* v. *Tyler,* 111 F. 2d 422. 311 U. S. 625.

The ultimate question is whether the "insurance" proceeds may be included in decedent's gross estate.

Section 302 of the Revenue Act of 1926 (44 Stat. 9, 70; as amended, 47 Stat. 169, 279; 48 Stat. 680, 752) provides: "The value of the gross estate of the decedent shall be determined by including the value at the time

of his death of all property, real or personal, tangible or intangible . . .—(g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life." Thus the basic question is whether the amounts received here are amounts "receivable as insurance" within the meaning of § 302 (g).

Conventional aids to construction are of little assistance here. Section 302 (g) first appeared in identical language in the Revenue Act of 1918 as § 402 (f). 40 Stat. 1057, 1098. It has never been changed.[1] None of the acts has ever defined "insurance." Treasury Regulations, interpreting the original provision, stated simply: "The term 'insurance' refers to life insurance of every description, including death benefits paid by fraternal beneficial societies, operating under the lodge system." Treasury Regulations No. 37, 1921 edition, p. 23. This statement has never been amplified.[2] The committee report accompanying the Revenue Act of 1918 merely noted that the provision taxing insurance receivable by the executor clarified existing law, and that the provision taxing insurance in excess of $40,000 receivable by specific beneficiaries was inserted to prevent tax evasion. House Report No. 767, 65th Cong., 2d Sess., p. 22.[3] Sub-

[1] Act of 1921: 42 Stat. 227, 279; Act of 1924: 43 Stat. 253, 305; Act of 1926: 44 Stat. 9, 71; Code of 1939: 53 Stat. 1, 122.

[2] Regulations No. 63, p. 26; Regulations No. 68, p. 31; Regulations No. 70, 1926 edition, p. 30; Regulations No. 70, 1929 edition, p. 33; Regulations No. 80, p. 62.

[3] ". . . [Insurance payable to specific beneficiaries does] not fall within the existing provisions defining gross estate. It has been brought to the attention of the committee that wealthy persons have and now anticipate resorting to this method of defeating the

sequent committee reports do not mention § 302 (g). Transcripts of committee hearings in 1918 and since are equally uninformative.[4]

Necessarily, then, the language and the apparent purpose of § 302 (g) are virtually the only bases for determining what Congress intended to bring within the scope of the phrase "receivable as insurance." In fact, in using the term "insurance" Congress has identified the characteristic that determines what transactions are entitled to the partial exemption of § 302 (g).

We think the fair import of subsection (g) is that the amounts must be received as the result of a transaction which involved an actual "insurance risk" at the time the transaction was executed. Historically and commonly insurance involves risk-shifting and risk-distributing. That life insurance is desirable from an economic and social standpoint as a device to shift and distribute risk of loss from premature death is unquestionable. That these elements of risk-shifting and risk-distributing are essential to a life insurance contract is agreed by courts and commentators. See for example: *Ritter* v. *Mutual Life Ins. Co.,* 169 U. S. 139; *In re Walsh,* 19 F. Supp. 567; Guaranty Trust Co. v. Commissioner, 16 B. T. A. 314; Ackerman v. Commissioner, 15 B. T. A. 635; Couch, Cyclopedia of Insurance, Vol. I, § 61; Vance,

estate tax. Agents of insurance companies have openly urged persons of wealth to take out additional insurance payable to specific beneficiaries for the reason that such insurance would not be included in the gross estate. A liberal exemption of $40,000 has been included and it seems not unreasonable to require the inclusion of amounts in excess of this sum. *Id.,* p. 22.

The same comment appears in Senate Report No. 617, 65th Cong., 3d Sess., p. 42.

[4] The curious consistency and inadequacy of § 302 (g) have not escaped notice. See Paul, Life Insurance and The Federal Estate Tax, 52 Harv. L. Rev. 1037; Paul, Studies in Federal Taxation, 3d Series, p. 351; *United States Trust Co.* v. *Sears,* 29 F. Supp. 643, 650.

Insurance, §§ 1–3; Cooley, Briefs on Insurance, 2d edition, Vol. I, p. 114; Huebner, Life Insurance, Ch. 1. Accordingly, it is logical to assume that when Congress used the words "receivable as insurance" in § 302 (g), it contemplated amounts received pursuant to a transaction possessing these features. *Commissioner* v. *Keller's Estate, supra; Helvering* v. *Tyler, supra; Old Colony Trust Co.* v. *Commissioner,* 102 F. 2d 380; Ackerman v. Commissioner, *supra.*

Analysis of the apparent purpose of the partial exemption granted in § 302 (g) strengthens the assumption that Congress used the word "insurance" in its commonly accepted sense. Implicit in this provision is acknowledgment of the fact that usually insurance payable to specific beneficiaries is designed to shift to a group of individuals the risk of premature death of the one upon whom the beneficiaries are dependent for support. Indeed, the pith of the exemption is particular protection of contracts and their proceeds intended to guard against just such a risk. See *Commissioner* v. *Keller's Estate, supra; United States Trust Co.* v. *Sears,* 29 F. Supp. 643; Hughes, Federal Death Tax, p. 91; Comment, 38 Mich. L. Rev. 526, 528; compare *Chase National Bank* v. *United States,* 28 F. Supp. 947; *In re Walsh, supra; Moskowitz* v. *Davis,* 68 F. 2d 818. Hence, the next question is whether the transaction in suit in fact involved an "insurance risk" as outlined above.

We cannot find such an insurance risk in the contracts between decedent and the insurance company.

The two contracts must be considered together. To say they are distinct transactions is to ignore actuality, for it is conceded on all sides and was found as a fact by the Board of Tax Appeals that the "insurance" policy would not have been issued without the annuity contract. Failure, even studious failure, in one contract to refer to the other cannot be controlling. Moreover,

authority for such consideration is not wanting, however unrealistic the distinction between form and substance may be. *Commissioner* v. *Keller's Estate, supra; Helvering* v. *Tyler, supra.* See Williston, Contracts, Vol. III, § 628; Paul, Studies in Federal Taxation, 2d series, p. 218; compare *Pearson* v. *McGraw,* 308 U. S. 313.[5]

Considered together, the contracts wholly fail to spell out any element of insurance risk. It is true that the "insurance" contract looks like an insurance policy, contains all the usual provisions of one, and could have been assigned or surrendered without the annuity. Certainly the mere presence of the customary provisions does not create risk, and the fact that the policy could have been assigned is immaterial since, no matter who held the policy and the annuity, the two contracts, relating to the life of the one to whom they were originally issued, still counteracted each other. It may well be true that if enough people of decedent's age wanted such a policy it would be issued without the annuity, or that if the instant policy had been surrendered a risk would have arisen. In either event the essential relation between the two parties would be different from what it is here. The fact remains that annuity and insurance are opposites; in this combination the one neutralizes the risk customarily inherent in the other. From the company's viewpoint, insurance looks to longevity, annuity to transiency. See *Commissioner* v. *Keller's Estate, supra; Helvering* v. *Tyler, supra; Old Colony Trust Co.* v. *Commissioner, supra; Carroll* v. *Equitable Life Assur. Soc.,* 9 F. Supp. 223; Note, 49 Yale L. J. 946; Cohen, Annuities and Transfer Taxes, 7 Kan. B. A. J. 139.

[5] *Legg* v. *St. John,* 296 U. S. 489, is not to the contrary. There nothing indicated that the one contract would not have been issued without the other; there was no necessary connection between the two.

Here the total consideration was prepaid and exceeded the face value of the "insurance" policy. The excess financed loading and other incidental charges. Any risk that the prepayment would earn less than the amount paid to respondent as an annuity was an investment risk similar to the risk assumed by a bank; it was not an insurance risk as explained above. It follows that the sums payable to a specific beneficiary here are not within the scope of § 302 (g). The only remaining question is whether they are taxable.

We hold that they are taxable under § 302 (c) of the Revenue Act of 1926, as amended, as a transfer to take effect in possession or enjoyment at or after death. See *Helvering* v. *Tyler, supra; Old Colony Trust Co.* v. *Commissioner, supra; Kernochan* v. *United States,* 29 F. Supp. 860; Guaranty Trust Co. v. Commissioner, *supra;* compare, *Gaither* v. *Miles,* 268 F. 692; Comment, 38 Mich. L. Rev. 526; Comment, 32 Ill. L. Rev. 223.

The judgment of the Circuit Court of Appeals is

Reversed.

The CHIEF JUSTICE and MR. JUSTICE ROBERTS think the judgment should be affirmed for the reasons stated in the opinion of the Circuit Court of Appeals.

ESTATE OF KELLER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 371. Argued January 10, 1941.—Decided March 3, 1941.

1. Decided in part upon the authority of *Helvering* v. *Le Gierse, ante*, p. 531. P. 543.
2. That a physical examination was not required is inconclusive as to the non-existence of an "insurance risk." P. 544.
3. That the premium might not earn enough to cover profitably the annuity payable to the decedent, or that there was a miscalculation of the proper total consideration, does not in this case establish the existence of an "insurance risk." P. 544.

113 F. 2d 833, affirmed.

CERTIORARI, 311 U. S. 630, to review a judgment reversing a decison of the Board of Tax Appeals, 39 B. T. A. 1047, disapproving of a deficiency estate tax assessment.

Mr. Ferdinand T. Weil, with whom *Mr. J. Smith Christy* was on the brief, for petitioners.

Assistant Attorney General Clark, with whom *Solicitor General Biddle* and *Messrs. Sewall Key, Richard H. Demuth, Maurice J. Mahoney,* and *Berryman Green* were on the brief, for respondent.

MR. JUSTICE MURPHY delivered the opinion of the Court.

This case is companion to *Helvering* v. *Le Gierse, ante*, p. 531. In all material respects the facts are alike except for the differences to be noted. Here the annuity contract provided for annual payments of $390.84 and cost decedent $3,258.20. The "insurance" policy stipulated for payment of $20,000 to decedent's daughter at de-

cedent's death, and the single premium was $17,941.80. Decedent was 74 at the time the contract was executed and died about two years later. Proceeding on the same theory as in the *Le Gierse* case, the Commissioner assessed a deficiency in the federal estate tax which the Board of Tax Appeals reversed. 39 B. T. A. 1047. The Circuit Court of Appeals in turn reversed the Board of Tax Appeals. 113 F. 2d 833. The case is here because of conflict with the *Le Gierse* case (110 F. 2d 734).

Petitioners contend that this case is distinguishable from the *Le Gierse* case because here the insurance company found that the total consideration for the two contracts, which was 106% of the face value of the policy, was inadequate. They point out that the rate for this combination of contracts was later increased to 108% and finally to 110%. Further, they contend that absence of physical examination does not establish absence of risk, and that the Board of Tax Appeals found that there was "some" risk to the insurance company.

We find the distinction insufficient to require a different result.

It is not enough to show that the insurance company assumed "some" risk. A bank assumes a risk when it accepts a depositor's funds and invests them. The investment may prove to be an unsafe one, or the bank may have agreed to pay the depositor a higher rate of interest than it can profitably earn on the funds it invests. Indisputably this is a risk. But it is not an insurance risk in the sense explained in the *Le Gierse* case. That the insurance company subsequently changed the total charge for this particular combination of contracts because it was unprofitable does not establish the existence of an insurance risk. Rather, it illustrates strikingly the interrelation of the two agreements and emphasizes the effort of the company to remove all possible investment risk.

Absence of a physical examination may well be inconclusive as to the existence of an insurance risk. For example, some companies do not require such an examination for group insurance. But there the risk as to one is distributed among the group, an insurance risk squarely within the definition stated in the *Le Gierse* case. Here the annuity issued with the policy did more than substitute for a physical examination. It removed the necessity for any risk distribution and completely countervailed a risk otherwise assumed in the "insurance" policy.

The finding by the Board of Tax Appeals that there was some risk necessarily is ambiguous in view of their finding that the company annually earned from 3½ to 4 percent on its own investments. It is therefore reasonable to conclude that the "risk" referred to was a risk that the funds might not earn enough to cover profitably the annuity payable to the decedent, or a risk due to a miscalculation of the proper total consideration. In either event it is not a finding of the existence of an insurance risk.

Since the case is not distinguishable from *Helvering* v. *Le Gierse, supra,* the judgment of the Circuit Court of Appeals is

Affirmed.

The CHIEF JUSTICE and MR. JUSTICE ROBERTS think the judgment should be reversed for the reasons stated in the opinion of the Circuit Court of Appeals for the Second Circuit in *Commissioner* v. *Le Gierse,* 110 F. 2d 734.

EX PARTE CLEIO HULL.

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF HABEAS CORPUS.

No. —, original. Decided March 3, 1941.

1. A state prison rule abridging or impairing a prisoner's right to apply to the federal courts for a writ of habeas corpus is invalid. P. 548.
2. A petition for habeas corpus attached as an exhibit to petitioner's response to a warden's return to an order to show cause is treated in this case as a motion for leave to file a petition for the writ. P. 549.
3. A petition for a writ of habeas corpus to test the validity of a conviction for a second offense, committed while the petitioner was under sentence for a first offense but on parole, and sentence for which has not begun to be served, *held* not premature when revocation of the parole was due to the second conviction. P. 549.
4. A motion for leave to file a petition for a writ of habeas corpus *held* not sufficient to require answer. P. 550.

   The petition was based on a variance between pleading and proof with respect to the date of the offense. The petitioner was represented by counsel throughout the trial, yet his petition did not say that any objection to evidence, claim of surprise or motion for continuance was made because of such variance; or that he had an alibi for any other date. The petition did not make clear the extent of any variance and no transcript of the trial was furnished.

Motion for leave to file a petition for writ of habeas corpus denied.

Cleio Hull, pro se.

Messrs. Herbert J. Rushton, Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor General, and *Kenneth G. Prettie,* Assistant Attorney General, for Harry H. Jackson, Warden, State Prison, of Southern Michigan, on the return to the rule to show cause.

MR. JUSTICE MURPHY delivered the opinion of the Court.

In January, 1936, petitioner was convicted of a statutory sex offense and was sentenced to the Michigan state prison at Jackson, Michigan, for an indeterminate term of six months to ten years. About ten months later he was paroled. In October, 1937, he was convicted of another sex offense and was returned to the same prison to serve a sentence of two and one-half to five years from entry of the second judgment. Apparently for the sole reason that the second conviction was regarded as a violation of his parole, petitioner was given a hearing before the state parole board and was passed indefinitely toward the maximum sentence for the first offense. See Michigan Statutes Annotated, 1940 supplement, § 28.2108.

In November, 1940, petitioner prepared a petition for writ of habeas corpus and exhibits to file in this Court. He took the papers to a prison official and requested him to notarize them. The official refused and informed petitioner that the papers and a registered letter to the clerk of this Court concerning them would not be accepted for mailing. Although the papers were not notarized, petitioner then delivered them to his father for mailing outside the prison but guards confiscated them. Several days later, petitioner again attempted to mail a letter concerning his case to the clerk of this Court. It was intercepted and sent to the legal investigator for the state parole board.[1] Apparently neither of the let-

[1] About a week later petitioner received the following reply from the legal investigator: "Your letter of November 18, 1940, addressed to the Clerk of the United States Supreme Court, has been referred to the writer for reply. In the first place your application in its present form would not be acceptable to that court. You must file a petition for whatever relief you are seeking and state your reasons therefor, together with a memorandum brief. Your petition must be verified under oath and supported by proper affidavits, if

ters was returned to the petitioner,[2] and the papers taken from his father were not returned until late in December.

Petitioner then prepared another document which he somehow managed to have his father, as "agent," file with the clerk of this Court on December 26, 1940. In this document petitioner detailed his efforts to file the papers confiscated by prison officials, contended that he was therefore unlawfully restrained, and prayed that he be released.

On January 6, 1941, we issued a rule to show cause why leave to file a petition for writ of habeas corpus should not be granted. The warden filed a return to the rule setting forth the circumstances of the two convictions, the proceedings of the parole board, and numerous exhibits. In justification of the action preventing petitioner from filing his papers or communicating with this Court, the warden alleged that in November, 1940, he had published a regulation providing that: "All legal documents, briefs, petitions, motions, habeas corpus proceedings and appeals will first have to be submitted to the institutional welfare office and if favorably acted upon be then referred to Perry A. Maynard, legal investigator to the Parole Board, Lansing, Michigan.

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any you have. Your letter was, no doubt, intercepted for the reason that it was deemed to be inadequate and which undoubtedly accounts for the fact that it found its way to my desk."

Apparently the legal investigator serves as attorney and advisor to the state parole board. His functions with respect to legal documents of prison inmates appear more fully from the prison regulation quoted hereafter.

[2] Neither of the letters reached the clerk of this Court. On December 12, 1940, petitioner requested the prison superintendent of mail to trace the registered letter since he had not received the return receipt which accompanied it. The assistant superintendent replied: "This was mailed thru Perry Maynard by orders from Warden." Apparently the legal investigator made no reply.

Documents submitted to Perry A. Maynard, if in his opinion are properly drawn, will be directed to the court designated or will be referred back to the inmate."

In answer, petitioner filed a "Response to the Return" which again challenged the validity of this regulation and which contained numerous exhibits. One of the exhibits was the petition for writ of habeas corpus taken from petitioner's father. In brief, this petition assailed the legality of petitioner's imprisonment under the second conviction on the ground that he had been denied procedural due process.

The first question concerns the effect of the regulation quoted in the warden's return.

The regulation is invalid. The considerations that prompted its formulation are not without merit, but the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus. Whether a petition for writ of habeas corpus addressed to a federal court is properly drawn and what allegations it must contain are questions for that court alone to determine. Compare *First National Bank* v. *Anderson,* 269 U. S. 341, 346; *Erie R. Co.* v. *Purdy,* 185 U. S. 148, 152; *Carter* v. *Texas,* 177 U. S. 442, 447; see *Ex parte Sharp,* 33 F. Supp. 464.

However, the invalidity of the prison regulation does not compel petitioner's release. For that reason it is necessary to examine the petition annexed to the response. Although it is here as an exhibit to the response, it may be considered as a motion for leave to file a petition for writ of habeas corpus inasmuch as the warden has not had an opportunity to answer it. The next question, therefore, is whether this petition is premature.

The petition is not premature. Compare *McNally* v. *Hill,* 293 U. S. 131; *In re Bonner,* 151 U. S. 242. Despite

the fact that petitioner is now in prison under the sentence for the first offense, he was at liberty on parole at the time he was arrested and charged with the second offense. True, parole regulations obligated him to stay within Jackson County but that is not the imprisonment present in the *McNally* case. Moreover, petitioner's parole was revoked and he was ordered to serve out his first sentence only because of the second conviction. See Michigan Statutes Annotated, *supra*. There is no reason to suppose that he can compel the parole board to review the record of the second conviction, or to make a declaratory ruling that if that conviction is void his parole will be reinstated. Thus the last question is whether the petition, treated as a motion for leave to file a petition for writ of habeas corpus, is sufficient to necessitate an order requiring the warden to answer.

At bottom, petitioner's case is this: that in the second trial there was a variance between pleading and proof with respect to the date when the offense was committed, and that petitioner thus was denied the fair notice of the charge guaranteed by the due process clause. From exhibits and rather vague statements in the petition, the following appears: that in his opening statement and throughout the trial the prosecutor insisted that the offense occurred on the date charged in the information; that petitioner's defense was that he was elsewhere at the time in question; that some of the testimony tended to fix the date of the offense about a week earlier than that charged in the indictment; that at the close of all the evidence, petitioner's counsel moved for a directed verdict on the ground that there was no evidence to prove that the offense was committed on the date charged in the information; that the trial judge denied this motion and charged the jury that the precise date was immaterial, it being sufficient to show that the offense occurred during the month previous; that the trial judge

entered judgment on the jury's verdict of guilty and denied petitioner's motion for a new trial on the same ground urged in the motion for directed verdict; and that the Michigan Supreme Court subsequently denied certiorari.

We conclude that the showing made by the petition and exhibits is insufficient to compel an order requiring the warden to answer. Petitioner was represented by counsel throughout the second trial. Yet there is no claim in the petition that he objected to evidence tending to establish a different date for commission of the offense, or that he claimed surprise, or that he moved for a continuance to enable him to secure other witnesses. He does not allege that at the time of the trial he had an alibi for any other date, nor does he make clear the actual extent of any variance. Furthermore, ascertainment of these facts is impossible since petitioner has not furnished the transcript taken at the second trial. Accordingly, it would be improper to inquire whether petitioner was denied procedural due process in the second trial. Compare *Hardy* v. *United States,* 186 U. S. 224, 225; *Ledbetter* v. *United States,* 170 U. S. 606, 612; *Hodgson* v. *Vermont,* 168 U. S. 262, 271; *Matthews* v. *United States,* 161 U. S. 500.

The motion for leave to file a petition for writ of habeas corpus is therefore denied.

Motion denied.

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

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

No. 257. Argued March 3, 1941.—Decided March 17, 1941.

1. Upon review of a decision of the Board of Tax Appeals that neither under § 166 nor § 167 of the Revenue Act of 1934 was the income of the trusts here involved taxable to the grantor, the Circuit Court of Appeals—*Helvering* v. *Clifford*, 309 U. S. 331, having in the meantime been decided by this Court—could properly consider the question of the grantor's liability under § 22 (a) of the Act, even though the Commissioner had not relied on that section in the proceeding before the Board. Pp. 554, 559.
2. Consideration of that question by the Circuit Court of Appeals, in the circumstances of this case, is consistent with its statutory authority in reviewing decisions of the Board of Tax Appeals to modify, reverse or remand, "as justice may require," decisions which are not in accordance with law. P. 556.
3. A rigid and undeviating judicially declared practice whereby courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with the policy that rules of procedure and practice should promote, not defeat, the ends of justice. P. 557.
4. The cause is remanded in order that the applicability of § 22 (a) may be considered in the light of such evidence touching that issue as may be offered by the taxpayer. P. 560.

111 F. 2d 1, affirmed.

CERTIORARI, 311 U. S. 626, to review the reversal of a decision of the Board of Tax Appeals, 39 B. T. A. 244, which set aside a determination of a deficiency in income tax.

Messrs. George M. Wolfson and *R. C. Alderson* for petitioner.

Assistant Attorney General Clark, with whom *Solicitor General Biddle* and *Messrs. Sewall Key, L. W. Post,* and *William L. Cary* were on the brief, for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

The Commissioner of Internal Revenue assessed a deficiency against petitioner for failure to include in his 1934 and 1935 tax returns the income of three separate trusts declared by him in 1934. Each of the declarations of trust recited that the beneficiaries were "Jay C. Hormel [petitioner himself], and Germaine D. Hormel, his wife, as guardian for their son," a different son being designated by each trust instrument. Each trust estate consisted of shares of stock in Geo. A. Hormel & Co., of which petitioner was an officer. Petitioner named himself and another as co-trustees; all dividends from each trust estate, up to $2000 a year, were to be paid to petitioner's wife as guardian for the son named in the particular trust instrument, and any excess over $2000 was to be paid to petitioner; the trusts were to expire automatically after three years, or upon the death of petitioner, or upon the death of the named son, whichever event should occur first; upon expiration of each trust, the entire principal should be the property of petitioner, his legatees, devisees, or heirs; petitioner and his wife (as guardian) had the power to remove petitioner's co-trustee at any time, and to choose a successor; the co-trustees could appoint proxies to exercise voting rights over the shares of stock making up the trust estates, and could sell the securities deposited and substitute others; it was provided that no title to the trust estates should vest in petitioner's wife, as guardian, or in his sons, and it was further provided that the wife and sons should have no power "to sell, transfer, encumber or in any manner anticipate or dispose of any

interest in the trust estate"; and, finally, the trust instruments stated that the co-trustees were to be responsible for loss only upon wilful and deliberate violations of their duties.

All of the trust income for the years in question was distributed to petitioner's wife as guardian, who reported it to the federal government as guardianship income. Petitioner, in his individual returns, did not include it. The Commissioner, taking the position that petitioner should have included the trust income in his individual returns, assessed a deficiency against him, asserting that the trusts were "revocable" and the income therefore petitioner's within the meaning of § 166 of the Revenue Act of 1934.[1] The Board of Tax Appeals decided against the Commissioner, holding that the income in question was taxable to petitioner neither under § 166 nor 167,[2] the two sections expressly relied on by the Commissioner before the Board. In the Circuit Court of Appeals, the Commissioner abandoned reliance on § 166, urged that the Board was in error as to taxability under § 167, and

[1] "Where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested—

"(1) in the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, or

"(2) in any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, then the income of such part of the trust shall be included in computing the net income of the grantor."

[2] Section 167 reads in part as follows: "(a) Where any part of the income of a trust—

"(1) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, held or accumulated for future distribution to the grantor; or

"(2) may, in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income, be distributed to the grantor; . . ."

argued that in any event the income was taxable to petitioner under § 22 (a).[3] The taxpayer argued that the applicability of § 22 (a) was not open for consideration, inasmuch as that section had not been relied on before the Board. The Circuit Court of Appeals, though agreeing with the Board as to non-taxability under §§ 166 and 167, nevertheless ruled that § 22 (a) could properly be considered, and held the income taxable to petitioner under that section. Because of a conflict among the Circuit Courts of Appeals on the propriety of considering § 22 (a) under these circumstances,[4] we granted certiorari. 311 U. S. 626. Two questions are presented for our decision: First, Was the court below correct in holding that § 22 (a) should be considered? Second, If so, was the court below justified in determining that the income of these trusts was taxable to petitioner under § 22 (a)?

Petitioner in effect challenges the power of the Circuit Court of Appeals to pass upon any questions other than those which were directly and squarely presented in the proceedings before the Board of Tax Appeals. That court's authority to review decisions of the Board rests on statutes, which provide in part that the Circuit Courts of Appeals "have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without

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[3] " 'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. . . ."

[4] Cf., e. g., *Helvering* v. *Hormel,* 111 F. 2d 1 (the decision below), with *Helvering* v. *Richter,* 114 F. 2d 452, reversed, *post,* p. 561.

remanding the case for a rehearing, as justice may require." 26 U. S. C. § 1141 (c) (1) (Supp. 1939). In general, it is the function of the Board to determine the facts of a tax controversy on issues raised before it and to apply the law to those facts; and it is the function of the reviewing court to decide whether the Board has applied the correct rule of law.[5]

Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence. And the basic reasons which support this general principle applicable to trial courts make it equally desirable that parties should have an opportunity to offer evidence on the general issues involved in the less formal proceedings before administrative agencies entrusted with the responsibility of fact finding. Recognition of this general principle has caused this Court to say on a number of occasions that the reviewing court should pass by, without decision, questions which were not urged before the Board of Tax Appeals. But those cases do not announce an inflexible practice as indeed they could not without

[5] The Board's rulings on questions of law, while not as conclusive as its findings of fact, are nevertheless persuasive, and it is desirable that a reviewing court have the benefit of such rulings. See *Helvering* v. *Wood*, 309 U. S. 344, 349; *Helvering* v. *Tex-Penn Oil Co.*, 300 U. S. 481, 498. This is true not only of the Board of Tax Appeals but of other administrative bodies as well. Cf. *Federal Trade Commission* v. *R. F. Keppel & Bro.*, 291 U. S. 304, 314.

doing violence to the statutes which give to Circuit Courts of Appeals reviewing decisions of the Board of Tax Appeals the power to modify, reverse or remand decisions not in accordance with law "as justice may require." There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below. See *Blair* v. *Oesterlein Machine Co.*, 275 U. S. 220, 225.

Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice. And examination of the cases relied upon by petitioner discloses that this Court, in following in some cases the general principle sought to be invoked here by petitioner, has been careful to point out the circumstances justifying application of the practice in the particular case. Thus, for example, we held in *Helvering* v. *Wood*, 309 U. S. 344, 348–349, that the government could not present in this Court as a wholly new issue the applicability of § 22 (a). But we there especially relied upon the fact that the government, when the case was before the Circuit Court of Appeals, had made an express waiver of any reliance upon 22 (a). In *Helvering* v. *Tex-Penn Oil Co.*, 300 U. S. 481, 498, this Court declined to consider a newly presented question, but pointed out that it had not been raised by the Commissioner either in his notice of tax deficiency, in his appearances before the Board of Tax Appeals or the Circuit Court of Appeals,

or in his petition for certiorari to this Court. And in *General Utilities & Operating Co.* v. *Helvering,* 296 U. S. 200, 206–207, though this Court said that the Circuit Court of Appeals should not have considered a contention not presented to or ruled upon by the Board of Tax Appeals, the statement was buttressed by adding that the Circuit Court of Appeals had "made an inference of fact directly in conflict with the stipulation of the parties and the findings, for which we think the record affords no support whatever. To remand the cause for further findings would be futile. The Board could not properly find anything which would assist the Commissioner's cause." The plain implication of that decision was that the cause would have been remanded to the Board of Tax Appeals had the Court considered the newly raised point to be of sufficient merit. These decisions and others like them, while recognizing the desirability and existence of a general practice under which appellate courts confine themselves to the issues raised below, nevertheless do not lose sight of the fact that such appellate practice should not be applied where the obvious result would be a plain miscarriage of justice. Analogous in principle is the philosophy which underlies this Court's decisions with relation to appellate practices in other cases: those in which it has been held that a decision of the Board of Tax Appeals can be supported in the reviewing court on a new theory of law; [6] those which have been remanded because the lower courts failed to give consideration to a phase of the case involving legal theories not presented; [7] and those in which there have been judicial interpretations of existing law after decision below and pending appeal—interpretations which if

[6] E. g., *Helvering* v. *Gowran,* 302 U. S. 238, 246.

[7] E. g., *United States* v. *Shelby Iron Co.,* 273 U. S. 571, 579; *United States* v. *Rio Grande Dam & Irrigation Co.,* 184 U. S. 416, 423.

applied might have materially altered the result.[8] Whether articulated or not, the philosophy underlying the exceptions to the general practice is in accord with the statutory authority given to courts reviewing decisions of the Board of Tax Appeals—decisions not in accordance with law should be modified, reversed or reversed and remanded "as justice may require."

In accordance with this principle, we are of opinion that the court below should have given and properly did give consideration to § 22 (a) in determining petitioner's tax liability. The Commissioner urged this point before the Circuit Court of Appeals and has strongly presented it here. At the time the Board of Tax Appeals made its decision in this case, we had not yet handed down our opinion in *Helvering* v. *Clifford*, 309 U. S. 331, in which we held that under § 22 (a) the income of certain trusts was taxable to respondent. The Circuit Court of Appeals was of opinion that there were no controlling distinctions between the trusts created by petitioner in this case and those created by Clifford. Here, as there, control over the trusts was completely in the hands of the taxpayer and his wife. For while petitioner's trust instruments showed a co-trustee acting with petitioner, the same instruments also disclosed that such co-trustee could be removed at any time by the joint action of petitioner and his wife. "To hold otherwise [i. e., that petitioner is not subject to the tax] would be to treat the wife as a complete stranger; to let mere formalism obscure the normal consequences of family solidarity; and to force concepts of ownership to be fashioned out of legal niceties which may have little or no significance in such household arrangements." [9] As the

[8] E. g., *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538, and cases there cited.

[9] *Helvering* v. *Clifford*, 309 U. S. 331, 336–337.

record now stands we think the court below correctly concluded that the trust income was taxable to petitioner under the principles announced in the *Clifford* case. Therefore to apply here the general principle of appellate practice for which petitioner contends would result in permitting him wholly to escape payment of a tax which under the record before us he clearly owes. Thus viewed, this is exactly the type of case where application of the general practice would defeat rather than promote the ends of justice, and the court below was right in so holding.

But the Board of Tax Appeals neither found the facts nor considered the applicability of 22 (a) in the light of the *Clifford* case. Congress has entrusted the Board with exclusive authority to determine disputed facts. Under these circumstances we do not feel that petitioner should be foreclosed from all opportunity to offer evidence before the Board on this issue, however remote may be his chance to take his case out of the *Clifford* rule.[10] Accordingly, the judgment of the lower court reversing the decision of the Board of Tax Appeals is affirmed, with directions to the Board of Tax Appeals for further proceedings in accordance with this opinion.

Affirmed.

[10] In this connection petitioner pointed out in his brief before the Circuit Court of Appeals that "If any contention whatsoever had at any time been suggested or considered as to Section 22, the matter of the evidence introduced or to be introduced would have required further consideration."

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

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

No 516. Argued March 3, 4, 1941.—Decided March 17, 1941.

Decided upon the authority of *Hormel* v. *Helvering, ante,* p. 552. P. 562.
114 F. 2d 452, reversed.

CERTIORARI, 311 U. S. 641, to review the affirmance of a decision of the Board of Tax Appeals setting aside a determination of a deficiency in income tax.

Assistant Attorney General Clark, with whom *Solicitor General Biddle* and *Messrs. Sewall Key, Joseph M. Jones,* and *William L. Cary* were on the brief, for petitioner.

Mr. Richard H. Wilmer, with whom *Mr. Douglas L. Hatch* was on the brief, for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

Because the decision below, 114 F. 2d 452, was in conflict with that of the Circuit Court of Appeals for the Eighth Circuit in *Helvering* v. *Hormel,* 111 F. 2d 1, affirmed, *ante,* p. 552, we granted certiorari "limited to the first question presented by the petition for the writ." 311 U. S. 641. The petition stated that question as follows:

"The taxpayer transferred securities to a third party in trust to pay the income to his wife. At the end of five years, or earlier if the beneficiary consented, the securities were to be transferred back to the taxpayer. The Board of Tax Appeals held that the grantor was not

taxable with respect to the income from the trust. Two questions are presented:

"1. Whether, by invoking the general gross income provisions of Section 22, the Commissioner had so changed the theory of the Government's case on appeal as to preclude the Circuit Court of Appeals from considering the issue.

"2. Whether, on the merits, the trust income was taxable as income of the grantor under Section 22."

In view of the limited grant of certiorari, the second question is not before us. On the first question, the Circuit Court of Appeals held that it could not consider the applicability of § 22 (a), that being an "issue now for the first time presented by the Commissioner." The decision of the Board of Tax Appeals, which the Circuit Court of Appeals affirmed, was handed down prior to our decision in *Helvering* v. *Clifford,* 309 U. S. 331. Respondent urges that had he been advised with fair certainty that the government relied upon § 22 (a), he could have introduced additional evidence directed to that issue. For reasons set out in our decision in *Hormel* v. *Helvering, ante,* p. 552, we are of opinion that the Circuit Court of Appeals was in error in its conclusion, but we are also of opinion that respondent is entitled to introduce additional evidence if he so desires. The judgment is accordingly reversed, with directions to the court below to remand to the Board of Tax Appeals for rehearing in the light of the *Clifford* case.

Reversed.

Counsel for Parties.

METROPOLITAN CASUALTY INSURANCE CO. *v.* STEVENS ET AL.

CERTIORARI TO THE SUPREME COURT OF MICHIGAN.

No. 425. Argued February 13, 1941.—Decided March 17, 1941.

One against whom a state court issued a writ of garnishment, requiring him to make disclosure concerning his liability to judgment debtors, applied to the state court for removal of the proceeding to the federal court. The application was denied, whereupon the garnishee applied to the federal court for removal, and filed in that court a disclosure denying liability to the judgment debtor. While the garnishee's application was pending in the federal court, the state court entered a default judgment against the garnishee for failure to appear. Subsequently, the federal court remanded the cause to the state court, which thereupon reëntered a default judgment against the garnishee. Upon review here of that judgment, *held*:

1. The order of the federal court remanding the cause to the state court was not reviewable directly or indirectly. P. 565.

2. Proceedings in the state court subsequent to the petition for removal were valid if the suit was not in fact removable. P. 566.

3. The federal court's order of remand being not reviewable, it must be assumed for the purposes of this case that the proceeding was not removable. P. 569.

4. The state court had jurisdiction to enter the default judgment, and it was for that court to determine the effect of the disclosure filed in the federal court. P. 569.

5. In cases such as this, it is better practice for the state court, if it be assured that the federal court will decide promptly the question of removability, to await that decision; but its failure so to do denies no federal right if the cause be not removable. P. 569.

293 Mich. 31; 291 N. W. 211, affirmed.

CERTIORARI, 311 U. S. 637, to review the affirmance of a judgment against the petitioner. Applications to the state court and to the federal court for removal of the cause had been denied.

Mr. Alan W. Boyd for petitioner.

Mr. B. A. Wendrow, with whom *Mr. Archibald Broomfield* was on the brief, for Stevens, and *Mr. William E. Crane* for Northway et al., respondents. *Mr. Lloyd T. Crane* also entered an appearance for Northway et al.

Mr. Justice Murphy delivered the opinion of the Court.

We are asked in effect to hold invalid a default judgment entered by a state court in a garnishment proceeding after it had denied a petition for removal to a federal district court. The principal questions are whether we may review an order of the federal district court remanding the suit to the court from which it was removed, and whether the latter court was free to disregard a disclosure filed in the federal court before the default judgment was entered. From the record the following appears:

On March 8, 1939, respondent obtained a writ of garnishment from a Michigan state court requiring petitioner to appear on or before March 31 and disclose whether it was liable to individuals against whom respondent had recovered a judgment. On March 28, petitioner filed an application and bond in the state court for removal of the proceeding to the proper federal district court. On April 4, the state court denied the application. On April 10, petitioner filed in the federal district court copies of all papers on record in the state court and its disclosure denying any liability to respondent or to the judgment debtors. The next day, respondent entered petitioner's default in the state court for failure to appear, and notified petitioner that respondent would move for judgment on April 17.

On April 15, petitioner notified respondent of its attempt to remove the suit notwithstanding the ruling of the state court. Respondent promptly moved to have the proceeding remanded, and on the same day the dis-

trict judge granted the motion. The remand order was filed in the state court on April 17. Respondent thereupon entered petitioner's default a second time, introduced evidence, and obtained a default judgment. On April 18, petitioner unsuccessfully moved to vacate the judgment. Appeal to the Michigan Supreme Court followed and the judgment was affirmed. 293 Mich. 31; 291 N. W. 211. Because it involved important questions concerning the removal statute (28 U. S. C. § 71), we brought the case here. 311 U. S. 637.

Petitioner contends that the garnishment proceeding was removable as a separable controversy and that the state court therefore was without jurisdiction to enter the default judgment. Further, petitioner contends in substance that the petition for removal when filed in the state court deprived that court of power to proceed with the cause, at least until the federal court had passed upon the question of removability, and that in all events the refusal of the state court to accord any legal effect to the disclosure filed in the federal district court while the petition for removal was pending there was a denial of a federal right given by the removal statute, *supra.* We cannot agree.

The case is ruled by *Yankaus* v. *Feltenstein,* 244 U. S. 127.[1] There we held that an order of a federal district court remanding the cause to the state court was not reviewable directly or indirectly, and affirmed the judg-

[1] Feltenstein and another brought suit in a state court against Yankaus on October 11, 1915. On October 16, Yankaus filed a petition for removal in the state court, and on October 20 filed copies of all papers on record in the state court and an answer in the federal court. On the latter date the state court denied his petition for removal, and on October 26 entered judgment against him. On November 15, the federal court remanded the cause, and two weeks later the state court denied a motion to vacate the judgment. The state appellate court subsequently dismissed an appeal.

ment of the state court even though it had been secured by default.[2] While the opinion does not expressly consider the effect of a petition for removal on subsequent proceedings in the state court, the clear import of the decision is that the proceedings are valid if the case was not in fact removable. See *Southern Pacific Co.* v. *Waite,* 279 F. 171; *Commodores Point Terminal Co.* v. *Hudnall,* 279 F. 606, 607; *First National Bank* v. *King Bridge Co.,* 9 Fed. Cas. 88.[3]

The rule that the remand order is not reviewable stems from § 28 of the Judicial Code (28 U. S. C. § 71) and from many decisions adjusting the relationship of state and federal courts and the scope of authority of each in cases sought to be removed from the former to the latter. The rule that proceedings in the state court subsequent to the petition for removal are valid if the suit was not in fact removable is the logical corollary of the proposition that such proceedings are void if the cause was removable. *Iowa Central Ry. Co.* v. *Bacon,* 236 U. S. 305; *Madisonville Traction Co.* v. *St. Bernard Mining Co.,* 196 U. S. 239; *Virginia* v. *Rives,* 100 U. S.

[2] It is not evident from the opinion that the judgment was taken by default, but this fact clearly appears in the record filed in this Court. Record, p. 7.

[3] See *Pearson* v. *Zacher,* 177 Minn. 182; 225 N. W. 9; *Roberts* v. *Chicago, St. P., M. & O. Ry. Co.,* 48 Minn. 521; 51 N. W. 478 (affirmed, 164 U. S. 703); *Tierney* v. *Helvetia Swiss Fire Ins. Co.,* 126 App. Div. 446; 110 N. Y. S. 613; *State* v. *American Surety Co.,* 26 Idaho 652; 145 P. 1097.

Compare *Iowa Central Ry. Co.* v. *Bacon,* 236 U. S. 305; *Madisonville Traction Co.* v. *St. Bernard Mining Co.,* 196 U. S. 239; *Stone* v. *South Carolina,* 117 U. S. 430; *Phoenix Ins. Co.* v. *Pechner,* 95 U. S. 183; *Winchell* v. *Coney,* 54 Conn. 24; 5 A. 354; *Tomson* v. *Traveling Men's Assn.,* 78 Neb. 400; 110 N. W. 997; *Golden* v. *Northern Pacific Ry Co.,* 39 Mont. 435; 104 P. 549; *Dahlonega Co.* v. *Hall Mdse. Co.,* 88 Ga. 339; 14 S. E. 473; *Bishop-Babcock Sales Co.* v. *Lackman,* 4 S. W. 2d 109.

313; *Phoenix Insurance Co.* v. *Pechner,* 95 U. S. 183; *Home Life Ins. Co.* v. *Dunn,* 19 Wall. 214; *Gordon* v. *Longest,* 16 Pet. 97.[4]

When a petition for removal to a federal court is denied by the state court, the petitioner may do one of three things. He may object to the ruling, save an exception, and litigate the cause in the state courts. *Iowa Central Ry. Co.* v. *Bacon, supra; Stone* v. *South Carolina,* 117 U. S. 430; *Baltimore & Ohio R. Co.* v. *Koontz,* 104 U. S. 5; *Removal Cases,* 100 U. S. 457; *Gordon* v. *Longest, supra.* He may remove the suit to the federal court despite the ruling of the state court. *Baltimore & Ohio R. Co.* v. *Koontz, supra; Kern* v. *Huidekoper,* 103 U. S. 485; *Home Life Ins. Co.* v. *Dunn, supra.* He may proceed in both courts at the same time. *Kern* v. *Huidekoper, supra; Removal Cases, supra.*

If the petitioner litigates the cause in the state court and preserves an exception, he may have the order of the state court denying his petition for removal reviewed in the state appellate court. In proper cases he may come here asserting a denial of his right of removal. *Iowa Central Ry. Co.* v. *Bacon, supra; Stone* v. *South Carolina, supra; Removal Cases, supra.* If he removes the cause to the federal district court despite the state court ruling and the federal court assumes jurisdiction over the objection of his adversary, the latter, after final judgment, may contest this assumption of jurisdiction in the circuit court of appeals, and in this court in proper cases. *Powers* v. *Chesapeake & Ohio Ry. Co.,* 169 U. S. 92; *Cates* v. *Allen,* 149 U. S. 451; *Graves* v. *Corbin,* 132

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[4] See *Centaur Motor Co.* v. *Eccleston,* 264 F. 852; *City of Montgomery* v. *Postal Telegraph Co.,* 218 F. 471; *Donovan* v. *Wells, Fargo Co.,* 169 F. 363; *Murphy* v. *Payette Alluvial Gold Co.,* 98 F. 321; *Johnson* v. *Wells, Fargo Co.,* 91 F. 1; *Shepherd* v. *Bradstreet Co.,* 65 F. 142.

U. S. 571. If petitioner proceeds simultaneously in state and federal courts and both render final judgments, he and his adversary may obtain review of the question of removability by following respectively the courses just outlined. *Kern* v. *Huidekoper, supra; Removal Cases, supra.*

Petitioner is protected whichever course he elects. If he makes timely application for removal and properly objects to its denial by the state court, participation in subsequent proceedings in the state court is not a waiver of his claim that the cause should have been litigated in the federal court. *Powers* v. *Chesapeake & Ohio Ry. Co., supra; Removal Cases, supra; Home Life Ins. Co.* v. *Dunn, supra.* Compare *Miller* v. *Buyer,* 82 Colo. 474; 261 P. 659; *State* v. *American Surety Co.,* 26 Idaho 652; 145 P. 1097; *Ashland* v. *Whitcomb,* 120 Wis. 549; 98 N. W. 531. If he removes the cause notwithstanding the state court ruling, he may nevertheless resist further action by his opponent in the state court. *Kern* v. *Huidekoper, supra; Removal Cases, supra.*

However, the issue of removability is closed if the federal district court refuses to assume jurisdiction and remands the cause. Section 28 of the Judicial Code, *supra,* precludes review of the remand order directly (*Kloeb* v. *Armour & Co.,* 311 U. S. 199; *Employers Reinsurance Corp.* v. *Bryant,* 299 U. S. 374; *City of Waco* v. *U. S. Fidelity & Guaranty Co.,* 293 U. S. 140; *In re Pennsylvania Company,* 137 U. S. 451), or indirectly after final judgment in the highest court of the state in which decision could be had. *McLaughlin Brothers* v. *Hallowell,* 228 U. S. 278; *Missouri Pacific Ry. Co.* v. *Fitzgerald,* 160 U. S. 556; compare *Pacific Live Stock Co.* v. *Lewis,* 241 U. S. 440.

Here, petitioner attempted to remove the cause, as it had a right to do, even though the state court had denied its petition for removal. The federal court held it was

not removable as a separable controversy and remanded it to the state court. For the reasons already stated, we are not at liberty to review the remand order. Consequently, we must assume, so far as this case is concerned, that the suit was not removable. Having made this assumption, we must conclude that the state court had jurisdiction to enter the default judgment (*Yankaus* v. *Felterstein,* 244 U. S. 127; *Southern Pacific Co.* v. *Waite,* 279 F. 171), and it was for that court to determine the effect of the disclosure filed in the federal court. *Ayres* v. *Wiswall,* 112 U. S. 187; *Broadway Ins. Co.* v. *Chicago G. W. Ry. Co.,* 101 F. 507; compare *Tracy Loan & Trust Co.* v. *Mutual Life Ins. Co.,* 79 Utah 33; 7 P. 2d 279. If, in cases like the present one, the state court is assured that the federal court will decide promptly the question of removability, it is better practice to await that decision (*Chesapeake & Ohio Ry. Co.* v. *McCabe,* 213 U. S. 207; *Baltimore & Ohio R. Co.* v. *Koontz, supra*), but we cannot say that failure to do so is a denial of a federal right if the cause was not removable.

Accordingly, the judgment of the Michigan Supreme Court is

Affirmed.

COX ET AL. v. NEW HAMPSHIRE.

APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE.

No. 502. Argued March 7, 1941.—Decided March 31, 1941.

1. Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. P. 574.
2. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. P. 574.

3. As regulation of the use of the streets for parades and processions is a traditional exercise of control by local government, the question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places. P. 574.
4. A state law providing that no parade or procession upon any public street shall be permitted unless a special license therefor shall first be obtained from the selectmen of the town, or from a licensing committee for the city, and subjecting any violator to a fine, *held* constitutional, in view of its construction by the state supreme court, as applied to members of the band of "Jehovah's Witnesses," who marched in groups of from fifteen to twenty members each, in close single files, along the sidewalks in the business district of a populous city, each marcher carrying a sign or placard with "informational" inscriptions. P. 575.
5. In exercise of its power to license parades on city streets, the State may charge a license fee reasonably adjusted to the occasion, for meeting administrative and police expenses. P. 576.

91 N. H. 137; 16 A. 2d 508, affirmed.

APPEAL from the affirmance of judgments imposing fines on violators of a state law regulating parades in city streets.

Mr. Hayden Covington, with whom *Mr. Joseph F. Rutherford* was on the brief, for appellants.

Mr. Frank R. Kenison, Attorney General of New Hampshire, with whom *Messrs. J. Vincent Broderick* and *Jeremy R. Waldron* were on the brief, for appellee.

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

Appellants are five "Jehovah's Witnesses" who, with sixty-three others of the same persuasion, were convicted in the municipal court of Manchester, New Hampshire, for violation of a state statute prohibiting a "parade or

procession" upon a public street without a special license.

Upon appeal, there was a trial *de novo* of these appellants before a jury in the Superior Court, the other defendants having agreed to abide by the final decision in that proceeding. Appellants were found guilty and the judgment of conviction was affirmed by the Supreme Court of the State. *State* v. *Cox,* 91 N. H. 137; 16 A. 2d 508.

By motions and exceptions, appellants raised the questions that the statute was invalid under the Fourteenth Amendment of the Constitution of the United States in that it deprived appellants of their rights of freedom of worship, freedom of speech and press, and freedom of assembly, vested unreasonable and unlimited arbitrary and discriminatory powers in the licensing authority, and was vague and indefinite. These contentions were overruled and the case comes here on appeal.

The statutory prohibition is as follows (New Hampshire, P. L., Chap. 145, § 2):

"No theatrical or dramatic representation shall be performed or exhibited, and no parade or procession upon any public street or way, and no open-air public meeting upon any ground abutting thereon, shall be permitted, unless a special license therefor shall first be obtained from the selectmen of the town, or from a licensing committee for cities hereinafter provided for."

The provisions for licensing are set forth in the margin.[1]

[1] New Hampshire, P. L., Chap. 145, §§ 3, 4, and 5 are as follows:

"Section 3: Licensing Board. Any city may create a licensing board to consist of the person who is the active head of the police department, the mayor of such city and one other person who shall be appointed by the city government, which board shall have delegated powers to investigate and decide the question of granting licenses under this chapter, and it may grant revocable blanket

The facts, which are conceded by the appellants to be established by the evidence, are these: The sixty-eight defendants and twenty other persons met at a hall in the City of Manchester on the evening of Saturday, July 8, 1939, "for the purpose of engaging in an information march." The company was divided into four or five groups, each with about fifteen to twenty persons. Each group then proceeded to a different part of the business district of the city and there "would line up in single-file formation and then proceed to march along the sidewalk, 'single-file,' that is, following one another." Each of the defendants carried a small staff with a sign reading "Religion is a Snare and a Racket" and on the reverse "Serve God and Christ the King." Some of the marchers carried placards bearing the statement "Fascism or Freedom. Hear Judge Rutherford and Face the Facts." The marchers also handed out printed leaflets announcing a meeting to be held at a later time in the hall from which they had started, where a talk on government would be given to the public free of charge. Defendants did not apply for a permit and none was issued.

There was a dispute in the evidence as to the distance

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licenses to fraternal and other like organizations, to theatres and to undertakers.

"Section 4: Licenses: Fees. Every such special license shall be in writing, and shall specify the day and hour of the permit to perform or exhibit or of such parade, procession or open-air public meeting. Every licensee shall pay in advance for such license, for the use of the city or town, a sum not more than three hundred dollars for each day such licensee shall perform or exhibit, or such parade, procession or open-air public meeting shall take place; but the fee for a license to exhibit in any hall shall not exceed fifty dollars.

"Section 5: Penalty. If any person shall violate the provisions of the preceding sections he shall be fined not more than five hundred dollars; and it shall be the duty of the selectmen to prosecute for every violation of this chapter."

between the marchers. Defendants said that they were from fifteen to twenty feet apart. The State insists that the evidence clearly showed that the "marchers were as close together as it was possible for them to walk." Appellants concede that this dispute is not material to the questions presented. The recital of facts which prefaced the opinion of the state court thus summarizes the effect of the march: "Manchester had a population of over 75,000 in 1930, and there was testimony that on Saturday nights in an hour's time 26,000 persons passed one of the intersections where the defendants marched. The marchers interfered with the normal sidewalk travel, but no technical breach of the peace occurred. The march was a prearranged affair, and no permit for it was sought, although the defendants understood that under the statute one was required."

Appellants urge that each of the defendants was a minister ordained to preach the gospel in accordance with his belief and that the participation of these ministers in the march was for the purpose of disseminating information in the public interest and was one of their ways of worship.

The sole charge against appellants was that they were "taking part in a parade or procession" on public streets without a permit as the statute required. They were not prosecuted for distributing leaflets, or for conveying information by placards or otherwise, or for issuing invitations to a public meeting, or for holding a public meeting, or for maintaining or expressing religious beliefs. Their right to do any one of these things apart from engaging in a "parade or procession" upon a public street is not here involved and the question of the validity of a statute addressed to any other sort of conduct than that complained of is not before us.

There appears to be no ground for challenging the ruling of the state court that appellants were in fact

engaged in a parade or procession upon the public streets. As the state court observed: "It was a march in formation, and its advertising and informatory purpose did not make it otherwise. . . . It is immaterial that its tactics were few and simple. It is enough that it proceeded in an ordered and close file as a collective body of persons on the city streets."

Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection. One would not be justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command or sought by that means to direct public attention to an announcement of his opinions. As regulation of the use of the streets for parades and processions is a traditional exercise of control by local government, the question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places. *Lovell* v. *Griffin,* 303 U. S. 444, 451; *Hague* v. *Committee for Industrial Organiza-*

tion, 307 U. S. 496, 515, 516; *Schneider* v. *State,* 308 U. S. 147, 160; *Cantwell* v. *Connecticut,* 310 U. S. 296, 306, 307.

In the instant case, we are aided by the opinion of the Supreme Court of the State, which construed the statute and defined the limitations of the authority conferred for the granting of licenses for parades and processions. The court observed that if the clause of the Act requiring a license "for all open-air public meetings upon land contiguous to a highway" was invalid, that invalidity did not nullify the Act in its application to the other situations described. Recognizing the importance of the civil liberties invoked by appellants, the court thought it significant that the statute prescribed "no measures for controlling or suppressing the publication on the highways of facts and opinions, either by speech or by writing"; that communication "by the distribution of literature or by the display of placards and signs" was in no respect regulated by the statute; that the regulation with respect to parades and processions was applicable only "to organized formations of persons using the highways"; and that "the defendants, separately, or collectively in groups not constituting a parade or procession," were "under no contemplation of the Act." In this light, the court thought that interference with liberty of speech and writing seemed slight; that the distribution of pamphlets and folders by the groups "traveling in unorganized fashion" would have had as large a circulation, and that "signs carried by members of the groups not in marching formation would have been as conspicuous, as published by them while in parade or procession."

It was with this view of the limited objective of the statute that the state court considered and defined the duty of the licensing authority and the rights of the appellants to a license for their parade, with regard only to considerations of time, place and manner so as to

conserve the public convenience. The obvious advantage of requiring application for a permit was noted as giving the public authorities notice in advance so as to afford opportunity for proper policing. And the court further observed that, in fixing time and place, the license served "to prevent confusion by overlapping parades or processions, to secure convenient use of the streets by other travelers, and to minimize the risk of disorder." But the court held that the licensing board was not vested with arbitrary power or an unfettered discretion; that its discretion must be exercised with "uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination"; that a "systematic, consistent and just order of treatment, with reference to the convenience of public use of the highways, is the statutory mandate." The defendants, said the court, "had a right, under the Act, to a license to march when, where and as they did, if after a required investigation it was found that the convenience of the public in the use of the streets would not thereby be unduly disturbed, upon such conditions or changes in time, place and manner as would avoid disturbance."

If a municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place and manner in relation to the other proper uses of the streets. We find it impossible to say that the limited authority conferred by the licensing provisions of the statute in question as thus construed by the state court contravened any constitutional right.

There remains the question of license fees which, as the court said, had a permissible range from $300 to a nominal amount. The court construed the Act as requiring "a reasonable fixing of the amount of the fee." "The

charge," said the court, "for a circus parade or a celebration procession of length, each drawing crowds of observers, would take into account the greater public expense of policing the spectacle, compared with the slight expense of a less expansive and attractive parade or procession, to which the charge would be adjusted." The fee was held to be "not a revenue tax, but one to meet the expense incident to the administration of the Act and to the maintenance of public order in the matter licensed." There is nothing contrary to the Constitution in the charge of a fee limited to the purpose stated. The suggestion that a flat fee should have been charged fails to take account of the difficulty of framing a fair schedule to meet all circumstances, and we perceive no constitutional ground for denying to local governments that flexibility of adjustment of fees which in the light of varying conditions would tend to conserve rather than impair the liberty sought.

There is no evidence that the statute has been administered otherwise than in the fair and non-discriminatory manner which the state court has construed it to require.

The decisions upon which appellants rely are not applicable. In *Lovell* v. *Griffin, supra,* the ordinance prohibited the distribution of literature of any kind at any time, at any place, and in any manner without a permit from the city manager, thus striking at the very foundation of the freedom of the press by subjecting it to license and censorship. In *Hague* v. *Committee for Industrial Organization, supra,* the ordinance dealt with the exercise of the right of assembly for the purpose of communicating views; it did not make comfort or convenience in the use of streets the standard of official action but enabled the local official absolutely to refuse a permit on his mere opinion that such refusal would prevent "riots, disturbances or disorderly assemblage." The ordi-

nance thus created, as the record disclosed, an instrument of arbitrary suppression of opinions on public questions. The court said that "uncontrolled official suppression of the privilege cannot be made a substitute for the duty to maintain order in connection with the exercise of the right." In *Schneider* v. *State, supra* (p. 163) the ordinance was directed at canvassing and banned unlicensed communication of any views, or the advocacy of any cause, from door to door, subject only to the power of a police officer to determine as a censor what literature might be distributed and who might distribute it. In *Cantwell* v. *Connecticut, supra* (p. 305) the statute dealt with the solicitation of funds for religious causes and authorized an official to determine whether the cause was a religious one and to refuse a permit if he determined it was not, thus establishing a censorship of religion.

Nor is any question of peaceful picketing here involved, as in *Thornhill* v. *Alabama,* 310 U. S. 88, and *Carlson* v. *California,* 310 U. S. 106. The statute, as the state court said, is not aimed at any restraint of freedom of speech, and there is no basis for an assumption that it would be applied so as to prevent peaceful picketing as described in the cases cited.

The argument as to freedom of worship is also beside the point. No interference with religious worship or the practice of religion in any proper sense is shown, but only the exercise of local control over the use of streets for parades and processions.

The judgment of the Supreme Court of New Hampshire is

Affirmed.

HARRISON, COLLECTOR OF INTERNAL REVENUE, *v.* SCHAFFNER.

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

No. 437. Argued March 4, 1941.—Decided March 31, 1941.

The life beneficiary of a trust assigned to her children specified amounts in dollars from the income of the trust for the year following the assignment. *Held* that the amount assigned, which was paid by the trustees to the assignees, was taxable as income to the assignor. Revenue Act, 1928, §§ 22 (a), 161 (a), 162 (b). P. 582.

113 F. 2d 449, reversed.

CERTIORARI, 311 U. S. 638, to review the affirmance of a judgment for the above-named respondent in a suit to recover money exacted as taxes.

Mr. Arnold Raum, with whom *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Edward First* were on the brief, for petitioner.

Mr. Herbert A. Friedlich, with whom *Messrs. Carl Meyer* and *Louis A. Kohn* were on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

In December, 1929, respondent, the life beneficiary of a testamentary trust, "assigned" to certain of her children specified amounts in dollars from the income of the trust for the year following the assignment. She made a like assignment to her children and a son-in-law in November, 1930. The question for decision is whether, under the applicable 1928 Revenue Act, 45 Stat. 791, the assigned income, which was paid by the trustees to the several assignees, is taxable as such to the assignor or to the assignees.

The Commissioner ruled that the income was that of

the life beneficiary and assessed a deficiency against her for the calendar years 1930 and 1931, which she paid. In the present suit to recover the tax paid as illegally exacted the district court below gave judgment for the taxpayer, which the Court of Appeals affirmed. 113 F. 2d 449. We granted certiorari, 311 U. S. 638, to resolve an alleged conflict in principle of the decision below with those in *Lucas* v. *Earl,* 281 U. S. 111; *Burnet* v. *Leininger,* 285 U. S. 136, and *Helvering* v. *Clifford,* 309 U. S. 331.

Since granting certiorari we have held, following the reasoning of *Lucas* v. *Earl, supra,* that one who is entitled to receive, at a future date, interest or compensation for services and who makes a gift of it by an anticipatory assignment, realizes taxable income quite as much as if he had collected the income and paid it over to the object of his bounty. *Helvering* v. *Horst,* 311 U. S. 112; *Helvering* v. *Eubank,* 311 U. S. 122. Decision in these cases was rested on the principle that the power to dispose of income is the equivalent of ownership of it and that the exercise of the power to procure its payment to another, whether to pay a debt or to make a gift, is within the reach of the statute taxing income "derived from any source whatever." In the light of our opinions in these cases the narrow question presented by this record is whether it makes any difference in the application of the taxing statute that the gift is accomplished by the anticipatory assignment of trust income rather than of interest, dividends, rents and the like which are payable to the donor.

Respondent, recognizing that the practical consequences of a gift by assignment, in advance, of a year's income from the trust, are, so far as the use and enjoyment of the income are concerned, no different from those of the gift by assignment of interest or wages, rests his case on technical distinctions affecting the conveyanc-

ing of equitable interests. It is said that since by the assignment of trust income the assignee acquires an equitable right to an accounting by the trustee which, for many purposes, is treated by courts of equity as a present equitable estate in the trust property, it follows that each assignee in the present case is a donee of an interest in the trust property for the term of a year and is thus the recipient of income from his own property which is taxable to him rather than to the donor. See *Blair* v. *Commissioner,* 300 U. S. 5.

We lay to one side the argument which the Government could have made that the assignments were no more than an attempt to charge the specified payments upon the whole income which could pass no present interest in the trust property. See Scott on Trusts, §§ 10.1, 10.6, 29, 30. For we think that the operation of the statutes taxing income is not dependent upon such "attenuated subtleties," but rather on the import and reasonable construction of the taxing act. *Lucas* v. *Earl, supra,* 114.

Section 22 (a) of the 1928 Revenue Act provides, "'Gross income' includes gains, profits, and income derived from . . . interest, rent, dividends, securities or the transactions of any business carried on for gain or profit, or gains or profits, and income derived from any source whatever." By §§ 161 (a) and 162 (b) the tax is laid upon the income "of any kind of property held in trust," and income of a trust for the taxable year which is to be distributed to the beneficiaries is to be taxed to them "whether distributed to them or not." In construing these and like provisions in other revenue acts we have uniformly held that they are not so much concerned with the refinements of title as with the actual command over the income which is taxed and the actual benefit for which the tax is paid. See *Corliss* v. *Bowers,*

281 U. S. 376; *Lucas* v. *Earl, supra; Helvering* v. *Horst, supra; Helvering* v. *Eubank, supra; Helvering* v. *Clifford, supra.* It was for that reason that in each of those cases it was held that one vested with the right to receive income did not escape the tax by any kind of anticipatory arrangement, however skillfully devised, by which he procures payment of it to another, since, by the exercise of his power to command the income, he enjoys the benefit of the income on which the tax is laid.

Those decisions are controlling here. Taxation is a practical matter and those practical considerations which support the treatment of the disposition of one's income by way of gift as a realization of the income to the donor are the same whether the income be from a trust or from shares of stock or bonds which he owns. It is true, as respondent argues, that where the beneficiary of a trust had assigned a share of the income to another for life without retaining any form of control over the interest assigned, this Court construed the assignment as a transfer *in praesenti* to the donee, of a life interest in the corpus of the trust property, and held in consequence that the income thereafter paid to the donee was taxable to him and not the donor. *Blair* v. *Commissioner, supra.* But we think it quite another matter to say that the beneficiary of a trust who makes a single gift of a sum of money payable out of the income of the trust does not realize income when the gift is effectuated by payment, or that he escapes the tax by attempting to clothe the transaction in the guise of a transfer of trust property rather than the transfer of income, where that is its obvious purpose and effect. We think that the gift by a beneficiary of a trust of some part of the income derived from the trust property for the period of a day, a month or a year involves no such substantial disposition of the trust property as to camouflage the reality that he is

enjoying the benefit of the income from the trust of which he continues to be the beneficiary, quite as much as he enjoys the benefits of interest or wages which he gives away as in the *Horst* and *Eubank* cases. Even though the gift of income be in form accomplished by the temporary disposition of the donor's property which produces the income, the donor retaining every other substantial interest in it, we have not allowed the form to obscure the reality. Income which the donor gives away through the medium of a short term trust created for the benefit of the donee is nevertheless income taxable to the donor. *Helvering* v. *Clifford, supra; Hormel* v. *Helvering, ante,* p. 552. We perceive no difference, so far as the construction and application of the Revenue Act is concerned, between a gift of income in a specified amount by the creation of a trust for a year, see *Hormel* v. *Helvering, supra,* and the assignment by the beneficiary of a trust already created of a like amount from its income for a year.

Nor are we troubled by the logical difficulties of drawing the line between a gift of an equitable interest in property for life effected by a gift for life of a share of the income of the trust and the gift of the income or a part of it for the period of a year as in this case. "Drawing the line" is a recurrent difficulty in those fields of the law where differences in degree produce ultimate differences in kind. See *Irwin* v. *Gavit,* 268 U. S. 161, 168. It is enough that we find in the present case that the taxpayer, in point of substance, has parted with no substantial interest in property other than the specified payments of income which, like other gifts of income, are taxable to the donor. Unless in the meantime the difficulty be resolved by statute or treasury regulation, we leave it to future judicial decisions to determine precisely where the line shall be drawn between gifts of

income-producing property and gifts of income from property of which the donor remains the owner, for all substantial and practical purposes. Cf. *Helvering* v. *Clifford, supra.*

Reversed.

UNITED STATES *v.* SHERWOOD.

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

No. 500. Argued March 6, 7, 1941.—Decided March 31, 1941.

A New York court, acting under authority of § 795 of the New York Civil Practice Act, made an order authorizing a judgment creditor to sue under the Tucker Act, to recover damages from the United States for breach of its contract with the judgment debtor, the order directing that out of the recovery the judgment creditor should be entitled to a sum sufficient to satisfy his judgment with interest, costs, etc. The state law cited makes the judgment debtor a necessary party and authorizes him in any suit so brought to attack the validity of the order and of the judgment on which it is founded. *Held:*

1. That a suit brought accordingly against the United States and the judgment debtor was not within the jurisdiction of the federal court. P. 588.

2. A court has no jurisdiction of a suit against the United States to which the United States has not consented. P. 587.

3. Jurisdiction of a federal court to award damages for breach of contract by the United States is defined by the Tucker Act and is restricted to suits against the Government alone; if adjudication of the plaintiff's right to maintain the suit as against a private party is prerequisite to its prosecution against the United States, the suit must be dismissed. P. 588.

4. The Federal Rules of Civil Procedure do not authorize any suit against the United States to which it has not otherwise consented. P. 589.

5. The Act of June 19, 1934, 48 Stat. 1064, 28 U. S. C. 723, authorizing this Court to prescribe rules of procedure in civil actions gave it no authority to modify, abridge or enlarge the substantive

rights of litigants or to enlarge or diminish the jurisdiction of federal courts. P. 590.

6. The concurrent jurisdiction of the District Court under the Tucker Act does not extend to any suit which could not be litigated in the Court of Claims. P. 590.

7. Waivers of sovereign immunity from suit are strictly construed. P. 590.

112 F. 2d 587, reversed.

CERTIORARI, 311 U. S. 640, to review the reversal of a judgment of the District Court dismissing for want of jurisdiction a suit against the United States and a private party.

Mr. Sidney J. Kaplan, with whom *Solicitor General Biddle, Assistant Attorney General Shea,* and *Messrs. Melvin Siegel* and *Richard H. Demuth* were on the brief, for the United States.

Mr. Milton U. Copland, with whom *Mr. David Morgulas* was on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

The New York Supreme Court, acting under authority of § 795 of the New York Civil Practice Act, made an order authorizing respondent, as a judgment creditor, to maintain a suit under the Tucker Act of March 3, 1887, 24 Stat. 505, § 24 (20) of the Judicial Code, 28 U. S. C. § 41 (20), to recover damages from the United States for breach of its contract with the judgment debtor. The question for decision is whether a United States District Court has jurisdiction to entertain the suit.

The order authorized respondent, who had recovered a judgment against Kaiser in the New York Supreme Court for $5,567.22, to bring suit against the Government to recover for breach of its contract with Kaiser for the construction of a postoffice building. The order

directed that out of the amount recovered respondent should be entitled to a sum sufficient to satisfy his judgment with interest "as well as costs, disbursements and expenses which may be allowed by the court."

Respondent brought the present suit against the United States and Kaiser in the District Court for Eastern New York. By his complaint he set up the judgment and the order of the state court, the breach of contract by the United States, and the consequent damage to Kaiser in the sum of $14,448.49, and prayed judgment in the sum of $10,000. The order of the District Court dismissing the complaint for want of jurisdiction was reversed by the Circuit Court of Appeals for the Second Circuit, 112 F. 2d 587, which held that under Rule 17 (b) of the Federal Rules of Civil Procedure respondent's "capacity to sue" was governed by the law of New York, which was his domicile; and that the order of the state court had conferred authority upon respondent to maintain the suit, the United States being a "person indebted" within the meaning of § 795 of the Civil Practice Act, which sanctions orders by the state court authorizing a suit by a judgment creditor against a "person . . . indebted to the judgment debtor." We granted certiorari, 311 U. S. 640, the question of the jurisdiction of the District Court under the Tucker Act being of public importance.

The United States, as sovereign, is immune from suit save as it consents to be sued, *United States* v. *Thompson*, 98 U. S. 486; *United States* v. *Lee*, 106 U. S. 196; *Kansas* v. *United States*, 204 U. S. 331; *Minnesota* v. *United States*, 305 U. S. 382, 387; *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381, 388; *United States* v. *Shaw*, 309 U. S. 495 (see cases cited in *The Pesaro*, 277 F. 473, 474, *et seq.*), and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.

Minnesota v. *United States, supra,* 388 and cases cited; cf. *Stanley* v. *Schwalby,* 162 U. S. 255, 270. Jurisdiction to entertain suits against the United States to recover damages for breach of contract and certain other specified classes of claims was conferred on the Court of Claims by Act of February 24, 1855, 10 Stat. 612. With additions not now material, the jurisdiction was continued by paragraph First of the Tucker Act of March 3, 1887, 24 Stat. 505, which, as supplemented and reënacted, is now § 145 of the Judicial Code, 28 U. S. C. § 250. Section 2, which, as supplemented and reënacted, is now § 24 (20) of the Judicial Code, 28 U. S. C. § 41 (20), confers jurisdiction on the district courts "Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded . . . upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable . . ."

The Court of Claims is a legislative, not a constitutional, court. Its judicial power is derived not from the Judiciary Article of the Constitution, but from the Congressional power "to pay the debts . . . of the United States," which it is free to exercise through judicial as well as non-judicial agencies. See *Williams* v. *United States,* 289 U. S. 553, 569, 579; *Ex parte Bakelite Corporation,* 279 U. S. 438, 452, *et seq.* It is for this reason, and because of the power of the sovereign to attach conditions to its consent to be sued, that Congress, despite the Seventh Amendment, may dispense with a jury trial in suits brought in the Court of Claims. *McElrath* v. *United States,* 102 U. S. 426; *Williams* v. *United States, supra,* 570, 571; *Ex parte Bakelite Corporation, supra,* 453.

Except as Congress has consented there is no juris-

diction in the Court of Claims more than in any other court to entertain suits against the United States, or for the review of its decisions by appellate courts. *Luckenbach Steamship Co.* v. *United States,* 272 U. S. 533, 536, *et seq.* For that reason it has been uniformly held, upon a review of the statutes creating the court and defining its authority, that its jurisdiction is confined to the rendition of money judgments in suits brought for that relief against the United States, *United States* v. *Alire,* 6 Wall. 573; *United States* v. *Jones,* 131 U. S. 1, and if the relief sought is against others than the United States the suit as to them must be ignored as beyond the jurisdiction of the court, *United States* v. *Jones, supra; Lynn* v. *United States,* 110 F. 2d 586, 588; *Leather & Leigh* v. *United States,* 61 Ct. Cls. 388, or if its maintenance against private parties is prerequisite to prosecution of the suit against the United States the suit must be dismissed. *Jackson* v. *United States,* 27 Ct. Cls. 74, 84; *Waite* v. *United States,* 57 Ct. Cls. 546; *Leather & Leigh* v. *United States, supra;* cf. *Turner* v. *United States,* 248 U. S. 354; *Green* v. *Menominee Tribe,* 233 U. S. 558. See *Pacific Mutual Life Insurance Co.* v. *United States,* 44 F. 2d 887, 888.

We think it plain that the present suit could not have been maintained in the Court of Claims because that court is without jurisdiction of any suit brought against private parties and because adjudication of the right or capacity of respondent to proceed with the suit upon the contract of the judgment debtor with the United States is prerequisite to any recovery upon the Government contract. As the court below recognized, the judgment debtor, who is made a necessary party by § 795 of the Civil Practice Act, in any suit brought pursuant to the order of the state court is entitled to attack the validity of the order and of the judgment on which it

is founded. See *Nankivel* v. *Omsk All Russian Government,* 237 N. Y. 150, 158; 142 N. E. 569. Adjudication of that issue is not within the jurisdiction of the Court of Claims, whose authority, as we have seen, is narrowly restricted to the adjudication of suits brought against the Government alone.

But the question remains whether such a suit is nevertheless within the jurisdiction conferred by the Tucker Act on the district courts. The Court of Appeals thought that the obstacles to joining private parties, as parties defendant, in suits against the Government are procedural only, and that while no procedure is provided whereby the Court of Claims can adjudicate the rights of private parties in suits against the Government, that court is nevertheless free to adopt such a procedure. Cf. 28 U. S. C. § 263. In any case it thought such procedure has now been made applicable to suits in the district courts by the new rules of civil practice. It concluded that since the District Court under the Tucker Act has jurisdiction to adjudicate claims against the United States and by virtue of other provisions of the Judicial Code has jurisdiction to adjudicate the issues between respondent and the judgment debtor, the Rules of Civil Procedure authorize the exercise of both jurisdictions in a single suit.

This conclusion presupposes that the United States, either by the rules of practice or by the Tucker Act or both, has given its consent to be sued in litigations in which issues between the plaintiff and third persons are to be adjudicated. But we think that nothing in the new rules of civil practice so far as they may be applicable in suits brought in district courts under the Tucker Act authorizes the maintenance of any suit against the United States to which it has not otherwise consented. An authority conferred upon a court to make rules of

procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction; and the Act of June 19, 1934, 48 Stat. 1064, 28 U. S. C. 723b, authorizing this Court to prescribe rules of procedure in civil actions gave it no authority to modify, abridge or enlarge the substantive rights of litigants or to enlarge or diminish the jurisdiction of federal courts.

Nor with due regard to the words of § 2 of the Tucker Act and to its legislative history can we say that the United States has consented to the maintenance of suits against the Government in the district courts which could not be maintained in the Court of Claims. The section must be interpreted in the light of its function in giving consent of the Government to be sued, which consent, since it is a relinquishment of a sovereign immunity, must be strictly interpreted. *Schillinger* v. *United States,* 155 U. S. 163; *Price* v. *United States,* 174 U. S. 373; *United States* v. *Michel,* 282 U. S. 656; *United States* v. *Shaw,* 309 U. S. 495; *United States* v. *U. S. Fidelity & Guaranty Co.,* 309 U. S. 506; cf. *Federal Housing Administration* v. *Burr,* 309 U. S. 242, 247. Section 2, authorizing suits against the Government in district courts, is an integral part of the statute, other sections of which revised and enlarged the classes of claims against the United States which could be litigated in the Court of Claims. It was the jurisdiction thus defined and established for that court which was extended by the section to the district courts in the specified instances, for in consenting to suits against the Government in the district courts, Congress prescribed that the jurisdiction thus conferred should be "concurrent" with that of the Court of Claims.

Construing the statutory language with that conservatism which is appropriate in the case of a waiver of sovereign immunity, and in the light of the history of the

Court of Claims' jurisdiction to which we have referred, we think that the Tucker Act did no more than authorize the District Court to sit as a court of claims and that the authority thus given to adjudicate claims against the United States does not extend to any suit which could not be maintained in the Court of Claims. See *United States* v. *Jones, supra,* 19; *United States* v. *Pfitsch,* 256 U. S. 547, 550; cf. *Bates Mfg. Co.* v. *United States,* 303 U. S. 567, 571. The matter is not one of procedure but of jurisdiction whose limits are marked by the Government's consent to be sued. That consent may be conditioned, as we think it has been here, on the restriction of the issues to be adjudicated in the suit, to those between the claimant and the Government. The jurisdiction thus limited is unaffected by the Rules of Civil Procedure, which prescribe the methods by which the jurisdiction of the federal courts is to be exercised but do not enlarge the jurisdiction.

The present litigation well illustrates the embarrassments which would attend the defense of suits brought against the Government if the jurisdiction of district courts were not deemed to be as restricted as is that of the Court of Claims. The Government, to protect its interests, must not only litigate the claim upon which it has consented to be sued, but must make certain that respondent's right, as against the judgment debtor, to maintain the suit is properly adjudicated. And since the alleged claim for damages is larger than the $10,000 jurisdictional amount the Government must either be subjected to successive suits for partial recoveries of the amount due or must make certain that respondent has legal authority to relinquish the judgment debtor's claim in excess of $10,000, and that this has been accomplished by the limitation of his demand for judgment to that amount. See *Franklin* v. *United States,* 308 U. S. 516; *Otis Elevator*

Co. v. *United States,* 18 F. Supp. 87. The Government's consent to litigate such issues is hardly to be inferred from its consent to be sued upon a claim for damages for breach of contract. Cf. *National Surety Co.* v. *Washington Iron Works,* 243 F. 260.

Reversed.

UNITED STATES *v.* CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD CO. ET AL.

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

No. 535. Argued March 10, 11, 1941.—Decided March 31, 1941.

1. A railroad company whose road traverses an embankment built up from low-water mark in the bed of a navigable stream to a level above that of ordinary high water is not entitled, under the Fifth Amendment, to claim compensation from the United States for additional cost of protecting the embankment necessitated by the action of the Government in raising the water level above natural high-water mark, by means of a dam, for the purpose of improving navigation. So *held,* although the embankment was remote from the natural channel and from the course of navigation through the pool formed by the dam and did not obstruct navigation. Pp. 593, 596.
2. *United States* v. *Lynah,* 188 U. S. 445, in part overruled. P. 597.
3. The power of the Government over navigation covers the entire bed of a navigable stream, including all lands below ordinary high-water mark. Whether title to the bed is retained by the State or is in the riparian owner, the rights of the title-holder are subservient to this dominant easement. P. 596.

113 F. 2d 919, reversed.

CERTIORARI, 311 U. S. 642, to review the affirmance of a judgment on a verdict awarding compensation to the railroad company and to the telegraph company against the United States in a condemnation proceeding.

Assistant Attorney General Littell, with whom *Solicitor General Biddle* and *Mr. Vernon L. Wilkinson* were on the brief, for the United States.

Mr. A. C. Erdall, with whom *Messrs. F. W. Root, A. N. Whitlock,* and *C. S. Jefferson* were on the brief, for respondents.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The question for decision is whether the United States must compensate a riparian owner for injury to structures located between high and low water marks, where the damage is caused by the raising of the water level in a navigable stream for the improvement of navigation. The importance of the question, and a conflict in the decisions of this court, led to the grant of certiorari.

The tracks of the respondent railroad and the pole lines of the respondent telegraph company in Wabasha and Winona counties, Minnesota, as relocated in 1910, are, in part, on an embankment on the westerly side of the Mississippi River. The embankment was adequately riprapped, where necessary, to protect it in times of high water.

In the prosecution of a project for the improvement of navigation the United States has been, and is, engaged in constructing a series of locks and dams in the upper reaches of the Mississippi. One of the dams authorized by Act of Congress [1] raises the level of the river and creates a pool which inundates bottom lands along the west bank.

In 1933 the Government instituted condemnation proceedings to acquire the right to back water across the respondents' right of way and against their embankment. Since the dam raises the water level from 5.6 to 7.5 feet

[1] Rivers and Harbors Act of July 3, 1930, c. 847, 46 Stat. 918, 927.

above ordinary high-water mark, the respondents were compelled at certain points to add additional riprap to prevent damage to their embankment.

At the trial in the condemnation proceeding the Government offered to prove that four segments of the embankment lie between the ordinary high and ordinary low water marks of the river; are, therefore, subject to the federal power to improve navigation; and that any injury to them by additional flooding is an incident of the exercise of the power and not the subject of compensation. The respondents objected to the offer as immaterial for the reason that neither before nor after the improvement did the embankment constitute an obstruction or menace to navigation and its maintenance was and is, therefore, a right of private property, the injury to which, in the prosecution of the federal project, entitled the owner to compensation.

The District Court rejected the offer of proof. Thereupon the Government moved to dismiss from the proceedings all question of compensation for the four encroachment areas where the embankment was claimed to be located between high and low water marks. The motion was denied. A verdict and judgment ensued for damages to the entire length of the embankment both where it was admitted to be located on fast land and where it was claimed to lie between high and low water marks. Each party appealed. Thereafter, by stipulation, all questions, except that touching the four segments of the embankment which the Government claimed were located between high and low water marks, were eliminated from the cause. It was stipulated by the respondents that one of the four segments in question was so located, but as to the other three the parties are in disagreement. The Court of Appeals, for the purpose of decision, assumed that all four were so located but held, nevertheless, that the Government was bound

to compensate the respondents for damage to all of them, and affirmed the judgment of the District Court.[2]

Certain matters are not in dispute. The Mississippi River at the points in question is navigable. The respondent railroad is the riparian owner and, as such, its title extends to ordinary low-water mark. The natural channel and the course of navigation through the pool formed by the dam lie at a considerable distance from the embankment, which does not, and will not, obstruct or interfere with actual navigation. The lands lying between the embankment and the natural channel were lowlands which, prior to the improvement, were to a great extent covered with trees and scrub.

The respondents assert that the power of the Government to take private lands for the improvement of navigation is confined to the natural widths, levels, and flows of the river and that if more is taken compensation must be made. Their position is that the embankment can be injured without compensation only if it constitutes an encroachment and thus a hindrance or obstruction to actual navigation. The Government, on the other hand, insists that its power is not confined to the mere making or clearing of channels and removing hindrances and obstructions to their navigation, but embraces the exercise of every appropriate means for the improvement of navigable capacity; and that, in the provision of any such means, it is entitled to deal with and alter the level of the stream to any extent up to ordinary high-water mark without being answerable to riparian owners for injury to structures lying below that line.

Commerce, the regulation of which between the states is committed by the Constitution to Congress, includes navigation. "The power to regulate commerce compre-

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[2] 113 F. 2d 919.

hends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress." [3] And the determination of the necessity for a given improvement of navigable capacity, and the character and extent of it, is for Congress alone.[4] Whether, under local law, the title to the bed of the stream is retained by the State or the title of the riparian owner extends to the thread of the stream, or, as in this case, to low-water mark,[5] the rights of the title holder are subordinate to the dominant power of the federal Government in respect of navigation.[6]

The power of Congress extends not only to keeping clear the channels of interstate navigation by the prohibition or removal of actual obstructions located by the riparian owner, or others, but comprehends as well the power to improve and enlarge their navigability.[7]

The bed of a river is "that portion of its soil which is alternately covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, without reference to the extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn." [8]

The dominant power of the federal Government, as has

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[3] *Gilman* v. *Philadelphia,* 3 Wall. 713, 724.

[4] *Scranton* v. *Wheeler,* 179 U. S. 141, 162.

[5] *Morrill* v. *St. Anthony Falls Water Power Co.,* 26 Minn. 222; 2 N. W. 842.

[6] *Gibson* v. *United States,* 166 U. S. 269, 271, 272.

[7] *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 62; *New Jersey* v. *Sargent,* 169 U. S. 328, 337; *United States* v. *Appalachian Electric Power Co.,* 311 U. S. 377.

[8] *Alabama* v. *Georgia,* 23 How. 505, 515.

been repeatedly held, extends to the entire bed of a stream, which includes the lands below ordinary high-water mark. The exercise of the power within these limits is not an invasion of any private property right in such lands for which the United States must make compensation.[9] The damage sustained results not from a taking of the riparian owner's property in the stream bed, but from the lawful exercise of a power to which that property has always been subject.

The respondents admit that this is the settled rule but insist that it has been applied only in cases where the control of the Government was exercised to extend the area of practicable navigation either by constructing channels for actual use or by removing obstructions to navigation. They assert, and the court below was of opinion, that *United States* v. *Lynah*, 188 U. S. 445, and *United States* v. *Cress*, 243 U. S. 316, sanction a different principle where the improvement consists in the raising of the level of a stream to the injury of structures erected by the riparian owner between high and low water mark.

What was said in the *Cress* case must be confined to the facts there disclosed. In that case, the Government's improvement in a navigable stream resulted in the flooding of the plaintiff's land in and adjacent to a non-navigable stream. The owners of the land along and under the bed of the stream were held entitled to compensation for the damage to their lands. The question here presented was not discussed in the opinion.

In the *Lynah* case the plaintiff's rice plantation was rendered worthless by the Government's raising the water in the Savannah River. Three questions were considered

[9] *Scranton* v. *Wheeler*, 179 U. S. 141, 143, 144; *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251, 263; *Willink* v. *United States*, 240 U. S. 572, 580; *Delaware R. Co.* v. *Weeks*, 293 F. 114, 120; *Barr* v. *Spalding*, 46 F. 2d 798, 800; *Marret* v. *United States*, 82 Ct. Cls. 1, 13; *United States* v. *Meyer*, 113 F. 2d 387, 398.

at length by this Court: Whether the trial court (the then Circuit Court) had jurisdiction; whether there was a taking of plaintiff's property; and whether the Government was bound to compensate therefor. All were answered in the affirmative. Applying earlier decisions it was held that the permanent flooding of land adjacent to a stream in the improvement of navigation, pursuant to statutory authority, amounted to a taking and that the court had jurisdiction to award compensation upon the footing of an implied contract of the Government to pay for what it took. But as the court below points out, the quoted findings show, and the opinion adverted to the fact, that the plantation lay in part between the high and low water lines, and this Court held that the flooding constituted a taking of the whole, for which compensation was due under the Fifth Amendment to the Constitution. Moreover, three justices based their dissent largely on the fact that compensation was awarded for injury to lands lying below high-water mark. We are bound, therefore, to determine whether we shall follow that decision in respect of the issue involved in the instant case. The decision was by a divided court; and later, in a similar case, there was an affirmance by an equally divided court.[10] The case has often been cited as authority for the settled doctrine that an authorized taking of property for public use gives rise to an implied promise to pay just compensation. But we think this Court has never followed it as a binding decision that compensation is due for injury or destruction of a riparian owner's property located in the bed of a navigable stream. And we think that, so far as it sanctions such a principle, it is in irreconcilable conflict with our later decisions [11] and cannot be considered as expressing the law.

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[10] *United States* v. *Heyward*, 250 U. S. 633.

[11] See cases cited in Note 9 *supra*.

It is not true, as respondents maintain, that only structures in the bed of a navigable stream which obstruct or adversely affect navigation may be injured or destroyed without compensation by a federal improvement of navigable capacity. On the contrary, any structure is placed in the bed of a stream at the risk that it may be so injured or destroyed; and the right to compensation does not depend on the absence of physical interference with navigation. The *ratio decidendi* and the circumstances disclosed in numerous cases lead inevitably to this conclusion.[12]

The respondents claim that two of the sections of embankment in question not only are above ordinary high-water mark but also claim that they abut, not on the Mississippi River, but on a non-navigable tributary; and that another, though along the bank of the river, is at or above the ordinary high-water line. The Government disagrees. These issues of fact remain for solution by the District Court.

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

Reversed.

[12] See the cases cited in Note 9, and *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 70; *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82, 86–88.

UNITED STATES *v.* COOPER CORPORATION ET AL.

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

No. 484. Argued March 6, 1941.—Decided March 31, 1941.

1. While the United States is a juristic person in the sense that it can sue upon its contracts or in vindication of its property rights, the term "person" does not include the sovereign, in common usage, nor, ordinarily, when employed in statutes. P. 604.
2. The Sherman Antitrust Act, in creating new rights and remedies, allowed two classes of actions,—those made available only to the Government, and a right of action for treble damages granted to redress private injury. P. 608.
3. Section 7 of the Act, granting the right of action for treble damages, to "any person" injured in his business or property by "any other person or corporation" by reason of anything forbidden by the Act, does not give the United States a civil action for damages. P. 606 *et seq.*

   The text of the Act, taken in its natural and ordinary sense, makes against the extension of the term "person" to include the United States; and the usual aids to construction support this conclusion.

114 F. 2d 413, affirmed.

CERTIORARI, 311 U. S. 639, to review the affirmance of a judgment of the District Court, 31 F. Supp. 848, dismissing the complaint in an action by the United States to recover treble damages under § 7 of the Sherman Act.

Mr. Hugh B. Cox, with whom *Solicitor General Biddle* and *Assistant Attorney General Arnold* were on the brief, for the United States.

The words "any person," in § 7, are broad enough to include the United States, because it is a juristic person and as such is ordinarily entitled to all legal remedies available to anyone else. *Dugan* v. *United States,* 3 Wheat. 172, 181; *United States* v. *Gear,* 3 How. 120; *Cotton* v. *United States,* 11 How. 228, 231.

Section 8 was added for the purpose of making certain that corporations would be subject to the Act and not for the purpose of narrowing the scope of § 7. Any other construction of § 8 would turn words of inclusion into words of crippling limitation. Moreover, if Congress had intended to exclude the United States in § 8 it would have done so expressly and without ambiguity.

Inasmuch as § 7 is not limited by § 8, the words "any person" in § 7 should be given the broad meaning which Congress intended. The fact that § 7 does not refer expressly to the United States is not controlling. *Stanley* v. *Schwalby,* 147 U. S. 508, 517; *Helvering* v. *Stockholms Enskilda Bank,* 293 U. S. 84, 91–92; *Nardone* v. *United States,* 302 U. S. 379. The statute is remedial and should be liberally construed. Because it confers a general right or remedy, the United States is entitled to its benefits even though not expressly named. *Dollar Savings Bank* v. *United States,* 19 Wall. 227, 239.

The facts that the United States is the largest purchaser of goods in the country and that its purchases are paid for with public funds are persuasive reasons for giving to it the remedy created by § 7. Experience has shown that the United States, like any other purchaser, can be victimized by combinations and conspiracies. The other remedies given by the Act to the United States in its sovereign or governmental capacity do not enable the United States to deal with the problem of collusive bidding nor do they protect it when it has been required by circumstances to purchase at collusive and noncompetitive prices. There is no force in the argument that the remedies given to the United States by way of indictment or injunction are exclusive; those remedies cannot protect its proprietary interests or compensate it for the damages which respondents have inflicted upon it.

If § 8 is to be regarded as limiting or qualifying § 7, then the words of § 8 should be construed as including the

United States. The United States can properly be regarded as a corporation or an association existing under and authorized by the laws of the United States. The definition of "person" in § 8 is obviously drawn to include all kinds of corporations and associations. The purpose of the definition is not served by drawing artificial distinctions between the United States and other corporations and associations.

The legislative history of the antitrust laws does not support the conclusion that Congress intended to discriminate against the United States and to deprive it of a remedy open to every other juristic person. *Davis* v. *Pringle,* 268 U. S. 315, is not controlling here. There the United States was seeking priority in the distribution of the assets of an insolvent estate. Here the United States seeks not priority but equality of treatment with all other juristic persons. Furthermore, the statute involved in *Davis* v. *Pringle, supra,* gave to the United States a limited right of priority and the Court regarded this circumstance as indicating that Congress did not intend to give any broader right of priority. Here, unless the United States can sue under § 7, it is without a remedy and cannot recover in any way for the damages which respondents have inflicted upon it. The subsequent legislative history of the Bankruptcy Act and subsequent decisions of this Court create grave doubt as to whether *Davis* v. *Pringle, supra,* lays down any principle which now possesses vitality.

Failure of the United States to assert its rights under § 7 is not entitled to any weight whatsoever as an administrative interpretation of the statute. *Union Stock Yard Co.* v. *United States,* 308 U. S. 213, 224; *Louisville & N. R. Co.* v. *United States,* 282 U. S. 740, 757, 759; *Kansas City So. Ry. Co.* v. *United States,* 252 U. S. 147, 151.

Mr. Luther Day, with whom *Messrs. Robert Guinther, Lyman M. Bass, Paul H. Arthur, John C. Bruton, Jr.,*

Charles Wesley Dunn, Thurlow M. Gordon, Paul Van Anda, and *Joseph F. Murray* were on the brief, for respondents.

The Government is inviting this Court, as it has unsuccessfully invited the two courts below, to undertake, as a judicial function, powers of legislation.

If the United States needs any general right to sue for damages under the Act, it needs at most a right to sue for simple damages; no necessity exists to punish through threefold damages in addition to fines, imprisonment, injunctions and forfeitures. It does not need the right to sue for treble damages in order to obtain desired prices on defense projects. The Government has in its possession weapons far more potent to achieve that result—as, *e. g.,* its right to threaten, and if need be to use, the statutory right of taking over the property of a vendor who refuses to sell at prices deemed by the Government to be reasonable. Section 9 of the Act of Sept. 16, 1940, c. 720, 54 Stat. 885.

The Government must have statutory authorization before it can sue for treble damages under the Sherman Act. Such statutory authorization was intentionally denied by Congress.

That authority to sue for treble damages under the Sherman Act is lacking, has been the view of the courts, the Department of Justice, and Congress, uniformly, for fifty years.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

We took this case because it presents the important question whether the United States may maintain an action for treble damages under § 7 of the Sherman Act.[1]

The complaint charged the respondents had illegally

[1] Act of July 2, 1890, c. 647, 26 Stat. 209, 210.

combined and conspired to fix collusive prices of articles purchased by the United States; alleged the money damage inflicted upon the United States thereby, and sought judgment for three times that amount. The District Court granted a motion to dismiss the complaint on the ground that the United States is not a person as the term is used in § 7 of the Sherman Act.[2] The Circuit Court of Appeals affirmed the judgment.[3]

Section 7 provides:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

The United States is a juristic person in the sense that it has capacity to sue upon contracts made with it or in vindication of its property rights. The Sherman Act, however, created new rights and remedies which are available only to those on whom they are conferred by the Act.[4] The precise question for decision, therefore, is whether, by the use of the phrase "any person," Congress intended to confer upon the United States the right to maintain an action for treble damages against a violator of the Act.

Since, in common usage, the term "person" does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it.[5] But there is no hard

[2] 31 F. Supp. 848.

[3] 114 F. 2d 413.

[4] *Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, 174; *Fleitmann* v. *Welsbach Street Lighting Co.*, 240 U. S. 27, 29; *Geddes* v. *Anaconda Copper Mining Co.*, 254 U. S. 590, 593.

[5] *United States* v. *Fox*, 52 N. Y. 530; *Id.*, 94 U. S. 315, 321.

and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term, to bring state or nation within the scope of the law.[6]

The Government admits that often the word "person" is used in such a sense as not to include the sovereign but urges that where, as in the present instance, its wider application is consistent with, and tends to effectuate, the public policy evidenced by the statute, the term should be held to embrace the Government. And it strongly urges that all the considerations which moved Congress to confer the right to recover damages upon individuals and corporations injured by violations of the Act apply with equal force to the United States, which, as a large procurer of goods and services, is as likely to be injured by the denounced combinations and monopolies as is a natural or corporate person. We are asked, in this view, so to construe the Act as not to deny to the Government what public policy is thought to require.

Decision is not to be reached by a strict construction of the words of the Act, nor by the application of artificial canons of construction. On the contrary, we are to read the statutory language in its ordinary and natural sense, and if doubts remain, resolve them in the light, not only of the policy intended to be served by the enactment, but, as well, by all other available aids to construction. But it is not our function to engraft on a statute additions which we think the legislature logically might or should have made.[7]

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[6] See *Levy* v. *McCartee,* 6 Pet. 102, 110; *United States* v. *Freeman,* 3 How. 556, 565; *Ohio* v. *Helvering,* 292 U. S. 360, 370; *Nardone* v. *United States,* 302 U. S. 379.

[7] *The Pedro,* 175 U. S. 354, 364; *Dewey* v. *United States,* 178 U. S. 510, 519, 520; *Pirie* v. *Chicago Title & T. Co.,* 182 U. S. 438, 451; *White* v. *United States,* 191 U. S. 545, 551, 552; *Ebert* v. *Poston,* 266 U. S. 548, 554; *Helvering* v. *Oregon Life Ins. Co.,* 311 U. S. 267, 272.

The recent expressions of this court in *Tigner* v. *Texas*, 310 U. S. 141, 148, 149, warn that it is not for the courts to indulge in the business of policy-making in the field of antitrust legislation. Congress has not left us at large to devise every feasible means for protecting the Government as a purchaser. It is the function of Congress to fashion means to that end, and Congress has discharged this duty from time to time according to its own wisdom. Our function ends with the endeavor to ascertain from the words used, construed in the light of the relevant material, what was in fact the intent of Congress.

1. Without going beyond the words of the section, the use of the phrase "any person" is insufficient to authorize an action by the Government. This conclusion is supported by the fact that if the purpose was to include the United States, "the ordinary dignities of speech would have led" to its mention by name.[8] It is supported also by the collocation of the phrase in the section. The provision is that "any person" injured by violation of the Act "by any other person or corporation" may maintain an action for treble damages against the latter. It is hardly credible that Congress used the term "person" in different senses in the same sentence. Yet, unless it did, the United States would not only be entitled to sue but would be liable to suit for treble damages. The more natural inference, we think, is that the meaning of the word was in both uses limited to what are usually known as natural and artificial persons, that is, individuals and corporations. In addition, the concluding words of the section give the injured party, as part of his costs, a reasonable attorney's fee,—a provision more appropriate for a private litigant than for the United States.

2. The connotation of a term in one portion of an Act may often be clarified by reference to its use in others.

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[8] *Davis* v. *Pringle*, 268 U. S. 315, 318.

The word "person" is used in several sections other than § 7. In §§ 1, 2, and 3 the phrase designating those liable criminally is "every person who shall" etc. In each instance it is obvious that while the term "person" may well include a corporation it cannot embrace the United States. In § 8 Congress attempted to make clear that the term "person" is to include a corporation. The provision is "that the word 'person,' or 'persons,' wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country." The very fact, however, that this sweeping inclusion of various entities was thought important to preclude any narrow interpretation emphasizes the fact that if the United States was intended to be included Congress would have so provided expressly. We may say in passing that the argument that the United States may be treated as a corporation organized under its own laws, that is, under the Constitution as the fundamental law, seems so strained as not to merit serious consideration. It is fair to assume that the term "person," in the absence of an indication to the contrary, was employed by the Congress throughout the Act in the same, and not in different, senses.

3. The scheme and structure of the legislation are likewise important to a proper ascertainment of its purpose and intent. Sections 1, 2, and 3 impose criminal sanctions for violations of the acts denounced in those sections respectively. Section 4 gives jurisdiction to the federal courts of proceedings by the Government to restrain violations of the Act and imposes upon United States Attorneys the duty to institute equity proceedings to that end. Section 5 regulates service in such suits. Section 6 authorizes seizure, in the course of interstate transportation, of goods owned under any contract or pursuant to any conspiracy made illegal by the statute.

Thus far the Act deals in detail with the criminal and civil remedies of the Government in vindication of the policy of the legislation. There follows § 7, the only other substantive section, giving a civil action for an injury to property rights.

It seems evident that the Act envisaged two classes of actions,—those made available only to the Government, which are first provided in detail, and, in addition, a right of action for treble damages granted to redress private injury. If this be the fair construction of the Act, the Court's task is finished when it gives effect to the purposes of the law, evidenced by the various remedies it affords for different situations. Though the law gave a remedy by way of injunction at the suit of the United States, we were pressed to say that a private person should have the same remedy. We were compelled to answer that Congress had not seen fit so to provide.[9] For the like reasons we cannot hold that since a private purchaser is given a remedy for his losses in treble damages, the United States should be awarded the same remedy.

4. Supplemental legislation lends support to the view that Congress had in mind the distinction between public and private remedies and did not intend to confer a right of action on the United States by the use of the phrase "any person" in § 7. The antitrust provisions of the Wilson Tariff Act[10] follow the same pattern as the Sherman Act. Section 73[11] denounces combinations and agreements between parties importing articles from a foreign country and declares that every person guilty of

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[9] *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 71; *Paine Lumber Co.* v. *Neal*, 244 U. S. 459. The Act was amended to authorize suits for injunctions by private litigants. See the Clayton Act of October 15, 1914, c. 323, § 16, 38 Stat. 730, 737; 15 U. S. C. § 26.

[10] Act of August 27, 1894, c. 349, 28 Stat. 509, as amended by Act of Feb. 12, 1913, c. 40, 37 Stat. 667; 15 U. S. C. § 8.

[11] 28 Stat. 570, 37 Stat. 667.

violation of its terms shall be punished. Section 74 confers jurisdiction upon the federal courts and authorizes proceedings in equity by the United States to restrain such acts. Section 76 provides for seizure and forfeiture of property imported into the United States contrary to law and § 77 gives an action for treble damages to any person against any other person or corporation in the exact words of § 7 of the Sherman Act.

The antidumping provisions of the Revenue Act of 1916 [12] make it a criminal offense for "any person" importing articles from a foreign country to sell, or cause to be imported or sold, such articles within the United States at substantially less than the market value of such articles at the time of exportation in the principal markets of the country of production, etc. They further declare that any person injured in his business or property by any violation may sue therefor in the United States courts and recover threefold damages and costs, including a reasonable attorney's fee. It must be obvious that the United States cannot be embraced by the phrase "any person" there used.

When Congress came to supplement the Sherman Act by the Clayton Act,[13] it included in the latter a significant section bearing upon the question under consideration. Doubts had arisen as to whether issues adjudicated in a criminal proceeding or a suit in equity brought by the United States should be taken as concluded in an action for treble damages subsequently brought by an injured party. By § 5 of the Clayton Act it was sought to give such adjudication that effect. The section provides:

"A final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in

[12] Act of September 8, 1916, c. 463, 39 Stat. 756, 798, 15 U. S. C. § 72.

[13] Act of October 15, 1914, c. 323, 38 Stat. 730.

equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* This section shall not apply to consent judgments or decrees entered before any testimony has been taken."

Immediately following this provision the section continues:

"Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof."

Here again it seems clear that Congress recognized the distinction between proceedings initiated by the Government to vindicate public rights and actions by private litigants for damages.

It should be noted that § 1 of the Clayton Act again defined the term "person" exactly as it was defined by § 8 of the Sherman Act, and § 4 again enacted that any person injured by a violation might recover treble damages together with a reasonable attorney's fee.

5. There has been a considerable body of judicial expression to the effect that § 7 authorizes an action for damages only by private suitors and not by the Government.[14] While none of the cases presented the exact ques-

[14] *Pidcock* v. *Harrington,* 64 F. 821, 822; *Lowenstein* v. *Evans,* 69 F. 908, 911; *Greer, Mills & Co.* v. *Stoller,* 77 F. 1, 3; *City of Atlanta* v.

tion here involved, the statements bearing on the subject exhibit a uniform opinion contrary to the Government's present contention.

6. The legislative history is persuasive that the Sherman Act was not intended to give the United States a civil action for damages. Senator Sherman, on March 18, 1890, introduced a bill which, in § 1, provided that the United States might bring various civil actions and, in § 2, that "any person" should be entitled to sue any "person" or "corporation" for double damages.[15]

In the discussion of the bill it was pointed out that § 1 authorized the United States to bring civil actions including those for simple damages and that, under § 2, private parties were entitled to sue for double damages. Senator Sherman stated that § 2 gave a right to sue for double damages only to private parties and not to the United

Chattanooga Foundry Co., 101 F. 900, 904; *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 52; *United States* v. *Patterson*, 201 F. 697, 714; *General Investment Co.* v. *Lake Shore & Michigan So. Ry. Co.*, 260 U. S. 261, 286; *Glenn Coal Co.* v. *Dickinson Fuel Co.*, 72 F. 2d 885, 889; *Quemos Theatre Co.* v. *Warner Bros. Pictures*, 35 F. Supp. 949, 950; *Tigner* v. *Texas*, 310 U. S. 141, 148.

[15] "Section 1:

". . . And the circuit court of the United States shall have original jurisdiction of all suits of a civil nature at common law or in equity arising under this section, and to issue all remedial process, orders, or writs proper and necessary to enforce its provisions. And the Attorney-General and the several district attorneys are hereby directed, in the name of the United States, to commence and prosecute all such cases to final judgment and execution."

"Section 2:

"That any person or corporation injured or damnified by such arrangement, contract, agreement, trust, or combination defined in the first section of this Act may sue for and recover, in any court of the United States of competent jurisdiction, without respect to the amount involved, of any person or corporation a party to a combination described in the first section of this Act, twice the amount of damages sustained and the costs of the suit, together with a reasonable attorney's fee."

States. He stated that the civil suit by the United States authorized by § 1 might be for an ouster of the power of the corporation, for damages, or in *quo warranto,* and added: "But the second section provides purely a personal remedy, a civil suit also by citizens of the United States." [16]

As is well known, after Senator Sherman's bill had been amended, Senator Hoar rewrote most of the bill. In so doing he eliminated § 1 with its provision for civil suits by the United States and substituted §§ 1, 2, 3, 4, and 6, specifying the remedies, civil, criminal, and by way of forfeiture, available to the United States. In that revision he retained, with slight change, § 2 of the bill, increasing the recoverable damages to treble instead of double, and renumbered the section as § 7. In this form the bill was adopted.

As already stated, the language of § 7 of the Sherman Act was repeated in later statutes extending the antitrust laws although in the meantime this and other courts had expressed the view that the section accorded the Government no right of suit for treble damages. When the Clayton Act was before the Senate, Senator Culberson, Chairman of the Committee which reported the bill, enumerated the usual types of action prosecuted under the Sherman Act,—criminal prosecutions, suits in equity, and actions for damages, and stated with respect to Government suits under the Sherman Act and the Clayton Act: "There is no suit authorized by any of these statutes except a criminal prosecution or a suit in equity. The United States does not bring a suit at law for damages." [17]

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[16] 21 Cong. Rec. 2563–2564.

[17] 51 Cong. Rec. 13898. Statements by members of the House Judiciary Committee indicate a similar view: 51 Cong. Rec. 9079, 9490. Representative Webb the chairman of that Committee mentioned the civil remedies available under the bill as treble damage

In 1926 the Attorney General, in response to a Senate Resolution asking for information with respect to cases instituted under the first seven sections of the Sherman Act, wrote: "Under Section 7, which gives to private persons the right to sue for injuries arising under the act, a number of actions have been instituted. The United States, however, under the statute is not a party to suits under that section." [18]

Senator O'Mahoney has introduced a bill, which is pending as S. 2719, prepared jointly by him and by the Assistant Attorney General in charge of antitrust matters. On June 28, 1939, the Senator stated that the purpose of the bill was to provide more effective civil remedies. In the course of his statement he said: "There is only one other remedy worth mentioning available under existing law to the Department of Justice—the civil action for an injunction. In addition, there is the action in damages by a private person who has been injured. Neither of these remedies is effective." He further stated: "The bill permits the United States, in effect, to bring a suit for damages against an offending corporation and against its individual directors and officers." [19]

7. It is significant that, in the light of the expressions by the courts, the supplemental legislation, and the legislative history, no action has ever been brought by the United States under § 7 in the fifty years during which

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actions by persons, suits by the Federal Trade Commission, suits by the United States for injunctions, and similar suits by persons. He then said "Certainly the remedies are cumulative. The remedies pile up, and all of the remedies are open to the individual and to the Government in a suit." 51 Cong. Rec. 16276. But obviously he meant that the remedies given the public and the individual *respectively* were cumulative, as they clearly are; for it is plain the remedy given the Federal Trade Commission is not afforded to the individual.

[18] Sen. Doc. No. 79, 69th Cong., 1st Sess., p. 1.

[19] 84 Cong. Rec. 8192.

the statute has been in force until the present action was instituted. Down to the close of the year 1937, 428 criminal prosecutions and suits in equity had been instituted by the Government.[20] Down to December, 1939, 103 civil suits had been instituted by private persons, including corporations.[21] In the meantime the World War intervened with the Government a purchaser of enormous quantities of material and supplies. Then, as now, the complaint was prevalent that agreements and conspiracies existed to fix and maintain prices of materials needed by the Government. And throughout the life of the legislation able and vigilant officials devoted to enforcement of the policy of the Sherman Act have not been wanting.

In these circumstances the conviction that no right to sue had been given the Government, rather than a supine neglect to resort to an available remedy, seems to us the true explanation of the fact that no such actions have been instituted by the United States.

In summary, we are of opinion that the text of the Act, taken in its natural and ordinary sense, makes against the extension of the term "person" to include the United States, and that the usual aids to construction, taken together, instead of inducing the contrary conclusion, go to support the view that Congress did not use the word in the sense for which the Government contends.

The judgment is

Affirmed.

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[20] "Federal Antitrust Laws," published by the Department of Justice January 1938.

[21] 49 Yale Law Journal 296.

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

MR. JUSTICE BLACK, dissenting.

In order to give purchasers of goods an opportunity to buy them at prices fixed by competitive trade, the Sherman Act made it illegal to fix prices by combination or conspiracy. It is difficult for me to believe that Congress did not intend to give equal protection to all purchasers similarly injured. In my judgment, no language of that Act, nothing in its history, and no argument now presented for our consideration makes necessary the conclusion that Congress intended to discriminate in favor of some purchasers and against others. It would require clear and unequivocal statutory language to persuade me that Congress intended to grant a remedy to all except one of those who were injured by trust prices—the "all" including every natural and artificial person, every corporation and association,[1] foreign and domestic, and the single exception

[1] A 1940 report to the Senate, made by the Secretary of the Treasury pursuant to a Senate Resolution, revealed that the federal government was transacting part of its business through the medium of at least 1469 government corporations. Senate Document No. 172, 76th Cong., 3rd Sess., Part 1, p. 4. The judgment here does not foreclose such corporations from suing for damages under § 7, or so I assume. If I am correct in my assumption, the result is that as to those purchases made by its corporate agencies, the Government is protected by the Sherman Act, while as to those purchases made by its non-corporate agencies, it is not so protected. A process of statutory construction which results in giving to government corporations a right denied to constitutionally authorized government departments seems to me to conflict with the frequently declared rule that a statute should not be interpreted in such way as to produce an unreasonable or unjust result. See *United States* v. *American Trucking Associations*, 310 U. S. 534, 542–543; *Sorrells* v. *United States*, 287 U. S. 435, 446.

being the United States, which buys more goods and services than any other single purchaser.[2] No such clear and unequivocal statutory language exists. And no plausible reason has been hazarded to prove that the government as a purchaser of goods needs less protection from unlawful combinations than do other buyers.[3] Many deplorable instances in our history, in fact, indicate the contrary. Congress, no doubt stimulated to action by these historical occurrences, has by numerous enactments recognized the urgent necessity for safeguarding governmental purchases of goods and services against unfair and collusive price-fixing. To that end, competitive bidding as a prerequisite to government contracts has been the general statutory rule over a long period of years, and combinations to deprive the government of the advantages of such competition have been made criminal. It is therefore strange indeed that the Sherman Act, the greatest of all legislative efforts to make competition, not combination, the law of trade, should now be found to afford a greater protection against collusive price-fixing to every other buyer in the United States than is afforded to the United States itself.

So much for what seems to me to be the logical approach to the problem, and the one that should cause us to say that the government can sue for damages. If, however, we apply familiar canons of construction, I think we are led to the same result. For it is a primary principle that a law should be construed so as to carry

[2] For a recent study, see "Government Purchasing—An Economic Commentary," Monograph No. 19 of the Temporary National Economic Committee (1940).

[3] An argument is offered to the effect that the government has no need of a right to damages, because it has the power to bring criminal and injunctive proceedings. But the right to bring those proceedings is given to the government for the protection of the public, rather than for its self-protection as a purchaser. Further, criminal and injunctive proceedings, whatever their efficacy, do not achieve the object of § 7, which is to indemnify all injured purchasers.

out its purpose, in the light of the evil aimed at and the protection intended to be afforded. Here, among the evils legislated against was price-fixing by combination, and among the remedies afforded was the giving of a right of action to purchasers injured by prices so fixed. The result of this case—denying to the largest single purchaser of all goods manufactured and sold in the nation the protection afforded by this legislation—is to restrict the remedy in such way that the evil aimed at is less likely to be suppressed. For the construction given the Sherman Act, insofar as sales to the government and civil damages are concerned, enables those guilty of violating it to elude its provisions, escape its consequences, and defeat its objects.

Nor do I believe that the previous failure of the Attorneys General of the United States to bring actions similar to this should be deemed a persuasive reason to read the government out of the Act's benefits. The 1926 statement of the Attorney General to the effect that "the United States . . . is not a party to suits under" § 7 does not supply such a reason. For in the quoted statement the Attorney General did not take the position that the government lacked the power to sue for civil damages; apparently what he had reference to was the fact that the Sherman Act did not make the United States a party to actions for civil damages by private persons against private persons. We do not know and cannot possibly determine why no prior suits were instituted for the benefit of the government. To assign reasons for such inaction is but to guess. And the guesses would doubtless vary almost in accordance with the preconceived notions of the guessers. But whatever might have been the reasons behind the government's failure to sue, sure it is that the Attorney General is not the purchasing agent of the government. He cannot be assumed to have constant knowledge of the manifold prob-

lems that face those who buy the government's supplies. In the final analysis, it is probably true that even an Attorney General who might zealously desire to enforce the criminal provisions of the Sherman Act would not likely be stimulated to institute civil proceedings for damages unless his attention was directed to the point by keenly alert and diligent purchasing agencies. To attempt to construe the Sherman Act by a vain effort to appraise the reasons responsible for the non-action of Attorneys General is a journey into the realm of imponderables I find it unnecessary to take. I would simply read the Act from its language and manifest purpose as giving all purchasers of goods a right to sue if they have been injured as the result of prices held up by those types of unlawful combination condemned by the Act.[4]

The principle of strict construction now adopted in this case, resulting as it does in denying to the government the benefit of § 7 of the Sherman Act, is a radical departure from a long established policy under which the courts have construed laws most liberally in order to de-

[4] Though the Act is all-inclusive in naming those who may sue for damages, it is not equally all-inclusive in describing those acts which may be regarded as unlawful combinations. This is true both because of the original language and objects of the Sherman Act itself, and because of subsequent legislation. The most notable example of such subsequent legislation is that portion of the Clayton Act which provides: "The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." 38 Stat. 731, 15 U. S. C. § 17. See *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469.

clare the government entitled to their benefits.[5] And certainly it can hardly be denied that the language of the Act, giving all persons a right of action, should if liberally construed be held to justify suit by the United States. For in *Cotton* v. *United States,* 11 How. 229, 231, decided forty years before the Sherman Act was adopted, this Court said in speaking of the United States: "Every sovereign State is of necessity a body politic, or artificial person, and as such capable of making contracts and holding property. . . . It would present a strange anomaly, indeed, if, having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same remedies for their protection." And, speaking in similar vein in *Helvering* v. *Stockholms Enskilda Bank,* 293 U. S. 84, 92, after having cited Blackstone for the proposition that the sovereign is a "corporation," and after having gone even beyond this to hold that the statutory word "resident" included the United States, the Court said: "This may be in the nature of a legal fiction; but legal fictions have an appropriate place in the adminis-

[5] It is argued that if the government can sue for damages it may also be sued for damages. That question is not before us and need not be decided. Other principles will be material if such a question ever should be presented. See *United States* v. *Sherwood, ante,* p. 584; *Nardone* v. *United States,* 302 U. S. 379, 383–384; *United States* v. *Knight,* 14 Pet. 301, 315. Among these principles the most important is that of sovereign immunity. "The sovereignty of the United States raises a presumption against its suability, unless it is clearly shown; nor should a court enlarge its liability to suit beyond what the language [of the statute in question] requires." *Eastern Transportation Co.* v. *United States,* 272 U. S. 675, 686; *Price* v. *United States,* 174 U. S. 373, 375–376; *United States* v. *Sherwood, ante,* 584.

tration of the law when they are required by the demands of convenience and justice." [6]

These particular cases are but facets of a general rule that has long been accepted—the United States can exercise all of the legal remedies which other persons, bodies or associations can exercise, both at common law and under statutes,[7] unless there is something in a statute or in its history to indicate an intent to deprive the United States of that right.[8] In this case, nothing in the Sherman Act itself and nothing in its legislative history makes necessary the conclusion that Congress intended to withhold from the United States a remedy given to all other purchasers.[9] Under these circumstances, it is my opinion that the judgment below should be reversed.

MR. JUSTICE REED and MR. JUSTICE DOUGLAS join in this dissent.

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[6] To this statement the Court added: "If to carry out the purposes of a statute it be admissible to construe the word 'person' as including the United States [cases to that effect having previously been cited], it is hard to see why, in like circumstances, it is inadmissible to construe the word 'resident' as likewise including the United States." Cf. *Ohio* v. *Helvering,* 292 U. S. 360, 370–71; *Stanley* v. *Schwalby,* 147 U. S. 508, 517.

[7] See *Dugan* v. *United States,* 3 Wheat. 172; *United States* v. *Gear,* 3 How. 120; *Cotton* v. *United States, supra.* Cf. *Dollar Savings Bank* v. *United States,* 19 Wall. 227; *United States* v. *Chamberlin,* 219 U. S. 250.

[8] Cf. *Davis* v. *Pringle,* 268 U. S. 315.

[9] The legislative history of the Sherman Act is not enlightening on the question now before us. At best, all that can be said of the very few and scattered statements that were made on the subject during the debates on the Clayton Act is that they look both ways.

Syllabus.

PUBLIC SERVICE COMMISSION OF MISSOURI ET AL. *v.* BRASHEAR FREIGHT LINES, INC. ET AL.

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

No. 549. Argued March 10, 1941.—Decided March 31, 1941.

1. A motion to assess damages in a case under Jud. Code § 266 in which an injunction has been dissolved and the bill dismissed should be determined by the District Court in the exercise of its ordinary jurisdiction without participation by the two additional judges. P. 625.
2. A judgment of the District Court dismissing a motion to assess damages in a case decided by the court of three judges (Jud. Code § 266), is not invalidated by the fact that the two additional judges took part in its consideration; and, though not appealable directly to this Court, it is reviewable by the Circuit Court of Appeals, whose action upon it may in turn be reviewed here on certiorari. P. 626.
3. In a suit by numerous carriers by truck to enjoin state officials from enforcing a state statute imposing license fees, wherein the District Court, in dissolving an injunction and dismissing the bill, had dismissed, without hearing its merits, a counterclaim for the license fees owing by the several plaintiffs, the dismissal having been based upon a doubt of the right of the defendants to maintain such a counterclaim and having been made without prejudice to any right to maintain an independent suit or suits thereon,—*held,* that the ruling was not decisive of the right of defendants to obtain by motion at the end of the litigation an assessment of damages caused by the injunction, and costs. P. 626.
4. The plaintiffs having prevented collection of lawful license fees on behalf of the State of Missouri through an injunction obtained in a suit against the State's Attorney General, its Public Service Commission, and other public agencies, charging that the fees were unconstitutional and that the defendants threatened to collect them, and many of the plaintiffs having failed before the injunction was dissolved to deposit the fees falling due from them, as required by the injunction order and their injunction bonds, *held:*

(1) That the plaintiffs have no standing to resist a motion for assessment of damages upon the ground that the statutory power

to collect such fees is lodged in the State Treasurer, who was not a party to the suit. P. 627.

(2) Whoever has the power in Missouri to collect such license fees, the Attorney General has exclusive authority to bring suits in the name and on behalf of the State. P. 627.

(3) The defendant officials and agencies were proper parties to invoke an assessment of damages on behalf of the State. P. 628.

(4) The District Court, sitting in equity, has power to see that whatever sums are recovered go to the proper state officials. P. 628.

5. The District Court abused its discretion in refusing to assess damages in the injunction suit, thus remitting the State and its officials to many actions at law against the plaintiffs, some of them possibly in other States, and giving rise to serious problems in the apportionment of damages, including costs and expenses of litigation. P. 630.

It is especially fitting that equity exert its full strength in order to protect from loss a State which has been injured by reason of a suspension of enforcement of state laws imposed by equity itself.

114 F. 2d 1, reversed.

CERTIORARI, 311 U. S. 642, to review a decree which affirmed the District Court's denial of a motion to assess damages and costs in an injunction suit.

Mr. Daniel C. Rogers, with whom *Messrs. James H. Linton* and *Edgar H. Wayman* were on the brief, for petitioners.

Mr. Kenneth Teasdale, with whom *Mr. Paul G. Koontz* was on the brief, for respondents.

MR. JUSTICE BLACK delivered the opinion of the Court.

The issues in this case revolve around the power of a federal District Court to assess damages allegedly caused by a temporary injunction issued by the court but later dissolved on final hearing. These issues grow out of this situation: Respondents in this Court, seventy-six

individuals, partnerships, and corporations operating trucks as common carriers in interstate commerce, filed a bill in the federal District Court to enjoin petitioners here, Missouri officials and agencies, from enforcing against them certain allegedly unconstitutional tax and license features of the Missouri Bus and Truck Law.[1] A single district judge granted a temporary restraining order under which respondents were required to post injunction bonds and under which the contested fees were to be deposited with a trustee during the litigation. But because the bill sought to restrain state officials from enforcing an allegedly unconstitutional state statute, the case was set down for hearing before a three judge District Court pursuant to § 266 of the Judicial Code as amended, 28 U. S. C. § 380. Petitioners, in their answer to respondents' complaint, counterclaimed for fees and licenses the respondents had failed to pay in the past[2] and later amended the counterclaim to include amounts the respondents failed to deposit with the trustee during the litigation. Ultimately, the three judge court found the Bus and Truck Law constitutional, dissolved the restraining order, dismissed the truck operators' bill, and also ordered the counterclaim dismissed without prejudice because of "serious doubt as to the right of the de-

[1] Mo. Rev. Stats. (1929) § 5272, as amended by Mo. Laws (1931), p. 311. The Missouri officials were the Attorney General, the Superintendent of the State Highway Patrol, the State Highway Commission, and the Public Service Commission. The ground of attack on the statute was that it violated the Federal Constitution and the federal Motor Carrier Act of 1935, 49 Stat. 543, 49 U. S. C. §§ 301–327 (Supp. 1939).

[2] Respondents denied "each and every allegation, statement and thing" contained in the counterclaim. Later they contended that it was the understanding of the parties that should the counterclaim become material, then this pleading could be withdrawn and "an opportunity to plead fully" to the counterclaim be exercised. Petitioners denied that there was any such understanding.

fendants to maintain" such an action. The truck operators did not appeal from the dismissal of their bill. Petitioners' attempt to bring the dismissal of their counterclaim here by direct appeal was dismissed for want of jurisdiction. 306 U. S. 204. Thereupon the petitioners, on their own behalf and "in behalf of the State of Missouri and of the State Treasurer," filed in the three judge court a motion for assessment of damages and costs against the truck operators and their injunction bond sureties. That court denied the requested relief on the ground that the questions presented by the motion for damages had been ruled upon and finally determined by the judgment dismissing the original counterclaim. The Circuit Court of Appeals affirmed,[3] but on a different ground. It held that the motion to assess damages involved issues ancillary to the original litigation, which would require a long and complicated inquiry; that such litigation is not the type for which a three judge court is provided; that the three judge court, however, did have jurisdiction to consider the motion if it saw fit, or to remit it to the single district judge; and that the action actually taken by the three judge court was final, since under the circumstances that court had not abused its discretion. We granted certiorari, 311 U. S. 642, primarily because of the procedural importance of determining the statutory function of a three judge court in dealing with questions such as those here presented. The case as presented to us requires that we give consideration to these questions:

1. Should the two additional judges, called to assist the district judge pursuant to § 266, have participated in consideration of the motion to assess damages?

2. Was the District Court correct in holding that its prior denial of the counterclaim was a final adjudication

[3] 114 F. 2d 1.

of the issues presented by petitioners' motion to assess damages?

3. Were the enjoined Missouri officials and agencies, to whom the injunction bonds ran, proper parties to invoke the court's action for assessment of damages?

4. Did the District Court erroneously exercise its discretionary power, by its refusal to hear and determine the merits of petitioners' motion to assess damages?

First. We are of opinion that the two judges called in under § 266 to assist the district judge in passing upon the application for injunction should not have participated in consideration of the motion to assess damages. The limited statutory duties of the specially constituted three judge District Court had been fully performed before the motion for assessment of damages was filed. For § 266 of the Judicial Code provides for a hearing by three judges, instead of one district judge, only in connection with adjudication of a very narrow type of controversy—applications for temporary and permanent injunctions restraining state officials from enforcing state laws or orders made pursuant thereto upon the ground that the state statutes are repugnant to the Federal Constitution.[4] The motion for damages raised questions not within the statutory purpose for which the two additional judges had been called. Those questions were therefore for the consideration of the District Court in the exercise of its ordinary jurisdiction, and the three judge requirement of § 266 had no application.[5]

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[4] See *Phillips* v. *United States,* 312 U. S. 246; *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.,* 292 U. S. 386; *Ex parte Public National Bank,* 278 U. S. 101, 104.

[5] A District Court composed of three judges under § 266 of course has jurisdiction to determine every question involved in the litigation pertaining to the prayer for an injunction, in order that a single lawsuit may afford final and authoritative decision of the controversy between the parties. *Railroad Commission* v. *Pacific Gas &*

But the fact that it was mistakenly assumed that the motion should be passed upon by the district judge in association with the two judges previously called did not of itself invalidate the District Court's judgment dismissing the motion. Though that judgment of dismissal was not appealable directly to this court under § 266, even though participated in by three judges,[6] it was reviewable by the Circuit Court of Appeals, and since it has been so reviewed, the issues presented are properly before us.

Second. The ground assigned by the District Court for denying the motion to assess damages was that by its previous dismissal of petitioners' counterclaim it had already ruled upon and finally determined the questions raised by the motion. The original counterclaim, however, was dismissed without a hearing on the merits. No evidence was heard. It was dismissed, as the court said at the time, because of "serious doubt as to the right of the defendants to maintain such counterclaim," and in the order of dismissal it was specified that the action taken was "without prejudice to the right of the defendants . . . to maintain an independent action or suit thereon." We need not here point out the procedural reasons which might have caused the "serious doubt" which prompted the court to dismiss the counterclaim. For even assuming that the court properly dismissed the counterclaim without a hearing on the merits, it does not follow that its dismissal was a final adjudication of either the procedural or the substantive right of petitioners to invoke the court's jurisdiction by a motion to assess damages. Some of the damages asserted in the

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Electric Co., 302 U. S. 388, 391; *Sterling* v. *Constantin*, 287 U. S. 378, 393–394.

[6] See, e. g., *Public Service Commission* v. *Columbia Terminals Co.*, 309 U. S. 620; *Public Service Commission* v. *Brashear Freight Lines*, 306 U. S. 204, 207. Cf. *Eichholz* v. *Public Service Commission*, 306 U. S. 268.

motion—such as the costs of the litigation—were not asserted in the counterclaim, and such damages could not well have been determined until after final adjudication of the issues which caused the three judge court to be invoked. The record shows that action on the counterclaim was deferred pending full hearing on the constitutionality of the Missouri statute under attack. This postponement might well be attributed to a belief on the part of the court that the questions raised by the counterclaim were matters which could be better determined after final determination of the issues presented by the original bill for injunction. The judgment dismissing the motion for assessment of damages cannot be supported upon the ground that the issues raised by it had been adjudicated in the prior dismissal of the counterclaim.

Third. Respondents also seek to support the court's judgment upon the ground that the enjoined state officials and agencies are not the proper parties to invoke the court's action for assessment of damages brought about by the injunction. This claim cannot be sustained. The argument on which it rests is that the State Treasurer, not the Public Service Commission, is given statutory power to collect the fees that are in part the basis of the motion to assess damages. But petitioners insist that the Public Service Commission actually collects the fees under customs and rules of long standing, and urges that statutory authority exists for such action by the Commission. But whoever has the statutory authority to collect fees, it is not denied that the Missouri Attorney General, one of the enjoined and petitioning officials, is given exclusive authority to bring suit in the name of and on behalf of the state.[7] And if

[7] Mo. Rev. Stats. (1929) § 11276. (Mo. Rev. Stats. (1939) § 12901.)

upon a hearing damages are shown to have been suffered within the terms and conditions of the injunction bonds, the district court sitting in equity has ample power to see that whatever sums are recovered go to the proper state officials. In addition to this, respondents are in a poor position to argue that petitioners are not proper parties, for one of the grounds upon which the respondents claimed an injunction against these particular petitioners was that it was they who were threatening to bring actions against respondents to collect the very fees which are now a part of the present motion for assessment of damages. At the instance of the operators, these state officials were for a period of fifteen months deprived of all opportunity to collect any fees except those deposited with the trustees pursuant to the terms of the restraining order. Petitioners' motion alleges that many operators failed to comply with the conditions imposed by the order, and that the state has been deprived of fees that it would have collected but for the injunction. The respondents did not bring their suit nor press their claim upon the assumption that these officials could not and would not protect the interest of the state. On the contrary, they acted upon a directly opposite premise and executed bonds running to the enjoined officials in which they agreed to pay the damages suffered. It is obvious, and was obvious from the beginning, that the main damages would be suffered by the State of Missouri and not by these petitioners as individuals. It was to protect the state through its officials that the bonds were required. In making this requirement the court acted in harmony with the governing principle "that it is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all—including the public—whose interests the injunction may affect." *Inland Steel Co.* v. *United States,* 306 U. S. 153, 157. Petitioners were proper parties to invoke the court's

protection of the state's interest, and we have no doubt but that the court can mould any decree it renders so as to safeguard the rights of all interested parties.

Fourth. There yet remains the basis upon which the court below affirmed the District Court's refusal to assess damages—that the jurisdiction to exercise this power is discretionary, and that refusal to exercise the power was not shown to be erroneous. In considering this question, it is of no importance that dealing with petitioners' motion for assessment of damages would involve long and complicated hearings on issues inappropriate for decision by a three judge court. For as we have pointed out, the issues were appropriate for decision by the single judge of the district. There can be no question of that judge's right to deal with issues such as those here presented. Under long settled equity practice, courts of chancery have discretionary power to assess damages sustained by parties who have been injured because of an injunctive restraint ultimately determined to have been improperly granted. *Russell* v. *Farley,* 105 U. S. 433, 444 *et seq.; Pease* v. *Rathbun-Jones Engineering Co.,* 243 U. S. 273, 279. This power is, as stated, discretionary; there are of course cases where the Chancellor might properly conclude that parties should be remitted to an action at law. But this is not one of those cases. If petitioners had to bring actions at law, each of the seventy-six respondents might have to be made a defendant in a separate action. There is a controversy between the parties as to whether or not all of these respondents could be sued or served in the State of Missouri; to be compelled to sue some of them elsewhere would work a hardship on the state. In addition to this, part of the damages for which petitioners seek recovery is made up of various items of cost and expense incurred in the litigation; if petitioners succeed on the merits, there might conceivably be serious problems raised by the

seventy-six respondents as to the portion of damages fairly attributable to each—a problem peculiarly appropriate to equity, and preëminently adapted to settlement by a single court. Here, respondents joined themselves together in order jointly to restrain petitioners; they executed joint bonds; and they invoked the action of equity which has traditionally exerted its power not merely to assess damages caused by improvident injunctions but also to prevent the harmful consequences of an unnecessary multiplicity of causes of action. The circumstances of this case call so strongly for an assessment by equity that we think the court erred in dismissing the motion for assessment of damages. And it is especially fitting that equity exert its full strength in order to protect from loss a state which has been injured by reason of a suspension of enforcement of state laws imposed by equity itself.[8] The judgment of the court below is reversed and the cause is remanded for proceedings before a single district judge in conformity with this opinion.

Reversed and remanded.

MOORE *v.* ILLINOIS CENTRAL RAILROAD CO.

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

No. 550. Argued March 12, 1941.—Decided March 31, 1941.

1. A ruling by the state supreme court made on review of the first trial of an action on contract and determining the applicable state statute of limitations must be followed by the federal courts on a second trial, after removal, in the absence of any intervening change by legislation or by ruling of the state supreme court. P. 633.

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[8] Cf. *United States* v. *Morgan*, 307 U. S. 183, 197; *Inland Steel Co.* v. *United States*, 306 U. S. 153, 158; *Arkadelphia Milling Co.* v. *St. Louis Southwestern Ry. Co.*, 249 U. S. 134, 145–146.

2. Although a state supreme court considers itself free, on a second trial, to reconsider and overrule interpretations of state law made on the first review, the Circuit Court of Appeals upon review following a second trial, after removal, is nevertheless bound by the state court's interpretations. P. 633.
3. The right of a workman to sue a railroad company for wrongful discharge is not dependent upon prior exhaustion of his administrative remedies under the Railway Labor Act. P. 634.

112 F. 2d 959, reversed; judgment of the District Court, 24 F. Supp. 731, affirmed.

CERTIORARI, 311 U. S. 643, to review a judgment of the Circuit Court of Appeals reversing a judgment recovered by the plaintiff in the District Court in an action against a railroad company for wrongful discharge from employment.

Messrs. George Butler and *Garner W. Green* submitted for petitioner.

Mr. James L. Byrd, with whom *Messrs. Clinton H. McKay, E. C. Craig* and *V. W. Foster* were on the brief, for respondent.

Solicitor General Biddle and *Mr. Robert L. Stern* filed a brief on behalf of the United States, as *amicus curiae,* submitting views of the construction of the Railway Labor Act, as amended.

MR. JUSTICE BLACK delivered the opinion of the Court.

We granted certiorari in this case, 311 U. S. 643, to review a judgment in which the Circuit Court of Appeals applied a Mississippi statute of limitations contrary to the Mississippi Supreme Court's application of the same statute to the same plea in the same case. Compare *Moore* v. *Illinois Central Railroad Co.,* 180 Miss. 276; 176 So. 593, with *Illinois Central Railroad Co.* v. *Moore,* 112 F. 2d 959.

Petitioner Moore, a member of the Brotherhood of Railroad Trainmen, brought suit for damages against respondent railroad company in a Mississippi state court, claiming that he had been wrongfully discharged contrary to the terms of a contract between the Trainmen and the railroad, a copy of the contract being attached to the complaint as an exhibit. Petitioner alleged that as a member of the Trainmen he was entitled to all the benefits of the contract. Judgment on the pleadings was rendered against Moore by the trial court. Upon appeal the Mississippi Supreme Court reversed and remanded. One of the railroad's pleas was that the contract of employment between Moore and the railroad was verbal, rather than written, and that any action thereon was therefore barred by the three year statute of limitations provided by § 2299 of the Mississippi Code of 1930. With reference to this plea the Mississippi Supreme Court said: "The appellant's suit is not on a verbal contract between him and the appellee, but on a written contract made with the appellee, for appellant's benefit, by the Brotherhood of Railroad Trainmen; consequently, section 2299, Code of 1930, has no application, and the time within which appellant could sue is six years under section 2292, Code of 1930." *Moore* v. *Illinois Central R. Co., supra,* 291.

After the remand by the Mississippi Supreme Court, Moore amended his bill to ask damages in excess of $3000, and the railroad removed the case to the federal courts. The District Court, considering itself bound by state law, held that the Mississippi three year statute of limitations did not apply,[1] but on this point the Circuit Court of Appeals reversed,[2] declining to follow the

[1] 24 F. Supp. 731.

[2] 112 F. 2d 959.

Mississippi Supreme Court's ruling. Calling attention to the fact that the Mississippi Supreme Court does not regard itself as bound by a decision upon a second appeal, the Circuit Court of Appeals (one judge dissenting) said: "Since the removal of the case to the federal court this court stands in the place of the Supreme Court of Mississippi and with the same power of reconsideration." But the Circuit Courts of Appeals do not have the same power to reconsider interpretations of state law by state courts as do the highest courts of the state in which a decision has been rendered. The Mississippi Supreme Court had the power to reconsider and overrule its former interpretation, but the court below did not. And in the absence of a change by the Mississippi legislature, the court below could reconsider and depart from the ruling of the highest court of Mississippi on Mississippi's statute of limitations only to the extent, if any, that examination of the later opinions of the Mississippi Supreme Court showed that it had changed its earlier interpretation of the effect of the Mississippi statute. *Wichita Royalty Co.* v. *City National Bank*, 306 U. S. 103, 107; cf. *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223; *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169. But the court below did not rely upon any change brought about by the Mississippi legislature or the Mississippi Supreme Court. On the contrary, it concluded that it should reëxamine the law because there was involved the interpretation and application of a collective contract of an interstate railroad with its employees. The court below also based its failure to follow the Mississippi Supreme Court's decision in Moore's case on the ground that in an earlier case the Mississippi Supreme Court had said that the three year statute applied unless a contract was "wholly provable in writing," a situation which the court below did not think existed

here.[3] But even before the decision in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, the federal courts applied state statutes of limitations in accordance with the interpretations given to such statutes by the states' highest courts. As early as 1893, this Court said: "The construction given to a statute [of limitations] of a State by the highest judicial tribunal of such State is regarded as a part of the statute, and is as binding upon the courts of the United States as the text. If the highest judicial tribunal of a State adopt new views as to the proper construction of such a statute, and reverse its former decisions, this court will follow the latest settled adjudications." [4] It was error for the court below to depart from the Mississippi Supreme Court's interpretation of the state statute of limitations.

But respondent says that there is another reason why the judgment in its favor should be sustained.[5] This reason, according to respondent, is that both the District Court and the Circuit Court of Appeals erred in failing to hold that Moore's suit was prematurely brought because of his failure to exhaust the administrative remedies granted him by the Railway Labor Act, 44 Stat. 577, as amended, 48 Stat. 1185, 45 U. S. C. § 151, *et seq.* But we find nothing in that Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court. In support of its contention, the railroad points especially to § 153 (i), which, as amended in 1934, pro-

[3] *City of Hattiesburg* v. *Cobb Bros. Construction Co.,* 174 Miss. 20; 163 So. 676.

[4] *Bauserman* v. *Blunt,* 147 U. S. 647, 654, quoting from *Leffingwell* v. *Warren,* 2 Black 599, 603. And see *Balkam* v. *Woodstock Iron Co.,* 154 U. S. 177, 187.

[5] Cf. *Helvering* v. *Gowran,* 302 U. S. 238.

vides that disputes growing out of grievances or out of the interpretation or application of agreements "shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." And in connection with this statutory language the railroad also directs our attention to a provision in the agreement between the Trainmen and the railroad—a provision authorizing Moore to submit his complaint to officials of the railroad, offer witnesses before them, appeal to higher officers of the company in case the decision should be unsatisfactory, and obtain reinstatement and pay for time lost if officials of the railroad should find that his suspension or dismissal was unjust. It is to be noted that the section pointed out, § 153 (i), as amended in 1934, provides no more than that disputes "may be referred . . . to the . . . Adjustment Board . . ." It is significant that the comparable section of the 1926 Railway Labor Act (44 Stat. 577, 578) had, before the 1934 amendment, provided that upon failure of the parties to reach an adjustment a "dispute shall be referred to the designated Adjustment Board by the parties, or by either party . . ." This difference in language, substituting "may" for "shall," was not, we think, an indication of a change in policy, but was instead a clarification of the law's original purpose. For neither the original 1926 Act, nor the Act as amended in 1934, indicates that the machinery provided for settling disputes was based on a philosophy of legal compulsion. On the contrary, the legislative history of the Railway Labor Act shows a consistent purpose on the part of

Congress to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature.[6] The District Court and the Circuit Court of Appeals properly decided that petitioner was not required by the Railway Labor Act to seek adjustment of his controversy with the railroad as a prerequisite to suit for wrongful discharge. But, for failure to follow state law on the state statute of limitations, the judgment of the Circuit Court of Appeals is reversed; the judgment of the District Court is affirmed.

Reversed.

MR. JUSTICE FRANKFURTER concurs in the result.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* ESTATE OF ENRIGHT ET AL.

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

No. 436. Argued March 4, 1941.—Decided March 31, 1941.

Section 42 of the Revenue Act of 1934 permits the inclusion, as accruable items, in a decedent's gross income for the period ending with his death, of his share of the profits earned, but not yet received, by a partnership, although both the decedent and his firm kept their accounts and made their income tax reports on a calendar year cash receipts and disbursements basis. P. 640.

So *held* of a deceased member of a law firm in respect of his share of the earned portion of the estimated receipts from the unfinished business of the firm, valued as of the date of his death.

112 F. 2d 919, reversed.

CERTIORARI, 311 U. S. 638, to review the reversal of a decision of the Board of Tax Appeals sustaining a deficiency assessment.

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[6] See, e. g., H. Rep. No. 328, 69th Cong., 1st Sess., p. 4.

Mr. Gordon Tweedy, with whom *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Morton K. Rothschild* were on the brief, for petitioner.

Mr. James D. Carpenter, Jr., for respondents.

Mr. Harold S. Deming filed a brief on behalf of the Estate of Charles S. Haight, as *amicus curiae,* urging affirmance.

MR. JUSTICE REED delivered the opinion of the Court.

Certiorari was granted to review the judgment below [1] because of a conflict between it and *Pfaff* v. *Commissioner* [2] in the Second Circuit. The issue is whether § 42 of the Revenue Act of 1934 [3] permits the inclusion, as accruable items, in a decedent's gross income for the period ending with his death, of his share of the profits earned, but not yet received, of a partnership, when both the decedent and the partnership reported income on a cash receipts and disbursements basis.

Respondents are the executors of John M. Enright, an attorney and member of a law partnership in New Jersey. Both Mr. Enright and his firm kept their accounts and made their income tax report on a calendar year cash receipts and disbursements basis. He died, testate, No-

[1] 112 F. 2d 919.

[2] 113 F. 2d 114. See *Pfaff* v. *Commissioner, post,* p. 646.

[3] 48 Stat. 680, c. 277: "SEC. 42. Period in which Items of Gross Income Included. The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. In the case of the death of a taxpayer there shall be included in computing net income for the taxable period in which falls the date of his death, amounts accrued up to the date of his death if not otherwise properly includible in respect of such period or a prior period."

vember 19, 1934. The partnership agreement provided for the termination of the partnership on the death of any partner and that his estate should have his partnership percentage in the "net monies then in the treasury of the firm, plus his like percentage in the outstanding accounts and the earned proportion of the estimated receipts from unfinished business." The will directed that the valuation for the purpose of closing out the partnership should be made by his senior surviving partner, Mr. James D. Carpenter, and by agreement between Mr. Carpenter and the executors a valuation was made of these items as of the date of death for use in the federal estate tax and New Jersey inheritance tax returns, with the further understanding that the surviving partners would pay over to the executors whatever was ultimately realized out of the valued assets.

Pursuant to this arrangement the interest of Mr. Enright in the uncollected accounts was valued at $2,055.55 and in the unfinished work at $40,855.77. These sums were reported as assets in the estate and inheritance tax returns but were not included in the income tax return made for the decedent for 1934, nor were the sums derived from these assets reported in the estate's income tax for 1934 or later years.

The Commissioner assessed a deficiency because he included in the decedent's return for 1934, under the claimed authority of § 42, *supra* note 3, the items of accounts and unfinished work. Respondents appealed to the Board of Tax Appeals. The Board decided [4] that the evidence did not show the situation of the unfinished work in sufficient detail to enable the Board to determine independently that it was not accruable. The accounts

[4] August 28, 1939, by memorandum opinion. Cf. Lillian O. Fehrman, Executrix, 38 B. T. A. 37.

receivable were held accruable. This left the Commissioner's assessment intact.

On appeal the Circuit Court of Appeals reversed the Board. It was of the opinion that the partnership was a tax computing unit separate from its members and that § 42 had the effect of placing the decedent "upon an accrual basis at the date of his death." Consequently his return should be made as it would have been made if the deceased used the accrual method. The Court then reasoned that the requirement of § 182 of the Revenue Act of 1934, including a partner's distributive share of the partnership earnings, whether distributed or not, in the partner's computation of his own net income, put a partner on an accrual basis in accounting for partnership earnings, irrespective of § 42. Consequently § 42 was held not to affect the partnership accounting practices. It was further determined that it was the right to receive payment which made an earning accrue and that, as Mr. Enright under the partnership agreement had no right to receive anything from the firm except his proportionate share of the cash receipts, these cash receipts were all that "accrued" to him before his death.

The last sentence of § 42 which requires the inclusion of "amounts accrued up to the date of his death" in computing net income for the period in which his death falls was added by the 1934 Revenue Act.[5] The reports recommended its addition because the "courts have held that income accrued by a decedent on the cash basis prior to his death is not income to the estate, and under the present law, unless such income is taxable to the decedent, it escapes income tax altogether." [6] So § 42

[5] Cf. Revenue Act of 1932, 47 Stat. 169, c. 209, § 42.

[6] H. Rep. No. 704, 73rd Cong., 2nd Sess., p. 24; S. Rep. No. 558, 73rd Cong., 2nd Sess., p. 28.

This situation followed the decision of the Court of Claims in

was drawn to require the inclusion of all amounts accrued to the date of death "regardless of the fact that he may have kept his books on a cash basis." [7] With the declared purpose of Congress in mind, we proceed to examine the meaning of the section.

As the questioned items of unfinished work appear in the partnership accounts, we must determine whether such earnings, even if accruable, are includible in the partner's return for 1934. Respondent argues, as the Circuit Court of Appeals held, that § 182 [8] accrues, without any effect from the language of § 42, all the earnings that are includible in a partner's return, and that since the partnership method of keeping its books did not treat unfinished business as receipts, only the earnings actually collected are a part of the partner's distributive share under § 182.

We think such a conclusion is erroneous. The partnership agreement and the subsequent arrangement between the executors and the surviving partners called for a valu-

Nichols v. *United States*, 64 Ct. Cls. 241. A decedent on the cash basis was a member of a partnership dissolved by his death. Commissions earned before death but unpaid to the partnership were valued in the estate tax and collected by the partnership after death for payment to the executors. The Court of Claims held sums paid the executors were part of the corpus and not income.

The Board of Tax Appeals followed the reasoning of the Court of Claims. William G. Frank, Adm., 6 B. T. A. 1071; E. S. Heller, Exec., 10 B. T. A. 53; George Nichols, Exec., 10 B. T. A. 919; Estate of A. Plumer Austin, 10 B. T. A. 1055; William K. Vanderbilt, Exec., 11 B. T. A. 291; J. Howland Auchincloss, Exec., 11 B. T. A. 947; William P. Blodget, Exec., 13 B. T. A. 1243; Jackson B. Kemper, Adm., 14 B. T. A. 931; Maurice L. Goldman, 15 B. T. A. 1341.

[7] H. Rep. *supra.*

[8] "SEC. 182. Tax of Partners. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year."

ation on Mr. Enright's death and a dissolution as of that day. This necessitated an accounting of partnership earnings for this period. By the terms of the agreement, as would have been necessary anyway, the earned proportion of the unfinished business was to be valued to determine the decedent's interest in the partnership assets.[9] Assuming at this point that the unfinished business is accruable, this accounting as of the time of death would show the partnership income for the taxable year of the partnership.[10] As the net income of the partnership is to be accounted for in the deceased partner's return, without consideration of the period over which the income is earned, the fact that the payment for the unfinished business will not be collected until another taxable year is immaterial. "Circumstances wholly fortuitous may determine the year in which income, whenever earned, is taxable."[11] The "distributive share" re-

[9] We do not consider or decide whether this accounting for a fractional year may affect the individual returns of surviving partners. Neither do we appraise the effect of argeements for continuation of an interest in the partnership after death. See *Bull* v. *United States,* 295 U. S. 247.

If the partnership had been upon an accrual basis which treated accounts as accrued upon a determination of the amount of fees, it may be that a decedent's interest would not be distributable until a later year. It might then be income to the estate, even though the value of the right to receive it was included in the estate return. A conclusion as to this is unnecessary and is pretermitted. Cf. note 23, the cases cited in note 6 and *Bull* v. *United States,* 295 U. S. 247, 255, 256–57.

[10] "SEC. 48. Definitions. When used in this title—

"(a) Taxable Year.—'Taxable year' means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under this Part. 'Taxable year' includes, in the case of a return made for a fractional part of a year under the provisions of this title or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made."

[11] *Guaranty Trust Co.* v. *Commissioner,* 303 U. S. 493, 498.

ferred to in § 182 does not mean available in cash for payment to the partner. It means only that gains attributable to the partner's interest in the firm were earned. Partnership returns may be made on a different basis of computation than those of the members.[12] Thus because of the partnership arrangement and agreement, the value of the unfinished business must be determined as of the date of death. Further, the result, under the assumption here that it is an accrual, is a distributive share and is to be carried into the partner's return. Respondent's argument that the requirement of § 182, including all distributable shares in the partner's return, puts all partnership returns on the accrual basis fails to give weight to the fact that a partnership on the cash method shows only cash receipts as a partner's distributive share. The requirement to account for a distributive share, although the share is actually not distributed, is not a requirement to account for partnership income on an accrual basis. Since a partner's return of his partnership earnings would vary, dependent upon whether the partnership used the cash or accrual method of accounting, we do not agree with respondent's suggestion.

We turn now to whether this valuation of the decedent's interest in the partnership is an accrual of income which must be reflected in the income tax or a valuation of assets only reflected in estate or inheritance reports. This partnership uses the cash receipts method. There was no customary accounting system to determine whether the value of services rendered should be accrued before payment. Under such circumstances, we are of the view that items of partnership income properly accrued should be included in the income tax return of the deceased partner. This will cause the accrued items of

[12] *Truman* v. *United States*, 4 F. Supp. 447; §§ 183 and 187.

partnership returns to be included in the income tax return of a deceased partner, whether the partnership method is accrual or cash.[13] Furthermore, an accrual of compensation for the unfinished business seems sound in view of the purpose of the enactment of § 42.

The meaning of "amounts accrued up to the date of his death" is clear as to fixed rent, interest, salary or wages for personal services and other similar income which may readily be attributed to a particular period. There are like deductions such as interest and taxes.[14] The uncertainty as to the meaning arises in the field of personal service from items which cannot be accounted for on a basis of successive equal units of time. Examples of the difficulty are the value, prior to a successful result, of services rendered on a contingent basis, done on a quantum meruit whether that would or would not vary with the outcome, or exploratory or preliminary steps looking towards final accomplishment.

While "accrue" and its various derivatives are not new to the nomenclature of accounting or taxation, its use has not sufficed to build it into a word of art with a definite connotation when employed in describing items of gross income. The 1913 Act [15] put the taxpayer on an actual cash receipt and disbursement basis. The 1916 Act [16] gave the taxpayer the option of reporting on either the cash or accrual basis and the 1918 Act limited the return to the method of accounting regularly employed unless otherwise directed by the Commissioner of Internal Revenue.[17] A similar provision covers the year

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[13] The inevitable variations of "accrued" which depend upon established accounting practice do not destroy the principle.

[14] Cf. *United States* v. *Anderson,* 269 U. S. 422.

[15] 38 Stat. 114 at 166.

[16] 39 Stat. 756, §§ 8 (g) and 13 (d).

[17] 40 Stat. 1057, § 212 (b).

here in question.[18] That the meaning to be attributed to "accrued" as used in § 42 is to be gathered from its surroundings is emphasized by § 48, Definitions, which says:

"(c) Paid, Incurred, Accrued.—The terms 'paid or incurred' and 'paid or accrued' shall be construed according to the method of accounting upon the basis of which the net income is computed under this part." [19]

It is to be noted that no change was made by the 1934 Act in the § 48 definition of "accrued." [20] Yet, it is obvious that the definition is inapplicable since a taxpayer on a cash basis cannot have a "method of accounting" by which the meaning of accrual is fixed. Consequently it is beside the point to give weight to provisions of the regulations or accounting practices which do not recognize accruals until a determination of compensation.[21] Such provisions when applied bring the income into succeeding years. It has been frequently said, and correctly, that § 42 was aimed at putting the cash receipt taxpayer on the accrual basis.[22] But that statement does not answer the meaning of accrual in this section. Accounts kept consistently on a basis other than cash receipts might treat accruals quite differently from a method designed to reflect the earned income of a cash receipt taxpayer. Accruals here are to be construed in furtherance of the intent of Congress to cover into income the assets of decedents, earned during their life

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[18] 48 Stat. 680, § 42.

[19] Cf. Ernest M. Bull, Exec., 7 B. T. A. 993, 995.

[20] Cf. § 48 (c) of the Revenue Act of 1932, 47 Stat. 188.

[21] Regulation 86, Art. 42–1.

[22] Lillian O. Fehrman, Exec., 38 B. T. A. 37; Estate of Wilton J. Lambert, 40 B. T. A. 802, 806; Estate of G. Percy McGlue, 41 B. T. A. 1186, 1193; *Enright* v. *Commissioner*, 112 F. 2d 919, this case below.

and unreported as income, which on a cash return, would appear in the estate returns. Congress sought a fair reflection of income.[23]

Accrued income obviously connotes more than interest. In *United States* v. *American Can Co.*,[24] this Court approved an accrual basis where "pecuniary obligations to or by the Company were treated as if discharged when incurred." In *United States* v. *Anderson*[25] accruals of fixed annual charges, e. g., taxes payable in another year, were permitted against determinable gross income. "Keeping accounts and making returns on the accrual basis, as distinguished from the cash basis, import that it is the *right* to receive and not the actual receipt that determines the inclusion of the amount in gross income."[26] The completion of the work in progress was necessary to fix the amount due but the right to payment for work ordinarily arises on partial performance. Accrued income under § 42 for uncompleted operations includes the value of the services rendered by the decedent, capable of approximate valuation, whether based on the agreed compensation or on quantum meruit. The requirement of valuation comprehends the elements of collectibility.[27] The items here meet these tests and are subject to accrual.

[23] It is immaterial that all possibility of escaping an income tax is not barred, as for instance the increased value of asset items in an estate return. Act, 113 (a) (5) ". . . the entire field of proper legislation [need not] be covered by a single enactment." *Rosenthal* v. *New York*, 226 U. S. 260, 271; cf. *Keokee Coke Co.* v. *Taylor*, 234 U. S. 224, 227.

[24] 280 U. S. 412, 417.

[25] 269 U. S. 422, 437.

[26] *Spring City Co.* v. *Commissioner*, 292 U. S. 182, 184; *Guaranty Trust Co.* v. *Commissioner*, 303 U. S. 493, 498.

[27] Cf. Parlin, Accruals to Date of Death, 87 U. of Pa. L. Rev. 294, 301; Farrand & Farrand, Treatment of Accrued Items on Death, 13 So. Cal. L. Rev. 431.

The judgment of the Circuit Court of Appeals is reversed and the decision of the Board of Tax Appeals affirmed.

Reversed.

PFAFF ET AL., EXECUTORS, *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 479. Argued March 4, 5, 1941.—Decided March 31, 1941.

Decided upon the authority of *Helvering* v. *Estate of Enright, ante,* p. 636. P. 647.
113 F. 2d 114, affirmed.

CERTIORARI, 311 U. S. 639, to review a judgment which affirmed a decision of the Board of Tax Appeals sustaining a deficiency assessment.

Mr. Laurence Sovik for petitioners.

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

MR. JUSTICE REED delivered the opinion of the Court.

This case presents the same question as *Helvering* v. *Estate of Enright, ante,* p. 636. Petitioners are the executors of a deceased physician who during 1935 was a member of a medical partnership and entitled to forty per cent of its profits. He died December 25, 1935, on which date there were outstanding about $69,000 of partnership accounts receivable for services rendered to patients during his lifetime. His death worked a dissolution of the partnership under § 62(4) of the New York Partnership Law. The decedent's interest in these ac-

counts came to over $27,000. Both he and the partnership were on a cash basis. Pursuant to § 42 of the Revenue Act of 1934 and article 42(1) of Treasury Regulations 86, the commissioner included the decedent's share of the accounts receivable in his 1935 income, though only at about one-fifth of face value. The Board of Tax Appeals sustained the commissioner's view of the statute, and also ruled that the valuation of the decedent's interest in the accounts at one-fifth of face value was amply supported. The Circuit Court of Appeals, without writing an opinion, affirmed the Board. 113 F. 2d 114. Because of a conflict with the Third Circuit's decision in the *Enright* case, *supra,* we granted certiorari.

There is no relevant difference between these facts and *Helvering* v. *Estate of Enright.* For the reasons stated in that opinion it was proper to include in the decedent's 1935 income the fair value of his interest in the accounts.

Affirmed.

DECISIONS PER CURIAM, ETC., FROM JANUARY 7, 1941, THROUGH MARCH 31, 1941.*

No. 86. STEWART *v.* PENNSYLVANIA. Appeal from the Supreme Court of Pennsylvania. Argued January 6, 1941. Decided January 13, 1941. *Per Curiam:* The judgment is affirmed. *Curry* v. *McCanless,* 307 U. S. 357; *Graves* v. *Elliott,* 307 U. S. 383. MR. CHIEF JUSTICE HUGHES, MR. JUSTICE MCREYNOLDS, and MR. JUSTICE ROBERTS dissent. *Mr. Charles I. Thompson,* with whom *Mr. William A. Schnader* was on the brief, for appellant. *Mr. Frederic L. Ballard* entered an appearance for appellant. *Mr. E. Russell Shockley,* Deputy Attorney General of Pennsylvania, with whom *Mr. Claude T. Reno,* Attorney General, was on the brief, for appellee. Reported below: 338 Pa. 9; 12 A. 2d 444.

No. 210. MANUFACTURERS TRUST CO. ET AL. *v.* PRUDENCE SECURITIES ADVISORY GROUP ET AL.;

No. 211. ENDELMAN ET AL. *v.* PRUDENCE-BONDS CORP. ET AL.;

No. 214. KELBY, TRUSTEE, *v.* PRUDENCE SECURITIES ADVISORY GROUP ET AL.;

No. 259. PRUDENCE REALIZATION CORP. *v.* PRUDENCE-BONDS CORP.; and

No. 273. DAVISON *v.* PRUDENCE SECURITIES ADVISORY GROUP ET AL. On petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit. January 13, 1941. *Per Curiam:* The petitions for writs of

*For decisions on applications for certiorari, see *post,* pp. 669, 677; for rehearing, *post,* p. 711. For cases disposed of without consideration by the Court, *post,* p. 710.

certiorari are granted and the judgment is reversed on the authority of *Reconstruction Finance Corp.* v. *Prudence Securities Advisory Group,* 311 U. S. 579. *Messrs. Dan Gordon Judge, John Ross Delafield, Edwin De T. Bechtel, Ralph W. Crolly,* and *Emery H. Sykes* for petitioners in No. 210. *Messrs. Jacob A. Freedman* and *Edward Endelman* for petitioners in No. 211. *Mr. Charles A. Frueauff* for petitioner in No. 214. *Mr. Irving L. Schanzer* for petitioner in No. 259. *Mr. Alfred T. Davison pro se,* in No. 273. Reported below: 111 F. 2d 37.

No. 284. DENHAM *v.* MUNSON LINE, INCORPORATED. On petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit. January 13, 1941. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed on the authority of *Reconstruction Finance Corp.* v. *Prudence Securities Advisory Group,* 311 U. S. 579. *Mr. I. L. Broadwin* for petitioner. *Mr. Francis L. Driscoll* for respondent.

No. —. EX PARTE JOHN J. SHERIDAN. January 13, 1941. Application denied.

No. —, original. EX PARTE CHESTER W. CAMPBELL;

No. —, original. EX PARTE R. GORDON WHITMAN; and

No. —, original. EX PARTE HERBERT A. BURGTORF. January 13, 1941. Motions for leave to file petitions for writs of habeas corpus denied.

No. —, original. EX PARTE FRED J. BECKER. January 13, 1941. The rule to show cause is discharged and the

motion for leave to file petition for writ of habeas corpus is denied.

No. 498. STEWART *v.* JOHNSTON. See *post*, p. 677.

No. 255. RODDEWIG, CHAIRMAN, ET AL. *v.* SEARS, ROEBUCK & Co.; and

No. 256. RODDEWIG, CHAIRMAN, ET AL. *v.* MONTGOMERY WARD & Co., INC. January 13, 1941. State Tax Commission and Fred W. Nelson, present Chairman of the State Tax Commission, substituted as parties petitioners in the place and stead of Iowa State Board of Assessment and Review and Louis E. Roddewig, on motion of *Mr. John E. Mulroney* for the petitioners.

No. 315. EVANS *v.* UNITED STATES. Certiorari, 311 U. S. 635, to the Circuit Court of Appeals for the Tenth Circuit. January 20, 1941. *Per Curiam:* On consideration of the stipulation between counsel for the petitioner and the Solicitor General, the orders of the Circuit Court of Appeals dismissing the appeal and denying petitioner's motions to be furnished with a transcript of the record, for an extension of time within which to file a transcript of the record on appeal, and to remand the cause to the District Court for the purpose of permitting him to present a motion for a new trial on the ground of newly discovered evidence, are vacated. The cause is remanded to the Circuit Court of Appeals with directions to grant the petitioner reasonable extensions of time for the perfection of his appeal and to reconsider the motion to remand when the court shall have before it a transcript of the evidence. It is ordered that the mandate issue forthwith. *Everett Ault Evans, pro se,* and *Mr. Richard H. Wels* for petitioner. *Solicitor Gen-*

eral Biddle, Assistant Attorney General Rogge, and *Mr. William W. Barron* for the United States. Reported below: 113 F. 2d 935.

No. —. Ex parte Joseph J. McCarthy. January 20, 1941. Application denied.

No. 12, original. United States *v.* Alabama. January 20, 1941. The motion for leave to file the Bill of Complaint is granted and process is ordered to issue returnable Monday, March 3, next.

No. 689. Ohio ex rel. Squire, Superintendent of Banks in Charge of the Liquidation of The Guardian Trust Company, *v.* Brown et al. Appeal from the Supreme Court of Ohio. February 3, 1941. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a properly presented federal question: (1) *Cleveland & Pittsburgh R. Co.* v. *Cleveland,* 235 U. S. 50, 53; *Hiawassee Power Co.* v. *Carolina-Tenn. Co.,* 252 U. S. 341, 344; *White River Co.* v. *Arkansas,* 279 U. S. 692, 700; (2) *Zadig* v. *Baldwin,* 166 U. S. 485, 488; *Live Oak Water Users' Assn.* v. *Railroad Commission of California,* 269 U. S. 354, 357–358; *Lynch* v. *New York,* 293 U. S. 52, 54. *Mr. Thomas J. Herbert* for appellant. *Mr. Jack B. Dworken* for appellees. Reported below: 137 Ohio St. 315; 29 N. E. 2d 362.

No. 11, original. Kansas *v.* Missouri. February 3, 1941. Honorable Dean G. Acheson, having accepted appointment as Assistant Secretary of State of the United States, has resigned as Special Master in this case and his resignation has been accepted.

No. —. PORESKY *v.* ELY. February 3, 1941. Motion for leave to file application granted, and the application is denied.

No. —. STOEHR *v.* MINNESOTA. February 3, 1941. Application denied.

No. —, original. EX PARTE JOSEPH F. KOLEG;
No. —, original. EX PARTE C. E. PHILLIPS;
No. —, original. EX PARTE J. B. KING; and
No. —, original. EX PARTE ORVILLE CHESTER GARRISON. February 3, 1941. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —, original. EX PARTE MARY M. HUGHES. February 3, 1941. Motion for leave to file petition for writ of mandamus denied.

No. 312. SWANSON, SECRETARY OF STATE OF NEBRASKA, ET AL. *v.* BUCK ET AL. Appeal from the District Court of the United States for the District of Nebraska. February 3, 1941. Pursuant to paragraph (c) of Rule 75 of the Rules of Civil Procedure and without prejudice to the future application of paragraph (e) of Rule 75, the motion of the appellees for a writ of certiorari to correct a diminution of the record is granted with respect to items 1 to 57 inclusive. The motion is also granted with respect to items 58 to 62 inclusive so far as the certification of docket entries and designations is concerned, which, however, are to be dispensed with in printing.

No. 9. SCHRIBER-SCHROTH CO. *v.* CLEVELAND TRUST CO. ET AL.;

No. 10. ABERDEEN MOTOR SUPPLY CO. *v.* CLEVELAND TRUST CO. ET AL.; and

No. 11. F. E. ROWE SALES CO. *v.* CLEVELAND TRUST CO. ET AL. February 3, 1941. Ordered that the opinion in these cases be amended as follows:

1. Strike from the second complete paragraph, page 2, lines 5 and 6, the phrases "one of several claims" and "which the Court sustained".

2. In line 18 of the same paragraph substitute the word "one" for the word "another".

3. In the fourth line from the bottom of page 3 insert the words "without prejudice" before the word "of".

4. Modify the third, fourth, and fifth lines from the bottom of the first complete paragraph on page 9 to read: "found the elements of the invention which it described but in which, absent the flexible web element, it found no invention. In view of such want of invention and of the prior art the only material difference between the amended and the allowed claims is the presence in the former of the flexible web element and, in consequence of the surrender of the former particularizing".

The petition for rehearing and the motion to remand are denied.

Opinion reported as amended, 311 U. S. 211.

No. 319. SHERWIN *v.* UNITED STATES; and

No. 320. SHERIDAN *v.* UNITED STATES. Certiorari, 311 U. S. 636, to the Circuit Court of Appeals for the Ninth Circuit. February 10, 1941. *Per Curiam:* On the Government's confession of error, its motion to reverse is granted. The judgments are reversed, and the causes are remanded to the Circuit Court of Appeals with

directions to consider the sufficiency of the evidence to support the verdicts, and petitioners' assignment of error with respect to the argument of the Assistant United States Attorney without regard to any technical deficiency in its phraseology. *Messrs. Earl C. Demoss* and *Charles M. Trammell, Jr.* for petitioners. *Solicitor General Biddle, Assistant Attorney General Rogge,* and *Messrs. William W. Barron, J. Albert Woll,* and *William J. Connor* for the United States. Reported below: 112 F. 2d 503.

No. 708. PHILADELPHIA-DETROIT LINES, INC. *v.* SIMPSON, STATE ROAD COMMISSIONER, ET AL. Appeal from the District Court of the United States for the Southern District of West Virginia. February 10, 1941. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Maurer* v. *Hamilton,* 309 U. S. 598, 603–604; *South Carolina Highway Dept.* v. *Barnwell Bros.,* 303 U. S. 177. *Messrs. Leo P. Kitchen* and *Dan R. Schwartz* for appellant. *Messrs. Clarence W. Meadows,* Attorney General of West Virginia, and *Robert S. Spilman* for appellees. Reported below: 37 F. Supp. 314.

No. 11, original. KANSAS *v.* MISSOURI. February 10, 1941. Samuel M. Wilson, Esquire, of Lexington, Kentucky, appointed Special Master in this cause.

No. 28. SIBBACH *v.* WILSON & CO., INC. February 10, 1941. The opinion is amended by striking from the first sentence on page 7 the following words: "a litigant need not resort to the federal courts unless willing to comply with the rule, and that," and adding, after the word "comply", the words "with its provisions." The petition for rehearing is denied.

Opinion reported as amended, *ante,* p. 1.

Nos. 242 and 243. PHILADELPHIA COMPANY ET AL. *v.* DIPPLE ET AL. February 10, 1941. Ordered that the opinion in these cases be amended as follows:

In the second full sentence on page 6 of the opinion, strike out the words "the corporate identity of the companies whose lines have gone into this system should be ignored and", and add after the word "business", and before the word "treated", the words "should be".

Opinion reported as amended, *ante,* p. 168.

No. 705. UNITED STATES *v.* FLORIAN, EXECUTOR. On petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit. February 17, 1941. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed for want of jurisdiction in the Circuit Court of Appeals because of the absence of a final judgment in the District Court. *Collins* v. *Miller,* 252 U. S. 364, 370–371; *Nyanza Co.* v. *Jahncke Dry Dock,* 264 U. S. 439. The cause is remanded to the District Court for a determination of the issues presented by the remaining counts, which the District Court by its order of June 27, 1940, as of October 23, 1939, reserved for disposition. *Solicitor General Biddle* for the United States. Reported below: 114 F. 2d 990.

No. 719. READ, SUPERINTENDENT OF THE NEW JERSEY DEPARTMENT OF WEIGHTS AND MEASURES, *v.* DICKERSON ET AL. Appeal from the District Court of the United States for the District of New Jersey. February 17, 1941. *Per Curiam:* The judgment is reversed and the cause is remanded to the District Court for a determination and appropriate findings on the questions whether the jurisdictional amount is involved and whether a case has been made for the granting of an injunction restraining crimi-

nal prosecution. (1) *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, 188–189; *KVOS* v. *Associated Press*, 299 U. S. 269; (2) *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89; *Beal* v. *Missouri Pacific R. Corp.*, 312 U. S. 45. *Messrs. John Solan* and *Harry A. Walsh* for appellant. Reported below: 33 F. Supp. 431.

No. 82. UNITED STATES *v.* DARBY. February 17, 1941. The opinion in this case is amended as follows: 12th line from the top of page 14, the following phrase is added after the word "overtime": "of 'not less than one and one-half times the regular rate' at which the worker is employed."

Opinion reported as amended, *ante*, p. 100.

No. 330. OPP COTTON MILLS, INC., ET AL. *v.* ADMINISTRATOR OF THE WAGE AND HOUR DIVISION OF THE DEPARTMENT OF LABOR. February 17, 1941. The opinion in this case is amended as follows: 4th line from the top of page 14, strike the word "We" and insert the following phrase: "On the record before us, we".

Opinion reported as amended, *ante*, p. 126.

No. 368. TYLER, EXECUTRIX, *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. Certiorari, 311 U. S. 629, to the Circuit Court of Appeals for the Eighth Circuit. March 3, 1941. Judgment affirmed per stipulation of counsel to abide the decision in *Helvering* v. *Le Gierse*, *ante*, p. 531. *Mr. Harry B. Betty* for petitioner. *Solicitor General Biddle* for respondent. Reported below: 111 F. 2d 422.

No. 369. HEMPHILL *v.* UNITED STATES. Certiorari, 311 U. S. 634, to the Circuit Court of Appeals for the Ninth Circuit. Argued February 13, 1941. Decided

March 3, 1941. *Per Curiam:* The judgment is reversed and the cause remanded to the Circuit Court of Appeals with directions to consider the sufficiency of the evidence to support the verdict. *Sherwin* v. *United States* and *Sheridan* v. *United States, ante,* p. 654. *Mr. Melville Monheimer* submitted for petitioner. *Mr. Thomas E. Harris,* with whom *Solicitor General Biddle, Assistant Attorney General Berge,* and *Messrs. William W. Barron* and *George F. Kneip* were on the brief, for the United States. Reported below: 112 F. 2d 505.

No. 700. JOURNEYMEN TAILORS UNION LOCAL NO. 195 OF THE AMALGAMATED CLOTHING WORKERS OF AMERICA ET AL. *v.* MILLER'S, INC. On petition for writ of certiorari to the Court of Errors and Appeals of New Jersey. March 3, 1941. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed. *American Federation of Labor* v. *Swing, ante,* p. 321; *Thornhill* v. *Alabama,* 310 U. S. 88; *Carlson* v. *California,* 310 U. S. 106. *Mr. A. J. Isserman* for petitioners. *Mr. Louis R. Kagan* for respondent. Reported below: 128 N. J. Eq. 162; 15 A. 2d 822, 824.

No. 753. EAGLES ET AL. *v.* GENERAL ELECTRIC CO. Appeal from the Supreme Court of the State of Washington. March 3, 1941. *Per Curiam:* The appeal is dismissed for the want of a properly presented federal question. *Godchaux Co.* v. *Estopinal,* 251 U. S. 179; *Rooker* v. *Fidelity Trust Co.,* 261 U. S. 114, 117; *Herndon* v. *Georgia,* 295 U. S. 441, 443. *Messrs. O. C. Moore, Harry Ellsworth Foster,* and *John E. Belcher* for appellants. *Mr. Antone E. Russell* for appellee. Reported below: 5 Wash. 2d 20; 104 P. 2d 912.

No. 748. McKINLEY ET AL. *v.* SALTER ET AL. Appeal from the Court of Civil Appeals, 8th Supreme Judicial District, of Texas. March 3, 1941. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Jones* v. *Prairie Oil Co.,* 273 U. S. 195. *Messrs. F. W. Fischer* and *Earle B. Mayfield* for appellants. Reported below: 136 S. W. 2d 615.

No. 763. KREICKER *v.* NAYLOR PIPE CO. ET AL. Appeal from the Supreme Court of Illinois. March 3, 1941. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Violet Trapping Co.* v. *Grace,* 297 U. S. 119, 120; *Ingraham* v. *Hanson,* 297 U. S. 378, 381; *Schenebeck* v. *McCrary,* 298 U. S. 36, 37. *Mr. James A. Cosgrove* for appellant. *Mr. Floyd E. Thompson* for appellees. Reported below: 374 Ill. 364; 29 N. E. 2d 502.

No. 716. HUSSOCK *v.* STATE OF NEW YORK. Appeal from the Court of Special Sessions of the City of New York, State of New York. March 3, 1941. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of jurisdiction. Section 237 (a), Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari, as required by § 237 (c) of the Judicial Code (43 Stat. 936, 938), certiorari is denied. *Messrs. Joseph F. Rutherford* and *Hayden C. Covington* for appellant. *Mr. Stanley H. Fuld* for appellee. Reported below: 23 N. Y. S. 2d 520.

No. —, original. EX PARTE RALPH MARK. March 3, 1941. Motion for leave to file petition for writ of mandamus denied.

No. —, original. Ex parte Louis Burall. March 3, 1941. The rule to show cause is discharged and the motion for leave to file petition for writ of mandamus is denied, without prejudice to the petitioner's right to present a petition for a writ of habeas corpus to the United States District Court for the Northern District of California.

No. —, original. Ex parte Opal O. Meadows; and

No. —, original. Ex parte Taylor Seals. March 3, 1941. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 814. Vernon *v.* Wilson, Warden. March 6, 1941. Upon consideration of the application of counsel for the petitioner in the above-entitled cause for a stay of execution of the sentence of death upon the said Joe Vernon;

It is ordered that execution of the judgment and sentence of the Supreme Court of Alabama entered March 28, 1940, in the case therein entitled *Joe Vernon* v. *State of Alabama,* be, and the same hereby is, stayed pending the consideration and final determination by this Court of the petition for writ of certiorari herein filed this day.

No. 447. Westinghouse Electric & Manufacturing Co. *v.* National Labor Relations Board. Certiorari, 311 U. S. 639, to the Circuit Court of Appeals for the Second Circuit. Argued March 4, 1941. Decided March 10, 1941. *Per Curiam:* The judgment is affirmed. *Labor Board* v. *Newport News Co.,* 308 U. S. 241; *Labor Board* v. *Link-Belt Co.,* 311 U. S. 584. *Mr. Charles A. Reinwald,* with whom *Messrs. Roswell L. Gilpatric, F. Harold Smith,* and *Donald C. Swatland* were on the brief, for petitioner. *Mr. Robert B. Watts,* with whom

Solicitor General Biddle and *Messrs. Laurence A. Knapp* and *Mortimer B. Wolf,* and *Miss Ruth Weyand* were on the brief, for respondent. Reported below: 112 F. 2d 657.

No. 448. SCANDRETT ET AL., TRUSTEES, ET AL. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the District of Oregon. Argued March 5, 1941. Decided March 10, 1941. *Per Curiam:* The judgment is affirmed. Interstate Commerce Act, §§ 15 (1); 15a (2) (41 Stat. 484, 488; 49 U. S. C. 15 (1), 15a (2)); *United States* v. *Louisiana,* 290 U. S. 70, 75–77; *Florida* v. *United States,* 292 U. S. 1, 9. *Mr. Roy F. Shields,* with whom *Messrs. J. N. Davis, Robert S. Macfarlane, Fletcher Rockwood, Charles A. Hart, Arthur C. Spencer,* and *Lawrence W. Hobbs* were on the brief, for appellants. *Mr. Frank Coleman,* with whom *Solicitor General Biddle, Assistant Attorney General Arnold,* and *Messrs. Warner W. Gardner, James C. Wilson, Daniel W. Knowlton,* and *Nelson Thomas* were on the brief, for the United States et al.; and *Mr. Albert E. Stephan* for Dependable Tank Transport, Inc., et al., appellees. *Mr. Johnston B. Campbell* submitted for Inland Empire Waterways Assn. et al.; and *Mr. Harry Ellsworth Foster* submitted for International Brotherhood of Teamsters, Chauffeurs, etc., appellees. Reported below: 32 F. Supp. 995.

No. 556. EARLY, COLLECTOR OF INTERNAL REVENUE, *v.* REID. On petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit. March 10, 1941. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is affirmed. *Helvering* v. *Hutchings,* 312 U. S. 393. *Solicitor General Biddle* for petitioner. Reported below: 112 F. 2d 718.

No. 770. CHIRILLO ET AL. *v.* LEHMAN, GOVERNOR, ET AL. Appeal from the District Court of the United States for the Southern District of New York. March 10, 1941. *Per Curiam:* The judgment is affirmed. *American Surety Co. v. Baldwin,* 287 U. S. 156, 169. *Mr. Morris Shapiro* for appellants. Reported below: 38 F. Supp. 65.

No. —, original. EX PARTE GEORGE T. KEMNITZER. March 10, 1941. Motion for leave to file petition for writ of habeas corpus denied.

No. 667. RICHARDS *v.* FLORIDA. March 10, 1941. Petition for writ of certiorari to the Supreme Court of Florida dismissed for failure to comply with the rules. *Mr. Edgar W. Waybright, Sr.* for petitioner. Reported below: 144 Fla. 177; 197 So. 772.

No. 625. UTILITIES INSURANCE CO. *v.* POTTER ET AL. Certiorari, *post,* p. 670, to the Supreme Court of Oklahoma. Argued February 13, 1941. Decided March 17, 1941. *Per Curiam:* The writ of certiorari is dismissed for the reason that the judgment of the Supreme Court of Oklahoma rests upon a nonfederal ground adequate to support it. *Atlantic Coast Line* v. *Mims,* 242 U. S. 532, 535; *Nevada-California-Oregon Ry.* v. *Burrus,* 244 U. S. 103, 105; *Hartford Life Ins. Co.* v. *Johnson,* 249 U. S. 490, 492–493. *Mr. Clayton B. Pierce* for petitioner. *Mr. John W. Barry* for respondents. Reported below: 105 P. 2d 259.

No. 631. CASEBEER *v.* HUDSPETH, WARDEN. On petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit. March 17, 1941. *Per Curiam:* The motion for leave to proceed *in forma pauperis* is

granted, the petition for writ of certiorari is also granted, the judgment is reversed, and the cause is remanded to the Circuit Court of Appeals with directions to reconsider the petitioner's appeal in the light of a transcript of the testimony taken at the hearing on the petition for habeas corpus. *Edward Casebeer, pro se.* Reported below: 114 F. 2d 789.

No. 744. POSEY *v.* UNITED STATES. On petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit. March 17, 1941. *Per Curiam:* On the Government's confession of error, the petition for writ of certiorari is granted, the judgment is reversed, and the cause is remanded to the District Court with directions to grant the motion to suppress. *Mr. W. R. Fain, Jr.* for petitioner. *Solicitor General Biddle, Assistant Attorney General Berge,* and *Messrs. George F. Kneip, Fred E. Strine,* and *W. Marvin Smith* for the United States. Reported below: 116 F. 2d 282.

No. —. EX PARTE ISOM J. GUILLORY. March 17, 1941. The application for a stay, presented to MR. JUSTICE BLACK and referred by him to the Court, is denied.

No. —. EX PARTE CECIL L. SNYDER. March 17, 1941. Application denied.

No. —, original. EX PARTE CLARENCE SCOTT. March 17, 1941. The motion for leave to file petition for writ of habeas corpus is denied.

No. 9, original. ARKANSAS *v.* TENNESSEE. March 17, 1941.

DECREE

On consideration of the report filed herein on February 24, 1941, by W. H. Green and O. W. Gauss, the Commissioners appointed herein by decree of this Court entered October 14, 1940 (311 U. S. 1), to locate and mark on the ground the boundary between the State of Arkansas and the State of Tennessee, at the points designated in said decree; and the State of Arkansas and the State of Tennessee having stipulated by counsel that they have no exceptions and no objections to the said report, and they having applied to this Court to terminate the time within which exceptions or objections to said report may be filed:

It is now adjudged, ordered, and decreed as follows:

1. The time within which exceptions or objections to said report may be filed is hereby terminated;

2. The said report is in all respects confirmed;

3. The boundary line marked and located on the ground as set forth by the report and accompanying map is established and declared to be the true boundary between the State of Arkansas and the State of Tennessee, as determined by the decree of this Court of October 14, 1940;

4. As it appears that the Commissioners have completed their work in conformity with the decree of this Court of October 14, 1940, they are hereby discharged, and their fees and expenses in the amounts stated in the report are approved;

5. The Clerk of this Court is directed to transmit to the Chief Magistrates of the States of Arkansas and Tennessee copies of this decree, duly authenticated under the seal of this Court, together with copies of the said report

of the Commissioners and of the accompanying map;

6. The costs in this cause shall be borne and paid in equal parts by the States of Arkansas and Tennessee.

No. 268. MISSOURI-KANSAS PIPE LINE CO. *v.* UNITED STATES ET AL.; and

No. 269. PANHANDLE EASTERN PIPE LINE CO. *v.* UNITED STATES ET AL. March 17, 1941.

It is ordered that in the sentence beginning on line 6 of page 2 of the opinion handed down March 3, 1941, after the words "These acts stifled" and before the word "Panhandle's" there be inserted the words ", so it was claimed,".

It is further ordered that the paragraph beginning on page 4 of the opinion be stricken from the opinion and that the following paragraph be added in its place:

"A final contention in support of the order remains. It is based on two prior denials of motions by Mokan to intervene. Treating Mokan's motions as made on its own behalf on the score of its ownership of more than forty percent of Panhandle's stock, the district court denied the motions. Appeals from these denials were dismissed by the circuit court of appeals, 108 F. 2d 614, and we denied certiorari, 309 U. S. 687. The denials are now urged as *res judicata.* But they were a rejection of Mokan's attempt to intervene in its own behalf. In neither instance was the relief denied deemed a mode of enforcing Panhandle's rights under Sections IV and V of the Decree. The earlier denials involved different legal claims from that now asserted, and, therefore, are no bar to the present proceeding."

The petition for rehearing in No. 268 is denied.

Opinion reported as amended, *ante,* p. 502.

No. 79. CITY COMPANY OF NEW YORK, INC. *v.* STERN; and

No. 89. CHASE SECURITIES CORP. *v.* VOGEL. On petitions for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit. March 31, 1941. *Per Curiam:* The petitions for writs of certiorari are granted and the judgments are reversed. *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538; *Pomeroy* v. *National City Co.*, 209 Minn. 155; 296 N. W. 513; *Donaldson* v. *Chase Securities Corp.*, 209 Minn. 165; 296 N. W. 518. The causes are remanded to the Circuit Court of Appeals for further proceedings with respect to any questions not determined by the Supreme Court of Minnesota in the *Pomeroy* and *Donaldson* cases. *Messrs. M. J. Doherty* and *Wilfrid E. Rumble* for petitioner in No. 79. *Messrs. F. H. Stinchfield* and *S. S. Jennings, Jr.* for petitioner in No. 89. *Mr. Benedict Deinard* for respondents. Reported below: 110 F. 2d 601, 607.

No. 603. GRAY, DIRECTOR OF THE BITUMINOUS COAL DIVISION OF THE DEPARTMENT OF THE INTERIOR, ET AL. *v.* POWELL ET AL., RECEIVERS. Certiorari, 311 U. S. 644, to the Circuit Court of Appeals for the Fourth Circuit. Argued March 14, 1941. Decided March 31, 1941. *Per Curiam:* The judgment is affirmed by an equally divided Court. *Mr. Robert L. Stern,* with whom *Solicitor General Biddle, Assistant Attorney General Arnold,* and *Messrs. Richard H. Demuth, James C. Wilson, Abe Fortas,* and *Arnold Levy* were on the brief, for petitioners. *Messrs. Joseph F. Johnston* and *W. R. C. Cocke,* with whom *Mr. Wm. H. Delaney* was on the brief, for respondents. Reported below: 114 F. 2d 752.

No. 776. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* NEBRASKA BRIDGE SUPPLY & LUMBER CO.

On petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit. March 31, 1941. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed. *Helvering* v. *Hammel,* 311 U. S. 504; *Electro-Chemical Engraving Co.* v. *Commissioner,* 311 U. S. 513. *Solicitor General Biddle* for petitioner. *Mr. Clarence T. Spier* for respondent. Reported below: 115 F. 2d 288.

No. 789. CANTEY *v.* MCLAIN LINE, INC., ET AL. On petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit. March 31, 1941. *Per Curiam:* The petition for writ of certiorari is granted, the judgment is reversed, and the cause is remanded to the District Court for further proceedings. *South Chicago Coal & Dock Co.* v. *Bassett,* 309 U. S. 251, 258–259. *Mr. George J. Engleman* for petitioner. *Mr. Paul Speer* for respondents. Reported below: 114 F. 2d 1017.

No. 805. SUN-MAID RAISIN GROWERS ASSOCIATION ET AL. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Northern District of California. March 31, 1941. *Per Curiam:* The judgment is affirmed. *Swayne & Hoyt* v. *United States,* 300 U. S. 297, 303–304. *Mr. J. Richard Townsend* for appellants. Reported below: 33 F. Supp. 959.

No. —, original. EX PARTE ARTHUR MATTHEW BECKER; and

No. —, original. EX PARTE RAYMOND STITELY. March 31, 1941. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 291. EQUITABLE LIFE INSURANCE CO. *v.* HALSEY, STUART & CO. March 31, 1941. Ordered that the opinion in this case be amended by striking the word "unsuccessful" from the eighth line from the bottom of page 5. The petition for rehearing is denied.

Opinion reported as amended, *ante,* p. 410.

No. 373. JUST ET AL. *v.* CHAMBERS, EXECUTRIX. March 31, 1941. It is ordered that the opinion herein be amended by striking from the sixth and seventh lines of the second paragraph on page two the words, "and does not appear to be disputed here." The petition for rehearing is denied.

Opinion reported as amended, *ante,* p. 383.

No. 537. FASHION ORIGINATORS' GUILD OF AMERICA, INC., ET AL. *v.* FEDERAL TRADE COMMISSION. March 31, 1941. It is ordered that the last two sentences of the last full paragraph on page 2 of the opinion handed down March 3 be amended to read as follows: "And the power of the combination is made even greater by reason of the affiliation of some members of the National Federation of Textiles, Inc.—that being an organization composed of about one hundred textile manufacturers, converters, dyers, and printers of silk and rayon used in making women's garments. Those members of the Federation who are affiliated with the Guild have agreed to sell their products only to those garment manufacturers who have in turn agreed to sell only to cooperating retailers."

Opinion reported as amended, *ante,* p. 457.

DECISIONS GRANTING CERTIORARI, FROM JANUARY 7, 1941, THROUGH MARCH 31, 1941.

No. 210. MANUFACTURERS TRUST CO. ET AL. *v.* PRUDENCE SECURITIES ADVISORY GROUP ET AL.;

No. 211. ENDELMAN ET AL. *v.* PRUDENCE-BONDS CORP. ET AL.;

No. 214. KELBY, TRUSTEE, *v.* PRUDENCE SECURITIES ADVISORY GROUP ET AL.;

No. 259. PRUDENCE REALIZATION CORP. *v.* PRUDENCE-BONDS CORP.; and

No. 273. DAVISON *v.* PRUDENCE SECURITIES ADVISORY GROUP ET AL. See *ante*, p. 649.

No. 284. DENHAM *v.* MUNSON LINE, INC. See *ante*, p. 650.

No. 601. SAMPSELL, TRUSTEE IN BANKRUPTCY, *v.* IMPERIAL PAPER & COLOR CORP. January 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Thomas S. Tobin* for petitioner. *Mr. Hiram E. Casey* for respondent. Reported below: 114 F. 2d 49.

No. 387. PHELPS DODGE CORPORATION *v.* NATIONAL LABOR RELATIONS BOARD; and

No. 641. NATIONAL LABOR RELATIONS BOARD *v.* PHELPS DODGE CORPORATION. January 13, 1941. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit granted. MR. JUSTICE ROBERTS took no part in the consideration and decision of these applications. *Messrs. Denison Kitchel, Matthew C. Fleming,* and *William E. Stevenson* for the Phelps Dodge Corporation. *Solicitor General Biddle* and *Messrs. Thomas*

E. Harris, Charles Fahy, Robert B. Watts, Laurence A. Knapp, and *Morris P. Glushien* for the National Labor Relations Board. Reported below: 113 F. 2d 202.

No. 624. PHOENIX FINANCE CORP. *v.* IOWA-WISCONSIN BRIDGE CO. January 20, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. James R. Morford* and *Casper Schenk* for petitioner. *Messrs. Fred A. Ontjes* and *Wm. C. Green* for respondent. Reported below: 115 F. 2d 1.

No. 625. UTILITIES INSURANCE CO. *v.* POTTER ET AL. January 20, 1941. Petition for writ of certiorari to the Supreme Court of Oklahoma granted, limited to the first question presented by the petition for the writ. *Mr. Clayton B. Pierce* for petitioner. *Mr. John W. Barry* for respondents. Reported below: 188 Okla. 145; 105 P. 2d 259.

No. 629. HARRIS, ADMINISTRATOR, *v.* ZION'S SAVINGS BANK & TRUST CO. February 3, 1941. Petition for writ of certiorari to the Supreme Court of Utah granted. *Mr. J. D. Skeen* for petitioner. *Mr. Hadlond P. Thomas* for respondent. Reported below: 105 P. 2d 461.

No. 654. DEPARTMENT OF TREASURY OF INDIANA ET AL. *v.* WOOD PRESERVING CORP. February 3, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Samuel D. Jackson,* Attorney General of Indiana, *Joseph W. Hutchinson,* and *Joseph P. McNamara,* Deputy Attorneys General, for petitioners. *Messrs. Frederick E. Matson, Harry T.*

Ice, and *Carleton M. Crick* for respondent. Reported below: 114 F. 2d 922.

No. 655. DEPARTMENT OF TREASURY OF INDIANA ET AL. *v.* INGRAM-RICHARDSON MANUFACTURING CO. February 3, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Samuel D. Jackson,* Attorney General of Indiana, *Joseph W. Hutchinson,* and *Joseph P. McNamara,* Deputy Attorneys General, for petitioners. *Messrs. Earl B. Barnes, Alan W. Boyd,* and *Charles M. Wells* for respondent. Reported below: 114 F. 2d 889.

No. 666. DETROLA RADIO & TELEVISION CORP. *v.* HAZELTINE CORPORATION. February 3, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Messrs. Samuel E. Darby, Jr.* and *Floyd H. Crews* for petitioner. *Messrs. William H. Davis* and *R. M. Adams* for respondent. Reported below: 117 F. 2d 238.

No. 627. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* WILLIAM FLACCUS OAK LEATHER CO. February 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General Biddle* for petitioner. *Mr. John A. McCann* for respondent. Reported below: 114 F. 2d 783.

No. 678. BALTIMORE & OHIO RAILROAD CO. *v.* KEPNER. February 10, 1941. Petition for writ of certiorari to the Supreme Court of Ohio granted. *Messrs. Morison R. Waite* and *William A. Eggers* for petitioner. *Mr. Edward M. Ballard* for respondent. Reported below: 137 Ohio St. 206, 409; 28 N. E. 2d 586; 30 N. E. 2d 982.

Nos. 408 and 409. CITY BANK FARMERS TRUST CO., TRUSTEE, *v.* COMMISSIONER OF INTERNAL REVENUE. February 10, 1941. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Rollin Browne, John G. Jackson, Jr.,* and *George Craven* for petitioner. *Solicitor General Biddle* for respondent. Reported below: 112 F. 2d 457.

No. 705. UNITED STATES *v.* FLORIAN, EXECUTOR. See *ante,* p. 656.

No. 687. CALIFORNIA *v.* THOMPSON. February 17, 1941. Petition for writ of certiorari to the Superior Court, Appellate Department, County of Los Angeles, California, granted. *Messrs. Ray L. Chesebro, Frederick Von Schrader, John L. Bland* and *Bourke Jones* for petitioner.

No. 683. UNITED STATES *v.* PYNE ET AL., EXECUTORS. February 17, 1941. Petition for writ of certiorari to the Court of Claims granted. *Solicitor General Biddle* for the United States. *Mr. Allen G. Gartner* for respondents. Reported below: 92 Ct. Cls. 44; 35 F. Supp. 81.

No. 684. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* REYNOLDS. February 17, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted, limited to the questions presented by the petition, with the exception of the question whether the remainder was vested or contingent under the law of North Carolina. *Solicitor General Biddle* for petitioner. *Messrs. J. Gilmer Körner, Jr.* and *H. G. Hudson* for respondent. Reported below: 114 F. 2d 804.

No. 700. JOURNEYMEN TAILORS LOCAL NO. 195 OF THE AMALGAMATED CLOTHING WORKERS OF AMERICA ET AL. *v.* MILLER'S INC. See *ante*, p. 658.

No. 14, original. EX PARTE FORREST HOLIDAY. March 3, 1941. The motion for leave to file petition for writ of certiorari is granted. The motion to proceed *in forma pauperis* is granted and the petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit is granted. *Forrest Holiday, pro se.*

No. 671. KINNEY, SECRETARY OF LABOR OF NEBRASKA, *v.* NEBRASKA EX REL. WESTERN REFERENCE & BOND ASSOCIATION, INC., ET AL. March 3, 1941. Petition for writ of certiorari to the Supreme Court of Nebraska granted. *Messrs. Walter R. Johnson,* Attorney General of Nebraska, and *Don Kelley,* Assistant Attorney General, for petitioner. *Mr. Walter Gordon Merritt* for respondents. Reported below: 138 Neb. 574; 293 N. W. 393.

No. 714. CHRISTENSON, ADMINISTRATRIX, *v.* UNION PACIFIC RAILROAD CO. March 3, 1941. Petition for writ of certiorari to the Supreme Court of Nebraska granted. *Mr. Gordon A. Nicholson* for petitioner. *Mr. Thomas W. Bockes* for respondent. Reported below: 137 Neb. 538; 290 N. W. 246.

No. 715. ARKANSAS CORPORATION COMMISSION ET AL. *v.* THOMPSON, TRUSTEE. March 3, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. Jack Holt,* Attorney General of Arkansas, *Leffel Gentry,* Assistant Attorney General, *Henry L. Fitzhugh,* and *Joseph M. Hill* for peti-

tioners. *Messrs. Thomas T. Railey, Harvey G. Combs,* and *James M. Chaney* for respondent. Reported below: 116 F. 2d 179.

No. 740. GELFERT, EXECUTOR, *v.* NATIONAL CITY BANK OF NEW YORK. March 3, 1941. Petition for writ of certiorari to the Supreme Court of New York granted. *Mr. George Link, Jr.* for petitioner. *Mr. Barney B. Fensterstock* for respondent. Reported below: 257 App. Div. 465, 1076; 284 N. Y. 13; 13 N. Y. S. 2d 600; 14 N. Y. S. 2d 995; 29 N. E. 2d 449.

No. 741. KLAXON COMPANY *v.* STENTOR ELECTRIC MANUFACTURING CO., INC. March 3, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted, limited to the first question presented by the petition for the writ. *Messrs. James D. Carpenter, Jr.* and *John Thomas Smith* for petitioner. *Messrs. Murray C. Bernays* and *Paul Leahy* for respondent. Reported below: 115 F. 2d 268.

No. 556. EARLY, COLLECTOR OF INTERNAL REVENUE, *v.* REID. See *ante,* p. 661.

No. 729. LOMAX *v.* TEXAS. March 10, 1941. Motion for leave to proceed *in forma pauperis,* and petition for writ of certiorari to the Court of Criminal Appeals of Texas, granted. *Mr. F. S. K. Whittaker* for petitioner. Reported below: 136 Tex. Cr. R. 108; 124 S. W. 2d 126; 144 S. W. 2d 555.

No. 718. BROOKS *v.* DEWAR ET AL. March 10, 1941. Petition for writ of certiorari to the Supreme Court of

Nevada granted. *Solicitor General Biddle* for petitioner. *Mr. William J. Donovan* for respondents. Reported below: 60 Nev. 219; 106 P. 2d 755.

No. 732. JENKINS *v.* KURN ET AL., TRUSTEES. March 10, 1941. Petition for writ of certiorari to the Supreme Court of Missouri granted. *Mr. Harry G. Waltner, Jr.* for petitioner. Reported below: 146 Mo. 904; 144 S. W. 2d 76.

No. 717. UNITED STATES, GUARDIAN OF THE INDIANS OF THE TRIBE OF HUALPAI IN ARIZONA, *v.* SANTA FE PACIFIC RAILROAD CO. March 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Biddle* and *Messrs. Nathan R. Margold, Richard H. Hanna, William A. Brophy,* and *Felix S. Cohen* for petitioner. *Mr. Charles H. Woods* for respondent. Reported below: 114 F. 2d 420.

No. 727. SHAMROCK OIL & GAS CORP. *v.* SHEETS ET AL. March 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted, limited to the first question presented by the petition for the writ. *Messrs. R. C. Johnson, Joseph B. Dooley,* and *R. A. Wilson* for petitioner. Reported below: 115 F. 2d 880.

No. 734. CARY *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 735. FLAGLER *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 736. ESTATE OF FLAGLER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 737. MATTHEWS *v.* COMMISSIONER OF INTERNAL REVENUE. March 10, 1941. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Roswell L. Gilpatric* and *Joseph C. White* for petitioners. *Solicitor General Biddle* for respondent. Reported below: 116 F. 2d 800.

No. 631. CASEBEER *v.* HUDSPETH, WARDEN. See *ante,* p. 662.

No. 744. POSEY *v.* UNITED STATES. See *ante,* p. 663.

No. 755. GRIFFIN, ADMINISTRATOR, *v.* McCOACH, TRUSTEE. March 17, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Jos. W. Bailey, Jr.* for petitioner. *Mr. Carl B. Callaway* for respondent. Reported below: 116 F. 2d 261.

No. 79. CITY COMPANY OF NEW YORK, INC. *v.* STERN; and

No. 89. CHASE SECURITIES CORP. *v.* VOGEL. See *ante,* p. 666.

No. 776. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* NEBRASKA BRIDGE SUPPLY & LUMBER CO. See *ante,* p. 666.

No. 789. CANTEY *v.* McLAIN LINE, INC., ET AL. See *ante,* p. 667.

No. 277. AUTOMATIC DEVICES CORP. *v.* SINKO TOOL & MFG. CO. See *post,* p. 711.

No. 782. AMERICAN SURETY CO. OF NEW YORK *v.* BETHLEHEM NATIONAL BANK ET AL. March 31, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. George P. Williams, Jr.* for petitioner. *Messrs. George P. Barse* and *H. P. McFadden* for respondents. Reported below: 116 F. 2d 75.

No. 758. NATIONAL LABOR RELATIONS BOARD *v.* VIRGINIA ELECTRIC & POWER CO.; and

No. 759. NATIONAL LABOR RELATIONS BOARD *v.* INDEPENDENT ORGANIZATION OF EMPLOYEES OF THE VIRGINIA ELECTRIC & POWER CO. March 31, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Solicitor General Biddle* and *Mr. Robert B. Watts* for petitioner. *Messrs. T. Justin Moore* and *Stephen H. Simes* for respondent in No. 758. *Mr. Paul E. Hadlick* for respondent in No. 759. Reported below: 115 F. 2d 414.

No. 812. TEXTILE MILLS SECURITIES CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. March 31, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Edmund S. Kochersperger* for petitioner. *Solicitor General Biddle* for respondent. Reported below: 117 F. 2d 62.

DECISIONS DENYING CERTIORARI, FROM JANUARY 7, 1941, THROUGH MARCH 31, 1941.

No. 498. STEWART *v.* JOHNSTON. January 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. The motion for leave to file petition for writ of mandamus is also denied. *J. L. Stewart, pro se.* Reported below: 97 F. 2d 548.

No. 609. SCOTT *v.* UNITED STATES. January 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. C. L. McGuire* for petitioner. Reported below: 115 F. 2d 137.

No. 620. SLOCUM ET AL. *v.* FIRST NATIONAL BANK OF CHICAGO ET AL. January 13, 1941. Petition for writ of certiorari to the Appellate Court, 1st District, of Illinois, denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS took no part in the consideration and decision of this application. *Mr. Meyer Abrams* for petitioners. *Messrs. Max Swiren* and *Frank H. Towner* for the First National Bank et al.; and *Mr. Claire W. Hardy* for A. C. Allyn & Co., respondents. Reported below: 305 Ill. App. 488; 27 N. E. 2d 479.

No. 622. DRAVO CONTRACTING CO. *v.* JAMES, STATE TAX COMMISSIONER. January 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. MR. JUSTICE REED took no part in the consideration and decision of this application. *Messrs. Wm. S. Moorhead, Lawrence D. Blair, W. Chapman Revercomb,* and *W. Elliott Nefflen* for petitioner. *Messrs. Clarence W. Meadows,* Attorney General of West Virginia, and *W. Holt Wooddell,* Assistant Attorney General, for respondent. Reported below: 114 F. 2d 242.

No. 352. SUNSHINE MINING CO. *v.* NATIONAL LABOR RELATIONS BOARD. January 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Joseph C. Cheney* and *Charles H. Paul* for petitioner. *Solicitor General Biddle*

and *Messrs. Thomas E. Harris, Charles Fahy, Robert B. Watts,* and *Laurence A. Knapp* for respondent. Reported below: 110 F. 2d 780.

No. 563. HOSTETTER *v.* UNITED STATES. January 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. H. F. Stambaugh* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Arnold Raum,* and *F. E. Youngman* for the United States. Reported below: 113 F. 2d 64.

No. 582. NEAL *v.* UNITED STATES. January 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Edward J. Callahan* and *William J. Hughes, Jr.* for petitioner. *Solicitor General Biddle* and *Messrs. Wendell Berge, Raoul Berger, George F. Kneip,* and *W. Marvin Smith* for the United States. Reported below: 114 F. 2d 1000.

No. 602. CHALK, COMMISSIONER, ET AL. *v.* UNITED STATES. January 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Harry McMullan,* Attorney General of North Carolina, *Lee Overman Gregory,* Assistant Attorney General, *J. Y. Jordan, Jr., J. M. Horner, Jr.,* and *Peyton Randolph Harris* for petitioners. *Solicitor General Biddle* for the United States. Reported below: 114 F. 2d 207.

No. 604. UNITED STATES NATIONAL BANK OF SAN DIEGO ET AL. *v.* COUNTY OF SAN DIEGO ET AL. January 13, 1941. Petition for writ of certiorari to the Supreme

Court of California denied. *Mr. Louis W. Myers* for petitioners. *Mr. H. H. Linney,* Deputy Attorney General of California, for respondents. Reported below: 16 Cal. 2d 142; 105 P. 2d 94.

No. 606. VIKING PUMP CO. *v.* NATIONAL LABOR RELATIONS BOARD. January 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. James B. Newman* for petitioner. *Solicitor General Biddle* and *Messrs. Robert B. Watts, Laurence A. Knapp, Mortimer B. Wolf,* and *A. Norman Somers* for respondent. Reported below: 113 F. 2d 759.

No. 615. STEWART DIE CASTING CORP. *v.* NATIONAL LABOR RELATIONS BOARD. January 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Silas H. Strawn* and *Frank H. Towner* for petitioner. *Solicitor General Biddle* and *Messrs. Thomas E. Harris, Robert B. Watts, Laurence A. Knapp, Mortimer B. Wolf,* and *Bertram Edises* for respondent. Reported below: 114 F. 2d 849.

No. 630. COMMISSIONER OF CORPORATIONS & TAXATION *v.* FLAHERTY. January 13, 1941. Petition for writ of certiorari to the Supreme Judicial Court of Massachusetts denied. *Mr. Paul A. Dever,* Attorney General of Massachusetts, for petitioner. *Messrs. Charles B. Rugg* and *H. Brian Holland* for respondent. Reported below: 306 Mass. 461; 28 N. E. 2d 433.

No. 644. H. W. GOSSARD CO. *v.* LOEBER'S, INC. January 13, 1941. Petition for writ of certiorari to the Cir-

cuit Court of Appeals for the Seventh Circuit denied. *Messrs. Hugh M. Morris, Frederic Burnham,* and *Donald Malcolm* for petitioner. *Messrs. Samuel E. Darby, Jr.* and *Floyd H. Crews* for respondent. Reported below: 114 F. 2d 166.

No. 600. WALDON *v.* UNITED STATES. January 20, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. William Scott Stewart* for petitioner. Reported below: 114 F. 2d 982.

No. 626. GREEN *v.* HOLLAND, U. S. DISTRICT JUDGE. January 20, 1941. The motion to strike the brief of the City of Stuart is denied. The petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit is denied. *Mr. Manley P. Caldwell* for petitioner. *Mr. Geo. W. Coleman* for respondent. Reported below: 114 F. 2d 1018.

No. 612. MISSOURI PACIFIC TRANSPORTATION CO. ET AL. *v.* GEORGE ET AL. January 20, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Frank H. Myers* for petitioners. Reported below: 114 F. 2d 757.

No. 614. VALLEY WASTE MILLS *v.* PAGE ET AL. January 20, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. E. D. Smith, Jr., Hatton Lovejoy,* and *Marion Smith* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key*

and *Lee A. Jackson* for respondents. Reported below: 115 F. 2d 466.

No. 619. GENERAL MOTORS CORP. ET AL. *v.* FEDERAL TRADE COMMISSION. January 20, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. John Thomas Smith* and *Anthony J. Russo* for petitioners. *Solicitor General Biddle, Assistant Attorney General Arnold,* and *Messrs. Charles H. Weston* and *W. T. Kelley* for respondent. Reported below: 114 F. 2d 33.

No. 621. HENRY LEVAUR, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. January 20, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Allan Seserman* for petitioners. *Solicitor General Biddle* and *Messrs. Robert B. Watts, Laurence A. Knapp,* and *Mortimer B. Wolf* for respondent. Reported below: 115 F. 2d 105.

No. 632. DETROIT TRUST CO. (FORMERLY SECURITY TRUST COMPANY), EXECUTOR, *v.* WOODWORTH, COLLECTOR OF INTERNAL REVENUE. January 20, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Charles F. Delbridge* and *Francis W. McCauley* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Thomas E. Harris, Maurice J. Mahoney,* and *George H. Zeutzius* for respondent. Reported below: 110 F. 2d 829.

No. 634. BALTIMORE & OHIO RAILROAD CO. *v.* JOSEPH, ADMINISTRATOR. January 20, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth

Circuit denied. *Mr. Raymond T. Jackson* for petitioner. *Mr. Peter Q. Nyce* for respondent. Reported below: 112 F. 2d 518.

No. 643. MUTUAL BENEFIT HEALTH & ACCIDENT ASSN. *v.* MICCOLIS. January 20, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. L. L. Bomberger, John W. Morthland, Benjamin S. Minor, Arthur P. Drury,* and *John M. Lynham* for petitioner. *Mr. Oscar B. Thiel* for respondent. Reported below: 115 F. 2d 579.

No. 651. ANCHOR STOVE & RANGE CO. *v.* MONTGOMERY WARD & CO., INC. January 20, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Walter F. Murray* for petitioner. *Messrs. John A. Barr* and *Stuart S. Ball* for respondent. Reported below: 114 F. 2d 893.

No. 579. ODOM *v.* ADERHOLD, WARDEN. February 3, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *William Henry Odom, pro se.* Reported below: 115 F. 2d 202.

No. 608. MITCHELL *v.* BOARD OF GOVERNORS OF WASHINGTON STATE BAR ASSOCIATION. February 3, 1941. Petition for writ of certiorari to the Supreme Court of the State of Washington, and motion for leave to proceed further *in forma pauperis,* denied. *Walter B. Mitchell, pro se.*

No. 642. CRITES *v.* RADTKE ET AL. February 3, 1941. Petition for writ of certiorari to the Circuit Court of

Appeals for the Second Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Virgil C. Crites, pro se. Messrs. Stephen H. Philbin, Robert W. Perkins,* and *Leonard Day* for respondents.

No. 645. MONFILS, ADMINISTRATRIX, *v.* HAZELWOOD ET AL. February 3, 1941. Petition for writ of certiorari to the Supreme Court of North Carolina, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. J. H. Bridgers* for petitioner. *Mr. Bennett H. Perry* for respondents. Reported below: 218 N. C. 215; 10 S. E. 2d 673.

No. 635. WELD ET AL. *v.* CALIFORNIA. February 3, 1941. Petition for writ of certiorari to the Superior Court, County of Alameda, California, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. George Olshausen* for petitioners. *Messrs. Homer W. Buckley* and *Robert H. McCreary* for respondent.

No. 565. LOVVORN *v.* JOHNSTON, WARDEN. February 3, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *James A. Lovvorn, pro se.*

No. 664. KMECAK *v.* HUNT, WARDEN. February 3, 1941. Petition for writ of certiorari to the Supreme Court of the State of New York, and motion for leave to proceed further *in forma pauperis,* denied. *Steve Kmecak, pro se.*

No. 636. SCHWEIDEL *v.* LEHIGH VALLEY RAILROAD CO. ET AL. February 3, 1941. Petition for writ of certiorari

to the District Court of the United States for the Eastern District of Pennsylvania denied. MR. JUSTICE DOUGLAS took no part in the consideration and decision of this application. *Mr. Lemuel B. Schofield* for petitioner. *Mr. Maurice Bower Saul* for respondents.

No. 637. ABRAMS *v.* LEHIGH VALLEY RAILROAD CO. ET AL. February 3, 1941. Petition for writ of certiorari to the District Court of the United States for the Eastern District of Pennsylvania denied. MR. JUSTICE DOUGLAS took no part in the consideration and decision of this application. *Mr. Meyer Abrams, pro se. Mr. Maurice Bower Saul* for respondents.

No. 657. BRENNAN *v.* BALTIMORE & OHIO RAILROAD CO. February 3, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE BLACK is of the opinion that the petition for certiorari should be granted. *Mr. William Paul Allen* for petitioner. *Mr. Harold R. Oakes* for respondent. Reported below: 115 F. 2d 555.

No. 633. PECORARO ET AL. *v.* UNITED STATES. February 3, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Louis Halle* for petitioners. *Solicitor General Biddle* and *Messrs. Wendell Berge, George F. Kneip,* and *W. Marvin Smith* for the United States. Reported below: 115 F. 2d 245.

No. 639. STERN ET AL., COMMITTEE OF WAGE EARNERS OF DEBTOR, *v.* PENNSYLVANIA CENTRAL BREWING CO., BANKRUPT. February 3, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Third

Circuit denied. *Mr. J. Julius Levy* for petitioners. Reported below: 114 F. 2d 1010.

No. 646. OLIN, ADMINISTRATRIX, *v.* NEW ENGLAND LIFE INSURANCE CO. February 3, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Arthur R. Robinson* for petitioner. *Messrs. Clair McTurnan* and *William R. Higgins* for respondent. Reported below: 114 F. 2d 131.

No. 650. FUHRMAN & FORSTER CO. *v.* COMMISSIONER OF INTERNAL REVENUE. February 3, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Rayford W. Lemley* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Warner W. Gardner,* and *F. E. Youngman* for respondent. Reported below: 114 F. 2d 863.

No. 652. FARMERS UNDERWRITERS ASSOCIATION *v.* CARTER, ADMINISTRATOR. February 3, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Joseph D. Brady* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *John A. Gage* for respondent. Reported below: 115 F. 2d 302.

No. 653. ATLAS MILLING CO. *v.* JONES, COLLECTOR OF INTERNAL REVENUE. February 3, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Harry W. Blair* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Norman D. Keller,* and *Thomas E. Harris* for respondent. Reported below: 115 F. 2d 61.

No. 656. INGRAM-RICHARDSON MANUFACTURING CO. *v.* DEPARTMENT OF TREASURY OF INDIANA ET AL. February 3, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Earl B. Barnes, Alan W. Boyd,* and *Charles M. Wells* for petitioner. *Messrs. Samuel D. Jackson,* Attorney General of Indiana, *Joseph W. Hutchinson,* and *Joseph P. McNamara* for respondents. Reported below: 114 F. 2d 889.

No. 649. ALLIED BRIDGE & CONSTRUCTION CO. *v.* DANVILLE SANITARY DISTRICT. February 3, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Charles P. R. Macaulay* for petitioner. *Mr. Paul F. Jones* for respondent. Reported below: 114 F. 2d 155.

No. 660. BURLEY IRRIGATION DISTRICT *v.* ICKES, SECRETARY OF THE INTERIOR. February 3, 1941. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. E. Barrett Prettyman, F. G. Awalt, Raymond Sparks,* and *S. T. Lowe* for petitioner. *Solicitor General Biddle* for respondent. Reported below: 116 F. 2d 529.

No. 665. WIELAND *v.* PAGE. February 3, 1941. Petition for writ of certiorari to the Supreme Court of Ohio denied. *Mr. Charles Auerbach* for petitioner. *Mr. George Q. Keeley* for respondent. Reported below: 137 Ohio St. 198; 28 N. E. 2d 583.

No. 669. PEERLESS EQUIPMENT CO. *v.* W. H. MINER, INC. February 3, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit

denied. *Messrs. David P. Wolhaupter* and *Franklin M. Warden* for petitioner. *Mr. George I. Haight* for respondent. Reported below: 115 F. 2d 650.

No. 670. SANA LABORATORIES, INC., ET AL. *v.* UNITED STATES. February 3, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Harlan Besson* for petitioners. *Solicitor General Biddle* and *Messrs. Wendell Berge, George F. Kneip, Fred E. Strine,* and *W. Marvin Smith* for the United States. Reported below: 115 F. 2d 717.

No. 677. KYCOGA LAND CO. *v.* KENTUCKY RIVER COAL CORP. February 3, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Joseph S. Graydon* and *Buford C. Tynes* for petitioner. *Mr. Peter T. Wheeler* for respondent. Reported below: 110 F. 2d 894.

No. 682. GORHAM *v.* MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION OF OMAHA. February 3, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. I. M. Bailey* and *W. H. Yarborough* for petitioner. *Messrs. Julius C. Smith* and *C. R. Wharton* for respondent. Reported below: 114 F. 2d 97.

No. 703. GUERIN *v.* GRIEFEN. February 3, 1941. Petition for writ of certiorari to the Appellate Court, First District, of Illinois, denied. *Mr. William S. Kleinman* for petitioner. *Mr. Charles O. Rundall* for respondent. Reported below: 305 Ill. App. 494; 27 N. E. 2d 609.

No. 13, original. EX PARTE WILLIAM H. LOCKHART. February 10, 1941. The motion for leave to file petition for writ of certiorari is granted. The petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit, and motion for leave to proceed further *in forma pauperis,* are denied. *William H. Lockhart, pro se.*

No. 60. CANTU *v.* TEXAS. February 10, 1941. The motion to proceed on typewritten papers is granted. The petition for writ of certiorari to the Court of Criminal Appeals of Texas is denied. *Mr. A. B. Cole* for petitioner. *Messrs. Gerald C. Mann,* Attorney General of Texas, and *Lloyd W. Davidson* for respondent. Reported below: 135 S. W. 2d 705.

No. 136. C & C ICE CREAM CO., INC. *v.* EWING-VON ALLMEN DAIRY CO. ET AL. February 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. MR. JUSTICE ROBERTS took no part in the consideration and decision of this application. *Mr. Joseph S. Lawton* for petitioner. *Messrs. Marvin H. Taylor* and *Edward P. Humphrey* for respondents. Reported below: 109 F. 2d 898.

No. 661. FORD MOTOR CO. *v.* NATIONAL LABOR RELATIONS BOARD. February 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. MR. JUSTICE MURPHY took no part in the consideration and decision of this application. *Messrs. Frederick H. Wood* and *Alfred McCormack* for petitioner. *Solicitor General Biddle* and *Messrs. Warner W. Gardner, Robert B. Watts, Laurence A. Knapp,* and *Mortimer B. Wolf* for respondent. Reported below: 114 F. 2d 905.

No. 662. NUDELMAN, DIRECTOR OF FINANCE OF ILLINOIS, *v.* GLOBE VARNISH CO. February 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied for the want of jurisdiction. *Davis* v. *Preston,* 280 U. S. 406. *Messrs. John E. Cassidy,* Attorney General of Illinois, *Montgomery S. Winning, Edwin T. Breen, Eli J. Bibo,* and *Philip J. Simon,* Assistant Attorneys General, for petitioner. *Messrs. Thurlow G. Essington, Russell Whitman, William P. Sidley,* and *Hamilton K. Beebe* for respondent. Reported below: 114 F. 2d 916.

No. 187. RATH ET AL. *v.* CROSBY. February 10, 1941. Petition for writ of certiorari to the Supreme Court of Ohio denied. *Messrs. Joseph A. Padway* and *Leonard J. Stern* for petitioners. *Messrs. Welles K. Stanley* and *Harry E. Smoyer* for respondent. Reported below: 135 Ohio St. 666; 136 Ohio St. 352; 22 N. E. 2d 83; 25 N. E. 2d 934.

No. 685. KNIFFIN, TRUSTEE, *v.* STATE OF NEW YORK. February 10, 1941. Petition for writ of certiorari to the Court of Claims of the State of New York denied. *Mr. Lloyd B. Kanter* for petitioner. *Messrs. John J. Bennett, Jr.,* Attorney General of New York, *Henry Epstein,* Solicitor General, and *James H. Glavin, Jr.,* Assistant Attorney General, for respondent. Reported below: 257 App. Div. 43; 283 N. Y. 317; 284 N. Y. 593; 12 N. Y. S. 2d 422; 28 N. E. 2d 853; 29 N. E. 2d 668.

No. 690. VAN GILDER *v.* AMERICAN SURETY CO. OF NEW YORK. February 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Joseph W. Planck* for petitioner.

Mr. Clayton F. Jennings for respondent. Reported below: 115 F. 2d 200.

No. 711. MAY, DOING BUSINESS AS GEORGE S. MAY CO., *v.* MULLIGAN. February 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Harry C. Howard* for petitioner. Reported below: 117 F. 2d 259.

No. 190. KELLY *v.* JOHNSTON, WARDEN. February 17, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit, and motion for leave to proceed further *in forma pauperis*, denied. *Harry C. Kelly, pro se.* Reported below: 111 F. 2d 613.

No. 576. DE VEUVE, DOING BUSINESS AS SAN FRANCISCO UNDERWRITERS OF SAN FRANCISCO, ET AL. *v.* TARLETON ET AL. February 17, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Wallace Shepard* for petitioners. *Mr. James D. Meredith* for respondents. Reported below: 113 F. 2d 290.

No. 668. MANUFACTURERS TRUST CO. *v.* UNITED STATES. February 17, 1941. Petition for writ of certiorari to the Court of Claims denied. *Mr. Donald Marks* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *J. Louis Monarch* for the United States. Reported below: 91 Ct. Cls. 406; 32 F. Supp. 289.

No. 674. SCIORTINO *v.* UNITED STATES. February 17, 1941. Petition for writ of certiorari to the Circuit Court

of Appeals for the Second Circuit denied. *Mr. Leo H. Klugherz* for petitioner. *Solicitor General Biddle* and *Messrs. Wendell Berge, George F. Kneip,* and *W. Marvin Smith* for the United States. Reported below: 115 F. 2d 504.

No. 691. CHICAGO & NORTH WESTERN RAILWAY CO. ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. February 17, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Nelson Trottman* and *William T. Faricy* for petitioners. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Joseph M. Jones* for respondent. Reported below: 114 F. 2d 882.

No. 693. BAKER ET AL. *v.* UNITED STATES. February 17, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. A. G. Bush, W. R. Donham, L. E. Gwinn,* and *Jacob N. Halper* for petitioners. *Solicitor General Biddle* and *Messrs. Wendell Berge, Herbert Wechsler, William J. Connor,* and *M. Joseph Matan* for the United States. Reported below: 115 F. 2d 533.

No. 694. LUZON BROKERAGE CO., INC. *v.* PUBLIC SERVICE COMMISSION ET AL. February 17, 1941. Petition for writ of certiorari to the Supreme Court of the Philippines denied. *Mr. L. D. Lockwood* for petitioner. *Mr. Nathan R. Margold* for respondents.

No. 695. DETROIT & WINDSOR FERRY CO. *v.* WOODWORTH, FORMER COLLECTOR OF INTERNAL REVENUE. February 17, 1941. Petition for writ of certiorari to the

Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Hal H. Smith* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Arthur A. Armstrong* for respondent. Reported below: 115 F. 2d 795.

No. 696. BEKINS ET AL., TRUSTEES, ET AL. *v.* LINDSAY-STRATHMORE IRRIGATION DISTRICT. February 17, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. W. Coburn Cook* for petitioners. *Messrs. Guy Knupp* and *Jas. R. McBride* for respondent. Reported below: 114 F. 2d 680.

No. 698. JORDAN ET AL. *v.* PALO VERDE IRRIGATION DISTRICT. February 17, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. W. Coburn Cook* for petitioners. *Messrs. Arvin B. Shaw, Jr.* and *Wm. L. Murphey* for respondent. Reported below: 114 F. 2d 691.

No. 699. MOODY ET AL. *v.* JAMES IRRIGATION DISTRICT, DEBTOR. February 17, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. W. Coburn Cook* for petitioners. *Mr. A. L. Cowell* for respondent. Reported below: 114 F. 2d 685.

No. 725. CASCO PRODUCTS CORP. *v.* SINKO TOOL & MANUFACTURING CO. February 17, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Drury W. Cooper, Henry M. Huxley,* and *Thomas J. Byrne* for petitioner. *Messrs. Bernard A. Schroeder, Russell Wiles,* and *George*

A. Chritton for respondent. Reported below: 116 F. 2d 119.

No. 716. HUSSOCK *v.* STATE OF NEW YORK. See *ante*, p. 659.

No. 15, original. EARLEY *v.* CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC R. Co. March 3, 1941. Motion for leave to file a petition for writ of certiorari granted. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit, and motion for leave to proceed further *in forma pauperis*, denied. MR. JUSTICE DOUGLAS took no part in the consideration and decision of these applications. *John J. Earley, pro se.*

No. 688. LATIMER *v.* STATE OF WASHINGTON ET AL. March 3, 1941. Petition for writ of certiorari to the Supreme Court of the State of Washington, and motion for leave to proceed further *in forma pauperis*, denied. *George D. Latimer, pro se.*

No. 713. FLETCHER *v.* EVENING STAR NEWSPAPER CO. March 3, 1941. Petition for writ of certiorari to the Court of Appeals for the District of Columbia, and motion for leave to proceed further *in forma pauperis*, denied. *Edmond C. Fletcher, pro se.* Reported below: 72 App. D. C. 303; 114 F. 2d 582.

No. 730. STRZEP *v.* STATE OF NEW YORK. March 3, 1941. Petition for writ of certiorari to the Supreme Court of New York, and motion for leave to proceed further *in forma pauperis*, denied. *Celestian L. Strzep, pro se.* Reported below: 257 App. Div. 1042, 1100; 283

N. Y. 699; 284 N. Y. 580; 13 N. Y. S. 2d 850; 14 N. Y. S. 2d 1006; 28 N. E. 2d 715; 29 N. E. 2d 659.

No. 659. CHOCTAW NATION *v.* UNITED STATES. March 3, 1941. Petition for writ of certiorari to the Court of Claims denied. *Messrs. W. F. Semple, R. M. Rainey, Streeter B. Flynn,* and *T. P. Gore* for petitioner. *Solicitor General Biddle* for the United States. Reported below: 91 Ct. Cls. 320.

No. 680. REUTER *v.* UNITED STATES. March 3, 1941. Petition for writ of certiorari to the Court of Claims denied. *Mr. James A. Cosgrove* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Mr. Sewall Key* for the United States. Reported below: 92 Ct. Cls. 74; 34 F. Supp. 1014.

No. 702. MCINTYRE *v.* GEORGIA. March 3, 1941. Petition for writ of certiorari to the Supreme Court of Georgia denied. *Mr. G. Seals Aiken* for petitioner. *Mr. J. W. LeCraw* for respondent. Reported below: 190 Ga. 872; 11 S. E. 2d 5.

No. 704. MONARCH DISTRIBUTING CO. ET AL. *v.* UNITED STATES. March 3, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Harold J. Bandy* for petitioners. *Solicitor General Biddle* and *Messrs. Wendell Berge, Raoul Berger, George F. Kneip,* and *W. Marvin Smith* for the United States. Reported below: 116 F. 2d 11.

No. 706. ROMANS ET AL. *v.* MARYLAND. March 3, 1941. Petition for writ of certiorari to the Court of Appeals of Maryland denied. *Mr. Eldridge Hood Young*

for petitioners. *Mr. William C. Walsh,* Attorney General of Maryland, for respondent. Reported below: 178 Md. 588; 16 A. 2d 642.

No. 707. CITY OF NEW YORK *v.* UNITED STATES ET AL. March 3, 1941. Petition for writ of certiorari to the Supreme Court of New York denied. *Messrs. William C. Chanler, Paxton Blair,* and *Sol Charles Levine* for petitioner. *Solicitor General Biddle, Assistant Attorney General Shea,* and *Messrs. Melvin H. Siegel* and *Paul A. Sweeney* for respondents. Reported below: 259 App. Div. 688; 284 N. Y. 713; 20 N. Y. S. 2d 573; 31 N. E. 2d 48.

No. 663. OBARTUCH *v.* SECURITY MUTUAL LIFE INSURANCE CO. March 3, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Roy Massena* and *Donald N. Schaffer* for petitioner. *Messrs. Dwight S. Bobb* and *Robert W. Childs* for respondent. Reported below: 114 F. 2d 873.

No. 672. H. B. NELSON CONSTRUCTION CO. *v.* UNITED STATES. March 3, 1941. Petition for writ of certiorari to the Court of Claims denied. *Messrs. S. Wallace Dempsey* and *Thomas Bruce Fuller* for petitioner. *Solicitor General Biddle, Assistant Attorney General Shea,* and *Mr. Paul A. Sweeney* for the United States. Reported below: 91 Ct. Cls. 476.

No. 673. H. B. NELSON CONSTRUCTION CO. *v.* UNITED STATES. March 3, 1941. Petition for writ of certiorari to the Court of Claims denied. *Messrs. S. Wallace Dempsey* and *Thomas Bruce Fuller* for petitioner. *So-*

licitor General Biddle, Assistant Attorney General Shea, and *Mr. Melvin H. Siegel* for the United States. Reported below: 91 Ct. Cls. 488.

No. 675. SEEDS ET AL. *v.* UNITED STATES. March 3, 1941. Petition for writ of certiorari to the Court of Claims denied. *Mr. Walter Biddle Saul* for petitioners. *Solicitor General Biddle, Assistant Attorney General Shea,* and *Messrs. Melvin H. Siegel* and *Thomas E. Harris* for the United States. Reported below: 92 Ct. Cls. 97.

No. 723. JORDAN ET AL. *v.* FISHER ET AL. March 3, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. E. L. Klett* and *W. W. Campbell* for petitioners. *Mr. Alfred McKnight* for respondents. Reported below: 116 F. 2d 183.

No. 747. SHEPPARD, COMPTROLLER OF PUBLIC ACCOUNTS, ET AL. *v.* CARPENTER. March 3, 1941. Petition for writ of certiorari to the Supreme Court of Texas denied. *Messrs. Gerald C. Mann,* Attorney General of Texas, *Grover Sellers,* First Assistant Attorney General, *R. W. Fairchild, Ocie Speer,* and *Geo. W. Barcus,* Assistant Attorneys General, for petitioners. *Messrs. Dan Moody, Everett L. Looney, Claude V. Birkhead, R. L. Bobbitt,* and *Charles L. Black* for respondent. Reported below: 135 Texas 413; 145 S. W. 2d 562.

No. 613. ROBBINS *v.* SANFORD, WARDEN. March 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. James*

F. Kemp for petitioner. Reported below: 115 F. 2d 435.

No. 720. PARRISH *v.* STRATTON CRIPPLE CREEK MINING & DEVELOPMENT CO. March 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *E. F. Parrish, pro se. Mr. David P. Strickler* for respondent. Reported below: 116 F. 2d 207.

No. 701. SMITH *v.* HENDERSON, WARDEN. March 10, 1941. Petition for writ of certiorari to the Supreme Court of Georgia, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Leon A. Ransom* for petitioner. *Mr. J. Walter LeCraw* for respondent. Reported below: 190 Ga. 886; 10 S. E. 2d 921.

No. 751. INDIANA UNEMPLOYMENT COMPENSATION BOARD *v.* BENNER-CORYELL LUMBER CO., INC. March 10, 1941. Petition for writ of certiorari to the Supreme Court of Indiana denied for the want of a final judgment. *Messrs. Joseph P. McNamara* and *Thomas M. Quinn, Jr.* for petitioner. *Mr. John R. Browne* for respondent. Briefs were filed on behalf of unemployment compensation agencies of several States, as *amici curiae,* in support of the petition. Reported below: 218 Ind. —; 29 N. E. 2d 776.

No. 779. CITY OF JACKSON ET AL. *v.* MISSISSIPPI POWER & LIGHT CO. March 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. MR. JUSTICE DOUGLAS took no part in the consideration and decision of this application. *Messrs. J. Morgan Stevens* and *W. E. Morse* for petitioners.

Messrs. Marcellus Green and *Garner W. Green* for respondent. Reported below: 116 F. 2d 924.

No. 681. SHIP CONSTRUCTION & TRADING CO., INC. *v.* UNITED STATES. March 10, 1941. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Asbury Hayne de Yampert* and *Herbert M. Bingham* for petitioner. *Solicitor General Biddle, Assistant Attorney General Shea,* and *Messrs. Melvin H. Siegel* and *Thomas E. Harris* for the United States. Reported below: 91 Ct. Cls. 419.

No. 722. ADAMS, TRUSTEE, *v.* CITY BANK & TRUST CO. March 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. F. Baldwin Martin* for petitioner. *Mr. A. O. B. Sparks* for respondent. Reported below: 115 F. 2d 453.

No. 724. TROY-PARISIAN, INC. *v.* UNITED STATES EX REL. ADMINISTRATOR OF THE FEDERAL HOUSING ADMINISTRATION. March 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. O. A. Johannesen* for petitioner. *Solicitor General Biddle, Assistant Attorney General Shea,* and *Mr. Melvin H. Siegel* for respondent. Reported below: 115 F. 2d 224.

No. 726. ANHEUSER-BUSCH, INC., ET AL. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. March 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Daniel N. Kirby, Allen C. Orrick,* and *Harry W. Kroeger* for petitioners. *Solicitor General Biddle* and *Messrs. Sewall Key, Richard H. Demuth,* and *Morton K. Rothschild* for respondent. Reported below: 115 F. 2d 662.

No. 728. MAY DEPARTMENT STORES CO. ET AL. *v.* TAKASHI KATAOKA ET AL. March 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Frank J. Hogan, Edmund L. Jones,* and *Walter O. Schell* for petitioners. *Mr. J. Marion Wright* for respondents. Reported below: 115 F. 2d 521.

No. 733. ROERICH *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. March 10, 1941. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. Charles B. McInnis* and *John H. Jackson* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Mr. Sewall Key* for respondent. Reported below: 115 F. 2d 39.

No. 745. UNION TRUST CO. OF PITTSBURGH, TRUSTEE, *v.* COMMISSIONER OF INTERNAL REVENUE. March 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. J. Merrill Wright* and *David R. Shelton* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Mr. Sewall Key* for respondent. Reported below: 115 F. 2d 86.

No. 749. WELLS FARGO BANK & UNION TRUST CO. *v.* COLLECTOR OF INTERNAL REVENUE. March 10, 1941. Petition for writ of certiorari to the Supreme Court of the Philippines denied. *Messrs. Sidney M. Ehrman* and *Lloyd W. Dinkelspiel* for petitioner. *Mr. Nathan R. Margold* for respondent.

No. 750. BLAIR, JUDGE OF THE CIRCUIT COURT OF COLE COUNTY, MISSOURI *v.* MISSOURI EX REL. LUCAS, SUPERINTENDENT. March 10, 1941. Petition for writ of cer-

tiorari to the Supreme Court of Missouri denied. *Mr. John T. Barker* for petitioner. *Messrs. Roy McKittrick,* Attorney General of Missouri, *Covell R. Hewitt, Harry H. Kay,* Assistant Attorneys General, and *Charles L. Henson* for respondent. Reported below: 146 Mo. 1017; 144 S. W. 2d 106.

No. 647. MONSEN *v.* UNITED STATES. March 17, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Jennings B. Monsen, pro se.* Reported below: 115 F. 2d 635.

No. 742. MORGAN *v.* UNITED STATES. March 17, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. C. L. Dawson* for petitioner. Reported below: 115 F. 2d 427.

No. 754. OHIO EX REL. SMITH *v.* YOUNG, JUDGE, ET AL. March 17, 1941. Petition for writ of certiorari to the Supreme Court of Ohio, and motion for leave to proceed further *in forma pauperis,* denied. *Messrs. Paul D. Smith* and *Thomas M. Sutherland* for petitioner. *Mr. Howard F. Guthery* for respondents. Reported below: 137 Ohio St. 319; 29 N. E. 2d 564.

No. 731. MORGAN *v.* TENNESSEE VALLEY AUTHORITY ET AL. March 17, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. MR. JUSTICE FRANKFURTER took no part in the consideration and decision of this application. *Mr. Edwin H. Cassels* for petitioner. *Solicitor General Bid-*

dle, Assistant Attorney General Shea, and *Mr. William C. Fitts, Jr.* for respondents. Reported below: 115 F. 2d 990.

No. 757. CRAB ORCHARD IMPROVEMENT CO. *v.* CHESAPEAKE & OHIO RAILWAY CO. March 17, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. MR. JUSTICE REED took no part in the consideration and decision of this application. *Mr. W. A. Thornhill* for petitioner. Reported below: 115 F. 2d 277.

No. 762. MCGLOON *v.* UNITED STATES. March 17, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY took no part in the consideration and decision of this application. *Mr. Fred A. Ironside, Jr.* for petitioner. *Solicitor General Biddle, Assistant Attorney General Berge,* and *Messrs. James P. O'Brien, Arthur Breuer, W. Marvin Smith,* and *Chester T. Lane* for the United States. Reported below: 116 F. 2d 285.

No. 648. DOMENECH, TREASURER, *v.* SAN JUAN TRADING CO., INC.; and

No. 679. SAN JUAN TRADING CO., INC. *v.* DOMENECH, TREASURER OF PUERTO RICO. March 17, 1941. Petitions for writs of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. William Cattron Rigby, George A. Malcolm,* and *Nathan R. Margold* for petitioner in No. 648 and respondent in No. 679. *Mr. L. E. Dubon* for respondent in No. 648 and petitioner in No. 679. Reported below: 114 F. 2d 969.

No. 712. KYNETTE *v.* CALIFORNIA. March 17, 1941. Petition for writ of certiorari to the Supreme Court of California denied. *Earle E. Kynette, pro se.* *Messrs. Earl Warren,* Attorney General of California, *Everett W. Mattoon,* Assistant Attorney General, and *Frank Richards,* Deputy Attorney General, for respondent. Reported below: 15 Cal. 2d 731; 97 P. 2d 287; 104 P. 2d 794.

No. 721. SCOTT *v.* COHEN. March 17, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Robert Allen Ritchie* for petitioner. Reported below: 115 F. 2d 704.

No. 752. SOUTHWESTERN HOTEL CO. *v.* UNITED STATES. March 17, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Thornton Hardie* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *F. E. Youngman* for the United States. Reported below: 115 F. 2d 686.

No. 760. MILLER *v.* COMMISSIONER OF INTERNAL REVENUE. March 17, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. J. G. Korner, Jr.* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Arnold Raum,* and *Maurice J. Mahoney* for respondent. Reported below: 115 F. 2d 479.

No. 761. CRENSHAW *v.* UNITED STATES. March 17, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. L. E.*

Gwinn and *Charles C. Grassham* for petitioner. *Solicitor General Biddle, Assistant Attorney General Berge,* and *Mr. George F. Kneip* for the United States. Reported below: 116 F. 2d 737.

No. 764. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* CLEVELAND TRUST CO., TRUSTEE. March 17, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Solicitor General Biddle* for petitioner. *Mr. Charles P. Hine* for respondent. Reported below: 115 F. 2d 481.

No. 765. COTSIRILOS *v.* KLEIN, TRUSTEE. March 17, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Harold O. Mulks* for petitioner. Reported below: 115 F. 2d 626.

No. 788. NEW YORK LIFE INSURANCE CO. *v.* GRIESEDIECK. March 17, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. James C. Jones, Lon O. Hocker, James C. Jones, Jr.,* and *Louis H. Cooke* for petitioner. *Mr. William L. Mason* for respondent. Reported below: 116 F. 2d 559.

No. 772. BARTINDALE *v.* STATE OF NEW YORK. March 31, 1941. Petition for writ of certiorari to the County Court of Rockland County, State of New York, and motion for leave to proceed further *in forma pauperis,* denied. *Horace Lee Bartindale, pro se. Messrs. John J. Bennett, Jr.,* Attorney General of New York, and *George V. Dorsey* for respondent. Reported below: 259 App. Div. 841; 284 N. Y. 677; 20 N. Y. S. 2d 172; 30 N. E. 2d 724.

No. 813. LEWIS *v.* LOUISIANA. March 31, 1941. Petition for writ of certiorari to the Supreme Court of Louisiana, and motion for leave to proceed further *in forma pauperis,* denied. *Annie C. Lewis, pro se.* Reported below: 196 La. 814; 200 So. 265.

No. 777. ILLINOIS EX REL. LEAF, COUNTY TREASURER, *v.* ORVIS. March 31, 1941. Petition for writ of certiorari to the Supreme Court of Illinois denied for the want of a final judgment. *Messrs. Werner W. Schroeder* and *Hamilton K. Beebe* for petitioner. *Mr. Nelson Trottman* for respondent. Reported below: 374 Ill. 536; 30 N. E. 2d 28.

No. 783. EWING *v.* NATIONAL AIRPORT CORPORATION. March 31, 1941. The motion to consider the petition on appendices to briefs filed in the Circuit Court of Appeals is granted. The petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit is denied. *Messrs. William E. Leahy* and *William J. Hughes, Jr.* for petitioner. *Mr. Albert V. Bryan* for respondent. Reported below: 115 F. 2d 859.

No. 756. CARPENTER ET AL. *v.* SUPERIOR COURT OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES. March 31, 1941. The motion for leave to use the record in *Carpenter* v. *Hamilton,* 311 U. S. 656, is granted. The petition for writ of certiorari to the Supreme Court of California is denied. *Mr. A. L. Wirin* for petitioners. *Mr. W. B. McKesson* for respondent. Reported below: 15 Cal. 2d 130; 98 P. 2d 1027.

No. 768. DIXON ET AL. *v.* UNITED STATES. March 31, 1941. Petition for writ of certiorari to the Circuit Court

of Appeals for the Eighth Circuit denied. *Mr. Frank Hickman* for petitioners. *Solicitor General Biddle, Assistant Attorney General Berge,* and *Mr. George F. Kneip* for the United States. Reported below: 116 F. 2d 907.

No. 773. QUEEN INSURANCE CO. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. March 31, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. William H. Hotchkiss* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Richard H. Demuth,* and *Warren F. Wattles* for respondent. Reported below: 115 F. 2d 341.

No. 774. ALTMAIER *v.* COMMISSIONER OF INTERNAL REVENUE. March 31, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. John J. Kendrick* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Edward H. Hammond* for respondent. Reported below: 116 F. 2d 162.

No. 780. REELEY *v.* PENNSYLVANIA RAILROAD CO. March 31, 1941. Petition for writ of certiorari to the Court of Appeals of Maryland denied. *Mr. Isaac Lobe Straus* for petitioner. *Messrs. Edward E. Hargest, Jr.* and *O. Bowie Duckett, Jr.* for respondent. Reported below: 179 Md. 39; 16 A. 2d 904.

No. 787. OHIO NATIONAL LIFE INSURANCE CO. *v.* SACHS ET AL. March 31, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh

Circuit denied. *Mr. O. John Rogge* for petitioner. *Mr. Myron D. Alexander* for respondents. Reported below: 116 F. 2d 113.

No. 790. WALKER ET AL. *v.* O'BRIEN ET AL. March 31, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. A. G. M. Robertson* and *Garner Anthony* for petitioners. *Mr. Howard B. Henshey* for respondents. Reported below: 115 F. 2d 956.

No. 791. MUTUAL LIFE INSURANCE CO. *v.* HEILBRONNER, GUARDIAN. March 31, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. James C. Jones, Lon O. Hocker,* and *James C. Jones, Jr.* for petitioner. Reported below: 116 F. 2d 855.

No. 800. FROST ET AL., EXECUTORS AND TRUSTEES, ET AL. *v.* AMERICAN SECURITY & TRUST CO. ET AL. March 31, 1941. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. Norman B. Frost* and *Frederic N. Towers, pro se,* and *Messrs. John A. Kratz, James C. Wilkes,* and *Frank H. Myers* for petitioners. *Messrs. Frederic D. McKenney, John S. Flannery, G. Bowdoin Craighill,* and *John E. Larson* for American Security & Trust Co., respondent. Reported below: 117 F. 2d 283.

Nos. 820, 821 and 822. GERRITSEN BASIN DEVELOPMENT CORP. *v.* CITY OF NEW YORK. March 31, 1941. Petition for writs of certiorari to the Court of Appeals of New York denied. *Mr. Thos. L. Zimmerman, Jr.* for petitioner. *Messrs. William C. Chanler, Paxton Blair,* and *Joseph F. Mulqueen, Jr.* for respondent. Reported be-

low: 258 App. Div. 191; 284 N. Y. 673; 16 N. Y. S. 2d 55; 30 N. E. 2d 722.

No. 738. GENERAL MOTORS CORP. (AS TRANSFEREE IN COMPLETE LIQUIDATION OF WALTER J. BEMB, INC.) *v.* UNITED STATES. March 31, 1941. Petition for writ of certiorari to the Court of Claims denied. *Mr. Benjamin E. Jaffe* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Richard H. Demuth* for the United States. Reported below: 92 Ct. Cls. 159; 35 F. Supp. 466.

No. 739. UNITED MOTOR SERVICE, INC. *v.* UNITED STATES. March 31, 1941. Petition for writ of certiorari to the Court of Claims denied. *Mr. Benjamin E. Jaffe* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Richard H. Demuth* for the United States. Reported below: 92 Ct. Cls. 159; 35 F. Supp. 466.

No. 766. MILK CONTROL COMMISSION OF PENNSYLVANIA *v.* GREEN, TRADING AS GREEN'S DAIRY, ET AL. March 31, 1941. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *Messrs. Claude T. Reno,* Attorney General of Pennsylvania, and *Frank E. Coho,* Deputy Attorney General, for petitioner. *Mr. George H. Hafer* for respondents. Reported below: 340 Pa. 1; 16 A. 2d 9.

No. 771. BRITISH AMERICAN OIL PRODUCING CO. *v.* BUFFINGTON ET AL. March 31, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William E. Allen* for petitioner. *Mr. Mark McMahon* for respondents. Reported below: 116 F. 2d 363.

No. 775. CALIFORNIA LUMBERMEN'S COUNCIL ET AL. *v.* FEDERAL TRADE COMMISSION. March 31, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Morgan J. Doyle* for petitioners. *Solicitor General Biddle, Assistant Attorney General Arnold,* and *Messrs. Charles H. Weston, Thomas E. Harris,* and *W. T. Kelley* for respondent. Reported below: 115 F. 2d 178.

No. 778. NEW JERSEY WORSTED MILLS *v.* GNICHTEL ET AL., EXECUTORS. March 31, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Laurence Arnold Tanzer* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Maurice J. Mahoney* for respondents. Reported below: 116 F. 2d 338.

No. 786. CHERRY-BURRELL CORPORATION ET AL. *v.* CREAMERY PACKAGE MANUFACTURING CO. March 31, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Clair W. Fairbank, Hugh M. Morris,* and *Alexander L. Nichols* for petitioners. *Messrs. George W. Hansen* and *M. Hudson Rathburn* for respondent. Reported below: 115 F. 2d 980.

No. 801. SCHNEIDER *v.* STATE OF NEW YORK. March 31, 1941. Petition for writ of certiorari to the Court of General Sessions, County of New York, State of New York, denied. *Mr. Louis B. Boudin* for petitioner. *Mr. Stanley H. Fuld* for respondent. Reported below: 258 App. Div. 1044; 284 N. Y. 777; 18 N. Y. S. 2d 1000; 31 N. E. 2d 764.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM JANUARY 7, 1941, THROUGH MARCH 31, 1941.

No. 583. BETHLEHEM SHIPBUILDING CORP. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. On petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit. January 13, 1941. Dismissed on motion of counsel for the petitioners. *Messrs. Claude R. Branch* and *Albert R. Connelly* for petitioners. *Solicitor General Biddle* and *Messrs. Thomas E. Harris, Robert B. Watts,* and *Laurence A. Knapp* for respondent. Reported below: 114 F. 2d 930.

No. 504. MCFARLAND *v.* WEST COAST LIFE INSURANCE CO. ET AL. On petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. February 3, 1941. Dismissed per stipulation of counsel. *Mr. Chellis M. Carpenter* for petitioner. *Messrs. Francis V. Keesling* and *John G. Eliot* for respondents. Reported below: 112 F. 2d 567.

No. 714. CHRISTENSON, ADMINISTRATRIX, *v.* UNION PACIFIC RAILROAD CO. Certiorari, *ante,* p. 673, to the Supreme Court of Nebraska. March 31, 1941. Dismissed per stipulation of counsel. *Mr. Gordon A. Nicholson* for petitioner. *Mr. Thomas W. Bockes* for respondent. Reported below: 137 Neb. 538; 290 N. W. 246.

No. 842. PAGE *v.* WRIGHT. On petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit. March 31, 1941. Dismissed on motion of counsel for petitioner. *Mr. Barry Gilbert* for petitioner. Reported below: 116 F. 2d 449.

REHEARINGS GRANTED, FROM JANUARY 7, 1941, THROUGH MARCH 31, 1941.

No. 277. AUTOMATIC DEVICES CORP. *v.* SINKO TOOL & MANUFACTURING CO. March 31, 1941. The motion for leave to file petition for rehearing is granted. The petition for rehearing is granted. The order denying certiorari, 311 U. S. 673, is vacated and the petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit is granted, limited to the question whether claims 2, 3, and 11 of the Mead patent No. 1,736,544 are valid. *Messrs. Drury W. Cooper, Thomas J. Byrne,* and *Henry M. Huxley* for petitioner. *Messrs. Bernard A. Schroeder, Russell Wiles,* and *George A. Chritton* for respondent. Reported below: 112 F. 2d 335.

REHEARINGS DENIED, FROM JANUARY 7, 1941, THROUGH MARCH 31, 1941.*

No. 51. WRIGHT *v.* UNION CENTRAL LIFE INSURANCE CO. ET AL. January 13, 1941. Motion of petitioner for leave to file a petition for rehearing granted, and the petition for rehearing is denied. 311 U. S. 273.

No. 51. WRIGHT *v.* UNION CENTRAL LIFE INSURANCE CO. ET AL. January 13, 1941. Petition of Union Central Life Insurance Co. for rehearing denied. 311 U. S. 273.

No. 47. WISCONSIN ET AL. *v.* F. W. WOOLWORTH CO. January 13, 1941. Petition for rehearing denied. MR. JUSTICE STONE took no part in the consideration and decision of this application. 311 U. S. 622.

*See Table of Cases Reported in this volume for earlier decisions in these cases, unless otherwise indicated.

No. 46. WISCONSIN ET AL. *v.* J. C. PENNEY CO.; and

No. 48. WISCONSIN ET AL. *v.* MINNESOTA MINING & MANUFACTURING CO. January 13, 1941. 311 U. S. 435, 452.

No. 468. LYNCH *v.* SUPERIOR COURT OF LOS ANGELES COUNTY. January 13, 1941. 311 U. S. 711.

No. 532. KORTEPETER *v.* UNITED STATES. January 13, 1941. 311 U. S. 711.

No. 533. DERBYSHIRE *v.* UNITED STATES. January 13, 1941. 311 U. S. 711.

No. 553. LENIHAN ET AL. *v.* TRI-STATE TELEPHONE & TELEGRAPH CO. ET AL. January 13, 1941. 311 U. S. 711.

No. 12. UNITED STATES *v.* APPALACHIAN ELECTRIC POWER CO. January 20, 1941. 311 U. S. 377.

No. 66. MILLIKEN ET AL. *v.* MEYER, ADMINISTRATRIX. January 20, 1941. 311 U. S. 457.

No. 538. FRIED *v.* UNITED STATES. January 20, 1941. 311 U. S. 716.

No. 9. SCHRIBER-SCHROTH CO. *v.* CLEVELAND TRUST CO. ET AL.;

No. 10. ABERDEEN MOTOR SUPPLY CO. *v.* CLEVELAND TRUST CO. ET AL.; and

No. 11. F. E. ROWE SALES CO. *v.* CLEVELAND TRUST CO. ET AL. See *ante*, p. 654.

No. 112. FLOYD ET AL. *v.* EGGLESTON ET AL. February 3, 1941. Motion for leave to file petition for rehearing granted, and the petition for rehearing is denied. 311 U. S. 708.

No. 38. PALMER ET AL., TRUSTEES, *v.* CONNECTICUT RAILWAY & LIGHTING CO. February 3, 1941. 311 U. S. 544.

No. 74. STONER *v.* NEW YORK LIFE INSURANCE CO. February 3, 1941. 311 U. S. 464.

No. 205. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* EUBANK. February 3, 1941. 311 U. S. 122.

No. 399. BLAYDES ET AL. *v.* C. H. LITTLE & CO. ET AL. February 3, 1941. 311 U. S. 618.

No. 545. MILLER *v.* KIRWAN. February 3, 1941. 311 U. S. 716.

No. 28. SIBBACH *v.* WILSON & CO. See *ante*, p. 1.

No. 87. GORIN *v.* UNITED STATES; and

No. 88. SALICH *v.* UNITED STATES. February 10, 1941. *Ante*, p. 19.

No. 188. UNITED STATES *v.* COWDEN MANUFACTURING CO. February 10, 1941. *Ante*, p. 34.

No. 352. SUNSHINE MINING CO. *v.* NATIONAL LABOR RELATIONS BOARD. February 10, 1941.

No. 589. NEWHOUSE ET AL. *v.* CORCORAN IRRIGATION DISTRICT. February 10, 1941. 311 U. S. 717.

No. 591. PACIFIC NATIONAL BANK OF SAN FRANCISCO *v.* MERCED IRRIGATION DISTRICT. February 10, 1941. 311 U. S. 718.

No. 622. DRAVO CONTRACTING CO. *v.* JAMES, STATE TAX COMMISSIONER. February 10, 1941.

No. 634. BALTIMORE & OHIO RAILROAD CO. *v.* JOSEPH, ADMINISTRATOR. February 17, 1941.

No. 9. SCHRIBER-SCHROTH CO. *v.* CLEVELAND TRUST CO. ET AL.;

No. 10. ABERDEEN MOTOR SUPPLY CO. *v.* CLEVELAND TRUST CO. ET AL.; and

No. 11. F. E. ROWE SALES CO. *v.* CLEVELAND TRUST CO. ET AL. March 3, 1941. Motion for leave to file a second petition for rehearing granted, and the petition for rehearing is denied.

No. 623. BETZ *v.* ESTATE OF BRILL. March 3, 1941. Motion for leave to file petition for rehearing granted, and the petition for rehearing is denied.

No. 13, original. EX PARTE WILLIAM H. LOCKHART. March 3, 1941.

No. 120. PALMER ET AL., TRUSTEES, *v.* WEBSTER & ATLAS NATIONAL BANK OF BOSTON, TRUSTEE. March 3, 1941. *Ante,* p. 156.

No. 253. HIGGINS *v.* COMMISSIONER OF INTERNAL REVENUE. March 3, 1941. *Ante,* p. 212.

No. 579. ODOM *v.* ADERHOLD, WARDEN. March 3, 1941.

No. 608. MITCHELL *v.* BOARD OF GOVERNORS OF WASHINGTON STATE BAR ASSOCIATION. March 3, 1941.

No. 693. BAKER ET AL. *v.* UNITED STATES. March 3, 1941.

Nos. 281 and 282. WOODS, COURT TRUSTEE, *v.* CITY NATIONAL BANK AND TRUST CO. OF CHICAGO ET AL. March 10, 1941. The motion to strike the petition for rehearing and the motion for a rule to show cause are denied. The petition for rehearing is also denied. *Ante,* p. 262.

No. 56. AMERICAN FEDERATION OF LABOR ET AL. *v.* SWING ET AL. March 10, 1941. *Ante,* p. 321.

No. 705. UNITED STATES *v.* FLORIAN, EXECUTOR. March 10, 1941.

No. 268. MISSOURI-KANSAS PIPE LINE CO. *v.* UNITED STATES ET AL. See *ante,* p. 665.

No. 1. MILK WAGON DRIVERS UNION OF CHICAGO, LOCAL 753, ET AL. *v.* MEADOWMOOR DAIRIES, INC. March 17, 1941. Motion for leave to file petition for rehearing granted, and the petition for rehearing is denied. *Ante,* p. 287.

No. 190. KELLY *v.* JOHNSTON, WARDEN. March 17, 1941.

No. 255. NELSON, CHAIRMAN OF THE STATE TAX COMMISSION, ET AL. *v.* SEARS, ROEBUCK & CO. March 17, 1941. *Ante,* p. 359.

No. 256. NELSON, CHAIRMAN OF THE STATE TAX COMMISSION, ET AL. *v.* MONTGOMERY WARD & CO., INC. March 17, 1941. *Ante*, p. 373.

No. 696. BEKINS ET AL., TRUSTEES, ET AL. *v.* LINDSAY-STRATHMORE IRRIGATION DISTRICT. March 17, 1941.

No. 698. JORDAN ET AL. *v.* PALO VERDE IRRIGATION DISTRICT. March 17, 1941.

No. 291. EQUITABLE LIFE INSURANCE CO. *v.* HALSEY, STUART & CO. See *ante*, p. 668.

No. 373. JUST ET AL. *v.* CHAMBERS, EXECUTRIX. See *ante*, p. 668.

No. —, original. EX PARTE CLEIO HULL. March 31, 1941. The motion for leave to file exhibits is granted. The petition for rehearing is denied.

No. 310. WOODS, COURT TRUSTEE, *v.* CITY NATIONAL BANK & TRUST CO. ET AL. March 31, 1941. Motion for leave to file petition for rehearing granted, and the petition for rehearing is denied.

No. 608. MITCHELL *v.* BOARD OF GOVERNORS OF WASHINGTON STATE BAR ASSOCIATION. March 31, 1941. The motion for leave to file a second petition for rehearing is denied.

No. 663. OBARTUCH *v.* SECURITY MUTUAL LIFE INSURANCE CO. March 31, 1941.

Nos. 672 and 673. H. B. NELSON CONSTRUCTION CO. *v.* UNITED STATES. March 31, 1941.

APPOINTMENT OF ADVISORY COMMITTEE ON RULES IN CRIMINAL CASES.

ORDER.

It is ordered:

1. Pursuant to the Act of June 29, 1940 (Public, No. 675, 76th Congress, c. 445, 54 Stat. 688), the Court will undertake the preparation of rules of pleading, practice, and procedure with respect to proceedings prior to and including verdict, or finding of guilty or not guilty, in criminal cases in district courts of the United States.

2. To assist the Court in this undertaking, the Court appoints the following Advisory Committee to serve without compensation:

Arthur T. Vanderbilt, Newark, New Jersey, Chairman.

James J. Robinson, Professor of Law at the Indiana University Law School, Reporter.

Alexander Holtzoff, Washington, D. C., Secretary.

Newman F. Baker, Professor of Law at the Northwestern University Law School.

George James Burke, Ann Arbor, Michigan.

John J. Burns, Boston, Massachusetts.

Frederick E. Crane, New York City.

Gordon Dean, Washington, D. C.

George H. Dession, Professor of Law at the Yale Law School.

Sheldon Glueck, Professor of Law at the Harvard Law School.

George Z. Medalie, New York City.

Lester B. Orfield, Professor of Law at the University of Nebraska Law School.

Murray Seasongood, Cincinnati, Ohio.

J. O. Seth, Santa Fe, New Mexico.

APPOINTMENT OF ADVISORY COMMITTEE.

Order.

John B. Waite, Professor of Law at the University of Michigan Law School.

Herbert Wechsler, Professor of Law at the Columbia Law School.

G. Aaron Youngquist, Minneapolis, Minnesota.

3. It shall be the duty of the Advisory Committee, subject to the instructions of the Court, to prepare and submit to the Court a draft of rules as above described.

4. During the recess of the Court the CHIEF JUSTICE is authorized to fill any vacancy in the Advisory Committee which may occur through failure to accept appointment, resignation, or otherwise.

5. The Advisory Committee shall at all times be directly responsible to the Court. The Committee shall not incur expense or make any financial commitments except upon the approval of the Court as certified by the CHIEF JUSTICE or upon his order during a recess of the Court.

FEBRUARY 3, 1941.

AMENDMENT OF ORDER ESTABLISHING A TABLE OF FEES AND COSTS IN THE CIRCUIT COURTS OF APPEALS.

ORDER.

It is ordered, That the order of January 10, 1898, as amended by the order of February 28, 1898 (169 U. S. 740), establishing a table of fees and costs in the Circuit Courts of Appeals, be amended so as to read as follows:

"Ordered, in pursuance of the act of Congress of February 19, 1897, 29 Stat. 536, c. 263, that the following table of fees and costs in the Circuit Courts of Appeals be, and the same is hereby, established, and fees and costs not exceeding those herein named shall be charged:

"Docketing a case and filing the record	$5.00
Entering an appearance	.25
Transferring a case to the printed calendar	1.00
Entering a continuance	.25
Filing a motion, order, or other paper	.25
Entering any rule, or making or copying any record or other paper, for each one hundred words	.20
Entering a judgment or decree	1.00
Every search of the records of the court and certifying the same	1.00
Affixing a certificate and a seal to any paper	1.00
Receiving, keeping, and paying money, in pursuance of any statute or order of court, one percent on the amount so received, kept, and paid.	
Preparing the record for the printer, indexing the same, supervising the printing and distributing the copies, for each printed page of the record and index, twenty-five cents ($.25), provided that the charge for any single record and index shall not exceed five hundred dollars.	
Making a manuscript copy of the record, when required by the rules, for each one hundred words (but nothing in addition for supervising the printing)	.20

AMENDMENT OF ORDER.

Order.

Issuing a writ of error and accompanying papers, or a mandate or other process	$5.00
Filing briefs, for each party appearing	5.00
Copy of an opinion of the court, certified under seal, for each printed page (but not to exceed five dollars in the whole for any copy)	1.00
Attorney's docket fee	20.00"

It is further ordered, That this order shall apply to all cases docketed in a Circuit Court of Appeals on or after March 15, 1941.

MARCH 10, 1941.

AMENDMENT OF CRIMINAL RULES.

ORDER.

It is ordered, That the Rules of Practice and Procedure, after plea of guilty, verdict, or finding of guilt, in criminal cases brought in the District Courts of the United States and in the Supreme Court of the District of Columbia, promulgated by order of May 7, 1934 (292 U. S. 661), and amended by orders of May 24, 1937 (301 U. S. 717), May 31, 1938 (304 U. S. 592), and October 21, 1940 (311 U. S. 731), be and they hereby are made applicable to all proceedings after plea of guilty, verdict, or finding of guilt by the trial court where a jury is waived, in criminal cases in the District Courts of Alaska, Hawaii, Puerto Rico, Canal Zone, and Virgin Islands, and in all subsequent proceedings in such cases in the United States Circuit Courts of Appeals and in the Supreme Court of the United States.

It is further ordered, That these Rules shall be applicable to proceedings in all cases in such courts in which a plea of guilty shall be entered or a verdict or finding of guilt shall be rendered on or after the first day of July 1941.

MARCH 31, 1941.

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8. *Gift Tax. Amount of Gift.* Cost to donor or cash surrender value as basis of "value" in gift of single-premium policies of life insurance. *Guggenheim* v. *Rasquin,* 254; *Powers* v. *Commissioner,* 259; *U. S.* v. *Ryerson,* 260.

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10. *Id.* Gifts in trust dependent on survivorship are gifts of "future interest," excluded from § 504 (b) of 1932 Act. *U. S.* v. *Pelzer,* 399; *Ryerson* v. *U. S.,* 405.

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